

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

May 14, 1986

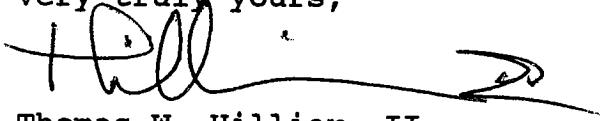
Hon. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Enclosed is a written submission addressing questions you sent to Ed Marek in anticipation of the hearing on a defendant's criminal record. As you noted in your letter, the Federal Defenders have previously addressed some of the issues which undoubtedly will be discussed at the May 22nd hearing. The enclosure speaks more specifically to your questions. Positions advanced in this supplemental submission are succinct due to time constraints.

Ed Marek has asked that I represent the Federal Public Defenders at the May 22nd hearing. I happily accepted his invitation and look forward to elaborating on positions advanced in our papers and answering any questions the Sentencing Commission may have concerning this most important topic. We appreciate the opportunity to appear and hope that we will be able to provide information which will assist you in accomplishing your considerable task.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Hillier', with a long horizontal flourish extending to the right.

Thomas W. Hillier, II
Federal Public Defender

TWH,II::klw/H0029

SUPPLEMENTAL SUBMISSION FROM FEDERAL DEFENDERS ON
DEFINITION OF "CRIMINAL HISTORY"; 28 U.S.C. §994(d)(10)

I

INTRODUCTION

On February 14, 1986, the Federal Defenders submitted a position paper addressing our thoughts on what information should be considered when determining an individual's "criminal history", as that term is used in 28 U.S.C. § 994(d)(10). The United States Sentencing Commission has scheduled a hearing on May 22, 1986 to discuss how a defendant's criminal record should affect his or her sentence. In anticipation of that hearing, Judge William W. Wilkins wrote the Federal Defenders inviting additional written input and requesting that we address specific questions set forth in the body of his letter. The purpose of this submission is to address the inquiries of Judge Wilkins and to refine thoughts presented in our paper of February 14, 1986.

II

DISCUSSION

In our first paper, we proposed that the Sentencing Commission narrowly define the term "criminal history", limiting the term to felony convictions. We then went on to suggest and discuss certain refinements, some of which are the subject of the questions presented in Judge Wilkins letter of April 29th. In the weeks since we presented our original paper, we have not altered our position that the term "criminal history" should be narrowly defined. We believe that our proposal will further the Sentencing Commission's goal of limiting sentencing disparity and will act to

limit litigation concerning sentencing issues.

A. Sources of Information Concerning a Defendant's Criminal History

Judge Wilkins has asked about the sources of information purporting to record a defendant's prior record and the reliability of that information. Time constraints have limited our ability to canvas all Federal Defenders concerning this question. However, it is the general experience of Federal Defenders that information concerning a defendant's prior record will generally come from FBI "rap sheets", printouts from the National Crime Information Center (NCIC), and similar printouts from information repositories located in each state. These informational sources are highly unreliable. "Rap sheet" entries rarely differentiate between misdemeanors and felonies. Arrests are usually listed without regard to whether or not a conviction followed. Information concerning disposition is generally vague and incomplete if provided at all. Entries include "administrative bookings". These entries reflect neither an arrest nor a conviction, but may indicate a transfer of a prisoner from one institution to another or the processing (fingerprinting) of an individual for federal employment purposes.

The task of providing a sentencing judge with reliable information concerning a defendant's prior record usually falls to the probation officer in charge of the presentence investigation. Unfortunately, that investigator usually begins his or her task with the defendant's "rap sheet". The ability to verify information

varies from case to case. Generally, the more serious the misconduct indicated on the "rap sheet", the easier it is to verify. Recordkeeping in courts of limited jurisdiction is often erratic and confusing. Thus, information concerning misdemeanor entries is often unverifiable and unreliable. It is with these difficulties in mind that we have suggested that the Sentencing Commission adopt a definition of criminal history which does not include misdemeanor convictions. We foresee protracted and unnecessary litigation if misdemeanors are to be considered. In addition, consideration of misdemeanors will necessarily require devising a scoring system for prior convictions which will be complex and possibly unmanageable. For example, the State of Minnesota has devised a system wherein misdemeanor convictions are assigned a fraction of a point for the purpose of calculating a defendant's criminal history score. See: Minnesota Sentencing Guidelines and Commentary, revised August 1, 1985, § II.B.301. Under the Minnesota plan, misdemeanor convictions can result in no more than one point total. However, the Minnesota Supreme Court has ruled that fractions of a point cannot be used in computing the criminal history score and therefore, cannot be used as a basis for departing from the guidelines. State v. Erickson, 313 N.W. 2nd 16 Minn. 1981). It is with these complexities and problems in mind that the State of New York determined that it would not use misdemeanor convictions when calculating a defendant's criminal history. We believe that there is sufficient flexibility under 28 U.S.C. § 994(b) to address a defendant's misdemeanor record in fashioning an appropriate sentence.

B. Felony and Misdemeanor Definitions

Judge Wilkins has asked how the Sentencing Commission should define felony and misdemeanor offenses in light of definitional disparity among states and between states and the federal system. It is our position that if an offense is classified as a misdemeanor in the jurisdiction where the conviction occurs, then it should remain a misdemeanor under the guideline adopted by the Sentencing Commission. Fundamental fairness requires this result.

In those cases where misconduct under state law results in a felony conviction that would have been a misdemeanor for the same misconduct in federal court, we believe that the misconduct should be classified as a misdemeanor under the Sentencing Commission's guidelines. A contrary approach would simply further a pre-existing disparity. For example, a particular state may classify certain misconduct as felonious despite the fact that most other states and the federal system classify the same misconduct as a misdemeanor. Should the Sentencing Commission fail to take into account such vagaries, similarly situated individuals will receive disparate sentences under our sentencing guidelines, a result which is at odds with the Commission's goal.

C. The "Decay Factor"

In our submission of February 14, 1986, we suggested that the Sentencing Commission adopt a system which would discount a conviction after 10 years of felony-free behavior in the community. This position is in accord with present Parole Commission policies.

The starting point for calculating the 10-year period should be the date on which the defendant is released from prison or, in cases where imprisonment is not imposed, the date of sentencing. We strongly oppose calculating the decay factor from the point of release from parole or probation supervision. While on probation or parole, an individual is interacting in the community. If the community conduct is crime-free, an individual should be given credit.

D. Juvenile Records

We have previously submitted thoughts concerning consideration of a juvenile record in calculating a defendant's "criminal history". We suggested certain limitations on consideration of juvenile records in an effort to assure sentencing uniformity. In that respect, Judge Wilkins asks whether juvenile convictions should be weighed the same as adult convictions. We have suggested that your guidelines include only juvenile convictions involving violent felonies. This suggestion speaks to Judge Wilkins' question. Oftentimes, non-violent juvenile misconduct results from peer pressure and immaturity which is "outgrown" in time. Such convictions should not be weighed in the same manner as an adult who is guilty of similar misconduct.

We believe that a "decay factor" is appropriate in considering juvenile records. We have already suggested that juvenile records involving misconduct before the defendant has reached the age of 16 should not be considered. Minnesota goes a step further. Under the Minnesota plan, prior juvenile felonies may

be considered provided that the offender has not attained the age of twenty-one at the time the felony was committed for which he or she is presenting being sentenced. This rapid "decay" of juvenile records would seem to further the general rehabilitative orientation of the juvenile process.

E. Arrest without Conviction Should not be Considered in a Defendant's Criminal History

The Federal Defenders strongly oppose a definition of criminal history which includes arrests. We have addressed this concern in our February 14th paper. Disparity and unfairness will prevail if this limitation is not adopted. Moreover, sentencing hearings will become protracted and appellate review will increase significantly. This litigation will occur because arrest records are grossly unreliable as indicators of criminal orientation. An arrest may be the result of negligence, harassment or mistake. Unquestionably, innocent citizens are arrested daily. To the extent that an individual's arrest record reliably shows antisocial behavior, the sentencing judge is left with sufficient flexibility under 28 U.S.C. § 994(b) to consider the same.

F. Multiple Convictions

Another area of concern involves those cases where multiple convictions flow from a single course of misconduct. Indictments frequently contain several charges even though the misconduct involved a single course of activity. For example, a drug importation may result in three felony charges: conspiracy, importation and possession with intent to deliver. It is possible

that a defendant will be treated differently from jurisdiction to jurisdiction depending upon plea and charge bargaining policies of the United States Attorney. An individual in New York may strike a bargain which allows him to plead to a single count of the indictment. In Texas, the "bargain" may require pleading to three counts. It is our position that multiple convictions flowing from a single course of conduct should be counted as only one conviction. Neither the number of convictions nor the type of sentence imposed should control. A contrary guideline will necessarily factor the prior disparity into the present practice. In cases involving multiple convictions flowing from a single course of conduct, the most serious conviction should be used in calculating the criminal history score.

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FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

June 10, 1986

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

Dear Judge Wilkins:

Enclosed is a follow-up to testimony presented at the May 22, 1986 hearing concerning a defendant's prior record. I am sorry for the delay -- circulation of my comments to other Federal Defenders invariably causes a time lag. I hope your Committee has not been inconvenienced and will have an opportunity to consider the enclosure.

Please let me know if there is need for additional input.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

TWH,II:klw/W0043

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

June 10, 1986

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

Dear Judge Wilkins:

I am writing as a follow-up to testimony recently presented on behalf of the Federal Defenders concerning scoring of a defendant's prior criminal history. First, I would like to again express my thanks for having had the opportunity to appear and discuss this important issue. It was an educational and rewarding experience, one I will not soon forget.

One important area of concern was not addressed during written or oral testimony presented on behalf of the Federal Defenders. After I had testified, a panel of probation officers appeared. Several Commissioners asked the panel for opinions as to whether scoring of a prior conviction should be based upon the offense of conviction or upon information "reflecting the overall circumstances" of the prior offense. At least two of the probation officers seemed to support a guideline which would take into account the overall circumstances of the prior conviction. The Federal Public Defenders believe that such an approach would be grossly unfair and would pose the probability of substantial litigation and controversy at the sentencing hearing. We emphatically favor a guideline system which scores only the prior offense of conviction. Our reasons are as follows.

First, through submission dated February 14, 1986 concerning "fact finding in guideline sentencing," we discussed several constitutional and practical problems involved in using unadjudicated facts as a basis for determining a particular guideline. In that paper, we were discussing the use of unadjudicated facts in assessing a guideline for the offense of conviction presently under consideration by the sentencing court. The constitutional and practical arguments set forth in that paper are equally relevant here. In that paper we

argued that, absent an admission by the defendant or a finding of guilt following trial, unadjudicated facts must not be used to enhance a sentence.

Constitutional and practical concerns related to scoring of prior convictions are even more acute and require a more restrictive scoring system. Defendants appearing before sentencing courts often have records which include convictions which are five, ten or fifteen years old. Probation officers who testified on May 22 indicated that the older a prior offense, the more difficult it is to develop reliable information concerning the circumstances of the offense. If the Sentencing Commission establishes a policy which takes into consideration the "overall circumstances" of the prior offense, then the presentence reporter will be left with the unenviable and perhaps impossible task of uncovering uncontested facts related to those "overall circumstances." This would seem an impractical approach.

Second, as all who have had contact with the criminal justice system are aware, prosecutors frequently "overcharge" cases knowing full well that the overcharging will encourage plea bargaining. Thus, a homicide charged as murder in the first degree may be properly disposed of as murder in the second degree or some lesser offense. Probation officers testifying on May 22nd voiced some concern over the scoring of offenses which have been "bargained down." There seemed to be an assumption that the greater offense was more truly indicative of the misbehavior. However, our experience is the opposite. Rarely, if ever, do plea bargains result from prosecutorial generosity, improper influence or the like. More frequently, plea bargains result from the prosecutor's accurate evaluation of the strength of his/her case.

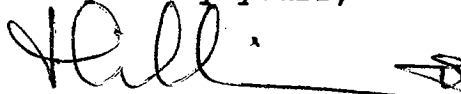
It is difficult to imagine the complexity of sentencing hearings should the Sentencing Commission require the examination of the "overall circumstances" of a defendant's prior criminal history. For example, are prosecutors and defense counsel going to be required to appear to explain why it is that certain plea agreements were struck? It would seem that such an approach would effectively challenge the integrity of the prior proceeding. How will the sentencing court evaluate challenged facts when witnesses are no longer available

Hon. William W. Wilkins, Jr.
June 10, 1986
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to testify concerning older prior convictions? If a charge is reduced because of "proof problems", should the sentencing court consider the possibility that the defendant would have been acquitted but for the plea bargain? (This result would seem as fair as assuming the defendant guilty of the greater offense.)

These inevitable problems speak loudly in favor of our suggestion that the offense of conviction and not the "overall circumstances" of that prior conviction should control the evaluation of a defendant's criminal history. Such an approach is consistent with fairness and the entire fiber of our criminal justice system. It is a practical approach and the one which we feel would best promote the Sentencing Commission's objective of preparing the best possible determinant sentencing system.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Hillier", followed by a horizontal line and a small flourish.

Thomas W. Hillier, II
Federal Public Defender

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