

**TESTIMONY FOR PUBLIC HEARING BEFORE
THE UNITED STATES SENTENCING
COMMISSION**

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RELEVANT CONDUCT

First of all, I would like to thank you for allowing me to testify before this Commission this morning. It is, indeed, an honor. My name is Steven Shaw. I represent Federal Paralegal Services of Coral Springs, Florida. Federal Paralegal Services is a paralegal firm specializing in post-conviction relief for federal inmates. We assist federal inmates in the preparation of the Habeas Corpus pursuant to 28 U.S.C. 2255, commonly known as "a 2255." We have been providing legal assistance in this area for about three (3) years now. The purpose of my presence here today is to bring to your attention, among other things, a common problem which we have discovered, relevant conduct and the criminal history. But first, let me tell you a short story.

A SHORT STORY ABOUT PRESTON GARY

Preston was born and raised in Ft. Myers, Florida. He worked there, got married there, and had children there. Although most people will say

that Preston is warm-hearted and a kind person, nevertheless Preston made a mistake. He got involved with drugs.

In 1986, he was arrest for possession of crack cocaine by the local police. He entered a plea of guilty, was placed on probation, but later violated and subsequently sent to prison. Again, he May 1990, Preston was arrested for sale and delivery of one rock of crack cocaine. By then, Preston was smoking crack; he did not earn enough money from work to support his habit, so he sold for consumption purposes. Again, he entered a plea of guilty, was placed on probation, violated it, then placed on house arrest, violated house arrest, and finally sentenced to prison. In 1992, he was released. Even though Preston had been punished for his crimes, he had not been cured of his addiction.

Hence, in 1993 he sold crack cocaine again. He was arrested by the same police officers, but this time the arrest was part of a join task force with federal and local authorities. In short, the Feds were involved. Preston was charged in a conspiracy to sell crack cocaine. The Indictment charged that the conspiracy began as early as January 1990 until his arrest in 1993. Of course, Preston entered a plea of guilty.

When the probation office had completed its pre-sentence report, Preston was scored as a career offender pursuant to section 4B1.1 of the

USSG. They concluded that based upon Preston's two prior drug arrests in 1986 and 1990, he could be sentenced as a career offender. Counsel did not object and the court adopted the PSI and consequently sentenced Preston to 22 years. End of Story.

THE PROBLEM

Preston should never have been sentenced as a career offender. Section 1B1.3(1)(A) of the USSG states, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (b) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonable foreseeable acts and omission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." In short, if it's related then it should be taken into account.

Please indulge me. I am not here to retry the case of Preston Gary before you. Rather, I want to demonstrate what is happening in the federal district courts around the country. Preston's case is typical of what has been happening to many unfortunate federal inmates. This relevant conduct has

been used as a tool to enhance the offense level and/or criminal history of an individual.

RELEVANT CONDUCT IS NOT A ONE-WAY STREET

Section 1B1.3 of the USSG should be revised. Relevant conduct should not be used as a tool for enhancement purposes only. Rather relevant conduct should be used as a device to derive a proper sentence. Too many times are prior drug convictions used against the defendants; when the prior convictions, according to the definition of relevant conduct, are clearly related and relevant to the instant offense. True, in section 4A1.2, application note 3, something is mentioned about related cases; but obviously this is not clear enough. Again, too many people are being enhanced to career offenders, or statutorily enhanced pursuant to section 21 USC 851 for prior arrest which are clearly related to, part of and relevant to the instant offense. For example, under section 21 USC 841, if a person is convicted for more than 50 grams of crack cocaine, he faces a minimum mandatory sentence of ten years. But, "if any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be

less than 20 years...," If he has two or more prior convictions, then he shall be sentenced to life. As you can see, the consequences are serious. Therefore, relevant conduct must be used to cover situations just like these. The vast majority of inmates in federal prison are drug offenders. Many of these offenders "graduated" to the federal level simply because local law enforcement, frustrated with arresting them previously for the same drug problems, referred the case to Federal authorities. The Feds make the arrest and get the conviction; then the probation office prepares the PSI. Thereafter, all previous drug convictions are counted against the defendant and thus, he receives an enhanced sentence. Unfortunately, many of these sentences are illegal.

In my professional opinion, in drug cases, the instant offense many times is directly related to the prior convictions. Typically, the sheriff arrests a person first for selling drugs, then years later the Feds get involved. Thereafter, the main focus seems to be on how much time the defendant could be enhanced to. Relevant conduct is used primarily for enhancement purposes as it relates to drug quantity. No one considers that the prior convictions are related to the instant offense. The majority of the time, during sentencing, counsel never objects to the issue. In my experience, counsel makes no objection because he/she is not aware that an argument

exists. Even the probation officer is ignorant to this subject. Once it has been explained, then suddenly the "lights goes off" and the corrections are made. My concerns are simple. How many people have been sentenced illegally because of this error? How many PSI's are incorrectly prepared? How many more attorneys, probation officers and prosecutors are ignorant to this issue? It has happened far too often for this to be dismissed as an isolated incident. My experience has shown that many of these errors have occurred during the period 1988 to 1992, although it still happens today. And the most distressing thing is the enactment of the Habeas Corpus Reform in 1996.

As you know, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in April 1996. This law places a limitation on the filing of the 2255. For many, after April 24, 1997, they are time-barred from filing a motion 2255. Let's just assume that there are some men/women who have been sentenced erroneously because their prior convictions were counted against them in the PSI. These sentences should never have been counted, yet due to ignorance at the time, no one knew this, the probation officer, the attorney, the prosecutor or even the Court. Then, after April 24, 1997, the inmate discovers the mistake. Under the current

provision, he would be time-barred from filing a habeas corpus motion for relief. Your actions today could help prevent this from happening.

Therefore, I implore you to clarify language in the sentencing guidelines to reflect that relevant conduct can be used to link the prior convictions to the instant offense, if it is related. Make it clear to the U.S. Probation office, U.S. Attorney office and all parties concerned.

If we must use relevant conduct as a "barometer" for sentencing purposes, then let's do it, but let's do it justly and accurately. I am now prepared to answer any questions.