

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-9642 (PTS)
818-897-9642 (COMM.)

V. § 4A1.2, Unconstitutional Convictions in the Criminal History Computation

We disagree with the amendment to Application Note 6 and the background statement following this note regarding use of uncounseled misdemeanors for which no term of imprisonment was imposed. Note 6 provides:

"Any other sentence resulting from a valid conviction is to be counted in the criminal history score, including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction."

I observe that a sentence may be constitutionally valid for some purposes and not others, but that distinction is not identified in the note. Moreover, the note, coupled with the new "background statement" (absent the distinction I have just referred to), make it appear that the Commission is making legal determination that belongs to the courts. The caselaw is badly divided as to the effect of uncounseled and other allegedly valid convictions. Toby Slawsky, Esquire, Assistant General Counsel for the Administrative Office of the United States Courts, is working on a memorandum on this subject and we would urge the Commission to withhold action at the present time.

Please note that this subject materially impacts on the work of probation officers. As stated in Appendix F of Presentence Investigation Reports Under the Sentencing Reform Act of 1984 (copy attached), it is our position that whether such an uncounseled misdemeanor can be used to increase the term of imprisonment is a legal issue to be decided by the sentencing judge. Thus, we have instructed probation officers to report such convictions under "Other Criminal Conduct" and indicate how the criminal history score would be changed if such convictions were included in the criminal history score.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#59. Pages 60-61 -- Criminal History

We object to the proposed Background paragraph on page 61 because it contains a one-sided interpretation of Baldasar v. Illinois, 446 U.S. 722 (1980). The sentencing judge should interpret that decision.