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United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500 South Lobby
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past five years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that, I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated.

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

Once the plants begin to flower, they stop new growth of branches and stem. Instead, all of the new growth consists of flowers in the male, which then dies, or the flowers of the unpollinated female. If the female remains unpollinated it continues to grow new flowers which spread along the branches and develop into thick masses commonly called buds or colas. Should the female flowers be pollinated, which occurs through wind pollination in nature, the plant stops growing new flowers and instead devotes its energy to developing seeds.

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Marijuana is a dioecious plant, there are separate male and female plants. Males make up half the population. The male is removed from the garden to prevent pollination of the females as soon as its sex is detected. The plant is discarded. If a garden is seized one day, the plant count might be much higher than the next day after males are removed.

Marijuana users prefer to smoke sinsemilla because it produces more weight of useable material and is easier to prepare for use than seeded flowers. The seeds cannot be used for intoxicating purposes and are commonly thrown away.

The size and yield of the plant is dependent on several factors.

1.) Variety.

Since there is no central source for seed, varieties have not been standardized as they have for commercial vegetable and flower crops. Growers either use seed that they have found in marijuana they bought for use, in the same way that a person might start a plant from an avocado pit, or find a source of seeds or cuttings. When they need new plants, they then use seeds which they have produced. Because of this each grower eventually has his/her own distinct variety. There are literally thousands of varieties and each has its own potential yield and prime conditions, climate and weather, gardening technique, water conditions, and date of planting.

2.) Cultivation Technique

No matter what the potential of a particular plant's genetics, cultivation processes determine the actual yield of a particular plant.

A.) Plants which are grown close together stunt side growth so that each has smaller buds with less branching than it would grow given more space. Unreleased DEA studies on spacing and yield confirm this. In these experiments, plants were placed on 6 foot centers (about 36 square feet) and yielded just one pound of bud per plant. A typical indoor garden may be the same size as the single plant grown by the DEA, six by six feet, a total of 36 square feet.

Rather than trying to grow large plants, growers often use a method dubbed, "sea of green". Plants are started four or more per square foot and are never intended to grow out of that space. This garden may have plants growing at the density of four plants per square foot, a total of 144 plants. Each plant would have a maximum yield under ideal conditions with a high yielding variety of only about one half ounce. The maximum yield of the garden would be four and a half pounds. If the grower were reproducing plants using cuttings, a small tray of them, with a size of less than two square feet, could contain 36 plants.

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B.) Plant growth and yield is determined in part by the amount of water the plant receives. Less water results in smaller growth. This is especially important in gardens which receive no irrigation. In parts of the country, there is no water for long periods during the growing cycle. This results in very small plants. Indoors, plants are often over watered, resulting in poor growth.

C.) Plants receiving low light or too intense a light have lower yields than plants receiving optimum light. Because of the necessarily surreptitious nature of growing operations and the need for them to remain hidden, plants are often grown in less than ideal conditions. They are often hidden under the shade of trees or in other areas where they do not receive direct sunlight. Plants receiving these conditions will grow much smaller than plants receiving direct sunlight. In areas of the country where the sun is very intense, plants will be stunted from over-radiation. Indoors, growers often try to grow plants using inadequate lighting, resulting in very low yields.

D.) Outdoors, late planting results in smaller plants, because the plants of a single variety flower at the same time no matter the size. Surreptitious growers often plant late so that there is less time for the plants to be detected and so that stay small, making detection less likely. Indoors, growers using the "sea of green" force the plants to flower when they are only 18 inches high. At maturity, the plants are only two to three feet tall, with no branching and a yield of only one half ounce.

3.) Conditions

A.) Soil fertility and fertilizing regimen plays a part in growth of plants. Plants receiving inadequate nutrients have smaller yields than those obtaining adequate amounts. No two farmers use exactly the same techniques, so each will have different results.

B.) Temperatures which are too high or too low retard both growth and yield. This affects all outdoor crops. Indoors, gardeners often find it difficult to control temperatures because of the heat generated by high intensity of the lights needed for indoor cultivation.

C.) Very high or low humidity lowers the growth rate and yield of the plant by slowing photosynthesis. This leads to lower yields.

D.) Rain may destroy a crop if it occurs close to harvest time because the ripening buds are susceptible to mold under conditions of high humidity and moisture. Once attacked the bud can be destroyed by the spreading fungus overnight.

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Lowering Level 42 through 24 as proposed (Sec 2D1.1) is a step in the right direction. The offense levels for what is now Levels 22-26 should also be reduced. Even a 2 point reduction would make the sentencing more appropriate.

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 12 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

(Commentary not yet available)

ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION)
Sentencing Alternatives and Procedures and
Appellate Review of Sentences
Approved February, 1993

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PART I. SCOPE OF CHAPTER; SENTENCE AUTHORITIES

Standard 18-1.1. Scope of chapter

(a) This chapter deals with sentencing of adult individuals or organizations convicted of felonies and misdemeanors [for which an individual offender may be sentenced to total confinement for six months or more].

(b) This chapter does not deal with capital punishment.

(c) This chapter does not deal with sentencing of juvenile offenders unless those offenders are tried and convicted as adults.

(d) This chapter does not deal with commitments to institutions for treatment programs, whether characterized as criminal or civil, unless a commitment is a part of a sentence imposed following conviction for an offense.

(e) This chapter does not deal with sentencing by military justice tribunals.

Standard 18-1.2. The legislative function

(a) The legislature and executive should determine the public policies of sentencing and enact the statutory framework for the sentencing system. The legislative function is performed best by statutes that articulate the societal purposes in sentencing, define the authorized types of sanctions, and set the maximum limits of those sanctions.

(b) The legislature and executive should establish the organs of government necessary to implement the legislatively determined policies within the legislative framework and delegate to them the powers appropriate to their roles.

Standard 18-1.3. The intermediate function; guided judicial discretion

(a) The legislature should create or empower a governmental agency to transform legislative policy choices into more particularized sentencing provisions that guide sentencing courts. The agency should also be charged with responsibility to collect, evaluate and disseminate information regarding sentences imposed and carried out within the jurisdiction. Guidance of judicial discretion in sentencing and development of an information base about sentencing are the basic aspects of what these Standards describe as "the intermediate function."

(b) The intermediate function should be performed by an agency with state-wide authority. The intermediate function is performed most effectively through a sentencing commission.

(c) If a jurisdiction elects not to create a sentencing commission, the legislature should either undertake the intermediate function itself or designate another organ of government to do so. If the function is delegated to the judicial branch, it should be made the responsibility of the highest state court or a state-wide judicial conference. ➤

Standard 18-1.4. The sentencing function; abolition of jury sentencing; sentencing councils; appellate review of sentences

(a) Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence.

(b) Sentencing courts may convene councils, composed of judges sitting on a sentencing court, as advisory panels to develop common criteria for sentencing decisions and to assist individual judges in determining the appropriate sentences in particular cases.

(c) The highest court of the state, if authorized to promulgate rules of criminal procedure, should establish rules for pre-sentence and sentencing proceedings.

(d) Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts.

PART II. PUBLIC POLICY LEGISLATIVE CHOICES

A. Societal Purposes

Standard 18-2.1. Multiple purposes; consequential and retributive approaches

(a) The legislature should consider at least five different societal purposes in designing a sentencing system:

(i) To foster respect for the law and to deter criminal conduct.

- (ii) To incapacitate offenders.
- (iii) To punish offenders.
- (iv) To provide restitution or reparation to victims of crimes.
- (v) To rehabilitate offenders.

(b) Determination of the societal purposes for sentencing is a primary element of the legislative function. The legislature may be aided by the agency performing the intermediate function.

B. Types of Sanctions

Standard 18-2.2. Types of sanctions authorized

(a) The legislature should enact a criminal code that authorizes imposition of the following types of sanctions upon persons convicted of offenses:

(i) **Compliance programs.** Compliance programs are sanctions intended to promote offenders' future compliance with the law. For individuals, compliance programs involve control or supervision of offenders within their communities, such as probation. For organizations, compliance programs may involve supervision or change in the management or control of an offender.

(ii) **Economic sanctions.** Economic sanctions include fines, monetary awards payable to victims, and mandatory community service. The legislature should not authorize imposition of economic sanctions for the purpose of producing revenue.

(iii) **Acknowledgment sanctions.** Acknowledgment sanctions include court-ordered communications to the public at large, or to particular classes of persons, of information about offenders' convictions and other facts about the offenses.

(iv) **Intermittent confinement.** Intermittent confinement is confinement during specified hours in a local facility or in an offender's residence.

(v) Total Confinement. Total confinement is incarceration in a federal, state, county, or municipal institution.

(b) The legislature should be receptive to the development and use of new sanctions not set forth in these standards.

(c) The legislature should enact an adult community corrections act to facilitate the establishment of a comprehensive adult community corrections program. The Model Adult-Community Corrections Act is a suggested example.

C. Costs and Resources

Standard 18-2.3. Costs of criminal sanctions; resources needed

(a) In designing or changing the criminal justice system, the legislature should consider financial and other costs of carrying out sentences imposed. For this purpose, the legislature should ensure that it receives a "sentencing impact statement" before it enacts new provisions in the criminal code.

(b) The legislature should appropriate the operating and capital funds necessary for each part of the sentencing system to perform its prescribed role. In particular, the legislature should provide adequate funding for alcohol and drug treatment programs.

(c) Presumptive sentences ideally should not be determined on the basis of funds or resources available.

(d) The legislature should recognize the consequences of not appropriating necessary funds, including the possibility that offenders will not serve appropriate and just sentences.

(e) In the event that the legislature fails to provide necessary funds, the agency performing the intermediate function should see that the aggregate of sentences imposed in conformity with legislative policies does not exceed the facilities and services provided for proper execution of those sentences. In particular, the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state.

D. Severity of Sanctions

Standard 18-2.4. Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

E. Determinacy, Disparity and Individualized Sentences

Standard 18-2.5. Determinacy and disparity

(a) The legislature should create a sentencing structure that enables the agency performing the intermediate function to make reasonably accurate forecasts of the aggregate of sentencing decisions, including forecasts of the types of sanctions and severity of sentences imposed, so that the legislature can make informed changes in sentence patterns through amendment of the criminal code, or the agency can do so through revised guidance to sentencing courts.

(b) The legislature should create a sentencing structure that sufficiently guides the exercise of sentencing courts' discretion to the end that unwarranted and inequitable disparities in sentences are avoided.

Standard 18-2.6. Individualization of sentences

(a) The legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders.

(i) Sentencing courts should be permitted to take into account facts and circumstances concerning the offense or the offender that constitute aggravating or mitigating factors.

(ii) Neither the legislature nor the agency performing the intermediate function should assign specific weights to aggravating or mitigating factors.

(b) The legislature should authorize sentencing courts, sentencing individual offenders, to take into account personal characteristics not

material to their culpability that may justify imposition of a different type of sanction or, in limited circumstances, a sentence of lesser severity than would otherwise be imposed.

F. Systemic Review

Standard 18-2.7. Systemic review

(a) The legislature should ensure that valid, current data are compiled on the operation of the criminal justice system, including data on the use and efficacy of each type of sanction.

(b) At least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed.

PART III. LEGISLATIVELY AUTHORIZED SENTENCES

A. Legislative Framework Generally

1. Current Offense Sentences

Standard 18-3.1. Ordinary offenses and offenders

(a) For each offense, the agency performing the intermediate function should guide sentencing courts to the presumptive sentence, i.e., the level of severity of the sentence and the permissible types of sanctions to be imposed in the ordinary case. For cases that are not ordinary, the legislature or the agency should establish criteria for imposing sanctions of more or less severity, or of different types of sanctions. Such criteria should include the factors aggravating or mitigating the gravity of offenses, the degree of offenders' culpability, and personal characteristics of individual offenders that may be taken into account.

(b) Presumptive sentences may be expressed in terms of ranges of severity of sanctions.

Standard 18-3.2. Mitigating factors

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

Standard 18-3.3. Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offenses.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sentences within the range and, if the factors are substantial, in departing upward from the range.

Standard 18-3.4. Personal characteristics of individual offenders

(a) The legislature and the agency performing the intermediate function should authorize sentencing courts, sentencing individual offenders, to consider their physical, mental, social and economic characteristics, even though not material to their culpability for the offenses, only as provided in this Standard.

(b) The legislature and the agency should permit sentencing courts to use information about offenders' financial circumstances for the purpose of determination of the amount or terms of fines or other economic sanctions.

(c) Except as provided in (b), the legislature and the agency should provide that sentencing courts may take into account personal characteristics of offenders not material to their culpability to determine the appropriate types of sanctions to impose or, if the characteristics are indicative of circumstances of hardship, deprivation, or handicap, to lessen the severity of sentences that would have been imposed.

(d) The legislature should specify that the following personal characteristics shall not, in and of themselves, be used for this or any other purpose with regard to sentencing:

(i) Race,

(ii) Gender or sexual orientation,

(iii) National origin,

(iv) Religion or creed,

(v) Marital status,

(vi) Political affiliation or belief.

2. Criminal History of Offenders

Standard 18-3.5. Criminal history; recidivism

(a) The legislature should authorize more severe sentences for convicted offenders with prior convictions. The extent of enhancement should be reasonably related to the sentence severity levels authorized for the offense of conviction.

(b) Standards for enhancement of sentence on the basis of criminal history should take into account the nature and number of prior convictions and the time elapsed since an offender's most recent prior conviction and completion of service of sentence. The legislature should fix time periods after which offenders' prior convictions may not be taken into account to enhance sentence; these periods may vary with the nature of the prior offenses.

(c) The agency performing the intermediate function should guide sentencing courts to the appropriate weight to be given to an offender's criminal history.

(d) If a jurisdiction has an "habitual offender" statute or comparable law regarding recidivists, the statute should provide that sentences imposed because of prior convictions should be reasonably related in severity to the level of sentence appropriate for the offense of current conviction.

3. Simultaneous Sentences for More than One Offense

Standard 18-3.6. Offense of conviction as basis for sentence

The legislature and the agency performing the intermediate function should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

Standard 18-3.7. Convictions of multiple offenses

- (a) The agency performing the intermediate function should direct sentencing courts to impose on any offender convicted of multiple offenses a consolidated set of sentences that appropriately takes into account all of the offender's current offenses.
- (b) For offenses that are part of a criminal episode,
 - (i) convictions of offenses whose elements substantially overlap should be merged for sentencing,
 - (ii) sentencing courts should not change the type of sanction or increase the severity of sentences for multiple offenses merely as a result of the number of counts or charges made from a single episode, and
 - (iii) where the separate offenses are not merged for sentencing, sentencing courts should impose sentences of a type of sanction and level of severity that take into account the fact that the separate offenses occurred as part of an episode.
- (c) If multiple offenses are of a kind that is graded by the amount of money or property involved, sentencing courts should be authorized and guided to determine the appropriate sentence by treating the offenses as a single offense and measuring its gravity by cumulating the amounts of money or property in the separate offenses.
- (d) Upon conviction of an offender for multiple offenses not within (b) or (c), the presumptive sentence should be derived by reference to the sentence appropriate for the most serious offense. If the court determines that an enhanced sentence is appropriate because of the other current offenses, the enhancement should ordinarily be determined as if the other current offenses were treated as part of the offender's criminal history or as factors aggravating the most serious offense.
- (e) Sentencing courts, sentencing an offender who is subject to service of a prior sentence, should be authorized and guided to take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

Standard 18-3.8. Multiple offenses in different jurisdictions

(a) The agency performing the intermediate function should direct sentencing courts, sentencing an offender who is subject to a prior sentence of total confinement imposed by a court in another jurisdiction, to take into account the unexecuted part of the prior sentence in shaping the sentence to be imposed.

(b) The legislature should make it possible for multiple sentences of total confinement imposed by different states to be served under one prison authority. A sentencing court should be authorized to impose a sanction of total confinement to run concurrently with an out-of-state sentence, even though the time will be served in an out-of-state institution.

(c) Outstanding charges of offenses committed in different states should be disposed of promptly.

(d) The legislature should authorize implementation of the principles in this standard through interstate and federal-state agreements.

**4. Offenders' Conduct in Response to Charges
As Affecting Sentence**

Standard 18-3.9. Acknowledgment of responsibility

(a) On guilty pleas, the agency performing the intermediate function should guide sentencing courts to impose sentences in accordance with Standard 14-1.8.

(b) In the absence of a guilty plea, sentencing courts should be guided to impose sentences of lesser severity or of a different type of sanction upon defendants who have acknowledged responsibility for their conduct.

Standard 18-3.10. Cooperation with prosecution

(a) The agency performing the intermediate function should guide sentencing courts to impose sanctions of lesser severity or of a different type upon defendants who have cooperated with the prosecution.

(b) The agency should ensure that the views of the relevant prosecutor are considered by the sentencing court.

B. Legislation as to Types of Sanctions

1. Authorization and Use

Standard 18-3.11. Authorization of sanctions

(a) The legislature should authorize sentencing courts to impose sentences composed of any one or more of the available sanctions.

(i) All types of sanctions should be available for sentences of individual offenders.

(ii) The sanctions of intermittent or total confinement are not feasible for sentences of organizations, but all other sanctions should be available.

(b) For each offense, the legislature should specify a maximum authorized severity level for each type of sanction.

(c) The legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.

Standard 18-3.12. Use of authorized sanctions; guidance to sentencing courts

(a) The agency performing the intermediate function should provide principles of preference among the types of sanctions to guide sentencing courts in the determination of sentences in light of the societal purposes to be served. The agency should recognize that

(i) Every criminal sanction is a deprivation of liberty or property and has the effects of punishing offenders, deterring criminal conduct and fostering respect for the law.

(ii) Sanctions other than total confinement may serve to punish and incapacitate offenders.

(iii) Rehabilitation of offenders is an insufficient basis, standing alone, for imposition of a criminal sanction not otherwise justified, or for imposition of a more severe sentence than otherwise justified. The possibility of rehabilitation or treatment of an individual offender is properly considered in choosing the type of sanction to impose.

(b) The agency should give priority to the use of sanctions that have the purpose and effect of promoting offenders' future compliance with the law. Compliance programs, alone or in conjunction with other types of sanctions, are an appropriate type of sanction for all offenders.

(c) Imposition of a sanction of total confinement may be proper -

(i) if the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) if other types of sanctions imposed upon an offender for prior offenses have proven ineffective to induce the offender to avoid serious criminal conduct,

(iii) if necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) for a very brief period, if necessary to impress upon an offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(d) Use of economic sanctions, alone or in conjunction with other types of sanctions, is appropriate for offenders with ability to pay the amounts ordered. Use of the sanction of restitution or reparation is not proper unless the amount of the claims can be ascertained without inordinate burden on the time and resources of sentencing courts.

(e) The legislature should ensure that levels of severity of composite sentences that combine sanctions of different types are not, in the aggregate, unreasonably severe.

(i) The agency performing the intermediate function should provide particular guidance on the maximum severity of composite sentences.

(ii) Appellate courts reviewing sentences should monitor the patterns of composite sentences being imposed and develop, through caselaw, standards of appropriate severity.

2. Compliance Programs

Standard 18-3.13. Compliance programs for individuals

- (a) The legislature should authorize sentence of an individual to a compliance program or programs. Sentence to a compliance program should be authorized as an appropriate sentence whether an offender has plead guilty, was convicted on plea of not guilty, or intends to appeal from conviction.
- (b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to a compliance program for a period specified in the sentence, subject to legislatively established maximum periods.
- (c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for individuals.
 - (i) Programs should promote offenders' future compliance with the law.
 - (ii) Programs should not be unduly restrictive of an offenders' liberty or autonomy. Where fundamental rights are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance.
 - (iii) Before an offender is sentenced to a program of education, rehabilitation or therapy, the court should consider whether the offender will participate in and benefit from the program, and
 - (iv) When an individual is required to pay a fine as a condition of a compliance program, the court should consider the offender's financial circumstances in determining the total amount of the fine and the schedule of payment. When an individual is required to make restitution to a victim as a condition of a compliance program, the court should consider the offender's financial circumstances in determining the schedule of payment.
- (d) The agency should ensure that sentencing courts set conditions of a compliance program that fit the circumstances of an individual offender. The basic condition of every sentence to a compliance program is that the offender lead a law abiding life. Discretionary conditions may deal appropriately with other matters to the extent that restrictions have a

reasonable relationship to the individual's current offense and criminal history, such as:

- (i) cooperating with the required terms of supervision;
- (ii) meeting family responsibilities;
- (iii) maintaining steady employment or engaging in a specific employment or occupation;
- (iv) pursuing a prescribed educational or vocational training program;
- (v) undergoing available medical, rehabilitative, psychological or psychiatric treatment, including periodic testing for illegal use of controlled substances;
- (vi) maintaining residence in a prescribed area or in an available facility for individuals sentenced to a compliance program;
- (vii) refraining from consorting with specified groups of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities;
- (viii) making restitution of the proceeds of the offense or making reparation for loss or injury caused by the offense;
- (ix) payment of a fine;
- (x) refraining from the use of alcohol or illegal substances or the possession of a dangerous weapon;
- (xi) performing specified public or community service.

The agency performing the intermediate function should develop a model set of compliance program conditions and guidance concerning their use.

(e) The legislature should authorize sentencing courts to set terms of a compliance program following release from total or intermittent confinement. The post-release program may, but need not, require supervision of an offender.

Standard 18-3.14. Compliance programs for organizations

(a) The legislature should authorize sentences of an organization to a compliance program. Sentence to a compliance program should be authorized as an appropriate sentence whether the organization has plead guilty, was convicted on plea of not guilty, or intends to appeal from conviction.

(b) The legislation should authorize a sentencing court to retain jurisdiction over an organization for a period specified in the sentence, subject to legislatively established maximum periods for various offenses.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for convicted organizations.

(i) Programs should promote offenders' future compliance with the law;

(ii) Programs may require that an organization cease or modify specified practices or activities that gave rise to the organization's criminal behavior, including a requirement that the organization engage in an internal study to identify such practices or activities;

(iii) Programs should not interfere with or delay the making of legitimate "business judgment" decisions by the organization's management, governing board, shareholders, or members.

(d) The legislature should authorize continuing judicial oversight of the overall activities of a convicted organization if the sentencing court finds from the organization's current offense and criminal history that the organization's criminal behavior (i) was serious, repetitive, and facilitated by inadequate internal management, accounting or supervisory controls, or (ii) presented a clear and present danger to public health or safety. Judicial oversight may be effected through adoption of monitoring, reporting, record keeping, and auditing controls designed to increase the organization's mechanisms for internal accountability, such as an independent audit committee, special counsel, and a separate staff system for an organization's governing board.

3. Economic Sanctions

Standard 18-3.15. Restitution or reparation

(a) For an offense that resulted in a victim's personal injury or loss of money or property, the legislature should authorize sentencing an individual or an organization to make restitution to the victim or to compensate the victim for losses suffered. The legislature should authorize a sentencing court to order payment to a fund for future disbursement if the identities of the victims or the amounts of their claims are not ascertained at the time of sentencing.

(b) In the event of injury or loss that the offender has special capacity to restore or repair, the legislature should authorize sentencing an individual or organization to perform such reparations.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of restitution and reparation.

(i) The sanction should be limited to the greater of the benefit to an offender or actual loss to identified persons or entities. Claimants seeking general, exemplary, or punitive damages, or asserting losses that require estimation of consequential damages, such as pain and suffering or lost profits, should be limited to their civil remedies.

(ii) The agency should provide that sentencing courts may require offenders to pay the full amount of the sanction forthwith or, taking into account the financial circumstances of an offender, to pay the amount in scheduled installments.

(d) The legislature should enact appropriate provisions to integrate the criminal sanction of restitution or reparation with a victim's right of civil action against an offender. The legislature should authorize sentencing courts to allow a defense or plea in bar, which might have been raised in a civil proceeding by a victim against an offender, as appropriate and relevant to liability imposed in the criminal proceeding.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a restitution or reparation sanction until the sanction is satisfied or the sentence is rescinded.

(f) The legislature should place responsibility for enforcement of orders of restitution or reparation on a designated public official. The

legislature should authorize that official to enforce the court order by use of any method available to enforce a civil judgment.

Standard 18-3.16. Fines

(a) The legislature should authorize sentence of an individual or an organization to a fine.

(b) The legislature should not prescribe a minimum fine for any offense.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of fines. Fine amounts may be set by use of one or more factors, including the following:

(i) the income and assets of the offender;

(ii) the amount of the victim's loss or the offender's gain; and

(iii) the difficulty of detection of the offense.

(d) The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.

(i) An offender's ability to pay should be a factor in determining the amount of the sanction. Sentencing courts, in imposing a fine on an individual, should consider the offender's obligations, particularly family obligations.

(ii) Sentencing courts, in imposing a fine, should not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring an offender to make restitution or reparation to the victim of the offense.

(iii) Sentencing courts, in imposing fines upon organizations, should not duplicate sanctions imposed under statutory provisions, such as antitrust laws or securities laws, for government or private civil actions for equitable relief, money damages, or civil penalties that have the same deterrent or remedial purpose as the sanctions of the criminal law.

(iv) Sentencing courts, taking into account the financial circumstances of an offender, should require the offender to pay the

full amount of a fine forthwith or to pay the amount in scheduled installments.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a fine until the fine is paid or the sentence is rescinded.

(f) The legislature should place responsibility for enforcement of fines on a designated public official. The legislature should authorize that official to collect a fine by use of any method available to enforce a civil judgment for a sum of money and, in appropriate cases, to seek a court order holding a delinquent offender in civil or criminal contempt.

Standard 18-3.17. Community service

(a) The legislature should authorize sentence of an individual or organization to perform a specified community service without compensation.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform a specified community service for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the community service sanction.

(i) Offenders should be ordered to perform community service only in programs of public agencies or non-profit organizations.

(ii) Sentencing courts selecting the particular community service to be included in an individual offender's sentence may, but need not, specify work possibly beneficial in rehabilitating an offender.

(iii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers or employees of the organization to work for a public agency or non-profit organization for the period of the sentence.

4. Acknowledgment Sanctions

Standard 18-3.18. Acknowledgment sanctions

(a) The legislature should authorize sentence of an individual or an organization to perform a specified acknowledgment sanction without compensation.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform an acknowledgment sanction for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the acknowledgment sanction.

(i) Sentencing courts selecting the particular acknowledgment sanction to be included in an offender's sentence may, but need not specify a sanction possibly beneficial in rehabilitating the offender.

(ii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers, employees of the organization, or agents hired from outside the organization to perform the acknowledgment sanction for the period of the sentence.

5. Intermittent Confinement Sanctions

Standard 18-3.19. Intermittent confinement in facility

(a) The legislature should authorize sentence of an individual offender to commitment in a facility on an intermittent basis that permits the offender to leave the facility for employment, education, vocational training, or other approved purpose, but requires the offender to return to the facility for specified hours or periods, such as nights or weekends.

(b) The legislation should authorize the sentencing court to retain jurisdiction over an individual sentenced to intermittent confinement for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of intermittent confinement.

Standard 18-3.20. Home detention

(a) The legislature should authorize sentence of an individual offender to remain at home except for specified periods when the offender may leave for employment, education or vocational training, or other approved purpose.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to home detention for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of home detention.

(d) Use of electronic monitoring devices as part of a sentence to home detention is appropriate, but the availability of such devices should not be a prerequisite for such sentences. The ability of an offender to pay the costs of such a device should not be considered by sentencing courts in determining whether to use the sanction of electronically monitored home detention.

6. Total Confinement

Standard 18-3.21. Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same conduct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive dates of release or in considering the release date of a specific individual, the provisions in this standard.

Standard 18-3.22. Costs, fees, and assessments

(a) The legislature may provide that an offender may be charged with reasonable court costs and, in an appropriate case, with reasonable costs associated with a correctional program or sanction included in that offender's sentence. The legislature should characterize such assessments as separate from offenders' sentences.

(b) The agency performing the intermediate function should provide that sentencing courts should take into account offenders' financial circumstances in determining whether to assess costs and the amount of costs assessed.

(c) The agency should ensure that sentencing courts, in assessing such costs, do not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring the offender to make restitution or reparations to the victim of the offense. The agency should determine whether assessments of such costs should be subordinated to sentence provisions for economic sanctions other than restitution or reparation.

(d) The agency should ensure that sentencing courts, in determining the amount of economic sanctions other than restitution or reparation, take into account the amount of costs assessed or to be assessed.

(e) The legislature should place responsibility for enforcement of cost assessments on a designated official. The legislature should authorize that official to enforce an assessment of costs by any method available to enforce a civil judgment. Non-payment of assessed costs should not be considered a sentence violation.

PART IV. THE INTERMEDIATE FUNCTION

A. General

Standard 18-4.1. Basic responsibilities of the agency performing the intermediate function

(a) Implementation of legislative policy determinations within the statutory framework of the criminal code requires a state-wide agency to develop a more specific set of provisions that guide sentencing courts to presumptive sentences and in the appropriate use of aggravating and mitigating factors, offenders' criminal history, and offenders' personal characteristics. This intermediate function is crucial to effective administration of a criminal justice system in a way that meets the established societal objectives, makes optimal use of available resources, and results in sentences that are reasonably determinate.

(b) The agency performing the intermediate function should be the information center for all elements of the criminal justice system. The agency should collect, analyze and disseminate information on the nature and effects of sentences imposed and carried out. The agency should develop

means to monitor, evaluate, and predict patterns of sentencing, including levels of severity of sentences imposed and relative use of each type of sanction. Information gathered by the agency is necessary to the legislature's performance of the legislative function, to the agency's performance of the intermediate function, and to the courts' performance of the judicial function. The agency's responsibility to provide information concerning the sentencing system extends to members of the bar and to the general public.

B. The Intermediate Function and a Sentencing Commission

Standard 18-4.2. Establishment of sentencing commission

(a) If a jurisdiction elects to establish a sentencing commission, the legislature should authorize the commission as a permanent body. The legislature should authorize appointment of commission members and chairman by the governor with the advice and consent of the senate or by the presiding judge of the highest state court. The legislature should provide that the commission be composed of lay persons and persons with varying perspectives and experience within the criminal justice system and with sentencing processes, including at least one representative of the judiciary, prosecuting authorities, defense bar, and correctional and probation agencies. In composing the commission, consideration should be given to the community's ethnic and gender diversity.

(i) Members of the commission should serve for a term of years long enough to ensure continuity and efficient functioning of the commission, but short enough to allow for the regular infusion of new perspectives and experience.

(ii) Members of the commission should be selected for their knowledge and experience and their ability to adopt a systemic, policy-making orientation. Members should not function as advocates of discrete segments of the criminal justice system.

(b) The legislature should designate the commission's responsibilities to include the following:

(i) promulgation and periodic revision of presumptive sentences and other provisions to guide sentencing discretion;

(ii) ongoing data gathering and research relating to sentencing policies and practices, including studies regarding compliance with the provisions promulgated by the commission, rates of disparities in

sentencing, and the past and projected impact of the provisions promulgated by the commission;

(iii) periodic reports to the legislature and the public regarding the commission's data gathering and research, and reports responsive to any particular queries posed by the legislature to the commission;

(iv) periodic recommendations to the legislature regarding changes in the criminal code or to the rule making authority regarding changes in the rules of criminal procedure;

(v) provision of information to the bar and the public regarding sentencing provisions promulgated by the commission and sentencing policies and practices;

(vi) development of manuals, forms, and other controls to attain greater consistency in the contents and preparation of presentence reports;

(vii) monitoring compliance with procedural rules, particularly as applicable to administrative and correctional personnel engaged in the collection and verification of sentencing data;

(viii) service as an educational agency for judges, probation officers, and for other personnel; and

(ix) administration of periodic sentencing institutes or seminars to discuss problems relating to sentencing and to develop improved criteria for the imposition of sentences.

(c) Adequate staff assistance for the commission is essential and should include persons familiar with recent developments in empirical criminology.

(d) The commission's empirical research capacity should be given highest priority and should be adequately funded by the legislature.

Standard 18-4.3. Creation of provisions to guide sentence discretion

(a) Presumptive sentences and other criteria to guide judicial sentencing discretion should be the product of cooperative effort by the legislature and the sentencing commission. The legislature should make a clear delineation of responsibility between itself and the commission with respect to the promulgation of sentencing policy.

(b) A new commission's first task, prior to the creation of sentencing provisions, should be a detailed empirical study of prior sentencing patterns in the jurisdiction. Projections regarding the impact of any proposed sentencing provisions should be developed. The legislature should require that the provisions promulgated by the commission reflect legislatively determined policy goals and judgments; presumptive sentences and related provisions should not be merely the product of reproducing or averaging prior sentencing practice.

(c) Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments.

(d) The commission should be required to observe the standards and procedures that apply generally to administrative agencies in rulemaking proceedings. Informal consultation with interested public groups and other criminal justice agencies should be encouraged.

Standard 18-4.4. Structure of provisions to guide sentence discretion

(a) The legislature should authorize the sentencing commission to transform the legislatively determined policy choices into more particularized sentencing provisions that guide sentencing courts to the levels of severity of presumptive sentences, within statutory limits, that are appropriate for ordinary offenders.

(b) The legislature should require the commission to indicate the types of sanctions that constitute the presumptive sentence for particular offenses. The legislature should further require the commission to specify the presumptively appropriate level of severity for each sanction.

(i) The sentencing provisions should direct sentencing courts to the types of sanction and severity of sanction determined with reference to the offense of conviction and the degree of culpability of the ordinary offender.

(ii) For the sanctions of fine, intermittent confinement or total confinement, the presumptive level of severity may be expressed in terms of a range. Sentencing courts, taking into account the material facts regarding the offense and the offender, should have broad discretion in determining sentences within the stated ranges. Ranges of presumptive sentences should be fixed so that sentences imposed are adequately determinate.

(iii) The sentencing provisions should indicate to sentencing courts the extent of adjustments in sentences appropriate to take into account an offender's criminal history.

(iv) The legislature should permit sentencing courts to impose a sentence of lesser or greater severity or types of sanctions different from the presumptive sentence if the court finds substantial reasons for so doing. Such circumstances are present:

(A) When a court finds a mitigating or aggravating factor that on balance justifies the court's determination, or

(B) When a court, sentencing an individual offender, finds a social, economic, physical or mental characteristic of the offender, indicative of circumstances of hardship, deprivation, or handicap, that justifies imposition of a less severe sentence.

(c) The legislature should require the commission to determine presumptive sentences for the sanction of total confinement with the expectation that, apart from credit for good time, the sentences imposed will determine the length of sentences served.

(i) The legislature should provide that the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations.

(ii) The legislature should provide that the commission may amend its sentencing provisions to reduce the length of presumptive sentences for the sanction of total confinement to relieve prison overcrowding. The amended provisions, when promulgated, should be applied to offenders still serving sentences of total confinement as well as to newly sentenced offenders.

C. The Intermediate Function in the Absence of a Sentencing Commission

Standard 18-4.5. Legislative agency to perform the intermediate function

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may elect to perform the intermediate function through an arm of the legislative branch.

(b) To assist the legislature in performing the intermediate function, the legislature should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The legislature should also charge that body with performance of all aspects of the intermediate function.

(c) The legislature should distinguish clearly between statutory provisions that carry out the legislative function, which should be controlling authority in sentencing proceedings, and provisions that carry out the intermediate function, which should be subject to exercise of discretion by sentencing courts.

Standard 18-4.6. Judicial agency to perform the intermediate function

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may delegate the intermediate function to the highest state court or a state-wide judicial conference. The intermediate function may be performed, in part, by rules of court.

(b) To assist the highest state court or judicial conference in performing the intermediate function, the supreme court should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The court or conference should also charge that body with performance of all aspects of the intermediate function.

(c) The supreme court or courts of appeal should have the authority to modify judicially created guidelines in the normal course of the courts' appellate review of sentences imposed.

PART V. SENTENCING PROCEDURES

A. Information Base

Standard 18-5.1. Information for sentence determination and system accountability

(a) The legislature and the agency performing the intermediate function should ensure that, in all cases, adequate information is developed,

through presentence investigations or other means, to enable sentencing courts and members of the bar to perform their sentencing responsibilities.

(b) The legislature and the agency should ensure that basic information is collected on all cases in which sentences are imposed to enable monitoring and evaluation of the operation of the sentencing system.

(c) The highest state court should ensure that regular educational programs are conducted to inform sentencing courts and members of the bar about community or state-wide programs and facilities that may be utilized in sentences of offenders.

B. Presentence Reports

Standard 18-5.2. Requirement of report

(a) The rules of procedure should authorize sentencing courts, upon their own motion or upon request of either party, to call for a presentence investigation and a written report of its results.

(b) The rules of procedure should require such investigation and report in all cases except that -

(i) The investigation and report may be omitted in a case if the offender waives them, with the consent of the prosecutor, and the court finds that it has sufficient information to sentence the offender.

(ii) The rules of procedure may provide exceptions for sentencing in cases where the costs of investigations and reports exceed possible benefits in the sentencing process.

Any sentencing court that lacks sufficient information to perform its sentencing responsibilities should have the power to order a presentence investigation and report.

Standard 18-5.3. Substantiation of information

The rules of procedure should provide that:

(i) Information in the presentence report should be limited to material facts which the preparer of the report, upon diligent inquiry, believes to be accurate and which, if challenged, can be substantiated;

(ii) The preparer of the report should be available to answer questions concerning the content of the report and the sources of information at a presentence conference and at the sentencing hearing;

(iii) If any material information in the report is challenged by either the prosecution or the defense, the preparer of the report is responsible to assist in determining whether the information can be sufficiently substantiated.

Standard 18-5.4. Contents of report

(a) The rules of procedure should require that agencies preparing presentence reports adhere to standards, developed by the agency performing the intermediate function, relating to the contents, preparation, and substantiation of presentence reports. The rules should require that all reports be made in writing.

(b) The rules should permit a sentencing court to vary the scope of reports in accordance with the court's determination of the information it needs to perform its sentencing responsibilities. A full presentence report may contain:

(i) A description of the offense of conviction, together with any aggravating or mitigating factors;

(ii) A description of any prior criminal convictions or juvenile adjudications of the offender;

(iii) A description of personal characteristics of an individual offender, even though not material to the offender's culpability, that may be taken into account in determination of the sentence;

(iv) Information about programs or resources, such as treatment centers, residential facilities, vocational training services, educational and rehabilitative programs, and other programs that might be incorporated in an individual offender's sentence;

(v) Information assessing the physical, psychological, economic, or social effects of the offense on any person against whom the offense was committed;

(vi) A description of the authorized types of sanctions and the ranges of severity, and reference to the guidance applicable to sentencing in the case;

(vii) An assessment of the impact of possible sanctions and collateral consequences upon an organizational offender, including employees, creditors and other third parties who would be directly affected by the sanctions;

(viii) A summary of the most significant aspects of the report and, if the sentencing court has so requested, a recommendation as to the appropriate sentence.

(c) A statement prepared by a victim under Standard 5.10 should be included as an attachment to the presentence report.

Standard 18-5.5. Timing of investigation and report

(a) The rules of procedure should provide that a presentence investigation must not be initiated until there has been a determination of guilt, unless the defendant, with the advice of counsel, has consented to such action.

(b) When a presentence investigation has been initiated prior to determination of guilt, the rules should provide that --

(i) In a case being tried, adequate precautions must be taken to assure that nothing disclosed by the investigation comes to the attention of the prosecution, the defense, the court, or the jury prior to a determination of guilt;

(ii) In a case in which a defendant has offered a plea of guilty, on request of the defense or the prosecution, the court should be authorized to examine the report prior to determining whether to accept the plea.

Standard 18-5.6. Confidentiality of presentence report

(a) The rules of procedure should provide that a presentence report not be made part of a public record and should be available only to the following persons or agencies under the conditions stated:

(i) The report should be available to the parties.

(ii) The report should be available to the sentencing court for the purpose of assisting it in determining the sentence.

(iii) The report should be available to all judges who participate in a sentencing council consideration of the case.

(iv) The report should be available to reviewing courts where material to an issue on which an appeal has been taken.

(v) The report should be available to the department or bureau responsible for supervision of offenders or with custody of individual offenders.

(vi) Reports should be available to sentencing guideline commissions or other bodies charged with performance of the intermediate function.

(b) Upon order of court, reports should be made available to persons or agencies having a legitimate professional or academic interest in the information likely to be contained therein. Examples of such persons or agencies would be a physician or mental health professional appointed to assist the court in sentencing, an examining facility, a correctional institution, or a probation or parole department.

Standard 18-5.7. Disclosure of report to parties

(a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.

(b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.

(c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

Standard 18-5.8. Disputes regarding information in report; stipulations; presentence conferences

(a) The rules of procedure should require each party to notify the opposing party, the court, and the preparer of the presentence report in writing of any part of the report which the party intends to controvert or supplement. Such notice should be required at a time sufficiently in advance

of the sentencing hearing to permit the preparer of the report to make an appropriate response.

(b) The rules should permit the parties to stipulate to a resolution of challenges to information in the report. The rules should provide that the resolution of any issue by stipulation must be preserved as part of the record of the sentencing proceedings.

(c) The rules should authorize a sentencing court to conduct a presentence conference to consider the possibility of a stipulation of the parties as to challenged information in the presentence report.

C. Victims' Rights in Sentencing

Standard 18-5.9. Notice to victims

(a) The rules of procedure should establish a mechanism for providing notice to victims of offenses of all important steps in the sentencing process. Notices should include information about victims' rights to participate in sentencing proceedings.

(b) If a victim is dead or unable to participate in sentencing proceedings, victims' rights should be afforded to the victim's heirs or guardian.

Standard 18-5.10. Victims' statements prior to sentencing hearings

(a) The rules of procedure should authorize victims to make statements concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require offices that prepare presentence reports to receive statements written by victims and to attach the statements to presentence reports.

Standard 18-5.11. Victims' statements at sentencing hearings

(a) The rules of procedure should ensure that victims are permitted to make oral statements at sentencing hearings concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require that, on motion of either party or on the court's own motion, the sentencing hearing be continued to permit the parties reasonable opportunity to respond to new issues of fact raised by the victim's statement.

Standard 18-5.12. Evidentiary effect of victims' statements

(a) A victim should be permitted to make a statement prior to or at the sentencing hearing without being put under oath as a witness.

(b) Information in a victim's unsworn statement should not be used as the basis for a finding of fact by the sentencing court.

(c) The right of a victim to make an unsworn statement should not preclude a victim being called as a witness at the sentencing hearing.

D. Sentencing Proceedings

Standard 18-5.13. Designation of sentencing judge

The rules of procedure should provide that the judge who presided in the guilt determination phase of a case should, if feasible, be the judge to preside in sentencing proceedings.

(i) If guilt was determined after a trial, the judge who presided at the trial should preside in sentencing proceedings unless there are compelling reasons in a specific case to provide otherwise.

(ii) If guilt was determined by plea, the judge who accepted the plea should preside in sentencing proceedings unless the system of rotating assignment of judges in a multi-judge court makes that unfeasible.

Standard 18-5.14. Time of sentencing

(a) The rules of procedure should ensure that sentencing proceedings take place as soon as practicable following determinations of guilt. Stated time limits, subject to extensions for cause, should be incorporated in the rules. A sentencing proceeding may be deferred to permit consolidation of multiple offenses.

(b) The rules should ensure that the calendar of sentencing proceedings is under the active control of the sentencing court.

Standard 18-5.15. Notice of possible departure from presumptive sentence

(a) The rules of procedure should require the parties, at a stated time before the sentencing hearing, to give notice in writing of intent to request the sentencing court to impose sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction. The notice should state the grounds of the request.

(b) The rules should require a sentencing court, considering on its own initiative imposition of sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction, to notify the parties and allow a reasonable time for response.

Standard 18-5.16. Consolidation of multiple offenses for sentencing; disposition of other charges

(a) The rules of procedure should provide that all outstanding convictions within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction be consolidated for sentencing in a single sentencing proceeding.

(b) The rules should permit a sentencing proceeding to be deferred to permit prompt disposition of other charges pending against the offender within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction and, if convictions ensue, consolidation of all convictions under (a).

(c) The rules should provide that, notwithstanding other venue requirements, a sentencing proceeding may be deferred to permit an offender, charged with other offenses within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction in the same state, to enter a plea of guilty to some or all of those charges in the sentencing court for purposes of consolidation of offenses in the sentencing proceeding.

(i) The rules should provide that permission to plead guilty in the sentencing court shall not be allowed without the written consent of the official responsible for prosecution of the charge.

(ii) The rules should provide that submission of a guilty plea under these circumstances is a waiver by the defendant of venue

provisions that would otherwise apply and, where formal charges have not yet been filed, a waiver of the right to a formal charge.

Standard 18-5.17. Sentencing hearing

(a) The rules of procedure should provide that counsel for both parties, the offender, and the victim have the opportunity to present submissions material to the sentence to the sentencing court.

(i) Both parties should be permitted to present evidence and information, to confront and cross-examine witnesses for the other side, and to offer rebuttal evidence and information to that adduced by the other side, contained in the presentence report, or otherwise presented to the sentencing court.

(ii) Both parties should be permitted to present argument on (A) the relevance and accuracy of any evidence or information presented to the sentencing court, (B) the application to the sentence determination of statutes and guidance by the agency performing the intermediate function, and (C) the type of sanction and the level of severity of sanction appropriate to the sentence determination.

(iii) The victim should be permitted the right to make an unsworn statement.

(iv) The offender should be permitted the right of allocution.

(b) The rules should require the prosecutor and the defense counsel to disclose to the court any agreement, in connection with a plea of guilty or nolo contendere, that included a provision on the sentence.

Standard 18-5.18. Findings of the sentencing court

(a) The rules of procedure should provide that the sentencing court resolve issues of fact material to the sentence to be imposed.

(i) The standard of proof on all issues of fact should be by a preponderance of the evidence.

(ii) The court may treat the unchallenged factual information in a presentence report as accurate.

(iii) The court may consider facts proven at the trial of the offender or facts established on the record of the acceptance of a plea.

(b) The rules should provide that the sentencing court make express findings on all disputed issues of fact material to the determination of the sentence imposed.

(c) The rules should provide that the sentencing court should integrate the sanctions of a current sentence with the remaining operative sanctions under any prior sentence of the offender.

Standard 18-5.19. Imposition of sentence

(a) The rules of procedure should provide that sentence be imposed in open court in the presence of the offender.

(b) The rules should provide that a sentencing court, when imposing sentence, should state or summarize the court's findings of fact, should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence.

(i) The statement of reasons may be relatively concise when the level of severity and type of sanction are consistent with the presumptive sentence, but the sentencing court should always provide an explanation of the court's reasons sufficient to inform the parties, appellate courts, and the public of the basis for the sentence.

(ii) If the sentencing court imposes a sanction other than total confinement, or in addition to total confinement, the court should ensure that the offender is informed, in detail, of the offender's responsibilities and obligations and, in general, of possible consequences of noncompliance with the terms of the sentence.

(iii) If the sentencing court imposes a sanction of total confinement, the court should inform the offender of the amount of credit the offender is entitled to receive for time already spent in custody and should ensure that the record accurately reflects time served.

(c) The rules should require the sentencing court to inform the offender of the right to appeal and of the time limits and procedures for initiating an appeal.

(d) The rules of procedure, or other rule of court, should require the attorney representing an offender at a sentencing proceeding to advise the

offender regarding possible appeal and to take the necessary steps to protect an offender's decision to initiate an appeal.

Standard 18-5.20. Record of sentencing proceedings

The rules of procedure should require a sentencing court to make a complete record of the sentencing proceeding. The record should include the following:

(i) A verbatim account of the entire sentencing proceeding, including all testimony received, statements made by defense counsel, the prosecutor, the offender, or the victim, and the statements of the sentencing court imposing and explaining the reasons for the sentence;

(ii) A verbatim account of such parts of the trial on the issue of guilt, or proceedings leading to the acceptance of a plea of guilty, as are material to the sentencing decision; and

(iii) A copy of the presentence report and of any other reports or documents made available to or used by the sentencing court in determining the sentence.

Standard 18-5.21. Sentence reports

(a) The rules of procedure should require that, following sentencing in all cases, a designated court official compile a standardized report that includes:

(i) Offense of conviction and the initial charge,

(ii) Characteristics of the offense and victim information,

(iii) Personal characteristics of the offender,

(iv) Disposition by bench trial, jury trial, or plea, and

(v) The sentence imposed.

(b) The rules should establish appropriate measures to protect the privacy of offenders or victims with regard to information, included in sentence reports, that is not otherwise a matter of public record.

PART VI. SENTENCING DISCRETION

Standard 18-6.1. General principles

(a) The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) A sentencing court should be guided in exercise of its sentencing discretion by standards promulgated by the agency performing the intermediate function. Courts should give serious consideration to the goal of avoidance of unwarranted and inequitable disparities in sentences.

Standard 18-6.2. Considering types of sanctions; composite sentences

(a) A sentencing court should consider all permitted types of sanctions and, subject to the guidance of the agency performing the intermediate function, should select the type of sanction or sanctions that is most appropriate for the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) In shaping a sentence that is a composite of different types of sanctions, a sentencing court should determine the level of severity for each type of sanction so that the composite sentence is no more severe than necessary to achieve the societal purposes for which it is imposed and does not result in unwarranted and inequitable disparities in sentences.

Standard 18-6.3. Using presumptive sentences: mitigating and aggravating factors and personal characteristics of individual offenders; criminal history

(a) In determining the sentence of an offender, a sentencing court should consider first the level of severity and the types of sanctions that are consistent with the presumptive sentence. The court should then consider any modification indicated by factors aggravating or mitigating the gravity of the offense or the degree of the offender's culpability, by personal characteristics of an individual offender that may be taken into account, or by the offender's criminal history.

(b) Following guidance of the agency performing the intermediate function, a sentencing court should take into account an offender's acknowledgment of responsibility or cooperation with the prosecution.

Standard 18-6.4. Sentencing to total confinement

(a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that -

(i) the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) other types of sanctions imposed upon the offender for prior offenses were ineffective to induce the offender to avoid serious criminal conduct,

(iii) the offender was convicted of an offense for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender's apparent need for rehabilitation or treatment.

Standard 18-6.5. Sentencing for more than one offense

(a) A sentencing court should impose a sanction appropriate to the offense of conviction and should not consider other offenses of which the defendant was not charged, which were dismissed prior to determination of guilt, or of which the defendant was acquitted.

(b) In sentencing an offender convicted of multiple offenses, a sentencing court ordinarily should impose a consolidated set of sentences that appropriately takes into account the offender's current offenses and criminal history.

(c) In sentencing an offender for offenses that were part of an episode,

(i) a sentencing court should not increase the severity of the sentence or change the type of sanction merely as a result of the number of counts or charges made from a single episode, and

(ii) where the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently.

(d) In sentencing an offender for an offense graded by the amount of money or property involved, a sentencing court ordinarily should determine the appropriate sentence by treating the offenses as a single offense and determining its gravity by cumulating the amounts of money or property in the separate offenses.

(e) In sentencing an offender for multiple offenses not within (c) or (d), a sentencing court should be guided by the presumptive sentence derived by reference to the sentence appropriate for the most serious current offense. Under guidance from the agency performing the intermediate function, a sentencing court may impose an enhanced sentence by treating other current offenses as part of an offender's criminal history or as factors aggravating the most serious offense.

(f) When multiple sentences of total confinement are to be served consecutively, a sentencing court should impose sentences that do not exceed a total term reasonably related to the gravity of the offenses.

(g) In sentencing an offender who is subject to service of a prior sentence, a sentencing court should take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

PART VII. CHANGE OF SENTENCE

A. Reduction in Severity or Modification

Standard 18-7.1. Authority to reduce the severity of sentences

(a) The rules of procedure should authorize a sentencing court, upon motion of either party or on its own motion, to reduce the severity of any sentence. The rules should restrict the time for reduction in severity of a sentence to a specified period after imposition of a sentence.

(b) The rules should prohibit ex parte communications with the sentencing court regarding reduction of sentence and should ensure that both parties receive notice of any proposed reduction.

(c) The rules should prohibit reduction in the severity of a sentence unless the sentencing court reopens the sentencing hearing and follows the procedures in Standards 18-5.17 through 18-5.21.

Standard 18-7.2. Authority to modify requirements or conditions of sentences in light of changed circumstances

(a) The rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender. Such sentences include:

- (i) a sentence to a compliance program,
- (ii) a sentence involving an economic sanction,
- (iii) a sentence to an acknowledgment sanction, or
- (iv) an intermittent confinement sanction.

(b) The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.

(c) The rules should provide that either party may move for modification of sentence or the sentencing court may act on its own motion. The rules should prohibit ex parte communications with the sentencing court regarding modification of a sentence and should ensure that both parties receive notice of any proposed modification with opportunity to respond.

Standard 18-7.2. Authority to modify requirements or conditions of sentences in light of changed circumstances

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- (i) a sentence to a compliance program,
- (ii) a sentence involving an economic sanction,
- (iii) a sentence to an acknowledgment sanction, or
- (iv) an intermittent confinement sanction.

(b) The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.

(c) The rules should provide that either party may move for modification of sentence or the sentencing court may act on its own motion. The rules should prohibit ex parte communications with the sentencing court regarding modification of a sentence and should ensure that both parties receive notice of any proposed modification with opportunity to respond.

B. Resentences Following Violation of Initial Sentences

Standard 18-7.3. Legislative authority to resentence offenders for violation of the requirements or conditions of sentences

(a) The legislature should authorize a sentencing court to resentence an offender, previously sentenced to a compliance program or a sentence involving an economic sanction, an acknowledgment sanction, or an intermittent confinement sanction, upon finding that the offender has committed a substantial violation of a material requirement or condition of the previous sentence.

(b) The legislature should provide that the effect of noncompliance or nonpayment should be determined after offenders' defaults and after examination of the reasons therefor.

(c) The legislature should provide that the sanctions available to a sentencing court imposing a resentence include all sanctions that were available at the time of the initial sentencing, although separate guidance by the agency performing the intermediate function may be appropriate.

(d) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the authority to resentence offenders.

(i) A sentencing court should consider first whether an offender's noncompliance or nonpayment is excusable and whether substantial performance of the initial sentence can be achieved by exercise of legal power to compel or induce performance, particularly by use of measures, including civil contempt, for enforcement of economic sanctions.

(ii) A sentencing court should not sentence an individual offender to total confinement unless the conditions of Standard 18-6.4 are met. Incarceration should not automatically follow noncompliance. In the event of nonpayment of an economic sanction, total confinement should not be imposed unless the offender wilfully refused to pay or failed to make sufficient bona fide efforts lawfully to acquire the resources to pay.

(iii) A sentencing court should determine explicitly the extent to which an offender's substantial compliance with the requirements or conditions of the initial sentence is to be credited toward the requirements or conditions of a resentence. In determining the severity of a resentence, a sentencing court should take into account an offender's substantial compliance with the initial sentence that cannot be credited toward a resentence.

(e) The legislature should prohibit sentencing courts from setting the terms of a resentence prior to finding of a violation of a requirement or condition of the initial sentence. The initial sentence should not specify the terms of a resentence in the event that the offender violates the primary sanction.

Standard 18-7.4. Procedures regarding violations of requirements or conditions of sentences

(a) The legislature should provide that offenders should ordinarily be called by summons to appear before the sentencing court to respond to charges of violation of a requirement or condition of sentence.

(b) The legislature should authorize arrest of an individual offender pursuant to a warrant of arrest if the court issuing the warrant finds probable cause to believe that:

(i) the offender has committed a substantial violation of a material requirement or condition of a sentence, and

(ii) the offender is not likely to respond to a summons to appear before the sentencing court.

(c) The legislature should authorize arrest without a warrant when the officer making the arrest has reasonable cause to obtain a warrant of arrest and reasonably believes that arrest is necessary to prevent the offender's flight.

(d) Legislation or a rule of procedure should direct that, upon arrest and detention of an offender for alleged violation of a sentence not involving total or intermittent confinement, a preliminary hearing should be held promptly to determine whether there is probable cause to believe that the offender has committed a substantial violation of a material condition of the sentence and that continued detention of the offender is necessary.

(e) Legislation or a rule of procedure should direct sentencing courts to hold hearings, within a reasonable time after preliminary determinations of probable cause, and promptly make final determinations whether the offender committed the alleged violation, provided, however, that final determination of an allegation of the commission of another offense should be made as provided in (h).

(f) The rules of procedure should provide that, at the preliminary or final hearing:

(i) the offender should receive adequate notice of the alleged violation, including a description of the surrounding facts and circumstances, and of the offender's rights at the hearing;

(ii) the offender should be entitled to representation by counsel and, if indigent, to have counsel appointed; and

(iii) both the prosecution and the offender should be permitted to subpoena witnesses, call and cross-examine witnesses, offer other evidence, and present arguments.

(g) The rules should provide that, with respect to the final hearing:

(i) the offender is entitled to discovery of all evidence intended to be used by the prosecution to show that a violation has occurred and to access to all official records concerning the offender's case;

(ii) the prosecution must establish a violation by a preponderance of the evidence;

(iii) the offender should be allowed to show mitigating circumstances or other reasons why the violation should not result in a resentencing;

(iv) the sentencing court should make explicit findings on all material issues of fact, and a statement of the court's reasons for its determination;

(v) the sentencing court should make and preserve a full and complete record of the hearing; and

(vi) the offender has the right to appeal a resentencing to the same extent as any other sentence.

(h) When an alleged violation is based solely on the alleged commission of another offense, the rules should provide that the final hearing on the alleged violation ordinarily should be held after disposition of the new criminal charge.

PART VIII. APPELLATE REVIEW OF SENTENCES

Standard 18-8.1. Jurisdiction to review sentences; reviewing courts

(a) The legislature should authorize appellate courts to entertain appeals of sentences. This should include:

(i) Review of a sentence imposed upon conviction based on a plea of guilty or the equivalent;

(ii) Review of a resentencing following violation of the requirements or conditions of a prior sentence; and

(iii) Review of a resentencing following reversal of a prior sentence by an appellate court and remand for resentencing.

(b) The legislature should authorize appellate review of sentences in the same courts empowered to entertain appeals from convictions. Specialized courts to review sentences only should not be established.

Standard 18-8.2. Purposes of appellate review

(a) The legislature should identify the following objectives of sentence review:

(i) To determine whether a sentence is unlawful or excessively severe under applicable statutes, provisions guiding sentencing courts, rules of court, or prior appellate decisions;

(ii) To determine whether the action of the sentencing court was an abuse of discretion; and

(iii) To interpret statutes, provisions guiding sentencing courts, and rules of court as applied to particular sentencing decisions and to develop a body of rational and just principles regarding sentences and sentencing procedures.

(b) Reviewing courts, and particularly the highest court of the state, should seek to make effective the legislature's public policy choices regarding sentencing. Reviewing courts should also seek, through caselaw, to develop principles for composite sentences.

Standard 18-8.3. Appeals by defense or prosecution

The legislature should authorize appeals from sentence at the initiative of the offender or the prosecution.

Standard 18-8.4. Disposition by reviewing court

(a) The legislature should authorize reviewing courts to:

(i) Affirm the sentence under review;

(ii) Reverse the sentence under review and remand the case to the sentencing court for resentencing;

(iii) Substitute for the sentence under review any other disposition that was available to the sentencing court.

(b) A reviewing court should set forth the basis for its decisions.

PART IX. DISPUTED TERMS OF TOTAL CONFINEMENT

Standard 18-9.1. Mechanism for resolving disputes about the length of a total confinement sentence

The legislature should designate an agency in the executive branch to resolve disputes about the correct date of release of offenders serving sentences of total confinement.