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March 16, 1987

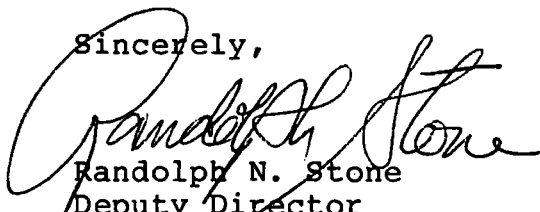
Hon. William W. Wilkins, Chairman  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Chairman Wilkins:

Enclosed herewith are the comments from the Public Defender Service for the District of Columbia on the Revised Draft Sentencing Guidelines.

We hope that our comments will assist the Commission in the development of fair and consistent guidelines.

Sincerely,



Randolph N. Stone  
Deputy Director

Enclosure

COMMENTS OF THE PUBLIC DEFENDER SERVICE  
FOR THE DISTRICT OF COLUMBIA  
ON THE REVISED DRAFT SENTENCING GUIDELINES

Submitted to  
THE UNITED STATES SENTENCING COMMISSION

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## INTRODUCTION

The Public Defender Service of the District of Columbia is an independent agency created by Act of Congress, D.C. Code §1-2701 et seq., Pub. L. 91-358, 84 Stat. 654 (1970) to provide representation to indigent persons charged with criminal offenses in the federal and local courts of the District of Columbia. PDS has long played an active role in the development of legislation and court procedures which affect criminal defendants, and has previously submitted comments to the Commission concerning the first draft of the proposed sentencing guidelines and the proposal to develop procedures for sentencing in capital cases.

In our view, the development of guidelines which will reduce sentencing disparity while achieving results in particular cases which are fair and consistent with the intent of Congress requires further study. The Revised Draft ("RD") guidelines are, in some respects, an improvement over the Commission's initial draft. Much more needs to be done before the guidelines are ready to be implemented following notice and comment. 28 U.S.C. §994(x).

While the Commission is not expected to produce a perfect system, it must produce one that is both more practical and fairer than the Revised Draft before the guidelines may be applied to real people. Two basic tasks must be accomplished. First, the Commission must develop a clearer, more coherent theory of sentencing. Until the Commission does so, it will be impossible to devise an offense severity scale or criminal

history score which serves the purposes of sentencing. A system devised without such a theory is arbitrary. Second, the Commission must devote more attention to the manner in which the guidelines will work in practice. Over 80% of federal criminal cases which result in convictions are resolved by guilty pleas rather than by trial, yet the Revised Draft devotes only 2 pages to the serious challenges which plea bargaining may present to the implementation of a guideline system. The Revised Draft generally has failed to grapple with the effects of the guidelines system on the criminal justice system as a whole, from the exercise of prosecutorial discretion, to the burden placed on probation officers, to the effect of the guidelines on prison populations.

The Commission recognizes that "[g]uideline sentencing is an evolutionary process ... that, over time, will be refined and amended as practical experience, analysis and logic dictate." RD at 1. For this very reason, the Commission's initial effort should be a less drastic upheaval of existing sentencing practices than is contemplated by the Revised Draft. The only certain result of these guidelines, if implemented, will be a significant increase in the proposition of federal criminal defendants sentenced to terms of incarceration and in the terms of their imprisonment. Even if this action rested on a solid theoretical base, it would be unsound for the Commission to adopt such a policy without a commitment from Congress to appropriate

the funds necessary to accomodate the vastly increased federal prison population. In our view, both good sentencing policy and a wise use of resources favor less, not more, incarceration, and more frequent use of community-based sentencing alternatives which have proved to be effective deterrents to criminal conduct.

### The Theoretical Framework

The Commission has adopted five general principles to guide its decisions:

1. sentences should be commensurate with the seriousness of the offense, reflecting the physical, economic and psychological harms to the victim and society caused by the offense;
2. sentences should aim to control crime through general deterrence, special deterrence, incapacitation, and rehabilitation;
3. sentences should be sufficiently punitive so as to make clear to offenders and to society that crime does not and will not pay;
4. to the extent that principles derived from retributive and crime control models conflict, justice for the public is the over-reaching goal; and
5. sentences should be effective, just, and efficient for the defendant, the victim and society.

RD at 2. These general principles implement 28 U.S.C. §994 and 18 U.S.C. §3553, which provide limited Congressional guidance for

the formulation of sentencing guidelines.<sup>1</sup> While unobjectionable as general principles, these policies do not lead to determinate, or even predictable results concerning guidelines for practical offenses or sentences in particular cases. No guideline or

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<sup>1</sup>/We recognize that the Commission can play only a limited role in the articulation of sentencing policy, and in the "rationalization" of sentencing laws to conform to this policy because of constitutional restrictions on the power of Congress to delegate legislative power to an administrative body such as the Commission. See generally Industrial Union v. American Petroleum Institute, 448 U.S. 607, 685-6 (1980) (Rehnquist, J. concurring); Note, The Fourth Branch: Reviving the Nondelegation Doctrine, 1984 B.Y.U. L. Rev. 619; Note, Rethinking the Nondelegation Doctrine, 62 B.U. L. Rev. 257 (1982); S. Barber, The Constitution and the Delegation of Congressional Power (1975); Aranson, Gelhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1 (1982). The specific range of punishments which may be imposed for a criminal offense, and the specification of what behavior may be punished are traditionally and exclusively legislative functions. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). Obviously, the Commission could not select guidelines for an offense which provide a longer sentence of imprisonment than the statutory maximum. Neither can the Commission provide for a lower sentence, under the guidelines, than a mandatory minimum sentence enacted by Congress. To a lesser degree, the nondelegation doctrine inhibits the Commission from making the fundamental value judgments required to resolve conflicts between the broad principles enunciated in the enabling legislation. Congress could not delegate the power to derive an "offense severity" scale out of nothing, since decisions about how seriously a particular act injures the public is a quintessentially legislative judgment. Nor could Congress delegate the power to undo Congressional judgments about the severity of various offenses, reflected in statutory maximum sentences, by classifying offenses with different statutory penalties under the same "guidelines." See page 7, infra.

Because the Commission can only implement moral and value judgments made by Congress, it may simply be impossible, and therefore an unfair criticism of the Revised Draft, for the Commission to articulate a more thorough-going theoretical framework for the guidelines. But this counsels, in turn, a set of guidelines anchored in existing sentencing law and practice.

sentence can be "tested" against these principles, as principles they are so general that they have little relevance to the task at hand. "Whether the allocation of punishment, is efficient, just, or effective cannot be assessed without specifying the criteria by which to judge the outcomes." NAS Study at 47.

#### A. Offense Levels

The Commission's general principles give the reader, and the Commission itself, little guidance about how to rate the seriousness of an offense. The Commission has failed to explain how it derived its offense levels, or why--and to what extent--it has departed from Congress' judgment of the relative seriousness of offenses. Several empirical sources of information about offense severity are available. One is existing sentencing practice. The Commission apparently has available to it a statistical "projection" of sentences for first offenders for a variety of federal crimes, based upon a sample of actual sentences in 40,000 cases. Whether or not the statistical analysis is accurate, since it is not based on actual first offender sentences but on a regression analysis which allows the statisticians to factor out portions of sentences based on prior criminal record, this data does give the Commission some insight into the hierarchy of offense severity, as perceived by current federal district judges. Of course, these judgments are those of unelected members of the judiciary, not members of Congress. But they are important for

two reasons: (1) to some extent judges do mirror the values and attitudes of their community; indeed this in large measure explains the greatest source of disparity in federal sentencing--the different perception of the seriousness of offenses in different areas of the country; (2) to work, the guidelines should be minimally compatible with the views and practices of those who will have to apply them. Otherwise, the guidelines will be undermined by formal but not substantive compliance, see National Academy of Sciences, Panel on Sentencing Research, Research on Sentencing: the Search for Reform 29 (1982)("NAS Study").<sup>2</sup>

The second important source of information about how serious offenses are--purely from the standpoint of "just desserts" sentencing--is federal law. Congress has provided maximum, and in some cases minimum, sentences for every offense. Although the federal criminal code has rightly been described as a patchwork, it is for Congress, not for an administrative body within the judicial branch, to decide when Congress has provided different penalties for the "same" offense through some error of judgment or lapse in attention, and when the difference has resulted from

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<sup>2</sup>/Of course, the federal guidelines, like the Minnesota guidelines for which the NAS study found a high degree of substantive compliance, id. at 29-30, have an "external enforcement mechanism: in the form of appellate review. As we note, pages 17-19, infra, appellate review may be ineffective in the vast majority of cases which are resolved by guilty pleas. Id. at 180.



a conscious decision to provide greater protection to some interests than to others. A good example is the Commissioner's decision to treat theft and embezzlement as "essentially equivalent." Commentary, RD at 27. There are certainly arguments to be made for this position, but embezzlement differs from theft because it involves a breach of trust. The Commission views breaches of trust seriously; that much is evidence from Part C of the guidelines, which pertains to offenses involving public officials. Introduction, RD at 39. Likewise, elsewhere in the guidelines offenses involving breach of trust are treated differently from offenses involving similar tangible losses or injuries. See §E252, RD at 62 (increase in base offense level if the defendant had a fiduciary duty under ERISA); §E256(a)(1), RD at 63 (increase in offense level if defendant is a union officer or occupied a position of trust in the union). The Commission's assessment of the importance of "breach of trust" as a characteristic of an offense is inconsistent. In any event, the Commission's justification of its policy decision to equate theft and embezzlement is inadequate.

The Commission has also not offered sufficient justification for guidelines which apply equal offense levels to offenses for which Congress has provided different statutory penalties. E.g. Compare 18 U.S.C. §641 (maximum penalty 10 years) with 18 U.S.C. §1702-3 (maximum penalty five years). Not only do the part B

guidelines lump offenses punishable by five years with those punishable by ten years, they also fail to take into account the misdemeanor penalties for thefts involving less than \$100, e.g., 18 U.S.C. §641; 18 U.S.C. §§1361-63; 18 U.S.C. §2113(b). Nor, in our view, does federal law justify an enhancement of the offense level for the theft or destruction of United States mail. 18 U.S.C. §1703 provides a maximum of one year penalty for the destruction of mail, no longer than other destruction or property offenses, but under the Commission's guidelines this offense merits an increased severity level of 5. §B213(a)(1).

Our discussion of the Part B guidelines is intended merely to illustrate a more general criticism of the Commission's failure to explain the relationship between its offense levels and the offense levels implicit in the existing statutory penalties. To what extent has the Commission departed (and may it depart) from these earlier Congressional judgments? To give another illustration, under the guidelines, blackmail in the form of a threat to report an illegal act, which is a misdemeanor offense, 18 U.S.C. §873, earns a severity level of 10, §B233 high enough so that anyone with any prior criminal record under the Criminal History Score will be ineligible for probation. The Commission has failed to articulate a reason for treating this as a more serious offense than theft of less than \$50,000. §B211. The Commission applies the same offense level to unlawful conduct

relating to a gambling ship, §E233. Again, this offense is punishable by a maximum of 2 years imprisonment, one fifth as much as Congress allows for many theft, embezzlement, and fraud offenses. Other offenses in the same category include involuntary manslaughter, §A213, which is punishable by a maximum of three years imprisonment (18 U.S.C. §1111), failure to register when no peacetime draft is in effect, §M246, which is punishable by a maximum of five years imprisonment (50 U.S. App. §462(a)) and simple possession of a schedule I or II opiate, §D221 which is punishable by a maximum of one year, 21 U.S.C. §844(a). If the offense severity levels in the guidelines simply reflect the personal moral judgment of the members of the Commission, serious separation of powers problems arise. And, in any event, the Commission must do more to justify and to explain its moral judgments.

#### B. Adjustments and Departures

The Commission's failure to relate its guidelines to a theory of sentencing is also apparent in the provisions relating to adjustments and departures from the guidelines. The most glaring example is the treatment of drug dependence. Section D314 states that "drug dependence is not a reason for imposing a sentence below the guidelines," but may, in some cases, justify a sentence above the guidelines. This statement conflicts with the legislative history of the Sentencing Reform Act, and makes

little sense as a matter of sentencing policy. The Report of the Senate Judiciary Committee on the 1984 Act states:

Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In the unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for "drying out," as a condition of probation.

S.Rep. 98-225, 98th Cong., 1st Sess. 173 (1983). Congress contemplates exactly the opposite of what the Revised Draft guidelines provide. It is clear that Congress did not intend, when it abolished the special sentencing provisions for youthful offenders and drug addicts, to erase these important considerations from federal sentencing law. Rather, Congress sought to promote uniformity "[b]y including such considerations in the formulation of sentencing guidelines." Id. at 120.

Congressional intent also reflects wise policy. Drug dependence is relevant to many sentencing principles. In part, the Narcotics Addict Rehabilitation Act, 18 U.S.C. §4251 et seq. was based on the belief that, an individual driven by addiction is less morally responsible for his or her actions than someone engaging in the same conduct without a drive which overbears (to some extent) free will and judgment. Moreover, since drug addiction may be treated, "rehabilitation" of drug dependent offenders directly promotes the interest in special deterrence and incapacitation.

tation. A person who commits crimes because of drug addiction will no longer pose the same threat to society if his addiction is cured.

The Commission's proposal seems to be guided by the notion that there are no effective treatments for drug dependence and that therefore at least some offenders should be punished more harshly because of their status as drug addicts. This policy conflicts with the constitutional principles articulated in Robinson v. California, 370 U.S. 660 (1962). It is also empirically unsound. Our country should be devoting more, not less, resources to the treatment of drug addiction. The Revised Draft seems to miss the fundamental difference between the treatment of drug addicts and a general repudiation of the so-called "medical model" of corrections. Drug addiction is a medical problem, and it can be addressed by means other than incarceration.

The Commission's apparent judgment that youth is only an aggravating factor in sentencing also conflicts with Congress' desire to incorporate the flexibility of sentencing for youthful offenders into the guideline system. S.Rep. 98-225 at 120. §D311 does not fulfill this purpose. But the Commission has offered no adequate reason for rejecting the widespread belief that youthful offenders should be treated differently because they are likely to have less judgment than adults. e.g., Eddings

v. Oklahoma, 455 U.S. 104, 115 (1982). Age, in this sense, is relevant to culpability, and also to specific deterrence and incapacitation. A young person is likely to be deterred from future criminal activity by a less severe sanction than an adult. Furthermore, imprisonment of the young with hardened adult offenders is likely to breed more and more expert criminals, rather than to reduce crime in the long run. See Barker v. Wingo, 407 U.S. 514, 520 (1972).

Apart from the merits of these disputes, it is troubling that the Commission has failed, in its published guidelines, to grapple with these issues in greater detail. The consent, and therefore the understanding, of the governed is vital to the functioning of a free society. But in some respects, the Commission's Revised Draft guidelines appear to govern by edict rather than by consent.

A similar, and equally troubling omission is Section Y218, which allows a departure of no more than 4 offense levels to reflect the effect of the defendant's diminished capacity on his or her responsibility for the offense. To begin with, Y218 must be read in the context of the radical change in the federal insanity defense in the 1984 Comprehensive Crime Control Act of 1984. 18 U.S.C. §20 narrowly limits the insanity defense, and excludes evidence that the defendant's ability to conform his or her conduct to the law was impaired. A departure of no more than

four levels hardly captures the potential range of mental impairments which directly affect an individual's moral culpability for an offense. Nor is the limitation of §Y218 to nonviolent offenses justified. The conjunction of §Y218 and the new federal insanity law may cause the unjust punishment of persons who are only minimally responsible for their actions under any system of punishment guided by moral principles. The only conclusion to be drawn from the Revised Draft is that the Commission has decided to elevate general deterrence concerns over retribution or "just desserts" in this situation. But it is doubtful that the punishment of the mentally impaired contributes significantly to the general deterrence of the population at large, because of their small numbers. At the margin, the benefit of this guideline towards deterrence is small, and far less than the harm it causes to our shared notions of culpability.

In our view, §Y218 is comparable to §Y228 (coercion/durress) and should be treated as an adjustment. The Commission should also permit a departure, without limitation, for both violent and nonviolent offenses, to take into account the offender's diminished capacity for his or her conduct.

### C. Criminal History

It is not clear what the Criminal History Score is designed to accomplish. The Commission should provide better empirical support if the Criminal History Score is to be defended as a good

predictor of recidivism and therefore of the need to incapacitate an offender. To us, the Score appears to overstate less serious criminal records. See NAS Study at 87. Sentences also escalate too rapidly. Without some solid empirical evidence that the Criminal History Score, as formulated, is an accurate predictor of future criminal behavior, which the Commission has not produced in the Revised Draft, uniform sentencing for like conduct is undermined without a corresponding gain to any other purpose of sentencing. It is not clear to us, for example, why a white collar criminal who defrauds investors of \$49,000 should be eligible for probation under the guidelines, while a mail carrier who destroys mail and has one prior conviction for a petty offense would not.

The Criminal History Score is also troubling because it builds race and class bias into the guidelines, despite the specific requirement of 28 U.S.C. §994(d). The Commission has limited judicial consideration of many factors long believed to have relevance to sentencing, such as the individual's family responsibilities. §D316, RD at 171. Yet the Commission perpetuates the disparity in sentencing of black and white, rich and poor, by escalating sentences based on prior record. Prior criminal record should, of course, play some important role in sentencing. The question is whether the Commission has allotted too large a role



to each single conviction, and whether it can justify the Score it has designed with empirical evidence.

The worst single feature of the Criminal History Score, and one which is not adequately explained by the Commission, is the use of juvenile adjudications. §A312(d)(2). As the Commission recognizes, §A312(d)(1), most jurisdictions provide for the transfer or waiver of juvenile court jurisdiction in most serious cases. This allows each state (or the federal government) to determine which types of offenses and which types of offenders should be treated as adult, with adult consequences including a lasting criminal record. Juvenile records are already used extensively in sentencing, despite the importance to the juvenile justice system of sealing records. NAS Study at 84. The Commission should not make matters worse by institutionalizing this practice under the guidelines. This is especially so because the evidence that race and socioeconomic class affects rates of arrest, "conviction" and incarceration for juvenile offenses is even stronger than for adult offenses. Krisberg, Schwartz, Fishman, Eiskovits, and Guttman, The Incarceration of Minority Youth, (monograph for the National Council on Crime and Delinquency) (1986).

The guidelines also fail to provide for convictions which are erased, expunged, or set aside under the provisions of the former Youth Corrections Act, 18 U.S.C. §5010 (1984), or analo-

gous state laws. Especially when prior state convictions are considered, this violates principles of comity and federalism. Respect for prior adjudications by state and federal judges requires that set aside convictions should be treated as a nullity for sentencing purposes, or, at most, should be counted under §A315 (adequacy of criminal history).

D. General

In our view, the work of the Commission is too important, and the consequences of criminal sentencing too severe, to use the Revised Draft as the basis for final sentencing guidelines. Even if additional time is needed, the Commission should rethink the guidelines in light of the policies which should guide criminal sentencing. We believe that the results will be more understandable, and therefore more acceptable to the public. The adoption of a sentencing scheme which treats many important human characteristics which we rely on in our daily assessment of blameworthiness as irrelevant should be undertaken with great caution, and only with a very clear articulation of the reasons for this action. Avoiding disparity means treating like cases alike. But this requires the Commission to determine which cases are alike. It is equally unjust to treat unlike cases as if they are alike, as to perpetuate the kind of disparity which prompted the creation of the Commission in the first place. See Coffee, The Repressed Issues of Sentencing: Accountability, Predictability

and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975 (1977).

### Practical Application

The vast majority of federal criminal sentences follow guilty pleas rather than trials. Most of these pleas result from negotiations between the government and the defense. The guidelines, as proposed in the Revised Draft, risk either a manyfold increase in the number of federal criminal trials, which would overwhelm judicial and prosecutorial resources, or a "black market" in sentencing which will undermine the guidelines. The Commission's failure to adopt adequate procedures for the resolution of factual disputes will also lead to great unpredictability. Either the guidelines will be implemented in a way which will violate the due process clause of the Fifth Amendment, or the workload of the federal courts will be multiplied by mini-trials of facts which must be established under the guidelines.

#### A. Effect on Plea Bargaining

The only acknowledgement of plea bargaining and its effect on sentencing is found at pages 173 to 174 of the Revised Draft. The ability of actors in the criminal process to undo reforms such as mandatory sentencing, presumptive sentencing, and even restrictions on plea negotiations by covert bargains is widely recognized. See e.g., NAS Study at 179-80. The Revised Draft attempts to control this problem by §A413, Ethical Standards for

Plea Agreements, which requires full disclosure of the relevant facts and circumstances of the offense in the agreement. In this way, the Commission hopes to prohibit "fact bargains." See NAS Study at 43. The Commission's hopes are unrealistic.

To begin with, the likelihood that a prosecutor and a defense lawyer (and client) will agree on the facts relevant to sentencing are much smaller than the likelihood of agreement on a charge or ultimate sentence. It may well be that a prosecutor has a firm conviction that certain things were part of the "offense," as defined at page 11. These things may not even be relevant to the charge to be proved at trial, certainly may include things that the prosecutor could not prove beyond a reasonable doubt and also may simply be untrue. Indeed, one should presume that allegations of uncharged criminal conduct are much less reliable than allegations leading to conviction.

No defendant, or defense lawyer can agree to "facts" which did not happen simply in order to obtain an agreement for a guilty plea. The most likely result is that prosecutors and defense lawyers will negotiate--since no facts were proved and no evidence was actually presented at trial--over what facts the plea agreement will contain. In effect, this creates a market system completely outside the guidelines, since the court cannot effectively prevent such negotiation. The court cannot determine when the resulting agreements are accurate, because the prosecu-

tor has dropped allegations which prove to be unfounded, and when the parties have essentially stipulated a sentence regardless of the real facts. Moreover, because the Commission has failed to adopt a standard of proof for facts relevant to sentencing under the guidelines but which are not elements of an offense, it is unclear when disputed facts ought to be included.

The result will be to give prosecutors more discretion and a larger role in determining ultimate sentences than they currently exercise. See generally Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for Fixed and Presumptive Sentencing, 126 U.Pa.L.Rev. 550 (1978). Indeed, it is possible that in white collar cases in which defense counsel frequently negotiate with the prosecution before an indictment is returned, negotiations will come to focus on the scope of the investigation itself, so as to limit the facts which must be disclosed to the court. On the other hand, it is also possible that the parties will find it very difficult to agree on a set of facts which will lead to a relatively predictable sentence, and will not bargain at all. If this happens, the federal courts will soon be overwhelmed.

A related question is whether a judge in a guilty plea case may rely upon any information other than what is contained in the plea agreement. For example, a judge who sentences a defendant who pleads guilty may have heard evidence in the trial of a

related case which might bear on the pleading defendant's role in the offense or culpability, or the presentence report may contain additional information. The Court should not be able to consider this information at all in sentencing. Otherwise plea agreements will be even more difficult to reach, or additional fact-finding hearings will be necessary, even in guilty plea cases.

B. Fact-finding

Section A414 states that "the court shall resolve disputed factors 'important to the sentencing determination' in accordance with Rule 32(a)(1), Fed. R. Cr. P." The Rule does not provide a standard of proof or a requirement that the court hear evidence before taking a "fact" into consideration in sentencing. We submit that the standard for proving disputed facts in a sentencing proceeding should be clear and convincing evidence. This is the standard of proof utilized in most proceedings which determine whether someone is to be confined involuntarily, see, e.g., Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing); Allen v. Illinois, \_\_\_\_ U.S. \_\_\_\_ 106 S.Ct. 2988 (reasonable doubt standard). See also Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights). Even if this standard of proof is not constitutionally required, McMillan v. Pennsylvania, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2411 (1986), it would improve the reliability of sentencing determinations and reduce the potential for disparity for the Commission to adopt this

standard for use in federal sentencing proceedings. Note, A Hidden Issue of Sentencing: Burden of Proof for Disputed Allegations in Presentence Reports, 66 Geo. L.J. 1515, 1543 (1977). Unless a high standard of proof is adopted, fact-finding may become a loophole through which new disparity will emerge, since some judges may rely on a fact in sentencing while other judges would not.

More important, there must be procedures for resolving disputes through evidentiary hearings. Rule 32(a)(1) gives undue weight to the presentence report. Probation officers are not qualified to find "facts," especially when those facts need not be proven as part of the government's case at trial. The problems which result from inaccurate presentence reports are well documented. See generally, Note, A Proposal to Ensure Accuracy in Presentence Investigation Reports, 91 Yale L. J. 1225 (1982); Fennell & Hall, Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 Harv. L. Rev. 1613, 1628-30 (1980). Probation officers are overly dependent on the version of an offense reported by the government. Faced with conflicting versions, a probation officer has no reliable way to resolve the disagreement. Even if the government has witnesses who assert that a fact is true, a probation officer would be well advised to discount the information if the witness has significant reasons to curry favor

with the government, or there are other reasons to doubt the witness' credibility. Probation officers simply cannot resolve conflicts in credibility or determine whether or not a particular accusation is true. Reliance on the probation officer is an inadequate substitute for an evidentiary hearing at which the government would be required to prove the aggravating factors on which it intends to rely. See Note, How Unreliable Factfinding Can Undermine Sentencing Guidelines, 95 Yale L. J. 1258 (1986).

C. Disparity in the Application of the Guidelines

Sentencing decisions are complex. They are rendered no less so by the use of guidelines. Experience with the federal parole system has shown a high--indeed an intolerable--level of error in the calculation of parole guidelines. See NAS Study at 195. The experience of the Social Security Administration with a grid system very similar to the parole and sentencing guidelines which is used to determine eligibility for disability benefits is also discouraging. See generally J. Mashaw, Bureaucratic Justice (1985) (recommending "quality control" model of review). While federal judges may be expected to be better than parole hearing examiners and social security administrative law judges at applying guidelines, they will also make mistakes. Other actors in the system will also err--probation officers, defense attorneys who must advise clients of the probable consequences of a plea based on an specific agreement and statement of facts, and



prosecutors. Errors by probation officers in the calculation of guidelines may recur in judicial sentencing decisions. Coffee, 66 Geo. L. J. at 984. Apparently, a study conducted by Judge Heaney of the United States Court of Appeals for the Eighth Circuit shows that there is likely to be significant disparity in the application of the Revised Draft guidelines. The guidelines are hardly a solution to disparity if this is true.

#### D. Use of Alternatives to Incarceration

Our perception is that the guidelines, as proposed in the Revised Draft, will significantly increase the average length of criminal sentences, and the proportion of federal defendants sentenced to imprisonment. We believe this is undesirable for a number of reasons. First of all, the federal prisons are already overcrowded. Additional prison capacity will be expensive to construct, and it has not been authorized by Congress. Second, there is plentiful evidence that certain punishment is more important than severity of punishment. As punishments for individual crimes escalate, the efforts to assure that someone is punished for each crime committed diminish. Prosecutors and police devote fewer resources to minor offenses, with the expectation that bad characters can be dealt with harshly in the end, and punished for their accumulated wrongs. The result of this system of enforcement and punishment is more, not less crime. Alternatives to incarceration better serve the purposes of crime control,

without necessarily undermining the desire of the community for just punishment. After all, what the community wants in the end is a citizen who will live within the law.

#### CONCLUSION

We urge the Commission to continue its progress towards a workable and fair system, but we recommend that the Commission request an extension of time from Congress to conduct further study before proposing final guidelines.