

**COMMENTS OF THE FEDERAL DEFENDERS
ON THE REVISED DRAFT SENTENCING GUIDELINES**

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TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
Due Process	2
Unadjudicated Conduct	14
Criminal History	18
The "In/Out" Decision	27
Other Offender Characteristics	28
Concurrent and Consecutive Sentences	37
Additional Comments	40
Chapter One	40
Chapter Two	41
Sentencing Factors	41
Offense Sections - Parts A-T	42
Other Offenses - Part X	42
General Provisions - Part Y	43
Role in the Offense - Part Z	58
Chapter Three	61
Chapter Four	63
Chapter Five	65
Chapter Six	69
Omissions	71
Additional Editing Errors	72
Conclusion	73

INTRODUCTION

The Federal Defenders appreciate the opportunity to express our views to the United States Sentencing Commission in connection with its effort to formulate federal sentencing guidelines. In this regard, we have reviewed the Revised Draft Sentencing Guidelines and attempted to collect our observations on this draft in written form in the brief time available. Our comments are organized first by topic, highlighting those of particular concern to us, and then sequentially following the format of the Revised Draft. We think this draft contains some significant improvements over the Preliminary Draft, but that substantial areas for improvement still remain. We hope the following comments will be useful to the Commission in refining and amending the second draft, and we remain available to the Commission in the coming weeks as it attempts to put the initial guidelines into final form.

DUE PROCESS

We are particularly concerned with the Revised Draft's treatment of procedural due process in sentencing. Not much is said on this subject. First, the introductory chapter contains a brief paragraph stating that disputes regarding factors important to the sentencing determination are to be resolved in accordance with amended Federal Rule of Criminal Procedure 32(a)(1) (effective November 1, 1987) "and applicable case law." Revised Draft at 7. In resolving these disputes, the court may "consider all reliable information concerning the defendant's background, character and conduct." Id. Finally, the Commission recommends that the court "notify the parties of its tentative findings" on significant disputed sentencing factors and "provide a reasonable time for the submission of written objections before imposition of sentence." Id.

Second, commentary on page 12 of the Revised Draft states that, in terms of content, there should be a liberal construction of the standard governing the type of information that may be considered in sentencing, provided "the information 'has sufficient indicia of reliability to support its probable accuracy.' United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), affirmed, 719 F.2d 887 (7th Cir. 1983)." Revised Draft at 12.

Finally, in Chapter Four, the Revised Draft contains three policy statements that deal with procedural due process. A414 states that the court "shall" resolve important disputed sentencing factors in accordance with amended Fed.R.Crim.P. 32(a)(1), but omits the additional reference to "applicable case law" contained in the introductory comments. Revised Draft at 174. A415 repeats the recommendation that in cases involving disputed sentencing factors, the court give notice of its tentative findings and provide time for written objections. Policy statement A411 directs the court to confirm that "within a reasonable time before sentencing" the parties have exchanged written statements of factors that each intends to rely on at sentencing. A party may rely on additional factors if written notice is provided to the opposing party within a reasonable time before sentencing. Copies of these "sentencing statements" are to be filed "contemporaneously" with the court* and submitted to the probation officer.

There are several problems with these comments and policy statements. The first relates to the right to a hearing. None of the provisions discusses the need for an evidentiary hearing

* Presumably this means that each party must file a copy of its sentencing statement with the court at the same time as he or she served it on the opposing party, and not that the filings by both parties have to be made simultaneously. For clarity, we suggest the word "contemporaneously" be omitted and language such as that contained in this footnote be substituted.

to resolve disputes over factors used in sentencing. Amended Rule 32(a)(1) likewise contains no requirement that an evidentiary hearing be held to resolve disputes concerning sentencing factors. The guideline's reference to applicable case law is contained only in introductory remarks and not in the more formal policy statements, and case law is for the most part unhelpful on this issue. While precedent in some circuits requires that evidentiary hearings be held to resolve disputed factors important to sentencing, see, e.g., United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), there is no comparable requirement in most parts of the country. Reliance on case law that differs from one district to another will result in a hodgepodge of methods used to determine sentencing facts and, consequently, in a wide variance in the reliability of factors used in sentencing. The absence of uniform fact-finding standards will thwart Commission efforts to fulfill its assigned role in overseeing and curtailing unwarranted disparity, and it will undermine the reliability of the continuing process of refining and revising guidelines over time. Moreover, the same provision that makes reference to applicable case law then discusses the court's resolution of disputed issues on the basis of "written objections" rather than a hearing, and the implication that only written objections are necessary is repeated in policy statement A415.

The need for a hearing to resolve disputed factors that will be used in sentencing can be illustrated by several guideline provisions. Y221 directs the court to increase the offense level by a certain number of levels depending on the relative amount of property damage or loss not already taken into account. If the government claims \$55,000 of property damage occurred from a flood caused by a trespasser on federal property, and the trespassing defendant claims the damage was only \$3,000, or that the property damage did not result from his trespass, the court could not determine whether to increase at all under Y221 or whether to increase 1, 3 or 5 levels without holding a hearing to resolve the factual dispute. Similar factual disputes could arise as to the mental and/or physical condition of a victim under Y222 (Extreme Psychological Injury), Y223 (Vulnerable Victims), and Y225 (Physical Injury), or under Y228 (Coercion or Duress) as to the relative levels of harm or the "imminence" of a physical threat. Even the calculation of fines under A542(c) will engender disputes over the amount of loss to the victim or gain to the defendant. If the defendant says he gained \$500 and the government asserts it was \$500,000, how can the court resolve the matter without a hearing?

Numerous factual disputes will undoubtedly arise under A313 and A315. A313 allows the court to aggravate above the guidelines for "prior similar misconduct" established by "other

information" (other than by civil adjudication or administrative order) and for "prior similar adult criminal conduct not resulting in a criminal charge or conviction." In A315 the court is told it "should" impose a sentence above the guidelines if the defendant's criminal history category "does not adequately reflect the seriousness of past criminal conduct," or if the defendant is dangerous or there is a likelihood he will commit other crimes. Where such a broad range of wholly unadjudicated conduct, both criminal and otherwise, as well as predictions of future conduct, are used to carry the defendant above the guidelines in an unlimited fashion, there is an equally unlimited potential for significant factual disputes to arise. These disputes will necessitate, at the very least, resolution at an evidentiary hearing. Even the "seriousness of past criminal conduct" is an issue that in most cases could not be resolved without a hearing into the underlying facts involved in prior convictions and prior uncharged crimes. These two sections in particular open a proverbial Pandora's box of due process concerns.

The second problem with the treatment of procedural due process in the Revised Draft centers around the type* of information that may be considered in sentencing and how convincing the evidence must be.

* "[T]ype" is not meant to refer to the content of sentencing information, as is discussed in 18 U.S.C. §3577, but rather to the form and source of the information.

The guidelines do not explain what kind or quality of information may be relied upon to resolve a sentencing factor dispute or to establish the existence of a factor important to the sentencing determination. Nor do they state to what degree of certainty such factors must be established. Rule 32(a)(1) provides no additional guidance on these points, and, to the extent that "applicable case law" deals with this subject, the existence and content of such case law differs among jurisdictions. As with the issue of a sentencing evidentiary hearing, a uniform standard must be established to insure the reliability of facts used in sentencing so that the Commission can determine whether courts are indeed imposing similar sentences in truly similar cases.

There are several guideline provisions that illustrate the problem of the type and weight of information that may be used to establish sentencing factors. Y216 requires that the court depart from the guidelines to increase the offense level to reflect the fact that the defendant committed the offense of conviction "in order to facilitate or conceal the commission of another offense, or for another criminal purpose." Revised Draft at 149. Criminal purpose is difficult to prove directly and would usually have to be established through circumstantial or other evidence, rendering this provision particularly susceptible to abuse. Yet the guideline gives no hint as to what

kind of evidence could acceptably be used to establish criminal purpose to insure that the provision is not abused. Y222, extreme psychological injury, another fairly subjective factor, could be established through medical and psychiatric examinations of the victim if the victim is required to submit to court-ordered examinations upon a defense request, but no such requirement is contained in the guideline. Therefore, psychological injury could presumably also be established simply through the victim's conclusory or self-serving statements to the probation officer, resulting in as much as a mandatory 3 level increase.* Similar problems of discovery and proof arise under Y223 (Vulnerable Victims) and Y225 (Physical Injury). A313 allows "other information" (other than civil adjudications or administrative orders) establishing prior similar misconduct to move a defendant's sentence above the guidelines. Such a loose standard could presumably include multiple hearsay of the most unreliable sort. A315 (Adequacy of Criminal History Category) also directs courts to consider the kinds of subjective factors that are particularly difficult

* For example, an elderly victim may tell the probation officer that she was defrauded of her \$20,000 life savings and, as a result, is extremely depressed and has lost her appetite and a great deal of weight, which has aggravated other health problems. If the probation officer decides there is extreme psychological injury that outweighs the financial damage, the resulting 3 level increase could mean the difference between a possible probationary sentence and a mandatory jail sentence.

to prove and does so without any limitation on the type and weight of information considered to establish the enumerated factors.

We understand that the Sentencing Commission does not have the authority to establish rules of criminal procedure. However, we think the Commission has the obligation to formulate and to recommend uniform rules and standards for procedural due process to apply in making the kinds of sentencing determinations required under its proposed guidelines. The guidelines can be no more reliable in achieving desired sentencing results than the fact-finding used to apply them. Therefore, we suggest that the Commission issue policy statements, identified as such, to govern the sentencing fact-finding process, and that it recommend to Congress amendment of the Federal Rules of Criminal Procedure to conform to the standards suggested in these policy statements. See 28 U.S.C. §995(a)(20).

As to the content of due process policy statements, we suggest the Commission look to applicable case law - for example, to United States v. Fatico - as a minimum. Fatico requires that a sentencing evidentiary hearing be held when an important factor is in dispute. 603 F.2d at 1057 n.9. Any factor that the judge intends to use to affect the length or type of sentence would be an important sentencing factor.

Further, Fatico permits the use of hearsay evidence to establish a disputed sentencing factor only if there is a particular need for use of hearsay and it is corroborated in a reliable fashion by other means. 579 F.2d 707, 713 (2d Cir. 1978). The applicable standard of proof for sentencing factors was not established definitively in Fatico. The Federal Defenders continue to urge the use of a clear and convincing standard of proof for factors used to aggravate a sentence. See Federal Defender previous submission entitled "Fact-Finding in Guideline Sentencing," and our comments on the first draft. This standard of proof is particularly important when unadjudicated, uncharged prior misconduct and factors as subjective as criminal purpose and the likelihood of future criminality are used to aggravate sentences.

Although we urge the Commission to look to case law, current case law should set the lowest limit of appropriate procedural due process. Under current law, the judge may impose whatever sentence he wishes and need not explain the reasons therefor. If the judge does nothing except pronounce sentence, his determination is unreviewable. The concern with accurate fact-finding is much reduced in a system in which no one knows what facts are relied upon and in which the relative propriety of different sentences is virtually irrelevant. By contrast, under a guideline sentencing system, the reliability

of determinations as to the presence and weight of each factor relied upon in sentencing is of the utmost importance. Now that we are to begin to assess in a public manner the relative propriety of sentences in different cases, there is an increased need for sufficient procedural due process to ensure accurate fact-finding in the cases that are to be compared.

Other problems with the guidelines' treatment of procedural due process are more technical but still important. A411 discusses notice of sentencing factors by the opposing parties, but makes no mention of notice by the probation officer. Amended Federal Rule of Criminal Procedure 32(a)(1) will require that, at some time prior to the sentencing hearing, the court give the parties notice of the probation officer's determination of the applicable offense and offender classifications and the applicable guideline range. Amended Rule 32(c)(3)(A) will require that, "at a reasonable time before imposing sentence," the court permit the defense to read parts of the presentence investigation report that contain, in addition to the above, the probation officer's assessment of the kinds of sentences suggested by the applicable guidelines, any factors that may indicate an outside-the-guideline sentence is called for, any pertinent policy statements, and victim impact information, but not any recommended sentence. Fed.R.Crim.P. 32(c)(2) and (c)(3)(A).

These provisions are inadequate. First, they do not clearly require that the parties be informed of the probation officer's calculations leading to his determination of the applicable classifications and guideline range. If the parties are informed only of the result and not of the computation employed in arriving at that result, they cannot ascertain whether appropriate factors have or have not been factored in and whether each has been accorded the correct weight. Moreover, it simply does not make sense to have all the other parties (the government, the defense, and the court) make public their assessments of the appropriate factors and sentence while allowing the probation officer, upon whom all are relying to make their own calculations, to keep his secret. It is inconsistent and unnecessary to permit secrecy in a system that was specifically designed to be open and public.

We would suggest a policy statement providing that the court should require the probation officer to disclose the following information to the parties:

1. The guideline factors used in arriving at the offense and offender classifications;
2. The weight assigned to each factor and, if applicable, the available range from which the weight was selected and the reason for selecting that particular weight;*

* While the probation officer may recommend a point within a range, the final determination as to the appropriate point within a range is a judicial function.

3. The classifications and guideline range arrived at;
4. The kinds of sentences suggested for that guideline; and
5. An explanation of any factor that may indicate departure from the guidelines would be appropriate.

We would also suggest that the Commission ask Congress to modify amended Rule 32(c)(3)(A) to permit the parties to see the probation officer's recommended sentence.

Second, it is important that the parties have access to the presentence investigation ("PSI") in advance of submitting their own notice of sentencing factors. This will save the parties from wasting time on facts set forth in the PSI which are undisputed, and it will likewise save the court the time of reviewing papers containing repetitive, undisputed facts and arguments. It will also provide the parties with the opportunity to respond to the PSI and, if necessary, challenge the information, reasoning, or conclusions in the PSI.

Third, the timing of the filing of sentencing statements by the parties is not indicated in the guidelines. It would be most logical to have the government file its statement first, have the defense file next, and, if necessary, give the government the opportunity to respond to any new factors raised by the defense. Filing the papers in sequence allows the parties

to respond to one another,* thereby delineating disputes for the court's attention and, again, saving the court the trouble of having to read through repetitive material on undisputed factors. We suggest the government file first because most of the information used to calculate the offense level and criminal history is usually supplied by the government.

UNADJUDICATED CONDUCT

Use of unadjudicated conduct to aggravate the sentence is an issue of great concern to the Federal Defenders and is closely related to the issue of due process. In a section called "Sentencing Factors" the Revised Draft tells the court that in determining the sentence it is to consider all relevant conduct and circumstances. The definition of relevant conduct and circumstances includes, among other things, acts or omissions committed, caused, or aided and abetted by the defendant that are part of the same course of conduct or a common scheme or plan as the offense of conviction, or that are relevant to the defendant's state of mind or motive in committing the offense. Revised Draft at 11. There is no requirement that any of this conduct or these circumstances be charged and

* The opportunity to respond is necessary to meet even minimal due process requirements.

either proved or admitted. These "Sentencing Factors"* are impliedly supposed to apply to all sentencing determinations, and are implemented more explicitly in later sections of the draft.

For example, in A221 the court is told to increase the base offense level for assault by two levels if there are multiple victims. Id. at 17. The commentary to this section explains that an enhancement is provided when multiple acts of assault occur and have not been separately charged, or when the defendant is only charged and convicted of assaulting one victim and there were three similar victims. Id. at 18. Similarly, the commentary to the labor racketeering guidelines indicates that higher offense levels are to be applied where the offense of conviction is part of a systematic pattern of corruption or exploitation. Id. at 64. There is no requirement that the pattern of conduct be charged and proved. Other, similar examples arise in several of the offense sections. See e.g., punishing for amounts of drugs not actually seized based on other alleged or assumed drug transactions (commentary on pg. 48); enhancement for multiple acts of theft (B211(a)(5), pg. 25), fraud (F211(a)(2) and (3), pg. 66); and forgery (B252(a)(1), pg. 36, and commentary on pg. 37).

* It is not clear whether the sentencing factors are intended to be guidelines, policy statements, or commentary, each of which carry different authority in sentencing.

In addition, unadjudicated conduct is counted in some of the General Provisions. Y216 directs the court to increase the offense level anywhere above the guidelines if the defendant had some other "criminal purpose" in mind in committing the offense, though the additional crime need not be charged, proved, or even committed. Y226 requires enhancement for possession or use of a weapon even when resolution of the issue of weapon possession may have been unnecessary to adjudication of the crime itself.

The enhancement of sentence based on unadjudicated conduct is even more explicit in the Criminal History sections. As discussed in our comments on due process, A313 and A315 tell the court that it "may" or "shall" increase the sentence to a point anywhere above the guidelines based on unadjudicated similar "misconduct," similar adult criminal conduct not resulting in a charge or conviction, and predictions as to future unadjudicated (indeed, as yet uncommitted) crimes.

As we argued in several prior submissions, unadjudicated, unadmitted conduct should not be used to enhance the sentence. It is not used in the states of Washington and Minnesota, which use guideline sentencing systems. To the extent such conduct is "proved" at all at sentencing, a standard proof and of procedural due process far less than that required at trial would be applied. In some cases, the government will be

relieved of its obligation to charge and prove other crimes beyond a reasonable doubt, while the defendant will nonetheless be sentenced for these uncharged crimes. In cases in which unadjudicated crimes have not even been committed (e.g., under Criminal Purpose (Y216)), defendants will be punished for an alleged mens rea alone without even an alleged actus reus; under A315, they will be punished now for predicted future conduct. Moreover, since the court is told to go outside the guidelines in certain instances, there is no limit (other than the statutory maximum) on the extent to which some unadjudicated behavior can aggravate the sentence. The overlap in guideline ranges for adjacent offense levels will, in some cases, cut the impact of increasing levels for unadjudicated conduct, but as long as the judge is permitted to consider such conduct at all, the overlapping ranges will not obviate the problem.

There are practical problems as well. Defendants who know they will be sentenced for unproved conduct will be less inclined to plead guilty to reduced charges when they will be sentenced on the basis of the original charges anyway. This means more cases will go to trial. In addition, some judges will find it fundamentally unfair to sentence for unadjudicated conduct, especially when the government did not even obtain an indictment based on the conduct. These judges may choose not

to depart from the guidelines to enhance for such conduct. This will lead to different results in similar cases and perpetuate sentencing disparity.

We urge the Commission to reconsider and reject its use of unadmitted, unadjudicated conduct to aggravate the sentence.

CRIMINAL HISTORY

The scoring system employed in the Criminal History section appears harsh; it brings defendants too quickly up the scale to higher guideline ranges, according a disproportionate value to criminal history.* In addition to altering the relationship between the criminal history score and the criminal history categories in the table on page 10, we suggest the following modifications:

A311(a) - "[0]ne year" should be changed to "two years." We assume the intent was to include only felonies in A311(a). However, in some jurisdictions, for example in Texas

* One Federal Defender reports, for example, that a client on unsupervised probation for a misdemeanor (simple assault) which occurred within the last three years was convicted of being a felon in possession of a gun. In addition to scoring for the conviction itself, he would receive 4 extra points. Many defendants will pick up 4 additional points for being on probation, even when unsupervised, for minor misdemeanors occurring within the last three years.

and Massachusetts, more than one year terms of imprisonment may be imposed for some misdemeanors.*

A311(b) - Change the "sixty days or more" cutoff to "greater than six months."** There is often a vast difference between the relative importance of a prior felony and a prior misdemeanor or petty offense. The "sixty days" criteria for scoring 2 points rather than 1 point will result in a great number of petty offenses and non-serious misdemeanors counting almost as much as 3 point felonies. We suggest "greater than six months" as the appropriate cutoff point because six months is the maximum sentence that may be imposed for a petty offense under federal law, 18 U.S.C. §1; it is the point up to which a defendant has no right to a jury trial; and it is a point below which one will find many convictions arising from proceedings at which the defendant was not represented by counsel. Waiver of counsel in petty offenses is frequently pro forma, without full advisement and understanding of rights.

* In Texas, up to three years could be imposed prior to 1974, though the law has now been amended so that most, though not all, misdemeanors carry a maximum of one year jail term. In Massachusetts, misdemeanants may receive sentences up to two and one-half years in jail.

** If this change is made, A312(d)(2)(A) should be similarly changed, so that the rule for juveniles continues to parallel that for adults.

A311(d) - Change the aggravation for this factor from 2 points to 1 point. Committing an offense while under criminal justice control should not count more than an offense itself; thus, (d) should not count more than (c).

A311(e) - This provision should be limited to apply only to category (a) and (b) offenses; category (c) offenses should be excluded. The relevant time period for determining recency should be reduced from three years to two years. In addition, the score to be added should be reduced from 2 points to 1 point; recency should not count as much as committing an offense while under criminal justice control.* Finally, we do not think the same conviction should be counted three times - once under (a), (b) or (c); twice under (d); and a third time under (e). Hence, (e) should not be counted if (d) applies as well.

A312(c) - We believe misdemeanors and petty offenses should never count. They are often not sufficiently serious in light of the problems associated with obtaining

* We understand that in assigning two points to (e), the Commission has relied on research indicating that recency of prior convictions is an accurate predictor of future criminality. We are not familiar with these studies and do not know whether they are widely accepted in the criminal justice field or have been challenged or questioned. See footnote on page 20. In any event, incapacitation of those thought likely to recidivate is not the only goal of sentencing. We think just retribution is important in this context as well, and we find it significantly more reprehensible to fall within A311(d) than A311(e).

accurate records on prior convictions for minor crimes. Our experience also indicates that some defendants plead guilty to misdemeanors in exchange for time served not because they are guilty but because they feel it is not worth disputing as they will not serve any additional time. If misdemeanors and petty offenses are to count, we suggest expanding the list of non-counted offenses to make it at least as extensive as that contained in the Parole Guidelines.

A312(e) - Fifteen years should be changed to 10 years, and subsections (1) and (2) should be combined. A312 (e)(1) provides that prior felony convictions where a jail term was imposed more than 15 years ago can still count in the criminal history score. We do not think convictions that old are sufficiently relevant in most cases. Federal Rule of Evidence 609 uses a 10 year age factor to determine the relevance of prior convictions, and we think the same factor should be used here.

A312(f) - Diversionary dispositions should not be counted at all. To count them contradicts the purpose of diversion, particularly as regards youthful offenders. Moreover, as we noted in commenting on the first draft, an admission of guilt is required of defendants in some jurisdictions in order to obtain a diversionary disposition, but it is not required in other jurisdictions. The result will be that some

diversions will count and others will not,* based solely on the happenstance of where the diversion occurred. To the extent that diversions are relevant because they involve crimes similar to the offense of conviction, they can be accounted for under A313 (Similar Misconduct) or by going to the top of the applicable guideline range.

Our second major criticism of the Criminal History section concerns its open-ended consideration of unadjudicated conduct with no due process guarantees in policy statements A313 and A315. This has been discussed to some extent in our earlier comments on due process and unadjudicated conduct. We have the following suggestions:

A313** - The second sentence of (a) should be changed to:

Prior similar misconduct not used to aggravate the offense level in Chapter Two, and established by a civil adjudication or by failure to comply with an administrative order, may be the basis for a sentence at the maximum of the applicable guideline range.

* Use of the word "may" in A312(f) exacerbates the problem of differential counting of diversionary dispositions.

** In A313(a), the words "of the" appear to be missing and should be inserted between "maximum" and "applicable guideline range."

Subsections (1) and (2) should be eliminated. As noted above, it is unfair to permit an end run around the right to trial by aggravating for misconduct which has not been the subject of a conviction. Moreover, the standard used in A313(a)(1) for establishing prior similar misconduct, by "other information," is far too broad. In addition, counting "prior similar adult criminal conduct not resulting in a criminal charge or conviction," under A313(a)(2), could unfairly require a defendant to have to disprove some alleged act that may have occurred as long as 20 or 30 or more years ago. Finally, A313 permits a court to aggravate a sentence more for uncharged or unadjudicated misconduct, which can be used as the basis for an unlimited above guideline sentence, than for prior convictions, which have limited scoring values in A311.

A315 - The first sentence of A315 is perfectly proper, but the second sentence should unquestionably be eliminated. The second sentence is at war with the whole notion of guideline sentencing. How does one prove a defendant poses a "danger to the public" or is likely to commit other crimes,* and, even more significant from the defense point of

* References to studies related to the issue of pretrial detention based on dangerousness conclude that it is impossible to predict dangerousness or to identify factors that would enable us to determine with any degree of reliability who will commit crimes while free on bail. See, e.g., Note, Preventive Detention: An Empirical Analysis, 6 Harv.C.R.-C.L.L.Rev. (footnote continued on next page)

view, how could one disprove such an allegation? These concepts are far too speculative to be a proper basis for encouraging departure from the guidelines. Moreover, to the extent certain aspects of criminal history are believed to indicate dangerous or recidivist tendencies (such as number, recency, or similarity of prior convictions), these have already been factored in in other sections. It is particularly interesting to note that there is no justification for this section offered in the commentary.

Finally, we offer the following additional comments on suggestions for modification of the Criminal History section:

A312(a)(2) - We think this is a fair and useful rule for assessing the appropriate weight of prior convictions.

A312(h) and (i) - The treatment of foreign and tribal convictions is much improved here over the treatment in the preliminary draft and in interim revisions we have seen.

* (footnote continued from previous page)
289 (1971) (Harvard statistical study sponsored by the American Bar Endowment); L. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va.L.Rev. 371, 382 & n.43 and authorities cited therein; authorities cited in United States v. Edwards, 430 A.2d 1321 (Mack, J. dissenting), including American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28 (1974), and Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 Arch. General Psychiatry 397 (1972); Hickey, Preventive Detention and the Crime of Being Dangerous, 58 Geo.L.Rev. 287, 304-09 (1969); H.R. Rep. No. 1121, 98th Cong., 2d Sess. 11-12 & n.11.

A312(j) - This rule seems fair as long as the modifications we suggested in A311(b) and (e) are employed. However, it is very poorly drafted and quite confusing to the reader. The commentary on page 164 explains the rule in much clearer terms, and we would hope some of it could be used to improve upon the language in the guideline itself.

A312(k) - We suggest omitting this section altogether. The term "overt act" is a term of art in the law that applies only, though not always, to conspiracies. Used in this context, it is confusing and may not shed any meaningful light on the problem of identifying the date an offense begins.

A316 - The language of this section was unfortunately altered from the original draft in a way that, probably unintentionally, alters its substance. As it now stands, it does not, as it claims, implement 28 U.S.C. §994(i)(2). We suggest simply using the language in the statute, as was done in the first draft, to read:

If the offender committed the current offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, and the guideline does not call for a substantial term of imprisonment, a sentence above the applicable guideline range may be imposed.

(emphasis added to illustrate substantive changes).

Commentary - General (pg. 163) - In the last sentence of the first paragraph of commentary on page 163, change "is" to "may be."

Commentary - Prior Convictions (pg. 163) - Omit "and foreign, tribal" from the first sentence. It contradicts the guidelines themselves.

Commentary - Applicable Time Period (pg. 164) - These comments would allow judges to ignore the rule established in the guideline and, for various questionable reasons, aggravate even above the applicable guideline range based on very old convictions. In the case of very old conduct, it is often difficult to summon proof of the nature, seriousness or other significance of prior convictions. The guideline establishes a sufficiently (we think overly) generous allowance for considering prior convictions; there is no need for the commentary to go farther.

Commentary - Factors Justifying Departure (pg. 164) - The phrase in parentheses should be omitted. It permits an unconstitutional presumption of criminal activity from evidence of income for which there appears to be no legitimate source, and it would unconstitutionally require a defendant to bear the burden of proving he had a legitimate source for his income. Moreover, no provision is made for a hearing or other due process procedures for proving and/or disproving the presumption.

THE "IN/OUT" DECISION

The Federal Defenders have repeatedly expressed our concern that the guidelines are far too restrictive in the specification of offenses and offenders for which a non-incarcerative sentence may be available. The Revised Draft is somewhat better than the Preliminary Draft in this regard, but it is still a far cry not only from current practice, but also from what we understand to be the Congressional intent in passing the Sentencing Reform Act. The November 26, 1986, written submission of Lucien B. Campbell, Federal Public Defender for the Western District of Texas (submitted following the Atlanta regional hearing), explains our position on the "in/out" decision. We urge the Commission to rethink the issue of a separate "in/out" guideline and we hope to submit a draft in/out guideline to the Commission in the next few days.

At the very least, we would like to see the guidelines on probation amended to remedy the very limited availability of this sanction, particularly at the lower end of the offense level scale and for the lower criminal history categories. Although we have not completed a comprehensive analysis, we believe that many more defendants will be incarcerated under the Revised Draft guidelines than under current practice. Moreover, we do not believe the Commission has fulfilled its statutory mandate to ensure that the guidelines reflect the

general appropriateness of imposing a non-incarcerative sentence on first offenders who have not been convicted of a violent or an otherwise serious offense. See 28 U.S.C. §994(j).

OTHER OFFENDER CHARACTERISTICS

The Federal Defenders are disturbed by the limited consideration permitted of most "other offender characteristics" in this revised draft. We think it is unwise, contrary to widespread current practice, and, in some instances, contrary to legislative intent.

Also, it is unclear whether this part of Chapter Three contains guidelines or policy statements. Judging by their content, they appear to be policy statements. They should be so identified.

Age - D311

The guideline precludes use of age as a determinant of the type of sentence to be imposed when sentencing options are available under the guidelines. While it may be true that age is not ordinarily "relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options," it is not true that it is never relevant. The guideline itself even recognizes situations in which it might be appropriate to go below the guidelines to impose a different type of sentence owing to age or infirmity; why then not accomplish the same

result when it is permitted by the guideline? Consequently, we suggest at least adding "ordinarily" between "it" and "relevant" in the second sentence of D311.

In a related vein, D311 permits the court to go below the guidelines owing to age or infirmity in certain circumstances in order to impose a non-incarcerative sentence. However, it does not permit the court in the same circumstances to go below the guidelines to impose an incarcerative sentence of shorter duration. In other words, the court may mitigate the sentence based on the age factor only if it mitigates all the way down to probation. We believe that under the same circumstances, the court ought to be able to reduce the length of a term of incarceration. This could be accomplished simply by changing the phrase "elderly or infirm and" to "elderly or infirm or" in the fourth sentence of D311.

We would also like to see two other circumstances included in which we believe age often does and should continue to play a role in sentencing. D311 tells the court it may go above the guidelines in order to incapacitate a young offender with an extensive record indicating likely future criminality. The guideline should authorize the converse as well; that is, it should tell the court that it may go below the guidelines in the case of a young offender without an extensive record whose actions clearly reflect immaturity rather than venality or

criminal propensity and where the circumstances indicate future criminality is unlikely. At the other end of the age spectrum, the guidelines should tell the court it may go below the guidelines in the case of an older offender where circumstances demonstrate that the offense was aberrational conduct on the defendant's part and the defendant is a situational offender,* indicating unlikely future criminality.

Education and Vocational Skills - D312

We strongly disagree with the Commission's conclusion that education and vocational skills are never relevant in determining the type of sentence to be imposed when the guidelines provide options. We think this prohibition and a similar prohibition in D314 (Physical Condition) probably stem from a misinterpretation of the governing statutory provisions, and are contrary to legislative intent.

Title 28 U.S.C. §994(d)(2),(3),(6),(7) and (8) direct the Sentencing Commission to consider the relevance of education, vocational skills, previous employment record, family ties and responsibilities, and community ties in sentencing, and to take these into account to the extent that they are relevant. Title 28 U.S.C. §994(e) states that "the

* So-called "situational offenders" are a class of defendants widely recognized by probation officers and judges as highly unlikely to commit future crimes.

Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Title 28 U.S.C. 994(k) provides that the "Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."

At first glance, (e) and (k) may appear to contradict (d), but the Report of the Senate Judiciary Committee accompanying the bill that became the Sentencing Reform Act aids in resolving the apparent contradiction. The Committee explains that §994(e) was intended "to guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983) (hereafter "Senate Report"). The Report further explains that the language of §994(e) is "cautionary rather than proscriptive," as evidenced by use of the phrase "generally inappropriate, rather than always inappropriate." Id. Thus, the Senate Committee states that "each of these factors may play other roles in the

sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." Id. at 174-75.

In short, these factors were not supposed to be used to put uneducated, unskilled or unemployed defendants in jail, but they were supposed to be used to keep such defendants out of jail in appropriate cases in order to provide them with needed rehabilitative programs and services. What the Commission has done in D312 and, as will be explained later, in D314, is forbid the very thing that Congress intended to provide. Rather than tell the judge that education and vocational skills are not relevant in choosing among different types of sentences permitted by a guideline, the guidelines should tell the judge that these factors may be relevant in determining the length or type of sentence within the guidelines and in sentencing below the guidelines if the defendant's criminality is related to his lack of skills and education and, without danger to the community, he could benefit from a probationary sentence that includes an appropriate, available rehabilitative program. A young, unemployable drop-out who receives job training may no longer need to resort to crime to earn a living. As Congress recognized, putting him in jail for six to eight months rather

than in a training program simply does not make sense. When his jail term is over, he will doubtless return to a life of crime because he is still untrained and unemployable.

We do not contend that rehabilitation is appropriate in every case, but we think D312 undermines the statutory inclusion of rehabilitation as one of the four purposes of sentencing by conveying the message that it is never appropriate. Congress did not want the entire criminal justice system to revolve around a rehabilitative model, as the current parole system theoretically (though not actually) does. It recognized that we cannot count on jail to rehabilitate offenders. See Senate Report at 176 (discussing §994(k)). But, at the same time, Congress very clearly preserved the goal of rehabilitation in the statute and legislative history, and emphasized at numerous points that it is to be accomplished where appropriate in a non-incarcerative setting.

Consequently, we believe that where a defendant's lack of education or vocational skills is found by a judge to have been a contributing factor in his involvement in criminal activity, and the circumstances indicate that, without posing a danger to the community, the defendant would be responsive to the opportunity to pursue educational or training programs, the court should be allowed sufficient leeway to impose a term of probation conditioned on participation in such a program. This

should be permitted even when the guidelines would otherwise call for a short or moderate term of incarceration. In other cases, the fact that a defendant is already engaged in such a program which would be interrupted by a period of incarceration should provide a basis for a decision not to impose an otherwise appropriate term of imprisonment.

We suggest the following revision of D312:

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall, except to the extent they are relevant under Z212. However in exceptional cases or where the guidelines provide probation as an option, the need for the acquisition of education or vocational skills with the indication that these will promote the rehabilitation of the defendant shall be considered in choosing among sentencing options within or outside the guidelines, provided the defendant does not pose a danger to the community. If a defendant is sentenced to probation or supervised release, these considerations may be relevant ... [continue as in original].

(modifications emphasized).

Physical Condition, Including Drug Dependence and Alcohol Abuse
- D314

D314 permits drug dependence to be the basis for a sentence above the guidelines if it "leads to a propensity to commit crimes," but prohibits its use as a reason for imposing

a sentence below the guidelines. Revised Draft at 171. Like D312, we think this prohibition arises from a misconception of governing statutory provisions and legislative intent.

Title 28 U.S.C. §994(d)(5) authorizes the Commission to consider what relevance drug dependence should have to "the nature, extent, place of service, or other incidents of an appropriate sentence." Title 28 U.S.C. §994(k), quoted above in our comments on D312, indicates that the guidelines should reflect the inappropriateness of imposing a prison sentence for purposes of rehabilitating the defendant or providing him with medical care or correctional treatment. The Senate Report explains that:

Drug dependence, in the Committee's view, generally should not play a role in a decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for "drying out," as a condition of probation.

The Federal Defenders recognize that in the case of a defendant with a severe substance abuse problem, the existence of that problem might rationally provide a basis for concluding that the defendant poses a greater risk of future danger to the community than he otherwise would, and that,

therefore, he should be incarcerated. We believe that consideration of a substance abuse problem in this fashion, however, should be restricted to those cases in which the court finds that the defendant has previously been afforded treatment opportunities of which he has failed to take advantage. Moreover, we believe that, in cases in which a defendant has not previously been afforded treatment opportunities and the guidelines would otherwise call for a short or moderate term of imprisonment, the court should consider the substance abuse problem as a mitigating circumstance militating in favor of a sentence of probation with a special condition of treatment in a community-based program. Consequently, we suggest the following to replace the first two sentences of the second paragraph of D314:

Drug dependence of long standing indicating that the defendant is not amenable to treatment and evidencing an increased propensity to commit further crimes may be a reason for imposing a sentence above the guidelines. On the other hand, where the defendant exhibits prospects for rehabilitation, drug dependence may be a reason to impose a non-incarcerative sentence conditioned on the defendant's participation in a treatment program.

Previous Employment Record - D315

D315 acknowledges that employment history may be relevant in selecting among guideline sentencing options. However, it should also acknowledge that this factor is relevant to

determine the length of a sentence within the discretionary range permitted by the applicable guideline. Judges often, without objection from the government, consider employment in determining the length of sentences because it indicates stability and a reduced likelihood of recidivism. Therefore, we suggest the phrase "or where within the guidelines a sentence should fall" be eliminated from the first sentence of D315.

Family Ties and Responsibilities and Community Ties - D316

We suggest the same modification of D316 as D315. Our experience indicates that this factor, too, is currently considered in determining the length of sentences, also without objection by the government, both because it often indicates a reduced likelihood of recidivism and because family responsibilities indicate the need for a defendant to get back into the community as a productive, law-abiding citizen in order to support his dependents.

CONCURRENT AND CONSECUTIVE SENTENCES

The revised guidelines covering cumulation of sentences are an improvement over those suggested in the first draft, but they do not go far enough. They do not create a presumption either for concurrent or for consecutive sentences. Revised Draft, commentary at 192. If no presumption is included, there

will be an enormous potential for wide and unwarranted disparity. We believe there should be a presumption for concurrent sentences.

Under current practice, concurrent sentences are usually imposed for multiple counts in the same indictment or in consolidated indictments; consecutive sentences are the exception and are reserved only for the unusual, particularly egregious cases. This practice is, in our experience, widely followed by both harsh and lenient sentencing judges all over the country. We see no reason to upset such a uniform rather than disparate current practice.

Moreover, the guidelines contain several provisions that both require and permit judges to enhance the sentence based on multiple acts or harms. The commentary to this portion of guidelines recognizes this fact. See Revised Draft at 193, last paragraph. For example, in some individual offense sections the court is told to cumulate all monetary harm resulting from all related acts when applying property harm tables. See, e.g., commentary to forgery provisions at page 37. In other offense sections the court is instructed to increase the offense level to reflect multiple transactions, occurrences, or victims. See, e.g., A221(a)(4) (Assault); B211(a)(5) (Theft); B251(a)(2) (Counterfeiting); B252(a)(1) (Forgery); F211(2) and (3) (Fraud). It is similarly told to

increase offense levels based on a pattern of conduct. See, e.g., commentary on labor racketeering at 64. Some General Provisions also permit enhancement for additional harm that is not part of a particular offense of conviction, for example, Y216 (Criminal Purpose), Y221 (Property Loss or Damage), and Y226 (Weapons). Certain Criminal History provisions permit the court to take multiple conduct or harm into account, for example, A313 (Similar Misconduct), A315 (Adequacy of Criminal History), and A316 (Criminal Livelihood).*

If these enhancements are still thought to be insufficient to reflect the additional harm contained in all multiple counts of conviction, the guidelines could contain a general rule in the concurrent/consecutive sentences section to remedy the deficiency. This guideline could indicate that concurrent sentences should generally be imposed, but the additional harms reflected in multiple counts of conviction should be factored into the calculation of the offense level for the single highest or most serious conviction, even when the applicable offense sections do not otherwise instruct the court to do so. This would ensure that there is no "free ride" for extra counts of conviction involving additional misconduct or harm. If this is done, the number of cases in which it

* As discussed above, we believe parts of A313 and A315 should be eliminated.

would still be necessary to impose consecutive sentences in order to reflect the full extent of the offense conduct and harms would be very small; it would be limited to those instances where the statutory maximum sentence for any one of the multiple counts of conviction is still too low to accomodate all the appropriate accumulation of additional harm.

In sum, A562 should be amended to presume concurrent sentences with total offense conduct and harm cumulated in the single sentence. It should permit consecutive sentences only when and to the extent that the cumulated harm exceeds the highest statutory maximum sentence available.*

ADDITIONAL COMMENTS

CHAPTER ONE

Overview

The guidelines numbering system is very confusing. See Revised Draft at 4. Logically, the number of each guideline section should proceed from the largest to the smallest unit, i.e., the chapter number should come first, the part of the chapter second, the section of the part third, and the sub-section last. Instead, the chapter and part are reversed in

* We note that in the commentary to A562(b) on page 193, the examples listed do not necessarily involve "ongoing conduct." Violent crimes, for example, need not always evidence ongoing conduct.

the guideline numbers. We suggest using, for example, "2-A13" in place of "A213" to signify Chapter Two, Part A, section 1, subsection 3. It may not be as aesthetically pleasing, but it is easier to locate quickly.

CHAPTER TWO

Sentencing Factors

On pages 11-12 of the draft, the guidelines define relevant conduct, circumstances, and injuries. We have already commented that it is unclear whether these "Sentencing Factors" are guidelines, policy statements or commentary. This should be clarified. We have also criticized definition #2 of relevant conduct and its accompanying commentary for including unadjudicated, unadmitted conduct. We also take issue with use of the very loose "to some degree" standard of proof in the commentary on page 11. If relevant conduct is to be so broadly defined as to include unadjudicated acts and states of mind, which we think it should not be, then at the very least a higher standard of proof should be required to establish such collateral factors.

In addition, relevant injury is defined in the text as "intended or foreseeable," but in the commentary as "intended or criminally negligent." We think the definition used should clearly indicate not only that a civil liability standard is

inappropriate, but also what is appropriate. Therefore, we suggest use of the phrase "involved conscious disregard of a known risk" in place of the more ambiguous "criminally negligent."

Offense Sections - Parts A-T

Given the limited time available for comment, we have not yet completed our written comments on the individual offense sections. We will forward these to the Commission in the next few days.

Other Offenses - Part X

X231 - A minimum reduction of 2 offense levels for an accessory after the fact is insufficient. The governing statute provides that the maximum sentence for an accessory is one-half the maximum for the principal. Since non-serious (low guideline level) crimes will rarely involve an accessory, the minimum reduction in offense levels should be higher than 2. (i.e., 2 would be appropriate for a level 4 offense, but an accessory would rarely, if ever, be charged in connection with a level 4 offense).

General Provisions - Part V

The Commission has asked for comment on three possible approaches to considering the General Provisions factors. The Federal Defenders think a combination of the first and third approaches discussed on page 148 is most appropriate. Preliminarily, we think it wise to separate factors commonly associated with particular offenses (which are included in individual offense sections) from factors that are not so regularly associated with particular offenses (which are included in the General Provisions). Factors that do not frequently accompany a particular offense and are also difficult to quantify meaningfully in relation to a broad range of offenses are logically treated as grounds for departure from the guidelines. On the other hand, factors not commonly associated with a particular offense but nevertheless easier to quantify meaningfully in relation to a broad range of offenses are logically treated as adjustments within the guidelines. The distinction is a sound and realistic one.

Furthermore, we commend the Commission's use of ranges of levels rather than fixed levels for certain adjustments, both in the General Provisions and in other parts of the Revised Draft. This adds the needed flexibility that the first draft was so widely criticized as lacking. We believe the use of ranges is preferable to the use of fixed adjustments in some

areas, particularly in regard to the General Provisions adjustments. These adjustments will apply to many different degrees of behavior or harm in relation to many different offenses; fixed levels could not fairly accomodate the wide variety of circumstances that will arise. Fixed numerical adjustments give a false sense of precision and may work unfairness to the parties. Ranges are necessary to effectuate the statutory mandate and Congressional intent of imposing fair, individualized sentences.

Moreover, we think the use of a range of levels, both here and elsewhere in the draft, is permissible under the governing statute. The 25% limitation on guideline ranges containing imprisonment, see 28 U.S.C. §994(b)(2), applies only to the final sentence range within which the judge may exercise unlimited discretion. Congress contemplated that for each combination of a category of offense and a category of offender the court would have up to a 25% leeway in selecting the term of a sentence of imprisonment. By its terms the 25% limitation has no relation to the selection of the appropriate offense and offender categories from which the applicable sentence range is ascertained. Congress placed no numerical limit on the method of determining the appropriate offense level or offender category, and it would have been impractical to have attempted to do so.

Nevertheless, in order to avoid violating the spirit of the Sentencing Reform Act - which attempted to curb excessive judicial discretion while maintaining fair, individualized sentencing - we suggest the Commission be careful to provide objective governing standards for judges to apply in determining the appropriate level within a range. This has been accomplished in most instances in which ranges are included in the Revised Draft. See, e.g., Y221 (Property Loss or Damage), Y225 (Physical Injury), F211(a)(2) and commentary on page 68. Moreover, the Sentencing Reform Act contains certain checks to ensure that all judges apply ranges consistently in similar cases. A party who feels the judge used an inappropriate level within a range could appeal based on an incorrect application of the guidelines. See 18 U.S.C. §3742(a)(2) and (b)(2). In addition, the Sentencing Commission will be reviewing data on sentences imposed all over the country and should be able to detect inconsistent application of ranges. If and when these occur, the Commission can amend or refine the guidelines as necessary based on actual case data.

We have the following comments on individual sections in Part Y:

Introduction - The word "expressly" in the first sentence should be omitted. We doubt that every possible instance in which general provisions factors are taken into account in the base offense level has been expressly identified. Just to make sure, we think "expressly" should be eliminated.

Departures - It appears that the departure provisions are intended to be policy statements rather than guidelines. The Commission should be careful both here and elsewhere in the draft to identify as such those provisions that are intended to be policy statements and those that are intended to be guidelines. We suggest use of a "PS" tacked onto the section number, as well as an appropriate heading where groups of policy statements are listed. If policy statements are not clearly identified as such, their authority and the parties' appellate rights will be left in a confused state.

Also, suggestions for departures should say "may" rather than "should," as the decision to depart is by its nature discretionary.

Finally, in the Commentary discussing departures, we urge the Commission to strike the last sentence in the second full paragraph on page 150. The judge should not be told that, in departing from the guidelines, he is ordinarily limited to the same type of sanction contained in the

applicable guideline. The whole point of departing is that the case presents such an unusual situation that the judge is to use his discretion to override the guidelines. When such an extreme case arises, there is no logical reason to bind the judge to the guideline type of sanction because the guideline itself is necessarily inapplicable to the facts of the case.

Y216 (Criminal Purpose) - In our earlier comments on due process and unadjudicated conduct, we explain why this provision is particularly susceptible to abuse and presents significant problems of proof. If it is to be retained nonetheless, we urge the Commission further to qualify its applicability. This could be done, for example, by adding at the end:

provided the increase is based on
objective, clear and convincing evi-
dence reliably establishing the
defendant's criminal purpose.

The commentary to this section should also discuss the need for clear, objective evidence, and should state that subjective conclusions of the probation officer based on circumstantial evidence will not suffice.

Y216 and its commentary should also be amended to make it clear that the terms "[]other offense" or "[]other criminal purpose" are meant to apply only to serious crimes and are not intended to include minor offenses, such as possession of drugs for personal use. In other words, it should be clear

that a judge is not supposed to depart under this section where a defendant who is convicted of bank embezzlement stole the money to support his drug habit.

Y217 (Altruistic Purpose) - The title and language of this section should both be changed so that "altruistic or non-malevolent" is substituted for "altruistic." The definition of altruistic (unselfish interest in or care for the welfare of others) does not cover all the situations discussed in the commentary (e.g., the gun memento case) in which the provision is intended to apply.

Y218 (Diminished Capacity) - We see no reason why this particular ground for departure - the only mitigating departure criterion - should have a cap. It is inconsistent with the notion of a departure (that, as opposed to an adjustment, it is "too individualized" to quantify in a meaningful way) for there be a numerical limit. No reason for the cap is provided in the commentary.

Also, we firmly oppose the prohibition in the last sentence of the commentary on page 152. Sentence reduction based on a mental state attributable to voluntary use of drugs or alcohol is, in our collective experience, a widely accepted current practice. There are cases in which all the participants in the criminal justice system - judges, prosecutors, defense counsel and probation officers - recognize the

appropriateness of voluntary intoxication acting as a mitigating factor. For example, mitigation might be appropriate where the defendant is a mailman who does not normally drink but got drunk at a birthday party luncheon and, as a result, threw out his deliveries. Mitigation might also be appropriate where a defendant is laid off at Christmas, goes out drinking, and later steals mail in a drunken state hoping to obtain money to buy presents for his family. We have found that in similar cases everyone involved agreed that mitigation was appropriate.

Not only is it unwise and unfair to preclude the use of voluntary intoxication as a mitigating factor, it is also unlawful to do so. The Commission is effectively negating the concept of departure, as it is described in the statute and legislative history, by saying that there is no case that could conceivably ever arise in which it would be appropriate to reduce the sentence based on voluntary intoxication. It is impossible to make such a pronouncement because it is not possible to conceive of every case that could arise. Moreover, the Commission cannot legally prohibit departure, as it has attempted to do here. The statute permits departure where a factor has not been adequately considered by the Commission in drafting the guidelines, either because it has not been considered at all or because it is present in a particular case to

a degree or in a manner not envisioned by the guidelines. Under the statute, it is a judicial function to determine whether the Commission has adequately considered a factor in formulating its guidelines; the Commission cannot make this determination for the court before the issue even arises.

Consequently, we suggest omitting the last sentence of the commentary on Y218, or at least changing it so that "generally inappropriate" is substituted for "expressly prohibited."

Adjustments - Generally, we think the adjustments should use permissive rather than mandatory language.* Where such collateral harms or mitigations might have occurred but they are minor or disputed, it may not be worth the trouble necessary to resolve or establish these factors. See testimony of the Honorable Jon Newman, U.S.C.J., at the New York regional hearing.

* The guidelines seem unclear on this point. The adjustments use mandatory language and the commentary in the fourth paragraph on page 147 confirms that if an adjustment criterion is met, the adjustment must be made. Yet the commentary in the fifth paragraph on page 147, in giving an example of psychological injury under Y222, states that "Section Y222 allows the judge to increase the penalty" (emphasis added) if the injury is present.

Y221 (Property Loss or Damage) - This guideline illustrates the false precision achieved by using fixed adjustments rather than ranges. It should simply contain a range of 1 to 5 levels, rather than specifying 1, 3, or 5 levels and then permitting use of intermediate ranges 2 and 4. The exact level chosen would depend on the comparable harm, as it now does for 1, 3, or 5 levels. We suggest the following language:

If the offense caused significant property damage or loss (and neither property damage nor loss is a factor in the offense guideline), increase the offense level by 1 to 5 levels depending on whether the property damage or loss is small, equal in magnitude to or substantially more serious than the other harm caused or risked.

Y222 (Extreme Psychological Injury) - If this factor is to be counted, the defendant must be afforded the right to have the victim examined to verify allegations of extreme psychological injury. Also, the definition of extreme psychological injury set forth in the commentary on page 155 should be included in the guidelines itself so that it has force of law.

Y223 (Vulnerable Victims) - The adjustment for vulnerable victims should be a range of 1 to 4, rather than 1 or 4. There are too many subjective judgments involved in this factor to require an automatic increase of either only 1 or as much as 4 levels. The specific level used to increase should be based upon the degree of vulnerability of the victim(s) and the extent to which the defendant intentionally selected victims who were vulnerable and exploited that vulnerability.

Also, in the commentary to this section on page 155, the last sentence should be changed from "the victim's vulnerability was related to the defendant's selection" to "the victim's vulnerability was the reason for the defendant's selection"

Y224 (Victim Official) - The phrase "high-level appointed official" should be defined; it is too ambiguous. Also, "other government employee or official" should be omitted; it is far too broad. In addition, a range of "up to 3 levels" should be used rather than a fixed 3 levels. The specific level selected should depend upon the significance of the fact that the defendant intentionally victimized a government official in relation to the nature of the crime and the other harm caused.

In order to conform with the guideline itself, the commentary to this section should clarify that scienter of the victim's status is required in order for Y224 to be used to aggravate the sentence. Clarification is necessary because knowledge of the victim's status may not be required for conviction of the particular crime involved.

Y225 (Physical Injury) - If this factor is to be used to aggravate the sentence, the defendant must have a fair opportunity to ascertain whether allegations of significant injury are well founded or should be challenged. This means the

defendant must be entitled to access to the victim (for purposes of medical examination) and/or to the victim's medical records.

Like Property Loss or Damage (Y221), this section really involves a range of increases. The guideline includes 2, 4, and 6, and the commentary expands this to include 3 and 5. We suggest making the full range explicit in the guideline, rather than give the false impression that this is more precise than it really is. For example, the following language could be used:

If significant physical injury resulted (and physical injury is not a factor in the offense guideline), increase the offense level by 1 to 6 levels to reflect the nature and extent of the injury.

If these changes are not made, the definition of permanent bodily injury in the commentary to Y225 on page 155 should be amended to eliminate the phrase "substantial risk of death from the injury." A crime may involve a substantial risk of death, yet it may be that no permanent injury results. Also, the term "major," used to modify "disability," should be added to modify "impairment" as well. In the definition of bodily injury on page 156, "significant" should be added between "other" and "physical injury."*

* These same changes should be made on page 18, in the commentary to A221(a)(3).

Y228 (Coercion or Duress) - The explication of circumstances required as a predicate for a sentence reduction under Y228 is far too restrictive; it almost (if not actually) amounts to a full defense to the crime. For example, the example provided in the last sentence of the second paragraph of the commentary on Y228 (page 156) involves a situation in which the defendant would have had a legal defense to commission of the crime and should not have been convicted. The purpose of allowing this factor to mitigate is to make it available even though it does not amount to a full defense. We suggest the following modification of Y228:

If the defendant committed the offense because he believed he or a member of his family would suffer physical or other harm unless he committed the offense, reduce the offense level by 1 to 5 levels, depending upon:

1. the imminence of the threat of harm,
2. the nature and seriousness of the harm threatened, and
3. the nature of the offense behavior.

This modification also eliminates the lengthy, awkward and unnecessary language contained in subsections (a) through (e), while preserving consideration of the factors discussed in those subsections and in the introductory language. It extends to threatened harm other than physical harm because defendants are sometimes threatened with more traditional types of financial or psychological blackmail, but it tells the court to

consider the nature and seriousness of the threatened harm in determining the appropriate level of reduction.

The Commission requested suggestions for additional departures and adjustments. We offer the following mitigating factors:

1. Delay in Prosecution - Where the prosecution of an offense was delayed through no fault of the defendant and, as a result, at the sentencing date the offense was so remote in time as to render a sentence within the guidelines unnecessary to accomplish the purposes of sentencing set forth in 18 U.S.C. §3553(a), the court may depart from the guidelines.

Commentary: In some cases the lapse of time between the offense and prosecution should justify a departure from the guideline range. Compared with state courts, where offenders tend to be arrested fairly soon after crimes occur or not at all, in federal court many indictments are returned only after long investigations. Because federal agencies are used to taking a long time for investigations, many low priority cases that could be prosecuted soon after the crimes occur end up at the bottom of the pile. Even after such low priority cases are referred for prosecution, they frequently sit in the prosecutors' offices for a long time while busy Assistant United States Attorneys deal with more pressing cases. Quite often such cases do not result in indictment until shortly before the five-year statute of limitation period expires. By that time, the offender (assuming he or she is, in fact, guilty) often has reformed.

As a result of the long delays between the offense and the prosecution in some minor cases, judges (even those with reputations for giving more severe sentences than average) often consider it appropriate to treat such cases less severely than less stale ones. We believe the sentencing Commission should allow this common-sense practice to continue. Indeed, it is quite

unfair in some cases to send a reformed person to jail for an offense committed years before because the government did not pursue the matter diligently. Of course, in cases in which the period of delay between the offense and the prosecution was the result of investigative efforts which were diligently pursued, consideration of this factor in mitigation of sentence would be inappropriate.

2. Collateral Sanctions - Where the defendant has suffered or will suffer collateral sanctions, such as loss of employment, pension, or seniority or disbarment or loss of a professional license, and the collateral sanction contributes significantly to fulfilling the purposes of sentencing set forth in 18 U.S.C. §3553(a), the court may impose a sentence below the guidelines.

Commentary: In many cases in which a defendant is convicted of a criminal offense, in addition to the punishment meted out in the course of criminal proceedings, he suffers substantial collateral sanctions which have a devastating life-long impact. Thus, for example, public employees who are convicted of felony offenses commonly are discharged from their employment, and often lose valuable pension rights, as well as the right to secure future public employment. Members of professions and persons engaged in other occupations which require licenses by state and local governments or federal regulatory agencies frequently are stripped of their right to engage in their professions or occupations as a result of felony convictions. Very often, this has a devastating impact, not only on their standing in the community, but, more important, on their ability to earn a future livelihood. When these collateral sanctions contribute significantly to fulfilling some or all of the purposes of sentencing specified in 18 U.S.C. §3553(a), a sentence below the guideline may be warranted.

3. Extreme Emotional Pressure - Where the defendant acted under extreme emotional pressure and the facts and circumstances

clearly indicate the offense was aberrant behavior on the defendant's part, the court may impose a sentence below the guideline.

Commentary: This is intended to apply in a situation where the defendant was under such unusual stress that he engaged in uncharacteristic behavior, and where future criminal behavior is unlikely to occur. For example, an elderly, law-abiding farmer who has just lost all his assets in bankruptcy robs his local bank, undisguised, to obtain money to pay his sick wife's hospital bill.

Note: This may have been intended to be included in Y217. If it is, it should be made more explicit.

4. Concern for Victim - Where prior to detection of the offense, the defendant made a good faith effort to compensate, assist, or lessen the injury to the victim, the court may impose a sentence below the guidelines [alternative: reduce the sentence by 1 to 2 levels].

Commentary: Judges sometimes appropriately recognize defendants' voluntary efforts to ameliorate the effect of the crime on their victims. For example, a defendant who tells his co-defendant to put away a gun during a bank robbery may be recognized for reducing the danger to the victims. A defendant who stops a co-defendant from pistol whipping a victim should be similarly rewarded. A defendant who is running away from the scene of a crime but who stops to help a bleeding victim and is thereupon apprehended may also receive a reduction in recognition of his concern.

5. Entrapment - Where there is significant evidence of entrapment falling short of a full legal defense to the crime, the court may impose a sentence below the guidelines [alternative: decrease the offense level by 1 to 4 levels].

Role in the Offense - Part 2

Z211 - The average or "normal" role that a defendant plays in an offense should already have been included in the base offense level. Yet the language used in this guideline makes it unclear whether the guideline applies to a party in a multi-defendant crime who played a more significant role than some other minor party but nevertheless not an especially important role. It is also unclear whether the sentence can be aggravated under Z221 for a defendant who clearly played a leadership role over some co-defendants, but not as prominent a leadership role as another co-defendant. We suggest the following clarification:

If the defendant's role in the offense was one of organization, leadership, direction, or supervision of others or the part he played was more significant than the normal or median level for such offense, the court shall increase the offense level by 1 to 6 levels, depending upon the nature and extent of the defendant's activities and the nature and seriousness of the offense. This guideline does not apply to a sole participant.

(modifications emphasized). Our suggested amendment also adds one particularly significant factor for selecting the appropriate increase - the nature of the offense - which is mentioned only in the commentary at page 157 but not in the guideline itself.

Z212 - Given the language used, it is not clear whether Z212 applies to a defendant who committed a crime alone. Also, the most important factor used to determine the appropriate amount of the enhancement for using a special skill should be the use made of the special skill, not the role of the defendant in the crime as a whole and his overall contribution, both of which could be based on factors other than his special skill. We suggest the following modifications:

If the defendant used a special skill, trade, training, education or public position to facilitate the commission of an offense, the court shall increase the offense level by 1 to 4 levels, depending upon the use made of the skill, trade, training, education or public position. The increase may be made even if the defendant was the sole participant.

Z213 - This guideline probably does not say what was intended. It effectively states that if there are two equally culpable leaders or supervisors in a 20 person criminal organization, neither leader can receive a role in the offense enhancement because both share "comparable responsibility." We suggest eliminating this guideline altogether. The concept it probably intended to capture - not enhancing for a defendant who played a normal or average role - can be captured by our suggested modification of Z211. The point Z213 makes regarding a sole participant should be included, as we have suggested, in Z211 and Z212, where the enhancements themselves are set forth.

2214 - The Federal Defenders feel that a 1 to 6 level reduction for minor role in the offense may not be sufficient in some instances. In our collective experience, there are a large number of cases prosecuted in federal court that involve defendants who played an exceedingly minor role.

For example, in major multi-defendant fraud cases there are often messengers or secretaries who may have or should have realized that something was amiss, but who facilitated the fraud only in a very indirect way and had no contact with the defrauded victims. Similarly, there may be recently-hired clerks or salesmen in these cases who were, to some extent, themselves duped by the leaders of the scheme, or who discovered the fraudulent nature of the scheme just before the arrests took place. In other cases, many of us have come across the wife or live-in girlfriend of a major drug dealer who, on occasion, took telephone messages for her husband or boyfriend from his drug customers, sometimes even grudgingly.

If no more than a 6 level reduction is permitted, these people will often serve very long prison terms, though they would receive very short jail terms or probation in virtually every court in the country under current practice. In other words, the guidelines, enacted to cure sentencing disparity, may well force judges to change their behavior in cases where they now appropriately act uniformly.

We suggest adding the following sentence at the end of Z214:

A greater reduction is permitted if the defendant's participation is so unusually incidental that the interests of justice so require.

Examples such as those described above (taken from actual cases) could be used in commentary to illustrate when this rule would apply.

Furthermore, we do not believe there is any inconsistency in allowing more than 6 levels of reduction for a minor role while not permitting more than 6 levels of increase for an aggravated role. Unusually aggravated roles are often already the subject of statutes (such as 18 U.S.C. §848) that provide significantly enhanced punishments for very major players.

CHAPTER THREE

Criminal History

Our comments on criminal history are included above.

Obstruction of Justice and Perjury

The admonition that the defendant should not be penalized for exercising constitutional rights, contained in the first sentence of the third paragraph of the commentary, should be part of the guideline itself.

Acceptance of Responsibility

We think this section contains a necessary and well formulated recognition of the defendant's steps toward accepting personal responsibility for his actions.

Cooperation

The treatment of cooperation in the Revised Draft, particularly in C331(a)(1), presents a major improvement over that contained in the first draft. The determination of whether and how much to reduce the defendant's sentence as a reward for his cooperation with authorities is placed where it should be, in the judge's hands rather than the prosecutor's. At the same time, the guideline recognizes that the government's evaluation of the significance and usefulness of the defendant's cooperation is, and should remain, one of the major considerations in the judge's determination. However, we think the guideline and the commentary (third paragraph on page 169) need to make it clear that the defendant's evaluation of the extent and value of his cooperation are also to be considered by the court.

CHAPTER FOUR

Plea Agreements

The Federal Defenders have continually maintained that Congress did not intend to prohibit plea agreements outside the guidelines. We are pleased to see the Commission has apparently concurred. In addition to the points discussed in our comments on due process, we have the following suggestion for this chapter:

A413 - The word "ethical" should be removed from the title of this section and the phrase "or any other unethical representations" should be eliminated from A413(c). Attorneys are always obliged to act ethically and subject to legal and professional sanctions if they do not. It is insulting and unnecessary to include the term ethical in this context.

We also suggest changing A413(c) to read simply "not be misleading." "[N]on-existent" and "incomplete" are unnecessary. A prohibition against agreements containing non-existent facts is covered by the admonition not to be misleading. Also, A413(b) already contains the requirement that plea agreements be complete and it is preferable to use of the term "incomplete" in subsection (c). Completeness can be an ambiguous term in this context, but subsection (b) clearly explains what is necessary for a plea agreement to be complete.

For clarity, we suggest adding to A413(a) "and indicate those significant facts which remain in dispute." Incorporating all of our suggestions, A413 would read as follows:

A413. Standards for Plea Agreements

Plea agreements shall:

- (a) set forth all relevant facts and circumstances of the offense conduct and indicate those significant facts which remain in dispute;
- (b) not omit any material fact relevant to the commission of the offense; and
- (c) not be misleading.

Finally, we think the Commission needs to clarify when and in what form it intends to have the facts behind a plea agreement be revealed. Currently, the relevant facts are contained in writing in the presentence investigation prepared by the probation office and orally in statements made by the parties to the court at the time of the plea. If the Commission intends that they now be contained in a written submission prepared before the plea, it should be aware of the fact that this will impose a substantial additional burden on the parties who do not currently put the facts and/or the bargain in writing, and it may consequently cause postponement or delay of pleas. It will present a particular problem in districts where the court sets a plea deadline and will not accept a plea subsequent to that date.

CHAPTER FIVE

Probation and Imprisonment

A511(a)(2) and A521(c) - These guidelines should be extended to permit short jail terms to be exchangeable with community service as well as with intermittent confinement, community confinement, and home detention. We feel the spectrum of guideline ranges under which probation is available is already too limited to further limit the exchange rule to custodial sentences.

Also, a probably unintended arithmetic problem is inherent in these provisions. We assume one laudable purpose of imposing a sentence of intermittent confinement is to permit a defendant to continue in his employment. A term of intermittent confinement cannot extend beyond one year at most. 18 U.S.C. §3563(b)(11). Therefore, a defendant who must serve a minimum of six months cannot fulfill this requirement with an alternative sentence of six months of intermittent confinement because, even if he goes to jail every weekend, holiday and vacation day for one year, he will not have completed his six months of service. One possible way to remedy this is to reduce to six the number of hours of confinement in A521(c)(1) that count as a day, so that weekends (Friday evening through Sunday night or Monday morning) can count as more than two

days. Alternatively, the Commission should recommend amendment of the statute to permit terms of intermittent confinement to extend beyond one year. See 28 U.S.C. §995(a)(20).

We also urge the Commission to eliminate the parenthetical in A521(c) which excludes defendants in a criminal history category of III or higher from the equivalency or exchange rule. As our comments on the criminal history provisions indicate, defendants accumulate a high criminal history score far too quickly for this to be an advisable limitation.

Supervised Release

A531(a) - Supervised release should be discretionary rather than mandatory. Title 18 U.S.C. §3583(c) provides that the court is to determine when supervised release is appropriate, and sets forth a list of factors the court is supposed to consider in making its determination. The guidelines are intended to aid the court in determining when supervised release is necessary, 28 U.S.C. §994(a)(1)(C); they are not intended to usurp the court's role and make the determination for the court, as A531(a) does. Furthermore, we note that the guidelines offer no explanation for the decision to require supervised release following every jail term of more than one year. Not every such defendant is in need of supervision, either for his own or for society's benefit.

A532 - This guideline makes a similar error with regard to the appropriate length of a term of supervised release. It effectively requires that the maximum statutory term be imposed in every case. This was not what Congress intended when it left the determination of length to the court and told the Commission to issue guidelines to aid the court in making its determination as to length.

A533(b)(3) - A533(b)(3) should be amended so that protection of the public and not deterrence is listed as one rationale for selecting certain conditions of supervised release. Section 4 of the proposed 1987 technical amendments to the Comprehensive Crime Control Act of 1984 and accompanying commentary indicate that the reference in 18 U.S.C. §3583(d) to a statutory provision discussing deterrence was a mistake. What was intended was reference to a statutory provision discussing protection of the public. We suggest amending A533(b)(3) accordingly.

Fines

A542(c) - This provision is discussed under "Due Process."

A542(d)(6) - Strike "a lesser amount." The amount of a previous fine should be irrelevant; it is the fact of a

previous fine that is important. Also, it is confusing to refer to a lesser amount when the current amount to which it is being compared has not yet been determined.

A542(f) - The last part of this guideline permits the court to impose a longer jail term than it otherwise would have imposed if the defendant cannot pay a fine, as long as the additional time does not extend beyond the top of the applicable guideline range. It is fundamentally unfair to penalize the indigent with prison time; sanctions other than additional jail time should be used.

A542(g) - This provision should be omitted. The governing statute contains detailed provisions controlling the payment of fines. It is confusing to have two different sets of instructions for the same thing. We suggest simply citing to the governing statute, as is done in A543 (Special Assessments) and A544 (Forfeiture).

A542(i) - The notion of having defendants pay for their supervision and jail stay is unrealistic and offensive. It will not be cost effective in many instances, especially considering the paperwork and litigation that will be involved for the substantial number of defendants who cannot afford to pay to establish their indigency, and for the government to pursue those who supposedly can pay but do not. Moreover, it will

discourage offenders from working while in prison because their compensation will have to be turned over to pay for their room and board.

Commentary to A542(c)(2) - In the third line of the second paragraph of commentary on page 186, the word "unprovable" should be inserted before the word "losses." The sentence does not make sense as it currently stands.

CHAPTER SIX

Violations of Probation and Supervised Release

We have the following observations on this chapter:

A614(a)(5) - Upon revocation of probation, credit should be given for time served in custody, community confinement, or home detention. We understand the Commission intended to avoid double-counting of time served because the Bureau of Prisons currently gives credit for time served in jail. However, this would not alleviate the problem for defendants who have served time in alternative custody (community confinement and home detention), and defendants cannot be assured that the Bureau will never change its rules. Perhaps the guidelines should give credit and the Commission should notify the Bureau that the Bureau needs to change its rules accordingly. In any

event, the guidelines should make it clear that the defendant is to receive credit for time served in custody or alternative confinements, but not double credit.

We also suggest changing the word "may" in the first line of the last paragraph of A614(a)(5) to "must."

A614(b)(4) - The same problem arises here with regard to supervised release as arises in A614(a)(5) with regard to probation. The violating defendant should be given credit for time served in alternative forms of custody (community confinement and home detention). Here there is no issue of time served in jail.

In addition, upon revocation of supervised release no credit is given for "street time" served under supervision. To the extent this applies to Category 1 violations, it mirrors current Parole Commission policies. However, to the extent it applies to Category 3 and 4 violations, it is inconsistent with current parole policy and more onerous. We think it is illogical to have a harsher policy for supervised release than for parole because the theory behind parole is that the defendant is serving out the remainder of his jail sentence, while the theory behind supervised release is that it is a separate sanction in addition to a jail sentence. Therefore, the defendant who has satisfied part of his additional sanction should be credited with having done so.

Commentary on "Violations for Drug Use" - (pg. 198) -

This provision is generally good, except it indicates that, where a defendant uses illicit drugs and is not placed in a treatment program, the violation constitutes "new criminal behavior." This effectively makes it a Category 1 violation, or a crime. Currently, however, a dirty specimen results at most in a technical violation, or a Category 4 violation. We see no reason why it should be treated as a crime and none is offered in the guidelines.

OMISSIONS

We note that some of the policy statements the Commission is directed by statute to promulgate are not included in the Revised Draft. These include policy statements regarding the appropriate use of the sentence modification provisions of 18 U.S.C. §§ 3564 (early termination and extension of probation), 3573 (modification or remission of fines), and 3582(c) (modification of terms of imprisonment), and the appropriate use of the temporary release and prelease custody provisions of 18 U.S.C. §§ 3622 and 3624(c), respectively. See 28 U.S.C. §994(a)(2)(C) and (F). We do not know whether these omissions were intentional.

ADDITIONAL EDITING ERRORS:

- Page 2 - #3 under Principles of Sentencing - "crimes" should be "crime"
- Pages 18 and 156 - under Serious Bodily Injury - insert "or" between "function", and "required"
- Page 54 - D218 - "by" should be "be"
- Page 68 - next to last paragraph, sixth line - "to" should be "of"
- Page 68 - next to last paragraph, seventh line - "F211(b)" apparently should be "F211(a)(2)"
- Page 76 - H225 - should "excess" be "excessive"?
- Page 127 - last word - "Q231" should be "Q221"
- Page 142 - T215 - "5" should be "6"
- Page 143 - T222 - "5" should be "4"
- Pages 144 and 145 - second paragraph of Commentary - the last three sentences should be part of the first rather than the second paragraph
- Page 155 - commentary on Y222, second paragraph - "2 levels" should be "1" level
- Page 176 - A511(c) - the "10" in the parentheses should be an "11"
- Page 192 - next to last line - "and" should be "or", according to A563
- Page 198 - first paragraph, last word - "released" should be "release"
- Page 198 - second paragraph, third line - "conduct" should be "conducting"

CONCLUSION

We hope our comments and suggestions, both positive and negative, have been helpful to the Commission. We trust you will feel free to consult with us in the time that remains concerning the points raised here and any others of concern to the Commission in drafting sentencing guidelines.