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July 3, 1986

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The Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
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Dear Judge Wilkins:

Thank you for the continued opportunity to be able to contribute to the Sentencing Commission's work on sentencing guidelines and now, sentencing alternatives. The openness of the Commission to the comments of practitioners is very much appreciated, particularly as regards to those policy issues that will frame the eventual sentencing guidelines to be used in Federal Courts across the country. It is to those policy issues that I would like to address my opening comments, with specific thoughts on the various sentencing alternatives to follow. The contents of this correspondence will form the basis for my testimony before the Committee on July 15, 1986.

First, I think it important to note that the Federal Courts work with a different type of offender than do the state courts. Unfortunately much of the research on sentencing, sentencing disparity, and alternatives to confinement have been based on sentencing in the state courts. Most violent crimes are left to local and state governments for prosecution and Federal prosecutions are for crimes that are nonviolent in nature, except for Bank Robbery, Kidnap and Assimilated Crimes Act cases. In fact, for the year ending June 30, 1983, only 6.4% of all criminal cases filed in U. S. District Courts were for Homicide, Robbery, Assault and Burglary. Some 39.6% of cases filed could be categorized as white collar offenses, with another 14.5% being drug cases. (1984 Sourcebook of Criminal Justice Statistics).

Secondly, I think it important to review the Congressional intent in the creation of the Sentencing Commission. My understanding of that is that the Commission was created to reduce disparity in sentencing. I think it important to note here that, while sentencing judges are criticized for disparity, much of the actual disparate treatment of offenders results from the action/inaction of law enforcement agencies and prosecutors. Most of the disparity occurs long before the sentencing function. Most prosecutions come from investigations that are initiated pursuant to policies which will vary from time to time and from one part of the country to another. Investigations and prosecutions are performed by

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political branches of government and their policies will change as elected officials attempt to perceive the public will. The prosecution makes the decisions on which cases to file and which cases to plea bargain. The prosecution can even present a stipulation for a specific sentence [Rule 11(e)(1)(c) of Federal Rules of Criminal Procedure].

It is interesting to note that much of the concern and debate on disparity comes from inmates. There is a need for concern about inmates' perception of fairness in the System, but there are also legitimate reasons for differences in sentences for what appear to be basically the same offense. We are a unified system because of our acceptance of the basic and fundamental principles of fairness reflected in the Constitution. The United States is also a diverse and complex society that has legitimate divergence in thought based on geography, religion, culture, mores and life-styles. The communities that judges work in hold those judges accountable for sentencing decisions. There are going to be legitimate community concerns about particular offenses and their punishment in different parts of the country. For example, the possession of cocaine is viewed differently in Aspen, Colorado, than it is in Middlebury, Connecticut.

The Sentencing Commission's role in all this should be to provide a basis for the articulation of a national philosophy towards sentencing and the establishment of general goals in pursuit of a fair and just sentencing process. The Commission's adoption of a clear policy on sentencing goals, strategies and programs for achieving those will be a major contribution to the Federal Judiciary's task.

Thirdly, it is my firm belief, based on many years experience working with a group of very dedicated jurists, that judges work extremely hard at formulating a just sentence. They agonize over their decisions, both before and after a sentence is imposed. The sentencing judge is in a very unique position to weigh all of the factors relevant to a sentencing decision. In your development of guidelines there must be a wide enough range to permit sentencing judges to function in their traditional role of balancing the collective interest of the public against the private interest of the defendant. That is necessary to reach a just result that is case specific and which can be perceived by the public and the defendant as both just and human. My recommendation, then, is that the Commission allow as much sentencing flexibility as possible to allow the court to respond to the variables that are inevitable with individual defendants who commit a multitude of diverse crimes in a multitude of ways.

Fourthly, I would recommend that the Commission adopt a philosophic framework for development of a national strategy that recognizes

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that crimes are knowingly and willingly committed by persons who, for whatever reason, chose to abandon the societal mores by taking, through force or guile, what is not earned through their own labor. That position recognizes that individuals are responsible for their behavior and are accountable to the society when they step outside what is acceptable. The establishment of a philosophic position that recognizes that individuals are responsible for their behavior, and accountable to the society, provides a vehicle for the establishment of position statements on how to sentence offenders.

The Comprehensive Crime Control Act, in the section addressing the imposition of sentence [18 USC 3553(a)], quite properly lists the defendant's treatment as last in priority in what is to be achieved with any particular sentence. The law recognizes that offenders that inflict or threaten physical harm to victims must be incapacitated, both for the safety of the society and as a message of deterrence for other would-be violent offenders. Maximum periods of community supervision should follow their incarceration. Individuals who commit isolated, nonviolent property crimes can then be sentenced to allow for reparation to the victim and society and for their own rehabilitation. It is important to note here that rehabilitation is the defendant's responsibility and not the courts or the Probation Service. Probation is meant to provide the opportunity for rehabilitation and it is in this area that alternative sentences such as restitution, fines, community service, etc. are better utilized.

Finally, philosophically, it is my perception that despite the important gains in the Victim Witness Protection Act of 1982, the victim is still a neglected part of the Criminal Justice System. It is my feeling that we have a good ways to go in providing a continuity of information and services to the victim so that they feel more a part of the System. The feelings we get from our interviews of victims is that they are on the outside looking in, with little or no impact on sentencing. Philosophically, I would suggest the adoption of a position that the Sentencing Commission will make every effort, through its policies, to: 1) protect the community; 2) punish, swiftly and surely, the criminal; and 3) involve the victim in the process.

The balance of my comments will address those specific sentencing options requested by the Commission, including incarceration and the probation based alternatives.

It is my belief that imprisonment is a legitimate societal sanction for lawbreaking. That sanction should not be limited to only those violent and serious criminal offenders that pose the most dangerous physical threat. The sense of the Senate resolution (October 12, 1984) on "nonviolent and non-serious offenders" makes

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little practical sense when it fails to recognize that the victim of a nonviolent white collar offender might well have been as traumatized as the victim of an armed robbery. The white collar offender, the drug trafficker or the individual who compromises our nation's secrets are as deservant of confinement as is the violent offender. All of the sentencing options must be available to the sentencing judge, with the degree of punishment based on the offense and the offender's characteristics.

Let me clarify an important issue, and that is that probation, in addition to treatment, is punishment. Living under the threat of incarceration is difficult -- our clients constantly reaffirm that to us. Probation conditions require that the individual offender work, support his dependents and stay away from other law violations. Probation supervision works because it monitors that behavior, confronts the client who chooses to live outside acceptable norms and forces his accountability or removal.

The Commission has asked for specific comments on intensive probation supervision. My review of the available literature leads me to conclude that intensive supervised probation was created at the state level in response to prison overcrowding problems or the need to "toughen" the image of probation and parole in the community. Prison overcrowding is a problem at the Federal level, but it is not the severe problem that the states are attempting to cope with. Additionally, as I noted earlier, the Federal Courts deal with a different type of client than do the state courts. The Federal Probation Service currently has a very workable method of classifying cases based on risk to the community and the needs of the individual offender. The Federal Probation Service, although not adequately staffed due to budgetary constraints, is in a much better position, personnel-wise, to properly supervise those persons who are "high activity". We are capable of, and currently provide, a quality supervision product to the Court. That supervision includes the monitoring of defendant's employment, family life, associates, attitude, etc. to either prevent or detect early any violative conduct. It is, therefore, my perception that there appears little purpose to be achieved with development of an "intensive supervised probation" category.

The Comprehensive Crime Control Act (18 USC 3583) does provide for a period of post-release supervision. If there were to be a need for more intensive supervision of any group of clients, it would be with this group. The Court, as an alternative to establishment of a separate supervision category, could order that the first six months or first year of that supervised release be "high activity" and could even mandate the number of personal contacts that the Probation Officer is to have with that particular defendant.

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The Commission has also asked if we feel a need for additional probation conditions. The mandatory and discretionary conditions provided for by 18 USC 3563(a) and (b) do include those conditions that are most commonly ordered as special conditions to a probation sentence. We would suggest the addition of two other alternatives for special conditions to supervision. Those would include: 1) a condition for financial disclosure. This condition is used infrequently but can be of major assistance to the Court in the supervision of white collar offenders (for example, mail fraud cases, securities and tax cases, etc.) where information on the individual or corporate defendant's financial condition is essential to the Court to discourage continuing criminal violation. The condition could include, where reasonably related to the offense and the rehabilitation of the offender, the requirement that defendant disclose his tax returns, business and/or personal financial records, etc. to the Court's Probation Department for review. 2) A special condition that provides for disclosure to third parties where the defendant poses a reasonably foreseeable risk to them through employment or otherwise. This could include; e.g., those individuals convicted of embezzlement who seek to continue work in positions of fiduciary responsibility. Probation Officers are coming under closer scrutiny on liability issues and a formal Court order, after due consideration and possibly hearings, would resolve liability issues for the Probation Officer and would clarify the expectations of the Court for that defendant's future conduct.

I would also suggest that some conditions of probation and/or supervised post-release be standard. Those would include the following conditions under 18 USC 3563(b):

1. Support dependents and meet family responsibilities.
5. Work at suitable employment or pursue training.
7. Refrain from frequenting specified places or associating with specified persons.
8. Refrain from excessive use of alcohol or any use of narcotic drugs without prescription.
9. Refrain from possessing firearm, destructive device or dangerous weapons.
15. Remain within the jurisdiction of the Court.
16. Report to the Probation Officer as directed.
17. Permit home visits or visits elsewhere as specified.
18. Answer questions by the Probation Officer and notify him of any change in address or employment.
19. Notify the Probation Officer if arrested or questioned by law enforcement.
20. Satisfy other conditions as the Court may impose.

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FINES

I feel that fines should be considered in virtually every case, but suggest that it be a preferred sanction in the following types of cases:

1. Traffic and driving offenses
2. Restraint of trade (15 USC 1) cases involving individuals or corporations
3. Organized crime cases involving illegal gambling, bookmaking or racketeering
4. Drug cases, where the primary motivation is financial gain. Fines imposed in these cases must be punitive to ensure they are not absorbed as merely a cost of doing business.
5. Crimes resulting in financial loss to the Government, for example, income tax violations, false statements and claims, etc.

Fines would be particularly appropriate where individuals victims can't be identified or where attempts to determine restitution would legitimately overcomplicate the sentencing process (per the Victim Witness Protection Act).

DETERMINING THE AMOUNT OF FINE

I believe it appropriate to base the amount of fine on the financial gain to the defendant, loss to the victim(s), and the ability to pay a fine on defendant's part. Again, the Comprehensive Crime Control Act at 18 USC 3572 and Victim Witness Protection Act at 18 USC 3579 provides the Court sufficient latitude to take into account relevant factors in determining the amount of a fine. The essential element here, again, is that the Court must have sufficient latitude to consider relevant factors before arriving at a decision on whether to fine and how large a fine to impose.

The Victim Witness Protection Act, as regards restitution, is well written on this point when it requires the defendant to carry the burden of establishing ability to pay. The Court, after appropriate hearings, can make judgements based on projections for defendant's future earning ability. Those decisions can be based on age, education, intelligence, past employment history, etc.. I doubt there is a formula devised yet that can take into account the various factors that the Court can consider in arriving at the amount of fine to impose. However, there is interesting research available from the National Institute of Justice. I have enclosed a copy of that research, should the Commission wish to peruse it. There is some interesting information there on a "day-fine" system used in Sweden and West Germany that involves

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determining "units of punishment." Those determinations are based on offense severity, offender characteristics and the offender's ability to pay.

A final note on imposing fines needs to be addressed. The caution with fines is that, once imposed, they must be collected. Fines imposed as a condition of probation make the Court the collector and provide for sanctions if there is a wilful failure to pay. Fines not a condition of probation, at least under current law, become the responsibility of the Department of Justice through the U. S. Attorneys Office. It is my observation that there are wide variations among the different districts in collecting fines. It seems to me that without a uniform and aggressive policy in pursuing payment, fines are meaningless.

RESTITUTION

Financial reparation through restitution is a very important element in sentencing, even more so than fines, and should be considered in all cases where there is an identifiable victim who has suffered loss. My perception is that restitution must be a higher priority than either a fine or community service. The Victim Witness Protection Act, currently 18 USC 3579, mandates that the Court consider restitution for victims of the offense regardless of any other sentencing sanctions. The law, and I believe it is well written, requires a combination of sanctions. The Comprehensive Crime Control Act mandates that persons convicted of a felony abide by at least one condition set forth at 18 USC 3563(b)(2) -- fine, (b)(3) -- restitution, or (b)(13) --community service. The best approach, and the one that seems to be mandated by the statutes, is that all the alternatives be considered by the Court in virtually all cases.

COMMUNITY SERVICE

The Administrative Office Monograph, Community Service: A Guide for Sentencing and Implementation, is close to completion and is a well thought out document that will provide adequate direction to the Court and its Probation Department. I do feel that community service is a criminal sanction for the defendant's wrongdoing and because of that the defendant, not the Probation Officer, must be responsible for the development of the community service proposal. The Probation Officer, for the Court, must approve and monitor the approved community service project closely to ensure that the sentencing objectives of the Court are met. I also feel that the cooperating community service agency is going to need to know what the Court's objectives are with a particular sentence and must also know what that individual defendant was convicted of, primarily to avoid third party risk issues.

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The community service alternative to both fine and imprisonment has gained increasing acceptance by the Courts. There are obvious advantages to the community of having a pool of manpower available to use in worthwhile projects. There are also advantages for criminal defendants to be involved in the community. For the person that lacks basic job skills, community service can provide an opportunity for a work-type experience. For the overachieving "yuppie", convicted of securities violation, it can provide an opportunity to work in projects for the handicapped where they can see that daily living is a struggle for survival for many.

HOUSE ARREST

The research materials that I have been able to review suggest that house arrest is used predominately by the states as an alternative to alleviate overcrowding in the prisons for a fairly select group of nonviolent offenders who are motivated to make it work. This sanction would seem appropriate for persons convicted of driving while intoxicated or other similar offenses. We do have a number of those cases, however, have been able to adequately curtail/monitor their activities through use of residential community treatment centers, alcohol treatment programs, etc. We also think it possible to place such persons on the National Crime Information Center computer tracking program so that we could learn immediately of any law enforcement contact. In summary, I believe there are adequate resources already employed in the Federal System without having to utilize house arrest or electronic surveillance.

The opportunity to address the Commission is appreciated, as is the openness of the Commission in seeking input from the field. That communication process will be critical in the future as sentencing guidelines are implemented. As a final recommendation, I would suggest that the Commission continue to utilize the expertise available in the Administrative Office of the U. S. Courts (including the Probation Committee and the Probation Division), selective probation representatives from the field, the Federal Bureau of Prisons and the U. S. Parole Commission so that feedback on the guidelines on all parties can be periodically reviewed and evaluated.

I do hope that the Commission will find some part of this communication helpful. It has been most gratifying to be able to participate. Thank you for this opportunity.

Sincerely,



William D. Graves
Chief U. S. Probation Officer

Enclosure
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