

M E M O R A N D U M

April 10, 1986

TO: United States Sentencing Commission
FROM: Federal Defender Legislative Committee
RE: Ranking of Offense Seriousness

I.

INTRODUCTION

This memorandum is submitted on behalf of the Federal Defenders by their Legislative Committee in response to Judge Wilkins' letter of March 19, 1986 seeking our response to an offense seriousness questionnaire prepared by the Sentencing Commission, along with our views on several issues related to the rating of offense seriousness which are to be discussed at the Commission's hearing on April 15, 1986.

II.

THE OFFENSE SERIOUSNESS QUESTIONNAIRE

Upon receipt of the offense seriousness questionnaire, the Federal Defender Legislative Committee distributed it to Federal Defender offices throughout the country for completion. To date, we have received completed questionnaires from twenty-five offices. All of the responses to the questionnaire have been combined in a chart which is attached hereto as Appendix A.

We have also analyzed the responses to ascertain areas of agreement and disagreement among the Defenders. For each case, the range of rankings among the twenty-five responses has been compiled. This information regarding the "gross range" for each case is shown in Column A of Appendix B attached hereto. In addition, with respect to each case we excluded the two extreme high and two extreme low rankings and, using the remaining twenty-one responses, completed a "net range" calculation for each case. This net range information is shown in Column B of Appendix B. In those cases in which the net range high number does not exceed the net range low number by more than four, we have concluded that there is sufficient consensus among the responding Defenders to assign the case a general seriousness ranking. Eleven of the cases in the questionnaire fall into this category and the consensus ranking for each of these cases (high, upper middle, middle, low middle, and low seriousness) is noted in Column C of Appendix B. In the remaining five cases, the extremes of the net range were greater than four numbers apart and we concluded that no meaningful consensus could be said to exist among the Defenders. Consequently, there are no general rankings of seriousness noted for these cases.

In addition to evaluating the questionnaire responses to identify cases in which a general consensus existed among the Defenders, we have added the numerical rankings assigned to each case in each of the twenty-five responses. The resulting cumulative totals were then utilized to give each case a cumulative

ranking from 1 to 16. The cumulative totals and the cumulative ranking which these totals yield are shown in Columns D and E of Appendix B. It should be noted that in some cases these cumulative rankings are the result of extremely varied individual responses by the Defenders and, therefore, they do not reflect a true consensus among the Defenders.

Finally, we have reviewed the comments submitted by the individual Defenders who responded to the questionnaire in order to identify the considerations which the Defenders felt were significant in their ranking of the individual cases.

A. Cases in Which a Consensus Exists Among the Defenders:

As noted earlier, there appears to be a consensus among the Defenders as to the general seriousness ranking of eleven of the cases included in the questionnaire. Cases A, C and H were ranked as cases of high seriousness. Cases E and I were ranked as cases in the upper middle category. Case F was ranked in the middle category. Cases G and O were ranked in the lower middle category, and cases D, M and N were ranked as cases of low seriousness. The reasons expressed for these rankings are discussed below.

Case A (Organized Crime Case) - Twenty-three of the Defenders placed Case A among the three most serious cases in their ranking. The factors in this case which were cited in support of its high ranking were the existence of organized group activity, the presence of violent behavior, the suggestion of careful planning implicit in the fraudulent predicates, and the apparent extended

length of time over which the offense was committed. The combination of these factors was viewed by the Defenders as posing the threat of both physical and economic harm to individuals, thus impacting substantially on society as a whole. It was for these reasons that this case was ranked as one of high seriousness.

Case C (Murder) - All of the responding Defenders ranked this case among the top four in seriousness and sixteen ranked it as the most serious offense. While the case does not involve group activity, any economic harm, or any criminal behavior over an extended period of time, the fact that it involved violent behavior leading to a loss of life led to its high rating. The responses with respect to this case point up the fact that the taking of human life, even under circumstances which suggest that a repetition of such conduct by the offender is not likely, is viewed as an evil of such magnitude that the offense must be categorized as of the highest seriousness.

Case H (Espionage) - The net range of the rankings for this case was 2 to 5, placing it in the high seriousness category. While the case lacks any element suggesting a threat to the safety of any particular individual, the general threat to the national security and the safety of the general populace were significant elements in its high ranking. Other factors which are present here which support this high ranking are the breach of a sensitive public trust, the apparent planning which must have been involved, the pecuniary motive of the defendant, the apparent insensitivity to

the great danger his conduct posed to the nation, and the economic cost of redressing the harm caused by the offense.

Case I (Heroin Importation) - The net range of the rankings of this case was 3 to 6, placing it in the upper middle seriousness category. The factors cited in support of viewing this as a relatively serious offense were the fact that it was part of group activity involving planning and premeditation, and that the large quantity of drugs involved posed a great danger to the health and well-being of the large number of persons who would ultimately consume them. Also, the substantial indirect threat to the safety and economic well-being of the general populace which arises from the crimes committed by drug users was viewed as a significant factor. This case might have been ranked even higher by some Defenders if there had been a clear indication that the captain was a principal in the narcotics operation, rather than a courier.

Case E (Bribery) - The net range of the rankings of this case was 4 to 8, placing it in the upper middle seriousness category. The significant factors which were cited as warranting the relatively high ranking of this offense were the high status of the offender, the breach of the high level trust involved, and the obvious planning and premeditation which his conduct entailed. These factors were viewed as rendering the conduct here more blameworthy than it might otherwise be in a case involving a bribe payment of this amount from a qualified contractor. While several of the Defenders are dubious of the extent to which general deterrence

is effective in many situations, the high visibility of the offense and offender in this case leads us to view the factor of deterrence as a significant consideration here. Thus, while this case does not involve any of the group activity, violence, or threat to personal or general safety which characterized the other highly ranked offenses, we believe that it should, nevertheless, be ranked as relatively serious.

Case F (Unarmed Bank Robbery) - The net range of the rankings of the unarmed bank robbery was 6 to 10, placing it squarely in the middle range category. The crime apparently involved some degree of planning, raised a threat of physical harm which undoubtedly caused fear to the victim, and also raised the possibility that efforts of security personnel to respond to the offense would give rise to physical violence. On the other hand, the actual dollar loss was relatively small and the offender apparently had no real intent to cause physical harm.

Case G (Bank Embezzlement) - The net range of the rankings of this offense was 9 to 13, reflecting a consensus that this case falls in the lower middle category of seriousness. While the monetary loss was the same as in the unarmed bank robbery, this case was ranked as less serious because of the absence of any threat of physical harm. The different ranking of these two offenses clearly illustrates the extent to which concerns about even a mere threat to use physical force (and the personal fears that such a threat engenders) weigh heavily as a factor in assessing the seriousness of criminal behavior. Also, while the teller here may be

said to have breached a trust, the Defenders believe that at this level of responsibility (in contrast to the situation in Case E), this should not be a significant factor. Similarly, we felt that at this low visibility level, general deterrence has little effect and should not result in more severe treatment. There were suggestions, however, that if this conduct were shown to be part of a pattern of planned behavior over a period of time, the seriousness ranking of this offense should be increased.

Case O (Felon/Gun) - The net range of the rankings of this offense was 9 to 13, identical to that of the bank embezzlement. This relatively moderate seriousness ranking was based on the fact that the weapon involved was a long-barreled, non-concealable, low powered hunting weapon and that there is no indication in the facts as presented that it was intended to be used to harm other persons. Several Defenders indicated that their ranking of this offense would be higher if the fact pattern indicated that the offender had a prior conviction for a violent offense, or if the weapon involved were a handgun.

Case N (Social Security Checks) - The net range of the rankings of this offense was 12 to 16, placing it in the low seriousness category. This low ranking was based on a number of factors. While the forging and cashing of the deceased husband's checks was calculated to realize personal financial gain, the actual receipt of the checks resulted from a failure to act rather than affirmative misconduct. The amount of financial loss is relatively small and there is no identifiable individual victim. The Defenders

as a group viewed this as an offense which posed little danger and, therefore, as one of low seriousness.

Case M (Camping/Fire) - The net range of the rankings of this case was 13 to 16. The major factors in the universally low ranking given this offense were the absence of an intent to cause any harm, the low level of the damage done, and the fact that none of the damage affected other persons.

Case D (Draft Evader) - The net range of the rankings of this offense was 14 to 16. As such, it was viewed as the least serious of the cases presented. While the conduct here indirectly caused harm to another person (the individual who was drafted in the place of the offender), it was assumed that this was not a harm intended by the offender. The intervening suspension of the draft and the assumption among many Defenders that the defendant may have been motivated by moral, ethical or political concerns also substantially affected the ranking of this offense.

B. Cases in Which no Consensus was Established Among the Defenders:

As noted earlier, in five of the cases the net range of the rankings was so wide as to reveal a lack of consensus among the Defenders as to the appropriate ranking of the offense. Analysis of these cases reveals that each involved competing factors which apparently were weighed quite differently by the individual Defenders. These are discussed below.

Case B (Pollution) - The net range of the rankings of this offense was 6 to 15, thus running the gamut from an upper middle seriousness rating to a low seriousness rating. Those who viewed this offense as more serious cited the calculated group decision to violate the law without regard to the harm to the environment. Those who viewed it as much less serious focused on the absence of the risk of any harm to human life and the absence of any indication of economic loss.

Case J (Hiker/Sniper) - This case also produced a very wide disparity in ranking, with the net range running from 2 to 9. This was due in part to an ambiguity in the facts, as some Defenders were uncertain as to whether the defendant intended to shoot the ranger. Others viewed the offense as of only middle range seriousness because of absence of any actual harm. Those who viewed this as a very serious offense (eleven Defenders ranked this 4, 3 or 2 in their response) focused on what they understood to be an intent to shoot and, therefore, do harm to another human being. These Defenders viewed the element of blameworthiness as far more important than the fortuitous fact that the ranger was not hit by the shot.

Case K (Car Salesman) - The net range of the rankings in this case extends from 7 to 13. Those who viewed this offense as more serious focused on the fact that it was premeditated, took place over a period of time, and caused economic harm to a sizable number of individual victims. Those who ranked this offense toward the low or low middle end of the scale focused on the fact that the offense was non-violent.

Case L (College President) - The Defenders came close to a consensus placing this offense in the lower middle range of seriousness, but did not as the net range was 9 to 14. Those who viewed this case as less serious focused on the fact that the defendant acted out of concern for the school and not for personal enrichment, and that, although the amount of money involved was great, there were no individual victims. For others, the amount of money and the premeditated nature of the fraud resulted in a more serious ranking.

Case P (Perjury) - The net range of the rankings for this case was 4 to 11, suggesting widely varied views on the severity of this offense. Those who viewed this offense as serious cited its impact on the integrity of the justice system. The reasons why other Defenders considered this offense as less serious are unclear, as there was insufficient comment provided with their responses. There was a suggestion by some Defenders that in the absence of an indication of the nature of the offense charged at the trial in which the perjury occurred, it was difficult to rank this as a serious offense.

III.

HOW SHOULD THE RELATIVE SERIOUSNESS OF OFFENSES BE ASSESSED?

The discussion above of the Defenders' rankings of the case examples in the Commission's questionnaire suggests that the assessment of the seriousness of particular offenses should be based

on a consideration of factors which measure both the gravity of the harm caused by the offense and the blameworthiness of the offender. The factors which emerge from the cases as most significant are the extent to which the offense poses a danger or the threat of danger to the physical safety of individual victims and members of the general public, the extent to which the offense causes economic loss to individuals and the number of individuals who suffer such economic loss, the extent to which the offense involves group activity, the length of time over which the offense was committed, the extent to which the offense involves a breach of a high public or sensitive trust upon which the confidence of the population in our institutions is dependent, the degree of planning and premeditation involved in the offense, the extent to which the offender intended and could foresee the harm inflicted by his behavior, and the motivation of the offender in committing the offense.*

Certain of these factors clearly weigh very heavily in the evaluation of the seriousness of an offense. Thus, for example, it is clear from the responses of the Defenders that the fact that an offense involves violence or the threat of personal injury to others is considered an important factor which militates in favor of a high seriousness rating. This reflects the general public concern for

* It should be emphasized that in determining which of these factors are present in a particular case, sentencing judges should look only to the offense of conviction and such other facts as are established in accordance with the procedures proposed in the "Federal Defender Position Paper on Fact Finding in Guideline Sentencing" which has been previously submitted to the Commission.

personal safety, a concern which is expressed in several of the provisions of the Crime Control Act of 1984. However, we urge that the Commission, in developing its seriousness rankings, avoid rigid categorizations which are based solely on this factor and which do not take into account the relevance of the other considerations noted above. The approach to ranking offense seriousness must be multi-dimensional and not based on simple classifications of offenses. Not all offenses in which an element of violence or the threat of physical harm is present are more serious than white-collar crimes. Considerations of the offender's intent or lack of premeditation must also be taken into account. In some offenses involving physical force, these other considerations may well warrant an assessment that the offense is less serious than a white-collar crime which involved planning, group action and widespread economic loss.

IV.

SHOULD THE MANNER OF COMMITTING AN OFFENSE AFFECT ITS RANKING MORE OR LESS THAN THE HARM CAUSED?

The question of whether the manner of committing an offense should affect its seriousness rating more or less than the harm caused is an extremely difficult one. In most cases, the manner employed to carry out an offense will itself result in an increase in the harm that is caused. Thus, for example, in Case F in the Commission's questionnaire, the bank robber's manner of committing the offense resulted in a greater harm than that caused

by the bank employee in Case G, because the use of a threat by the bank robber put the victim teller in fear and undoubtedly caused some psychological trauma. Similarly, if the bank robber in Case F had actually displayed and used a weapon, the difference in the manner between that situation and the facts as given in Case F would result in an even greater degree of apprehension and harm. Thus, although these situations the manner in which the offense is committed may be of more significance than the amount of money taken, the reason for this is the new and different kind of harm which arose from the differences in the manner employed.

On the other hand, if one were comparing the offense of the bank robber who realized \$5,000 in Case F with that of a bank officer who, as a result of embezzlements over a period of years, stole \$300,000 from the bank, the balance might be struck differently. In comparing these two situations, the added element of harm created by the bank robber's threatening note pales in contrast to the substantially greater amount of monetary loss caused by the bank officer. In such a case, the differences in the degree of monetary loss would seem clearly to be more important than the different manner in which the two offenses were committed.

With respect to the Commission's question regarding the counterfeiting and check offenses, the responses of the Defenders were varied. Some, focusing on the planning and sophistication involved in the production of the counterfeit currency and the number of individuals who might suffer losses as a result, viewed that as the more serious offense. Others, however, felt that the fact of

the theft of checks from individuals who were dependent on their Social Security payments rendered the check offense more serious.

IV.

ARE CERTAIN KINDS OF SANCTIONS MORE APPROPRIATE FOR CERTAIN KINDS OF CRIMES?

The Federal Defenders believe that the choice of which sanctions are appropriate in a particular case should depend on a careful evaluation of the offense and the circumstances under which it was committed. We believe that in all cases the Commission and sentencing judges should look to the least restrictive sanction which gives effect to the purposes to be served by the sentence. Incarceration should be utilized only where it is determined to be necessary to accomplish those puposes in the particular case. We recognize that the relative importance of different sentencing purposes (e.g., incapacitation, deterrence, rehabilitation) may vary from offense to offense and thus impact upon the choice of sanction. However,

we would like to reserve for a further submission our views on the appropriateness of particular sanctions for particular offenses.

	Organized Crime	Pollution	Murder	Draft Evader	Bribery	Unarmed Bank Rob.	Bank Embezzlement	Espionage	Heroin Importation	Hiker/Sniper	Car Salesman	College President	Camping/Fire	Soc. Security Checks	Felon/Gun	Perjury
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
C.D.Cal.	2	7	1	16	6	9	12	3	5	4	10	13	14	15	11	8
N.D.Cal.	3	15	1	16	6	7	8	4	5	2	10	14	13	12	11	9
W.D.Wash.	1	8	2	16	6	7	13	3	4	5	11	9	14	15	12	10
Colo.	2	9	3	16	6	7	13	1	4	11	10	14	13	15	12	8
Kansas	5	11	1	14	13	8	10	2	3	4	7	12	16	15	9	6
W.D.Mo.	2	11	1	14	8	7	9	6	5	2	12	10	16	15	13	4
E.D.Mo.	2	13	3	14	6	8	10	1	9	5	7	14	16	16	13	4
E.D.N.C.	1	10	1	16	8	7	12	4	5	3	9	11	15	14	13	6
W.D.Tenn.	4	14	1	15	8	7	9	3	5	2	13	10	16	12	11	6
M.D.Fla.	1	8	4	16	5	9	13	2	3	11	7	6	14	15	12	10
E.D.La.	1	9	2	14	6	7	12	4	5	3	8	10	13	16	11	15
Minn.	2	3	1	16	4	9	14	4	5	6	7	10	13	16	12	11
E.D.Mich.	2	6	1	15	7	8	12	4	3	5	11	13	14	16	10	9
N.D.Oh.	2	9	1	8	6	10	13	3	4	7	11	12	14	15	16	5
W.D.Pa.	1	15	1	14	4	5	9	3	6	7	8	10	16	11	13	12
E.D.Pa.	1	9	2	16	8	10	11	4	5	3	6	13	14	15	12	7
N.J.	2	8	1	14	6	9	11	5	3	7	10	13	15	16	12	4
Conn.	2	6	1	16	7	10	11	4	5	3	9	13	15	14	12	8
S.D.N.Y.	2	9	1	14	5	8	12	4	6	3	11	13	15	16	10	7
Okla.	3	7	1	15	2	10	11	4	5	9	8	14	12	16	13	6
W.D.Texas	3	15	1	14	7	6	11	1	4	5	7	7	16	13	12	10
S.D.Texas	1	8	4	12	7	6	9	2	3	5	13	10	15	16	14	11
Arizona	2	10	1	15	6	7	12	5	4	3	13	9	16	14	8	11
N.Mex.	1	3	4	16	6	9	9	2	5	8	11	14	13	15	12	7
P.R.	1	11	3	16	10	9	5	7	2	8	12	13	15	14	4	6

<u>Case</u>	<u>A</u> <u>Gross</u> <u>Range</u>	<u>B</u> <u>Net</u> <u>Range</u>	<u>C</u>	<u>D</u> <u>Cum.</u> <u>Total</u>	<u>E</u> <u>Cum.</u> <u>Rank</u>
A (Organized Crime)	1 - 5	1 - 3	High	49	2
B (Pollution)	3 - 15	6 - 15	No Cons.	234	9
C (Murder)	1 - 4	1 - 4	High	43	1
D (Draft Evader)	8 - 16	14 - 16	Low	368	16
E (Bribery)	2 - 13	4 - 8	Upper Middle	163	6
F (Unarmed Bk.Rob.)	5 - 10	6 - 10	Middle	199	7
G (Bk.Embezzlement)	5 - 14	9 - 13	Lower Middle	270	11
H (Espionage)	1 - 7	2 - 5	High	85	3
I (Heroin Import.)	2 - 9	3 - 6	Upper Middle	113	4
J (Hiker/Sniper)	2 - 11	2 - 9	No Cons.	131	5
K (Car Salesman)	6 - 13	7 - 13	No Cons.	241	10
L (College Pres.)	6 - 14	9 - 14	No Cons.	287	12
M (Camping/Fire)	12 - 16	13 - 16	Low	363	14
N (Soc.Sec. Checks)	11 - 16	12 - 16	Low	367	15
O (Felon/Gun)	4 - 16	9 - 13	Lower Middle	288	13
P (Perjury)	4 - 15	4 - 11	No Cons.	200	8

	Organized Crime	Pollution	Murder	Draft Evader	Bribery	Unarmed Bank Rob.	Bank Embezzlement	Espionage	Heroin Importation	Hiker/Sniper	Car Salesman	College President	Camping/Fire	Soc. Security Checks	Felon/Gun	Perjury
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Colo.	2	9	3	16	6	7	13	1	4	11	10	14	13	15	12	8
Kansas	5	11	1	14	13	8	10	2	3	4	7	12	16	15	9	6
W.D.Mo.	2	11	1	14	8	7	9	6	5	2	12	10	16	15	13	4
E.D.Mo.	2	13	3	14	6	8	10	1	9	5	7	14	16	16	13	4
E.D.N.C.	1	10	1	16	8	7	12	4	5	3	9	11	15	14	13	6
W.D.Tenn.	4	14	1	15	8	7	9	3	5	2	13	10	16	12	11	6
M.D.Fla.	1	8	4	16	5	9	13	2	3	11	7	6	14	15	12	10
E.D.La.	1	9	2	14	6	7	12	4	5	3	8	10	13	16	11	15
Minn.	2	3	1	16	4	9	14	4	5	6	7	10	13	16	12	11
E.D.Mich.	2	6	1	15	7	8	12	4	3	5	11	13	14	16	10	9
N.D.Oh.	2	9	1	8	6	10	13	3	4	7	11	12	14	15	16	5
W.D.Pa.	1	15	1	14	4	5	9	3	6	7	8	10	16	11	13	12
E.D.Pa.	1	9	2	16	8	10	11	4	5	3	6	13	14	15	12	7
N.J.	2	8	1	14	6	9	11	5	3	7	10	13	15	16	12	4
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N.Mex.	1	3	4	16	6	9	9	2	5	8	11	14	13	15	12	7
P.R.	1	11	3	16	10	9	5	7	2	8	12	13	15	14	4	6

<u>Case</u>	<u>A</u> <u>Gross Range</u>	<u>B</u> <u>Net Range</u>	<u>C</u>	<u>D</u> <u>Cum. Total</u>	<u>E</u> <u>Cum. Rank</u>
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