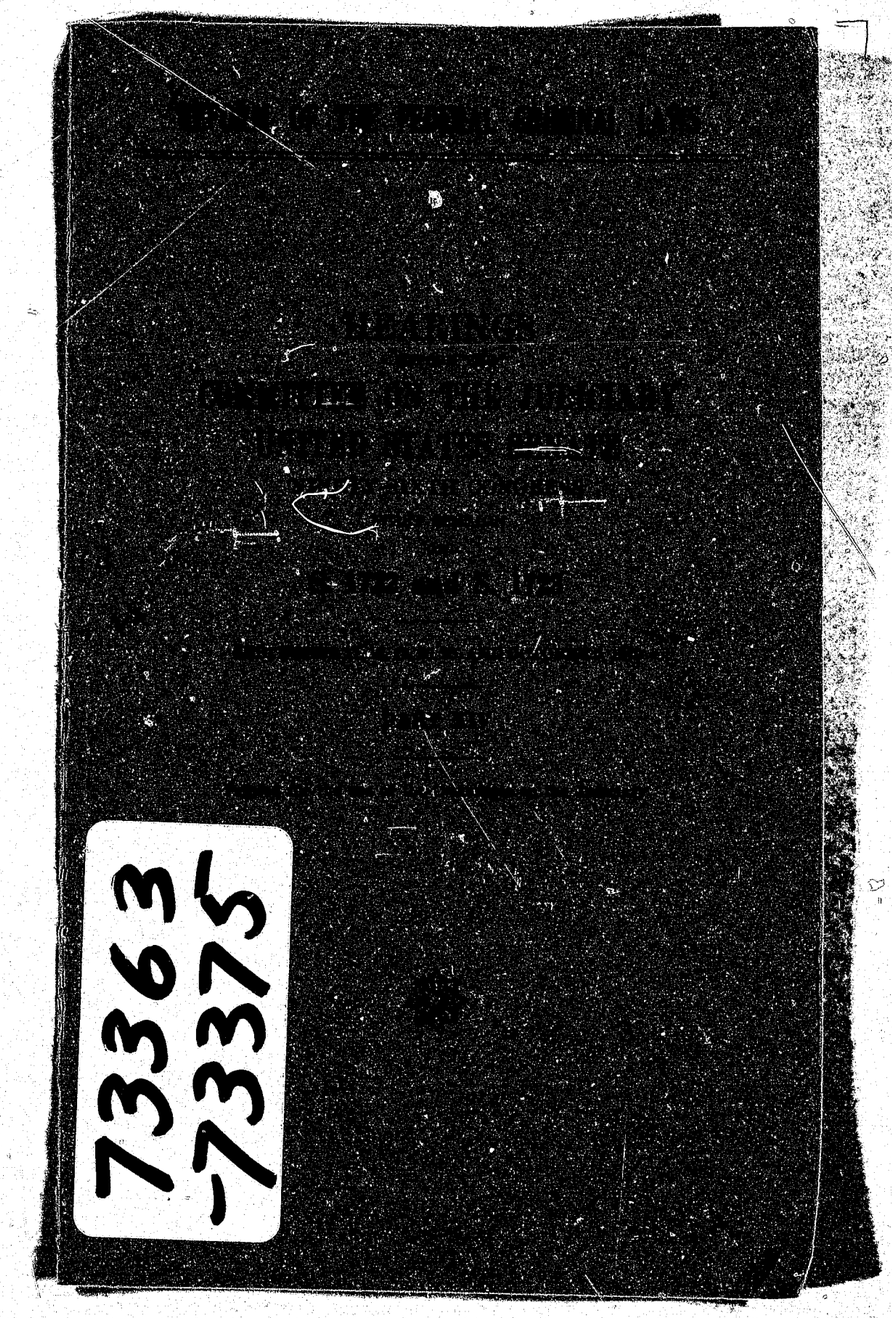

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

SEPTEMBER 11, 13, 18, 20, 25, AND OCTOBER 5, 1979

PART XIV

Printed for the use of the Committee on the Judiciary

51-840

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

COMMITTEE ON THE JUDICIARY

EDWARD M. KENNEDY, Massachusetts, *Chairman*

BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOSEPH R. BIDEN, Jr., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
THAD COCHRAN, Mississippi
ALAN K. SIMPSON, Wyoming

STEPHEN BREYER, *Chief Counsel*

CONTENTS

Additional prepared statements submitted for the record—

Exhibits—

NCJ# 73371
Postiton Paper and Testimony of the Federal Public andCommunity Defenders on the Proposed Federal Criminal Code (pp. 10366-10450) (1979)

NCJ# 73372
Position Paper and Testimony of the Federal Public and Community Defenders on The Proposed FederalCriminal Code (pp. 10451-10582) (March 1978)

NCJ# 73373
~~Study of~~ The Possible Impact on Sentence Length and Time Served In Prison of Sentencing Provisions of Major Criminal Code Reform Legislation of the 95 th Congress-Study (pp. 10642-10652)

NCJ# 73374
Sentencing Provisions of Major Criminal Code Reform Legislation of the 95th Congress: Possible Impact on Sentence Length and Time Served in Prison (pp. 10653-10669)

NCJ# 73375
Motion Picture Association of America, Inc. and Recording Industry of America Inc. Concerning Film and Record Piracy and Counterfeiting

73371

10366

POSITION PAPER AND TESTIMONY

of the

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

on the

PROPOSED FEDERAL CRIMINAL CODE

Prepared for the

Committee on the Judiciary

United States Senate

October, 1979

TABLE OF CONTENTS

I. INTRODUCTION

We thank the Chairman and the Committee for extending us an invitation to state our views on recodification of the federal criminal code.

In March 1978, and again in September 1979, representatives of the Federal Public and Community Defenders testified before the Subcommittee on Criminal Justice, Committee on the Judiciary of the United States House of Representatives. On each occasion, we also submitted a written position paper. The paper submitted in March 1978, and the testimony related thereto, dealt directly with the proposed recodification as contained in S.1437 and our comments were keyed to the section numbers and text of that bill. We would be happy to provide the Committee with additional copies of that first written submission to the House. The position paper is also reproduced, together with our oral testimony, in the printed Hearings before the Subcommittee on Criminal Justice, Committee on the Judiciary, U. S. House of Representatives on HR.6869, at pages 1031 through 1082.

The basic text of this position paper presently being submitted to your Committee was originally prepared for, and submitted to the House Subcommittee in September 1979. References to section numbers and statutory language were

directed to the House Committee Print of August 24, 1979, which has since been updated and introduced in the Senate as S.1723. We have attempted to conform the titles of the bills in this paper to the present designations of S.1722 and S.1723. In view of the short notice of our appearance before this Committee, however, we have not had an opportunity to make major modifications in that text based on any substantive changes to S.1723 made by the House Subcommittee since our testimony in September, 1979.

We agree that federal criminal law is long overdue for recodification. The many years that have passed since the Brown Commission made its report, and the pages and pages which have been written by members of Congress since that time are proof of the enormity and complexity of the task. Despite the work already done, we fear the full impact of the bill may not be apparent and that not all interested parties have had the opportunity to scrutinize and comment on it. Although we still have reservations, we believe the House version, S.1723, does ameliorate some of the problems contained in the original S.1437 (currently S.1722) about which we testified before the House Subcommittee in March, 1978.

Much of S.1723 is a recodification of present law. The principal change is in the area of sentencing and parole.

S.1723 does not suffer from all of the problems of S.1722, but it does include two of the major problems upon which we commented in the House hearings, mandatory sentencing guidelines and government appeal of sentences. We believe mandatory guidelines are a mistake, for they would give greater discretion to the prosecutor in his charging decision and reduce the discretion of the sentencing court. Government appeal of sentences, we believe, would have a severe chilling effect on a defendants right to appeal a conviction or other final order of the court.

In addition to the sentencing subtitle, we have commented on substantive changes in the law which we believe are neither justified nor wise. These involve the concepts of Complicity and States of Mind, Affirmative Defenses, and provisions pertaining to the Treatment of Mentally Ill Defendants. We have also included our comments on proposed amendments to the Criminal Justice Act, 18 USC section 3006(A).

In the time that we did have to analyze the several proposed bills, we have viewed them from the perspective of active criminal defense lawyers. We have tried to be objective and bring to bear our collective experience from different parts of the country and from districts with disparate populations and problems. To some extent, the deficiencies that

we see may stem from the fact that there was very little, if any, input from Federal Public and Community Defenders or private defense counsel during staff preparation of the draft bills and the hearings before the Senate in recent years. Even though the legislative process is apparently at an advanced stage at the present time, we hope that the Committee will take the time to consider our suggestions seriously, and we are hopeful that they will prove useful in formulating the final draft of the bill.

This presentation is the product of Federal Public and Community Defenders. Those who worked on the committee which produced this position paper are: James R. Dunn, Central District of California; Edward F. Marek, Northern District of Ohio; David S. Teske, Federal Defender Services, District of Oregon; Roland E. Dahlin, Southern District of Texas; and, Irwin H. Schwartz, Western District of Washington.

II. SENTENCING PROVISIONS

A. Appellate Review of Sentences

We endorse appellate review of sentences as a means to reach the problems of disparity and the outrageous sentence. Appellate review of sentences in the federal courts is long overdue.

With about 90% of all criminal cases resulting in dispositions where guilt is not contested, the only real issue at stake, in most cases, is the question of appropriate punishment.

> . . . the whole intricate network of protections and safeguards which were . . . [the defendant's] at the trial vanishes and gives way to the widest latitude of judicial discretion . . . Nine out of ten defendants plead guilty without trial. For them the punishment is the only issue, and yet we repose in a single judge the sole responsibility for this vital function. Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 265 (1962) (remarks of Judge Sobeloff).

Many appeals are presently taken because the defendant is dissatisfied with his sentence. A substantial number of substantive appeals would be avoided if the conviction and sentence were followed by appellate review of sentence only. Appellate review of the sentence would also aid the Court of Appeals.

> It is not difficult for skillful counsel to find scores of technical errors in the most carefully conducted trial. The temptation to the appellate court to seize on such errors for the reason that justice was denied by too severe a sentence has in fact--by the admission of many experienced appellate judges--induced numerous reversals. Overt appellate review should thus serve to focus such contests on what is really at stake, to the benefit both of future sentences and of the law of harmless error. It can also avoid an unnecessary retrial where only the sentence is defective. ABA Report on Standards Relating to Appellate Review of Sentences (Approved Draft 1968), p. 3.

We offer a few suggestions to remove ambiguities and to promote the efficient handling of sentence appeals.

Section 4101 Review of Sentence.

Limited review of sentences is provided for sentences not authorized by law; sentences resulting from erroneous application of guidelines, and sentences greater than the guidelines. These provisions unduly limit the scope of review by making the fact finding process immune from review. We suggest the addition of a provision in section 4101 which would permit a challenge by the defendant and review by the appellate courts, of findings of fact if clearly erroneous and material to the sentence, or if the sentence was materially affected thereby.

Section 4102 Appeal by Defendant

Section (a) provides the right to appeal those errors enumerated in section 4101. The time to perfect the appeal is not specified; therefore, Rule 4, Federal Rules of Appellate Procedure would govern. The Notice of Appeal would be filed within 10 days of the sentence to perfect an appeal. Section (b) provides for leave to appeal (a certiorari type procedure) sentences imposed within the guidelines. We generally favor the certiorari approach to some appeals, however, the provision which allows filing a petition for leave

to appeal within 30 days is likely to result in confusion where a different limit is set for appeals taken by right. We suggest that a uniform 30 day limit be established for both types of appeals. Such a period should provide the defendant with a "cooling off" period in which to reflect on the fairness of his sentence. That in turn may reduce the number of appeals taken.

Section 4103 Sentence Review Procedure

Section (f) provides that the defendant may join a sentence appeal with an appeal from the conviction. This provision may generate frivolous appeals of "substantive issues" in order to appeal the sentence without seeking leave to do so under section 4102(b).

1. Government Appeal of Sentences

There is no existing law permitting the government to appeal sentences in criminal cases. Our comments are addressed to the scheme proposed in S.1722 (reference is to the section numbers as they appeared originally in S.1437).

a. Provisions in S.1722 Permitting Government Appeal

Changes in Rule 35(b)(2), Federal Rules of Criminal Procedure would permit the government to move the district court within 120 days after sentence is imposed to modify a

51-840 0 - 79 - 31

sentence imposed in an illegal manner or as a result of incorrect application of the Sentencing Commission guidelines. See Senate Committee Report, p. 1060.

Section 3724(d) permits the government to petition the Court of Appeals for leave to appeal an order granting or denying a motion to correct sentence pursuant to Rule 35(b)(2), Federal Rules of Criminal Procedure.

Section 3725(b) creates a right of direct appeal by the government from Class A misdemeanors and felonies if the sentence is under the guidelines or specifies an eligibility for release more favorable than the guidelines issued by the Sentencing Commission. Sentences made pursuant to plea agreements under Rule 11(e)(1)(B) and (e)(1)(C), Federal Rules of Criminal Procedure are specifically excluded by section 3725(1) and (2).

These provisions create significant new appeal rights for the government which are not rooted in historical, statutory or constitutional origins.

b. The Brown Commission Did Not Recommend Government Appeal of Sentences

The features of S.1722 allowing government appeals were the subject of considerable controversy. The Senate Committee Report summarily dismissed the controversy:

> Although some persons have challenged the wisdom and validity of permitting an appeal of a sentence by the government, the Committee is convinced that neither objection has merit. Id. 1057.

The Senate Committee Report rejects the notion that the court should have power to increase a sentence on the defendant's appeal. Id. 1057, n. 19. However, the provisions of S. 1722 allowing government appeal of sentences are contrary to the conclusions of the Brown Commission on the reform of federal criminal laws.[1]

c. Government Appeal of Sentences Will Not Fulfill Objectives Stated in the Senate Committee Report

The sole reason advanced in the Senate Committee Report in support of a government appeal is to eliminate disparity:

> It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government to appeal and have increased a sentence that is below the applicable guideline and that is found to be "clearly unreasonable." Id. 1057.

---

[1] See, Working Papers of the National Commission on the Reform of Federal Laws, pp. 1334, 1335; Study Draft of a New Federal Criminal Code, United States National Commission on the Reform of Federal Criminal Laws, p. 311; Final Report of the National Commission on the Reform of Federal Criminal Laws, p. 317.

We do not believe government appeal will produce the intended effect for these reasons.

d. Government Appeal Right Acts as Deterrent to Appellate Review of Merits of Conviction

S.1722 would create an awesome procedural weapon in the prosecutor's arsenal with implications far beyond what may be intended. The government's ability to appeal a sentence which is below the guidelines is fraught with potential for procedural blackmail. For example, assume a defendant files a motion to suppress evidence, loses, and is given a sentence which is below the guidelines. The defendant is in the untenable position of risking a greater sentence on appeal if he appeals his conviction, and the government retaliates by appealing the sentence. Here the government's right to appeal would have a severe chilling effect on the defendant's right to contest his conviction.

The limited effectiveness of the government right to appeal as a factor in curbing disparity is outweighed by the potential for misuse. It is our recommendation that Congress adopt the position of the Brown Commission.

e. Government Appeal Probably Unconstitutional

The government's right to appeal may not be able to withstand a constitutional challenge on double jeopardy and

due process grounds.[2] This was one concern which brought the Brown Commission to the position against creating the right of government appeal of sentences.

> As a matter of principle, it could be argued rather convincingly that the government should be entitled to take an appeal seeking an increase if it feels that the sentence of the court is too low. It is clear, however, that such a provision would offend the constitutional prohibition against double jeopardy.
>
> Working Papers of the United States National Commission on the Reform of Federal Criminal Laws, p. 1335.

The Senate Committee Report in discussing the problem noted:

> With respect to validity, it seems . . . evident that a system, such as is contained in S.1437, in which sentence

[2] Ocampo v. United States, 234 U.S. 91 (1914); Trono v. United States, 199 U.S. 521 (1905); Kepner v. United States, 195 U.S. 100 (1904) may be read to the conclusion that an appeal by the government resulting in a sentence increase would violate the double jeopardy provision of the Fifth Amendment.

> increase is possible as a consequence of sentence review initiated by the government is not objectionable on constitutional grounds. Id1057.

The Senate Committee Report supports this conclusion with North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Wilson, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975) and brief discussion. It is submitted that the Committee position is an oversimplification of the constitutional question.

Pearce dealt with the constitutional limitations on imposing more severe punishment following reconviction of the same offense after a retrial at the behest of the defendant. Responding to the Fourteenth Amendment argument the court stated:

> In the first place, we deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Id. 722.

The double jeopardy clause protects "against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). United States v. Wilson, 420 U.S. 332, 343 (1975).

> When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. Ex Parte Lange, 18 Wall 163 (1874); In re Nielsen, 131 U.S. 176, (1889). When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188, (1957). Wilson at 343.

Unlike the appeals in Wilson and Jenkins, supra (where the government would be restored to status quo if it prevailed on appeal) sections 3724(d) and 3725(b) appeals would be taken to enhance the punishment. Thus we submit those provisions may very likely be unconstitutional because they provide for multiple punishment for the same offense. [2a]

[2a] The unconstitutionality of a government appeal of sentence has been recently upheld by the Second Circuit. United States v. DiFrancesco, 2nd Cir., Nos. 23, 908, 1094, decided August 6, 1979.

2. The Impact of Plea Bargaining

Since the great majority of cases are disposed of by negotiated pleas of guilty, most competent criminal defense attorneys will insulate the defendant from appeal by the government by including in the plea disposition: (a) an agreement to recommend a sentence or an agreement not to oppose a sentence, Rule 11(e)(1)(B) Federal Rules of Criminal Procedure, or (b) an agreement for a specific sentence, Rule 11(e)(1)(C), Federal Rules of Criminal Procedure, or (c) an agreement that the government will not appeal the sentence. These situations are specifically excepted from direct government appeal by section 3725(b)(1). Therefore in a majority of cases the defendant will effectively insulate himself from government initiated appellate review of his sentence.

B. Sentencing Guidelines

The shallow treatment of the guidelines and the powers and duties of the Sentencing Committee raise substantial questions regarding the impact of the Sentencing Committee on the disposition of offenders.

The first question is whether the guidelines are intended to be advisory or mandatory. The drafting of sections 3104(d)

and 4301[3] appears to be an attempt to strike a compromise which results in guidelines which are something more than advisory and something less than mandatory; thus are sown the seeds for litigation to clarify the character of the guidelines. We suggest the issue be confronted more directly in this legislation.

It is our view that the drafting of 3104 and 4301 taken together with the appellate review scheme in Chapter 41 creates a system of mandatory guidelines and therefore fixed or presumptive sentences. There is no such condition as being a "little bit pregnant."

---

[3]Section 3104(d) provides:

> (d) The court shall impose a sentence that is consistent with the sentencing guidelines prescribed under chapter 43 of this title, unless the court finds that an aggravating or mitigating circumstance should result in another sentence. (Emphasis added).

Section 4301 provides:

> (a)(1) For the purposes of --
> (A) promoting fairness and certainty in sentencing;
> (B) eliminating unwarranted disparity in sentencing; and
> (C) improving the administration of justice;
>
> the Judicial Conference of the United States shall prescribe sentencing guidelines for Federal judges to use in determining appropriate sentences to impose in criminal cases. (Emphasis added).

We believe any significant loss of the court's ability to dispense individualized justice is a loss for both the public and the individual. Justice is served best by courts which have the latitude to weigh the relevant interests that should be protected in each case, and where they are in conflict, decide which are paramount. To the extent that the court is limited in its discretion, it is prevented from achieving that goal.

The exercise of discretion creates disparity, but some disparity is warranted if the courts are effectively to serve their districts. For example, timber theft is an offense which occurs frequently in the District of Oregon but rarely in the Southern District of New York. Application of section 3103 sentencing factors of public safety and deterrence would produce a justifiable disparity between these districts for this offense of timber theft.

Some criticism of the court's exercise of its sentencing discretion is justified by historical performance. However, it may not be entirely the fault of the courts inasmuch as Congress has never legislated any objectives, policies, or guidance for the courts to follow. To this end, we feel that the provisions of sections 3103 and 3104 which state the factors to be considered in imposing sentences and which require that the reasons for imposing a sentence must be stated on the record,

are good steps toward the elimination of unwarranted disparity.

1. Sentencing Discretion Transferred to the Prosecutor

In addition, we believe the practical implications of the general sentencing scheme of S.1722 and S.1723 will be to transfer much of the sentencing authority to the prosecutor.

In the interests of eliminating disparity and in achieving certainty and fairness in sentencing, the Congress intends to destroy a certain amount of sentencing discretion. However, constraints upon the court's discretion will merely transfer the responsibility to others, principally the prosecutor. Where several grades of one offense are available to the prosecutor and where the range of discretion available to the sentencing judge is limited, the prosecutor can determine the sentence within a narrow range with the charging decision.

Placing this discretion with the prosecutor may be severely criticized because it is exercised in an atmosphere of low visibility and is generally not the subject of review. Another strong criticism we have is that it has been placed in the hands of an advocate. The transfer of the sentencing discretion to the charging authority moves sentencing one step away from the courtroom and one step closer to the police station.

Although there are varying views on the appropriateness of plea bargaining, this bill will greatly increase its importance. The narrow discretion available to the court places great importance on the charging decision and on plea bargaining. The charging decision will in most cases dictate the sentencing range available to the court within a narrow zone. While presently most concessions in plea bargaining are "charge concessions," they will become in effect "sentence concessions" under the scheme of sentencing proposed by this bill.

The question must be asked, should the sentencing decision be in the hands of the prosecutor? Should it be made in the atmosphere of low visibility and non-reviewability of plea bargaining? Should the basic sentencing decision be in the hands of an often inexperienced prosecutor or with an experienced judge?

C. Alternative Recommendations

1. Advisory Guidelines

We strongly recommend that the proposed guidelines be advisory rather than mandatory. We have no objection to mandatory consideration of the guidelines; however, we strongly feel their application must be advisory.

Without mandatory guidelines the bill would provide: (1) sentencing goals (section 3102), (2) factors to be considered in

sentencing (section 3103), (3) a statement on the record of the reasons for the sentence (section 3104(c)(4)), and (4) appellate review of the process. That is far more guidance and review of the sentencing process than ever before. We believe it will be enough to ameliorate present problems and is far more workable than mandatory guidelines. We also suggest a five year study to monitor the plan's effectiveness in reducing unwarranted disparity.

2. Advance Start Up of Sentencing Committee Recommended

The effective date of the bill is January 1, 1983. We recommend that the Sentencing Committee be established upon passage of the bill to allow ample time for study, input from interest groups, establishment of administrative procedures, and to assist generally in a smooth transition on the effective date of the bill.

3. Contents of the Guidelines

Section 4302 sets out the structure of the guidelines. The focus is on two factors: categories of offenders (section 4302(a)(1)), and categories of offenses (section 4302(a)(2)). What is proposed is a double axis system similar to that presently used by the Parole Commission. The guideline structure does not provide latitude to weigh the relevant interests that should be protected in each case, frustrating the intent expressed in sections 3102 and 3103. We fear also that the range of months of imprisonment referred to in section

4302(c)(2) will be very narrow. The Senate previously expressed its intent in this regard with S.1437 (28 U.S.C. 944(b)).[4] A narrow guidelines range transfers the sentencing decision to the prosecutor in the exercise of the charging decision. A wide range (although it would largely eviscerate appellate review) would be preferable if this language is retained. We urge consideration of language to convey the congressional intent that the range be wide enough that guidelines do not frustrate the intent of sections 3102 and 3103.

4. Membership of the Committee

We endorse the concept that a majority of the Committee will be judges, but that persons with other backgrounds will also be eligible to participate. We suggest that members of the defense bar be included for consideration for these positions, including private practioners and representatives of the Federal and Community Defenders.

---

[4] 28 U.S.C. section 994(b) provides:

* * *

> If a sentence specified by the guidelines includes a term of imprisonment:
> (1) the maximum of the range established for such a term shall not exceed the minimum of that range by more than 12 months or 25 percent, whichever is greater; . . .

D. Technical Observations on Sentencing

The previous discussion of sentencing considered general concepts. The following are a few nuts and bolts observations.

Section 3102: Purposes of Sentencing

Subsection (5) provides for restitution to aggrieved parties and in the alternative to victims. This language is so broad that it could lead to confusion or abuse. We believe the "victims" language should be used.

Subsection (6) provides that one goal of sentencing is to reconcile the community and the offender. This concept has not been sufficiently discussed in the literature on sentencing. This language, as drafted, might be interpreted to refer to rehabilitation by community service, or, on the other hand, to sentencing as a response to community vengence and/or sensational press coverage - two entirely different concepts. See, ABA Standards, Sentencing Alternatives and Procedures, paragraph 2.5(c)(iii), page 3, 1968. Perhaps a constructive device to deal with this aspect of the problem would be to provide for a sentence of community service.

Section (b) provides no consideration for the circumstances of the individual. We suggest that a fair sentence results from a balancing of several concerns, including the individual's circumstances.

Section 3103: Factors to be Considered at Sentencing

We urge the inclusion of section 3103(b) and further that the mandatory "shall" from that subsection be adopted.

Section 3105: Presentence Report

3105(a)(1)(2) should be clarified. We suggest the use of the words "criminal convictions" rather than the more ambiguous term "record."

3105(b)(1)(A) provides for inspection of the presentence investigation report by either counsel or the defendant. We recommend that both counsel and the defendant be permitted access to the report. The purpose of the inspection is to permit a fair opportunity to correct mistaken information in the report. Obviously, the defendant is in the best position to notice errors of this kind and bring them to his counsel's attention.

3105(b)(B)(3) should be clarified. The manner in which presentence reports may be read varies from district to district and sometimes even within a district. Some judges permit counsel to read the report while they look over counsel's shoulder, others permit counsel to have temporary physical custody of it but without permission to copy it, still others permit counsel to copy it. Ultimately, the defendant is provided with a copy when he faces the Parole Hearing. We believe it is time to make full open disclosure of the report to the defendant and his counsel and permit physical custody and/or copying. If there are peculiar problems with an isolated report, a protective order can be entered in an individual case.

Section 3106: Presentence Hearing

We recommend that the defendant and counsel have the right to subpoena witnesses and cross examine all witnesses, including the preparer of the report. This bill makes the opportunity to correct mistaken information in the report discretionary.

Subsection (c) contains an ambiguity regarding who is the party proponent of facts. The probation officer is a court employee and not a party to the case. In a case where the defendant challenges what he believes to be mistaken information in the presentence report, this bill creates an ambiguity concerning which party has the burden of persuasion.

We also recommend that the government be required to prove the existence of valid convictions beyond a reasonable doubt.

Section 3324: Conditions of Probation

Section (7) presents a problem regarding financial eligibility for programs. The language as written may discriminate against the indigent. Those defendants financially able could be required to make partial contributions toward programs, those unable should not be denied access.

Section (8) is a theoretical improvement of the "split sentence." A condition of probation is an easier concept to deal with. Many of the states use this sentencing device. We offer two suggestions.

51-840 O - 79 - 32

First, the maximum confinement should be increased to one year. That would allow the sentencing court greater flexibility in fashioning a sentence.

Second, we recommend that the words "Bureau of Prisons" be deleted. Presently, any sentence over sixty days may result in the defendant being transported out of the state by the Bureau of Prisons. Some of the principal values of a short sentence, proximity to family, employment and supervision by the probation officer are thus lost. We suggest 3324(8) be amended to read: "(8) Remain in custody as the court directs during the first year . . ."

Third, the "first year" period for confinement purposes should not commence until a defendant's appeal is resolved. The court could place the defendant on probation while the case was on appeal.

Section 3341(a)

The language "unless the court orders otherwise" is susceptible to abuse. Many courts make a practice of imposing terms of probation to follow service of terms of imprisonment. A type of layer-over parole system is thus created. Probation is a concept which should be limited to pre-incarceration imposition. We suggest any stay of the service of probation is presently covered adequately in Rule 38, Federal Rules of Criminal Procedure, and we recommend deletion of the language referred to above.

E. Views on the Parole Commission

Few subjects in the administration of criminal justice have produced as much controversy as the concept of parole and the performance of the Parole Commission. The Parole Commission has achieved some leveling effect on the outrageous sentence in a small amount of cases; however, even this function is curtailed by the one third rule of Title 18, section 4205(b)(1). It has disserved the great majority of inmates subject to its jurisdiction.

Parole, originally a concept designed to take into account a change of heart, a change of circumstances, or to dispense mercy in an appropriate case, has become a re-sentencing tool so predictable that judges, prosecutors and defense lawyers rely on it as a system of de facto determinative sentences. As such, many of our number would not lament its fall. However, before taking a step which literally sets penal philosophy back to the Civil War period, Congress should carefully study the direct and consequential effects.

First, abolishing the Parole Commission is a complete break with the rehabilitative concept. Although the Parole Commission has not functioned on this level, it recently has acknowledged some validity to the concept of incentive.

We have some question about the wisdom of maintaining approximately 25,000 prisoners who have no "good-time" or

work credits, who have no prospect of parole and who cannot be rewarded (or punished) for institutional behavior. Further, some consideration should be given to the overall impact on prison population. Parole allows some consideration for a balance between commitments and releases. Ultimately the taxpayer may be required to pay for additional prisons.

We believe that a significant deficit of this bill is that it leaves minimal procedural vehicles to adjust sentences where there is a change of circumstances after the sentence. There are cases in which the defendant's family may have suffered a catastrophe, the defendant provides significant service to law enforcement agencies, or there is a demonstrable change in attitude. Adequate post sentencing procedures should be maintained to give relief in these and similar situations. To this extent, the language in section 3704 is a step in the right direction.

The Parole Commission, if retained, would most likely continue to use double axis guidelines. Their effect when layered over the sentencing guidelines should be studied. Would they provide further disparity or a further leveling effect on a national scale?

Finally, there is the question of the disposition of the prisoners now under the jurisdiction of the Parole Commission. Any ex post facto application of this bill to those prisoners is

bound to cause litigation and run afoul of the Constitution. The phase out period for those prisoners now under the jurisdiction of the Parole Commission may take as long as twenty-five years. The burden to the taxpayer to wind down the Commission merits consideration.

III. CULPABLE STATES OF MIND AND COMPLICITY

A. Culpable States of Mind

In the written position paper and testimony prepared for the House Subcomittee on Criminal Justice in March, 1978, the Federal Public and Community Defenders expressed concern with Chapter 3 of S.1437, "Culpable States of Mind", and placed particular emphasis on the undesirable aspects of the rule of construction contained in section 303(b). It was our belief that Chapter 3 introduced the concept of recklessness into the federal criminal code in ways which were not fully considered or perhaps fully intended.

In both the Model Penal Code and the Final Report of the National Commission, two separate rules of construction were proposed: one which applies a presumption of a single mental state for all elements where there is no specification of mental element in the definition of the crime; and, a second which applies where the statute only partially specifies the mental state. (See Model Penal Code Sections 2.02(3) and (4) and Final Report Sections 302(2) and (3).) In an attempt to simplify matters the Senate combined these two rules, but instead, we believe the rule became more unworkable. (Senate Report, page 63, footnote 33.) In both the Model Penal Code and the Final Report, and other states such as New York and

Illinois, where the same general framework has been adopted, it is the general practice to include the element of mens rea in the description of the crime. Thus, only in the unusual case where there is no specification of mental intent in a statute, or where there is only a partial specification, does the underlying rule of construction come into play.

On the contrary, the approach in S.1722 was to purposely leave out the states of mind in the definitions of individual crimes and require reversion to an all encompassing rule of construction in virtually every case. As a result, it is not possible to determine from the face of the statute the various states of mind required for different elements of the crime. Moreover, if one particular state of mind is set forth in the definition, it does not automatically apply to the other elements as well. For example if "knowing" were used to describe the act, tnat same mental state would not necessarily apply to the other elements in the statute which required a mental state. Moreover, under S.1722, if no state of mind appears in the body of the statute, as to circumstances and result the standard is reckless.

We are pleased to note that S.1723 has effectively alleviated these problems created by S.1722.

1. Previous Defender Recommendations

At the House Subcommittee Hearings in March 1978, we made the following specific recommendations:

(1) We recommend that in the definition of recklessness, the words "substantial and unjustifiable" be restored just as they appeared originally in the Brown Commission report and the Model Penal Code and as they now appear in New York, and Illinois.

(2) We suggest adding the words "without substantial doubt" after the word "believes" in section 302(b)(2), as this makes it quite clear that the "willful-blindness" or "conscious-avoidance" test still applies, only within the confines of knowledge.

(3) We recommend that the rule of construction be amended back to its original intent, that is, when there is a mental state included in the language of the offense, that mental state apply across the board to all elements, so we are not faced with the confusing situation of having to go back to the general definitions in chapter 3.

(4) In the process, the Congress should make conscious choices as to whether or not they want recklessness to apply to some of these crimes.

(Hearings at page 1075).

In S.1723, recommendation number (1) has not been incorporated; recommendation number (2) appears to be under consideration (language bracketed); the rule of construction contained in our recommendation number (3) has been adopted as noted above; and, we understand that recommendation (4) has been adopted in that members of the Subcommittee have considered each individual substantive crime separately; made conscious choices as to the state of mind with regard to each element; and, included those definitions in the statutes.

The following is a section by section analysis and comparison of significant portions of this chapter as they appear in S.1722 and S.1723, together with defender comments and recommendations.

2. Definitions and Terminology

S.1723 deletes sections 301(b) and 301(c) of S.1722, apparently for the reason that they are unnecessary in view of the changes to the rule of construction in the House. Since it does not appear to effect any substantive change within the

context of the House version of the rules of construction, and in fact may add some clarity, we believe these sections might well be included in any final version of the bill.

Section 301 of S.1723 introduces an additional concept of "motive". Apparently, motive applies to those sections in which the words "because of" are used. It is our understanding that these instances are very few. Motive is generally irrelevant in defining criminal responsibility unless a particular motive is required as an element of a crime. In those cases, we believe motive is inherent in the requirement of a specific intent, and therefore we recommend that the language regarding motive and "because of" be deleted and the affected substantive criminal statutes be redrafted accordingly.

3. States of Mind Defined

a. Knowing Conduct

We prefer the basic drafting format of S.1722 section 302(b). Combining concepts in S.1723 section 301(c) tends to be confusing. If the Senate format is to be adopted, however, the words "without substantial doubt" should be added in section 302(b)(2) after the word "believes". This language has already been incorporated in the draft bill (This will clarify the fact that "willful blindness" and "conscious avoidance" are concepts

applicable to the mental state of "knowledge" rather than recklessness.) The Senate Report makes it clear that this is what was intended in S.1437:

> The belief that the actor must hold for the mental state to be "knowing" must be firm. That is, with respect to a circumstance, the actor must be without substantial doubt as to its existence. Regarding a result of conduct, the belief that the conduct will cause the result must be "substantially certain." [Emphasis added]
>
> (Senate Report at Page 59).

To the extent that the bracketed portions in S.1723 suggest there is doubt about using the terms "substantially certain to occur" with respect to a result, for the same reasons stated above we urge adoption of this language which already appears in S.1722.

b. Reckless Conduct

In defining the risk neither S.1723 nor S.1722, qualifies that risk with the words "substantial and unjustifiable" as does the original Brown Commission Report, the Model Penal Code, and current law in New York and Illinois. The comparable New York and Illinois statutes read as follows:

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto. [Emphasis added]

(New York Penal Law, section 15.05(3).)

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable

person would exercise in the situation. An act performed recklessly is preformed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning. [Emphasis added]

(Ill. Crim. Code, section 4-6.)

It is manifest in the Senate Report that the risk must be "substantial and unjustifiable" and yet this crucial language was left out because the Committee believed that the later language, "gross deviation from the standard of care", encompassed the adjectives "substantial and unjustifiable". Witness the language in the Senate Report:

As the proposed Code uses the term "reckless," the risk consciously disregarded must be substantial and unjusfiable. The Final Report and the Model Penal Code both use these adjectives in their respective draft provisions to modify the risk involved. The Committee believes that the last sentence in subsection (c), requiring the risk to be of "such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person

would exercise in such situation" encompasses these adjectives.

(Senate Report at page 60.)

It is apparent from the New York and Illinois codifications that that was not the view in those states: both the "substantial and unjustifiable" language and the "gross deviation" language are included. This is also true of the Final Report and the Model Penal Code. To consciously drop language which appears in the major antecedent legislation and reports can only add confusion and uncertainty. For these reasons we strongly urge that the language "substantial and unjustifiable" be restored to the final version.

c. Negligent Conduct

The discussion regarding reckless conduct applies equally here. From the Senate Report it is clear that the risk here must also be "substantial and unjustifiable":

> As in the case of recklessness, the last sentence of subsection (d) is intended to indicate that the risk must be substantial and unjustifiable. And, as previously discussed with respect to recklessness, the jury must evaluate the actor's failure of perception and determine whether, under all the circumstances, it constitutes a "gross deviation" from the proper standard of care so

> as to warrant the criminal sanction. [Emphasis added]
>
> (Senate Report page 61.)

Once again, we urge that the language "substantial and unjustifiable" be included.

4. Rules of Construction

The rule of construction in sections 302(a) and (b) of S.1723 is a dramatic improvement over S.1722. Inherent in the House version is the premise that the drafters of legislation should consider each individual substantive crime separately and make individual decisions as to the mens rea requirement for each element. If the statute is silent, then the state of mind required for conduct will be "knowing". If there is no specific qualifying language with regard to circumstances or results, then "knowing" would also be the applicable state of mind for these elements also. This does not interfere with the right of the Congress to apply a lesser standard of recklessness or negligence in individual cases when it is the considered judgment to do so; however, in the absence of such judgment, the higher standard of knowing applies across the board.

Apparently it is a basic philosophy of S.1722, that "it is inappropriate, in the absence of an explicit legislative determination, to require more than a conscious disregard of

the law" (Senate Report at page 64), i.e., no more than recklessness. We disagree that, as a general rule, persons should be exposed to criminal responsibility on the lesser standard of recklessness as it applies to a circumstance or result. As pointed out in our earlier paper, such a general rule of construction which imputes recklessness, in the absence of a specific legislative determination to the contrary, is more properly confined to acts which expose the public to a risk of serious bodily injury or death.

5. Miscellaneous Sections

Section 303(a), (d) and (e) of S.1722 and section 302(c) and (d) of S.1723 apparently cover the same areas. In its current state we prefer the drafting format of S.1722 as the House bill tends to be confusing. Section 303 of S.1723 is also unclear and misleading. Section 302(d) is much too broad and vague and could result in much uncertainty and many unintended results. We merely suggest that the language be revised for clarity.

B. Complicity

1. Liability of an Accomplice

For the reasons previously stated, we are pleased to see that S.1723 has deleted the Pinkerton Rule.

We also believe that it was correct to provide in S.1723 that the mental state required in section 401(a)(1) of S.1722 be

the same as that required in section 401(a)(2). We had urged that an aider and abettor should be liable only "if he acts with the intent necessary to prove the crime which he is alleged to have aided" (Position Paper, page 40).

51-840 O - 79 - 33

IV. DEFENSES AND SELECTED SUBSTANTIVE SECTIONS

A. Defenses

S.1723 in several areas materially reduces the government's burden of proof as to defenses. For example, entrapment, traditionally a defense, becomes a bar to prosecution and its existence a question of law for the trial court. Duress and reliance upon official misstatement of law become affirmative defenses, presumably with a burden of proof placed on the defendant to establish the defenses by a preponderance of evidence. In addition to altering these recognized defenses, S.1723 defines some substantive offenses in a way which shifts the burden of proof from the prosecutor to the defendant; traditional elements of an offense now become affirmative defenses which must be proved by the defendant. We oppose these departures from current law.

Presently, very few areas of federal law require the defendant to establish a defense by a preponderance of evidence. That is the law, however, in several states. Typically, once some evidence of the defense is introduced in a federal criminal trial, the government must negate the defense by evidence beyond a reasonable doubt.

1. Section 706 Entrapment

We endorse the definition of entrapment as set forth in section 706 of S.1723. We think, however, that entrapment is a

defense rather than a bar, and thus should be moved from subchapter I, to subchapter II, Defenses. A bar to prosecution is a matter of law to be determined by the court by a preponderance of the evidence.

Placement of entrapment in the subchapter defining bars to prosecution reduces the government's present burden of proof and deprives the defendant of a fact determination of the elements of entrapment at trial. Under current law, the defendant need only come forward with some evidence of government persuasion or inducement to commit the offense, and the government must then prove beyond a reasonable doubt either the absence of inducement or a predisposition on behalf of the defendant to commit the offense in spite of the inducement. United States v. Henicar, 568 F.2d 489 (6th Cir. 1977); United States v. Watson, 489 F.2d 504 (3rd Cir. 1973). In the draft bill the government still has a burden of proof, but as with other questions of law such as "materiality" in a perjury prosecution, need not convince the trial court by proof beyond a reasonable doubt.

2. Sections 726 and 725 Duress, and Reliance Upon Official Misstatement

Consistent with current federal law, the proposed defenses of insanity, Section 722; intoxication, section 723; mistake of fact or law, section 724; protection of persons,

section 727; and, protection of property, section 728, are not affirmative defenses. Once a defendant raises "some evidence" of the existence of these defenses the government must establish their non-existence by proof beyond a reasonable doubt. Proposed section 716 (Duress) and section 725 (Reliance Upon Official Misstatement), however, are established as affirmative defenses. Although the term "affirmative defense" is nowhere defined in the draft bill, it may be assumed to require only proof by a preponderance of evidence. This definition is consistent with S.1722.

These two defenses should be treated like the others in subchapter II. "Reliance upon misstatement", although distinct, is similar in some respects to entrapment. Cox v. Louisiana, 379 U.S. 559, 571 (1964). Both require some type of government action which contributes to the commission of the offense. Since the underpinnings are similar, there appears no reason in law or logic for requiring a different standard or allocation of proof.

Likewise, "duress" is similar in many respects to the defenses of protection of persons and property which are not given affirmative defense treatment. Compulsion to commit an offense under threat of imminent death or serious bodily injury, as measured by a reasonable man standard, is common to duress and to selfdefense. Moreover, treatment of duress as

an affirmative defense is at odds with case law. Although the law on the issue of burden of proof as to the defense of duress is sparse, one court has stated:

> It is the law, and no one contends otherwise, that the burden of proof rests upon the Government to prove the defendant's guilt beyond a reasonable doubt and there is no burden upon the defendant to prove his defense of coercion. Johnson v. United States, 291 F.2d 150, 155 (8th Cir. 1961).

3. Other "Affirmative Defenses"

S.1723 creates so-called affirmative defenses in the definition of several substantive offenses. Again, we assume this places the burden of proof on a defendant to establish the existence of the affirmative defense by a preponderance of evidence. In reality, the affirmative defenses in these sections are, or should be, elements of the offenses themselves which would require proof by the government beyond a reasonable doubt. In addition to these offenses which are described below, there are other offenses[5] which provide for an affirmative defense, but time does not permit a detailed analysis. We suggest further study of these sections also.

[5] See, for example: section 1101, attempt; section 1102, conspiracy; section 1712, misprision of a felony; section 301(a)(3) and (d), murder; and, section 2318, affirmative defenses as to subchapter II of chapter 23, assault offenses.

a. Section 1711 Hindering law enforcement

In part, section 1711 proscribes warning a person of impending discovery or apprehension (subsection (a)(3)), or altering or concealing a document or object, (subsection (a)(4)) thereby intentionally interfering with law enforcement. Concerning an unlawful warning, it is an affirmative defense if the warning was made solely to bring the person sought into compliance with the law. As to concealing documents, it is an affirmative defense that the document was not material to the discovery or apprehension of the person sought. These affirmative defenses are, in effect, elements of the offenses and therefore the burden of proof should not be placed on a defendant.

Evidence that a concealed document or object was not material to the discovery or apprehension of the person sought tends to defeat the element of the offense defined in section 1711(a) which requires that the defendant's action actually and intentionally interfere with, hinder, delay or prevent the discovery or apprehension. The adverse effect (or materiality) of the defendant's action on apprehension or discovery is thus an element of the crime.

Similarly, "warning" the person sought of impending discovery or apprehension solely in an effort to bring that person into compliance with the law, i.e., turn himself in, defeats the

corrupt intent requirement of section 1711(a)(3) and therefore simply negates an element of the offense. Section 1711(a), in addition to a "knowing" warning, requires that the defendant thereby "intentionally" interfere with, delay or prevent discovery or apprehension. Under the general definition of intent the defendant must act with a "conscious objective" of preventing apprehension. Telling a fugitive that he is being sought with a purpose of having him surrender is inconsistent with this conscious desire. The corrupt purpose or effect of a warning is an element which the government should be required to prove by traditional standards.

b. Section 1725 Tampering with physical evidence

This section prohibits a person from knowingly altering or concealing a document or object with intent to impair its integrity or availability for use in an official proceeding. An affirmative defense is proposed where the document or object "would not have been material to the official proceeding." Materiality is defined in terms of its natural tendency to influence or impede a grand jury investigation, or whether it is capable of influencing the person to whom the document or object is presented (subsections (d)(1)(A) and (B)).

Non-materiality, although a question of law, is a complete defense to perjury for example. Likewise, impairing a document's integrity or concealing it from use in an official

proceeding should only reach material documents or objects - those that could have some adverse affect on the proceedings. This can be accomplished by inserting the word "materiality" in the description of the offense and leaving section 1725 silent as to a burden of proof.

B. Selected Substantive Sections

Because of time constraints and the priority of other materials considered, we have not discussed all of the substantive offenses in S.1723 which concern us. However, the following are a few offenses which create problems.

1. Section 1725 Tampering with physical evidence

Section 1725 prohibits, in part, concealing a document or object with intent to impair its integrity or availability for use in an official proceeding. By implication, only "material" documents are reached and proving the lack of materiality is an affirmative defense. This aspect was discussed in more detail above. A further problem with section 1725 appears in subsection (c) where it is proposed that the fact that a document is legally privileged is not a defense.

As written, this section might apply to an attorney who discovers or receives an incriminating document or object from a client in a criminal case, and is thereafter faced with the dilemma of whether there is any legal or ethical duty to disclose it. This may conflict directly with the attorney-client privilege as well as the client's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. Documents or objects received from a client during the course of preparation for trial which may implicate the client in the offense charged are protected by the attorney-client privilege. They are no different in concept than incriminating statements made by the client. Under this section, however, the act of non-disclosure by an attorney receiving such documents or objects under these circumstances could be criminal. This is of particular concern when the offense description is read with proposed subsection (c) which provides that it is not a defense "that the record, document or other object would have been legally privileged." The attorney is placed in a situation of saying to the client that there may be some disclosures through documents or objects that the attorney cannot guarantee will be kept secret. This prospect destroys effective representation and the attorney-client relationship.

The danger highlighted here can be seen further when section 1725 is compared with proposed section 1712, misprision

of a felony. Section 1712 reaches concealment of "evidence that . . . [a] felony was committed" and would cover an incriminating document or object. However, section 1712(c) provides for a defense, albeit affirmative, where "the evidence of such felony was legally privileged."

2. Section 1729 Obstruction of official proceeding by fraud

Section 1729 is a catch-all provision in subchapter III of Chapter 17 which covers obstruction of justice. It creates an offense for one who "knowingly uses fraud and thereby intentionally obstructs or impairs an official proceeding" or attempts to do so. "Fraud," "obstructs" or "impairs" are not defined but present case law gives these terms broad meaning.

This section should not be enacted. First, much of the conduct it attempts to reach is covered by other sections: section 1721, witness bribery and graft; section 1723, tampering with a witness or an informant; section 1725, tampering with physical evidence; sections 1731-1734, criminal contempt; and, section 1741, perjury. Moreover, the language is much too vague and broad and may be subject to abuse, especially in an adversary proceeding. The language is broad enough conceivably to reach a defendant, or his attorney, who produces witnesses or documents at odds with substantial government evidence to the contrary. A grand jury setting could also

provide peril for the witness who asserts, and the attorney who advises the witness to assert, a Fifth Amendment privilege against self-incrimination felt by the prosecutor to be spurious.

Constitutional conflicts are present. A defendant has a Sixth Amendment right to testify in his own behalf and to present witnesses. The existence of section 1729, or a threat to use it, could dampen the exercise of these rights. The Sixth Amendment right to counsel is also eroded by this section's chilling effect on an attorney in the presentation of witnesses and documents on behalf of a client.

3. Section 1742 False swearing

The new offense of false swearing prohibits false statements made under oath which are not "material." Materiality is defined in present law as statements that have a natural tendency to influence, impede or dissuade, or are capable of influencing the proceedings. These are broad tests which do not require that the statements actually influence the proceedings.

There is no compelling reason to apply the criminal sanction to testimony which cannot, by definition, influence or affect the proceedings in which they are made. The prospect of a criminal prosecution against a witness who testifies falsely with respect to some insignificant matter such as education,

religion or other personal characteristic gives rise to a danger of selective and discriminatory prosecution. It is doubtful that this statute will receive across-the-board enforcement. The natural reaction of a prosecutor presented with evidence of a non-material false statement would be reluctance to proceed because of an absence of any real or apparent corrupting influence on the proceeding in which the statement was made. Only where a witness is suspected of other offenses or has given testimony in opposition to the government would an incentive to use this statute exist.

V. MENTAL INCOMPETENCE

Sections 6121-6126 address the problem of accused persons whose competence to stand trial is questioned. Sections 6121 and 6122 provide for a two stage procedure consisting of a screening examination followed in some instances by a more thorough examination to determine competence. While the initial screening procedure may have certain advantages, we think that on balance, as discussed more fully later, the disadvantages outweigh the advantages; we oppose the two stage procedure of a screening examination and a mental competence examination.

Sections 6121 and 6122 encourage local competence exams. These sections require that in order for an accused person to be confined for examination or treatment, specific conditions must be met and there must be findings of fact by the court supporting the conclusion that confinement is necessary. We endorse the concept that competence exams should be performed locally and without confinement if that is appropriate. We strongly endorse the second alternative for section 6122(d)(2).

Section 6123 provides for prompt hearings, perhaps too prompt, upon receipt of the report of the exam. If there is a determination of incompetency, the court after an additional hearing, is empowered to (a) dismiss charges below the grade of Class A or B Felony, (b) release the defendant, (c) deliver

the defendant to state officials, or (d) order treatment. We endorse this approach to the problem of incompetence.

Section 6124 concerns treatment to restore a defendant to competency. We endorse the decision to give the court the power to specify the facility for treatment of the defendant, and generally give the court greater responsibility for and access to information about the treatment of a defendant.

We think it is appropriate that the Secretary of Health, Education and Welfare be responsible for regulating treatment procedures, section 6124(d)(1)(A). We endorse the provision for protection of the rights of persons being treated, section 6124(d)(1) and (2). We are pleased that the term "mental health examiner" has been broadened to include a clinical psychologist acting alone, section 6126(a)(2)(B), as we previously recommended. We believe that the proposals of this subchapter will eliminate many of the problems associated with competence exams conducted at the United States Medical Center for Federal Prisoners in Springfield, Missouri.

While we endorse, with the one exception noted, the concepts in the proposed chapter on mental competence, we do find some troublesome omissions, some problem areas, and some dangers.

A. Subjects Not Addressed

In the Draft Bill

The proposed subchapter does not address the question of insanity of the accused at the time of an alleged offense. Although section 6125(a)(1) contemplates the delivery to state officials of defendants found not guilty by reason of insanity, there may be a significant number of defendants and federal prison inmates not eligible for transfer to a state for civil commitment. There is no provision for treatment or automatic commitment of a person found not guilty by reason of insanity in accordance with section 722 and section 6125(a)(1).

There are no provisions for transfer of an imprisoned person from a prison to a hospital or psychiatric treatment facility.

There is no prohibition of the admissibility of a finding of competency as evidence in a trial for the offense charged. Both S.1437 and the current 18 USC section 4244 provide that a finding of competency shall not prejudice the defendant in raising a sanity defense. Section 4244 even states that the finding cannot "otherwise be brought to the notice of the jury."

There is no provision for procedural safeguards where mental incompentency was undisclosed at trial. 18 USC section

4245 provides for a new trial if after conviction and sentence there is a finding of incompetence at the time of the trial.

B. Problem Areas

Section 6121(a) states a "substantial doubt" test. We would recommend following the test in the present section 4244 and in section 3611 of S.1437, that is, "reasonable cause to believe the defendant is not competent". Existing tests which have been embodied in or clarified by case law should not be changed except for compelling reasons.

We have previously stated the need for prompt hearings after psychiatric evaluations. We submit that the various time limits in the proposed legislation are too short. The 48 hour limit of section 6122(b), the 5 day limit of section 6123(a)(2), and the 10 day limit of section 6123(a)(3) are so restrictive as to impair the rights of a defendant. It must be recognized that we are dealing with members of an independent profession. Competent forensic psychiatrists and psychologists are busy professionals who in our experience are not likely to be willing or able to respond so quickly. What psychiatrist would comply with a 48 hour limit on an order issued on a Friday afternoon? Defense and prosecution counsel and the court might be compelled to use less qualified and less experienced mental

health examiners. Very short time limits would be especially difficult to meet outside of metropolitan areas. We propose a 30 day time limit.

In section 6122(e)(3)(F), the words "if such examiner feels such opinion is within that examiner's expertise" should be deleted. A mental health examiner should not be selected initially if the determination is not within his expertise.

Danger to self should also be a basis for consideration of confinement, treatment, or civil commitment. We frequently encounter the situation where a mental illness may manifest itself among other things, by self-mutilation or attempted suicide. We suggest that danger to self should be an alternate basis for confinement and treatment.

Section 6126(a)(2)(C), should be deleted. In our opinion, a clinical social worker does not possess the expertise required of a qualified mental health examiner.

C. Dangers in S.1723

1. Screening Examination Requirement: Two-Stage Procedure

Sections 6121 and 6122 provide for a screening examination and a mental competence examination, in what will sometimes be a two stage procedure. A serious drawback to the screening examination as drafted is that the 48 hour limitation is impractical considering the other demands on the mental

51-840 O - 79 - 34

health examiner's practice and problems in transporting a defendant to the examiner or arranging a jail examination. There should be some time limit placed on submission of the report, but the time should start from the date of the examination. Screening examinations should be an option rather than mandatory. The danger is that they will become perfunctory.

A very serious disadvantage of this procedure is that there is no method by which defense counsel can have any input in the selection of the mental health examiner; nor are there provisions requiring that the court select this mental health examiner from an objective staff. Consequently, there is the danger that all defendants might be sent to perfunctory, government oriented examiners. This is a critical drawback because the screening examination is the crucial stage of the evaluation. From that initial report, the court need only determine that the results indicate that the defendant is competent in order to proceed with the case, section 6122(a). The defendant must come forward and request a hearing on the issue of a more thorough examination. But there is no specific provision for independent appointment of a mental health examiner selected by the defense. If the court so determines, the defendant must contest the denial of a more thorough examination. The court must hold a hearing on the defendant's

request within 48 hours after the request. If the more thorough examination is again denied, we assume the test on appeal of this ruling would be abuse of discretion, a most difficult burden to overcome.

We think that the "substantial doubt" standard of section 6121(a), the lack of provision for an independent defense-selected mental health examiner, the 48 hour time limits, and the probability that appeal of a denial of a more thorough examination would be evaluated on an abuse of discretion standard, taken together, present a danger of increased likelihood that incompetent defendants will be forced to stand trial.

2. Failure to Bar Derivative Use of a Defendant's Statements or Conduct Made During Examination Ordered Pursuant to This Subchapter.

Section 6122(e)(4) would merely hold any statements or conduct made by a defendant during the course of an examination ordered in connection with section 6121 or section 6124, inadmissible as evidence against the accused on the issue of guilt of the offense charged. It is submitted that the protection which this section is designed to offer should be enlarged to include not only statements but all evidence obtained as a result of statements made by or conduct of the defendant in the course of such an examination. The evidence

should be inadmissible on the issue of guilt in any criminal proceeding. This latter language is found in both 18 USC 4244 and S.1722.

It would appear that the court in ordering an examination pursuant to section 6122 or section 6124, wants a well-reasoned opinion from the examiner based on all of the relevant factual information concerning a defendant. For an examiner to be able to prepare a useful and meaningful report, it is essential that he have the cooperation of the defendant. This desired aim, however, is militated against by the fact that any statement made by the defendant to the examiner or persons working under the examiner's control may be considered as admissions by the defendant. These admissions may relate not only to the crime for which the defendant stands charged, but also with respect to other possible criminal activities. These admissions may lead to additional evidence of other crimes.

A further consideration in this regard is the fact that many of the examinations contemplated by the chapter will be conducted at the request of the government or the court on its own motion. In addition, examining physicians may be chosen by the government or the court. Indeed, such examinations may be conducted while the defendant is in custody and at a government facility such as the Medical Center for Federal

Prisoners. For all these reasons, failure to bar derivative use of a defendant's statements made during the course of a psychiatric examination will no doubt raise substantial constitutional questions.

VI. AMENDMENTS TO THE CRIMINAL JUSTICE ACT

In view of time constraints, this commentary is not intended to be a comprehensive statement of our reasons and justifications for the proposed amendments. Further, these amendments deal with specific needs based on our experience over the last several years, and do not purport to deal with over-riding philosophical considerations of the Criminal Justice Act and any structural changes on that level.

The underlined portions of the statute indicate new material and the broken lines through the text indicate material to be deleted. We have interposed our amendments on the basic text of section 3006(A) of Title 18 rather than the proposed text of S.1722 or S.1723, and we have not addressed ourselves to simple language changes which do not effect substantive changes.[1]

[1]The symbol @ indicates a defender change. The symbol ¢ indicates that the particular change was recommended by the Judicial Conference of the United States in the Report of the Proceedings of the Judicial Conference of the United States, September 15-16, 1977.

Immediately following these comments is a verbatim copy of the Criminal Justice Act with defender changes incorporated therein.

(a) Choice of Plan

The principal change is the addition of the right to counsel for a "witness appearing before a grand jury or a court where there is reason to believe, either prior to or during testimony, that the witness could be subject to any criminal prosecution or face loss of liberty." Similar language has already been incorporated in the Guidelines for the Administration of the Criminal Justice Act. See Guidelines, section 2.01(D)(2). New paragraph (5) conforms the Act to the additional requirements for assistance of counsel in connection with a dispositional review of a detainer as provided in the Parole Commission and Reorganization Act. The minor modifications substituting the word "representation" for "defense" take into consideration the fact that counsel now may be appointed for a witness before the grand jury. This same change is found elsewhere in the Act.

(b) Appointment of Counsel

This change is intended to conform the language to that in section 5034 of Title 18, which provides that counsel may be appointed for a juvenile, without regard to financial ability, under certain circumstances. The deletion at the end of

paragraph (5) reflects the defender position that the only true conflict situation is when defendants have interests that cannot be properly represented by the same counsel. The deleted language is surplusage.

(c) Duration and Substitution of Appointment

The language added is verbatim from section 5-5.1 of the ABA Standards, Providing Defense Services, and reflects our position that counsel be appointed as soon as possible at every critical stage of the proceeding. There may be other language which would satisfy these concerns; however, we have merely adopted the ABA version as the recognized codification in order to make the statement of our views known. The second change indicates our belief that defense counsel are not "fungible" and that the interests of the attorney-client relationship dictate that substituting appointed defense counsel, without compelling reasons stated on the record, is to be discouraged.

(d) Payment for Representation

These amendments reflect our concern with the fact that rates have not been raised since the Act went into effect in 1971. The cost of living raise alone during that period of time is probably in excess of 70%. Under the unrealistically low rates now in effect, it is becoming increasingly difficult to keep the most competent criminal lawyers on the federal indigent panels.

The maximum ceilings also have been raised substantially to take into account the increased hourly rates, and also to eliminate the need in most cases to go to the Circuit Court of Appeals for authorization of payment in excess of the ceiling. The new ceilings should cover the great majority of cases and relieve the circuit councils of a substantial administrative burden. It has been suggested by others that there be a single hourly rate for both in-court and out-of-court time. This would be a desireable approach also, and if this is the system approved, we would suggest that an across-the-board rate of $50 an hour.

Presently, there is no mechanism for an attorney to appeal a reduction of his fee by the district court judge, except by treating the fee order as an appealable order under section 1291 of Title 28. There should be some means for an attorney to appeal the unreasonable or arbitrary and capricious cutting of a voucher short of the formal appeal mechanism which merely adds to an already overburdened court of appeals with additional briefs and records. We suggest that some method of administrative appeal to the Court of Appeals be created or some other remedy be provided.

The deletion in paragraph (d)(1) reflects the fact that fee schedules have been declared illegal.

The change in (d)(6) reflects the fact that some judges in at least one large district court continue to require the

pauper's affidavit and certification of good faith and lack of frivolity despite the existing language to the contrary. This requires counsel to appeal the order denying CJA status to the Court of Appeals in a number of cases. Although virtually all of these appeals are summarily granted and CJA status provided on appeal, the unnecessary appeal causes delay, and an additional expense and burden on the Court of Appeals and defense counsel.

(e) Services Other Than Counsel

This change makes it clear that ex parte applications are not to be disclosed or made available to the government. The only protection at this time is found in the Guidelines where it is stated that such application should be "impounded" until the end of the case. Some district courts do not interpret this to mean that such applications and the contents thereof should be sealed and not made available to the government.

The change in (e)(1) reflects our belief that with the permission of individual district courts, magistrates should be allowed to authorize counsel to obtain services even in cases over which they do not have primary jurisdiction.

(f) Receipt of Other Payments

No proposed changes.

(g) Discretionary Appointments

The deletion in paragraph (g) reflects the fact that representation of alleged parole violators is now mandatory

under the Parole Commission and Reorganization Act.

(h) Defender Organization

The change in (h)(A)(1) represents the view of the federal public and community defenders that their salaries should be equal to that of the United States Attorneys in their districts, and that the defender salary should be set by statute rather than by individual circuit councils. Federal defenders have a substantial responsibility in representing indigent persons accused of serious crime in the federal courts. They are appointed for four-year terms and, unlike United States Attorneys who are under the direct supervision of the Department of Justice, have total autonomy in decision-making on matters involving the representation of clients. They also are responsible for preparing and administering their own individual budgets and for assembling and maintaining professional and clerical staff. The independence and responsibilities of Federal Defenders fully justify a stipend equal to that of the public prosecutor.

(j) Appropriations

This change reflects our belief that money for continuing education and training of assistant federal defenders and their staffs, and members of indigent defense panels, should be available to defenders through their own budgetary process. We recognize and appreciate the fine job that the Federal

Judicial Center has done in the past in providing some training funds and presenting seminars for assistant defenders, but we also recognize that the needs of the defenders are not always compatible with the range of services and facilities available at the Center. Defenders are often involved in the training of indigent panel counsel at the local level, and the fact that Center funds are not available for this purpose inhibits this function. Separate funding would also permit closer cooperation between defender offices and the private bar in their continuing efforts to upgrade the quality of representation in federal courts. Moreover, many of the best clinical and other training programs nationally are sponsored by independent groups outside the Center that have resources that are not otherwise available. We are sensitive to the recent comments by Chief Justice Burger about the need for increased advocacy training and excellence in the courtroom, and we believe that training funds available in this manner will provide the needed flexibility to increase our overall effectiveness in the area of training and continuing education.

Section 3006A. Adequate representation of defendants

(a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency ~~by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor~~@¢ or with a violation of probation or parole,@¢ (2) who is under arrest, when such representation is required by law, (3) who is a witness appearing before a grand jury or court where there is reason to believe, either prior to or during testimony, that the witness could be subject to any criminal prosecution or face loss of liberty,@¢ [(3)][(4)]@¢ ~~who is subject to revocation of parole~~,@¢ in custody as a material witness, or seeking collateral relief, as provided in subsection (g) (5) who is facing a parole termination hearing pursuant to section 4211(c), title 18 of the United States Code,@¢ or is seeking assistance in the preparation of a written application for a dispositional review of a detainer pursuant to section 4214(b)(1), title 18 of the United States Code@ or, [(4)][(6)]@¢ for whom

the Sixth Amendment of the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for ~~an~~@¢ adequate ~~defense~~@¢ representation.@¢ Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial portion of the cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify

the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel.--Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In ~~every criminal~~ any@¢ case in which ~~the defendant~~@¢ a person ~~is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel~~,@¢ may be entitled to representation pursuant to a plan and appears without counsel,@¢ the United States magistrate or the court shall advise the ~~defendant~~@¢ person@¢ that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him, except that counsel may be appointed for

a juvenile, without regard to financial ability, as provided in section 6104(a) of this chapter.@ Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, ~~or when other good cause is shown.~~@

(c) Duration and substitution of appointments.--A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel. Upon request, counsel should be provided to persons who have not been taken into custody but who are in need of legal representation arising from criminal proceedings.@ If at any time after the appoint-

ment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f) as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. ~~The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.~~@

(d) Payment for Representation.--

(1) Hourly rate.--Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding ~~$30~~ $60@ per hour for the time expended in court or before a United States magistrate and ~~$20~~ $40@ per hour for time reasonably expended out of court, or such other hourly rate,

51-840 O - 79 - 35

fixed by the Judicial Council of the Circuit, not to exceed the ~~minimum hourly scale established by a bar association for similar services~~[@¢] usual minimum hourly rate for similar services[@¢] rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcript authorized by the United States magistrate or the court.

(2) Maximum amounts.--For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid an attorney or to a bar association or legal aid agency or community defender organization shall not exceed ~~$1,000~~ $3,500[@] for each attorney in a case in which one or more felonies are charged, and ~~$400~~ $1,500[@] for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed ~~$1,000~~ $3,500[@] for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or for representation provided under subsection (g) the compensation shall not exceed ~~$250~~ $750[@] for each attorney in each proceeding in each court. For representation required to be

provided under this chapter by any Federal law, when not otherwise prescribed, the compensation to be paid to an attorney may not exceed[@¢] [$400][¢] [$750].[@]

(3) Waiving maximum amounts.--Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims.--A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix

the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(5) New trials.--For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(6) Proceedings before appellate courts.--If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and ~~without filing the affidavit required by section 1915(a) of title 28.~~@ without filing the pauper's affidavit or certification of good faith and lack of frivolity required by section 1915(a) of title 28, and section 753(f) of title 28, as amended by Public Law 91-545@

(e) Services other than counsel.--

(1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for ~~an~~@¢ adequate ~~defense~~@¢ representation@¢ may request them in an ex parte application which shall not be disclosed or made available to the government@. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, or if such magistrate is otherwise authorized by the court to do so,@ shall authorize counsel to obtain the services.

(2) Without prior request.--Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for ~~an~~@¢ adequate ~~defense~~@¢ representation.@¢ The total cost of services obtained without prior authorization may not exceed ~~$150~~ $300@ and expenses reasonably incurred.

(3) Maximum amounts.--Compensation to be paid to a person for services rendered by him to a person under this

subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed ~~$300~~ $1,000@, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate, if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

(f) Receipt of other payments.--Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may accept or request any payment or promise of payment for representing a defendant.

(g) Discretionary appointments.--Any person ~~subject to revocation of parole~~@¢ in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so requires and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

(h) Defender organization.--

(1) Qualifications.--A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) Types of defender organizations.--

(A) Federal Public Defender Organization.--A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the judicial council of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the judicial council of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be equal to@ ~~fixed by the judicial counsel of the circuit at a rate not to exceed~~@ the compensation received by the United States Attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive

service, full-time attorneys in such number as may be approved by the Judicial Council of the Circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to such attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, similarly as under title 28, United States Code, section 605, and subject to the conditions of that section, a budget for each organinzation for each fiscal year and shall out of appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organizations.—A Community Defender Organization shall be a nonprofit defense counsel service established by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and to receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the coming year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to etablish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(i) Rules and reports.--Each district court and judicial council of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office

of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(j) Appropriations.--There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, <u>including funds for the continuing education and training of persons providing representation under this chapter.</u>@ When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Admistrative Office of the United States courts.

(k) Districts included.--The term "district court" as used in this section includes the District Court of the Virgin Islands the District Court of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code.

(1) Applicability in the District of Columbia.—The provisions of this Act, other than subsection (h) of section 1, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

END