

REPORT OF SECTION 4, COURTS, LAWYERS AND
ADMINISTRATION OF JUSTICE OF THE DISTRICT
OF COLUMBIA BAR, ON THE INITIAL REPORT OF THE
SUPERIOR COURT SENTENCING GUIDELINES COMMISSION

John T. Boese, Chair
Ellen Bass
Richard B. Hoffman
Thomas C. Papson
Jay A. Resnick
Arthur B. Spitzer*
Cornish F. Hitchcock

Members, Section 4
Steering Committee

* Dissenting in Part

John T. Boese, Chair
Ellen Bass
Amy Berman
F. Joseph Warin
Steven D. Gordon
Kenneth C. Cowgill

Members, Special Committee
on Sentencing Guidelines

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"The views expressed herein represent only those of the
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the D.C. Bar and not those of the D.C. Bar or of its Board of
Governors."

INTRODUCTION

Section 4 of the District of Columbia Bar -- the Section on Courts, Lawyers, and the Administration of Justice -- through a Special Committee on Sentencing Guidelines, has reviewed the "Initial Report of the Superior Court Sentencing Guidelines Commission" issued on February 11, 1987. The Guidelines are the result of a substantial effort by the Sentencing Guidelines Commission ("the Commission") which has invested more than three years of effort in the task of studying the need for the Guidelines and drafting the terms and explanatory Report. According to the Commission, the purpose of the Guidelines was "to ensure that comparable sentences are imposed on offenders with similar criminal backgrounds who have been convicted of similar crimes." The proposed Guidelines are intended to be implemented initially by the Court on a voluntary basis and the effect of the Guidelines will be closely monitored. The Commission states that it expects that adjustments will be made as necessary.

Our Section supports the purpose and intent of the Guidelines and broadly commends the Commission for its efforts in developing them. The recommendations discussed in this Report should not detract from our Section's belief that Sentencing Guidelines are proper and appropriate to ensure comparability in criminal sentences. Sentencing Guidelines

have been successfully implemented in other jurisdictions and the Commission has properly drawn upon the experience of these other jurisdictions in drafting the Guidelines suggested. In addition, the federal court system is very near to adopting Sentencing Guidelines based upon the Report of the United States Sentencing Commission.

Most importantly, our Section believes that Guidelines properly utilize criteria similar to that now used by each judge in the sentencing process. The nature and severity of the crime has been and must continue to be a primary factor in the sentence. Likewise, prior convictions have always been a factor in sentencing by utilizing "repeat papers." These Guidelines, however, should remove the arbitrary manner in which prior convictions have on occasion been utilized in the past. For this reason, we believe the Guidelines will not unreasonably increase the time and expense of the sentencing process, yet will assure all involved in that process -- the defendant, the victim, the prosecutors, the defense counsel, and the public -- that the sentence imposed is as fair and as just as the judicial process can impose.

Because of time constraints, our Report does not attempt to resolve or comment on a number of "threshold" issues. First, this Report does not address the relationship between the Guidelines and the effect of District of Columbia Bill 6-505. Under that bill, good time credits for parole

eligibility are given based upon months of incarceration. Second, we do not attempt to address the legitimate issues raised in the Minority Report as to the effect of the Guidelines on prison population. The Section recognizes that the Sentencing Guidelines will have some impact on prison population, particularly if consecutive sentences are preferred. However, we believe that the solution is not primarily a judicial issue. Third, in view of the fact that only voluntary compliance with the Guidelines is being proposed at this time, this Report does not address the question of whether legislation would be necessary to implement mandatory Guidelines, and whether implementation by rule, without legislation, would create a "separation of powers" issue.

In our view, the Commission has properly decided to implement the Guidelines initially on a voluntary "phase-in" basis. (See Initial Report pp. 42-43; Table 21). This "voluntary" implementation will "permit testing and adjustment" which may answer many questions regarding the effect on prison population. This voluntary implementation also renders premature and speculative any issues about the method of implementation and legal effect of the Guidelines when and if they are made mandatory.

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I. GRID ANALYSIS OF THE DECISION ON
PROBATION OR INCARCERATION

On the Unarmed Grid, the Commission has proposed that certain lesser offenses for non-recidivists be "presumptively" served in the community. As the criminal history increases, and/or as the offenses become more serious, the sentencing court's discretion lessens until, by Level 7, probation is no longer possible. The Commission indicates these choices of probation versus incarceration by using the symbols "a," "b" or "c" in the Grid box. Alternative "a" assumes no incarceration and community service, along with fines, restitution, etc. Alternative "b" allows either a "community sentence" (like alternative "a"), or incarceration, but the sentencing judge must explain on the record why a non-incarcerative sentence has not imposed. Alternative "c" presumes incarceration but allows alternatives to incarceration provided the offenses did not involve use of a gun, there was no injury to the victim, and the offender was not on probation or parole at the time of the offense. While the Section generally agrees that probation (or a non-incarcerative sentence) should properly be less likely for repeat offenders or for the more serious crime, the restrictions in this grid could cause substantial injustice and should be revised.

First, the Section believes that more cells should allow use of Alternative "c" which allows the judge to consider alternatives to incarceration provided there was no use of a

weapon and no injury to the victim. Alternative "c" may be particularly appropriate at the "C" and "D" boxes in Offense Levels 3, 4, 5 and 6 and a first-time offender in Levels 7 and 8. While the Section believes that a multiple offender, or a person convicted of a Level 7 or 8 offense may properly be incarcerated, in such instances the judge should have the discretion to place the offender in jail or on probation.

A few examples should demonstrate why more discretion is appropriate. Level 8 includes two offenses, kidnapping and burglary I, which could involve no personal violence or harm to the victim. A kidnapping could (and many times does) involve the taking by one parent of a minor child in which the court has awarded custody to the other parent. A burglary I may involve breaking in a basement or garage of an occupied residence in which the occupant is not even awake, or the intruder flees when the occupant awakes or the police arrive.

While our Section considers these to be extremely serious offenses, there may be compelling cases where probation is appropriate and automatic incarceration for a minimum of 42 months is unwarranted, especially in the absence of any criminal record. Finally, we note that lack of judicial discretion may seriously undermine many drug rehabilitation programs.

II. GRID ANALYSIS RELATED TO PRIOR CONVICTIONS

The Section agrees that the consideration and use of prior convictions should be one of the principal determinants in sentencing. Nevertheless, both the sheer number and seriousness of convictions that are necessary to impose a lengthy sentence are excessive. The experience of the Section's subcommittee is that very few defendants appear before the Court with 4 prior felony convictions. Generally, a defendant with a serious recidivist problem has 2 or 3 convictions. Nonetheless, that defendant generally would not be subject to incarceration of more than 5 years under the proposed Guidelines. This problem is best demonstrated by reviewing the charts. If a defendant is convicted of armed robbery (offense category 7), he would need at least 4 felony convictions in levels 1-4 or at least 2 convictions in levels 5-9 in order for a sentence to be imposed of 5 to 6 years. As a result, the defendant could have 3 prior attempted robbery convictions and still not be subject to a sentence in the range of 4 1/2 to 5 1/2 years. The section believes that the "armed" grid should increase the length of sentences earlier in the criminal history score or decrease the number of convictions necessary for a sentence of more than 5 years.

The second point is that the Commission obviously credits greatly the importance of the criminal history of a defendant in imposing sentence. Despite giving weight to the

prior criminal history, the Commission seems to approach it in a lock-step fashion when it moves from A through E. The Section believes that, given the significance of recidivism, in the movements from C through E, the length of time available should be increased in the offenses from offense category 5 through 11. For instance, a defendant who is convicted of "robbery while armed by means of force and violence" can only be subject to an average of 54 months of incarceration if he has a criminal history score of D. A "D" score presumes at least 4 prior level 1-4 felony convictions or at least 2 prior level 5-9 convictions. The Section believes that a defendant who has been convicted of four prior felony convictions and is standing convicted of a fifth for robbery with force and violence should be subject to more than 4 1/2 years of incarceration. This theme of lock-step movement in 6-month averages pervades all of C, D and E on both the armed and unarmed grid. We recommend that the numbers be increased in C, D and E approximately 1 year in each category because a defendant should face a substantial increase in the length of incarceration with each succeeding conviction.

A. Scoring A Defendant's Criminal History

Our principal criticism of the proposed Sentencing Guidelines is in the weighting of the defendant's prior criminal record. This is the horizontal component of the

sentencing grids titled the "Criminal Histories Score." Simply stated, we believe that penalties should climb much more quickly than presently proposed. To illustrate, under both the armed and unarmed grids the most severe penalties are imposed in Category E which requires an offense score of 6 points. However, in order to achieve a score of 6 points, a defendant would have to have 2 prior murder convictions or 3 different prior armed offense convictions. While some such individuals may exist, they are few and far between. This criterion is simply unrealistic. A prior conviction history of 2 different armed offenses should place a defendant in the most severe category. Yet under the proposed Guidelines, 2 prior armed offenses would total 4 points which would barely get a defendant into Category D. Similarly, one prior armed conviction or conviction for a crime of violence should result in a very substantial sentence if a defendant commits yet another such crime. However, this simply does not happen under the grids as presently structured.

To further illustrate our point, consider the following examples:

Example 1: A defendant with no prior record who is convicted of robbery (force and violence) receives a presumptive sentence of 12 months' incarceration. If he then commits a second such robbery, he receives a sentence of 24 months' incarceration. If he commits a third such offense, he

receives a sentence of 30 months' incarceration. Exactly the same presumptive sentences would result if the offense instead was second degree burglary ("B-II") of a residence.

Example 2: A defendant with no prior criminal record commits a B-II of a commercial establishment. His presumptive sentence would be 9 months' incarceration. If he then commits a second such offense, his presumptive sentence would be 18 months' incarceration. If he commits a third such offense, his presumptive sentence would be 24 months' incarceration.

Example 3: A defendant with no prior criminal commits a forgery. His presumptive sentence would be 6 months to be serve in the community. If he then commits a second such offense, his presumptive sentence would remain 6 months which, at the discretion of the judge, would be served either in the community or via incarceration. If he commits a third such offense, his presumptive sentence would be 9 months' incarceration, although the judge could consider alternatives to incarceration.

If one considers Example 1 involving robbery and burglary, the presumptive sentence doubles upon a second conviction for the same offense. However, the penalty for a third such offense increases only slightly over the penalty for a second offense. We respectfully submit that this is not a rational progression. The example involving forgery presents an analogous problem. There is a reasonably steep progression

between a sentence for first offense, which is presumptively probation, and a sentence for a second offense, which involves a possibility of incarceration. However, the recidivist who commits a third such offense is dealt with far too leniently. The conclusion that recidivists are treated too leniently becomes even stronger if one moves from the unarmed grid to the more serious offense in the armed grid. Consider the following examples:

Example 4: A defendant with no prior record of convictions who is convicted of armed robbery ("AR") receives a presumptive sentence of 36 months' incarceration. Upon a second conviction he receives a presumptive sentence of 48 months' incarceration. Upon a third conviction he receives a sentence of 54 months' incarceration.

Example 5: A defendant with no prior convictions who is convicted of armed rape receives a presumptive sentence of 72 months' incarceration. If he is then convicted of a second such offense, he receives a presumptive sentence of 84 months' incarceration. Upon a third conviction, he receives the presumptive sentence of 90 months.

Example 6: A defendant with no prior record of convictions who is convicted of (unarmed) rape receives a presumptive sentence of 48 months' incarceration. Upon his release, he is convicted of simple assault based on a sexual type of assault and receives a misdemeanor sentence.

Thereafter he is convicted of assault with intent to commit rape. Under the Guidelines he would receive a presumptive sentence of only 36 months.

It is readily apparent from consideration of these examples that the present "criminal history score" provisions do not increase the penalties rapidly enough for repeat armed or violent offenders. In the case of unarmed robbery, a defendant's presumptive sentence doubles from his first to his second conviction. This is an appropriate progression. However, in the case of armed robbery, a defendant's sentence increases only by 33% upon a second conviction, and upon a third conviction it increases only 12 1/2% over the sentence for a second conviction. The proportionality is even worse with respect to the example involving the armed rapist. A second conviction results in a sentence which is only some 16% more severe than the sentence for a first conviction. A sentence for a third conviction results in a sentence which is only 25% more severe than the sentence for a first conviction and only some 7% more severe than the sentence imposed for a second conviction.

It has long been known that a disproportionate amount of serious crime in this and any other community is committed by a relatively small group of individuals. Our criminal justice system has made substantial strides over the past decade in focusing on these repeat offenders. However, the

proposed criminal history scoring system undercuts the effort to punish severely the relatively small group of recidivists who wreak havoc on the community. A defendant who stands convicted of a second armed or violent offense has branded himself a recidivist and a very dangerous one. We submit that the penalty imposed upon such an individual should be roughly double that imposed upon a first offender. And a third offender should receive a sentence at or very close to the maximum which is statutorily permissible. The proposed Guidelines fall far short of this measure. Moreover, the guideline sentences for repeat armed offenders are drastically lower than the mandatory minimum which would be imposed under 22 D.C. Code Section 3202.

The examples we have thus far used involved defendants who repeat the same offense or same sort of offense. However, the conclusion that the proposed criminal history scoring is simply too lenient does not change if the examples are altered to suppose criminal histories of the same order of magnitude but comprised of different offenses. For example, we have argued that a presumptive sentence of 48 months is too short for a second time armed robber. This conclusion does not change if a defendant's prior conviction(s) were instead, an assault with a dangerous weapon, or a robbery, or two different felony weapons convictions, or four different misdemeanor convictions. Similarly, a presumptive sentence of 54 months

for armed robbery is too lenient if a defendant's 4-point prior history score consists of a robbery and a residential burglary second degree, etc. rather than 2 prior armed offenses. The repeat armed or violent offender may well deserve a more severe sentence than a defendant with an equivalent criminal history score which is composed of unarmed and non-violent offenses. However, we believe that the presumptive sentences proposed are still too low for any given criminal history score, regardless of its composition.

The solution to these problems, we submit, is twofold. First, we do not perceive a need to spread the criminal history score out across 5 different categories. We believe that 3 or, at most, 4 categories should be sufficient. Second, the presumptive sentences at given levels of criminal history should be increased. Increases are needed most for the higher levels of criminal history and higher offense levels.

B. The "Decay Criterion"

We also have several comments with regard to another aspect of the criminal history score, namely, the "decay" criterion. We agree that the decay concept is appropriate. However, the 10-year decay period selected for adult convictions may or may not be appropriate depending on its definition. We support the 10-year decay criterion if it is intended to operate in such a manner that any conviction, or

service of a sentence, parole or probation, within the past 10 years opens up all of a defendant's prior convictions in computing his criminal history score. Cf. U.S. v. Glass, 395 A.2d 796 (D.C. 1979) (prior convictions admissible for impeachment against defendant who testifies unless 10 years old, where defendant has no convictions whose sentences fall within 10 years prior to testimony). It is not entirely clear from the Commission's Report whether this is their intention or whether, instead, they are proposing that each individual conviction counted in the criminal history score must have involved a sentence which falls, in part, within the past 10 years. (Compare Commission Report at p. 14 with p. 77). We would strongly oppose the latter approach. Such an approach would mean that a defendant who is convicted 16 years ago of murder and given a 10-year sentence, and who was subsequently convicted within the past 4 years of robbery would have only the latter conviction counted in computing his criminal history score. Clearly this is inappropriate. If an individual has managed to live a crime-free life for a period of 10 years following the completion of his last sentence, then it is appropriate that his prior criminal history be ignored in computing a sentence for any new offense he may commit. However, there is no justification for the latter approach.

While we support in general the decay criterion proposed for juvenile convictions, we have some problems with

its structure. The Commission has properly concluded that some juvenile convictions should be considered in determining a criminal history score. The boundaries which they have drawn in that regard seem sensible, although a substantial case could be made that armed, or comparably serious, offenses committed when an individual is 15 should be included. Further, we agree with the Commission that the decay criterion for juvenile convictions should generally involve a shorter period of time than the decay criterion for adult convictions. However, we are troubled by the approach which the Commission has adopted on this score. The Commission would apply the decay concept to juvenile convictions by utilizing an arbitrary cut-off at age 23. We believe that this approach is anomalous. Suppose, for example, a defendant commits an armed robbery at age 17 and another robbery or armed robbery at age 20. After serving a period of incarceration for the second offense, he is released back into the community and commits yet another armed robbery at age 23. This defendant is a classic dangerous recidivist. Yet, instead of being treated like the thrice-convicted armed robber that he is, the Commission's proposed decay concept with respect to juvenile adjudications would result in his original armed robbery not even being taken into account when he is sentenced for his third identical offense.

The vast majority of violent crime in this city, as in other cities, is committed by young men between the ages of

roughly 15 and 30. Some teenage crimes are indeed youthful mistakes and it is appropriate that they not taint the defendant's life for many years thereafter. However, when a defendant by his subsequent actions proves that his juvenile offenses were not youthful mistakes, it is illogical and even dangerous to willfully blind the sentencing judge to the initial offenses which he commits. The solution to these concerns is fairly simple. It involves application of a shorter version of the decay criterion applied to adult convictions. For example a 5-year decay criterion for juvenile convictions would work out quite well. In most instances a juvenile defendant would have finished his juvenile sentence by the time he is age 18. If he then passes the next 5 years of his life without a further conviction, it would be appropriate to disregard his juvenile conviction(s). On the other hand, if he accumulates further convictions during this period then the logical conclusion is that his juvenile convictions were the first of a continued string of lawlessness on his part. In such circumstances, it is appropriate that those juvenile adjudications be considered right along with his adult convictions in arriving at an appropriate sentence for his latest criminal conviction.

C. Misdemeanor Convictions

The Section believes some amendment is necessary when evaluating misdemeanor convictions used in computing the criminal history score. The Guidelines provide the offender is assigned one-half point for each prior conviction (non-decayed) for misdemeanors if either: (1) the misdemeanor involved personal violence, or (2) the misdemeanor allowed for potential imprisonment for one year or more. This criteria could result in overlooking serious misdemeanors which should properly be considered in sentencing on a later offense, while giving undue consideration to other irrelevant misdemeanor convictions. For example, a conviction for the misdemeanor of "unlawful entry" is punishable by only 6 months, so absent personal violence a conviction for unlawful entry (even with substantial prison time) would not be a factor in sentencing for a later offense. Yet experience shows that some convictions for unlawful entry reflect aborted burglaries and should properly be considered in later sentencing. On the other hand, less serious offenses, such as possession or distribution of marijuana, are punishable by imprisonment of 1 year or more, and would be counted under the Guidelines.

The Section believes these anomalies arise because of the use of the "potential" sentence as opposed to using a concrete factor based on the actual offense. For this reason, the Section supports use of the misdemeanor conviction if it

involved personal violence, but the Section does not support consideration if there is only "potential" incarceration for more than one year. The Section believes that the one-half point should be assessed based on actual time served in prison of two months or more. Since these are for non-violent offenses, the Section believes that actual sentence, rather than potential sentence, is a more accurate barometer of the seriousness of the misdemeanor offense. With respect to prior crimes committed in other jurisdictions, the actual sentence will also be much easier to determine than the potential sentence.

III. OFFENSE RANKING

We turn now to the vertical component of the proposed sentencing grids, namely, the offense ranking. In general, we believe that offenses are appropriately ranked. We do not have any serious objection to the overall structuring here which is comparable to our objections to the horizontal portion of the grid which establish the criminal history score. Nonetheless, we do have several constructive criticisms to offer.

Dealing first with the unarmed offense grid we note that burglary II of a commercial establishment is equated to assault with a dangerous weapon and to indecent acts on a minor child. It is ranked as being more serious offense than enticing a minor or assault on a police officer. Burglary is

properly regarded as a serious offense but we query whether the burglary II of a commercial establishment, an offense which is generally committed during non-business hours, is properly equated to an actual assault on a person involving a dangerous weapon or a sexual offense upon a child. Similarly, burglary-II of a residence is equated to robbery (force and violence), arson, assault on a police officer with a dangerous weapon, and assault with intent to commit mayhem. We are in total agreement with the Commission that residential burglaries should be distinguished from and punished more severely than burglaries of commercial establishments. However, we query whether the burglary of an unoccupied residence is properly equated to actual assaults on individuals, or to offenses like arson which involve an enormous potential for property damage and personal injury or even death. Moving further down the grid, first degree burglary ("burglary-I") is equated to kidnapping and is rated as being more serious than the foregoing offenses and higher even than involuntary manslaughter. The burglary of an occupied residence is indeed a serious offense. However, in fact, many of the burglary-I offenses which are actually prosecuted in Superior Court involve no assaultive conduct, or threatened assaultive conduct, whatsoever to the occupants of the residence. Indeed, in many cases, the residents are not even aware of the burglar's presence. We suggest that burglary-I might more

appropriately be equated to a robbery (force and violence), thus shifting it slightly higher up on the grid, with corresponding shifts made for burglary-II of a residence and burglary-II of a commercial establishment.

In ranking the most serious sexual assaults, the Commission has properly equated sodomy to rape and called for a long overdue change in the law to effectuate this. However, the Commission continues to equate carnal knowledge to rape, apparently in reliance on the statutory equation of the two offenses. While carnal knowledge is a serious offense, we do not believe that it is properly equated to rape since, by definition, it is consensual rather than against the will of the victim.^{1/} (The argument that, in the eyes of the law, the victim of carnal knowledge is incapable of consenting thereto does not change our analysis).

Finally, we would suggest that consideration be given to moving manslaughter to a level one step more serious than it is presently set at. While it lacks the element of malice present in second degree murder, manslaughter still involves the unlawful taking of a human life, which is one of the most

^{1/} A far more serious problem arises when the offense is a consensual act between two persons of similar ages, both under 16 or one just under 16 and one just over 16. In such circumstances, making the teenage defendant a Level 9 offender with no possibility of parole is cruel and excessive.

serious possible offenses. The consequences of the defendant's criminal acts are the most extreme possible and that consideration alone may justify a more substantial sentence than is now proposed.

Turning to the armed offense grid, our major criticism would be that assault with intent to commit robbery while armed ("AWI Rob w/a") is ranked one level below armed robbery. We believe that the fact that property is not actually taken from the victim in an AWI Rob w/a whereas it is in an armed robbery is a distinction without a difference. Most AWI Rob w/a offenses are unsuccessful armed robberies which are either aborted, or failed because the victim had no property worth taking. The victim of a "stick-up" is no less victimized simply because the robbers did not succeed in taking anything from him. We believe that the fundamental character of the offense from the victim's, and the community's viewpoint is being assaulted with a dangerous weapon, put in fear of ones life or safety, and coerced to give up property. Whether the offender actually succeeds in obtaining property is a very minor consideration in the overall scheme. Accordingly we submit that an AWI Rob w/a should be equated to armed robbery insofar as the grid is concerned.

We also note that assault with intent to commit rape while armed is ranked two levels below raped while armed in terms of its seriousness. Unlike the robbery situation just

discussed, it clearly does make a significant difference whether a defendant actually succeeds in forcing his victim to submit to sexual intercourse against her will. Therefore, it is entirely appropriate to treat rape while armed more seriously than assault with intent to commit rape while armed. Nonetheless, we would suggest that consideration be given to moving assault with intent to commit rape while armed up one level so that it is ranked only one level below raped while armed.

We once again query the rankings that are given to the various burglary offenses. Second degree burglary while armed of a residence is equated to armed robbery and first degree burglary while armed is ranked as being two levels more serious than armed robbery and one level more serious than an armed robbery with injury to the victim. Just as we suggest that (unarmed) first degree burglary be equated to robbery, so we suggest that first degree burglary while armed be equated to armed robbery, with corresponding adjustments made as to the other burglary offenses.

The proposed Guidelines properly prescribed very substantial sentences for most homicide offenses. However, the presumptive sentence for conviction of second degree murder while armed ranges from 10 to 11-1/2 years' incarceration for all defendants except those few who can qualify under current Category E. This is only half of the mandatory minimum

sentence required upon conviction of first degree murder. Philosophically, one may ask whether such a substantial gap is appropriate. More practically, we note that a gap of this size may inhibit plea bargaining in premeditated first degree murder cases where there are not associated felony charges which can be utilized to "fill the gap."

IV. SENTENCING IN THE DRUG OFFENSE GRID
IS GENERALLY DISPROPORTIONATE TO THE CRIME

The Section believes the Commission should reconsider the grid for drug offenses and determine whether legislative revision should be recommended. Over the past several years the Superior Court has been literally flooded with a rising tide of felony drug prosecutions. At the same time it has been forced to apply a mandatory minimum sentencing provision which was enacted by citizens' initiative. While the sentencing provision clearly reflects the community's understandable and proper desire to get tough with drug dealers, it is very rigid and produces some anomalous consequences.

First, while the Commission has attempted to work within the constraints imposed by the mandatory minimum sentencing provisions, it appears that the Guidelines may have ignored the important statutory distinctions made in the 1981 District of Columbia Uniform Controlled Substances Act ("UCSA"). On a number of issues, such as categorizing controlled substances and limiting the "addict exception," the Guidelines appear to conflict with the UCSA.

Second, and more importantly, the Section believes that the sentences for many drug offenses are totally disproportionate when compared to sentences for non-drug offenses contemplated by the Guidelines. For example, a second time heroin or Dilaudid dealer (or a first time dealer who does not get the benefit of the "addict exception") must receive a mandatory minimum term of 48 months upon conviction. This is the same sentence as the Guidelines propose for an armed robber upon his second conviction, or an armed robber without a prior record who actually injures his victim in the course of offense. It exceeds the presumptive sentence imposed upon an unarmed robber no matter how bad his prior record. The mandatory minimum term for other common street drugs including PCP, cocaine, and prelude is 20 months, which is more than the Guidelines would impose upon a unarmed robber convicted of his second offense or upon an arsonist.

These sort of sentences might be warranted if a significant drug trafficker was being sentenced. However, the fact is that the majority of the defendants being sentenced for felony drug offenses in Superior Court are small-time, street level dealers, many of whom sell drugs to support their own habits. We recognize that drugs are a cancer on this community and a highly sensitive political issue. Nonetheless, we would suggest that changes should be recommended in the drug sentencing provisions to make them more flexible and achieve

sentences more consistent with those imposed for non-drug offenses. We would further suggest that the maximum sentence for trafficking in cocaine or preludein be increased.

In sum, we recommend significant changes in the law to require evidence that the defendant is a major trafficker before such mandatory minimum sentences are imposed. This could consist of a quantity requirement or some other comparable proof of the defendant's major trafficker status. Moving below the level of such major trafficker, we recommend the law be changed to restore sentencing discretion to the judges of the Superior Court and suggest that this discretion be guided through the development of a new grid regarding narcotics offenses which is more refined than is presently possible under the current law.

V. TRIPLE EFFECT OF COMMITTING AN OFFENSE
WHILE ON PROBATION AND PAROLE

While the Section agrees that commission of an offense while on probation or parole merits additional punishment, the Sentencing Guidelines use this same factor to penalize an offender in three separate and critical sentencing determinations. First, on both the armed and unarmed grid, an offender who is on probation or parole at the time of the instant offense is given one additional point on the criminal history score axis, in addition to the point or points assessed on this grid for the offense for which the offender is on

probation or parole. Second, probation or parole is also a determinative factor in the decision whether to impose a consecutive or concurrent sentence, in that such offenders must receive a separate consecutive sentence. Third, the boxes marked by the letter "c" in the unarmed offenses sentencing grid are incarceration-only boxes for offenders on probation or parole. We are not convinced the Commission was fully aware of this triple effect.

VI. "PLEA CREDIT" CONSIDERATIONS

The issue of the "spread" within the cells of the proposed sentencing grids, insofar as they impact upon the issue of "plea credit," causes our Section some concern. The proposed Guidelines endorse the concept of a "plea credit" but only as a criterion for moving within the limits set in a particular grid cell. (Commission Report at pp. 30-31). While we agree with this approach, we are concerned that the proposed Guidelines do not allow sufficient room for an effective plea credit with respect to the more serious offenses.

Obviously there is not universal agreement as to what is the appropriate amount of a "plea credit" or even whether a plea credit is appropriate at all. Nevertheless, the Section believes that the plea of guilty, which accounts for nearly 90% of the criminal dispositions, should be credited under the Guidelines because: (1) it demonstrates an acknowledgement by

the defendant of the wrongfulness of his conduct; (2) many social scientists and judges believe that this acknowledgement is the initial step of a defendant toward rehabilitation; (3) the consideration of a plea greatly increases the court's efficiency and reduces the costs associated with the criminal justice system; (4) the plea coupled with the Guidelines will permit the current system of charge bargaining to remain in effect but will provide greater certainty as to the outcome for both sides.

The starting point of our analysis is examination of the proposed grids for unarmed and armed offenses. Examination of the unarmed grid shows that in cells 1D-5C and 6A & 6B there is a 6-month "spread" between the minimum and maximum permissible sentence. There is a 12-month "spread" in cells 5 D, and 6C through 10. There is a 24-month "spread" at Level 11. In the armed grid there is a 12-month "spread" in Levels 4-9 and a 24-month "spread" in Levels 10 & 11.

We believe that a number of judges and practicing attorneys would agree that a plea credit of approximately 25% is both realistic and necessary. That is, a defendant who pleads guilty at an early date is eligible to receive a sentence which is approximately 25% less than the sentence which the judge would have imposed following a trial. In the unarmed offense grid as presently structured there is sufficient spread in the cells almost all of the offense levels

to permit a judge to give a 25% plea credit, assuming he imposes the maximum sentence in the event of trial and the minimum sentence in the event of a prompt plea. However this is not possible for the offenses at Level 10 of the unarmed grid. Turning to the armed offense grid, the situation is reversed. There it is impossible in most instances for the judge to give a 25% plea credit. (Specifically it is impossible for offenses in cells 5D, 6C & 6D, and all offenses from Level 7 on up). These problems are exacerbated to the extent that a judge is unwilling to utilize the maximum sentence available within a cell in the event of a conviction after trial, and instead utilizes the mid-point presumptive sentence. This approach would cut the available plea credit in half.

Of course, in many cases the potential problem here would be minimized by the presence of multiple charges, some of which could be bargained away or reduced in return for a plea. However, the problem of insufficient available "plea credit" could be quite real in those cases involving only a single, serious charge where the prosecution is unwilling to reduce that charge. Consider, for example, a defendant charged with a single count of armed rape with a criminal history score in Category B. The difference between a 6- and a 7-year sentence may well seem so inconsequential to such a defendant as to encourage him to gamble on an acquittal at trial.

To ameliorate this problem we would suggest consideration be given to an 18-month "spread" in the cells at Levels 6-9 of the armed offense grids and at Levels 9-10 of the unarmed grid. Of course, if the spreads within the grids were increased overall, as a result of our recommendations above in Section II.A. concerning reduction of the number of grids along the horizontal axis, this may take care of the problem of the plea discount.

VII. DEPARTURE FROM THE GRID

The Section agrees with the Commission's determination that judges should be required to articulate substantial reasons for departing from the Guidelines, but it differs with the Commission's rules for when departure may occur. An underlying theme of the Commission's report is that a sentencing scheme should provide for similar sentences for similar offenses, but that the scheme should be flexible enough to recognize differences among individual offenders. The only individual characteristic recognized by the grid structure is a defendant's prior criminal record. The acceptable reasons for departure from the applicable grid cell are contained in Table 16. These factors, which include the defendant's cooperation with law enforcement authorities or his efforts at restitution, relate only to the defendant's activities at the time of the offense or his subsequent interaction with the criminal justice

system. In addition, in Table 7(b), the Commission has enumerated those factors which a court may not consider as a basis for departing from the narrow range of presumptive sentences within the grid cell. These factors include a defendant's age, educational attainment, employment status, residential stability, and dependent children. Section 4 maintains that a judge should have the discretion to consider some of the factors deemed prohibited by Table 7(b), specifically the defendant's employment or community activities. These factors become particularly important given the length of time that frequently elapse between arrest and trial and the significant rehabilitative efforts that may take place during that period.

It is not hard to imagine cases where it would be cruel and counterproductive to take a defendant who has found gainful employment while on pre-trial release and is supporting his dependent children, and incarcerate him, thereby ruining his chances of prompt rehabilitation, increasing the likelihood of his recidivism, precluding the possibility of restitution, and forcing his dependent children onto the welfare rolls (and by removing the father from the home presumably increasing the likelihood of their becoming truant and delinquent). Granting the court the right to consider such factors would not undermine the principles of equity and regularity embodied in the Guidelines; the court would still be bound to follow the Guidelines absent substantial and compelling reasons to depart.

VIII. APPEALABILITY

We recommend that any Sentencing Guidelines, whatever the mechanism for adoption, contain a specific provision specifying that no legal sentence will be appealable, even if the trial judge has departed from the applicable grid cell.

The manner in which the rules for departure are framed signals the appealability of departures: i.e., the notice and hearing provisions of Table 17, the "substantial and compelling reasons" standard for departure, and the requirement of reasons (or findings) by the trial court justifying each departure. While we do not disagree with these requirements, we believe that absent a prohibition on appealability of departures, a flood of sentencing appeals will ensue -- at least in the short run - which will unnecessarily clog the already overburdened Court of Appeals and lead to abuse.

Almost certainly, the vast majority of sentencing decisions would be upheld as committed to the sound discretion of the trial court and thus not reversible except for an abuse of discretion. Nevertheless, in light of the numerous and necessarily broadly worded departure factors and the existence of prohibited factors, the potential for appeals from sentences departing from the grid is substantial. This is particularly true in view of the admonition in the guidelines that departure factors must be "present in the extreme" to justify departure and the fact that the list of mitigating and aggravating

factors is "non-exclusive" (Table 5). The Court of Appeals should not be asked to determine, for example, if a particular victim injury is "extreme" enough to warrant departure or if a victim's participation in an assault was "extreme" enough to warrant departure. Nor should the Court of Appeals be asked to decide whether an unlisted departure factor used in a particular case is "comparable" to those specifically set out in Table 16, consistent with the final, catch-all factor listed therein.

Even more troubling is the prospect that, despite an articulation of reasons by a trial judge squarely within the departure principles, appeals will almost certainly be premised on the argument that the trial judge sub silentio relied upon a prohibited factor or factors listed in Table 7. Sentencing hearings are generally very open forums where counsel may cite a variety of factors; we believe this is desirable in order to give the sentencing judge as much information as possible in order to make an informed decision. But almost inevitably, a Table 7 prohibited factor or factors - especially from the second list - will be mentioned during the hearing, thus providing counsel with what will be perceived as an appealable issue; though such appeals will, in our view, largely be unmeritorious, they will be brought because counsel will feel obligated to do so, for a variety of reasons.

PARTIALLY DISSENTING STATEMENT OF ARTHUR SPITZER

Section 4's comments are, as usual, the result of a searching and intelligent examination of the matter at hand, and are worth the Commission's careful consideration. I join in the Section's commendation of the Commission's herculean (but I hope not sisyphean) efforts, and of its Initial Report, which provides the foundation for a substantial advance in the equality of criminal justice in the District of Columbia.

I am in general agreement with most of the Section's comments. However, there are several points at which I cannot join with the majority of the Steering Committee.

A. Length Of Sentences, Alternatives To Incarceration And Failure To Consider Impact On Prison Population

My major disagreement with the Section has to do with its failure to address what it concedes to be "the legitimate issues raised in the Minority Report [of the Commission]," dealing with the skewing of criminal justice resources towards increased prison sentences and away from front-line law enforcement programs and programs of alternatives to incarceration. In my view, the Commission's Minority Report convincingly demonstrated that the significant overall increase in sentences that would be compelled by the Commission's recommendations would be likely to lead to less effective law enforcement. No one denies that overcrowded prisons, as ours

already are, cannot begin to implement the kind of educational, vocational, and other rehabilitational programs that are needed if incarceration is not to be simply a breeding ground for recidivism. Section 4's comments should have been grounded in the understanding (shared by such authorities as the American Bar Association) that the increased use of alternatives to incarceration should be a major thrust of any Sentencing Guidelines.^{2/}

Not only does Section 4 fail to consider the need for reduced aggregate levels of incarceration, but, particularly, in Part II(A) of its comments, it urges substantially longer sentences than the Commission has proposed. Of course, determining the appropriate length of the sentence for a particular type of crime is not a matter of scientific measurement but of judgment, and each of us is entitled to his or her own view. But my view is that the sentences proposed by the Commission are quite long enough, particularly in view of

^{2/} The Commission staff estimated that implementation of the Guidelines would result in a 12% increase in the prison population over six years. Minority Report at 1. It is not clear whether the staff's estimate took into account the "triple whammy" effect that the proposed Guidelines would have on the sentencing of persons who commit crimes while on probation or parole, as discussed in Part V of the Section's comments. Since many defendants fall into that category, requiring that the sentences imposed on such persons be served consecutively, rather than (as is often now the case) concurrently, will significantly increase the total time served in the system.

the fact that incarceration has increasingly been shown to be a counterproductive, as well as an extremely expensive, method of dealing with convicted criminals.

I concede the force of the Section's point that increases of only 12.5% or 7% in length of sentence between a second and third serious felony seems virtually meaningless. But there are two equally efficacious means of increasing the ratio between a second and third sentence: increasing the third sentence or decreasing the second (and perhaps the first as well). To use one of the Section's own examples, I agree that if the sentence for a second conviction of robbery with force and violence is two years, it is somewhat difficult to justify a sentence of only 2-1/2 years for a third conviction. But in my view the problem lies in sentencing a defendant with no prior record to a year in prison for a first such offense. If the first offense received a presumptive sentence of six months, or even probation, then the second and third offenses could receive substantially increased sentences without arriving at an unduly long sentence for such a crime.^{3/}

^{3/} I might also note that the Section's recommendation that the number of horizontal boxes in the grid be reduced from five to three or four disserves its desire that repeat offenders receive substantially increased sentences. If there are only three horizontal boxes on the grid, then a third offender will have received the maximum possible sentence for an offense, and a defendant being sentenced for a fourth or subsequent similar offense will receive no increase in

In Part I, I would go even further than the Section in recommending that judges be allowed to consider alternatives to incarceration for an increased range of crimes (i.e., adding a symbol of "c" in additional grid boxes). Some crimes at levels 9 and even 11, and some crimes involving injury, do not necessarily call for incarceration. For example, it seems to me outrageous to require 3-1/2 years of imprisonment for a first offender convicted of carnal knowledge of a female under 16 -- a crime which is by definition consensual and without physical injury. If the offender is 18, it is hard for me to justify any significant punishment at all. But even if the offender is older, the appropriate sentence for a Humbert Humbert is not incarceration but probation conditioned upon a program of outpatient psychiatric therapy. Similarly, the defendant who is convicted of Murder II for the "mercy killing" of his or her terminally ill spouse or parent should not necessarily be required to serve a minimum of seven years in prison, as would be the case under the proposed grid.

3/ Footnote Continued From Previous Page

punishment at all. One cannot have both rapidly and continuously increasing sentences without quickly arriving at very long sentences for most crimes.

B. Appealability

In Part VIII of its comments, Section 4 recommends that the Guidelines contain a specific provision precluding the appeal of a "legal sentence," even one handed down in disregard of the Guidelines. But if the Guidelines are implemented on a purely voluntary basis, as the Commission has suggested for the moment (Initial Report at 95), then such a provision is wholly unnecessary since the law regarding both sentencing and the appeal of sentences will be unaffected. Section 4 has avoided considering other important issues on the ground that they are hypothetical until mandatory enforcement of the Guidelines is proposed. The same principle should have been applied here.

In my view, even if the Guidelines are made mandatory, no such provision should be added, because a trial judge should not be free to violate the law without the possibility of correction on appeal. If this jurisdiction comes to believe that it is important enough to pass a law or promulgate a rule regularizing criminal sentencing, then it is also important enough to enforce that law or rule.^{4/} As a practical matter, most such appeals will be part of an appeal of the defendant's conviction, and will not significantly increase the time

^{4/} I am not expressing any opinion on the question whether the courts, or the D.C. Council, or only the Congress could adopt such a law or rule.

required for the appellate court to dispose of the case. But even if such appeals required substantial court time, the criminal sentencing of a person is not yet such an inconsequential act that it should take last place behind all the other current business of the Court of Appeals.