



U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

APR 7 1987

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

One of the primary areas of concern with the Revised Draft Guidelines is the effect of the 25 percent rule set forth in 28 U.S.C. §994(b)(2) on the use of sentencing ranges consisting of several offense levels for particular offense or offender characteristics. To the extent the guidelines authorize the sentencing judge to choose, in the exercise of broad discretion, from among various offense levels so that a term of imprisonment to be imposed could vary by more than 25 percent or 6 months, depending upon the particular level chosen, we firmly believe that the guidelines violate the mandate of 28 U.S.C. §994(b)(2).

Section 994(b) of title 28, United States Code, imposes significant restrictions on the Sentencing Commission in the development of sentencing guidelines. It requires the establishment of a sentencing range for each category of offense involving each category of defendant that provides no more than a 25 percent or six-month variation in a term of imprisonment, whichever is greater. The provision states:

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

The Revised Draft Sentencing Guidelines provide a sentencing table establishing 43 offense levels, each with a range of

approximately 25 percent, except for the lowest offense levels, for which the range is six or fewer months. If the sentencing judge in all instances were limited to applying one of the offense levels for a particular factor, there would be no violation of the 25 percent rule in the law. However, there are numerous instances in which the guidelines direct the judge to increase or decrease the offense level for a particular sentencing factor by, for example, a range of one to four levels. Because each offense level provides for variation in a term of imprisonment to the maximum extent authorized by law, any direction in the guidelines to choose from among two or more levels could potentially authorize a sentence of imprisonment in which the maximum of the range exceeded the minimum by more than 25 percent or six months. The only exception to this conclusion relates to the first five offense levels, for which the full statutory six-month range has not been utilized.

The sentencing choices a judge would face under the Revised Draft Guidelines can be illustrated by a bribery case. The guidelines direct the judge to determine the base offense level by selecting a value from the range of offense levels 10 to 15, depending upon the extent and duration of the offense (§C211), and to enhance it by an additional 1 to 8 offense levels. Overall, therefore, the judge could choose an offense level from a range that varied from a minimum of 8 months to a maximum of 57 months of imprisonment -- over 700 percent. If the offense involved others and the defendant's role was one of organization or leadership, the guidelines direct the judge to increase the offense level by 1 to 6 levels (§Z211), which could increase the maximum term of imprisonment to 108 months. After this adjustment, the overall range is potentially 8 months to 9 years -- or 1350 percent. As can be seen from this example, the wide variation in the offense level for the specific offense is compounded by the application of a general offense characteristic, which also provides an unjustifiably broad range. Two offenders with similar backgrounds convicted of the same bribery offense, with the same degree of involvement, could face vastly different sentences depending upon the sentencing predilections of the particular sentencing judge, despite the fact that both sentences would be imposed under a sentencing guideline system.

Bribery is not the only offense for which the guidelines authorize the use of a range of more than one offense level. Involuntary manslaughter provides a range of four offense levels or a 350 percent range in prison terms (§A216); use of a dangerous weapon in an assault case provides a three-level range, or a 176 percent variation in prison terms (§A221); and transporting hazardous material aboard an aircraft is subject to a range of 8 levels -- a 2400 percent range (§K231). There are many more examples. In each case any direction to the judge as to how to choose a level from within the range provided is very general. For example, the guideline for various military offenses, including incitement to insubordination, disloyalty, and mutiny, qualifies a range of five offense levels by the phrase "depending upon the nature and circumstances of the offense" (§M241).

Wide ranges for offense and offender characteristics are inconsistent with, and undermine, the purposes of the Sentencing Reform Act. The essential premise behind the Sentencing Reform Act is that unfettered judicial discretion in sentencing has resulted in a system characterized by uncertainty, unwarranted disparity, and a lack of fairness. Simply stated, unwarranted disparity caused by broad judicial discretion is the ill that the Sentencing Reform Act seeks to cure. Thus, the Act specifically requires the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). The provisions of law that establish the Sentencing Commission restate this purpose as one of the Commission's missions. 28 U.S.C. §991(b)(1)(B).

Limitations on judicial discretion are prominent features of the Sentencing Reform Act. The requirement to develop a guideline system, the mandate to sentence within the guidelines unless the court finds an aggravating or mitigating circumstance that was not adequately considered in the formulation of the guidelines, and the appeal mechanism for sentences that are outside the guidelines or that result from their incorrect application are all designed to limit discretion in sentencing and to eliminate unwarranted sentencing disparity. However, unjustifiable disparity is built into the guideline system under the Revised Draft by virtue of the broad ranges provided for many offense and offender characteristics. In essence, broad discretion is returned to the judges in the form of guidelines. Without greater limitations on judicial discretion in a guideline system, such a system could have all of the shortcomings of past practice -- unwarranted inconsistency, lack of fairness, and lack of certainty -- without the simplicity that the old system provided.

In connection with the enactment of an exception to the 25% rule for sentences at either end of the spectrum, the House Subcommittee on Criminal Justice addressed the importance of curtailing discretion through operation of the rule and other features of the Sentencing Reform Act:

The philosophy behind the Sentencing Reform Act is to restrict the discretion of the various participants in the sentencing process. The discretion of sentencing judges is restricted by the requirement that they sentence within the applicable guideline, except in extraordinary circumstances, and by appellate review of the sentence if they do not. The 25% rule restricts the Sentencing Commission's discretion in order to guard against the return of broad discretion to the sentencing judge by the promulgation of wide sentencing guidelines. H.R. Rep. No. 614, 99th Cong. 2d Sess 6 (1986).

Congress believed that the 25 percent rule it enacted in 1984 constituted a meaningful restriction or it would have found little need in 1986 to provide an exception to it.

The legislative history of the Sentencing Reform Act itself indicates that the Senate Judiciary Committee considered the provision setting forth the 25 percent rule "of major significance." S. Rep. No. 225, 98th Cong. 1st Sess. 168 (1983). The report further reveals that the Judiciary Committee contemplated a guideline system characterized by many finely graded distinctions:

For a particular penal offense ... while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent from its minimum to its maximum; all the ranges together, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense. ... The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors. Id. at 168-169.

Guidelines which provide a range of several offense levels for a factor and grant the judge discretion to determine which specific level should represent the factor simply fail to meet the standard of refinement which should characterize sentencing guidelines under the Sentencing Reform Act. Moreover, general guidance to the judge as to how to choose a point within the applicable range does not save the system devised since it, too, fails to assure that unwarranted sentencing disparity will not be perpetuated. It is difficult to imagine any reasonable degree of uniformity arising under such criteria as "depending upon the use made of the weapon" (§A221) or "depending upon the nature of the defendant's conduct and any personal benefit derived or expected to be derived from the offense" (§E221). Moreover, judicial review involving these standards is unlikely to be very meaningful. Only if these criteria were transformed into specific gradations within the guideline ranges provided would they reduce unwarranted sentencing disparity sufficiently to warrant our support. To the extent these specific gradations omit a factor relevant to a particular case or fail adequately to take a factor into account, the judge would be authorized by law to sentence outside the guidelines. 18 U.S.C. §3553(b).

One final point for consideration with regard to the 25 percent rule is the suggestion that it does not apply to intermediate steps in the sentencing process under the guidelines. That is, it may have been argued by some that since the final range facing the sentencing judge after application of the

guidelines is limited to one level or 25 percent variation in the length of imprisonment, the statutory criteria are satisfied. First, the guidelines do not assure that the use of ranges is limited to intermediate steps in the sentencing process. Ranges would be used often in the final calculation under the guidelines as drafted, either with respect to specific offenses where there is no adjustment for any general characteristic or with respect to the general characteristics themselves.

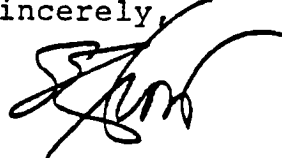
More importantly, whether broad ranges are incorporated into the guidelines at an intermediate stage or at the final application is irrelevant. In both cases the 25 percent rule would be violated. If during the sentencing process the judge may in his or her discretion increase or decrease the prior calculation by a range of, for example, one to four levels, the whole range applicable to the specific set of offense and offender characteristics is increased or decreased by one to four levels and, consequently, by more than 25 percent in the length of imprisonment. This result is no different from one that would be dictated by sentencing guidelines that provided no ranges in intermediate steps of application but which directed the judge to increase or decrease the final result by one to four levels, depending upon the nature and circumstances of the offense.

If the Sentencing Reform Act authorized the use of sentencing ranges for specific factors used in intermediate steps in the application of the guidelines, it would be difficult to make sense of the requirement imposed on the court to state the reason for imposing a sentence at a particular point within an applicable range. 18 U.S.C. §3553(c)(1). If this mandate only applied to the judge's choice of sentence from the 25 percent range represented by the one offense level finally resulting from application of the guidelines, then the judge would be required to explain his determination concerning a narrow range while free to choose from a broad range during intermediate steps without explanation. On the other hand, if this requirement to pinpoint the reason for a particular sentencing point within each range applied throughout the sentencing process, the judge would be forced to explain many decisions along the way. (The language of this provision does not on its face support the concept of many explanations.) While the guidelines are less complicated by the use of ranges, the judge's task is not.

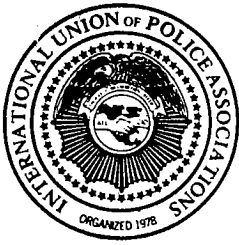
For all of these reasons, the Department strongly urges that the guidelines be revised to conform to the 25 percent rule by

substituting for the many guideline ranges that vary by more than 25 percent in the length of imprisonment specific gradations which take into account and weigh the factors relevant to these ranges.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Trott', with a stylized flourish extending from the end.

Stephen S. Trott  
Associate Attorney General



**INTERNATIONAL UNION  
OF POLICE ASSOCIATIONS  
AFL-CIO**

**THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS**

Robert B. Kliesmet  
*President*

Al Angele  
*Secretary-Treasurer*

☒ National Headquarters • 815 16th Street, N.W., #507 • Washington, D.C. 20006 • (202) 628-2740  
☐ West Coast Regional Office • 224 E. Olive Ave., #301 • Burbank, Ca. 91502 • (818) 841-5426

---

Statement of

ROBERT B. KLIESMET  
PRESIDENT

of the

INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

before the

UNITED STATES SENTENCING COMMISSION

March 12, 1987

**AFFILIATED WITH THE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO**

Thank you for the opportunity to submit this statement. I have testified before this Commission on two occasions, and unfortunately my schedule prevents my appearing before you in person.

On the occasions when I testified before this Commission, I brought to you the perspective of the average street cop. I believe that perspective is as valuable now as when I testified then.

The average street cop will look at these Guidelines and ask if they deter crime -- will they make his neighborhood, his community, a safer place in which to live. After studying these Guidelines, I must regretfully conclude that he will probably conclude that they do not make this country a safer place in which to live.

There are two major reasons why I believe this is so: first, the Guidelines provide base offense levels which are too low; second, coupled with the wide range of base offense levels and offender characteristic ranges, the Guidelines give judges too much discretion.

One of the greatest frustrations in a policeman's career occurs when a violent criminal is given what is essentially a slap on the hand by a lenient judge. These Guidelines give judges an immense amount of discretion, which many judges will use in order to thwart the intention of Congress. Criminals will not be deterred by this system because it is simply too lenient.

Many of the base offense levels are so low that they will not deter crime. Insider trading carries a base offense level of 8, while robbery carries a level of 6. Crimes against national security, such as treason and espionage, carry basic offense levels of 30.

These offenses, and many others have levels which are simply too low. They must be raised in order to deter criminal behavior. If our criminal justice system is to be truly effective, sentences must be meaningful. This means they must be tough and determinative.

Lenient sentences do more than just frustrate policemen. When courts release dangerous criminals, they undermine public confidence in the criminal justice system. At best, the public feels cynical; at worst, it feels helpless. Courts must recognize that criminals intentionally commit crimes and should take this into account in the sentencing process. These people should be given lengthy prison sentences so that they will not pose a threat to innocent people.

The Commission must curtail judicial discretion in sentencing. The combination of a wide variance in sentencing for a base offense, plus even wider discretion in increasing the base offense level for specific offense characteristics has resulted in sentencing ranges which are not only in violation of the Sentencing Reform Act's limit of twenty-five percent, but are bad public policy.

The Revised Draft Sentencing Guidelines give judges too much discretion. Under this system, it is inevitable that many criminals will be given unconscionably low sentences. This means that they will be back on the street sooner than they should be. It also means that many -- if not most -- of those same people will become recidivists.

Notwithstanding these criticisms, the Guidelines represent an improvement over current sentencing practices. Thus, if given the choice between the current system, and this draft, I would choose the latter.

In conclusion, while the Revised Draft Sentencing Guidelines represent an improvement over the current sentencing system, they are seriously flawed. The most blatant flaw is that they give sentencing judges too much discretion. The levels for base offenses and offense characteristics should be a single number, not a range of numbers.

If Guidelines are passed with these provisions, society will pay a heavy price. Criminals will not be deterred by these Guidelines to the extent that they would have been by the September Guidelines. Criminals will be released before they should be. When they are released, they will be more likely to become repeat offenders. In this sense, the Guidelines so the public a disservice. The final Guidelines should be both tough and determinative.

Thank you again for the opportunity to present my views to you.

THE FEDERAL JUDICIAL CENTER  
DOLLEY MADISON HOUSE  
1520 H STREET, N.W.  
WASHINGTON, D. C. 20005

Writer's Direct Dial Number:

633-6344

March 12, 1987

United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Attention: Guideline Comments

Dear Commissioners:

I offer the following comments on the January draft of the sentencing guidelines.

The views expressed here are mine alone, and do not represent the views of either the Federal Judicial Center or the Research Division.

Comments of a General Nature

Organization

I regard the present draft as a substantial improvement over prior drafts in terms of ease of use, and I am astonished at the amount that was accomplished in the short time you had after receiving comments on the September draft.

It does seem to me that there remains a good deal of looseness in classifying material as guideline, policy statement, or commentary. I raise some specific examples below of what seems to me to be misclassification, but I think there is a need to review the entire document with this problem in mind. The decision whether material is classified as guideline material or not is particularly important, since guidelines are binding and other things are not. But the document would also be more user-friendly if the commentary were restricted to explanatory material--legislative history, so to speak--and specific advice to judges were put somewhere else. I would put the specific advice in things denominated policy statements, but if the "general policy statements" language of the statute is regarded as inhibiting, some other label would do.

Also under the heading of user-friendliness, it seems to me that the numbering system would be improved if, instead of § A213, you had § 2A13. I think finding one's way around would come much more naturally that way. The normal expectation is that A3 comes soon after A2, but that expectation is regularly defeated by the present numbering system.

Discretion in determining the offense level

I am among those who believe that the wide discretion that the draft gives judges to determine the offense level is inconsistent with the Commission's statutory mandate. I do recognize the difficulty of complying with the twenty-five percent rule, but I think the solution adopted here is not one permitted by the statute.

I believe the appropriate solution is to write narrower guidelines that are tailored to the most common fact patterns, and invite departures from the guidelines in cases in which the facts are sufficiently different. I should have supposed, for example, that most fraud cases are adequately measured by number of transactions, number of victims, and monetary gain or loss, and that you could appropriately invite a judge to depart from the guidelines when a factor such as public corruption is involved. That would eliminate the need, under § F211, for a guideline that tells a judge to increase the base offense level by three to nine levels (40 to 170 percent, I think) when the gravity of the offense is not reflected by the amount of financial loss or gain.

I recognize that this proposal will not be instantly welcomed by appellate judges. But if you succeed in writing narrow guidelines for the kinds of cases that appear in great numbers, and you also make it clear for rarer kinds of cases that, in the Commission's own view, you have not adequately taken certain factors into account, the burden on the appellate courts will be to review relatively rare situations for reasonableness. I believe the burden would not be undue. Over time, of course, the Commission could work to narrow the range of exceptions.

Even if one accepts the legality of guideline provisions that permit a judge discretion in determining the offense level, it seems to me that there is a need for more guidance about how to make the choice. For example, in § A216, the base level is 10 to 14, "depending upon the circumstances of the offense and the degree of recklessness involved." But there is no indication of what "circumstances of the offense" should influence the decision. See also, for relatively egregious examples, §§ E241, G231, and M244. The use of examples in these cases would be very helpful. The Commission might give one example of a 10 case and

one example of a 14 case under § A216, or it might give an example of circumstances that would call for a rating of 12. But some kind of anchor is badly needed.

### Comments on Specific Material

#### Page 2

Of the five general principles toward the bottom of page 2, the fourth seems to me to be very unclear: It says where there is a conflict between retribution and crime control, choose motherhood. If the Commission really has agreed upon a principle for resolving such conflicts, I think it is important that it be stated intelligibly. It should probably be in a policy statement, moreover, so that it will serve as guidance to judges in exercising the discretion that they retain.

#### Page 11

I think the discussion under the heading "Sentencing Factors" needs a good deal of expansion and elaboration, including the use of some examples. The question of what conduct should be considered in sentencing promises to be one of the more difficult areas in guideline application, and I do not think it is handled adequately here. Nor do I find the references to rules 8(a) and 404(b) particularly helpful. Rule 404(b), for example, may permit evidence of a five-year old crime to be introduced in a current trial. Surely, the Commission does not intend to suggest that a judge could treat the old crime as part of the conduct for which he or she is sentencing.

#### Section A212

I do not understand the statement in the commentary to the effect that, "as a practical matter," a defendant who causes death during the course of a felony will be subject to life imprisonment even if the felony is not covered by 18 U.S.C. § 1111. It is true that a departure from guidelines is invited in such a case, but it is far from clear that such a departure would always get you up to level 42.

The third paragraph of commentary here appears to misstate the content of § Y224, which by its terms applies to all government employees.

Section A216

The last sentence of commentary would belong in a policy statement if my view of the role of policy statements were accepted.

Sections A221 and A222

The distinction between "assault" and "simple assault" is unclear. Apparently, "assault" does not mean assault with a dangerous weapon, since that is listed separately as a specific offense characteristic.

I also find the enhancement for use of a dangerous weapon somewhat ambiguous. Is it intended to incorporate the expansive interpretation that has been given to the term "deadly weapon" in court decisions?

I believe the definitions of levels of injury belong in the guidelines themselves, not in the commentary. I note that in the definition of "permanent bodily injury," it is grammatically unclear whether "impairment" is modified by "of a bodily function."

The last sentence of the commentary to § A222 is surprising. If you want a stiffer sentence for assault committed by striking, beating, or wounding, say so. If you want a stiffer sentence for minor bodily injury, say so. There is no point in making one a surrogate for the other.

It would be helpful to have a note somewhere indicating that assault with intent to commit murder is covered under § A214 rather than § A221 and that assault with intent to commit rape is similarly covered under § A231.

Section A231

In paragraph (a)(1), consideration might be given to a gradual response between age 12 and age 16, rather than making a three-level jump depend on whether the victim is just short of her twelfth birthday or just past it.

The fourth paragraph of the commentary, dealing with certain forms of coercion, does not seem to reflect the guideline accurately.

Section B232

The last two sentences of the commentary are not appropriately "commentary." They should be included in the guidelines.

Sections B241-B243

The first paragraph of the commentary, telling you when to use the amount of the bribe and when to use the value of the benefit to the briber, should be included as part of the guidelines.

However, I find the instructions very unclear. In the first example, the briber and the bribee have different values placed on their conduct, but nothing in the preceding text suggests that outcome. In the gambler example, the reference to the amount that the gambler "stood to gain" implies that the "monetary benefit" standard should be used even when their wasn't any.

I am not sure I have a good solution, but I also find it somewhat odd that, where the benefit can't be valued, the amount of the bribe becomes the governing standard. There can be some very large transactions in which it is difficult to place a monetary value on the benefit received. For example, a bank officer may approve a very large loan that should not have been made at all under the bank's regulations. It would appear that the offense could be seriously undervalued if the amount of the bribe were determinative.

Section B251

In paragraph (a)(3), does "market value" mean what the market value would be if the counterfeit were accepted as real? It seems to me that this should be the rule: You want to value a counterfeit bond at what an innocent victim would pay for it, not at what it can be sold to a fence for. But I do not think the guideline is clear on this question.

Sections B252-B253

Note the inconsistency between the second and sixth paragraphs of commentary, dealing with whether loss to private individuals should be an explicit sentencing factor.

Sections C211 and C212

The Commission's intention to distinguish between a gratuity and a bribe does not come across clearly.

Section D211

The fourth full paragraph of commentary on page 48 is mysterious. It contradicts the guideline, which states that an amount of heroin between 500 and 999 grams makes a level 30 offense.

The fifth full paragraph on page 48 is an instruction to the sentencing judge, and belongs in the guidelines rather than the commentary.

With regard to the last paragraph of commentary on page 49, I note that "profession" is not included in § 2212.

Section D212

This is another case in which a great deal turns on whether somebody has just passed a particular birthday. It seems like an unnecessarily sharp step.

Section D213

It is not clear what is intended when two or three of the paragraphs of this section are applicable -- for example, if someone sells heroin within 1,000 feet of a schoolyard to a 20-year-old pregnant woman.

Section D217

Should paragraph (2) read "For the second or subsequent conviction"?

Sections E252 and E256

If specific offense characteristics (2) and (3) are intended to be in the alternative, it could be stated more clearly.

Section K214

I suggest that the distinction between paragraphs (1) and (3) be reconsidered. It would appear to me that the severity of the offense should be made to depend upon the objective risk of death or serious bodily injury, or at least the objective risk based on facts known to the defendant. In a case in which the objective risk was high, the guideline as presently drafted makes a great deal depend upon the offender's subjective intent.

It also seems to me that some attention should be paid to the importance of the thing destroyed. It should make some difference whether you burn the mansion or the outhouse.

Importance could usually be measured by dollar value, but there may need to be an exception for unique objects such as paintings, historical documents, and the like. Perhaps judges should be encouraged to go over the guidelines in such cases.

Section M246

Does "time of war" encompass Korea and Vietnam? It appears to me that the draftsmanship here leaves a lot of room for inconsistent characterizations of particular foreign policy adventures.

Section M262

This strikes me as a remarkably severe guideline. As the commentary notes, the offense generally involves people who are engaged in legitimate activity but who have not disclosed their roles.

Section T212

The drafting is unfortunate in that it defines the word "deficiency" to mean something other than its accepted meaning in tax law. It would be better to refer to the deficiency or ten percent of the amount by which the taxpayer's income exceeded \$20,000, whichever is greater.

As I read the guideline, a small deficiency--say, \$100--produces a base level of five, but no deficiency at all produces a base level of six. That seems to be moving in the wrong direction.

Sections T213 and T214

I think paragraph (a)(1) in each of these sections is very easy on the accountant or lawyer who may be in the business of assisting in the preparation of tax returns.

Sections T216 and T217

As I have observed in commenting on a prior draft, I believe the guidelines do not sufficiently distinguish between the cases in which a tax has been withheld from an employee and not paid over or deposited and the case in which the tax has not been withheld at all. Small businessmen in financial difficulty have a strong incentive to look to the withheld taxes. It is money they have no right to use as their own; when they do so and then go belly up, the money is lost to the Treasury. By contrast, the incentive not to withhold at all is much smaller, and in such cases the employee remains liable for the tax.

Sections Y211-Y218

In discussing departures from the guidelines, it seems to me unfortunate to refer to increasing the offense level. The advice should simply be that the court should impose a sentence more severe than the guideline sentence. "Increasing the offense level" refers to guideline manipulation, not to departure.

Section Y224

If you are ultimately going to get to "other government . . . employee," nothing is gained by the listing of particular positions in this section.

Section A311

Query whether a distinction should be made between a sentence of one year and a sentence of more than one year. In the federal system, a sentence of a year and a day has traditionally been regarded as less severe than a sentence of one year because the longer sentence carries parole eligibility and the shorter does not. If the stated sentence is to be used as the indicator of seriousness, almost any other breakpoint would be better. "One year or more" would be my suggestion. It has been suggested that the present distinction reflects a common dividing line between felonies and misdemeanors, but I don't think that should be taken very seriously; a misdemeanor almost never draws a one-year sentence in fact.

I recognize that probation officers tell us that it is difficult to get records of actual incarceration time. I nevertheless am troubled by using the stated sentence as an indicator of seriousness, particularly in light of the movement toward truth in sentencing. Offenders who have been sentenced in jurisdictions that have retained parole are likely to be viewed as more serious troublemakers than similar offenders who have been sentenced in "truth in sentencing" jurisdictions. The Commission probably cannot take account of the fact that people do more time in some states than others, but it should be able to deal in real time.

Paragraphs (d) and (e) of this section both contain the phrase "custody or escape status," which I take to be an erroneous duplication. Even without that, it appears possible under section A311 that a person with one prior conviction can achieve a criminal history score of 7 by violating paragraphs (d) and (e) simultaneously. This would occur, for example, if the current offense was committed within three years of release from

custody on the prior sentence and while the defendant was still on parole. I wonder if this was intended.

In paragraph (e), the language refers to "release from . . . a prior sentence of imprisonment." It is unclear whether that means release from custody or unconditional release from the sentence. The commentary clears it up, but the guideline itself should be clarified.

The first paragraph of commentary at page 163 indicates that an above-guideline sentence is warranted if the defendant has more than ten criminal history points. That seems to me inconsistent with the sentencing table on page 10. If "9 or more" is not what was intended in the sentencing table, it should simply say "9 or 10." But I do wonder whether a great many defendants may not fall in the "over 10" category.

#### Section A312

In paragraph (a)(2), there is a need for a definition of "related cases."

In the case of someone who has committed a very serious crime and served more than fifteen years for it, the rule of paragraph (e)(1) wipes out any previous criminal record. Even if he returns to crime on the day of his release from custody, the defendant will be treated as if he had only one prior conviction. That suggests that you may wish to provide for ignoring old convictions only if there has been some crime-free period in the community.

#### Section A316

28 U.S.C. § 994(i)(2) states that the guidelines shall "specify a sentence to a substantial term of imprisonment" for this category of offenders. Telling judges to go over the guidelines does not seem to me to comply.

#### Section B311

The last paragraph of the commentary belongs in the guidelines.

Also, it is unclear to me whether the rule of § A312(e) applies in determining whether someone is a special offender.

#### Section C321

One member of the Commission has referred to "acceptance of responsibility" as a code phrase for "pleading guilty." I cannot

urge too strongly that the Commission not deliberately try to communicate with judges and lawyers in code. Some of them will decipher it and others won't, with resulting inconsistent behavior. Deciphering is hard enough when the Commission is trying to communicate in English.

If the Commission is not trying to communicate in code, greater emphasis should be given to the reference in paragraph (a)(8) to "objective conduct." The second paragraph of commentary, in which it is asserted that the sentencing judge is in a unique position to evaluate whether expressions of remorse are sincere or merely self-serving, does not appear to be talking about objective indicators.

#### Section C324

I find it hard to reconcile this section with 18 U.S.C. § 3553(c). Surely, Congress intended that reasons be given for all sentences. In a case in which a claim is made to the sentencing judge that a discount for acceptance of responsibility is appropriate, it would be an empty set of reasons that didn't deal with it.

#### Section C331

I believe it should be made clear that this section invites a departure from guidelines, and does not purport to be a guideline. It probably should be in policy statement rather than in the guidelines themselves.

In the commentary, the last sentence of the first paragraph permits the court to provide its reasons to the defendant in camera. I have some question about the authority of the of the Commission to make procedural rules like that.

#### Section A412

Since this is a policy statement and nonbinding, the language that the court may accept a plea agreement "provided . . ." is unfortunate.

In spite of its nonbinding nature, I regard the section as immensely important, and I think it has some unfortunate ambiguities.

The strict reading is that a court should not accept a plea agreement if it will do the defendant any good. In the case of a charge agreement, for example, you might argue that "the remaining charges or counts reflect the seriousness of the offense behavior" only if they enable the court to impose the

sentence that the guidelines say is appropriate for the offense behavior. Where paragraphs (b) and (c) refer to determining "that reason exists for departure from the guidelines," you could read the language to say that the court must find that an outside-guideline sentence would be warranted even if the defendant had not pled.

At the other extreme, you could read the language about reflecting the seriousness of offense behavior as being an invitation to the judge to exercise his or her independent judgment, without regard to guidelines, and you could read the language about reason existing for departure in a similar manner. Indeed, it is predictable that some judges will conclude that an adequate reason for departure is the defendant's willingness to plead.

Whatever the desired outcome, it seems to me that this section needs a lot of work.

You may also wish to address the question of what happens when a plea agreement is rejected. In spite of rule 11, many trial judges today act upon the view that they are without power to reject a plea agreement. The argument goes that I can't make the United States Attorney prosecute, and therefore I can't reject his deal. If your objective is to encourage more judicial control over plea bargaining, you are going to have a hard time overcoming that view.

#### Section A511

In paragraph (c), the reference to level 10 should be to level 11. Level 10 has a minimum of exactly six months.

#### Section A541

Insofar as paragraph (b) suggests that a sentencing judge has an option whether to make restitution an independent sentence or a condition of probation, it is at best doubtful law. See United States v. Kallash, 785 F.2d 26 (2d Cir. 1986).

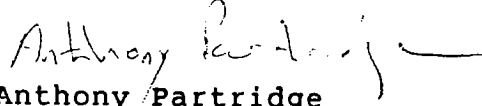
#### Section A561

The statement in the third paragraph of commentary that section 561 "is not meant to create a presumption either for or against the imposition of concurrent or consecutive sentences" appears to be inconsistent with the last paragraph of the commentary on page 193, which rather clearly creates a presumption in favor of concurrent sentences unless they are inadequate to reach the guideline. I note also that the material

United States Sentencing Commission  
page 12

at the bottom of page 193 is appropriately part of the guidelines  
rather than commentary.

Sincerely,

  
Anthony Partridge  
Deputy Director of Research

PCB 00063

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
PROBATION OFFICE

PAUL E. PANTHER  
CHIEF PROBATION OFFICER  
P.O. BOX 870  
HAMMOND, INDIANA 46325  
219-932-5500, EXT. 233

JOSEPH L. WILEY  
SUPERVISOR - FORT WAYNE  
MICHAEL F. HERMAN  
SUPERVISOR - GARY

March 12, 1987

United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D. C. 20004

Re: Response to Second Draft

Dear Commissioners:

First of all, I wish to express my deepest appreciation for the monumental task that you have undertaken as well as the monumental amount of work that you have accomplished.

I would like to offer the following thoughts as the Commission winds down prior to its submission of its final report and recommendations to Congress. I would like to comment on the fact that there are still many more questions than there are answers, as I hear from those who comment to the Commission in efforts to assist. As I understand it, two of the major purposes behind the Commission's efforts are to reduce disparity and respond appropriately to various severity levels of crime, and do so with the recognition that prisons are scarce resources. If I am anywhere near accurate, I would like to propose the following consideration.

Referring to the Sentencing Table on Guideline Range and Months of Imprisonment (as contained on Page 10 of the Revised Draft of January, 1987) and in light of what I have perceived to be the goals of the Commission as stated in the previous paragraph, I would suggest that the Commission seriously consider revising the expected guideline range in months from Level 15 (Criminal History Category I) to Level 8 (Criminal History Category VI). I suggest broadening the base of judicial discretion in sentencing from the 18-24 months to 0-24 months, as an example.

My rationale is that disparity has occurred mostly in terms of individuals receiving sentences of, for instance, probation for one individual whereas another receives 10 years for the same offense.

Expanding judicial discretion at the suggested offense level, or even higher if the Commission saw fit, would (1) insure that maximum discretion of the court on lesser offenses would be available to include probation, community service, etc., (2) insure that prisons would be better utilized as scarce resources and (3) insure that disparity in sentencing would be reasonably reduced over present circumstances.

In essence, due to the nature of offenses (perhaps from Level 15 down) we would be giving the court options to use a considerably large number of community alternatives for non-violent, non-serious offenses, while recognizing at the same time that (for instance) a person in Criminal History Category VI should overall receive up to 24 months on a non-violent offense. To date, there appears to be little emphasis on these alternatives by the Commission.

From Level 15 upwards to Level 43, for the most part we are considering offenses that are "more serious" and perhaps more dangerous to the community. In that case, minimum guidelines might (for instance) begin at 8-27 for Level 16, 10-30 for Level 30, 12-33 for Level 18, etc., until they finally meet at the guidelines presently proposed by the Commission at the upper offense levels.

Although broadening the discretionary powers of the courts would appear to introduce somewhat more disparity in one view, at the same time it would allow for a minimum certainty of punishment for the range of individuals who would be committing these offenses and not "oversentence" them. This would reflect heavily on the concept of using prisons as scarce resources and the stark economic realities we appear to be facing with the present guidelines.

In short, I am suggesting far more latitude at the lower and middle levels and a maintenance of present guideline ranges at the upper levels.

I see this approach as responding very appropriately to the most serious offenses with more latitude allowed for middle and lower level offenses.

It is my studied opinion that the citizens of the United States have considerable understanding when they themselves can relate to the possibilities of themselves committing certain crimes. The lesser the crimes that people commit, the more likely people are to see themselves as possibly having made the same errors or mistakes. Therefore, they are more likely to accept community service/probation alternatives for those than they would for very serious offenses such as kidnapping, where they have no identifiable potential with the offense.

It is suggested that the Commission can send to Congress and eventually to the American people the message that those people who commit lesser crimes can be afforded opportunities to repay the "community" without need of incarceration. In so doing, positive reparation/retribution occurs as well as, quite frankly, punishment for those who receive such type sentences. Such an approach may be considerably less costly, more productive and perhaps viewed much more in line with the concept of justice and fairness than would mandatory prison terms for these "lesser" offenses. I would also suggest that this type of approach would be politically palatable from a human concern issue and a justice fairness issue, as well as from an eco-

March 12, 1987

conomic issue. Finally, this concept would not seem to require a wholesale revision of the developing "scoring techniques."

Sincerely,

A handwritten signature in black ink, appearing to read "Paul E. Panther", written over a horizontal line.

Paul E. Panther  
Chief U. S. Probation Officer

PEP/pg

Statement of Professor Stephen J. Schulhofer,  
University of Chicago Law School  
Before the United States Sentencing Commission  
March 12, 1987

The Commission's Revised Draft represents a substantial improvement over the September Draft. The revised structure seems workable and appropriate overall, but the details still need attention. There remain numerous problems of incompleteness, inconsistency and poor drafting. In several areas, substantive judgments appear to have received inadequate thought. I will discuss (1) the degree of discretion preserved, (2) plea agreements, (3) severity levels and (4) the guiding principles of sentencing. An Appendix lists miscellaneous examples of sections that need to be "debugged."

1. The degree of discretion preserved

The September Draft put forward an extremely rigid system that left inadequate scope for appraisal of individual facts and circumstances. The present Draft may go too far in the opposite direction. Considerable discretion results from three parts of the structure: (a) base offense levels in Chapter Two are often stated as ranges; (b) these base offense levels are subject to further departures and adjustments; and (c) discretion to impose consecutive sentences is not significantly confined.

Judicial discretion under guidelines might prove even more dangerous than judicial discretion in current law because parole release decisions will no longer offset aberrant judicial sentencing and because appellate review (intended in part to

replace the checking function of the Parole Commission) will be largely inoperative when the sentence is within guidelines. As a result the Commission's approach in the three areas mentioned warrants a close look.

a. Base offense levels stated as a range.

The practice of stating base offense levels as a range appears on its face to violate §994(b)(2) because the available spread between minimum and maximum sentences is well over 25%. For involuntary manslaughter the judge can choose an offense level between 10 and 14 (i.e. a sentence of imprisonment from 6 to 21 months). For bribery the offense level can vary from 11 to 23 (i.e. a prison sentence from 8 to 57 months). Numerous examples of this kind permeate Chapter Two.

It is obviously preferable for the Commission to pick a single offense level if available information permits it to do so. But in many areas greater specificity is not possible in the current state of knowledge. Where that is the case, the Commission can appropriately state the offense level as a narrow range, together with concrete criteria for choosing within the range. The classic techniques for control of discretion are confining (by narrowing boundaries), structuring (by identifying criteria) and checking (by subsequent review). Where further confining is no longer feasible, it is appropriate to structure discretion by identifying the relevant criteria.

There remains the question whether the 25% limitation in §994(b)(2) bars this approach. Congress apparently assumed that precision adequate to meet §994(b)(2) would be attainable in all

cases. Since this assumption has proved incorrect, one must guess at Congress's preference. It would be prudent for the Commission to request a statutory amendment to confirm that choice among a range of offense levels may be left to the judge.

In the absence of amendment, can the statute be interpreted to permit the flexible approach I recommend? If the 25% limitation is inflexible, then the Commission would be barred from promulgating any guideline for an offense category in which such precision was unattainable. Since the Commission clearly has power to promulgate no guideline, the statute should be interpreted to permit guidelines which, where necessary, produce flexibility that exceeds the 25% standard. Congress's main goal in §994(b)(2) was to avoid unrestricted discretion; compared to the prospect of no guideline at all, a range of offense levels can serve as a "less unrestrictive alternative."

I conclude that flexibility exceeding the 25% limit is permissible, but only if three conditions are satisfied. Present knowledge must be inadequate to support more refined categories meeting the 25% limit, the range of offense levels authorized must be as narrow as available knowledge and analysis permits, and the Commission must provide judges with concrete criteria for choosing the proper offense level within the authorized range. Guideline provisions that do not meet these three criteria fail to fulfill the Commission's charge and are vulnerable under §994(b)(2).

Many of the guideline ranges appear to satisfy these three conditions without difficulty. Section A214 (range of 28 to 33

levels for attempted murder) is an example. Others are dubious, however. A prize (of sorts) goes to Section N211(a)(2) which authorizes a range of 7 to 10 levels for food and drug violations, without mentioning any criteria whatsoever to guide the judge's choice. Numerous other sections are functionally identical (and identically vulnerable) because they state only that the selection of an offense level should depend on "the circumstances of the offense." The Commission must make an effort to be more specific. In addition, some ranges are much too wide. Bribery sections C211 and C212 (range of levels 11-23) come immediately to mind.<sup>1</sup> The Commission must break such offenses into sub-categories with narrower ranges and then specify concrete criteria for selecting within the narrowed range. The authorized range need not be broad enough to capture every conceivable case. Under the statutory scheme the Commission is expected to promulgate narrow guidelines that are appropriate for the typical case. Judges remain free to depart from those guidelines, for stated reasons, when the circumstances are unusual.

b. Departures and Adjustments.

Both departures and adjustments are appropriate concepts under the statute. Logically, adjustments come first (and the next Revision should so place them) because they are part of the guidelines themselves. A departure, unlike an adjustment should

---

1. For both §§C211 and C212, the "specific offense characteristic" seems substantially to duplicate the elements necessary to prove the base offense.

always be optional with the judge. The present "Departures" section creates problems by its varying language that is alternatively hortatory ("should increase," §Y211), mandatory ("shall increase," §Y216), or injunctive ("reduce," §Y217; "decrease," §Y218). Are these varying formulations intended to convey a difference in emphasis? If so why, and in what way? If the judge disregards the order (e.g. "reduce"), is his refusal to depart a "departure from the departure guideline" and appealable as such? Tighter draftsmanship would be of great help here.

In choosing between departures and adjustments (a matter on which the Commission has requested comment), the Commission should, wherever possible, use adjustments -- that is changes in offense levels that are specific and mandatory. The reason is that resort to adjustments confines discretion as the statute intended, while relegating a matter to departures produces the problems of increased discretion and inadequate checks mentioned above. In addition, every resort to the "departure" approach increases the number of cases likely to be appealed and increases the appellate burden because sentences in such cases must be reviewed for "unreasonable[ness]."

The hard question is whether the Commission is knowledgeable enough to determine the precise relevance of sentencing factors by specific, mandatory adjustments. I am not optimistic. The proposed adjustment for duress illustrates the problems. Suppose a bank clerk steals \$300,000 from his employer, or a smuggler carries 300 grams of cocaine into the country, both in response to credible threats of serious physical harm. How is the judge

to determine whether the threatened injury outweighs the harm of the offense? The problem of incommensurate harms is inescapable under §Y228(a)-(c) which deal by hypothesis with weighing threats of serious injury against the harm of non-violent offenses. In any event, assume that both offenders qualify for the maximum 5 level reduction. This would mean punishment at level 7 (1-7 months) for the bank clerk and at level 19 (30-37 months) for the smuggler. But under present federal law, both defendants would have a defense requiring complete acquittal.<sup>2</sup> Acquittal would also be required under present law where the threatened injury does not outweigh the harm caused and where the offense is violent (with the possible exception of homicide).

It is unclear whether §Y228 was proposed with awareness of applicable law, but such a provision can still do damage. Although duress is recognized as a complete defense, its contours in current law are sufficiently vague that a Commission pronouncement could influence its development at the margins; an authoritative Commission pronouncement about when duress should mitigate punishment might even change the Supreme Court's assumptions about the availability of a substantive defense in core cases. Commission judgments should influence such developments if they represent thoughtful appraisals of the problem in light of previous knowledge and precedent. By the

---

2. United States v. Contento-Pachon, 723 F.2d 691 (9th Cir. 1984); R.I. Recreation Center v. Aetna Cas. & Sur. Co., 177 F.2d 603 (1st Cir. 1949) (dictum). See generally United States v. Bailey, 444 U.S. 394 (1980); Kawakita v. United States, 343 U.S. 717, 736 (1952).

same token the Commission must take care not to pronounce dogmatic judgments prematurely, when it has not had the opportunity to come to grips with the issues.

These concerns carry over to other sentencing factors included as adjustments. The proposals for property damage, personal injury and psychological harm are all independent of the offender's intent, knowledge, recklessness or criminal negligence with respect to such results, an oversight that will render these adjustments unworkable and unjust. The proposal with respect to diminished capacity (though listed as a "departure") is seemingly written to preclude adjustment or departure in the case of violent offenses, voluntary intoxication or departures in any event by more than 4 levels. In all these respects, the Commission should not allow its draft proposal to become final without assuring itself that it has fully absorbed the range of viewpoints on the issues and come to grips with existing precedent, much of which is at odds with the Commission's proposal. The same would have to be said with respect to other possibly mitigating factors that one would have wanted the Commission to address if time and available expertise had permitted: e.g., mistake of law, superior orders, mistake as to justification or victim consent.

My conclusion is that the adjustment approach, though important to preserving consistency and coherence and to avoiding unduly burdensome appellate review, is probably beyond the Commission's capacity at the present time. The four weeks remaining in the present schedule do not seem adequate for the

task required. This means that the Commission should, regrettably, deal with general sentencing factors more diffidently, either by flexible adjustment ranges or as grounds for departure. Alternatively, the Commission might consider asking Congress for a further extension of time (roughly 6-9 months) so that this important aspect of the job can be done properly.

c. Consecutive sentences.

The operative language of §A562(b) guides the judge by telling him to decide on the basis of "the statutory purposes of sentencing." This is not very helpful. Such language also creates a problem for the appellate courts: when a judge chooses to impose consecutive sentences (in order to serve "the statutory purposes of sentencing") in his decision within guidelines or a departure from guidelines?

There are many possible standards for the consecutive sentencing question, focusing on such elements as the number of distinct transactions, objectives or victims. In order to guide both sentencing judges and appellate courts, the Commission needs to be much more specific here. For related transactions the Commission's base offense levels and specific offense characteristics already contain a judgment about the proper sentencing consequences of multiple transactions and victims, total dollar amounts of loss or gain, sophisticated schemes and the like. As a result, the consecutive sentencing guideline applicable to such cases should direct judges to impose consecutive sentences but only to the extent necessary to produce

the overall sentence called for by the other guidelines. For unrelated transactions, limited power to impose consecutive sentences is sometimes appropriate, but only if concrete criteria are specified. See, e.g., 128 U.Pa.L.Rev., at 827 (1980). Judges will retain power to impose a consecutive sentence in other situations anyway, but those decisions should constitute guideline departures requiring specific justification.

## 2. Plea Agreements

Chapter Four sets up a sound framework for review of plea agreements and makes a major contribution to truth in sentencing, especially in §A413. But there are several details that could create serious problems of substance:

a. Section 412(c)(2) calls for the judge to make an independent determination, but there is no reference to independence in the determinations mentioned in §§412(a)&(b). Is this difference in wording intentional, and if so what difference in emphasis is implied? Some members of the Commission could well think it unnecessary to tell judges to be independent; from this perspective the superfluous adverb in §412(c) should be deleted. With respect to plea agreements, however, it is necessary to tell judges to be independent: prevailing practice is for judges to defer heavily to prosecutors, especially with respect to reduction of charges, and there is some case law requiring judges to defer to prosecutors with respect to charge-reduction plea agreements.<sup>3</sup> Such heavy deference will be inappropriate in a world of sentencing guidelines and is contrary

to the Congressional intent expressed in 28 U.S.C. §994(a)(2)(D). Nonetheless, if the Commission expects prevailing habits to change, it must say so clearly -- by requiring an independent determination under all subsections of §A412. The same idea could be conveyed more effectively, and without the superfluous connotations of "independence," by requiring a de novo determination.

b. Section A412(c)(2) requires that departures "not undermine any of the legislatively mandated purposes," but §A412(b)(2) contains no parallel requirement. A difference of substance presumably could not have been intended here, but why invite speculation? The language of §A412(b)(2) should be tightened.

c. Both Sections A412(b) and (c) tell the judge to approve departures only if a "reason exists." To tell judges to do something only for a reason is similar to telling them to be independent: The exhortation is either superfluous or unhelpful. Presumably, the Commission has in mind a requirement of some content, but the content needs to be spelled out. Which of the following are a "reason" for purposes of §A412?:

-- that the defendant pleaded guilty (§C323 implies the contrary, but may not govern where the plea is part of an agreement with the government);

-- that there is doubt about factual guilt;

-- that there are problems of proof;

-- that the trial will be expensive;

-- that a sentencing factor exists that was not adequately considered by the Commission in formulating the guidelines [18 U.S.C. §3553(b)].

In principle, only the last of the above factors should be recognized as a legitimate "reason." Acceptance of the other factors would in practice mean leaving the sentencing decision in the hands of prosecutors and defense counsel in every case. In any event the concept of adequate reason must be clarified.

d. Section A412(d) gives the judge discretion to defer decision, presumably pending receipt of the presentence report. This discretion is consistent with F.R.Crim.P. 11(e)(2), but it creates problems under §§A412(a)-(c). How can the judge properly decide whether to accept a plea agreement without having the presentence report? This problem is particularly acute given the present scope of §A413, which does not require disclosure of relevant criminal history, but the problem would persist even if §A413 is extended (as it should be) to cover factors necessary for application of Chapter Three. The judge should be required to consult a presentence report before accepting a plea agreement in all but narrow categories of minor, exceptional cases.

e. Section A412(a) allows dismissal of charges and counts only if the remaining charges "reflect the seriousness of the offense behavior." The meaning here may leave too much to the reader's imagination. Language should either be added for emphasis (e.g., "fully reflect") or Commentary should make clear the meaning intended.

f. More generally, the absence of Commentary for these sections is troublesome. The language of §§A412-A415 works significant changes in current practice, and judges will have to work with it in 80-90% of their cases. The concepts used and the reasons for them should be explained.

### 3. Severity questions

The severity levels need to be tested carefully against current practice and expected prison impact. The Commission has not made available the data necessary to permit outside comment on this crucially important aspect of its work. The reliability of the prison impact study currently under way will be problematic because the proposed guidelines leave so much flexibility to the judge. It is essential that the prison impact study produce estimates based on three or four alternative sets of assumptions about how judicial discretion under the guidelines will be exercised.

Some of the white collar sentences appear too low (e.g. §N221), but evaluation of this question requires attention to the data.

The sentence of life imprisonment for first-degree murder is consistent with 18 U.S.C. §1111, but the Congress that enacted this statute assumed the availability of parole. Life imprisonment without parole is not appropriate for all first-degree murders. If legislative clarification is necessary to confirm the propriety of shorter sentences in some first-degree cases, the Commission should seek such clarification promptly.

In my view the Commission already has the power to specify a guideline sentence less than life, since such a guideline would reflect assumptions about what life imprisonment meant when the murder statute was enacted. In addition, 18 U.S.C. §3559(a)(1)(A) provides that murder is a Class A felony, and 18 U.S.C. §3581(b)(1) states explicitly that the authorized imprisonment for a Class A felony is "life or any period of time" (emphasis added).

The Sentencing Reform Act requires the Commission "to insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment" for first offenders not convicted of violent or otherwise serious offenses. 28 U.S.C. §994(j) There are several serious problems concerning the extent of the Commission's compliance with this mandate.

a. There is not a single offense in the guidelines for which the Commission has expressed a preference for non-incarceration. At most, the Commission has made non-incarceration available as an option, along with imprisonment. This non-incarceration option approach can be supported only by a strained reading of §994(j). The clear intention of this section was to indicate that a sentence of imprisonment is inappropriate for non-serious, non-violent first offenders, just as the second clause of §994(j), which uses language identical to the first, indicates that non-incarceration is inappropriate for violent offenders who inflict serious injury. The Commission has complied with the latter mandate by denying the non-incarceration option for such cases, but it has not denied the imprisonment

option for any cases at all. To comply with §994(j) the Commission should specify in the lowest offense levels (e.g. 6 and below), that imprisonment is not a guideline option for first offenders. In exceptional cases, of course, the judge would remain free to impose imprisonment by departing from the guidelines for stated reasons.

b. Section §A521(c) permits minimum imprisonment terms of 6 months or less to be satisfied by intermittent confinement, community confinement or home detention. This concept of converting imprisonment into less costly restraints is sound and important. It is also essential to carrying out the Commission's mandate under §994(j) because without such conversion, imprisonment becomes mandatory even for the relatively less serious offenses that fall in levels 7-10.

My concern is that the conversion option may not work smoothly in practice. Has the Commission verified the availability of the resources and programs necessary to insure that the conversion option is viable in Districts throughout the country? In Districts not highly urbanized, some of the conversion options may be unavailable or difficult to implement on a cost-effective basis for small numbers of offenders. Imprisonment should not become mandatory for a level 7 offense simply because suitable alternatives are locally unavailable. The Commission needs to ascertain the extent of this problem and to provide judges some flexibility in responding to it. In addition, community service should be recognized as an appropriate alternative, at least to the extent of 2-3 months of

imprisonment. Without these steps, the conversion option can break down in practice, and the treatment of level 7-10 offenses would be at odds with §994(j).

c. At offense level 10 probation (with some substitute confinement) remains an option, but at level 11, imprisonment for a minimum of 8 months becomes mandatory. This abrupt discontinuity is inappropriate in terms of just and effective punishment. The discontinuity will also create pressures for manipulation of facts or dubious guideline departures in order to reduce offenses to level 10 or below. Evenhandedness and "truth in sentencing" will suffer.

To avoid such strains on the guidelines system, some transition conversion principles should be recognized for offense levels 11-13. For example, the judge could be permitted to satisfy the required minimum sentence by converting a portion of the specified prison term into a period of supervised release conditioned on community confinement, home detention, or community service. 18 U.S.C. §3583(d)(3). The portion of the prison term eligible for conversion could be 6 months at level 11, 4 months at level 12 and 2 months at level 13.

d. The guidelines make imprisonment mandatory for offense levels 11 and above. But mandatory imprisonment of non-violent first offenders is permissible only if the offenses placed at that level are "serious." §994(j) Many non-violent offenses seem to have been graded without sufficient attention to this requirement. The following offenses seem insufficiently serious to warrant imposing on first offenders a mandatory minimum prison

sentence of 8 months or more:

-- copyright infringement involving reproduction (without distribution) of 65 videotapes (\$B253: level 16, minimum 21 months).

-- selling a single stolen vehicle worth \$6000 with an altered VIN (\$B262: level 13, minimum 12 months).

-- offering a gratuity to a government meat inspector, or to a District of Columbia police officer to fix a traffic ticket (\$C211: level 11, minimum 8 months).

-- two acts of mail fraud involving small amounts, or two acts of bribing a traffic court judge, if prosecuted under 18 U.S.C. §1962(c) (\$E211: level 19, minimum 30 months).

-- defrauding 2 victims of \$12,000 each (\$F211: level 11, minimum 8 months).

-- making a \$60,000 profit by trading on an inside tip (regardless of the degree of sophistication, planning or degree of fiduciary responsibility) (\$F212: level 12, minimum 10 months).

-- tampering with the odometer on two cars, with the help of a partner or employee (\$N233: level 12, minimum 10 months).

-- one violation of fish importing regulations for commercial purposes, goods valued at \$6000 (\$Q226: level 12, minimum 10 months).

Compliance with §994(j) requires a careful, detailed review of Chapter Two and a downgrading of non-serious offenses such as these.

#### 4. Principles of Sentencing

The proposed language dealing with this subject (p. 2 of the Revised Draft) is largely symbolic, but it sets a tone for the entire guidelines and can affect application of the guidelines in marginal cases. I assume that this language is meant to be taken seriously and that it therefore warrants careful review.

a. The Commission's basic premise is "that the fundamental objective of the Comprehensive Crime Control Act is to prevent crime and protect the public." No citations are provided to back up this statement, and I cannot find anything in the statute or legislative history to support it. To the extent that the sections of the Act relevant to the Commission can be said to have any single purpose, it is the one articulated by Attorney General William French Smith and quoted prominently at the outset of the Senate Report on the bill: "These [sentencing] provisions . . . rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing."<sup>4</sup> The remainder of the Report speaks repeatedly of such interrelated objectives as "comprehensiveness," "consistency," removing "disparity and uncertainty," "assuring fairness," "certainty in release date," and the like.<sup>5</sup> Of course, crime control can be among the derivative benefits of greater certainty in sentencing. But the Senate Report gives little or no attention to this fringe

---

4. S.Rep. 98-225, p. 38 (emphasis added).

5. Id. at 39-60.

benefit, and nowhere in the Report do the stated objectives include crime prevention and public protection as such.

The Commission's emphasis on crime prevention as the "fundamental objective" to the exclusion of all others, and its disregard of the statutory goals of certainty and consistency thus seem seriously at odds with the intention and spirit of the authorizing legislation. This misconception of the animating objective may be partly responsible for two of the major weaknesses of the Revised Draft already discussed -- its preservation of excessive, unguided judicial discretion and its inappropriately severe sentences for non-violent first offenders.

b. The fourth of the Commission's "five general principles" is the statement that when retributive and crime control models conflict, "justice for the public is the overreaching goal." Since the term "justice to the public" is left undefined, it could be read to include justice to the individual. But most readers will assume that the Commission's language expresses a choice for the crime control objective, in preference to justice to the individual. So read, the language is highly problematic. There is of course a vast philosophical literature on this subject. Virtually all of this literature rejects, in one way or another, the principle that the Commission appears to propose. It may be more helpful, however, to focus on the extent to which the proposed principle is reconcilable with existing federal law and judicial precedent.

Strict liability, prominent in the food and drug laws and other regulatory offenses, is a good example of an area where

protection of the public has been held paramount to justice to the individual defendant. So is the generally prevailing refusal to allow reasonable mistake of law as a defense.<sup>6</sup> But federal law has for decades regarded these instances of strict liability as exceptional. Where serious crimes carrying substantial penalties are concerned, justice to the individual is consistently held to be the overriding concern. This tradition, best articulated in Justice Jackson's famous opinion for the Court in Morissette v. United States, 342 U.S. 246 (1952), continues to be reaffirmed in recent decisions, as for example in Chief Justice Burger's opinion for the Court in United States v. U.S. Gypsum Co., 438 U.S. 422 (1978). And even where the law permits conviction on a strict liability basis, the courts have stressed that attention to actual culpability, i.e. justice to the individual, remains a dominant concern at sentencing. Indeed, the assumption that sentencing judges will be attentive to this concern has been among the primary justifications for the willingness to deemphasize fairness to the individual in these exceptional situations at the conviction stage.<sup>7</sup>

I conclude that the Commission's fourth principle is seriously at odds with federal law, including the previous

---

6. "Justice to the individual is rightly outweighed by the larger interests on the other side of the scale." United States v. Barker, 546 F.2d 940, 964 (D.C. Cir. 1976) (Leventhal, J., dissenting).

7. In Barker, supra n.6, at 965, Judge Leventhal wrote that "flexible opportunities for mitigating the law's impact -- through prosecutorial discretion, judicial sentencing, and executive clemency -- avoid the necessity for bending and stretching the law [in its formal elements for conviction.]"

judgment of respected authorities who have never been thought insensitive to crime prevention concerns. In this area, as in others I have mentioned today, the Commission has a responsibility to familiarize itself fully with the range of relevant considerations, with the views expressed by thoughtful judges and with the leading precedents of federal jurisprudence before pronouncing premature judgment on complex issues of fundamental importance.

c. Absent from the list of general principles is any policy to promote consistency, certainty or the elimination of unwarranted disparities. This is a most surprising, and possibly revealing, oversight.

\* \* \*

Thank you for this opportunity to present my thoughts on the Revised Draft.

Appendix:

Examples of Miscellaneous Problems

- §C324 violates 18 U.S.C. §3553(c).
- §B231(a)(1) should not have a weapons enhancement greater than that in §A221(a)(1); robbery by definition includes an assault.
- §B253(a)(1) & (2) should not have such abrupt discontinuities; the difference between 60 and 70 copies is 6 levels or over a year in prison.
- §E211 should not place non-violent RICO offenses (e.g. mail fraud) seven levels higher than violent crimes in aid of racketeering (§E213).
- §N221(a) provides substantially overlapping enhancements in subsections (1) & (2).
- §N221 offense levels seem much too low as applied to reckless conduct involving risk of substantial harm.
- §N231 grading structure and levels differ inappropriately from §N221.

- §X211 Conspiracies and attempts should carry the same punishment as the underlying offense only when substantially all acts necessary to commit the crime have been completed; conspiracies and attempts intercepted at early steps, or involving only an agreement with minimal overt acts, should carry substantially lower offense levels.
- §X212 Solicitation should be treated the same as conspiracy and attempt.
- Part Y instructions should repeat the limitation indicated at p. 11, that harms count only if they are intended or within a risk with respect to which the defendant was reckless or criminally negligent.
- §Y225 injury adjustments should not be the same for violent offenses (e.g. robbery) and non-violent offenses; the former already are graded with the risk of injury in mind.
- §Y226 weapon adjustment (and related weapon adjustments under specific offenses) should not apply to the full extent when an injury adjustment (§§Y211, Y221, Y222, Y225) also applies. The underlying principle is that an offender should not receive cumulative punishments for an inchoate

offense and for the harm that was the object of the inchoate offense. See 28 U.S.C. §994(1)(2); 18 U.S.C. §3584(a).

- §A311 needs to be reconciled with Chapter Two provisions that increase the offense level for some prior convictions; such double counting is appropriate only under unusual circumstances.
- §A311(e) should not apply where §A311(d) also applies; In addition, the ¶(e) circumstances, being substantially less serious than those in ¶(d), warrant an increase of only one level.
- §A312(b)(1) appears to treat the defendant sentenced to 18 months and released after serving 6 months the same as a defendant sentenced to 18 months who fails to qualify for early release.
- A312(c)(1) should provide for the exclusion of all non-similar misdemeanors resulting in minor sentences; otherwise six prior prostitution convictions (with \$100 fines for each) would produce six points. Other minor misdemeanors (petty theft, simple assault) also do not warrant a full point when minor sentences were imposed.

- A312(c)(1) should treat sentences to one year's probation (which are common) the same as shorter probationary terms; the exclusion should remain applicable unless the term of probation was for more than one year.
- §A312(d)(2)(B) adds a point for offenders under 18 (whether convicted as juveniles or adults) for misconduct that would not produce added points in the case of an over-18 offender. Compare §A312(c).
- §C321 appropriately requires a determination (largely discretionary) whether the acceptance of responsibility is genuine, but if it is genuine, the judge should then be required to reduce the offense level.

**STATEMENT OF GERALD W. HEANEY  
UNITED STATES CIRCUIT JUDGE  
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT  
BEFORE THE  
UNITED STATES SENTENCING COMMISSION  
ON MARCH 12, 1987**

I welcome the opportunity to appear before the Sentencing Commission and to comment on the second draft of the guidelines.

The judges of the Eighth Circuit are pleased that the initial draft of the guidelines has been modified to give district judges greater discretion in the sentencing process. We continue to believe, however, that the standards for eligibility for probation are very severe, that sentences will be significantly longer than under present practice, and that some persons may be denied due process. In our view, the Commission should move toward a simpler set of guidelines based on an offense of conviction model. A simplified version of the grid contained in the revised draft would be a good starting point for such a model. More complex guidelines could be adopted as experience is obtained.

I turn now to my detailed comments on the second draft.

1. More offenders will be sentenced to prison for longer periods of time than under the present practice. Fewer offenders will be eligible for probation.

2. Adjustments and departures will be the rule rather than the exception. Moreover, in all too many instances, the sentence attributable to uncharged conduct will be as or more significant than the sentence attributable to charged conduct.

3. The probation offices will have the most important role in the sentencing process. Not only will they have a primary and perhaps decisive factfinding role, they will also have an important judgmental role. In addition, they will have continuing responsibility for the supervision of probationers and those on supervised release.

4. There will be great pressure on district judges to accept plea bargains that fix the sentence. Defense counsel will insist on the practice simply because they will want to know the bottom line before their clients plead guilty. Prosecutors will insist on the practice to keep their dockets current.

5. Inevitably, there will be serious disputes over factual issues that affect the sentence. The guidelines are not at all clear about how these disputes are to be resolved. I understand them to allow a district judge to resolve such disputes by a standard of some evidence without the necessity of an evidentiary hearing on the written evidence presented by the parties and the probation office. If I am correct, serious due process questions are raised. In any event, the time spent by the district judges in the sentencing process will increase dramatically.

6. There is a concern about the extent to which the recommendations of the probation office will be available to the parties before sentencing. In my view, every element of the probation officer's report should be disclosed to all parties involved.

7. There is merit to Commissioner Robinson's criticism that the guidelines have failed to rank offenses according to a rational standard. The Minnesota offense of conviction model avoided this irrationality because the Minnesota Sentencing Commission undertook the difficult process of determining the severity of crimes relative to each other prior to the adoption of sanctions. This Commission should do the same.

8. The number of appeals will increase dramatically.

9. The guidelines permit a district judge to reward cooperation to an unlimited extent. I recognize that the Commission has made this change to accommodate the universal appeal at the initial hearings for such authority. This may be a wise decision, but it is certain to create substantial public distrust. Undoubtedly, the decision to reward cooperation constitutes the biggest loophole in the guidelines and may, unless exercised providently, cause a loss of confidence in them.

#### **LENGTH OF SENTENCES AND AVAILABILITY OF PROBATION**

Immediately after the second draft of the guidelines was made available, we submitted twenty case histories, including the presentence reports, to four experienced chief probation officers in our Circuit. We asked each of them to compute sentences under the revised draft using worksheets developed by the Commission. We also asked them to make observations with respect to the guidelines, the worksheets, and any problems that they encountered. We attach hereto a copy of our letter to the probation officers and the reports, worksheets, and comments of each officer, together with an analysis of the materials submitted. See Exhibit No. I. I will summarize here the results in the case studies and include some of the comments of probation officers.

1. The studies indicate that persons sentenced to prison will serve substantially longer sentences under the revised guidelines than under current law. Under current law, the twenty individuals studied will serve a total of 693 months. Under the revised guidelines, their sentences would be nearly three times as long. (Probation Officer A estimated 1959 months, Officer B,

2007 months, Officer C, 1717 months, and Officer D, 1792 months.) See Exhibit II.

The results of our twenty-case study are confirmed by a sixty-one case study independently undertaken by the Western District of Missouri. See Exhibit No. III. That study indicates that the total time served in the sixty-one cases would be increased from 820 months to 2,678 months. The two studies admittedly comprise a small sample, yet they clearly show the need for a more comprehensive study by the Commission before guidelines are issued.

2. Fewer people will be placed on probation. Under existing law, four of the twenty persons in our study were placed on probation. Under the guidelines, only one person appears to be eligible for probation, unless, of course, the judge departs from the guidelines. But, departures should be the exception rather than the rule.

The Western District of Missouri study again confirms the results reached in the twenty-case study. In the Missouri study, under existing law, thirty persons were placed on probation. Under the proposed guidelines, only twelve persons would be eligible.

The Bureau of Prisons reports that in 1985, only 52.5% of all persons convicted were sentenced to a term of imprisonment. Presumably, the remaining 47.5% received nonimprisonment sentences. The only statistics that I have seen from the Commission with respect to probation are those contained in the February 2, 1987, report of William Rhodes, Research Director for the Commission. It appears from this report that a very high percentage of first offenders convicted after a trial will be sentenced to prison under the new guidelines. I understand from Mr. Rhodes that additional studies are now underway. These studies should also be completed and carefully reviewed before

any final decision is made with respect to the guidelines relating to probation.

I again refer you to the comprehensive study of Chief Judge G. Thomas Eisele. His study, as I noted in my original testimony before this Commission, concludes that the rate of recidivism among probationers, particularly first-time offenders, is very low.

I also call your attention to the recent publication by Senators Armstrong and Nunn titled "Alternatives to Incarceration." They state that, in adopting the Comprehensive Crime Control Act, the Senate intended to create a rebuttable presumption that nonconfinement alternatives are to be used for nonviolent and nondangerous offenders. They note that this policy will save money, ease prison overcrowding, result in punishments that are productive to the victim and the community and are less destructive to offenders, increase the prospect for successful rehabilitation of offenders, and reduce the rate of recidivism. In our view, attention should be paid to non-confinement alternatives and the guidelines should encourage judges to use such alternatives in every appropriate case.

In addition, we believe that Congress intended that the decision whether a person should be placed on probation or confined should be made before any consideration is given to the length of sentence. Thus, 28 U.S.C. § 994(a)(1)(A) sets out the type of sanction as the first sentencing decision and the length of the sanction as the second sentencing decision. Sections 3551 and 3553 of 18 U.S.C. reinforce the independence of these two sentencing decisions.

## DISPARITIES

The reports of the four probation offices are not encouraging from the standpoint of eliminating disparities. The reports indicate wide variations in the estimates of time to be served by individuals. See Exhibit II. Thus, there are significant variations in ten of the twenty cases we studied (e.g., 180 months in Case 2, 209 months in Case 5, 144 months in Case 7, and 147 months in Case 11). On closer examination, the significant variations appear to be caused by differences relating to associated conduct rather than offense of conviction conduct.

Although the four probation officers did not have the advantage of study and training with respect to the guidelines, they are among the best and most experienced probation officers in the nation. The lessons that I draw from the reports of the officers are:

- (a) The guidelines must be simplified.
- (b) There must be an intensive training program for judges, probation officers, prosecutors, public defenders, defense counsel, and all others involved in administering the system.
- (c) It is very difficult to eliminate disparities, real or perceived, when human beings make decisions about other human beings. Discretion will always play an important role in the sentencing process. The question is where the discretion should be placed. I know that I speak for the judges of our Court when I say that we believe the discretion should be placed in those who do not have a stake in the outcome of the case.

## ADJUSTMENTS AND DEPARTURES

The case studies reveal the great weight the guidelines place on conduct other than that necessary to establish the offense of conviction. For purposes of analysis, we have broken the sentence into two elements: (a) the conduct that must be proven to obtain a conviction, and (b) associated conduct. The analysis indicates, overall, the associated conduct in the twenty cases was nearly as important in determining the ultimate sentence as the offense of conviction conduct. See Exhibit IV. This is a matter of great concern. The practical result is that in many cases, the conduct proved beyond a reasonable doubt is less important than the conduct proved by "some evidence."

I do not believe that the Commission intended this result. It states on page 3 of the guidelines:

The revised draft uses traditional offense categories and takes as its base the offense of conviction. Related conduct not included in the offense of conviction may still be used to aggravate or mitigate a sentence, but it does not carry the weight of a separately charged and convicted offense. The goals of reducing disparity and permitting individualization where it is appropriate have simultaneously been pursued. [Emphasis added.]

Unfortunately, however, the guidelines often require a judge to give great weight to associated conduct. Let us take, for example, the offense of assault from page 17 of the guidelines. Let us assume that the offense of assault was charged and that the defendant, who had no prior criminal history, pled guilty to the charge. The base level of the offense is 15. The guideline sentence is 18 to 24 months.

Let us further assume that the prosecutor contends that:

|                                    |   |                     |
|------------------------------------|---|---------------------|
| a dangerous weapon was displayed   | - | add 4 levels        |
| the assault was planned            | - | add 3 levels        |
| the victim was permanently injured | - | add 6 levels        |
| there was more than one victim     | - | <u>add 2 levels</u> |
| Total levels added                 |   | 15 levels           |

Let us further assume that the defendant denies each of the prosecutor's contentions.

Who is to resolve these vital disputes;  
what is the standard of proof; and  
is the defendant entitled to an evidentiary hearing?

The answer to the questions are crucial because the answers do not simply involve a doubling of the sentence. The hard facts are that doubling the offense level from 15 to 30 increases the sentence range from 18-24 months to 97-121 months. Thus, at the midpoint of these ranges, the defendant stands to have his sentence increased by about 500%.

It appears that the Commission has fallen short of the goal it set for itself, and that the defendant's constitutional rights may be in danger. Unfortunately, other similar scenarios can be easily developed.

I am fully aware that the United States Supreme Court, in Williams v. New York, held that conduct associated with a crime could be considered by the court in setting a sentence. That decision was sound when made. Under the sentencing procedures of that day, rehabilitation in a prison setting was considered desirable and the Parole Commission was given broad authority to retain or release individuals on the basis of their record in prison. Indeed, judges were encouraged to impose indeterminate sentences, leaving the Parole Commission to determine the actual

time served. Moreover, the judges did not impose real-time sentences. In the ordinary case, a person sentenced to prison was expected to serve only slightly more than a third of the sentence.

A new situation confronts us today. Congress has ordained that there will be truth in sentencing. If a federal district judge sentences an offender to ten years in prison, ten years will be served (less good time). Moreover, Congress has declared that rehabilitation in prison is no longer to be a primary goal in the sentencing process. We accept these changes, but are concerned with a system in which offenders may serve as much or more time for associated conduct established by "some" evidence as they will for the offense of conviction established by proof beyond a reasonable doubt. We are concerned about a criminal justice system in which we zealously guard the constitutional rights of an accused before and during trial only to forget about these rights when the time comes to impose a sentence.

#### ROLE OF THE PROBATION OFFICER

It is not an exaggeration to say that under the revised guidelines the probation officer becomes the most important person in the criminal justice system. The officer will be required to make detailed and accurate factual reports to the judge. He will be required to exercise his judgment in determining the offender's criminal history, in resolving factual disputes, in deciding whether or not departures are appropriate and, if so, the extent of the adjustment or departure, and in making a bottom-line recommendation to the judge.

If we expect the probation officers to perform satisfactorily in their new roles, we must ensure that the probation offices are adequately and competently staffed. We must insist that this be done by the time the guidelines go into effect, not years

later. It is also essential that the probation officers be well trained in the use of the guidelines, and that before the guidelines become final, they are simplified and ambiguities are eliminated. In this connection, we note that the probation officers have found the worksheets prepared by the Commission to be helpful.

The probation officers have expressed two concerns: First, they are worried that they will not have sufficient information gathering powers to perform the role contemplated by the guidelines. They report that under present practice, some prosecutors are reluctant to make files available to the probation officers. Prosecutors often expect the probation officers to accept their summary of the facts and circumstances. If the sentencing process is to remain open and honest, we must make sure that the prosecutors' files will be generally available to the probation offices.

Second, probation officers question the extent to which their bottom-line recommendations to the district court should be available to the parties before sentencing. Some favor such disclosure; others oppose it. My own view is that if we intend to have an open system, absent extraordinary circumstances, every element of the probation officer's report should be made available to the parties before sentencing.

#### **THE DISTRICT COURT'S ROLE**

There is no doubt that the revised draft gives the district judge more discretion in the sentencing process than did the earlier draft. The judges appreciate this change. There are, however, a number of problem areas.

The guidelines do not clearly indicate how the district court should carry out its role in the factfinding process. Our

understanding is that the district court must state its reasons for arriving at the sentence imposed. This requirement includes not only the reasons why the base offense value for the offense of conviction is a particular level but also why the district court placed the defendant at a particular point in the guideline range. In addition, if the district court decides to make any adjustment or departure, it must give reasons.

The guidelines are not clear how factual disputes are to be resolved. My own understanding is that district courts can resolve them without an evidentiary hearing under a "some evidence" standard. The evidence considered will be only that included in the report of the probation officer and the filings of the parties. If my understanding is correct, serious due process questions are raised.

#### **GUILTY PLEAS**

It is difficult to predict whether 85% to 90% of offenders will continue to plead guilty. Offenders under present practices are not aware of the facts in the presentence report at the time they plead guilty. In view of the importance of associated conduct under the guidelines, can we expect them to plead guilty, or will courts have to resort to provisional pleas? To what extent would provisional pleas add to the already heavy load of the district courts? Will there be increased pressure for bottom-line plea bargaining because the alternative will be lengthy hearings to resolve factual disputes? What changes will have to be made in rule 11 to make sure that the offender is fully aware of the sentencing options? Will the practice of pre-indictment bargaining in complex cases be accelerated? If it is, how will the probation office and the district court gain a thorough understanding of the facts in a case which may have been under investigation for years? These and other questions must be resolved. In my view, that will be a difficult task if as much

weight is given to conduct, other than that proved as an element of the offense of conviction, as appears to be given in the present draft of the guidelines.

### **APPEALS**

Although the number of appeals will certainly increase dramatically under the guidelines, the extent to which the courts of appeals may review the district court's application of the guidelines is unclear. Apparently, either the defendant or the government may appeal an incorrect application of the guidelines. Yet, it is uncertain whether either party may appeal disputed factual issues significant to application of the guidelines. This uncertainty is especially troubling in light of the ambiguity concerning the district court's obligation to hold evidentiary hearings and to resolve disputed factual issues.

My understanding is that either the government or the defendant will be able to appeal questions about the accuracy of the facts used to determine the base offense, criminal history, and any appropriate "adjustments" or "departures." If my understanding is correct, reports of the probation officers indicate that nearly every case will contain at least one appealable issue. Moreover, the more emphasis the guidelines place on associated conduct, the greater the likelihood that the facts constituting the associated conduct will be appealed.

### **RECOMMENDATIONS**

1. The Commission should ask the Congress for additional time within which to submit proposed guidelines. The Commission should use the additional time to determine the impact that the guidelines proposed in the second draft or any alternative thereto will have on probation, the length of time to be served

for various offenses and the impact that they will have on all elements of the criminal justice system, including the courts, probation officers, prosecutors, defendants, and defense counsel, public or private. The additional time should also be used to implement test programs in diverse district courts.

2. The plea bargaining process should be spelled out in greater detail. Only two out of the 250 pages of the revised draft are devoted to this very important aspect of the criminal justice system, notwithstanding the fact that 85% to 90% of the cases will have to be disposed of through the plea bargaining process if the system is to work.

3. The plea bargaining process should not force a district judge to choose between accepting bottom-line plea bargaining or destroying his calendar.

4. More intensive study must be given to the question of criminal histories. At the present time the guidelines grossly exaggerate prior minor criminal offenses and take from the district judge the discretion to consider the seriousness of the earlier crimes.

5. Finally, and most importantly, the Commission should make a prompt determination to adopt a simple set of guidelines based on an offense of conviction model. The grid which the Commission has prepared is a strong first step in this process, particularly if it is reexamined in light of its impact on the prison population. This grid permits district judges to routinely sentence within a 25% range. If it were coupled with a clear and consistent directive permitting district judges to make limited departures from the sentence required by the grid in only extraordinary circumstances, a sentencing system would be put in place which would achieve the major objectives of Congress--to have a determinate sentencing policy which eliminates the real or perceived disparities in the existing system.

Exhibit I

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

CHAMBERS OF  
JUDGE GERALD W. HEANEY  
FEDERAL BUILDING  
DULUTH, MINNESOTA 55802

February 17, 1987

The Honorable G. Thomas Eisele  
Chief Judge  
United States District Court  
P. O. Box 3684  
Little Rock, Arkansas 72203

RE: Second Draft of Sentencing Guidelines

Dear Judge Eisele:

As you probably know, a second draft of the sentencing guidelines has been prepared. Hearings on this draft will be held in Washington, D. C., on March 11th and 12th. Chief Judge Lay has asked Judge Donald O'Brien and myself to participate in these hearings.

The Chief Probation Officers of Minnesota, Eastern District of Arkansas, Eastern District of Missouri and Southern District of Iowa have been kind enough to furnish me with a number of presentence reports. I have selected twenty (20) from the number submitted to me. The twenty appear to represent a good cross-section of cases coming before the District Courts of this Circuit. I would deeply appreciate it if your Probation Office could review these presentence reports and come up with the sentence that they believe is called for in each case under the new guidelines. I enclose herewith three work sheets that have been developed by the Sentencing Commission staff to use in computing sentences.

It is my intention to use the information developed to answer questions concerning: (1) the availability of probation under the proposed guidelines, (2) the length of sentences that will be required under the new guidelines, (3) disparities that may result as a result of the application of the guidelines, and (4) the additional work imposed on the District Courts and the Probation Officers under the proposed guidelines. I would also hope to obtain any additional comments or suggestions that you or your Probation Office might have with respect to the guidelines.

I would suggest that the Probation Officers use the following criteria:

If the guidelines provide a range of offense level increase or decrease, please indicate that range and, in parentheses, indicate the specific point within the range you feel is appropriate and why. If there is nothing in the presentence investigation report upon which to base selection of a point within the range, use the lowest end of the range.

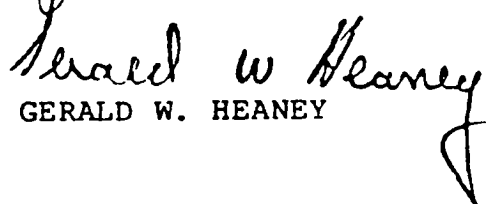
For example, burglary has a base offense level of 20. The guidelines also require an increase of 3 to 6 levels if the defendant had a gun. If the PSI you are analyzing indicates nothing more than that the defendant had a gun, an enhancement of three levels is appropriate. On the other hand, if the presentence report contains any information that would indicate a greater enhancement is appropriate, indicate that enhancement and explain the reason for it.

Follow the same procedure anytime the guidelines allow a range of enhancement. This includes enhancements for such general factors as role in the offense, cooperation, physical injury to the victim and the like.

If the guidelines only indicate the departure is appropriate but leave the departure to the discretion of the judge, indicate the section of the guidelines under which such a departure would be appropriate. For example, if the offense resulted in a death, you should indicate that departure would be appropriate under section Y211 of the guidelines.

I recognize that I am asking a lot, but it would be very helpful if I could receive the analysis no later than March 3rd. This will give me an opportunity to analyze the results to transmit them to the Circuit and District Court judges, and to give them an opportunity to comment before the hearings in Washington on the 11th and 12th.

Sincerely,

  
GERALD W. HEANEY

Encls.

GWH:eei

**[NOTE:** The remainder of Exhibit I consists of the responses of the probation officers to this request. These have been sent to Judge Breyer under separate cover. Judge Breyer has been requested to deliver the responses to Paul K. Martin, Director, for distribution.]

# EXHIBIT II

|    | OFFENDER                 | TIME TO BE SERVED<br>PRESENT SYSTEM<br>(EXCLUDING GOOD TIME)<br>IN MONTHS | TIME TO BE SERVED UNDER REVISED DEPT<br>(EXCLUDING GOOD TIME) IN MONTHS |                           |                           |                           |
|----|--------------------------|---------------------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------|---------------------------|---------------------------|
|    |                          | 1                                                                         | 2                                                                       | 3                         | 4                         | 5                         |
|    |                          |                                                                           | PROBATION<br>OFFICER<br>A                                               | PROBATION<br>OFFICER<br>B | PROBATION<br>OFFICER<br>C | PROBATION<br>OFFICER<br>D |
| 1  | 1                        | probation                                                                 | 15                                                                      | 18                        | 46                        | 18                        |
| 2  | 2                        | 100                                                                       | 360                                                                     | 180                       | 235                       | 360                       |
| 3  | 3                        | 20                                                                        | 27                                                                      | 48                        | 27                        | 21                        |
| 4  | 4                        | probation                                                                 | 9                                                                       | 24                        | 18                        | 27                        |
| 5  | 5                        | 60                                                                        | 211                                                                     | 420                       | 272                       | 271                       |
| 6  | 6                        | probation                                                                 | 15                                                                      | 15                        | 16                        | 15                        |
| 7  | 7                        | 32                                                                        | 324                                                                     | 180                       | 168                       | 210                       |
| 8  | 8                        | probation                                                                 | probation                                                               | probation                 | probation                 | probation                 |
| 9  | 9                        | 40                                                                        | 51                                                                      | 72                        | 51                        | 55                        |
| 10 | 10                       | 20                                                                        | 360                                                                     | 360                       | 360                       | 360                       |
| 11 | 11                       | 104                                                                       | 270                                                                     | 210                       | 228                       | 123                       |
| 12 | 12                       | 4                                                                         | 33                                                                      | 55                        | 42                        | 57                        |
| 13 | 13                       | 20                                                                        | 30                                                                      | 33                        | 51                        | 33                        |
| 14 | 14                       | 48                                                                        | 137                                                                     | 300                       | 110                       | 137                       |
| 15 | 15                       | 6                                                                         | 18                                                                      | 14                        | 12                        | 15                        |
| 16 | 16                       | 6                                                                         | 30                                                                      | 12                        | 12                        | 27                        |
| 17 | 17                       | 6                                                                         | probation                                                               | 12                        | 10                        | probation                 |
| 18 | 18                       | 16                                                                        | 18                                                                      | 24                        | 37                        | 18                        |
| 19 | 19                       | 12                                                                        | 15                                                                      | 15                        | 15                        | 21                        |
| 20 | 20                       | 18                                                                        | 32                                                                      | 15                        | 8                         | 24                        |
| 21 | TOTAL                    | 693                                                                       | 1959.0                                                                  | 2007.0                    | 1717.0                    | 1792.0                    |
| 22 | AVG PER SENTENCE         | 34.65                                                                     | 97.95                                                                   | 100.35                    | 86.0                      | 89.60                     |
| 23 | EXCLUDING DRUG OFFENDERS |                                                                           |                                                                         |                           |                           |                           |
| 24 | #s 2, 7, 9, 10, 12       | 481                                                                       | 834                                                                     | 1182.0                    | 852                       | 774.0                     |
| 25 | Avg = 15                 | 32.97                                                                     | 55.60                                                                   | 78.80                     | 56.8                      | 51.60                     |

## EXHIBIT III

61 CASES FROM W.D. MO.

| OFFENDER | TIME TO BE SERVED PRESENT SYSTEM (IN MONTHS) | TIME TO BE SERVED REVISED DRAFT (IN MONTHS) | OFFENDER | TIME TO BE SERVED PRESENT SYSTEM (IN MONTHS) | TIME TO BE SERVED REVISED DRAFT (IN MONTHS) |
|----------|----------------------------------------------|---------------------------------------------|----------|----------------------------------------------|---------------------------------------------|
|          |                                              |                                             |          |                                              |                                             |
| 1        | probation                                    | 51                                          | 51       | probation                                    | 21                                          |
| 2        | 30                                           | 9                                           | 52       | 6                                            | 37                                          |
| 3        | probation                                    | probation                                   | 53       | 2                                            | probation                                   |
| 4        | 12                                           | 30                                          | 54       | 32                                           | 189                                         |
| 5        | 10                                           | probation                                   | 55       | 4                                            | 18                                          |
| 6        | 20                                           | probation                                   | 56       | probation                                    | 27                                          |
| 7        | 30                                           | 11                                          | 57       | probation                                    | 33                                          |
| 8        | 6                                            | 97                                          | 58       | 6                                            | 70                                          |
| 9        | probation                                    | 33                                          | 59       | probation                                    | 70                                          |
| 10       | probation                                    | probation                                   | 60       | 30                                           | probation                                   |
| 11       | probation                                    | probation                                   | 61       | probation                                    | 27                                          |
| 12       | 34                                           | 264                                         | TOTAL    |                                              | 2678.0                                      |
| 13       | 66                                           | 109                                         | Avg (61) |                                              | 43.90                                       |
| 14       | 54                                           | 70                                          |          |                                              |                                             |
| 15       | probation                                    | 11                                          |          |                                              |                                             |
| 16       | probation                                    | 46                                          |          |                                              |                                             |
| 17       | probation                                    | 97                                          |          |                                              |                                             |
| 18       | probation                                    | 11                                          |          |                                              |                                             |
| 19       | probation                                    | 11                                          |          |                                              |                                             |
| 20       | 2                                            | 151                                         |          |                                              |                                             |
| 21       | 39                                           | 24                                          |          |                                              |                                             |
| 22       | probation                                    | 13                                          |          |                                              |                                             |
| 23       | 30                                           | 21                                          |          |                                              |                                             |
| 24       | probation                                    | probation                                   |          |                                              |                                             |
| 25       | probation                                    | 13                                          |          |                                              |                                             |
| 26       | 7                                            | 37                                          |          |                                              |                                             |
| 27       | 21                                           | 11                                          |          |                                              |                                             |
| 28       | probation                                    | 18                                          |          |                                              |                                             |
| 29       | probation                                    | probation                                   |          |                                              |                                             |
| 30       | probation                                    | probation                                   |          |                                              |                                             |
| 31       | 30                                           | 33                                          |          |                                              |                                             |
| 32       | probation                                    | 13                                          |          |                                              |                                             |
| 33       | 40                                           | 78                                          |          |                                              |                                             |
| 34       | 30                                           | 33                                          |          |                                              |                                             |
| 35       | probation                                    | 30                                          |          |                                              |                                             |
| 36       | 10                                           | probation                                   |          |                                              |                                             |
| 37       | 124                                          | 123                                         |          |                                              |                                             |
| 38       | 4                                            | 24                                          |          |                                              |                                             |
| 39       | 10                                           | 27                                          |          |                                              |                                             |
| 40       | probation                                    | 24                                          |          |                                              |                                             |
| 41       | 6                                            | 97                                          |          |                                              |                                             |
| 42       | probation                                    | 30                                          |          |                                              |                                             |
| 43       | probation                                    | 21                                          |          |                                              |                                             |
| 44       | probation                                    | probation                                   |          |                                              |                                             |
| 45       | probation                                    | 30                                          |          |                                              |                                             |
| 46       | 30                                           | 29                                          |          |                                              |                                             |
| 47       | 10                                           | 15                                          |          |                                              |                                             |
| 48       | probation                                    | 51                                          |          |                                              |                                             |
| 49       | 30                                           | 360                                         |          |                                              |                                             |
| 50       | probation                                    | 30                                          |          |                                              |                                             |

# EXHIBIT IV

| BASE OFFENSE - ALL CONDUCT         |           |           |           |           | ASSOCIATED CONDUCT - ALL CONDUCT |           |           |           |
|------------------------------------|-----------|-----------|-----------|-----------|----------------------------------|-----------|-----------|-----------|
| THAT MUST BE PERFORMED TO OBTAIN A |           |           |           |           | OTHER THAN CONDUCT CONSTITUTING  |           |           |           |
| CONVICTION PLUS CRIMINAL HISTORY   |           |           |           |           | BASE OFFENSE (IN MONTHS)         |           |           |           |
| (IN MONTHS)                        |           |           |           |           |                                  |           |           |           |
| 1                                  | 2         | 3         | 4         | 5         | 6                                | 7         | 8         | 9         |
| OFFENSE                            | PROBATION | PROBATION | PROBATION | PROBATION | PROBATION                        | PROBATION | PROBATION | PROBATION |
| OFFENSE                            | OFFICIAL  | OFFICIAL  | OFFICIAL  | OFFICIAL  | OFFICIAL                         | OFFICIAL  | OFFICIAL  | OFFICIAL  |
| A                                  | B         | C         | D         | A         | B                                | C         | D         |           |
| 1. COUNT I                         | 9         | 4         | 2.5       | 2.5       | +12                              | +11       | +44.5     | +15.5     |
| 2. COUNT I                         | 169       | 236       | 136       | 211       | +191                             | +124      | +128      | +149      |
| 3. COUNT II                        | 169       | 236       | 136       | 211       | +191                             | +124      | +128      | +149      |
| 4. COUNT I                         | 7         | 9         | 9         | 7         | +17                              | +32       | +21       | +26       |
| 5. COUNT I                         | 12        | 12        | 12        | 12        | 0                                | +3        | +9        | 0         |
| 6. COUNT I                         | 123       | 123       | 123       | 123       | +46                              | +23       | +22       | 734       |
| 7. COUNT II                        | 60-STAT   | 60-STAT   | 60        | 60-STAT   | 0                                | 0         | 0         | 0         |
| 8. COUNT III                       | 57        | 57        | 57        | 57        | 0                                | 0         | 0         | +7        |
| 9. COUNT II                        | 24        | 24        | 24        | 24        | +6                               | +6        | 0         | +6        |
| 10. COUNT I                        | 9         | 12        | 12        | 4         | +3                               | +6        | +3        | +2        |
| 11. COUNT II                       | 9         | 12        | 7         | 9         | +3                               | +6        | 0         | +3        |
| 12. COUNT I                        | 103       | 115       | 118       | 151       | +261                             | +23       | +93       | +85       |
| 13. COUNT III                      | 103       | 30        | 118       | 151       | +261                             | +7        | +93       | +85       |
| 14. COUNT I                        | 2.5       | 2.5       | 2.5       | 2.5       | -1                               | -5        | 0         | 0         |
| 15. COUNT I                        | 13        | 13        | 13        | 13        | +33                              | +20       | +33       | +33       |
| 16. COUNT II                       | 13        | 13        | 13        | 13        | +33                              | +20       | +33       | +33       |
| 17. COUNT III                      | 13        | 13        | 13        | 13        | +33                              | +20       | +33       | +33       |
| 18. COUNT I                        | 13        | 13        | 13        | 13        | +33                              | +20       | +33       | +33       |
| 19. COUNT II                       | 37        | 37        | 37        | 37        | +9                               | 0         | +20       | +20       |
| 20. COUNT I                        | 189       | 189       | 169       | 211       | +171                             | +171      | +191      | +149      |
| 21. COUNT II                       | 189       | 189       | 169       | 211       | +171                             | +171      | +191      | +149      |
| 22. COUNT III                      | 189       | 189       | 169       | 211       | +171                             | +171      | +191      | +149      |
| 23. COUNT I                        | 27        | 27        | 27        | 33        | +24                              | +19       | 0         | +30       |
| 24. COUNT I                        | 44        | 44        | 44        | 46        | +172                             | +72       | +125      | +11       |
| 25. COUNT II                       | 60-STAT   | 60-STAT   | 60        | 60-STAT   | 0                                | 0         | 0         | 0         |
| 26. COUNT I                        | 46        | 46        | 46        | 46        | -9                               | +5        | 0         | +18       |
| 27. COUNT I                        | 18        | 18        | 33        | 24        | +15                              | 0         | +24       | +13       |
| 28. COUNT II                       | 18        | 18        | 33        | 24        | +15                              | 0         | +24       | +13       |
| 29. COUNT I                        | 123       | 123       | 123       | 123       | 0                                | 0         | 0         | 0         |
| 30. COUNT II                       | 3         | 2         | 3         | 3         | -1                               | +9        | +12       | +15       |
| 31. COUNT I                        | 15        | 15        | 7         | 15        | +18                              | 0         | +8        | +9        |
| 32. COUNT II                       | 2         | 2         | 2         | 2         | +9                               | +13       | +11       | +7        |
| 33. COUNT II                       | 12        | 12        | 9         | 12        | 0                                | -3        | +32       | +3        |
| 34. COUNT I                        | 2         | 2         | 2         | 2         | +16                              | +16       | +16       | +22       |
| 35. COUNT II                       | 2         | 2         | 2         | 2         | +16                              | +16       | +16       | +22       |
| 36. COUNT III                      | 2         | 2         | 2         | 2         | +16                              | +16       | +16       | +22       |
| 37. COUNT I                        | 21        | 21        | 11        | 21        | 0                                | 0         | 0         | +6        |
| 38. COUNT II                       | 7         | 7         | 3         | 7         | +2                               | +5        | +1        | +8        |
| TOTALS                             | 1929.5    | 2012.5    | 1836.0    | 2169.0    | 26 up                            | 27 up     | 29 up     | 33 up     |
|                                    | 50.78     | 52.96     | 48.32     | 57.08     | 7 NEUTRAL                        | 9 NEUTRAL | 9 NEUTRAL | 5 NEUTRAL |
|                                    |           |           |           |           | 3 DOWN                           | 2 DOWN    | 0 DOWN    | 0 DOWN    |
|                                    |           |           |           |           | +1937.0                          | +1134.0   | +1555.5   | +1359.5   |
|                                    |           |           |           |           | +50.77                           | +29.84    | +40.93    | +35.73    |
|                                    |           |           |           |           | per COUNT                        | per COUNT | per COUNT | per COUNT |

WASHINGTON LEGAL FOUNDATION

1705 N STREET, N. W.  
WASHINGTON, D. C. 20036  
202-857-0240

March 16, 1987

Paul Martin  
U.S. Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dear Paul:

Enclosed is an original and copy of the testimony that I delivered last week for the Commission. Please make it available to the Commissioners and insert in in the public record.

Thank you for your assistance.

Sincerely,



Paul D. Kamenar

encl

TESTIMONY OF THE WASHINGTON LEGAL FOUNDATION

PRESENTED BY PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

BEFORE THE

UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

MARCH 12, 1987

WASHINGTON LEGAL FOUNDATION  
1705 N STREET, N.W.  
WASHINGTON, DC 20036  
202-857-0240

Mr. Chairman and Members of the Commission:

On behalf of the Washington Legal Foundation (WLF), I appreciate the opportunity to testify once again before this Commission on its formulation of sentencing guidelines to be used by federal courts. As a preliminary matter, I would like to express our disappointment by the Commission's vote the other day to exclude capital punishment sentencing guidelines from its final draft. If the Commission does not include capital punishment guidelines in its report to Congress, it is our position that it should make clear in that report that the failure by the Commission not to include it does not mean that capital punishment cannot be imposed for those federal crimes which provide for it. The Commission should at least acknowledge or recognize that the Supreme Court has not ruled on the constitutionality of the federal death penalty, and that there are legitimate arguments that Rule 32 of the Federal Rules of Criminal Procedure provide the necessary and sufficient guidelines for imposing capital punishment.

Looking at the latest draft of the guidelines, I have a few stylistic suggestions to make to the Commission. The guidelines are set up under numerical chapters numbered 1-6 and within each chapter there are alphabetical parts such as A-Z, and within those parts there are numerical sections. Yet, the guidelines are designated with the alphabetical part first and then reference the chapter. For example, for homicide, it is listed as Section A211. However, since 2 is the chapter and A is a

part within the chapter, I suggest that you reverse the A and the 2 and list homicide, for example, as Section 2A11 so that the reader will immediately know that the number 2 is for offense characteristics and 3 is for offender characteristics. In fact, since Chapter 1 is only an overview of all of the sentencing guidelines and is not substantively incorporated in computing the actual sentence, I suggest that you eliminate Chapter 1 and have Chapter 2 be renumbered as Chapter 1, and have Chapter 3 be renumbered as Chapter 2, so that by looking at the sections, one would immediately know that the number 1 refers to offense characteristics and the number 2 refers to offender characteristics.

Also, if you look at the ten steps that you have listed on page 5 for computing the actual sentence, the order in which the steps are listed are out of sequence. For example, step number 1 refers to computing the offender characteristic level from Chapter 3. We think that you should make the computation process "user friendly" and begin with the beginning, keeping the steps in logical order. In step number 4 you should put in reference to Part Y to make it clear as to whether or not you are referring to adjustments only or are you also adding departures in section 1 of Part Y? In other words are we talking about adjustments with a capital "A" or adjustments with a small "a"? Step number 5 should have reference to Part Z and number 6 should have reference to Part C. Finally, all of your special offense characteristics are in subsection (a) and

there is never any subsection (b). I suggest therefore that you eliminate the reference to subsection a, and simply insert a period after the section. In other words, one section might read as section 2A1.1.

With respect to our general views on the sentencing guidelines as a whole, we share many of the concerns expressed by Commissioner Robinson in his dissent to the guidelines. For example, ranges in the sentences are too large and greatly exceed the 25% specified in the statute, thereby resulting in gross disparities in the sentences that could be imposed. We also think that the base offense levels for many of the crimes listed should be much higher than they currently are. We also think that the provision for departures from the guidelines could very well lead judges to ignore the guidelines, although I must admit that most of the departures listed would increase the base level of the sentences. On the other hand, the departure listed at section Y217 entitled "Altruistic Purposes" may present some problems. For example in Minnesota, U.S. District Judge Miles Lord gave probation to several anti-war demonstrators who broke into a defense contractor and with hammers in hand, damaged the computers which were used to develop our strategic missiles. Judge Lord praised their conduct and said that the real criminals were those who were making the bombs. Similarly, a federal judge in Texas who sentenced those found guilty of illegally smuggling aliens praised their motives as part of the sanctuary movement.

Perhaps this disagreement on the ranges, departures, adjustments, and so forth is the result of the necessary tension between the duties of the Commission in promulgating these guidelines and the duties of a federal judge in applying them. Thus, under 18 U.S.C. § 3553(b), a judge is required to impose a sentence within the guidelines unless the court finds aggravating or mitigating circumstances that were "not adequately taken into consideration". Thus, the court could find an aggravating circumstance was taken into account by this commission, but not "adequately" and therefore can reduce the sentence under the law. Such a sentence will be upheld by the Court of Appeals if the departure was "not unreasonable." Accordingly, in our view, many of the sentences imposed by judges today could very well be imposed under the guidelines and still be upheld by the court of appeals. The Commission's reference to departures and adjustments appears to be a mechanism to give some guidance to the district court in terms of what is reasonable or unreasonable.

Looking at the specific crime categories and their base offense levels, we have a few suggestions. For example, the crime of espionage on page 97 and 98 was not in your first draft. Section M233 is the espionage section under which John Walker and those in the Walker spy ring were convicted. However, the base offense level that you have listed is 30, which translates to 97 to 121 months of incarceration or only about 8-10 years. We think that that base offense level is

woefully inadequate and that this Commission should raise the base offense level to ensure that those convicted of espionage would serve at least twenty years in prison. Subsection A1, as a special offense characteristic, would increase the base offense level to 43 if the espionage occurred in time of war. However, we believe that extreme damage to the national security can be accomplished even in a time of relative peace even though we are engaged in low intensity warfare around the globe. Therefore I would recommend that if you do not increase the espionage base offense level, that at least you indicate that "war" does not mean a formal declaration of war by Congress or Executive Order finding of an Emergency, but means declared or undeclared hostilities, or that it involves giving secrets to an enemy such as the Soviet Union. Therefore, some distinction may be made between espionage for an enemy such as the Soviet Union, and a different category for spying for an ally such as Israel. In both cases, the espionage is serious breach of our national security and should be treated harshly, but if you are going to make any distinctions of espionage, we would think it makes just as much sense to treat the spy more harshly in the case where the secrets are given to an enemy.

The other major concern we have is with the category of drug trafficking. We do not believe that the punishment listed in the base offense levels adequately reflect the severity of these crimes. There can be absolutely no question that drug trafficking and drug abuse in our country has reached serious

proportions and is literally killing our citizens. Drugs are destroying our children's health and safety, our families, our schools, and the entire fabric of our society. Accordingly, this Commission has the responsibility and duty to treat drug traffickers in as severe a manner as possible. In that regard, on page 46, this Commission has listed drug trafficking of Scheduled I or II controlled substances at a base offense level at only 12. This translates into only 10-16 months of incarceration at best for a drug dealer in that level or amount of drugs listed in the category. We believe that this is entirely too low of a base offense level, and we think that it should be at least doubled. We think it is inappropriate to have to distinguish between trafficking in 200 marijuana plants as opposed to 300 or 400. That's like saying that we should go easier on someone who places Cyanide in only ten Tylenol bottles as opposed to someone who placed Cyanide capsules in 20 bottles or 30 or 40. The current sentencing practice of drug traffickers is a national scandal and is entirely too low to begin with. Thus, although this proposed sentencing scheme increases drug sentences somewhat, it is still far short of the minimum sentence that we think adequately reflects the severity of the crime. We suggest that you increase the base level from 12 at least to 24, and then if you want to have several gradations above that that's fine, but as long as you start from a higher sentence. We also think it is totally outrageous that for certain drug traffickers, this Commission is actually considering that with respect to a drug trafficker of Schedule V

drugs, that the level is only 6 which translates into 0 to 6 months of incarceration, and under the Commission's guidelines, that person is eligible for probation. We think it should be made clear that when anybody is ever convicted of dealing in or trafficking in illegal controlled substances, regardless of whether it's cocaine or marijuana or lesser type of drugs, that the dealer knows that they are going to jail for some minimum amount of time. Accordingly, we suggest that you double the base offense level from 6 to 12 for Schedule V drugs. I can assure this Commission that if these recommendations by us for increasing the levels of the punishment for drug traffickers is acted upon and sent to the Congress, not even Senator Joseph Biden will get on the Senate floor and announce his intention to veto your guidelines, as he did on the capital punishment issue, on the basis that this Commission is too tough on drug pushers. As it now stands, I dare say that there may even be opposition by Congress because of the lenient sentences currently proposed for drug traffickers.

Thank you for the opportunity to present our testimony today.

WASHINGTON LEGAL FOUNDATION  
1705 N STREET, N.W.  
WASHINGTON, DC 20036

202-857-0240



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 395-2200

STATEMENT OF EUGENE C. THOMAS

PRESIDENT  
OF THE  
AMERICAN BAR ASSOCIATION

BEFORE THE  
UNITED STATES SENTENCING COMMISSION

COMMENTS ON REVISED DRAFT  
SENTENCING GUIDELINES

MARCH 11, 1987

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

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

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

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

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

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

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

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

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

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

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

Retaining necessary discretion for the sentencing judge.

The Revised Draft is, in its overall structure, consistent

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

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

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

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

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

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

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

## II. Additional Strengths of the Revised Draft Sentencing Guidelines

The Association notes and commends the Commission for

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

The guidelines incorporate the least restrictive alternative principle.

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

Mental and emotional condition can be considered a mitigating factor.

Judges are given greater flexibility in taking contrition into account.

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

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

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

Restitution is an expected part of every criminal sentence.

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

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

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

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

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

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

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

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

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

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

negative incentive for the use of critically important sentencing considerations.

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

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

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

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

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

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

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

(B) to afford adequate deterrence to criminal conduct;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second states that the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### IV. Necessary Further Revisions of the Revised Draft Guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### VI. Additional Observations

The Association makes these further suggestions:

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

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

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

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

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

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

**Submitted: March 11, 1987**

## 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 Editting 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.



COMMONWEALTH OF PENNSYLVANIA  
THE PENNSYLVANIA COMMISSION ON SENTENCING

P.O. BOX 1200  
STATE COLLEGE, PA 16804  
(814) 863-2797

John W. O'Brien  
Chairman

John H. Kramer  
Executive Director

March 20, 1987

The Honorable William W. Wilkins, Jr.  
Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1200-A  
Washington, D.C. 20004

Dear Commissioner Wilkins:

Thank you for providing me a copy of the Revised Draft Sentencing Guidelines. As you will note in my comments that follow, I think that there are several issues that the Commission must yet address. I must also note that despite my expressions of concern, I am very impressed with the painstaking work that you have put into the guideline development.

My basic recommendation is that the current proposal still requires significant attention to several issues. I do not believe that these issues can be given adequate attention in the few short weeks available before the guidelines must be submitted to Congress. Therefore, I recommend that you request an extension from Congress to continue your work.

One major problem with the proposed guidelines is their failure to incorporate systematically the relative seriousness of the offense. Commissioner Robinson makes the point that "the Commission never systematically ranked offenses." This results in inconsistencies such that some clearly less serious offenses are treated more severely than their more serious counterparts and vice versa. I think that the Commission has evolved an implicit ranking based on sentence recommendations including enhancements. In ranking offenses in Pennsylvania we first ranked all offenses, and as a result of the ranking decisions we developed a sentence severity rationale. I think that this worked very well in Pennsylvania and think that such a process would be helpful to the Commission as it writes its guidelines. I understand that the ranking of federal offenses would be a more complex task than we confronted, but I am sure that you would find it enlightening and helpful. Moreover, it

March 20, 1987

may help you in disseminating the guidelines. If you are able to explicitly demonstrate your rationale as to why one form of criminal behavior receives a harsher recommendation than another form of criminal behavior, the acceptance of the guidelines may be enhanced.

A second major difficulty with the Commission's work is the failure to specify the impact of the guidelines on prison populations. While I do not believe that prison population should be the driving force of the sentence recommendations, I do believe that the sentence recommendations should be grounded in the reality of capacity. It would at least inform the public of the potential costs involved in the proposal. Although it is politically acceptable to ignore such an important ingredient in the criminal justice equation, it is not good social policy. I am fearful that the report generated by the General Accounting Office may find the impact excessive and jeopardize the approval of the guidelines by Congress. This problem may well have arisen as the result of the Commission's attempting to meet deadlines which are next to impossible. If this is the case, I would recommend that the Commission not risk its hard work by prematurely submitting its work to Congress.

Another issue raised in the dissent, and with which I concur, is the inordinate amount of disparity that may result from the current proposal. Although my work with the Pennsylvania Commission on Sentencing has resulted in my general view that guidelines may become overly rigid and narrow, it is my view that the current proposal allows too much discretion. The ranges in the sentencing grid itself are fine. Where I have problems is the adding or subtracting of levels for various factors. Often the court is given a range of levels from which to select depending on its view of the appropriate increase or decrease. This often seems to give the judge an excessive degree of discretion. Obviously such discretion is also provided to the United States Attorney to bring such factors to the courts' attention. I would recommend the Commission explore ways that it might specify the appropriate level more clearly rather than leaving the choice totally to the court.

Based on my work in Pennsylvania, I think it is important to caution the Commission regarding its detail work. It is important that the Commission specify such issues as the definition of prior conviction, the add on for sale of drugs to a minor, and numerous other factors that are not now clearly defined in the proposed guidelines. I would recommend that draft guidelines be "experimented" with in several diverse jurisdictions prior to the

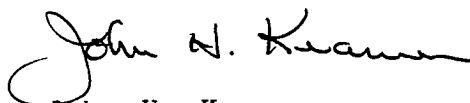
March 20, 1987

final submission to Congress. Only through such testing will many of the difficulties arise that will require revision and clarification. I think that Congress would be amenable to such a testing so as to minimize any legal difficulties in the future.

Although my comments seem very negative, I want to say that in general I am pleased with the progress that the Commission made from September to this draft. I think that the shift of focus to offense of conviction rather than the previous standard of modified real offense sentencing is significant. Establishing the Sentencing Table is also an important step forward over the earlier proposal and the ranges in the table are appropriate. The explicit section dealing with plea agreements is similarly an advancement. I am amazed at the number of accomplishments over such a very short period of time. However, I think that the Commission needs more time. Time to assess the impact of the guidelines, time to develop a seriousness ranking of all offenses, and time to allow for field testing.

I commend the Commission for its hard work and its progress. It is clear that the Commission will never please everyone, and it should not. Having worked with the development of sentencing guidelines, I appreciate the difficulty and complexity of your task and respect the quality of your product.

Very truly yours,



John H. Kramer  
Executive Director

JHK:seb