



AMERICAN BAR ASSOCIATION

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STATEMENT OF EUGENE C. THOMAS

PRESIDENT
OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
UNITED STATES SENTENCING COMMISSION

COMMENTS ON REVISED DRAFT
SENTENCING GUIDELINES

MARCH 11, 1987

I am Eugene C. Thomas, President of the American Bar Association. I am engaged in the private practice of law in Boise, Idaho. Although I served as a prosecutor early in my legal career, I appear before you today not so much to contribute my personal expertise concerning the matters before the Commission, but rather to demonstrate the profound interest of the 330,000 members of the American Bar Association in your work. You are engaged in an enterprise of fundamental importance to the ability of the federal judicial system to justly sentence persons convicted of federal crimes. Your work product will serve as an example, for good or for bad, throughout this land.

Appearing with me this morning are John M. Greacen, Chair-Elect of the Association's Criminal Justice Section and the Association's principal liaison to this Commission, and Laurie Robinson, Director of the Association's Washington, D.C., Professional Services Division.

The membership of the Association was deeply troubled by the approach to sentencing guidelines taken by the Commission in the Preliminary Draft issued last fall. We believe that the Commission is now proceeding in the right direction with the changes incorporated in the Revised Draft.

We are not ready to endorse this product, however. Some further major changes are required. The availability of probation remains unnecessarily limited in the current draft.

Our review of the limited data made available by the Commission suggests that the sentences contained in the guidelines are still too severe to constitute a fair, or wise, sentencing structure. Sentencing judges need to be given broader authority to take various offender characteristics into account in determining a proper sentence. The procedures by which the sentence is to be determined need further explication.

We remain in doubt as to the meaning and intent of the Revised Guidelines in some critically important areas -- the treatment of plea agreements and standards for concurrent and consecutive sentences.

The document is, in important respects, a first draft requiring significantly greater refinement than we believe can be accomplished in the remaining month before the Commission must present a finished product to the Congress. We therefore urge the Commission to propose that the Congress defer action on the initial sentencing guidelines for a period of one year. During that year they can be subjected to detailed and critical review by practitioners in the course of a "field test" during which guideline sentences would be calculated and compared to sentences imposed under current law, and flaws and ambiguities identified and corrected by the Commission before these guidelines take legal effect.

Finally, the Association agrees with the Commission that the guidelines' application needs to be limited to crimes committed after their effective date.

These comments will note with approval the many positive aspects of the Revised Draft that parallel the Association's earlier recommendations and testimony. They will argue that the Commission's use of "ranges" for the effects of some offenses and aggravating and mitigating circumstances, leaving the sentencing judge with guided discretion in their application, is consistent with the Commission's statutory mandate. They will describe the remaining flaws that the Association perceives in the basic structure of the guidelines and describe and present the rationale for a careful field test period predating their binding legal effect. And they close with the Association's offer to be of whatever assistance the Commission may find useful in the month remaining before its reporting deadline.

I. A Review of the Association's Principal Concerns with Sentencing Guidelines

The Association had five major criticisms of the Preliminary Draft Sentencing Guidelines. The Commission's Revised Draft has now removed our grounds for concern in two respects, and reduced, but not eliminated, our concerns with respect to a third. Our fourth and fifth objections have not yet been addressed adequately.

Retaining necessary discretion for the sentencing judge.

The Revised Draft is, in its overall structure, consistent

with the Association's advocacy that the Commission find a means to assure sentencing consistency without sacrificing the sentencing judge's ability to recognize, and take account of, the unique factors associated with an individual crime and offender. The most significant contributor is the inclusion of "ranges" of effects for various base offense levels and adjustments to them. We commend the Commission for its resolution of this central problem with guideline construction. The provision of "ranges" for various sentencing factors is a critically important feature of the Revised Draft that should be retained.

Allowing the sentencing judge to take into account the wide variety of offense and offender characteristics that arise in real life. While the Association will urge later in these comments further refinement of the treatment of various offender characteristics, the Revised Draft represents a significant improvement over the Preliminary Draft, authorizing a judge to take account of various factors in applying the guidelines, and clearly inviting him or her to deviate from the guidelines where such considerations cannot adequately be accommodated within the guidelines structure.

The Association is particularly pleased with the introductory policy statement on Sentencing Factors, on page 11 of the Revised Draft, requiring that "all conduct, circumstances, and injuries relevant to the offense of

conviction and all relevant offender characteristics shall be taken into account." (emphasis added).

Eliminating the modified real offense sentencing approach. The rigid and complicated modified real offense sentencing schema, which the Association strongly criticized, is gone from the Revised Draft.

Authorizing the continued use of probation. As will be explained more thoroughly below, the Association believes that the Commission continues, in this draft, to too narrowly constrain the availability of probation. This remains a major flaw in the document.

Overall severity of sentences specified in the guidelines. The Revised Draft purports to be grounded, as the Association had advocated, and the statute requires, in data on sentences currently served for federal crimes. Enhancements of current sentences are included where required by statute (as with the enhanced sanctions for drug offenses) or otherwise where deemed necessary by the Commission. After analyzing the publicly released data, however, we remain skeptical that the severity levels included in the guidelines are, in fact, consistent with present practice in their overall effects.

II. Additional Strengths of the Revised Draft Sentencing Guidelines

The Association notes and commends the Commission for

these additional suggestions from our earlier testimony that have been incorporated in the Revised Draft:

The guidelines incorporate the least restrictive alternative principle.

The sentencing judge is now authorized to take account of crimes for which the defendant was not convicted.

Mental and emotional condition can be considered a mitigating factor.

Judges are given greater flexibility in taking contrition into account.

Judges can give greater weight to the defendant's cooperation; the decision concerning the weight to be given is the judge's, following consultation with the prosecutor.

Fines take the defendant's ability to pay into consideration.

The guidelines recognize a separate category for "shock sentences" to probation with a requirement for a short period of incarceration.

Restitution is an expected part of every criminal sentence.

Attorneys are prevented from presenting a plea agreement that fails to disclose relevant information to the court.

The parties are required to disclose to each other the factors on which they intend to rely well prior to the sentencing hearing.

The judge is required to resolve all disputed factors "important to the sentencing determination."

The Association also supports the provisions of part X of Chapter Two punishing attempts and conspiracies at the same seriousness level as the attempted or conspired about crime.

We strongly urge the Commission to retain these features in its final draft.

III. The Commission's Authority to Incorporate "Ranges" for the Effects of Various Aggravating and Mitigating Circumstances.

In the Introduction to Part V General Provisions of Chapter Two, the Commission notes three possible ways of taking account of general aggravating and mitigating factors:

- (1) identifying the factors for sentencing judges with the suggestion that they be considered as grounds for departures from the guidelines,
- (2) considering the factors as adjustments within the guidelines and providing specific adjustment levels defining the effect of a particular factor in a given case, or
- (3) considering the factors as adjustments, but providing a range to which a judge could refer in making the adjustments in a particular case.

The Commission has employed the third approach extensively in the Revised Draft, but "has not reached a conclusion . . . about whether its authorizing statute permits this approach." The Commission has used the same device in defining the base offense level for some offenses.

The Association strongly criticized the first and second approaches in its comments on the Preliminary Draft guidelines. Forcing judges to treat all "other factors" as departures from the guidelines would undercut the policy statement requiring consideration of all relevant offense and offender characteristics. In order to take account of much relevant information, sentencing judges would have to subject their decisions to appellate review, creating a strong

negative incentive for the use of critically important sentencing considerations.

The second approach necessarily produces the arbitrary, mechanistic process demonstrated by the Preliminary Draft.

The third alternative -- the specification within the guidelines of ranges for the possible effect of particular sentencing factors, leaving to the sentencing judge the point within the range appropriate to a particular case -- is a solution which the Association wholeheartedly supports. We believe that it is consistent with the Commission's statutory authority, provided the Commission supplies sufficient guidance to sentencing judges in the form of the relevant circumstances or considerations to be taken into account in choosing a point within the range in a particular case and such guidance is sufficient to support appellate review of the judge's choice.

The inclusion within the guidelines of ranges for the effect of a particular sentencing factor in a particular case is well within the Commission's authority as defined in the statute.

The most basic, relevant provisions of the 1984 act are sections 991(b) and 994(b). Section 991(b) defines the purposes of the Commission. The very first of those purposes is to "establish sentencing policies and practices . . . that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code.

. . ." (emphasis added) The statement of the Commission's purposes goes on to call for avoidance of unwarranted disparities, and for "sufficient flexibility to permit individualized sentences when warranted by . . . factors not taken into account in the establishment of general sentencing practices . . ." It describes those specific goals as part of the more general object of providing "certainty and fairness in meeting the purposes of sentencing," obviously another reference to the purposes identified in section 3553(a)(2).

Section 3553(a)(2) identifies the following four purposes of sentencing.

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Thus, the most fundamental provision of the Commission's charter, section 991(b), expressly requires that the guidelines promote all four of the purposes of sentencing.

Section 994(b) requires the Commission "for each category of offense involving each category of defendant," to "establish a sentencing range that is consistent with all pertinent provisions of title 18 . . ." The pertinent

provisions of that title obviously include the four purposes of sentencing stated in section 3553(a)(2).

These basic provisions make it the broad and overriding mandate of the Commission to devise guidelines that adequately serve all four purposes of punishment. It would take the Commission much more than two or three years to devise guidelines that covered every characteristic of every offense and every offender for every sentence that can be imposed for every federal criminal statute, and to do so in a way that served not just retribution but all of the prescribed purposes of punishment. The statute reflects that fact, by giving the Commission permanent existence, by requiring it periodically to "review and revise" the guidelines (§ 994(n)), and by setting a time limit for promulgating only what the statute calls "the initial sentencing guidelines." (emphasis added)

The statute does not specify how comprehensive or detailed these "initial . . . guidelines" must be. The statute on its face leaves to the Commission the extremely difficult task of deciding how many initial guidelines to promulgate, and how broadly to define "each category of offense" and "each category of defendant" in the initial guidelines it decides to promulgate.

Another provision of the act underscores this point. Subsections (a)(4) and (b)(4) of 18 U.S.C. § 3742 expressly provide for appeals of sentences in certain cases involving

offenses "for which no sentencing guideline has been issued. . . ." Clearly, Congress expected that there might be periods of time during which the guidelines were less than comprehensive.

In sum, then, the Congress left to the Commission the responsibility for determining the sentencing guidelines methodology that best apply the four different purposes of sentencing to "each category of offense" and "each category of offender." The Commission's decision to do so by providing judges the discretion to choose one of a range of possible effects of a sentencing factor in a particular case falls well within this statutory authority.

If the sentencing judge is given adequate guidance in the form of a statement of the criteria or a listing of relevant considerations to be taken into account in choosing the appropriate point within the range in a particular case, the guidelines serve to specify the offense level for "each category of offense" involving "each category of offender" while taking account of the four purposes of sentencing. In fact, the Association has argued that without such flexibility, sentencing guidelines cannot serve the Congress' purposes of "certainty and fairness" in criminal sentencing.

Commissioner Robinson has argued, however, that this mechanism contravenes the "25 percent" restriction of § 994(b)(2) of the Act. Subsection 994(b)(2) requires that "if a sentence specified by the guidelines includes a term of

imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months" We do not agree with Commissioner Robinson's interpretation for three reasons. By its specific terms, the 25 percent limitation applies only to the breadth of the ultimate sentencing range (included in the Commission's Sentencing Table) within which the judge's discretion is unlimited. That limitation serves the fundamentally important function of limiting the judge's unconstrained discretion so as to effectuate the statute's purposes of increasing the certainty of punishment and decreasing unwarranted sentencing disparity. So understood, it does have a further implication for the remainder of the guidelines structure, to wit, the requirement that other discretionary decisions made by a judge leading to the identification of the appropriate cell within the Sentencing Table be circumscribed by at least general standards or policy guidance, the application of which are subject to review. But it does not imply that judicial discretion otherwise be eliminated from the guidelines, and the guidelines be so comprehensive as to specify with exactness the effect of every aggravator and mitigator to every combination of offense and offender characteristics. Finally, isolated legislative history that suggests such an expansive implication should be discounted.

A principal, and justified, criticism of early attempts to develop sentencing guidelines was the large range of sentencing discretion allowed the judge after all of the guideline calculations and adjustments were completed. See Rich, Sutton, Clear & Saks, Sentencing by Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines (National Center for State Courts 1982). Early guidelines invariably consisted of a sentencing matrix or "grid" (not unlike the Commission's Sentencing Table on page 10 of the Revised Draft) together with rudimentary rules for calculating the offense severity and offender characteristic scores that served to specify the appropriate cell in the matrix. The first guidelines were empirically derived from regression analyses of past sentencing practices. The sentence range specified in a single matrix cell might be quite large when there was considerable disparity in past practice. It was this breadth that concerned the critics.

The judge's discretion to choose a sentence within that ultimate range -- both in the early guidelines and in the Commission's guidelines as well -- is completely unconstrained. Little guidance is given on the considerations favoring sentences at the top or bottom of a range; no appellate review is available for a sentence falling "within the range." The purpose of specifying a range of possible sentences, at the final stage of the

sentencing analysis is to leave the judge with some unfettered discretion. When that range becomes large, the extent of discretion it provides wholly undermines the goals of consistency, predictability and disparity reduction that motivate the establishment of guidelines.

When viewed in this historical perspective, the purpose of the 25 percent limitation of § 994(b)(2) is straight forward -- to limit the range of values contained in any cell of the Sentencing Table to a maximum of 25 percent. The Revised Draft complies with that literal requirement.

Analysis obviously cannot stop at that point. The policy of § 994(b)(2) would clearly be circumvented by guidelines that consisted only of a matrix of sentence lengths, leaving the sentencing judge free to choose any cell within the matrix that he or she thought appropriate. The 25 percent limitation, then, necessarily implies some further restriction on the structure of the guidelines beyond the Sentencing Table itself. What are its necessary implications? The historical background of the section demonstrates the necessary implication that further unfettered and unguided discretion cannot be given to the sentencing judge in other portions of the sentence determination process.

The existence of some judicial discretion in reaching the final sentencing matrix cell is, of course, inevitable. There are necessary judgments to be made concerning the

nature of the crime committed, the sufficiency of the evidence provable at trial to support various statutory elements, and the existence of relevant aggravating and mitigating factors. Because the exercise of such judicial discretion in reaching the final sentencing range is unavoidable, the 25 percent limitation could not have been intended to remove it altogether. Rather, it requires that further discretion be constrained by the articulation of standards by which it is to be exercised. The relative generality or specificity of such standards must depend upon the particular decision being made. That judgment, in the Association's view, necessarily was left by the Congress to the Commission.

The only consideration imposing a practical limitation on the degree of flexibility given the sentencing judge in choosing a point within a range for base offense level, or the effect of an adjustment factor, is the susceptibility of the standard used to appellate review under 18 U.S.C. § 3742.

Considerable leeway exists in that principle, however. Meaningful appellate review can be based on a variety of different standards, ranging all the way from abuse of discretion to the appellate court's duplication of the trial judge's decisional process. In our view, § 3742 is sufficiently broad (including standards of "violation of law," "incorrect application of the guidelines," "clearly erroneous," "outside the range of the applicable sentencing

guideline," and "unreasonable,") that the Commission has the authority both to define generally or specifically the standard for making a particular discretionary decision and, where the statute is not clear, to suggest the standard by which that decision should be reviewed on appeal.

In summary, the 25 percent limitation of § 994(b)(2) has obvious and vital functions, and implications, when read literally. There is no reason to read it more broadly, as forbidding the Commission to give judges discretion in weighing sentencing factors on the way to choosing the final spot within the Sentencing Table from which to choose a sentence. That broader interpretation of the 25 percent provision has no support in the text of the statute, or in a careful analysis of its implications. Worse yet, it would create grave difficulties as the Commission tries to obey the most fundamental command of the statute, that it promulgate guidelines that serve all four purposes of sentencing.

The one portion of the Senate Report (Senate Committee on the Judiciary, S. Rep. No. 98-225, August 4, 1983) discussing § 994(b) can be read to suggest a broader implication for the 25 percent limitation. The report (on pages 165 and 166) says repeatedly that the guidelines contemplated are to be "detailed." Each guideline range is to describe "a somewhat different combination of offender characteristics and offense circumstances." The Committee expected guidelines to be "sufficiently detailed and refined

to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors." (Page 166) (emphasis added)

It thus seems that the Senate Committee contemplated guidelines that would specify every factor deemed relevant, assign a weight to each factor, deal with relationships among factors, and do all this in considerable detail. However, the Congress was wise enough not to include this vision in the legislation itself. The same section of the Senate Report speculates about a multitude of possible guidelines approaches -- "grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices." (Page 165). Two footnotes on page 165 (notes 404 and 405) contradict the vision of extraordinary specificity. The first provides:

[I]t is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply to different categories of offenders convicted of basically similar offenses.

The second states that the Committee:

expects that the Commission will undertake an evaluation to assure that the guidelines are not so complex as to detract from their effective use.

But the Congress included in the statute itself no instructions as to the mechanisms or techniques the Commission must use.

The Commission's Preliminary Draft was an attempt at extreme detail and precision. Those characteristics of the draft elicited harsh criticism from well-informed persons. Drawing upon that experience, the Commission has concluded that it can best serve its statutory functions by issuing initial guidelines that are more general, including within them guided discretion by which the sentencing judge can take into account a greater variety of factors, without rendering the guidelines "so complex as to detract from their effective use." That conclusion should be accorded great deference by Congress and the courts.

We do not believe that the Senate Report's vision of the guidelines can fairly be used to support an interpretation of the 25 percent limitation that incorporates that vision.

First, as was argued above, the most fundamental parts of the statute require the Commission to do things that could not conceivably be done, comprehensively and in the kind of detail the Senate Committee demands, within the time allotted for promulgation of the initial guidelines. In short, this part of the Senate Report should be disregarded on the ground that it is inconsistent with the language of other, basic provisions of the act.

Second, the Report language itself does not necessarily support the proposition that guidelines cannot incorporate discretionary choices. It merely requires that the guidelines "reflect every important factor relevant to

sentencing for each category of offense and each category of offender." Particularly in view of the footnote warning against excessive complexity, the Report language cannot fairly be read to require that the effect of every variable be defined with absolute precision, or deleted altogether. The Commission's compromise of guided discretion in the application of various factors and adjustments is consistent with the language's contradictory goals of comprehensiveness and specificity on the one hand and avoidance of unworkable complexity on the other.

Third and finally, if it is read as presenting a wholly consistent vision of detail and specificity, the Report language should be considered insignificant, because it is not even adequately rooted in the statutory language that it purports to interpret. Legislative history cannot be used to add provisions to a statute beyond those actually found in the act.

The 25 percent provision specifies only that, if a guideline calls for a range of terms of imprisonment, " . . . the maximum of the range . . . shall not exceed the minimum of that range by more than 25 per centum." Those words cannot reasonably be read to require that the initial guidelines cover every offense, and every important aggravating or mitigating characteristic of each offense and each offender. Neither can they reasonably be read to require that the initial guidelines define with great

specificity each factor, the weight of each factor, and the effect of each possible combination of factors.

It is doubtful, at best, that any requirements as extreme as those would have been passed by either House or signed by the President, if they had appeared in the bill itself. It is crystal-clear that the statute, as enacted, does not contain any of those requirements. The Senate Report language in question is not truly an interpretation of the 25 percent limit or of any other language in the statute. It therefore should be disregarded.

If the Commission wished to even further insulate its "ranges" approach from criticism, it could construct "scenarios" -- as suggested in the Association's earlier testimony -- suggesting situations in which particular choices within a range would be appropriate, allowing sentencing judges to interpolate the factors of a real case within the context of the examples set forth. This elaboration would further illuminate the Commission's philosophy in each instance, and simplify the job of the appellate courts in reviewing the sentencing judge's choices.

The experience in at least one state implementing sentencing guidelines is consistent with the Commission's "ranges" approach. Guidelines implemented in Massachusetts incorporated a feature similar to that proposed by the Commission, by which the sentencing judge was given the discretion to assign a score for the degree of injury caused,

based on general descriptions of seriousness degrees included in the guidelines.

In summary, we view the Commission's use of ranges for the permissible impact of various sentencing factors to be within the discretion given the Commission by its authorizing statute, provided that the judge's discretion to choose a point within the range is guided by policy statements, criteria, listings of relevant considerations, or exemplary scenarios, and that criteria for such choices are reviewable by an appellate court.

IV. Necessary Further Revisions of the Revised Draft Guidelines

The Association urges the following additional changes or clarifications to the Revised Draft Guidelines before they are submitted to the Congress:

Allowing More Extensive Use of Probation. In our earlier testimony, the Association pointed out that the Commission's linkage of the availability of probation to a minimum sentence of six months was at odds with the Sentencing Reform Act of 1984, with sound theory on sentencing practice, and with the American Bar Association Standards of Criminal Justice. The Sentencing Reform Act treats probation as a type of sentence different from a sentence to incarceration. It is authorized for all crimes, with three exceptions -- Class A and B felonies (punishable

by 20 years or more); offenses for which probation has been expressly precluded by statute; and for cases in which a defendant is simultaneously sentenced to imprisonment for another offense. The Revised Draft continues to rewrite the statutory provision allowing probation for offenses punishable by less than 20 years to a prohibition of probation for any offense punishable by more than 6 months. Sentencing research has shown that judges look to different factors in deciding, first, whether an offender should go to prison, and, second, if he is to go to prison, the length of an appropriate sentence. The guidelines use the same standards for both decisions. The ABA Standards call for the maximum use of non-incarcerative sentences, except for the most serious offenders; the Commission, instead, requires incarceration except for the most insignificant offenders. The distinction has profound consequences for sentencing.

Today roughly half of all federal sentences call for punishments other than imprisonment. The data provided by the Commission on current sentencing practices shows the estimated proportion of first offenders currently placed on probation for 201 offense categories. In only four instances -- 1st and 2nd degree homicide; kidnapping involving rape; and civil rights violations involving victim death -- are 100% of offenders now incarcerated. In only 31 categories are more than 95% now imprisoned. One of our members did a rough tally of the Commission's base level offense

categories. Of the over 500 separate categories he identified, probation would be unavailable for first offenders, except as a guideline departure, in 300. While this is a gross comparison -- given the obvious differences in the categories used in the research and in the guidelines -- the result is so striking that we consider it relevant. Under current practice, probation is used to some extent in 85% of the reported offense categories. Under the Revised Draft guidelines, it would be available in only 40% of the base level offense categories.

We reiterate our plea that the Commission address separately the criteria that a judge should use in deciding whether to place an offender on probation or commit him to prison. It is inconsistent with the Commission's responsibility to leave the availability of probation to the sentencing judge's willingness to depart from the guidelines. At the very least, the Commission should raise the floor for the consideration of probation from Offense Level 10 to Level 17 (or, minimally, Level 13), resulting in the availability of probation for any offense punishable by 24 (or 12) months or less of imprisonment. While this change would not represent an adequate solution, it would improve the current guidelines approach.

Re-examination of the severity of the guidelines sentences. The Commission has explained in the Introduction to the Revised Draft that it has taken account of the average

sentences currently served for federal crimes in assigning the seriousness levels to the various offenses.

The Association has made an effort to determine whether the Revised Draft sentences in fact are roughly reflective of current practice. We have been unable to do so on the basis of the information made available by the Commission. The data sent us by the Commission is, according to the Commission's own research report, a statistical projection of current sentences to approximate the average time served by first offenders convicted following trial in offense categories similar to those used by the Commission. Where sufficient first offender data was not available, we understand that extrapolations were made from prior record sentences. The information therefore does not show actual average sentences for first offenders under current practice. No information has been made available on current sentences for prior offenders. We have attempted to supplement the Commission's data with impressionistic surveys of some of our members who practice in some of the areas covered by the guidelines.

On the basis of the information that we have been able to develop, we have the following reasons for believing that the implementation of these guidelines would significantly increase the number of federal inmates:

- As the Commission notes, it has been instructed to enhance the penalties for some offense categories, particularly drug offenses.

- The Commission has intentionally increased the length of prison terms for some categories of offenses traditionally considered of lesser seriousness by judges and practitioners, including lesser instances of bribery and extortion, tax offenses, and correctional violations.
- The Commission's untoward restrictions on probation will mean that a much higher proportion of offenders in all categories will be incarcerated.
- It is not clear how the Commission intends to treat plea agreements. The data released by the Commission indicates that pleas today result in reductions of from 2 to 7 sentencing levels, depending upon the crime category. These levels represent a 23% to 59% reduction in sentence length, for those sentenced to imprisonment. We do not have comparable information on the effects of guilty pleas on the in/out decision. If guilty plea sentences are subjected to the guideline standards, there will be a resulting huge increase in the number of persons incarcerated and the length of their imprisonment.
- The ultimate impact of the guidelines will also be affected significantly by the treatment of multiple offenses. As noted below, we find that section of the guidelines subject to the implication that first-time, multiple offenders will be sentenced as recidivists rather than as first offenders, as in current practice, with resulting harsher sentences.
- We have failed to identify any instance in which the Commission proposes to decrease current sentences in a single crime category to counter-balance these many noted increases.

The Commission has not made public any data on the impact that the Revised Draft guidelines would have on federal prison populations.

The Association is not prepared to support federal sentencing guidelines that substantially increase the use of incarceration in the federal system beyond the specific statutory enhancements enacted by the Congress. Section

994(g) of the Sentencing Reform Act requires that guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." (emphasis added) Furthermore, the Association is convinced, as stated in our earlier testimony, that guidelines requiring sentences thought by practitioners to be too harsh will be subverted in their application. Regardless of the Commission's plea agreement standards, if the judges, prosecutors and defense attorneys conclude that the guidelines are unfair, or unworkable, they will devise stratagems for avoiding their consequences, the effects of which will escape appellate review because neither party would have an incentive to appeal. The real decision-making process would become invisible, and the current disparity and arbitrariness of criminal sentencing remain unchecked.

We will await with interest the results of the Commission's further research and deliberations, hoping that the Commission will further ameliorate the guideline sentences, or provide inmate population projections proving that our continuing concerns are unwarranted.

Substantial Refinement of the Uses to Which Offender Characteristics Can Be Put. The introductory policy statement on page 11 provides that a judge "shall" take into account "all conduct, circumstances, and injuries relevant to the offense of conviction and all relevant offender characteristics." Yet, in Part D of Chapter Three, the

Commission states that age, education and vocational skill, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are "not ordinarily relevant" to a sentencing determination. The Commission makes a few exceptions to the "not ordinarily relevant" standard, and distinguishes two factors which may be relevant to a probation decision, when probation is an available alternative.

The overall effect of this section, and some of the preceding parts of Chapter Three, is to contradict the salutary principle set forth on page 11. The Association urges the Commission to approach these questions with greater sensitivity to the subtleties of the real world of criminal sentencing.

Consider the factor of "age" which the Commission declares irrelevant, except in sentencing persons under 21, having extensive criminal records, to incapacitative terms, and the elderly and infirm to non-incarcerative settings. Youth, when coupled with a negligible prior criminal history, has historically been used as a justification for leniency, based upon our universal experience with the rebellious, impulsive nature of adolescence which the passage of time usually cures. It should be a permissible consideration in deciding in favor of probation, in choosing a sentence within a guideline range, and as a possible reason for deviating from the guidelines in extreme cases. We fail to perceive

the magic to the age of 21 as a bright line for being able to gauge a young offender's likelihood of being a persistent offender. A comparison of age with an offender's prior criminal history is generally relevant, regardless of the offender's particular age, in assessing his or her future dangerousness to the community. The current structure of Section D311 makes a sentencing judge's consideration of these factors, even in exercising the discretion to choose a sentence within the guideline range, impermissible. Such provisions -- palpably at odds with current practice and good sense -- will reduce the respect given the Commission's product.

Mental and emotional condition may be usable as a potential aggravator as well as a mitigator. The Commission's Section D313 appears to prohibit a judge from doing so. The Commission should distinguish the effects of mental retardation and mental disease.

Far more serious are the prohibitions of Sections D315 and D316 preventing the sentencing judge from taking into account an offender's previous employment and family and community ties. We agree with the Commission's current formulation in two regards -- that these factors cannot be used to increase a guidelines sentence and that they should be considered in deciding whether to choose an available probation alternative. They should also be taken into consideration, as a part of the judge's consideration of the

offender's dangerousness to the community, in determining the sentence within the allowable sentencing range, and, in special cases, as a reason for departing below the guidelines.

Section A315 of Chapter Three, taken from the current Parole Commission guidelines, is an appropriate addition, urging a sentencing judge to depart from the guidelines when an offender's formal prior record "does not adequately reflect the seriousness of past criminal conduct." This provision is necessary for appropriate sentencing of organized crime figures in many instances. The section should be expanded to urge the converse, as well -- that a departure below the guidelines may be appropriate when an offender's prior criminal history exaggerates the offender's dangerousness to the community.

If the Commission has insufficient time to increase the sophistication of its treatment of the factors in Part Three, it should consider deleting them in favor of the broad policy statement in the Introduction.

Assuring adequate sentencing procedures. In our previous testimony the Association urged the Commission to provide detail to the procedures to be used in imposing a sentence. The Revised Draft includes some new, and laudable, features, requiring notification of sentencing factors on which the parties will rely, a factual finding on all "disputed factors important to the sentencing determination,"

and a recommendation that the judge disclose his or her tentative findings for comment. In our view, the guidelines need further procedural elaboration:

- to provide for responses to the opposing party's notice of sentencing factors, so as to limit the issues for judicial decision;
- to guarantee the availability of a hearing at the request of either party, together with the right to subpoena and cross-examine witnesses; and
- to require that sentencing facts be established by a preponderance of the evidence (the standard incorporated in the Preliminary Draft).

Plea Agreements. Chapter Four, in two pages, attempts to deal with roughly 90% of all federal criminal convictions. The chapter is sufficiently vague that some of our members interpret it to require that pleas be subject to the same standards as any other sentence, while others interpret it to establish a wholly different standard -- that the sentencing judge is free to accept any "reason" put forth by counsel to deviate from the guidelines.

This may be the single most important part of the guidelines in their practical application. Judges and practitioners need better guidance than the Commission's current opaque language, which invites inconsistency from judge to judge. At the very least, this section requires extensive explanatory comment and examples.

We urge specifically that Section A413(a) be revised to make clear that the prosecution and defense need not agree on a statement of the relevant facts and circumstances, but

rather are required to set forth, in full, their respective versions of the facts.

Refinement of the treatment of multiple offense sentencing. The policies articulated in Sections A561 through A565 are not clear in their application. Standing alone, § A561 appears to state the salutary principle that an offender will serve only one sentence for a series of criminal events arising out of the same incident or course of criminal conduct. Section A563 states the converse -- that separate crimes, committed at separate times, are punished consecutively. The commentary to § A563 then confuses the Commission's intention, referring to multiple sentences "in the same or related cases" not running concurrently. The final paragraph of the commentary goes further, suggesting that the behavior represented in companion counts in a multicount indictment be "incorporated" as "relevant acts of misconduct" in sentencing for each count. A possible consequence could be the conversion of every first offense conviction, of unlawfully transporting illegal aliens for instance, into a recidivist crime for sentencing purposes, greatly aggravating current sentences for such situations. This very problem plagued the Minnesota Sentencing Guidelines for several years.

The Commission needs to clarify the workings of this section of the guidelines, perhaps by presenting a series of

practical examples, assuring that the result suggested above will not eventuate.

The Commission should also consider articulating the admittedly broad principle that where more than one federal criminal statute prohibits a particular act, or act in the course of a single criminal enterprise, the court will sentence the defendant only for the most serious such offense, aggravated as appropriate for additional harms produced. An example can be found in § E212 of Chapter Two, covering the application of the Travel Act in the context of racketeering. We have not found other places in the guidelines dealing with Travel Act violations, or illegal uses of interstate communications facilities, which are usually tied to the commission of other substantive offenses. The Commission should attempt to prevent disparity arising from the prosecutor's ability to pyramid these sorts of ancillary charges. This is a classic instance where a law of sentencing needs to be developed on a case-by-case basis by the courts of appeals.

Clarification of the distinction between guideline sentences and deviations from the guidelines. Commissioner Robinson's dissent contends that the Commission's recognition of a judge's authority and responsibility to deviate from the guidelines, and its policy statements suggesting some instances in which deviations would be advisable, transform such sentences into sentences within the guidelines. This is

not a necessary, or correct, interpretation. When a judge follows such a policy statement in deviating from the otherwise applicable guideline, he or she is required to justify it just as any other deviation. In this instance it is specifically apparent that the factor included in the commission's policy statement is not one "taken into account by the Commission in the establishment of the guidelines."

Modification of the standard governing the crimes to which the guidelines will apply. The Sentencing Reform Act provides that the guidelines, and the entire new sentencing scheme that they implement, will go into effect six months after the Commission submits the guidelines to the Congress, and will apply to all sentencing decisions made after that date. We have considerable doubt that the initial guidelines can apply to already committed crimes under the constitutional prohibition against ex post facto laws. According to the Supreme Court, in Weaver v. Graham, 450 U.S. 24, 30n.13 (1981), ex post facto analysis is "concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." At least colorable arguments can be made that the many effects of the Comprehensive Crime Control Act of 1984, including the elimination of the Parole Commission, the reformulation of the basic provisions governing sentencing under Title 18, the many specific instructions concerning the severity of sentences to be

included in the guidelines in certain circumstances, as well as the establishment of the sentencing guidelines themselves, "assign more disadvantageous criminal or penal consequences." The certainty of extended litigation on this point, and the possibility of subsequent invalidation of numerous criminal sentences should such a challenge be upheld, counsel for an amendment to the current provisions to apply the initial guidelines only to crimes committed after their effective date. The principle of prospectivity probably need not apply to subsequent modifications of the guidelines once in place. The Association endorses the Commission's legislative recommendation to the Congress that the initial guidelines be made applicable only to crimes committed after their effective date.

V. The Need for a Careful Field Test Period for the Guidelines

The Association strongly suggests that the Commission request that the Congress postpone consideration of the initial guidelines, and postpone the effective date of the remaining provisions of the Sentencing Reform Act for an additional year to allow for a comprehensive field test, and refinement, of the initial guidelines. During that period, sentencing judges could continue to hand down sentences under current law, but would be required to determine the applicable guideline sentence, before or after he or she

reached a sentencing decision, and report to the Commission the difference between the two sentences and any perceived anomaly in the applicable guidelines disclosed by their application to the case before the judge. Similar comments would be solicited from the attorneys and probation officers in the case.

The Commission would collect all such comments for a period of at least six months and solicit additional comments on the overall operation of the guidelines from interested organizations and individuals. In reviewing those comments, and its own further research, the Commission would be able to make the appropriate adjustments to the seriousness levels for particular types of offenses, refine its articulation of the standards for considering aggravating and mitigating circumstances, and refine the judicial procedures to be followed in the sentencing process itself.

The Commission would be required to submit its revised initial guidelines to the Congress on April 13, 1988. They would be subject to the same review process set forth in the current law, just one year later.

The purpose of the proposed field test would be the honing of the guidelines into a polished product prior to their legal effectiveness. The deadline faced by the Commission has imposed serious constraints on the Commission and its staff. Very large portions of the Revised Draft are being subjected to public scrutiny for the first time. The

Commission's responses to those comments will not be subject to further review before they must be submitted to the Congress.

Federal sentencing guidelines are extraordinarily complex. The amount of detail is overwhelming. The amount of pretesting that can be done prior to the Congressional reporting deadline is limited, and cannot duplicate the live environment of the courtroom and sitting judges making real decisions. It is inevitable that guidelines fashioned in this haste by the most dedicated Commission and staff will contain errors and anomalies, some of which will undercut the very purposes articulated by the Congress in establishing guidelines. They will also greatly complicate the initial appellate review processes, lead to conflicts among the circuits, and ultimately undermine the finality of federal criminal sentences.

Instituting a field test period would provide an opportunity for correction of the overwhelming majority of such "glitches" in the guidelines. The field test period would also provide a substantial opportunity for training of all persons involved in the criminal sentencing process in their detailed operation.

The field test would also provide the only truly adequate means for gathering accurate data on the effects of the sentencing guidelines on the severity of federal criminal sentences. Comparing the actual sentence under current law

with the same judge's interpretation of the guidelines would assure the comparability of the data gathered.

The cost to Congress' objectives would be minimal. The Congress would be assured that the momentum for the implementation of guidelines would not be checked. Practitioners would become familiar with the guidelines' operation, and capable of implementing the revised initial guidelines as soon as they were approved by Congress, or went into effect without Congressional action. Federal judges and practitioners would feel that they had a substantial role in refining the system that they would be required to implement. The effects of a one year delay in the guidelines' effective date pale in comparison with the consequences of having to deal with the unavoidable initial flaws of the guidelines that will be submitted to the Congress this spring.

VI. Additional Observations

The Association makes these further suggestions:

- The treatment of prior record should note that an expunged criminal sentence no longer exists and is not considered in calculating prior record, as an aggravating circumstance, or as a basis for deviating from the guidelines sentence.
- The Guidelines provide a five year tolling period for the effect of a prior juvenile conviction. The ABA Standards recommend a two year period.
- The Association questions the maximum limitation of \$250,000 for fines. Especially

for environmental offenses, substantial fines constitute a principal deterrent effect of the criminal law.

- The Association urges that the mitigating effect of diminished capacity under § Y218 of Chapter Two not be limited to non-violent offenses. It is in the context of violent offenses that such considerations usually arise.

We greatly appreciate the opportunity again to address the Commission and present our points of view on the important public policy issues with which you must struggle. We commend the Commission for the major improvements incorporated in the Revised Draft and for your openness to further suggestions and criticisms. We hope that the final draft submitted to the Congress will embrace the further suggestions that we make today.

The time left to the Commission for further revision of this document is very limited. Recognizing that, the American Bar Association stands ready -- at the Commission's request -- to assemble a group of active practitioners, on very short notice, to assist the Commission in making the sorts of further practical refinements that we have advocated. We wish you the very best as you face an impossible deadline for completing an almost impossible task.