



U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

March 9, 1990

Honorable William Wilkins
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Based on my experience in parole and supervision related matters I would like to comment on the two proposed options for handling the revocation of probationers and supervised releasees.

After careful review of the options published I would strongly encourage the Sentencing Commission to reject Option I and adopt Option II in a modified form. Option I would be problematic and circumvent the statutory mission of the Sentencing Commission: incapacitation, reduction of disparity and providing just punishment.

The concept I would like to address is the two classes of violators included: probationers and supervised releasees. Although the process of supervising these clients may be similar, to assume that the individuals who fall in these two categories are also similar is a grave oversight. To ignore the background characteristics of the probationer or a supervised releasee would be an injustice to the client, the supervising probation officer and the community.

OPTION I

I want to emphasize the misguided quest for "simplicity"

proposed under Option I. I recognize that the Probation Officer's duties continue to grow more complex and burdensome however there is a much greater issue at stake. The process of managing a person's freedom and protection of the public have never been a simple process and should never be reduced to one.

The ultimate responsibility for applying any type of revocation guidelines will fall on a court, a Magistrate, or Executive Agency appointed for that task. Determining guidelines for revocation purposes will not be any more complex than determining them for an initial sentencing proceeding. Whenever a personal liberty is at issue we must not simplify procedures merely to keep the job simple or easy.

In view of the administration's policy toward "zero tolerance" and emphasis on fighting drug abuse, I see no emphasis for sanctioning drug users in the community. Under Option I a drug user could receive a maximum of 1-6 months and under Option II 6-12 months. Supervised Release is not unlike the Special Parole Term violator's who receive anywhere from eight to sixteen months under U.S. Parole Commission guidelines. The Sentencing Commission would be perceived as getting "soft" on drug cases if these current options are adopted.

The major problem perceived with Option I is the broad, vague classification of offenses and the total absence of risk factor consideration.

A Class I violator as outlined can include a probationer who is arrested for selling a gram of cocaine or a supervised release violator (who might have a criminal history Category VI) who is convicted of possessing with intent to distribute 100 kilos of cocaine. Under Option I both of these individuals have guidelines of 12-18 or [15-21] months.

Similar examples can be made for Class II violators. It would appear that the system proposed by Option I would generate numerous departures on a regular basis at best. THIS SYSTEM WOULD TREAT DISSIMILAR OFFENSES AND DISSIMILAR OFFENDERS SIMILARLY AND THIS DISPARITY WOULD BE INHERENT.

Under Option I a person serving a 5 year SPT who violates by possession of a controlled substance is required by statute to

serve a minimum of one-third of the term of supervised release.
(18 U.S.C. 3583)

Option I does not incorporate this under the proposed guidelines and instead offers that when the guidelines are in conflict with the statute, obviously the statute controls. The point I make is that in the situation of a violator found in possession of drugs, anyone with a 2 year SPT or more will be outside the guidelines in order to allow for the statutory minimum penalty to be served.

The proponents of Option I argue against a guideline range determination that would require "mini-trials". Option I therefore attempts to merely sanction a violator for breaking the supervision contract regardless of the violation behavior, in hopes that the pending charges will be pursued by a state or local jurisdiction. This is a risk that responsible criminal justice professionals should not be willing to take. The current crisis of overcrowded jails and prisons is a constant inducement for prosecuting agencies to drop their charges in favor of the federal warrants placed as detainers. In instances where the charges are dropped, no review or sanction for new criminal behavior would be attempted under Option I. The violator would simply be sanctioned for breaking his supervision contract. How does this type of policy "enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system?" This directly violates the objective of Congress "to achieve proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." To ignore the content of the violation behavior by broad and vague classifications as well as ignoring the background characteristics of these offenders will undermine the concept of selective incapacitation of violators and defeats the statutory purpose of protection of the public.

Option I also creates a disparate system that treats the initial sentencing decision under a "modified real offense system," but treats probation or supervised release violators by ignoring the "modified real offense" behavior.

Finally under the proposed sanctions for Class III violations, this option allows for Probation Officers to make

their own determination as to when the court should be notified of technical violations. This allows for some 2,000+ Probation Officers to decide how many dirty UA's are acceptable before being reported. For example, it could be 1, 3, 10 or 20. How long can a person be out of contact (absconder behavior) before the Probation Officer reports this to the court, one month, 3 months or 6 months? Again the broad vague categorization would appear to encourage disparity as a result of 2,000+ interpretations of what "undue risk" is, or how one views the public's, perception of what constitutes "respect for the justice system." How does the Probation Officer insure proper interpretation of the original intent of the Sentencing Court? This system would not even promote uniformity within districts let alone the entire country.

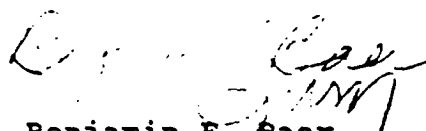
OPTION II

Although this is a more complex option, Option II is a more credible approach to a complex problem. It would achieve uniformity and proportionality, and allow for a consistent application of policy not subject to personal interpretation.

I would urge that the offense level and criminal history be recomputed for all new felony offenses and that all misdemeanor offenses be treated under the proposed 6-12 month guideline range. I would urge the application of the Chapter two guidelines to consider the "real offense" violation behavior. This would be consistent with the Sentencing Commission policy and treatment of all other offenders.

In closing I would again urge the Sentencing Commission to consider the offender's characteristics and recalculate the criminal history score when considering a new offense. I would caution against adopting any proposal that would make revocation guidelines simple or easy if they do not safeguard the objective of truth in sentencing and public safety.

Sincerely,


Benjamin F. Baer
Chairman

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).

#69, Pages 74 et. seq.--

Probation & Supervised Release Guidelines

We oppose this proposal to extend the Guidelines to these matters without further study and prior special hearings as was done with regard to Organizational Sanctions.

We believe that this increased Guideline coverage will further overwhelm judges, probation officers, prosecutors and defense attorneys with the highly complicated Guideline system without sufficient corresponding benefit to society.

We suggest a cost-benefit analysis prior to setting forth any specific proposals. In the meantime, we believe that the judges can continue to deal effectively with these matters.



Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Revocation of Probation and Supervised Release

The Commission seeks comment on the development of guidelines relating to probation and supervised release revocation and resentencing upon revocation. We believe there is a real need for guidelines in this area because probation and supervised release revocations are taking place without the benefit of any guidelines regarding resentencing.

Two options are proposed for probation and supervised release revocation. Amendment No. 69. The first divides probation and supervised release violations into three categories and



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Washington, D.C. 20530

STATEMENT

OF

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UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

provides for specific ranges of imprisonment for resentencing, with the most serious offenses subject to a resentencing range of 18 to 24 months. Option one is based on the assumption that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction over the underlying offense. Option two determines the resentencing range by applying the sentencing guidelines to the new criminal conduct.

We prefer option two because it more fairly reflects the nature of the violation giving rise to probation or supervised release revocation. A defendant who commits a very serious offense should not be limited to a maximum term of imprisonment upon revocation of only 18 to 24 months. We also disagree with the assumption that the new offense will result in prosecution and conviction since the new offense may be a state violation.



U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

With the pressures of criminal prosecution and prison overcrowding on state governments, we have found that prosecutors are sometimes content to rely on federal revocation proceedings.

While we prefer option two, we believe it should be revised regarding the minimum prison term for resentencing. For some violations warranting a prison term, the sentencing range should provide a minimum prison term of less than the six months proposed. We also question the proposed application of guideline §5C1.1 to supervised release revocation. Guideline §5C1.1 authorizes split sentences (including a term of supervised release) that may not be compatible with resentencing upon supervised release revocation. Conforming changes would also be necessary with regard to this reference to guideline §5C1.1 in light of our recommendation to lower the minimum of the resentencing range to less than six months and should be made to the proposed provisions regarding both probation and supervised release. The Department would be pleased to assist in the Commission's efforts to develop these and other guidelines

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 69. Neither option is entirely satisfactory, and we urge the Commission not to promulgate guidelines for probation and supervised release violations at this time. If compelled to choose between the two options presented, Option 2 is preferable, although the guideline should only apply to conduct punishable by more than one year.

Option 1 is objectionable because it would result in extreme disparity. Dissimilarly situated individuals - for example, individuals who violate supervised release by possessing marijuana and those who engage in violent behavior - will receive similar terms of imprisonment under option 1. This option also results in severe "cliffs": a theft of under \$200 is to be considered a Class III violation and receive no more than 7 months additional imprisonment, but a theft of more than \$200 is a Class II violation and would result in 12 to 18 months imprisonment.

Finally, it is unclear what statutory authority the Commission is relying upon to promulgate binding procedures for probation officers.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604**

**CHAMBERS OF
CHARLES P. KOCORAS
JUDGE**

March 30, 1990

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

Dear Chairman Wilkins:

On behalf of the Committee on Criminal Law and Probation Administration of the Judicial Conference and at the request of the Chairman, Judge Edward R. Becker, I write to provide comments regarding the proposed amendments to the sentencing guidelines pertaining to revocation of probation and supervised release. As you know, supervision of offenders is a critical part of the responsibilities of the United States Probation Office and of fundamental importance to the overall success, or failure, of our criminal justice system efforts. Because our committee has responsibility for the supervision process and, in light of the strain on supervision resources because of the effects of the Sentencing Guidelines, we have a deep interest in the formulation of amendments dealing with the subject of revocation of persons on supervised release or probation.

Guidelines for revocation of probation and supervised release will have a substantial effect on the operation of the courts and the Federal Probation System. Effective supervision of offenders in the community is fundamental to the administration of justice. For these reasons, it is imperative that all preliminary steps necessary to the enactment of amendments be completed prior to their enactment. These preliminary steps include appropriate field testing and adequate input from those most informed, and most affected, by the amendments. We do not believe Option I and Option II have been developed in a way to insure that all of the statutory objectives and other relevant considerations have been accommodated. We also do not think

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there has been sufficient opportunity for evaluation and comment by those with experience in the field. We do not believe Option I and Option II should be enacted as presently drafted.

It is clear that Option I and Option II were developed based on different philosophical approaches. Because the two options are premised in fundamentally different ways -- Option I treating the new offense essentially as a sanction for failure to abide by the conditions of supervision and not as a sanction for the new criminal conduct (although the sanction partakes, in a general way, of the nature of the violation), while Option II essentially treats the new offense as the basis for, and measure of, the sanction to be imposed -- criticisms of the two options need to be separately addressed. Each of the two options, however, contain a common failing.

Both Options I and II treat probation and supervised release in the same way in revocation matters. Because probation and supervised release are neither synonymous terms nor define identical conditions, it is essential to consider the point at which they are found in the criminal justice system. An offender on supervised release will already have served the period of imprisonment that the court imposed for the original offense. The penalty for a violation of supervised release is not determined by the original imprisonment penalty for the underlying offense, but rather by the statutory classification of the original offense.

In contrast, an offender ordered to be supervised on probation has not been sentenced to the full term of imprisonment for the original offense. If the probation term is revoked, the original statutory penalty is available for the court to impose. In addition, following probation revocation and service of a prison term, the same individual may be subject to a period of supervised release. Revocation guidelines must incorporate these appreciable statutory differences. Neither Option I nor Option II address these differences adequately.

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The introductory commentary to Option I states, in part, that "the guidelines envision that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction." Option I, as presently drafted, essentially reflects this belief. In reality, however, in a good many cases the offenders will only face the revocation proceedings and not a separate prosecution for the new offense. There needs to be sufficient flexibility in the choices of the presiding judge to accommodate these possibilities.

Option II, on the other hand, puts the judge in the same straitjacket as when the original sentence was imposed. Recognizing the necessity to treat similarly situated offenders similarly, it is also necessary, however, to afford the judge the ability to give weight to considerations which were not as prominent when the original sentence was imposed or which are not adequately reflected in the guideline calculations. Concerns about reintegration of the offender into the community, the attainment of educational or vocational goals and the pursuit of the most efficacious way of handling drug problems are some, but not all, of the considerations which are common in revocation proceedings. These considerations mandate that a judge should have a full range of options at his command to deal with the variety of situations which will trigger revocation proceedings. Option II does not provide that, and neither does Option I.

We believe guidelines for revocation should address the following matters:

- (1) the nature and severity of the misconduct;
- (2) that persons on probation supervision did not receive the full imprisonment sanction for the underlying offense whereas offenders under

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supervised release supervision have served the period of imprisonment initially imposed;

(3) that reintegration of offenders into the community and risk control while they reside in the community are appropriate correctional goals in revocation proceedings;

(4) consideration of other criminal justice sanctions imposed for the conduct giving rise to the revocation proceeding;

(5) the virtue of not unduly burdening the courts when fairness and consistency do not require it.

While Options I and II of the proposed amendments accomplish some of these goals, neither accomplish all of them. Option I has the desirable quality of being simple to operate; however, to quote Chapter One of the Guidelines Manual, "Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects." Option I does not include considerations of the risk that the offender poses to the community, the harm (or potential harm) caused by the conduct, or the need to incapacitate certain offenders. Although this approach seeks to sanction a breach of the supervision contract, it does not adequately address the complexity and variety of the violations of supervision that the courts process. Using this approach, the courts would thereby treat dissimilar violators similarly.

Option II would entail reapplication of sentencing guidelines for violation matters. In doing so, it would make fine distinctions among violators based upon their criminal history and the conduct constituting the violation. This process would replicate the application procedures of the

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sentencing guidelines in the violation guidelines and bring with it its attendant complexity and the substantial lack of judicial discretion necessary to revocation matters.

We are not opposed in principle to complexity when fairness and justice demand it. However, the facts of violation conduct are not consistently available for the detailed analysis required under the sentencing guidelines. This is particularly true of allegations of new criminal behavior without a conviction or new criminal behavior investigated by local jurisdictions. In such cases, the information available to calculate the offense level under the guidelines is often unavailable, or to make it available would require a mini-trial at the violation hearing.

In February 1990, Judge Becker conducted a survey of the probation offices in twenty districts. We learned that implementation of the sentencing guidelines appears to be going reasonably well. However, the districts uniformly reported that one effect of the new system has been to increase the length of time between initial indictment and sentencing with notable increases in the length of sentencing hearings. The structure of the sentencing guidelines requires factfinding by the court for the specific offense characteristics, adjustments, criminal history category, and sometimes even regarding the base offense level when it is predicated on quantities. The initial application by the probation officer regarding all of these guideline components may be subject to dispute by the parties, necessitating hearings. Less time-consuming procedures for violations would be preferable.

Individuals serving a term of supervision will eventually reside in the community without criminal justice controls and, as a consequence, an important goal of supervised release and probation is the reintegration of offenders to the community. This objective must, of course, be balanced by the goal of control of offenders when they pose a danger or risk. The guidelines must be sufficiently flexible to allow the judge to impose an

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informed determination. We fear that neither Option I or II meets this standard.

Prior to the enactment of violation guidelines, it would be prudent to address some technical issues. Option II states that if supervised release is revoked and the offender incarcerated, he shall be ordered to recommence supervised release to complete any time remaining on the term of release. Option I is not explicit regarding this issue, but seems to imply that such a procedure is possible. Both options depart on the premise that a second period of supervised release can be imposed after the revocation of the first period of supervised release. We do not find any statutory authority for the imposition of a second term of supervised release after the revocation of the initial period of supervised release imposed at time of sentencing. If this legal issue is not addressed before violation guidelines are promulgated, the courts will face a new problem of disparity in the interpretation of the supervised release statute.

In order to avoid ex post facto issues, it would be prudent to include the effective date of the violation guidelines. Would they pertain to the date of the violation hearing, the violation behavior, the date of sentence, or the date of the original offense?

In summary, we oppose enactment of both Option I and Option II. Because revocation guidelines are analogous to sentencing guidelines in importance, they must only be enacted after studied care. Supervision of offenders is a fundamental part of the criminal justice system and affect greatly the operations of the United States Probation Office. Both Options I and II suffer from inadequate development and analysis and, for the reasons stated above, should not be enacted. While we presently offer no specific alternative proposals, our committee and the probation office stand ready to assist in the rewriting of appropriate amendments. Because of their

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importance to us, we would willingly accept an invitation to assist you in your efforts.

The members of the Criminal Law and Probation Committee of the Judicial Conference appreciate the opportunity to comment on the proposed amendments. We thank you for your consideration of our views and, as expressed above, stand ready to help you in any way you may wish.



Charles P. Kocoras

United States District Judge

Member, Committee on Criminal

Law and Probation

Administration

cc: Honorable Edward R. Becker

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

668 EUGLIO AVENUE, ROOM 606
CLEVELAND 44114

March 30, 1990

U.S. SENTENCING COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Attention: Paul K. Martin

Re: Proposed Amendments
Chapter Seven

I urge that adoption of the proposed amendments for VIOLATIONS OF PROBATION AND SUPERVISED RELEASE be delayed.

The probation system is presently pilot testing in select districts a new classification and supervision system. I understand that by the end of this year we will have information on the results of this pilot testing. I recommend that these results be considered before the Commission adopts revocation guidelines.

Respectfully submitted,

Keith A. Koenning

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

PERRY D. MATHIS
CHIEF PROBATION OFFICER

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March 27, 1990

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

Re: Proposed Amendments
to Sentencing Guidelines

Dear Director:

I write to comment on the proposed amendments to Chapter Seven - Violations of Probation and Supervised Release. I support the adoption of Option 1 over Option 2.

Several items concern me about the implications for Probation Officers and the Court under Option 2.

1. Section 7A1.2(c)(1) will require the USPO to go through the process of determining Relevant Conduct issues of the new criminal conduct. This proves difficult sometimes even when the criminal conduct constitutes a federal offense from the outset. It would prove particularly cumbersome if the new criminal conduct constituted a non-federal offense since the level of investigation and record keeping may be incomplete and important issues would perhaps take even more time to resolve than the original case circumstances.

2. The specific offense characteristics, Victim Related Adjustments, Obstruction issues, Multiple Count issues (if the new violation involved more than one crime), Acceptance of Responsibility issues, Chapter Four calculations, etc. would come into play because "the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense - - - -". This is a lot of work to arrive at a calculation which is not called for under Option 1.

3. Option 2 could lead to attempts to re-open objections which were not resolved to the satisfaction of the complaining party in the original sentencing.

4. As I interpret Option 2, Section 7A1.2(c)(1) the USPO would essentially complete another PSI in order to assist the Court in revoking probation or supervised release. Even after going through all these calculations it could be determined that the sentence called for is less than the 6 to 12 months which is mandated under 7A1.3(c)(1) or (2).

5. It appears that sentencing a person by use of 7A1.2(c)(1) would result in a sentence for criminal conduct totally unrelated to the original conviction even though the stated goal in the Introductory Commentary for Chapter Seven is to impose a sentence as to sanction for failure to abide by conditions of supervision and not as a sanction for new criminal conduct. For instance, the original conviction may have been Theft which has a base offense level of 4 under 2B1.1(a). If the new criminal conduct is Possession of 250 Grams of Marijuana the base offense would be 6 under 2D1.1(a)(3). This just does not seem appropriate to me.

It is my opinion that Option 2 presents the potential for creating an enormous amount of work for the USPO and the Court which would be avoided if Option 1 is adopted.

Sincerely,


Perry D. Mathis, Chief
U. S. Probation Officer

PDM:bh

cc: Earl E. O'Connor, Chief
U. S. District Court Judge

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BARBARA MEIERHOEFER
1725 Maxwell Court
McLean, VA 22101
(703) 893-2485

March 23, 1990

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

RE: Proposed Revocation Guidelines

Dear Judge Wilkins:

I would like to comment on the two proposed options for handling the revocation of probation and supervised release. My past and current experience includes research and writing in the areas of sentencing and community supervision, development of federal guidelines for parole release and revocation, and membership on the Committee on Criminal Law and Probation Administration's Task Force on Supervision for the last two years. I emphasize, however, that the comments that follow express my personal views rather than the official position of any organization.

In my opinion, neither option as presented captures all of the elements necessary for a purposeful, fair, and workable set of revocation guidelines. Option 1 distinguishes poorly among the types of revocation behavior to be sanctioned or deterred, it does not consider the risk the offender presents to the community, and it neither differentiates between probation and supervised release nor provides for intermediate sanctions. Its only merits are a workable number of violation types and ease of application.

Option 2 makes too many distinctions among offense behaviors. Many allegations of new criminal conduct will be considered on revocation prior to a conviction and/or based on non-federal arrests. Obtaining the detailed, reliable information necessary for a full recalculation of the offense level under these circumstances will surely be more difficult than it is when reports from U.S. Attorneys and case agents more familiar with guideline-information needs are available. I believe that offense level calculation is an unnecessarily onerous approach given that reflecting the seriousness of the offense is not one of the statutory purposes for either imposing or responding to violations of supervised release.

Number of Violation Behavior Categories

I recommend that the number of categories to describe violation behaviors be kept to around five. Not having been a probation officer, I do not feel competent to describe the nuances that should be captured in the

classifications. I strongly recommend, however, that the Commission form a working group of knowledgeable officers to devise a realistic set of violation categories.

Assessing Offender Risk

I strongly recommend that any set of revocation guidelines include an assessment of offender risk. Protection of the public is a statutory purpose to be served in responding to violations of both probation and supervised release. Such an assessment could be easily accomplished by a recalculation of the Offender History Score as proposed in Option 2.

Consecutive vs. Concurrent Service of Violation Terms

I endorse the Option 2 approach. The Commission should avoid the disparate overall treatment of similar violators based on the prosecutorial and sentencing practices of criminal justice systems beyond its control.

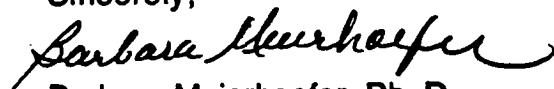
Over-reliance on Imprisonment

Neither option adequately allows for graded, "half-way back" responses to violations. Although Option 2 allows the substitution of community and home confinement under the same conditions as allowed in the initial guideline application, it does not provide a broad enough array of intermediate sanctions or attend sufficiently to the purposes to be accomplished by community supervision.

We need a system of supervision that is designed to assure compliance with the conditions imposed, protect society in the short-term by providing adequate methods of detection and control, and strive for long-term protection of society through the provision of necessary correctional treatment. What has been referred to as the simplistic "tail 'em, nail 'em, and jail 'em" philosophy, with its resulting over-reliance on prison, is unlikely to accomplish these goals and gives too little attention to statutory directives to impose the least restrictive sanction necessary to accomplish the purposes. Attempts can and should be made to bring offenders into compliance with the conditions of their supervision while keeping them in the community under controlled conditions that afford adequate public protection. I would go even further and suggest that the Commission break with precedent and define a category of offender risk and type of violation behavior for which a community sanction is the normally appropriate response, with incarceration as the "outside guidelines" decision.

In short, I think that more thought should be given to this important area, and would encourage at least one more round of modification and comment prior to promulgation. Thank you for the opportunity to express my views.

Sincerely,


Barbara Meierhoefer, Ph. D.



FEDERAL PROBATION OFFICERS ASSOCIATION

Dear Judge Wilkins:

This will serve as written recordation of my testimony on behalf of the Federal Probation Officers Association on March 15, 1990 regarding the proposed amendments and additions to the Sentencing Guidelines, Policy Statements and Commentary.

The primary concern of the FPOA relates to guidelines for revocation of probation and supervised release, Chapter Seven, "VIOLATIONS OF PROBATION AND SUPERVISED RELEASE." The Commission has set forth two options for the proposed revision of Chapter Seven.

First of all, the FPOA believes that a much more expansive Chapter Seven than currently exists is required, given the intent of Congress in the Comprehensive Crime Control Act of 1984.

Secondly, although there is much good language in Option Two, the FPOA supports Option One of the proposed Chapter Seven amendments, primarily based on structure. We believe that Option One is more clear and unambiguous than Option Two. More importantly, Option One expresses a philosophy which will enhance respect for the supervision process. By that we mean supervision of federal offenders in the community, either instead of incarceration, or after incarceration. Option One's clear separation of new criminal conduct which may form the basis of a violation from the separate and distinct failure to abide by the conditions of supervision, establishes a more rational basis for accountability than Option Two as well as mirroring the reality of the situation as perceived by the community and probation officers in general. In other words, the "bargain basement" or "two for one" approach to violative behavior will no longer be acceptable and the criminal will pay a price for his or her new infraction as well as a separate penalty for the earlier conviction which resulted in a suspension of part or all of the possible prison term available at that time.

We believe that the violator who is on federal supervision when the new criminal violation takes place commits two breaches. First, there is the new violation of the law. Secondly, there is a violation of the terms and conditions of supervision whether that be probation or supervised release or whatever it may be called. We view the terms and conditions of probation or supervised release, etc., as a contract between the Court and the defendant. Violation of the terms and conditions of supervision requires an informed sanction. Proposed Option One calls for two separate considerations of sanctions for the two legally separate actions that we have just mentioned. Option Two does not, in our judgment, do so or, at least, with clarity.



FEDERAL PROBATION OFFICERS ASSOCIATION

In this respect, and in general, Option One is subject to less interpretation than Option Two. As a result, it is the opinion of the FPOA that more consistent application of violation sanctions will result from Option One than from Option Two.

Option One also provides appropriate latitude to the Court in cases involving so-called technical violations or violations involving new criminal conduct which is deemed petty or relatively minor.

We do suggest that in proposed Guideline 7A1.4(c)(1)(A) of Option One that for consistency as well as a better opportunity for the Court to order an appropriate sanction, the range be from one to twelve months instead of one to seven months as in the Commission's proposal. This would provide for an unbroken continuum of sanctions addressing increasingly more egregious violations. The least of the sanctions available in Option One equals zero time in custody. This is followed by a sanction range of from one to seven months which we are recommending see twelve months at the top of the range. The next most serious violation behavior has a range of twelve to eighteen months, with eighteen to twenty-four months being at the top of this particular ladder.

Regarding Guideline 7A1.4(d)(1) of proposed Option One, we are not clear as to the Commission's intent. For instance, in conjunction with Guideline 7A1.5(a) of Option One, it could be seen as providing that a given defendant be on supervision for life, on the installment plan. If so, we think that to be ill advised and, perhaps, punitive of the probation officer rather than the defendant. At any rate, we think that the Commission should clarify its intent here.

Guideline 7A1.5(b) in proposed Option One makes very clear and enhances the underlying philosophy of Option One that a sentence based upon revocation is a sanction for failure to honor the conditions of supervision and quite separate from any sanction which may be imposed for new criminal conduct. The FPOA endorses this.

Briefly, Option Two would require much more interpretation and calculation than Option One. We see this as unnecessarily complicating the violation procedure as well as prolonging the process without ensuring any greater fairness than Option One.

In summary, although Option Two has some language to recommend it, Option One is the preferred starting point in this area of our concern and, after sufficient experience with application of Option One, any deficiencies can be resolved in the amendment process which is available to the Commission.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA has also looked at other areas of the proposed amendments, including the areas of fines, obstruction of justice and role in the offense. Although the FPOA does not have complete position statements as to each of these areas, we do offer some preliminary commentary.

As to the fines section, the proposed amendments to Guideline 5B1.2 appears to clarify fine computation and, therefore, wards against errors in this area. In that respect it is a good amendment. The FPOA also likes the attention given to restitution and the "escape hatch" relating to the possible complication and prolongation of the sentencing process as is set forth in Paragraph 65 which is found on Page 66 of the Commission's proposed amendments.

A major concern in the area of proposed amendments to Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures) is in the area of comprehension and ease of calculation on the part of the practitioner. In other words, if these amendments result in a better understanding of this section of the Guidelines and make the probation officer's calculation easier, they are to be wholeheartedly supported. We are continuing to examine this aspect.



FEDERAL PROBATION OFFICERS ASSOCIATION

Regarding the Commission's proposed amendment to Section 3C1.1, Chapter Three, Part C (Obstruction) of the Guidelines, the FPOA believes that the proposed amendment more accurately describes this section and is therefore good. We are curious about one

matter, however. The word "wilfully" is taken out of the title of the Guideline in the proposed amendment but left in the Guideline itself. We wonder why this was done and whether or not this will lead to confusion. We are also concerned that there might be some message in this. Having heard the staff response to Your Honor's question during the hearing that, basically, the word "wilfully" was left out of the title for economy purposes, is reassuring. On the other hand, it is perhaps better to deal away economy in a matter such as this to be absolutely sure that clarity reigns supreme.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA chooses not to make any comment at this juncture regarding "Role in the Offense." With this, as with the proposed amendments relating to fines and "obstruction," the FPOA hopes to have completed positions in the hands of the Commission before the end of the commentary period.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA wishes to alert the Commission to something that has emerged as a discussion item, viz., it appears that some enhancements in Chapter Two of the Guidelines such as "Prior Similar Conduct" may more properly be addressed in Chapter Four, which deals with prior record considerations. For example, Guideline 2L1.1, "Smuggling an Unlawful Alien," has as a specific offense characteristic a two-level increase if the defendant had previously been convicted of smuggling an unlawful alien. Again, while we have no concrete position on

this we have begun discussing whether or not an obvious prior record consideration should not more properly be in Chapter Four instead of Chapter Two to preserve logic and the integrity of the Guidelines.

The Federal Probation Officers Association has been working with the Commission since before the first set of Guidelines was promulgated and have relished every minute of it. We are very grateful for the continuing opportunity to provide our input. This is the fourth consecutive year that the Commission has allowed me on behalf of the FPOA to testify on proposed amendments and we believe that it is very important for the Commission to hear the perspectives of the primary field practitioners, probation officers. We applaud the Commission for always having had an open door policy for us.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE**

**CARLOS JUENKE
CHIEF PROBATION OFFICER**

**364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559**

March 8, 1990

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

RE: PROPOSED REVOCATION GUIDELINES

Dear Judge Wilkins:

On March 5-6, 1990, a working group of probation officers met with commission staff to discuss two options in reference to proposed revocation guidelines. It was suggested to the group that correspondence describing the findings and recommendations of the group be directed to your attention. This is the purpose of this letter.

A detailed description of both options for revocation was distributed to the invitees prior to the group meeting. As a consequence, all of the officers were able to apply three actual revocation cases to each of the two options. This proved to be very valuable in terms of evaluating the two options. The group was able to not only discuss the philosophical and theoretical aspects of the options, but the practical aspects of application as to each option as well.

Option Two was examined first. A detailed presentation was made to the group describing the theory as well as the application principles for Option Two. However, the group unanimously recommended that the commission not adopt Option Two. This was based upon the philosophy behind Option Two as well as application and reality concerns. Essentially, the group found Option Two to be far too complex and demanding for the courts to effectively utilize for purposes of revocation. The translation of revocation behavior into a guideline sentence appeared to be not only unrealistic but unworkable. One of the group members felt that the complexity and demands of Option Two were so severe that the judges in that district would simply ignore the guideline. After unanimously reaching an agreement as to Option Two, the group undertook an evaluation of Option One.

Honorable William W. Wilkins, Jr.
March 8, 1990
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RE: PROPOSED REVOCATION GUIDELINES

Once again, the theory and application principles were examined. The group felt that the categorization of revocation behavior was a reasonable approach for the courts to utilize. This provided a means to differentiate between types of revocation behavior while not making the determination so complex that application would be overwhelmingly difficult. Nevertheless, the group did recommend some changes in the ranges for incarceration, the classes of offenders and application. A report reflecting those recommended changes is being prepared and will be submitted to the commission members for evaluation.

It was a pleasure to work on this project. All of us enjoyed it. On behalf of the members of the group, please do not hesitate to call upon any of us in the future if you feel that we may be of additional service to the commission.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

cc: Jerry Denzlinger, SUSPO, SD/TX
Patricia Hardage, USPO, ED/AK
Tim Kitch, USPO, D/ID
Joe Napurano, SUSPO, D/NJ
Nancy Reims, DCUSPO, CD/CA
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Sharon Hennigan, U.S. Sentencing Comm.

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Charlie E. Varnon
Chief Probation Officer

March 20, 1990

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

Attention: Mr. Paul K. Martin
Communications Director

Dear Mr. Martin:

I write in response to the Commission's request for public comment on the proposed amendments and additions to the sentencing guidelines. I have not had the opportunity to review all of the proposed amendments; so, I will limit my comments to the proposed amendments to Chapter Seven (Violations of Probation and Supervised Release) at this time.

The "Introductory Commentary" states: "The sentence imposed upon revocation is envisioned as a sanction for failure to abide by the conditions of supervision and not as a sanction for new criminal conduct that may be the basis for the violation." It appears both proposed guidelines which follow this commentary would do otherwise. Also, the commentary is inconsistent with general practice of sanctioning violations of conditional release in our courts.

I believe, in practice, the sanction for violation of probation is generally based on the seriousness of the original offense for which probation was imposed as may be modified to some degree by the severity of the violation behavior. In both proposals, the original guideline is disregarded in determining the sanction for violation. This would result in the same treatment of two offenders who may have committed similar violations without regard for the seriousness of the original offense. For example, one offender may be on probation for an offense which carried a guideline of 0-6 months, and the other may be on probation by way of a departure for an offense which had a 12-18 month guideline. Under both proposals, if the violation behavior is the same, both of these offenders would receive the same violation term.

Proposal One would be easy to apply but it would be driven by the violation behavior without consideration of the original

offense. The second proposal would present a variety of complex issues which may require more litigation than computation of the original guidelines.

- * Base offense levels and adjustments would have to be litigated, unless the court is willing to wait months or even years for conviction in another jurisdiction. We have a parole violator who was arrested 17 months ago, and she has not yet had her preliminary hearing in the state court.
- * Local prosecutors may be reluctant to release evidence to the Federal Court for processing violations before the case is tried in the state court.
- * Basing the violation guideline on the new offense conduct will produce excessive sanctions for minor offenses. If the offender is on probation for an offense level 3 crime and commits an offense level 24 violation, there would be an enhancement of almost five years or 10-fold in the sanction for the original crime. I realize the violation term may take into account the term imposed by another court, but, in appearance and in fact, we would be sanctioning, primarily, the new state offense. This will aggravate the problem we already have with local jurisdictions waiting for our revocations and then dismissing the local charges if our violation term satisfies the local prosecutor.

I recommend the violation guidelines truly provide for sanction of the original offense with limited consideration of the nature of the violation behavior. The new crime should be sanctioned by the court having jurisdiction. In discussions in this district, we have attempted to articulate the difference between probation violators and supervised release violators as follows. The probation violator owes principal and interest on the original guideline term, i.e. he has not served the term, and he has violated the court's order. The supervised releasee owes only interest, i.e. he has served the term, and he should be penalized only for violating the order of the court. I suggest such a system could be accomplished as follows.

The classes of violations could be collapsed into two classes, one for felony crimes and one for misdemeanors and technicals or petty offenses and technicals as the commission may prefer. This would reduce the need to argue over definitions and would provide for significant sanctions for serious violations.

For Class I probation violations, the violation term could be determined by adding three points to the original criminal history

score. This will account for principal and interest as discussed above. The addition of three points takes into account the fact the defendant was on probation and would count the original crime in the revised Criminal History Category. The court would then sentence within that new guideline. This would differentiate between the minor and more serious original crime in a rational way.

For Class II probation violators, the court would sentence within the original guideline. This procedure would differentiate between the serious and less serious violators while still relating the violator term to the original guideline. The probationer does not get credit for "street time," so there is some additional sanction for the violator over the offender sentenced to imprisonment in the first place.

Supervised Release violators could be sentenced to not less than one-half of the supervised release term for Class I violations and not more than one-half for Class II violations.

Such a system, or something akin to it, would provide for differential sanctions depending on the nature of the original offense and the nature of the violation. It would be less complex than the second option proposed in the current amendments, and it would reduce the amount of litigation required to process violations.

I agree that the guideline should require a written report of all Class I violations, and I think the guideline should be strengthened by indicating that report should be made as soon as the officer has reason to believe such a violation has occurred. This would provide for more consistent practice regarding when a violation is reported. In some courts, a new offense is not reported until after conviction. Such a practice seems to delegate the responsibility for supervision of conditional release by our courts to courts of other jurisdictions.

I also agree a term of imprisonment is appropriate for felony violations, but I am just as convinced community custody, home detention, etc, are necessary as alternative sanctions for lesser, Class II violations. In the case of probation violators, the original offense is not serious, or the defendant would not be on probation, so less-serious sanctions may be effective as punishment and as a means to bring the defendant into compliance without the costly use of limited prison bed space.

I assume departures for stated cause will be permissible in violation proceedings, and if so, maybe that should be stated in the commentary. Also, if something like these proposed guidelines were adopted, violation terms should be served consecutive to any new term unless the result would be silly, e.g. six months consecutive to 50 years.

I believe guidelines for violations are necessary and that they should address when violations are reported, when supervision should be revoked, and what sanction should be imposed at revocation. There is probably greater disparity in this area than in sentencing in general. I just hope the final guidelines are not so complex as to impose an unnecessary burden on an already overburdened court and prison system.

On another matter, I had an opportunity to read the testimony of the General Accounting Office on its review of the work of the Commission. I was amazed that given the unprecedented accomplishments of the Commission in such a short time, GAO found it necessary to spend the bulk of its time commenting on the organization and communication of the Commission. I guess, in the opinion of GAO, you really should try to rearrange the furniture on the deck of the Titanic. Those of us who use your product every day do appreciate your excellent performance of an impossible task.

Respectfully submitted,

Charlie E. Varnon

CHARLIE E. VARNON
Chief U. S. Probation Officer