COMMENTS OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR ON THE INITIAL REPORT OF THE SUPERIOR COURT SENTENCING GUIDELINES COMMISSION

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STANDARD DISCLAIMER

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

SUMMARY OF SECTION 5 (CRIMINAL LAW AND INDIVIDUAL RIGHTS) SENTENCING GUIDELINES COMMENTS:

The Section on Criminal Law and Individual Rights of the District of Columbia Bar submits these comments in response to a request for public comments on the draft felony sentencing guidelines issued by the Superior Court Sentencing Guidelines Commission ("Commission").

At the outset, we note that the Commission obviously has devoted a tremendous amount of time and effort to the extremely difficult task of trying to organize all the factors which have an impact upon a court's felony sentencing decision. We noted that the debate generated by these guidelines has focused attention upon a myriad of sentencing issues which are too often ignored by the bar and the public. This process alone is worthwhile and beneficial for all the participants.

We first address generally whether any sentencing guidelines should be adopted in the District of Columbia as well as the manner in which these guidelines were developed and are to be implemented. We express three concerns about sentencing guidelines generally. First, we disagree with the Commission's assumption that sentencing guidelines, which utilize a relatively inflexible mathematical grid box system, can appropriately deal with the tremendous variety of felony cases which come before the Superior Court bench for sentencing. Second, we question whether the COmmission has authority unilaterally to develop and to implement such guidelines. Finally, we express the belief that guidelines generally will adversely affect the plea bargaining process.

We then turn specifically to the Commission's proposed felony sentencing guidelines and set forth the Section's concerns about some aspects of these particular guidelines. We question the Commission's policy determinations to include juvenile adjudications in the computation of a person's criminal history score. We disagree with the weight that the Commission has given to probation/parole status. We take issue with the Commission's proposals on concurrent/consecutive sentences and with the drug offense grid. We approve of certain of the "departure" procedures, but we suggest that they do not go far enough. We also discuss the value of the proposed Comprehensive Rehabilitation Plans and the need for consideration of more alternatives to incarceration. Finally, we discuss the due process considerations that we believe are relevant to the Commission's proposals.

INTRODUCTION

On February 11, 1987, the Superior Court Sentencing Guidelines Commission ("Commission") issued draft felony sentencing guidelines and requested public comments. The Section on Criminal Law and Individual Rights of the District of Columbia Bar submits these comments in response to that request.

At the outset, we note that the Commission obviously has devoted a tremendous amount of time and effort to the extremely difficult task of trying to organize all the factors which have an impact upon a court's felony sentencing decision. At a minimum, the debate generated by these guidelines has focused attention upon a myriad of sentencing issues which are too often ignored by the bar and the public. This process alone is worthwhile and beneficial for all the participants.

With that in mind, in Part I below, we address generally whether any sentencing guidelines should be adopted in the District of Columbia as well as the manner in which these guidelines were developed and are to be implemented. In Part II, we turn specifically to the Commission's proposed felony sentencing guidelines and set forth the Section's concerns about certain aspects of these particular guidelines. We do so with one caveat. Because of the time constraints under which the Section members preparing these comments have worked, we have not addressed every aspect of the guidelines. Rather we

have focused upon certain key portions in areas with which we are familiar and which we believe merit additional attention and review by the Commission.

PART I -- GENERAL OBSERVATIONS

We have three concerns about sentencing guidelines generally. First, we disagree with the Commission's assumption that sentencing guidelines, which utilize a relatively inflexible mathematical grid box system, can appropriately deal with the tremendous variety of felony cases which come before the Superior Court bench for sentencing.[1/] Second, we question whether the Commission has authority unilaterally to develop and to implement such guidelines. Finally, we believe guidelines generally will adversely impact on the plea bargaining process. We address each of these points in turn.

A. Inflexible and Arbitrary Nature of Guidelines

Judges have traditionally enjoyed broad discretion in

1/ We assume that the Commission was given the task of developing specific felony sentencing guidelines after a decision had already been made that such guidelines were desirable. As a result, the Commission may not have addressed the threshold question of whether guidelines generally should be implemented in the District of Columbia.

sentencing within statutory limits.[2/] The Section is deeply concerned about the extent to which sentencing guidelines unduly curtail this exercise of discretion. By definition, guidelines require a judge to consider some of the circumstances of a particular defendant convicted of a particular offense in a rigid quantitative manner that inhibits the unfettered exercise of sentencing discretion. In essence, guidelines require a judge to treat an individual defendant as a member of a predefined category based upon a generic analysis of the offense he committed and some factors about the defendant. In the interest of "reducing sentencing disparity,"[3/] this rigid approach to sentencing ignores the

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2/ As the District of Columbia Court of Appeals recognized in Sobin v. District of Columbia, 494 A.2d 1272 (D.C. 1985), cert. denied, 106 S. Ct. 173 (1986):

> [A] judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.

(quoting from Wasman v. United States, 468 U.S. 559, 563 (1984)).

3/ The Commission frequently uses the term "unwarranted disparity" as a label for the "problem" which the proposed guidelines are designed to minimize. That term implicitly is based upon the premise that there are cases which are completely identical and in which defendants receive different sentences. We doubt that any two cases are ever completely identical. And even if a few cases were, we question whether differences in such sentences create a significant problem. Because "disparities" are the primary justification for guidelines, we use that term for the purpose of these comments without conceding that there is a substantial problem resulting from "unwarranted disparities."

differences which exist in each case and makes it difficult, if not impossible, for a judge to develop a sentence which is uniquely appropriate for the particular person being sentenced.

Quite bluntly, guidelines are based on the assumption that judges cannot be trusted to impose appropriate sentences. We disagree with that conclusion. Superior Court judges are carefully selected because of their experience, good judgment, and integrity. In addition, the adversary process is designed to ensure that the court receives the necessary information upon which to base its decision. The attorneys, acting as advocates for the two sides, present the most important factors for the court's consideration. After weighing the material in the presentence report and the information presented by the attorneys, the court should have all the data pertinent to its sentencing decision. At that point, it should have the freedom to fashion an appropriate sentence based upon all the factors which it decides are relevant.

As practitioners, we are aware that some judges are more lenient or harsh than others in their sentencing practices. It does not follow, however, that because there are differences in the sentences imposed that those sentences are necessarily unfair, improper or unwarranted. An experienced prosecutor or defense attorney generally is not surprised when one defendant guilty of armed robbery is sentenced to a substantial period of incarceration and another defendant who commits the same offense is placed on probation. The defendants' circumstances and the specific nature of the armed robberies they committed

might warrant this "disparity" and make both sentences appropriate. Similarly, while most defendants who commit the offense of unauthorized use of a vehicle should receive sentences that can be served in the community or with minimal incarceration, a particular defendant's circumstances and/or the particular offense might warrant the maximum possible period of incarceration.

Because the Section fears that the imposition of guidelines will eliminate "warranted disparity," the judges' discretion to depart from the guidelines in appropriate cases is crucial. We appreciate that the more departures that occur, the more sentencing "disparity" will result. However, differences in sentences based upon judicial discretion and identifiable mitigating or aggravating factors is not unwarranted.

Finally, the guidelines themselves necessarily are arbitrary at least in some aspects. For example, most residential second degree burglaries are potentially more serious than most commercial second degree burglaries. However, there will certainly be some commercial burglaries that are more serious than some residential burglaries. The range within the grid cells may not be sufficient to account for these differences. Because departures from the grid are restricted, the court will not always be able to take these differences into account.

There is also inherent arbitrariness in computing the criminal history score in a guideline system. What is the basis for treating defendants with a criminal history score of

2.0 and 3.5 the same, and treating those with a score of 3.5 and 4.0 differently? We recognize that lines were necessarily drawn to create categories for a guideline system. Yet some defendants will unfortunately find themselves on the wrong side of an arbitrary line. Again, the range within the cell and the restrictions on departures may prevent a judge from exercising his discretion, as he might otherwise do, to correct any unfairness that might be visited upon a particular defendant.

Thus, we urge the Commission to consider carefully whether any mechanical felony sentencing guidelines should be adopted by the Superior Court bench. For the reasons set forth above, the Section is not in favor of the adoption of any sentencing guideline system in the District of Columbia.

B. Authority for Guidelines

We question whether the Commission has authority to adopt sentencing guidelines, absent a legislative mandate. Chief Judge Moultrie, of the Superior Court, appointed the members of the Commission and directed them to develop guidelines for felony sentencing in the District of Columbia. This was done without any legislative mandate, either for the appointment of such a commission or for the promulgation of sentencing guidelines. In a footnote to the proposed guidelines, the Commission recognized that most jurisdictions which have instituted guidelines have done so with a statutory mandate. (Guidelines at n.5 and 97). However, the Commission never addressed its authority to institute these guidelines absent

that mandate. Although the guidelines will be implemented initially on a voluntary phase-in basis, the Commission expects that most of the Superior Court judges will support and presumably adhere to them. (Guidelines at 43).

Thus, in a number of instances, an independent judicially created Commission effectively will be overriding the policy decisions already made by a duly elected legislature. Several examples of this potential "separation of powers" issue are readily apparent. For example, the District of Columbia statutes provide for some period of imprisonment as a possible punishment for all felonies. No special circumstances must exist by statute for a judge to sentence any felony offender to jail. Under the proposed guidelines, certain felony offenders are presumed to receive a non-custodial sentence. While the judge may still sentence such an offender to a period of incarceration, he may do so only after finding substantial and compelling reasons that are either contained in the list of aggravating circumstances or are comparable to those listed there. Thus, the legislative standard for imposing incarceration is substantially altered by the guidelines.

As a another example, statutes in the District of Columbia, particularly D.C. Code § 16-710(a), permit a sentencing judge to suspend execution of all or part of a sentence and to place a defendant on probation, "if it appears to the satisfaction of the court that the ends of justice and the best interests of the public and of the defendant would be

served thereby." The proposed guidelines, however, provide that persons convicted of certain crimes should not receive probation, but should be incarcerated. While the judge may depart from the presumed incarcerative sentence and grant probation, he may do so only after finding substantial and compelling reasons. Thus, the legislative standard for granting probation will be substantially altered by the guidelines.

If these guidelines are voluntarily adopted by the judges of the Superior Court, the question remains how far a judicially created commission can, or should, go in prescribing the penalty to be imposed for specific offenses. We suggest that the Commission may have gone too far in proposing guidelines which conflict with existing legislatively enacted sentencing provisions.

C. Impact of Guidelines on Plea Bargaining

Currently in the District of Columbia, the majority of criminal cases are disposed of by way of plea bargains. Because the presumptive sentences in the guidelines are longer than many currently imposed, under guidelines a heavier burden than currently exists will fall upon defendants who exercise their right to go to trial and are found guilty. Thus, it is likely that under the guidelines even more cases will be disposed of through guilty pleas. That, in effect, will mean that the prosecutors will have even more control over what sentence a defendant receives.

Prosecutors now have a tremendous amount of power to affect the outcome of criminal cases in Superior Court through the plea bargaining process. First, they have virtually unlimited authority as to what charges to bring in a case. Second, the government is in a superior position, relative to the defendant, in many plea negotiations because it has the final word as to what an acceptable plea will be. The prosecutor can simply go to trial if a defendant refuses a plea offer, while many defendants realistically are compelled to accept the best plea offer they can get because the risk of going to trial and being convicted is too great. This superior bargaining position creates a potential danger of abuse.

With guidelines, both the defense and the prosecution will be aware of what is the presumptive sentence. Although the guidelines do not represent "mandatory" sentences established by the legislature, they will specify the sentence to which a judge will be bound in all but "extraordinary" cases. (Guidelines at 29). The prosecutor thus will be able to control the specific term of incarceration in most cases by his charging decisions and by his plea offers.4/

A brief review of the current practice in disposing of drug offense cases may be helpful in demonstrating what is likely to happen under these proposed guidelines. Drug

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4/ This power will be even greater than in the case of mandatory minimum sentences. Currently, the government can control whether mandatory minimums apply or not. If a prosecutor chooses to do so, he can allow the defendant to avoid their application. The sentencing range that is open then allows the judge to exercise his or her unfettered discretion.

offenses constitute the largest category of offenses in which a "known" penalty may exist. In other words, for many of these offenses, because of the existence of mandatory minimum sentencing provisions, a judge's discretion is either curtailed or removed by the mere fact of conviction for a particular offense. Thus, it is often entirely the government's decision whether a defendant will be subject to a mandatory minimum sentence. The government can allow a defendant to avoid such a sentence by charging or offering pleas to misdemeanors or to offenses which do not carry mandatory minimums. At the same time, a defendant has little bargaining power to influence the prosecutor's decision in that regard.

Thus, with the imposition of the guidelines, given the control which the government will have over the charges to which a defendant will be permitted to plead, the government will be able to tailor the plea so that it can effectively determine, within a very small range (i.e., the grid box), the sentence which, in most cases, must be imposed. We are concerned that this will essentially shift many sentencing decisions, which appropriately belong with the Court, to the prosecutor.

PART II -- SPECIFIC ISSUES RELATING TO THESE GUIDELINES

A. Juvenile Adjudications Should Not Be Used in Computing Criminal History Score

The guidelines provide that certain juvenile adjudications shall be used in computing an individual's criminal history score. Specifically, the juvenile adjudications which will be considered are all felonies and those misdemeanors involving either personal violence or potential imprisonment for one year or more, provided that the offense was committed by a juvenile who was 16 years of age or over and provided that the individual had not yet reached his 23rd birthday at the time of the commission of the offense for which he is being sentenced. (Guidelines at 14). Such juvenile adjudications can increase the individual's criminal history score substantially. For example, a defendant is assigned one point for each prior felony conviction (or adjudication) which is ranked in offense seriousness at Levels 1-4 and two points for each felony conviction ranked at Levels 5-9.

As discussed below, given the issues raised by the use of any juvenile adjudications in computing the criminal history score and the substantial impact upon the presumptive sentence which this score will have, we strongly recommend that juvenile adjudications <u>not</u> be included as a component of the criminal history score. If any juvenile adjudications are utilized, however, we suggest that they be considered only as a factor in determining where on the presumptive sentence range an

individual should be sentenced rather than in determining in which presumptive sentence box the person falls. Finally, if the Commission concludes that any juvenile adjudications should be considered as a sentencing factor, then we recommend that only those adjudications occurring after the implementation of these guidelines be considered.

Juvenile adjudications should not be used to compute criminal history scores for several reasons. First, juvenile adjudications and adult convictions are not equivalent and should not be treated as such. The paternal philosophy underlying juvenile court and its goals are substantially different than the goals of adult court. At least theoretically, the purpose of juvenile court is to rehabilitate a youngster. It is not supposed to be a punitive system. For that reason, the District's juvenile statute does not differentiate between offenses for purposes of disposition [i.e., sentencing in juvenile court]. In other words, a youngster found involved in the felony offense of murder faces the same "maximum sentence" as a youngster found involved in a misdemeanor of shoplifting -- i.e., commitment for a period of up to two years, which can be extended one year at a time by the court until he reaches age twenty-one. The reason for that is relatively straightforward -- regardless of the precise offense which resulted in juvenile court supervision, the court's primary concern is to try to help the youngster so that he does not continue to get into trouble. Needless to say, that is not generally the primary function of adult criminal court.

As noted above, there is no technical distinction between the specific offense for which a youngster is adjudicated and the maximum possible sentence in the District of Columbia. As a result, often neither the child nor his attorney has been overly concerned about the precise offense to which the child plead guilty. Thus, youngsters in juvenile court have often entered guilty pleas to felony offenses in exchange for other promises from the government (e.g., the Corporation Counsel's assurance that it would support a particular placement at the time of disposition). In other words, plea bargaining in juvenile court is primarily concerned with the possible rehabilitative program that may be available to a youngster and discounts, to a much greater extent than in adult court, the exact offense to which the child pleads guilty. As a result, we believe that these juvenile adjudications should not be used at all in computing an adult defendant's criminal history score.

In addition, because there is not a unified prosecutorial system, papering decisions in juvenile court vary substantially from those in adult court. Behavior, which is sometimes charged as a felony in juvenile court, many times would have been "papered" as only a misdemeanor -- if papered at all -- in adult court. For example, snatching an item of personal property from another child's hand in a school yard will frequently be charged as a felony robbery (snatch) in juvenile court. In adult court, that would more likely be charged as a theft or diverted from the system. Thus, an adjudication for that robbery offense, as a juvenile, should not automatically increase a defendant's criminal history score by two points and

move him substantially farther up the presumptive sentence grid. As another example, a sixteen year old boy having sex with his fifteen year old girlfriend will be prosecuted for the felony of carnal knowledge in juvenile court; yet that is a substantially different situation than an older adult engaging in the same behavior. But under these guidelines, such a carnal knowledge adjudication would still be classified as a Level 9 felony and would increase a defendant's criminal history score by 2 points.

Another problem with using these juvenile adjudications is that despite In re Gault, 387 U.S. 1 (1967), and its progeny, the rights guaranteed to juveniles are not identical to those of adults. In the District of Columbia, for example, insanity is not a defense in juvenile court. See In re C.W.M., 407 A.2d 617 (D.C. 1979). Yet, under these guidelines, a child who might have had a viable insanity defense if tried as an adult, would be found involved in juvenile court. He would then have that adjudication on his record for purposes of later determining his adult "criminal history score." Again, at a minimum, the circumstances surrounding each adjudication would have to be explored before that adjudication could be relied upon by the court.5/ Such adjudications either (1) should

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5/ Many times, juvenile case files do not contain report forms describing the incident. Even if the case jackets do contain that information, it is often not accurate. Nor are the social studies in a youngster's social file, which contain brief descriptions of the offense(s), usually complete or accurate. As a result, it may be difficult, and in some cases impossible, for counsel and the court to determine exactly what happened in these prior adjudications.

not be considered at all for purposes of computing the criminal history score or (2) should be discounted substantially.

Moreover, the use of these juvenile adjudications will result in challenges to the validity of guilty pleas entered by some juveniles. Counsel and the court will have to satisfy themselves that all guilty pleas entered by these youngsters were knowing and voluntary. That will require investigation by counsel and the court into the past plea hearing itself.

Finally, at a minimum, if such juvenile adjudications are considered, then they should not be used retroactively. Rather only those adjudications actually occurring after the implementation of the guidelines should be considered when computing a criminal history score. At least then the juveniles would be making decisions to plead guilty to a particular offense only after they have been informed of all the possible ramifications of that plea -- i.e., how the adjudication might later be used if they are convicted as adults.

Overall, we recommend instead that juvenile adjudications should be used only as a factor for the judge to consider as to where within the prescribed range in a grid box a defendant should be sentenced; they should not be used to compute the criminal history score itself and thus determine where on the sentencing grid a defendant fits. We make that suggestion because of the inherent differences between the adult and juvenile systems in the District of Columbia.

B. Aggravated Impact of Being on Probation or Parole

We agree with the Commission that a defendant who is on probation or parole when he commits another offense, in most cases, should have this fact reflected in his sentence, but the proposed guidelines impose far too harsh a penalty upon a defendant in that situation. Such a status has an inordinate multiple effect. First, the underlying offense for which a defendant is on probation or parole is used as a prior conviction to add more points to his criminal history score, and he or she is also assessed an additional point for being on probation or parole. Second, probation or parole is a determinative factor in whether sentences will be concurrent or consecutive. If the defendant is on probation or parole, the sentences must be consecutive.[6/] (Guidelines at 35). Finally, on the presumptive unarmed sentencing grid, the boxes marked by the letter "c" mandate "incarceration-only" for offenders on probation or parole. (Guidelines, Table 9 at 80). As a result, if someone is on probation or parole at the time of the instant offense, (1) his criminal history score is higher; (2) in some cases, he would otherwise be eligible for

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6/ In cases in which probation is revoked and the underlying sentence is imposed, we assume that the Commission intends that whichever sentence is imposed last the court will make that sentence consecutive to all other sentences then being served by the defendant. Although the guidelines are not explicit on that point, we base our assumption upon the Commission's clear intent that "[o]ffenders under sentence (probation or parole) for one crime who are convicted of additional crime(s) would receive a separate consecutive sentence." (Guidelines at 35).

probation but for the fact that he was already on probation or parole; and (3) he must receive consecutive sentences. The double, and even triple, effects of this status are excessive.

C. Concurrent v. Consecutive Sentences

The Commission's guidelines on the imposition of concurrent and consecutive sentences also create several significant problems. The guidelines provide that in the case of multiple offenses:

> a) Unless precluded by the law of merger of offenses, persons convicted of multiple offenses against the person or habitation, which arise out of the same transaction or separate transactions, shall receive consecutive sentences on each offense.
>
> b) Unless precluded by the law of merger of offenses, persons convicted of multiple offenses arising out of one transaction or a series of separate transactions, which are closely related in time and which are not crimes against the person or habitation, shall receive concurrent sentences.

(Guidelines, Table 14 at 85).

The only basis for departing from these guidelines is if the court finds that there are certain mitigating or aggravating factors. Specifically, as a mitigating factor the court must find that:

> The consecutive/concurrent sentencing policy results in a guideline sentence that is so excessive in relation to the seriousness of the offense and history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence which is less than the sentence which would result if all guideline sentences are concurrent.

(Guidelines, Table 16 at 88-89).

As an aggravating factor, the Court must find that:

> The consecutive/concurrent sentencing policy results in a guideline sentence that is so lenient in relation to the seriousness of the offense and the history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence which exceeds the sentence which would result if all guideline sentences are consecutive.

(Guidelines, Table 16 at 90).

For these mitigating or aggravating factors to apply, the court will have to find that these factors constituted "substantial and compelling reasons" for imposing a sentence outside the applicable guidelines. (Guidelines at 29). This will create one of two situations. First, some judges will strictly follow the guidelines for imposing concurrent or consecutive sentences and will rarely be able to find "manifest injustice" and thus will rarely depart from the guidelines. That will result in substantially longer sentences than are currently being imposed. In the alternative, some judges will not be so reluctant to find "manifest injustice". As a result, they will apply the departure principles differently from other judges in comparable circumstances. That will, in effect, create those "disparities" which the Commission condemns.7/

7/ One way in which that may happen results from the necessarily vague nature of the guidelines themselves. The guidelines pertaining to consecutive or concurrent sentences simply do not provide sufficient guidance to the judges. At no point, for example, does the Commission define the terms

(footnote continued)

With that in mind, we address the specific problems created by these provisions.

First, the imposition of consecutive sentences for multiple offenses against the person or habitation arising out of a single transaction will mean that many defendants will receive substantially longer sentences than they currently receive.8/ These particular provisions simply are far too rigid and do not take into account the variations in cases which the Section believes warrant different treatment in imposing consecutive or concurrent sentences. For example, under these guidelines, a defendant who used a knife in committing a single armed robbery with five victims would

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7/ (continued)

"same" or "separate" transactions or the phrase "series of separate transactions, which are closely related in time." To the extent that a court concludes that a particular sentence is too harsh or too lenient but cannot meet the heavy burden of finding "manifest injustice" under the departure principles, the court may well reach its desired result by the manner in which it defines the terms listed above. That would mean that courts are likely to be defining these terms differently in different cases or drawing technical distinctions to justify the sentence that the court concludes is just. That, in effect, will perpetuate the disparate sentences which the Commission seeks to eliminate. If the terms are narrowly defined, however, we believe that the groupings will create artificial distinctions. While these broad terms permit some flexibility in sentencing -- a general concept with which we agree -- we do not think that this is a desirable method of achieving that flexibility. Indeed, as discussed in Part I, infra, we would prefer that the court retain the sentencing flexibility which currently exists.

8/ We are not aware of any statistical studies that were relied upon by the Commission which analyze the impact of these proposed consecutive and concurrent guidelines upon the length of sentences which will be imposed. It is not clear whether the six month study cited by the Commission took this factor into account. Logic suggests that the application of the Commission's policy on consecutive and concurrent sentences will have a substantial impact upon the length of the sentences.

receive consecutive sentences for each offense against each victim while a defendant who committed five separate armed robberies each involving a solitary victim would get the same consecutive sentence treatment. Although both defendants endangered the safety of the same number of victims, the circumstances are sufficiently different that the presumed guideline sentence should reflect the greater severity of the five separate and independent offenses.

In addition, the Commission provides no justification for why a defendant should receive a multiple increase in punishment for those offenses which are against the habitation rather than against the person. Thus, for example, a defendant convicted of Burglary II and Theft I arising out of the burglary of an obviously unoccupied home would receive consecutive sentences while a defendant convicted of Burglary II and Theft I arising out of the burglary of a commercial establishment when people were in the building would receive concurrent sentences. We doubt that the Commission intended such anomalous results.

D. Drug Offense Grid [9/]

The Commission has constructed the "drug offense grid" differently from the armed and unarmed offense grids. Instead

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9/ The statutes governing drug offenses in the District are technical and complicated. Because of the background of the Commission's members, this discussion assumes a basic understanding of the provisions of the Uniform Controlled Substances Act ("USCA").

of dividing offenses according to the severity or seriousness of the offense, the drug offense grid is divided into boxes according to the controlled substance involved. (Guidelines, Table 11 at 82). In addition, defendants are not classified strictly according to their criminal history score; they are divided according to whether they are addicts or not, their records, and their amenability to treatment.

Although initially this division of offenses is appealing, by focusing solely upon the drug involved, it ignores differences in the actual conduct or the specific offense for which the defendant was convicted. For example, it does not draw any distinction between conspiracy to distribute cocaine and actual distribution.

Such a division might be workable if all the penalties for felony charges involving a certain controlled substance were the same, but they are not. The drug offense grid, however, appears to be based on the assumption that all felony offenses for the drug listed carry a mandatory minimum penalty. Although that assumption is correct for offenses under D.C. Code § 33-541 (distribution, manufacture, or possession with intent to distribute or manufacture), it is not true of other commonly charged offenses, such as those in D.C. Code § 33-548 (attempt or conspiracy to commit an act forbidden by the USCA). Because the government in many cases now concludes that sentences less than the mandatory minimums which are prescribed are appropriate, it often offers pleas to charges under D.C. Code § 33-548 as a way to avoid the mandatory minimums. The

guidelines would in essence eliminate what everyone now agrees are appropriate sentences by failing to draw a distinction between conspiracy or attempt pleas in drug cases and convictions for other drug offenses. We question, therefore, whether the Commission has fully explored the possibility of presumptive sentences that are less than mandatory minimum sentences particularly in these circumstances. In addition, the Commission does not appear to have fully considered whether offenses involving controlled substances that are not subject to mandatory minimum sentences should have the same presumptive sentence.

Finally, we are also concerned that the proposed guidelines will impose unjustified burdens upon eligibility for the "addict exception," an exception to mandatory minimum sentences approved by a majority vote by the citizens of the District of Columbia. Currently, the "addict exception" allows a judge to depart from the imposition of a mandatory minimum sentence if the person (a) is addicted to a narcotic or other abusive drug, (b) was engaging in the illegal activity to support his or her habit, and (c) had not been convicted of distribution or possession with intent to distribute a drug. See D.C. Code § 33-541 (c)(2).

The guidelines add to those three statutorily mandated requirements by imposing restrictions based upon the person's criminal record and by requiring the court to assess the defendant's potential for rehabilitation and his risk to the community. (Guidelines, Table 11 at 82). Although these

latter factors may be ones that a court could consider in determining whether to impose a sentence of incarceration or not there is no justification for requiring the defendant to satisfy these requirements before being eligible for exemption from the mandatory minimum, particularly when the specific factors were approved by voters in the District.

We urge the Commission to reconsider its proposed guidelines within the drug offense grid so that treatment will be available to any person who merits the addict exception, without the extra factors currently proposed. We also recommend that the Commission reconsider the structure of the drug offense grid to account for circumstances in which mandatory minimum sentences are not applicable.

E. Departure From Guidelines

Assuming that some version of a guideline system is adopted, in a guideline system which necessarily involves a formalistic and mathematical approach to sentencing, vesting judges with the discretion to depart from a sentence mandated by the guidelines in an appropriate case is crucial. The preservation of the judges' ability to fashion the appropriate sentence for a particular defendant is fostered by departure principles. Thus, we agree with the Commission's inclusion of departure standards and procedures as part of the guidelines package. Moreover, we agree with the Commission's decision to place no limitations on the sentence once departure is justified. As the Commission has recognized, extraordinary

cases require extraordinary sentences, and once the legal and factual basis for departing from the guidelines is established, the judge should be free to impose the minimum or maximum sentence allowed by law.

We are concerned, however, that judges will not be able to make the necessary legal and factual findings to justify departure in as many cases as would be appropriate. In requiring that judges make a finding of substantial and compelling reasons for treating a case outside the applicable guidelines, the Commission has selected a standard that is at the strict end of the spectrum. (Guidelines at 29). The establishment of a list of approved mitigating and aggravating factors limits the factual circumstances that would justify departure. In practice, the combination of this strict standard and the need to find all the elements of one of these predefined factors will unduly limit those cases in which the sentencing judge legitimately will be able to justify departure.

We recognize that the list of mitigating and aggravating factors is not exclusive. Nevertheless, the mitigating and aggravating factors cover many of the predictable categories of mitigation and aggravation but provide definitions that are too narrow.10/ Where a number of aggravating factors are present to some degree but not to the factual level defined in any approved aggravating factor, a judge would not be permitted to

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10/ Because of limitations of resources and time, we have not commented on the relevant and practical usefulness of each mitigating and aggravating factor.

impose a sentence greater than would be mandated by the grid analysis. For example, deliberate cruelty or gratuitous violence inflicted upon a victim would justify departure; a crime committed against a victim whom the defendant knows is particularly vulnerable would justify departure; and a devastating injury to a victim would justify departure. However, a crime involving unnecessary, but perhaps not gratuitous, violence against a somewhat vulnerable victim who sustains a substantial but not devastating injury would not allow a judge, in the exercise of his discretion, to impose a sentence greater than that called for by the guideline grid. Because of the absence of any single aggravating factor which rises to the level required by the guidelines, departure, although arguably desirable, would not be permissible in such a case.

Similarly, in a situation where there are mitigating circumstances to some degree but not to the point defined in any of the list of mitigating factors, a judge must stay within the range mandated by the guidelines. For example, if an offense was principally accomplished by another but the defendant did not manifest extreme caution or sincere concern for the safety and well-being of the victim (perhaps because he never came face-to-face with him), the defendant would not have satisfied all of the elements of Mitigating Factor 4. (Guidelines, Table 16 at 88). If the same defendant provided major assistance to law enforcement in the prosecution of the main perpetrator, but it cannot be said that detection or prosecution of the perpetrator would have been substantially

more difficult or impossible without the defendant's assistance, he would not satisfy all of the elements of Mitigating Factor 7. Id. Yet, the combination of the mitigating circumstances surrounding his case should justify departure from the guidelines. It would be unfair to tell such a defendant that, because he does not fit neatly into one of the mitigating factor pigeon holes, the best he can do is receive a sentence at the low end of the guideline range. We believe that the failure of a defendant to fit precisely into one of the mitigating or aggravating factors should not prevent a judge from imposing a sentence outside the guideline range where sufficient mitigating or aggravating circumstances are present.

In addition, we believe that paragraph 2 of the Prohibited Factors List (Guidelines, Table 7 at 75), separately or at least in combination, should justify a departure from the presumptive sentence and should, therefore, be included in the list of mitigating and aggravating factors. For example, the fact that a defendant is very young or very old may mean that less incarceration is needed to inflict an appropriate punishment.

We appreciate the tension between allowing departures from the guidelines and the Commission's goal of promoting sentencing uniformity according to the grid system. Yet, a

guideline system that does not have sufficient flexibility to allow judges, in the exercise of the discretion we vest in them, to fashion appropriate sentences in the face of varying degrees of mitigating and aggravating factors truly sacrifices form over substance. Accordingly, we recommend that the Commission facilitate departures from the guidelines by adopting a standard for departure that would permit judges to impose a sentence outside the applicable guideline if they find a substantial reason to depart. In addition, we also recommend that the definition of mitigating and aggravating circumstances be broadened.

F. Comprehensive Rehabilitation Plans

In the explanation to the guidelines, the Commission explains that it has not prioritized sentencing goals. See Part I, supra. Yet, in effect, it has. The goals of retribution, punishment, and incapacitation seem to have the greatest priority under these guidelines. Although the Commission attempts to address the goal of rehabilitation by its inclusion of "Comprehensive Rehabilitation Plans" ("CRPs") within its sentencing scheme, these CRPs cannot adequately provide rehabilitation.

The guidelines contemplate that the Department of Corrections will prepare reports prescribing "rehabilitation program[s] for each incarcerated offender." (Guidelines at 37). Given the District of Columbia's current lack of funding, staffing, and resources, it is unlikely that the Department of

Corrections can accomplish this task. Presently, the Department is in violation of federal court orders, in part, because it cannot complete the reports necessary for an inmate to have a timely parole hearing. Thus, it is fanciful to believe that the Department can prepare individualized plans for all inmates when it is currently having difficulty preparing those that are already statutorily and judicially mandated.

Furthermore, even assuming that CRPs could be prepared, it is difficult to imagine how the required rehabilitative services can be provided. With the present overcrowding and lack of resources in the institutions, the Department cannot accommodate the basic rehabilitative needs of its current inmates, let alone those of a potentially increased population.

Finally, in determining the proposed sentences on the grid the Commission said that it took into account the rehabilitation programs it believes should exist in the institution. (Guidelines at 40). Even if the preparation of the CRPs and the provision of rehabilitative services to incarcerated persons can eventually be accomplished, neither of these tasks will be completed within the time frame envisioned by the Commission for the implementation of the guidelines. To allow the guidelines to become effective long before this "rehabilitation" component can be established will further skew the guidelines in favor of retribution and increased terms of incarceration. We urge the Commission to revise the guideline

structure to allow for increased use of rehabilitative services in the community.

G. Restrictions on Sentencing Alternatives

We are concerned that the proposed guidelines will unduly restrict the use of sentencing options which are currently available. Although the guidelines indicate that the Commission did not establish "priorities" among sentencing goals (Guidelines at 5), and that it "support[s] in concept the utilization of alternatives to incarceration" (Guidelines at 35), the guidelines presume incarceration in many cases where non-incarcerative sentencing options are currently used and are often successful. We specifically urge the Commission to reconsider the consequences of its policies in this regard in the following areas:

1. Split Sentences

Although split sentences currently provide an important sentencing option for judges in the Superior Court, the Commission has decided "to defer consideration of split sentences under guidelines." (Guidelines at 25). Arguably, under the proposed guidelines, split sentences would only be allowable if the case fit within one of the "bridge boxes" or if it qualified for departure from the guidelines. We believe that such a result is too restrictive and should be reconsidered by the Commission.

The Council of the District of Columbia expanded the judges' sentencing discretion in 1982 when it passed legislation permitting judges to impose split sentences. See D.C. Code § 16-710(a). The legislation did not impose any restrictions on the kinds of offenses for which a split sentence could be utilized. The only restrictions on the amount of time that could be suspended are found in other statutes which create mandatory minimum penalties (e.g., first degree murder, distribution of drugs, offenses while armed with a pistol).

The result of the Commission's failure to allow judges to impose split sentences in most cases contravenes this express legislative intent. When the Council has spoken so clearly and recently on an issue, the Commission should not disregard it. We urge the Commission to formulate a policy that would allow split sentences in many more cases.

2. Intensive Probation Supervision

Although it is still new, the Intensive Probation Supervision Program ("IPS") is providing a valuable option for judges in cases in which they desire additional supervision. It would still be available for those in the "a" grid boxes, but these generally are defendants who were never intended to be in the program in the first place. For these individuals, "regular" probation was seen as being sufficient in most cases.

Although it would still be an option for some defendants in the "b" and "c" boxes, it would be on a much more limited

basis than is currently contemplated. For example, the guidelines provide that probation is not an option for a person who falls into a "c" grid box for an offense that was committed while on probation. The IPS criteria allow for defendants in such cases to be placed into the program. Furthermore, the guidelines presume incarceration for all offenders convicted of certain crimes, while the IPS criteria makes them eligible for admission to that program (see, e.g., involuntary manslaughter, attempted distribution of drugs).

We believe that the restrictions that the guidelines impose on many defendants -- precluding their consideration for IPS merely because of the grid box structure -- are unwarranted. The exclusion of these defendants from IPS also implies that the Commission has chosen retribution and punishment over rehabilitation as sentencing goals in many cases where rehabilitation has been recognized as possible and worthwhile by the court's own social workers.

3. Residential Programs

Many defendants have a sincere and strong desire to change their behavior and their lives by participation in residential treatment programs.[11/] These programs are often long and rigorous. To enter one of these programs, however, the defendant cannot be incarcerated. The court must place him on

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11/ These programs, which include RAP, Second Genesis, and Delancey Street, are designed to address problems with a person's behavior patterns and attitudes. Many of them also address substance abuse problems.

probation with the condition that he enter and complete a particular residential program. Such conditions render the sentence very different from what is generally contemplated by the term "probation."

The guidelines, however, do not recognize these differences. Rather, they focus primarily on only two options -- probation or incarceration. The value of a residential program or its security and structure, are not factors which the court will be able to consider. The guidelines do not allow departure from a presumptive sentence of incarceration even if a viable rehabilitation option is found, unless the facts of the case fit within a narrow pigeon hole." See Part II. E, supra. We would suggest that some adjustments be made to recognize the substantial likelihood of rehabilitation that these programs provide and to give the goal of rehabilitation at least equal weight to the sentencing goal of retribution, which is reflected in a presumptive sentence of incarceration.

4. Youth Rehabilitation Act Sentences

The Commission has proposed that the guidelines apply to sentences imposed under the Youth Rehabilitation Act ("YRA"). (Guidelines at 26-27). Because we believe that this is contrary to the legislative intent expressed in the passage of the YRA in 1985, we urge the Commission to reconsider this provision.

When the Council passed the YRA, it stated that one of the "primary objectives" of the Act was "to give the court flexibility in sentencing a youth offender according to his

individual needs." Report of the Committee on the Judiciary Council of the District of Columbia, Youth Rehabilitation Act (June 19, 1985) at 2 (emphasis added). The guidelines, which focus on defendants as part of "classes" or "categories" of offenders do not contemplate or allow this type of attention to individual needs of youthful offenders. The Commission should not implement guidelines which so directly conflict with the Council's express legislative intent.

In addition, the Commission proposes that YRA sentences be computed simply by tripling the presumptive grid sentence applicable to the defendant and his offense. Such a scheme, does not address the rehabilitative requirements of a young offender. The presumptive grid sentences are primarily designed to address the Commission's concerns that an offender receive an "appropriate" punishment or be incapacitated for an "appropriate" period of time. On the other hand, YRA sentences are to be designed with an eye toward rehabilitation. There is no logical basis for the Commission to arbitrarily decide that the appropriate period of "rehabilitation" shall be three times the parole eligibility date for an "adult" sentence.12/

12/ This formulation also seems to imply that youth offenders will be paroled at approximately one-third of their maximum sentence. That assumption is not valid. It is our experience that a person sentenced under the YRA often serves substantially more than one-third of his term. Thus, even if the proposed formulation of a YRA sentence were correct (i.e., that the presumptive sentence should simply be tripled), the actual effect on the defendant was not intended by the legislature nor, we believe, anticipated by the Commission.

We urge the Commission to exclude YRA sentences from the guidelines system. Judges should be allowed -- and encouraged -- to construct individualized sentences for young offenders who they find will benefit from treatment under the YRA. These sentences should be allowed to fall within the entire range provided by the Council from probation to extensive confinement, depending upon the individual needs of the offender.

H. Due Process Issues

Finally, the Commission should also consider the due process requirements which will be implicated by the adoption of these guidelines. Traditionally, because a judge has wide discretion in imposing sentences, he may "'conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" Roberts v. United States, 445 U.S. 552, 556 (1980) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).

That broad discretion, however, must still be exercised within the constitutional constraints of due process. United States v. Lemon, 232 U.S. App. D.C. 396, 723 F.2d 922, 932 (1983). One of the requirements of due process is that the court base its sentencing decision upon accurate and reliable information. Roberts v. United States, 445 U.S. 552, 556 (1980). Indeed, due process concerns are raised whenever "the sentencing process create[s] a significant possibility that

misinformation infected the decision." United States v. Bass, 175 U.S. App. D.C. 282, 535 F.2d 110, 118 (1976).

Superior Court judges have always been sensitive to the need to have accurate information at the time of sentencing. Indeed, that concern is reflected in the Commission's recognition that some cases will require an evidentiary hearing to resolve factual issues raised in applying departure principles. (Guidelines at 33-34). But the adoption of these proposed guidelines will make the accuracy of particular facts even more critical than they have been in the past. For example, the presumptive sentence, from which the court would be able to depart only in rare circumstances, will be determined, in part, by computing a defendant's "criminal history score." The components of this criminal history score include such factors as the individual's adult convictions for virtually all felonies and certain misdemeanors,[13/] most juvenile adjudications,[14/] and whether at the time of the

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13/ Specifically, the guidelines provide that all felonies and misdemeanors "involving either personal violence or potential imprisonment for one year or more, whether committed in the District of Columbia or elsewhere, should be included, provided not more than 10 years have elapsed between the expiration of the sentence, including probation or parole supervision, and the date of commission of the instant offense." (Guidelines at 14).

14/ Under the proposed guidelines, juvenile adjudications "for felonies and for those misdemeanors involving either personal violence or potential imprisonment for one year or more should be included, provided the offense was committed by a juvenile who was 16 years of age or over and provided the offender had not yet reached his/her 23rd birthday at the time of the commission of the instant offense." (Guidelines at 14). See discussion concerning the use of juvenile adjudications, Part II, A, infra.

offense for which he is being sentenced, the defendant was on probation or parole or serving a sentence.

Given the tremendous impact which these "facts" will have upon the sentence which is likely to be imposed, it is critical that the information which the court receives be accurate; that the defendant be given notice of the specific facts upon which the court is relying in computing this criminal history score; and that the defendant be given a meaningful opportunity to challenge any misinformation or inaccuracies and to present additional information.

The first critical step is that all the parties be given notice of what "facts" the court intends to rely upon when computing a defendant's placement on the appropriate presumptive sentencing grid. That notice must be given in sufficient time before the scheduled sentencing hearing to permit counsel to review and investigate the relevant "facts." (The same notice requirement would apply, as the Commission recognizes, (Guidelines at 33-34), if the court intends to depart from the presumptive sentence by relying upon mitigating or aggravating factors.)

Because presentence reports are not always complete or accurate, neither counsel nor the court will be able to rely completely upon them.15/ As a result, to provide effective

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15/ A related concern is whether the probation office will have sufficient staff or funds to prepare accurate and complete presentence reports. In addition, issues concerning the validity of prior convictions or pleas can only be assessed by an attorney -- not a probation officer.

assistance at sentencing, a defense attorney will have to investigate each of his client's prior convictions and/or juvenile adjudications which are being considered by the court. He will have to determine whether prior multiple convictions arise out of "one criminal event" or several (Guidelines at 50) -- for that could make a substantial difference in the defendant's criminal history score.16/ He will have to investigate such issues as the validity of convictions in other jurisdictions (e.g., whether the defendant had been denied his Sixth Amendment right to counsel); whether the prior conviction constituted an armed offense under D.C. law; and also, if the convictions or adjudications were for misdemeanors, whether personal violence was involved. He will also need to investigate all the circumstances surrounding any pertinent juvenile adjudications to determine such facts as the actual nature of the offense or the validity of any pleas.

An additional problem created by the guidelines is that the Commission has subdivided various offenses for purposes of determining the level of offense seriousness both for calculating the criminal history score and for determining where the offense for which a defendant is being sentenced falls on the left side of the presumptive grid. For example, the Commission draws distinctions between three kinds of

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16/ The guidelines provide that multiple convictions "arising out of one criminal event" are to be included as one prior conviction, rather than several with the conviction score based on the most serious offense. (Guidelines at 15).

unarmed robberies -- robbery (snatch), robbery (stealthy seizure), and robbery (force and violence). Generally, an indictment alleges all three types in a given count. If a defendant has entered a plea to such a count but there is no further record of the exact type of robbery which was committed, it may be impossible to determine into which category a prior conviction fits. In that situation, a mini-trial may be necessary to resolve any factual disputes. Even that may not be sufficient. This also highlights the necessity for counsel and the court to carefully review the specific facts of all prior convictions and/or adjudications.

After adequate notice and investigation, a meaningful opportunity will have to be afforded to both the defendant or the government if they wish to challenge the information which is being relied upon by the court. In many cases, this will also require an evidentiary hearing. As part of such a procedure, each side should be entitled to subpoena witnesses and to cross examine any witnesses called by the other side. For example, if the court is relying upon the fact that the victim sustained a "devastating injury" as an aggravating factor justifying departure from the presumptive guideline, defense counsel should have an opportunity to obtain relevant information from the victim and his or her physician, to cross-examine those individuals if necessary, and to call his own witnesses to refute such evidence.

Finally, notwithstanding the Commission's unsupported claim that a court's decision not to depart from the

presumptive guidelines "would not be reviewable," (Guidelines, Table 15 at 86, ¶ 3), constitutional due process limitations apply to the court's sentencing discretion; and thus, the adoption of these guidelines will result in a substantial increase in appellate challenges to particular sentences. As the Supreme Court has acknowledged, "[a]ppellate modification of a statutorily authorized sentence. . . is an entirely different matter than the careful scrutiny of the judicial process by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases." Dorsyznski v. United States, 418 U.S. 424, 443 (1974) (emphasis in original).

With the implementation of these guidelines, therefore, the sentencing process itself becomes much more susceptible to review by an appellate court. For example, whether a defense attorney provided effective assistance at the time of sentencing is likely to be challenged more often on appeal after the implementation of these guidelines.17/ We point

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17/ In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-prong standard for the evaluation of post-trial ineffective assistance of counsel claims. Although the Court alluded to a possible difference between the standard for effective assistance of counsel in capital sentencing cases and in "an ordinary sentencing" due to the "informal proceedings" and "standardless discretion" typically found in the latter, id. at 686, the adoption of the standards found in these guidelines and the more "formal" hearings which must result, may well make the Strickland standard applicable to these proceedings as well.

this out, not necessarily to criticize this development, but merely to alert the Commission to the greater likelihood of appeals on sentencing issues.18/

We do not view concerns which have been raised about possible overloading of the Court of Appeals' docket as relevant to the question of whether appellate review is required to satisfy due process considerations. We certainly do not agree with the suggestion of some commentators that because there will be an increase in the number of appeals from sentencing decisions, that defendants should not be permitted to take such appeals. That ignores each defendant's constitutional due process right to challenge the process by which his sentence was imposed. These concerns must be recognized in the development and implementation of any guidelines.

18/ Another by-product of these procedural safeguards which should be recognized is the increased attorney and court costs associated with the additional investigations, preparation, hearings, and appeals connected with the adoption of the guidelines. We raise this factor because, at the very least, such costs should be anticipated and steps taken to obtain the necessary funding.