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Federal Probation

Guideline Sentencing: Probation Officer Responsibilities and
Interagency Issues *John S. Dierna*

The Presentence Report, Probation Officer Accountability, and
Recruitment Practices: Some Influences of Guideline Sentencing *Harry Joe Jaffe*

Prison "Boot Camps" Do Not Measure Up *Dale K. Sechrest*

The Greatest Correctional Myth: Winning the War on Crime Through
Incarceration *Joseph W. Rogers*

Probation and Parole Malpractice in a Noninstitutional Setting: A Contemporary
Analysis *John C. Watkins, Jr.*

The Utilization of Technology in Correctional Institutions *Lawrence F. Travis III*
Edward J. Latessa, Jr.
Robert W. Oldendick

Prison Overcrowding: The Case of New Jersey *Edward W. Sieh*

Crime Victims Seeking Fairness, Not Revenge: Toward Restorative
Justice *Mark S. Umbreit*

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This Issue in Brief ^{ACQUISITIONS}

Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues.—The recent decision by the U.S. Supreme Court to uphold the constitutionality of the sentencing guidelines system has provided the impetus for further legitimization of the Federal probation profession; yet problematic issues and difficult guideline decisions confront probation officers as they carry out the guideline sentence investigation. This article by U.S. probation officer John S. Dierna focuses on the important, challenging responsibilities placed upon the Federal probation officer conducting guideline sentence investigations and introduces a three-step process to assist probation officers assigned to these investigations.

The Presentence Report, Probation Officer Accountability, and Recruitment Practices.—Under guideline sentencing, the probation officer has become the “fixer of punishment,” according to Federal probation officer Harry J. Jaffe. This new role affects the drafting of the presentence report, heightens the degree of accountability, and argues for a change in the hiring protocol of new officers. As punisher, the probation officer must now function as an evaluator of knowledge rather than as a presenter of simple facts. This untraditional role requires a diversity of analytical skills and competencies, extending beyond the vistas of the social sciences.

Prison “Boot Camps” Do Not Measure Up.—This article by Dale K. Sechrest is about prison “boot camps,” or shock incarceration programs, which are proliferating in the United States and have generated great interest from the public and media. Typical programs provide a 90- to 120-day period of military-style recruit training designed to instill discipline and improve the self-respect of the individual participants, thus leading to improved future behavior.

System goals include reducing prison populations, reducing costs, and perhaps reducing recidivism rates for these offenders. Recidivism evidence to date, however, shows little improvement over national norms for these offenders. In fact, they may be doing worse.

The Greatest Correctional Myth: Winning the War on Crime Through Incarceration.—Reiteration of the futility of trying to win the Nation’s war on crime through overreliance on incarceration is essential, asserts author Joseph W. Rogers. Taken to extremes, the imprisonment solution has become

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Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues

BY JOHN S. DIERNA

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THE RECENT decision by the United States Supreme Court (*U.S.A. v. Mistretta*) to uphold the constitutionality of the Sentencing Reform Act of 1984 has placed a significant responsibility upon the Federal probation officer to develop a thorough understanding of the theoretical framework and implementation procedures of the sentencing guidelines. Of equal importance, probation officers must be keenly aware of the difficult guideline-related responsibilities and potential obstacles that may be encountered in certain cases. Since the introduction of the Sentencing Reform Act of 1984, judges, probation officers, attorneys, and law enforcement agencies have begun to familiarize themselves with the new and challenging responsibilities placed upon them by the United States Sentencing Commission. Consequently, these new roles, responsibilities, expectations, and rapid changes generated by guideline sentencing have had an enormous impact on probation offices and other professional agencies that strive toward the common goal of effective guideline sentencing.

In the following pages, the guideline-related responsibilities of the probation officer will be analyzed. In addition, the responsibilities of the prosecuting attorney, defense counsel, and case agent will be examined, as well as their impact on the probation officer's presentence investigation. Further, a three-step process will be presented to assist the probation officer in focusing on guideline presentence investigation responsibilities. It is hoped that probation officers and other professional agencies involved in guideline sentencing will better understand and address these changing responsibilities and guideline-related issues in order to fortify their pivotal roles and ensure a more effective and unified guideline sentencing process.

Reducing Sentencing Disparity in the Court

The three basic objectives that Congress sought to achieve in developing sentencing guidelines were

¹ United States Sentencing Commission, *Sentencing Guideline Manual*. Washington, D.C.: Government Printing Office, 1987, p. 1.2.

² *Ibid.*, p. 1.3.

³ Susan D. Krup, "A Retributive-Justice Model of Sentencing," *Federal Probation*, 1981, 45, p. 25.

honesty, uniformity, and proportionality in sentencing. One of the primary purposes of achieving uniformity in the sentencing process was to narrow "the wide disparity in sentences imposed by different Federal courts for similar criminal conduct by similar offenders."¹ In order to reduce sentencing disparity in the court system (i.e., increase uniformity) yet encourage different sentences for different criminal conduct (i.e., proportionality) the United States Sentencing Commission acknowledged the dilemma of how to achieve uniformity and proportionality in the sentencing of defendants in United States district courts. The dilemma centered on whether to establish a broad category approach which granted judges the discretion to select a sentence along a broad sentencing range or a complex system of subcategories which would require judges and probation officers to make decisions regarding complicated facts and specific issues about the offense. The U.S. Sentencing Commission concluded:

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex sub-categorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer the drawbacks of each approach.²

The final product established by the U.S. Sentencing Commission to reduce the discretionary powers of the court is a blending of the aforementioned ways to categorize offense behavior. The Sentencing Reform Act of 1984 is considered a retributive-justice model of sentencing that has introduced a sentencing framework that effectively reduces judicial discretion by requiring that "sentences be based upon the serious nature of the offense and be proportional to the harm done by the offender."³ An integral component of this sentencing process is the probation officer, who is required to investigate the facts of the offense and determine the guideline applicability of these facts for the purpose of offense level computation purposes.

The Changing Role of the Probation Officer in the Sentencing Process

Guideline sentencing has presented the framework for revitalizing the Federal probation field based on the prominent role assigned to probation officers. Prior to guideline sentencing, the primary task of the probation officer, as it pertained to sentencing, focused on compiling prosecutorial and defendant versions of the offense, verifying prior arrest history and personal background data, evaluating the information, and making a recommendation. The aforementioned contents of the presentence report were (and except for a few modifications still are) useful in providing the sentencing judge with a more thorough understanding of the defendant for sentencing purposes. Yet, the introduction of increased probation officer decision-making responsibilities that affect upon guideline calculations has significantly expanded the role of the probation officer and has amplified the importance of the presentence investigation report.

Primarily, the probation officer has been assigned the difficult, yet challenging responsibilities of thoroughly investigating the criminal activity of the defendant) i.e., offense of conviction and charged/un-charged criminal conduct) in order to determine the base offense level, existence/nonexistence of relevant conduct, specific offense characteristics and adjustments (see sections A - E, chapter 3 of the Guidelines Manual), and departure issues. These guideline determinations are based on the probation officer's ability to establish the facts of the case and to apply these facts to law (i.e., sentencing guidelines). This application process occurs after the probation officer has thoroughly investigated and analyzed the case and has engaged in case discussions with the prosecuting attorney, case agents, and defendant. In addition to these offense-related responsibilities, the probation officer must present a sound sentencing recommendation, including the rationale for this decision, to the sentencing judge. Finally, the probation officer must be prepared to defend guideline decisions when confronted with objections by the prosecuting attorney and/or defense counsel.

Guideline Decision-Making Responsibilities

An example of the decision-making responsibilities required of the probation officer during the preparation of a guideline presentence report is detailed in the analysis of the following hypothetical case situation:

Drug Enforcement Administration agents arrest an individual after he sells approximately 1.5 kilograms of cocaine to a confidential informant. He is arrested at his home without incident. During a search of the residence, agents confiscate an additional kilogram of cocaine in an adjoining room along with a weighing

scale and drug packaging paraphernalia. Further, officers confiscated a loaded handgun under a seat cushion which was 4 feet from where the transaction occurred. Officers located drug records and have developed a 12-member hierarchy as it pertains to the drug distribution ring. Five additional arrests have been made. It should also be noted that the informant admitted to arresting officers that 2 months ago (before he was used as an informant) he purchased a total of 28 ounces of cocaine during two meetings with the defendant.

The case scenario presents myriad guideline-related issues that the probation officer must analyze. The probation officer must ultimately determine whether, and to what extent, such issues should be included in the report (i.e., for informational purposes or guideline computation purposes). Examples of these important decisions are detailed below:

- (1) Is the 1 kilogram of cocaine found in the defendant's home a consideration bearing on relevant conduct under sections 1B1.3(a)(1), (2), (3), (4) or (5)?
- (2) If this additional quantity of cocaine is not a consideration under relevant conduct, should it be used as a factor to warrant an upward departure or a sentence at the upward point of the guideline imprisonment range?
- (3) Does the loaded handgun represent a weapon possession enhancement under section 2D1.1(b) (1)?
- (4) Is there enough evidence to utilize the 28 ounces of cocaine purchased by the informant as relevant conduct? If not, should it be included in the report for informational purposes or as a factor to warrant departure?
- (5) What is the defendant's role in the offense? Does his role necessitate an adjustment under section 3B1.1(a), (b), (c) or 3B1.2(a) (b)?
- (6) In terms of the relevant conduct, specific offense characteristics, and adjustment determinations, does the probation officer have the support of the U.S. attorney's office, case agent, and informant if a sentencing hearing is held before the judge?

It is evident that numerous difficult decisions confront the probation officer during preparation of the presentence report. It is of utmost importance that the officer utilize his investigative and decision-making skills especially when making determinations that affect the Total Offense Level such as issues of relevant conduct, offense level adjustments, and specific offense characteristics. The simple three-step process described below may assist the probation officer assigned to a guideline presentence investigation. The three-step process, an easy pathway to follow when conducting the presentence investigation, involves the following:

- (1.) *Establishing the facts of the case;*
- (2.) *Applying case facts to law:* Guideline interpretation;
- (3.) *Maintaining confidence* with the guideline decisions that are made.

Establishing the Facts of a Guideline Case

The probation officer's responsibility of establishing the facts of a case for guideline presentence investigation purposes commences upon the defendant's plea

of guilty or conviction in United States district court. Once the probation officer has been assigned a guideline presentence investigation, he embarks on the challenging, yet rewarding task of interviewing, investigating, verifying, and quantifying in order to obtain and eventually analyze offense information for inclusion in the presentence report. The U.S. Sentencing Commission has bestowed upon the probation officer the important responsibility of establishing the case facts which affect the guideline calculations (i.e., Total Offense Level) and the corresponding guideline imprisonment range. Based on this significant responsibility, the investigating probation officer must familiarize himself with generic offense-related questions that should be answered during the course of the presentence investigation. A few of the questions that could ultimately affect guideline calculations in certain cases are as follows:

- When was the criminal investigation that pertains to the defendant initiated by law enforcement officials?
- Which law enforcement agencies were involved in the investigation?
- When and why did the defendant become a target of the investigation?
- How many individuals were involved and/or have been charged as a result of this crime?
- What is the defendant's role in the offense?
- Describe the overall offense behavior of the defendant.
- Quantify the total amount of drugs/monetary loss attributable to the case.
- Will the case agents testify to the truthfulness of the facts of this case?

These offense-related questions assist the probation officer in establishing a comprehensive understanding of the investigation and the defendant's participation in the criminal activity. During the presentence investigation, the probation officer must establish case facts by interviewing case agents and distinguishing between statements based on fact, allegation, and assumption. It is important for the probation officer to determine whether the case agent would testify to the truthfulness of offense-related information in the event that objections are raised and a sentencing hearing is required. An agent's willingness to testify to certain offense-related information is an excellent determinant of whether the information is factually based. This determination process and an agent's support of offense information obtained by the probation officer are an integral component of the guideline presentence investigation, especially in cases which involve information that had not been discussed in the charges that had been filed (yet may be used for calculating the Total Offense Level for purposes of relevant conduct or factors to warrant departure).

Guideline Interpretation: Applying Case Facts to Law

The establishment of case facts leads to the process of determining whether the facts can be applied to

the law (i.e., sentencing guidelines). During this segment of the guideline presentence investigation, the probation officer is required to analyze the facts that have been obtained regarding the Federal offense and the characteristics pertaining to the defendant's involvement and determine their applicability/non-applicability in the guideline calculations. This, too, can be a difficult decision-making process, primarily because the probation officer must conclude whether the offense information obtained is based on enough fact to warrant consideration for offense-level computation purposes. In order to effectively assess the applicability of case facts to the law, the probation officer should examine the facts in relation to the specific sentencing guideline section of the Guideline Manual.

This decision-making process is evident in the analysis of the case scenario presented earlier. For example a loaded weapon was found under a seat cushion at the home of an individual who had been involved in drug distribution activities (established case fact). Analysis of section 2D1.1(b) (1) and the Guideline Commentary page 2.40, number 3, of the sentencing guidelines manual reveals that an enhancement for firearm possession applies when there is "an increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present . . ." ⁴ (definition of the law). At this point, the probation officer must decide whether the facts of the case apply to the law that has been established for firearm possession. It is understandable that probation officers may differ in their understanding of this specific offense characteristic and other offense-related information contained in the sentencing guidelines manual. It is evident that decisions vary when individuals with the responsibility to decide the applicability of these facts to law possess differing case facts.

A probation officer's decision-making skills in guideline situations become more refined with experience and effective communication with co-workers who have confronted various guideline decision situations. It is vitally important that probation office administrators address this issue by encouraging dialogue between officers on a consistent basis in order to discuss guideline-relevant issues such as guideline applicability/calculation decisions. For example, weekly meetings should be scheduled between office administrators and line officers. Office meetings are an important tool in the guideline sentencing process. The importance of office meetings was addressed in Jack Phillips' article "We've Got to Keep Meeting Like This." Phillips concluded:

(Office meetings) give employees an opportunity to contribute ideas and suggestions about the implementation of new policies and to express their feelings about existing ones. Together, employees and supervisors can identify, discuss and deal with

⁴ United States Sentencing Commission, Sentencing Guideline Manual, p. 2.40.

potential problems before they can become unmanageable. Such open discussion among employees and between the employees and their supervisor improves cooperation and teamwork in the work unit.⁵

Office meetings should concentrate on the specific problems that have confronted officers since the implementation of guideline sentencing and an examination, as an office, of offense conduct issues, specific offense characteristics, and additional elements of the presentence report that require the probation officer to utilize his decision-making abilities. In the author's opinion, the failure to address the issues of guideline decision-making responsibilities and the process of applying case facts to law may result in divergent viewpoints regarding the general understanding and application of the sentencing guidelines. Probation offices must work together, especially during this evolutionary stage of guideline sentencing, in order to candidly discuss the process of applying case facts to the sentencing guideline framework.

The author does not propose, however, that probation offices, districts, or the entire probation system formulate and adhere to a myopic and mechanistic view of guideline sentencing and decision-making responsibilities. It is apparent that no matter how specific a guideline is, it is subject to individual interpretation and individual decision-making as to whether the information should be used for calculation purposes and whether the officer can adequately argue these decisions in court. It is recommended that office meetings on guideline issues be held which would provide officers the opportunity to candidly discuss the difficulty in making guideline decisions and instill confidence and an increased level of understanding of the guideline elements that are necessary in making important guideline decisions.

Maintaining Confidence With Guideline Decisions

Throughout the guideline presentence investigation process, it is of utmost importance that the probation officer maintain confidence regarding the guideline determinations that he makes and expounds upon in the presentence report. Maintaining confidence is especially important since the advent of guideline sentencing because it is the probation officer's responsibility (in the author's opinion the probation officer's most challenging responsibility) to defend (orally and in writing) guideline decisions if objections are raised by the prosecutor and/or defense attorney. Prior to guideline sentencing, objections raised by defense counsel and/or the prosecuting attorney were responded to in addendum form. At the time of sentencing, the judge would further address the objection(s) and

decide whether the objections affected upon his sentencing decision. Under guideline sentencing in the Southern District of Ohio, written objections to the presentence report must be submitted by the objector (i.e., defense counsel/prosecuting attorney) within 10 working days and responded to in writing by the probation officer in 7 working days. If objections remain unresolved, a sentencing conference is scheduled at the U.S. probation office at which time the parties involved (defense counsel, prosecutor, case agent) meet in an attempt to resolve the objections. In many cases, the objections remained unresolved, and a sentencing hearing is required before the judge in order to resolve the objections.

Sentencing conferences and hearings require the probation officer to exhibit oratorical skills, professional savvy, and an ability to present rational and persuasive arguments in support of his guideline-relevant decisions. The aforementioned responsibility is awesome given the fact that prior to guideline sentencing the probation officer's reliance on these skills was significantly less as they refer to the presentence investigation and sentencing process. The introduction of new and challenging responsibilities should be accompanied by various techniques to ensure that the employee adequately fulfills the requirements and responsibilities placed upon him. If probation officers are not afforded the opportunity to expand their abilities as communicators, mediators, and decision-makers, their effectiveness as guidelines sentencing applicators is severely hindered. It is recommended that probation officers be afforded the opportunity to enhance their communication skills by attending seminars, educational courses, and workshops aimed at assertiveness training, mediation techniques, and public speaking.

Effects of Guideline Sentencing on Plea Agreements

The challenging guideline decision-making responsibilities are not the only dilemmas facing the United States probation officer since the introduction of guideline sentencing. Of equal importance is the reduction in prosecutorial flexibility regarding the plea bargaining process, which may produce deleterious effects on probation officers and their ability to fulfill their roles as guideline presentence investigators. The U.S. Sentencing Commission expected "the initial set of guidelines to have a positive, rationalizing impact upon plea agreements . . ."⁶ One of the reasons for the positive impact envisioned by the Sentencing Commission is discussed below:

. . . the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement) and the reason for the agreement, they will

⁵ Jack J. Phillips, "We've Got to Keep Meeting Like This," *Personnel*, January 1988, p. 43.

⁶ United States Sentencing Commission, *Sentencing Guideline Manual*, p. 1.8.

find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.⁷

Yet, prosecutorial discretion has been addressed many times by criminologists who study retributive-justice models of sentencing. Susan D. Krup's article, "A Retributive-Justice Model of Sentencing," focuses on prosecutorial discretion as a major problem in this sentencing model:

One of the major flaws cited by critics of the retributive approach is that, while limiting judicial discretion, it fails to realistically take into account prosecutorial discretion and the prosecutor's use of plea-bargaining. In fact, the critics argue that these models only serve to replace abuses of judicial discretion with an even more dangerous potential, increased prosecutorial discretion.⁸

Under guideline sentencing, judges are required to examine and ultimately determine whether to accept the plea agreement and to "make certain that prosecutors have not used plea bargaining to undermine the sentencing guideline."⁹ The aforementioned monitoring process, and the increased guideline decision-making responsibilities of the probation officer, have, in some cases, begun to deteriorate the once strong and symbiotic relationship between the U.S. attorney's office and the U.S. probation office. The fragility of this relationship was initially examined by Donald Chamlee, chief of the Probation Division, Administrative Office of the United States Courts, when he lauded the probation officer's role in guideline sentencing, yet remarked on the possible effects of this role and guideline decisions on plea agreements;

In applying the guidelines as Rule 32 requires, the officer comes up with facts or an interpretation of the guidelines that calls for a sentence different, and usually greater, than what either the defense or prosecution had in mind. This threatens to overturn the plea bargain.¹⁰

Guideline Sentencing Relationships: The Probation Officer and the Assistant United States Attorney

Prior to the Sentencing Reform Act of 1984, the professional relationship between the staffs of the U.S. attorney's office and the U.S. probation office was generally grounded in mutual respect and reliance as it related to the presentence report and the sentencing of defendants in U.S. district courts. Probation officers routinely depended upon the assistant United States attorney "as a primary source of

essential information . . . in preparing the official account of the offense in presentence reports."¹¹ Likewise, prosecuting attorneys relied on the probation officer to present a thorough and fair representation of the defendant's criminal activities in the presentence report in order for the judge to have a complete understanding of the defendant for sentencing purposes. As previously discussed, the introduction of guideline sentencing has placed the responsibility on the probation officer to make crucial decisions regarding the extent of the defendant's involvement in the instant offense. On occasion, these determinations may be in direct contrast to the plea agreement and the discussions between prosecutor, defendant, and defense counsel. Further, these guideline decisions may result in the rejection of the plea agreement by the sentencing judge and a significant increase or decrease in the defendant's total offense level and guideline imprisonment range.

Relevant Conduct: A Controversial Guideline Decision

The existence or nonexistence of relevant conduct in a guideline case is a difficult and sometimes controversial decision that the probation officer must make during some presentence investigations. An example of how the relevant conduct determination and additional offense-related decisions may threaten the plea agreement and cause disharmony between the probation officer and the prosecutor is evidenced in the case scenario presented earlier.

A Possible Prosecutorial Viewpoint

The defendant is charged with one count of Distribution of Cocaine (i.e., 1.5 kilograms of cocaine) [Title 21, USC 841 (b) (1) (B)] and one count of Conspiracy [Title 21, USC 846]. The defendant pleads guilty to Distribution of Cocaine in return for the dismissal of the Conspiracy charge. The plea agreement recommends that the defendant be considered a minor participant [Section 3B1.2(b)]. In addition, the plea agreement states that the prosecution has no evidence to suggest that the gun found in the home was used during the commission of the offense. It is noted that preplea negotiations focused on the 1.5 kilograms of cocaine for the purposes of a preliminary drafting of a total offense level and guideline imprisonment range.

The prosecutor advised defense counsel that probation officials were not bound by the preliminary findings/recommendations. Based on the 1.5 kilograms, no enhancements, a two-level reduction for minor participant, acceptance of responsibility and a lack of a prior arrest history, preliminary calculations revealed a total offense level of 22 and a guideline imprisonment range of 41-51 months. Defense counsel was advised that the statutory penalty for the Distribution of Cocaine count was 5 - 40 years imprisonment, which meant that the Judge would have to sentence the defendant to at least 60 months in prison regardless of the guideline imprisonment range.

A Probation Officer's Guideline Investigation

The probation officer interviewed the defendant, who accepted responsibility for his involvement in

⁷ Ibid.

⁸ Krup, "A Retributive-Justice Model of Sentencing," *Federal Probation*, 1981, p.26.

⁹ United States Sentencing Commission, *Sentencing Guideline Manual*, p. 6.5.

¹⁰ Probation Division, *News and Views, A Message from the Chief*. Washington D.C.: Administrative Office of the United States Courts, (Volume XIII, No. 17), p. 1.

¹¹ The Federal Judicial Center, *An Introduction to the Federal Probation System*. Federal Judicial Center, 1976, p. 19.

the count of conviction, yet declined to discuss his possible involvement in additional drug distribution activities. An interview with the prosecutor revealed that the plea agreement was fashioned in a way that would reduce the possibility that the defendant (who is a first-time offender) would be sentenced to a period of imprisonment in excess of 5 years. In addition, the prosecutor stated that the minor participant recommendation was based on the lack of the defendant's knowledge of the scope of the distribution ring and the short period of time (i.e., 3 months) that he was involved in the crime.

An interview with the Drug Enforcement Agency (DEA) case agent and the probation officer's analysis of the details of the offense revealed that the defendant was responsible for the 1.5 kilogram transaction and had been involved in transactions totaling 28 ounces of cocaine with the informant before he was used as an informant with the DEA. Although individuals had been arrested who were considered more culpable than the defendant, a two-level reduction did not appear warranted. Further, the loaded gun reflected an increased danger of violence because it was loaded and in extremely close proximity to the defendant during the transaction. In addition, the one kilogram of cocaine confiscated from the defendant's home and the 28 ounces of cocaine that he sold to the informant 3 months earlier were considered relevant conduct based on sections 1B1.3(a)(1) and (a)(2). This determination was based on the fact that one kilogram was found in the home surrounded by drug packaging and distribution paraphernalia and is considered to be "part of the same course of conduct . . . as the offense of conviction."¹² In addition, guideline manual commentary has authorized the inclusion of additional quantities of drugs in offense level computation (see page 2.40 paragraph 6, page 2.46 paragraph 11, page 1.16 paragraph 2, pages 1.18 and 1.19). The additional 28 ounces of cocaine that the defendant sold to the informant are considered relevant conduct based on sections 1B1(a)(1) and (a)(2) and the aforementioned guideline commentaries. The 28 ounces represented conduct in preparation for the offense of conviction and was part of the same course of conduct or common scheme or plan as the offense of conviction. Further, the DEA case agent and the informant were interviewed by the probation officer and agreed to testify to the truthfulness of their statements in the event that a sentencing hearing was required.

The Probation Officer's Guideline Calculations

The probation officer's guideline offense level determinations are listed below:

- (1) 1.5 kilos + 1 kilo + 28 ounces = 3.3 kilos of cocaine
[relevant conduct 1B1.3(a)(1) and (a)(2)] Base Offense Level = 28

¹² United States Sentencing Commission, Sentencing Guideline Manual, p. 1.17.

¹³ Probation Division, News and Views (Volume XIII, No. 17), p. 1.

- (2) two level enhancement for weapon possession
[2D1.1(b)(1)] = +2

- (3) no upward or downward adjustment for role in the offense

- (4) two level reduction for acceptance of responsibility [3E1.1(a)] = -2

- (5) Total Offense Level of 28, Criminal History category of I and a guideline imprisonment range of 78 - 97 months.

It is evident that the probation officer's guideline computations are in stark contrast to the preliminary discussions between the prosecutor and the defense attorney (i.e., 78-97 months imprisonment vs. 41-51 months). Regardless of whether the sentencing judge agrees with the probation officer's assessment of the case, it is apparent that the probation officer considered the aspects of the case and provided the judge with an overall assessment of the defendant's criminal behavior. Case scenarios such as the one described above threaten the plea agreements established by Federal prosecutors and may transform the symbiotic relationship between Federal prosecutors and probation officers into an adversarial relationship.

Withholding Guideline Relevant Information

Another method of guideline circumvention that has a direct impact on the responsibilities of the probation officer focuses on the deliberate withholding of guideline-relevant information from the investigating probation officer by the Federal prosecutor. It is apparent that if the defendant is not charged with this additional offense behavior and the probation officer is not informed of the overall offense behavior of the defendant's criminal conduct, relevant conduct is not an issue and the plea agreement is relatively secure. Chamlee responded to this type of guideline circumvention by offering the following advice to probation officers:

If this new sentencing scheme encourages opposing counsel or others to suppress information or otherwise make it unavailable to the probation officer, the officer is best advised to inform the Court. It is the Court that has the greatest interest in having available a full array of all pertinent facts in a case . . . probation officers must (continue) to objectively pursue the issues on behalf of the Court and lay out these facts for the Courts to address.¹³

A Need To Initiate Interagency Dialogue

The U.S. Sentencing Commission did not formulate the sentencing guidelines in order for probation officers to independently and arbitrarily decide a defendant's punishment, nor did it espouse Federal prosecutors withholding potentially guideline-relevant information from investigating probation officers. Additionally, the U.S. Sentencing Commission intended that prosecutors meet with defense attorneys and

construct fair and honest plea agreements based on the defendant's criminal behavior. The methods of circumvention utilized by some prosecutors to prevent probation officers from obtaining a thorough understanding of a defendant's criminal activity were recently addressed in a memorandum for Federal prosecutors authored by Attorney General Dick Thornburgh entitled "Plea Bargaining Under the Sentencing Reform Act of 1984." Thornburgh cautioned that "prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve."¹⁴ The issue of plea bargaining by Federal prosecutors was also addressed by Thornburgh:

Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct The basic policy is that charges are not to be bargained away or dropped unless the prosecutor has a good faith doubt as to the government's ability to readily prove a charge for legal or evidentiary reasons (One exception) is if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in part D of chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be.¹⁵

The memo authored by Thornburgh represents a positive step in resolving potential problems, yet it is recommended that administrators of U.S. probation and U.S. attorney's offices initiate discussions regarding the problems confronting each agency in the effective implementation of the sentencing guidelines. It is necessary for the offices involved to openly discuss their differing guideline responsibilities, yet focus on the overall goals of each agency as they pertain to the sentencing of defendants—specific and general deterrence and the protection of society from individuals involved in deviant behavior.

Guideline Sentencing Relationships: The Probation Officer and Defense Counsel

The professional relationship between the probation officer and defense counsel has generated increased levels of dialogue and disagreement since the implementation of guideline sentencing. Specific-

ally, sentencing guidelines and the new responsibilities of the probation officer have resulted in the following: (1) differing levels of guideline knowledgeability between officers and defense attorneys, (2) a more spirited objection/resolution process, and (3) a heightened level of probation officer mistrust by defense attorneys because of the increased decision-making authority of the probation officer during the presentence investigation process.

Probation officers in the Southern District of Ohio have prepared presentence reports in guideline format since November 1, 1987. Although the initial number of presentence reports completed during this time period were not actually guideline cases, probation officers, judges, prosecutors, and defense attorneys were promptly indoctrinated to guidelines sentencing. Although probation officers, judges, and prosecutors actually participated in the gradual process of understanding the framework and implementation procedures of the guidelines, it appeared that the majority of defense attorneys who represented Federal defendants in one location lacked the knowledge and motivation to learn the sentencing guidelines. This was particularly distressing given the fact that an extensive guideline training seminar was conducted by the U.S. probation office for defense attorneys in the Southern District of Ohio.

The differing levels of guideline knowledgeability between probation officers and defense attorneys continued until January 1989 (when the constitutionality of the guidelines was upheld) when defense attorneys assumed a more active interest in expanding their understanding of the guidelines. Although the defense attorneys who had previously chosen not to actively engage in the guideline learning process are currently becoming more acquainted with this intricate sentencing framework, the knowledge imbalance continues. Specifically, the disclosure process is more time-consuming and a number of objections and recommendations from defense attorneys are not congruent with the requirements of the Sentencing Reform Act of 1984. Nonetheless, defense attorneys' knowledge about guidelines has improved significantly since the U.S. Supreme Court decision in January 1989, and it is anticipated that probation officers and defense attorneys will continue to work diligently in this extremely important area of the Federal criminal court system.

Guideline sentencing has resulted in increased defense counsel participation in the presentence investigation process. Currently, defense attorneys seem more inclined to be present during presentence interviews between the probation officer and the defendant. The defense attorney's request to be present during these interviews is justified and encouraged given the fact that a defense attorney's absence from

¹⁴ Dick Thornburgh, Attorney General of the United States, Memorandum on Plea Bargaining Under the Sentencing Reform Act, March 13, 1989, p.1.

¹⁵ *Ibid.*, p. 3.

these discussions could result in the consideration of relevant conduct, factors to warrant an upward departure, and enhanced guideline calculations. A defendant who has not been properly advised by his attorney regarding the sentencing guidelines and their impact on his sentence in U.S. district court may candidly discuss his participation in the offense which may enhance his Base Offense Level and corresponding guideline imprisonment range. In an attempt to reduce the defendant's probability of providing self-incriminating information, many defense attorneys have instructed their clients to limit their discussions with investigating probation officers to the offense of conviction. Although these instructions have effectively reduced the possibility of a defendant providing self-incriminating information, it has caused problems regarding the probation officer's decision to grant a two-level reduction for acceptance of responsibility under section 3E1.1(a) of the guidelines manual.

A controversial issue currently confronting probation officers is whether to grant a two-level reduction for acceptance of responsibility to a defendant who candidly discusses the offense of conviction but, on the advice of his attorney, declines to discuss counts to be dismissed and/or overall offense behavior. Section 3E1.1(a) of the guidelines manual advises probation officers that in determining whether a defendant qualifies for the two-level reduction, one of the considerations is "voluntary and truthful admission to authorities of involvement in the offense and related conduct."¹⁶ The prosecuting attorney is able to prevent this issue from becoming a problem by utilizing section 1B1.8 of the guidelines manual in the plea agreement. Section 1B1.8 prohibits the use of self-incriminating information provided by the defendant in determining the applicable guideline range unless the information so provided was known by the Government prior to the agreement. Section 1B1.8 is applicable in cases in which the defendant has agreed to cooperate with the Government by providing information concerning the unlawful activities of others. The inclusion of this provision in the plea agreement allows the defendant to discuss the overall offense without its being used for purposes of offense-level calculation and results in a two-level reduction for acceptance of responsibility.

The guideline sentencing process appears to have caused an increase in the number of defense attorney objections to the guideline presentence report. As previously discussed, the probation officer has assumed a more active role in the objection process and is required to engage in discussions with the defense attorney in an attempt to resolve the objection(s).

Further, unresolved objections result in a hearing before the sentencing judge during which time the probation officer and defense attorney must present information and evidence regarding their reasoning for the guideline decision and subsequent objection. These new probation officer responsibilities are challenging and require thorough investigative skills and precise decision-making abilities, yet it has engendered an increased level of mutual respect between probation officers and defense attorneys.

Guideline Sentencing Relationships: The Probation Officer and the Case Agent

The role of the case agent (i.e., the individual(s) responsible for conducting the criminal investigation on the defendant) in guidelines sentencing is extremely important to the probation officer assigned to a guideline sentencing case. Case agents have been considered assets to probation officers conducting presentence investigations because it is the agent who possesses the details and knowledge of a case and can provide guidance regarding offense information and the extent of a defendant's involvement in the criminal activity. Under guideline sentencing, the case agent continues to assume an integral role in providing guideline-relevant information. Yet, Federal law enforcement agencies and task forces created to focus on specific Federal offenses are faced with at least two predicaments as a result of the evolution of sentencing guidelines.

First, the guideline sentencing has resulted in harsher sentences, the reduction in sentencing disparity, and a plea agreement monitoring process which significantly reduces defendants receiving lighter sentences based on the plea agreement and defendants' level of cooperation with law enforcement authorities. In essence, guideline sentencing may result in a lack of incentive for defendants to cooperate with authorities and may result in a substantial reduction in defendants being used as informants for law enforcement purposes. Currently, it appears that the only incentive for a defendant to act as an informant or provide substantial assistance to authorities is a recommendation by the prosecutor for a downward departure from the guidelines (see section 1B1.9 of the guidelines manual). Should the prosecutor decline to file a motion under section 1B1.9, or if the sentencing judge rejects the prosecutor's recommendation for a downward departure, the defendant is sentenced and not rewarded for his efforts to assist with law enforcement authorities.

Another problem facing the case agent in providing overall offense information pertaining to the defendant is that it may result in the determination of relevant conduct and/or offense level enhancement/adjustment. These guideline-relevant decisions result

¹⁶ United States Sentencing Commission, Sentencing Guideline Manual, p. 3.21.

in an enhanced guideline imprisonment range which may cause the defendant to refuse to cooperate with the case agent in the overall criminal investigation. Additionally, case agents may be approached by Federal prosecutors and asked to refrain from discussing the defendant's overall involvement in the offense in order to prevent the probation officer from using this information as relevant conduct or a factor to warrant departure. In the majority of case scenarios, the author has witnessed the total cooperation of case agents in providing information regarding the defendant's overall offense behavior to the investigating probation officer. Law enforcement agents have expressed a willingness to assist probation officers in the preparation of guideline presentence reports regardless of potential pressure by the Federal prosecutor or the fact that the offense information may be used to aggravate the defendant's sentence and cause him to refuse to further cooperate with law enforcement authorities. Guideline sentencing has placed law enforcement agencies in an uncomfortable situation based on their relationships with the U.S. attorney's office and the U.S. probation office. Although guideline sentencing is currently in its developmental stage, and Federal agencies are experiencing the role changes and the effects of the guidelines, it appears that case agents from Federal agencies and task forces are becoming increasingly aware of the pivotal role they assume in the effectiveness of guideline sentencing.

It is imperative that guideline training be afforded to law enforcement officers on a routine basis in order that they may increase their understanding of the intricacies of sentencing guidelines. As Federal law enforcement agencies and task forces become more adept concerning the framework and implementation procedures of guideline sentencing, they also become an even more important asset to the probation officer in the presentence investigation stage and the entire guideline sentencing process.

Summary

Guideline sentencing has redefined the roles and responsibilities placed upon the Federal probation officer during the sentencing process. Probation officers have always been required to conduct thorough presentence investigations to assist the sentencing judge in further understanding the offense and the defendant. Yet, guideline sentencing requires the probation officer to make important guideline relevant

decisions that may impact upon the defendant's sentence in the United States district court. These guideline tasks are extremely important and should be monitored by probation management staff in each office and the Probation Division, Administrative Office of the United States Courts. Guideline sentencing is an evolutionary process, as is the probation officer's effectiveness in guideline application determinations. It is evident that problems will be confronted by probation officers during the course of the guideline presentence investigation, and the initial step of problem resolution for each of these obstacles is intra-inter agency communication. Whether the problem focuses on establishing the facts of the case or circumvention of the guidelines by prosecutors, communication is the essential component in problem identification and eventual resolution. Federal probation offices and districts must initiate discussions on a routine basis in order to address the issues that confront them in the quest to effectively fulfill their roles and accomplish their guideline responsibilities. It is important to remember that the Federal Probation System has been bestowed with important, yet immensely challenging responsibilities in this new era of Federal sentencing. It is of utmost importance that Federal probation officers work diligently as part of a unified system to uphold these responsibilities and accomplish guideline tasks in an effective and professional manner.

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