Approved February 25, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:05 a.m./~~p~~m on February 6, 1991 in room 514-S of the Capitol.

All members were present except: Senator Kerr who was excused.

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Judge Gary W. Rulon, Appelate Court
Judge Richard B. Walker, District Court Judge
Richard Ney, Public Defender
David J. Gottlieb, University of Kansas School of Law
Helen Stephens, Kansas Peace Officers Association
George J. Schureman, Kansas Peace Officers' Association
Pastor Averil E. Royal, Antioch Missionary Baptist Church

The Chairman called the meeting to order by continuing the hearings for proponents of the Kansas Sentencing Commission recommendations.

Judge Gary W. Rulon, Appelate Court and Vice Chairperson of the Kansas Sentencing Commission, testified in support of the recommendations. (ATTACHMENT 1)

Judge Richard B. Walker, District Court Judge, testified in support of the recommendations. (ATTACHMENT 2)

Richard Ney, Public Defender, Wichita, testified in support of the recommendations. (ATTACHMENT 3)

David J. Gottlieb, Professor of the University of Kansas School of Law, testified in support of the recommendations. (ATTACHMENT 4)

Helen Stephens, Kansas Peace Officers Association, testified in support of the recommendations. (ATTACHMENT 5)

George J. Schureman, Past President of the Kansas Peace Officers' Association, testified in support of the recommendations. (ATTACHMENT 6)

Pastor Averil E. Royal, Antioch Missionary Baptist Church, testified in support of the recommendations. (ATTACHMENT 7)

The hearings were continued to Thursday, February 7, 1991 at 10:05 a.m. in Room 519-S.

The meeting was adjourned.

Date 6 February 1991

VISITOR SHEET

Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
DAVID GOTTLIEB	UNIVERSITY OF KANSAS (for id. only)
John J. Dunne 29th Dist.	
JEFF SONNICH	KNLSI TOPEKA
Will Belden	LWVK
Harold Maines	
Blaine N Carter	K.S.C.
Steve Stark	KBI
Bruce Linhos	KALRCA
Betty Johnson	KCCD
Kathy Gilbert	
Carla Stovall KPIB	
Sandy Smith	Parole Board
Doug Bal	city of KCK
Ron Miles	Bd of Ind. Def.
Alisa Hammer	Ct/App.
Gary W. Rulon	Ks. Sent. Comm.
Glen Stephens	KPOA
George J. Schuseman	KPOA
Brenda Staley	
RICHARD NEY	Shawnee Co. Public Defenders
JIM CLARK/KCDAA	
Ben Coates KBC	
Richard Walker	District Judge, 9th District
Joe Rushowitz	WCCC

February 6, 1991

Senator Winter and members of the Senate Judiciary Committee:

Thank you for the opportunity to appear today and briefly speak in favor of the recommendations recently submitted to the Kansas Legislature by the Kansas Sentencing Commission.

Initially, I commend the Kansas Legislature for its keen insight in creating the Kansas Sentencing Commission to study, in detail, the Kansas criminal justice system and to propose reforms and revisions in the method by which criminal sentences are imposed in Kansas. After nearly 18 months of intensive work as a member of the Kansas Sentencing Commission, I believe Kansas is blessed with extremely dedicated, conscientious public employees and private legal practioners striving to provide its citizens with a fair and just criminal justice system. Never in my memory has the Kansas criminal justice system undergone such a detailed examination as that conducted by the Kansas Sentencing Commission during the past months. Every phase of the criminal justice system including prosecution, plea bargaining, trial court sentencing, appellate

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review, corrections policies, and parole practices and procedures has been under the microscope of the Kansas Sentencing Commission. I am both pleased and deeply perplexed by some of the findings of the Commission. Arguably, the Kansas criminal justice system has some faults, at all levels, needing some corrective measures. I firmly believe if the Kansas Legislature adopts the Sentencing Commission's recommendations, Kansas again will leap forward and provide a model criminal justice system which other states will seek to emulate. The proposed guidelines suggest a method to ensure uniformity in the imposition of criminal sentences, and stable, predictable prison populations.

Time today does not permit detailed comments concerning the impressively drafted and comprehensive report before you. Generally, I support the report as submitted. However, I offer several thoughts concerning the impact of the Sentencing Commission's recommendations upon judicial discretion at several tiers of the criminal justice system.

First, I will comment upon the effect of sentencing guidelines at the trial court level. The proposed guidelines are presumptive and <u>not</u> mandatory. Therefore, under the proposed guidelines a judge may depart from the presumed guideline sentence if "substantial and compelling reasons exist." Departure sentences may be either durational (length of sentence) or dispositional (incarceration, probation or

community corrections). If a sentencing judge imposes a durational departure sentence either upward or downward, both the prosecution and defense are afforded appellate review of the imposed sentence. Similarly, a dispositional departure sentence is subject to either party seeking appellate review. Any departure sentence must be supported in the record by "substantial and compelling reasons." Arguably therefore, under the proposed guidelines, sentencing judges maintain considerable discretion in the manner in which criminal sentences are imposed. Hopefully, departure sentences will be reserved for only the truly exceptional cases. The proposed guidelines contain a non-exclusive list of sentencing departure criteria. Other departure criteria may be developed by common law.

Next, I will briefly focus my comments upon appellate review of proposed guideline sentences. If a sentencing judge does not impose a departure sentence, there is in most cases, no appellate review of the imposed sentence. On the other hand, if a judge imposes a departure sentence, either the prosecutor or the defendant may seek appellate review of the imposed sentence. Under current Kansas law, the prosecution virtually has no opportunity to seek appellate review of a criminal sentence. Additionally, the proposed guidelines provide a method for expedited appellate procedures which ensures timely review of departure sentences. Appellate procedures under the proposed guidelines are both expeditious

and meaningful. After the initial constitutional challenges, hopefully the appellate courts will not experience an increased number of appeals under the proposed guidelines.

A close reading of the proposed sentencing guidelines suggests that Kansas trial judges would retain considerable discretion to craft and impose fair and uniform criminal sentences. Before closing, I offer the following suggestions if the proposed guidelines are adopted:

1. The Kansas Sentencing Commission should be established as a permanent, independent entity to monitor compliance of criminal sentences imposed under the guidelines and to serve as a non-partisan body to consider requested changes to the guidelines.

2. The Kansas Legislature should clearly take a position as to the retroactive application of the sentencing guidelines to pre-guideline sentences. If the guidelines are to be retroactive, pre-guideline sentences should only be reduced, not increased. (Adequate funding for all governmental agencies will be needed to ensure timely application of the guidelines to pre-guideline sentences.)

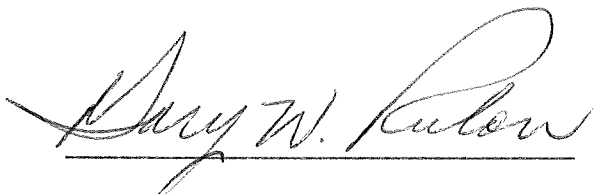
3. Plea bargaining guidelines, similar to those adopted by the American Bar Association, should be considered and adopted to compliment sentencing guidelines.

I urge each of you to seek the advice, comments and criticism of "reasonable, fair-minded" people before casting your vote, either for or against the proposed sentencing guidelines. Your vote on this issue will be among the most important cast this legislative session.

Finally, I express my deepest appreciation to the other members of the Sentencing Commission for their responsible cooperation, long days of intense debate, and hard work. Especially, I thank Ben Coates and the entire Commission staff for their dedication, expertise, advice, and many courtesies. "Well done" to Ben and staff.

I am available now or later to answer any of your questions about the proposed guidelines.

Submitted By:



Gary W. Rulon,
Vice-Chairperson, Kansas
Sentencing Commission

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RICHARD B. WALKER
District Court Judge
Harvey County Courthouse
Newton, Kansas 67114

JUDGES OF THE NINTH JUDICIAL DISTRICT
Harvey and McPherson Counties
ADMINISTRATIVE JUDGE
CARL B ANDERSON, JR.
DISTRICT JUDGES
THEODORE B. ICE, Division I
RICHARD B. WALKER, Division II

TELEPHONE
(316) 283-6900

February 6, 1991

CHAIRMAN WINTER AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

I appreciate this opportunity to speak to you in support of the recommendations made by the Kansas Sentencing Commission.

Two years ago I stood before you and urged the passage of Senate Bill 50, which created the Kansas Sentencing Commission. I indicated to you on that occasion that the bill gave you a unique opportunity to literally grab ahold of and study the entire system of criminal sentencing in Kansas, rather than dealing with it on a piecemeal basis in the typical crisis environment of a short annual legislative session. I am now pleased to be able to stand before and commend to you the fruits of the process you set in motion when you passed Senate Bill 50.

When the 1989 Legislature passed Senate Bill 50, it was echoing widespread dissatisfaction with the way the system of indeterminate sentencing actually works. You told the newly created Sentencing Commission to establish "rational and consistent sentencing standards" which would reduce sentence disparity and eliminate any racial and regional biases. You told us at the very outset that what you wanted was "a mechanism for linking justice and corrections policies."

What you have been presented in the report of the Commission is the result of 18 months of hard work by the Commission and its staff to carry out that mandate. We have come together from all points of the criminal justice compass to work together in carrying out the difficult task you gave us. As a commission member, I can tell you that it has not been easy to find common ground among the various groups who are directly affected by the shape of the criminal justice system. I suspect that not one of the Commission members can say that the report contains a new system exactly as he or she would like to see it.

As a trial judge who regularly sentences convicted felons, I support the sentencing guidelines proposed by the Commission as the best chance to bring order and stability to the sentencing process. Many of my fellow judges

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across the state will agree, a substantial number will likely not. Most judges, I suspect, simply would like you to provide them with a fair and rational system which allows them the latitude to depart from the normal sentence in unusual and difficult situations. I believe the sentencing guidelines proposed in the Commission's report fairly balance the need to have sentencing as uniform and predictable as possible with the important traditional role of the judge as the final arbiter of fairness in hard cases.

The 1991 Legislature has an important and historic opportunity to bring greater order and rationality to one of the most politically sensitive areas of state lawmaking. By adopting the sentencing guidelines contained in the Commission's report you will be able, for the first time, to actually link together the millions of dollars you spend for criminal justice and correctional facilities. You will also have set in place a process for helping with difficult decisions future legislatures will face in dealing with these sensitive issues. I urge you not to pass up this unique opportunity.

Senate Judiciary Committee
Sen. Wint Winter, Chairman
Testimony of Richard Ney
Sedgwick County Public Defender
Concerning Sentencing Guidelines
February 6, 1991

END JUDICIAL DISCRETION

Judges should decide the law of cases, legislatures should decide penalties. Kansas has found itself with a prison system beyond capacity, in large part because of unbridled judicial discretion in setting sentences. Past attempts by this Legislature to limit who goes to jail by creating presumptions of probation for minor felony offenders has been roundly ignored by the courts, both trial and appellate. Further, studies show that racial minorities are treated more severely at every stage of the criminal justice system than are whites. The only way on instituting color blindness in the system is a sentencing scheme that eliminates discretion ("gut feelings") from the process. What is needed now are the proposed sentencing guidelines, modified to exclude any judicial discretion, up or down.

First, the proposed grid itself has a range built into it which can adequately be used to address the particularities of a crime. Of the three numbers in the grid box, the longest, shortest or mid-range number can be chosen by the sentencing judge to reflect his or her feelings concerning the offense or the offender. (Although I in no way believe that the ranges will be used in any less arbitrary way than maximums and minimums are used currently, at least the disparity will be limited.)

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Second, such discretionary departure factors such as "excessive brutality" and "particularly vulnerable" are without any real definition and will be used at will by sentencing judges to enhance. What one judge sees as "excessively brutal," another judge will not and we will be back with the same disparities as exist in the current system. Also, we must ask whether it is appropriate to double an individual offender's sentence for a street robbery because the victim was 60 as opposed to 40.

Third, even assuming the commission's position that the majority of departures would be downward, the issue of disparity is still no answered. I suggest that downward departures will be used for white, middle-class defendants and the same racial disparity that now exists will be perpetuated. It does not matter if some blacks are treated worse or whites better, the result is the same.

Fourth, even without departing, a sentencing judge can, by running sentences consecutive, double what another judge might do by using concurrent sentences. Guidelines limiting the use of consecutive sentences must be formulated. The unfettered use of such sentences has gotten the state into the position it currently faces. Surely the use of departures and consecutive sentences must be forbidden. Otherwise the result would allow the possibility of sentences longer than those now permitted by law.

Finally, the number of appeals from departures will swamp the appellate courts and the lawyers handling such matters.

PASS RETROACTIVITY

Legislation making the sentencing guidelines retroactive is of paramount importance. It avoids the creation of two classes of inmate in Kansas prisons and allows past discrimination to be rectified. If blacks in the prison system were sentenced more harshly than similarly situated whites, retroactivity can correct that. It is also fundamentally unfair to sentence an offender under the guidelines to 18 months and another, with the same record and offense, to five years, merely because of the date they were incarcerated.

CHANGE THE PROPOSED DRUG GRID

It has long been bemoaned as disproportionate in Kansas that possession of a small amount of narcotics is punishable as severely as sale of a large amount. The sentencing commission was presented with the perfect opportunity to change that anomaly, but did not. I strongly urge you to treat simple, one-dose possession as a probationable offense. If there are victims to drug use, it is the users themselves, and there is no crime we know better how to rehabilitate the offender than drug use.

Amend the drug grid to give imprisonment to sellers, and, like the federal guidelines, base length of sentence on amount sold. There is a very real difference between someone selling a small amount of drugs to maintain their habit and a major level dealer selling ounces and pounds.

Testimony of Professor
David J. Gottlieb
University of Kansas School of Law
before Kansas Senate Judiciary Committee
February 6, 1991

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1:

1. The Commission's in-out line should be set to produce not only a substantial reduction in the rate of imprisonment, but a real projected reduction in total prison population.

2. The Legislature should make most category 5 crimes, particularly robbery and aggravated burglary, presumptively probatable for first offenders.

3. A first-time sale of small amounts of drugs should be probatable.

4. All category 10 crimes, and most category 9 offenses, should be presumptively probatable for all offenders.

5. The Legislature should not propose terms of imprisonment that exceed the amount of time an inmate with good behavior legally can serve under current law.

RECOMMENDATION 2: The legislature should institute a "Good Time" system providing for reductions of up to 20% off the guideline sentence for inmates who maintain acceptable behavior in prison.

RECOMMENDATION 3: The Commission should recognize youth, age and amenability for probation as departure factors. At the same time, the Commission should build in failure on probation as one of the factors in its Criminal History score.

RECOMMENDATION 4: The legislature should study the adoption of guidelines for the exercise of prosecutorial discretion.

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Testimony of Professor
David J. Gottlieb
University of Kansas School of Law
before Kansas Senate Judiciary Committee
February 6, 1991

I am a Professor at the University of Kansas School of Law. For the past 11 years, I have also served as Director of the Kansas Defender Project, a law school clinical program in which students represent inmates at the federal and state penitentiaries in Leavenworth and Lansing. I'm also the co-editor of Practice Under the New Federal Sentencing Guidelines, the first treatise on the federal guidelines. I'm pleased to be able to offer my comments on the preliminary recommendations of the Commission.

I testified in favor of SB 50. Although I favor sentencing guidelines for Kansas, I have serious reservations about several features of the guidelines. I believe, therefore, that the guidelines should be revised in light of these concerns before they are passed by the legislature.

First, the guidelines are too harsh. They may increase prison overcrowding. At the very least, they fail to provide solid assurance that they will stabilize or reduce total prison population. What is worse, they will mandate severe penalties for individuals who most people believe should not be incarcerated, and who are not incarcerated at present.

Second, the guidelines are too rigid. Factors that most citizens, let alone judges, consider relevant, are left out entirely. The Commission, correctly concerned about the disparity problem of treating similarly situated offenders in a different way, has overreacted and created a different disparity problem--these guidelines require that judges treat differently situated offenders exactly the same. They also overreact to the problem of excessive reliance on rehabilitation as a reason for sentencing. Instead of reducing that reliance, they eliminate it entirely.

Third, although the guidelines purport to reduce discretion, unless some attention is given to prosecutorial practice, they will merely transfer that discretion to the prosecution.

Inattention on the federal level to the problems I've just identified has lead to massive overcrowding and considerable injustice. I'd hope that Kansas can avoid the federal experience.

I THE GUIDELINES MAY WORSEN PRISON OVERCROWDING

Over the past ten years, the crime rate in the State has remained almost constant. Nevertheless, beginning in 1980, the

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State began a series of extraordinary increases in prison population. From a population of 2416 in 1979, the population almost tripled to a figure of 6172 in fiscal year 1989. The average increase in population was slightly over 400 inmates per year.

This rapid increase had its predictable result. In 1987, the Kansas State Penitentiary was operating at 224% of capacity; KSIR in Hutchinson was operating at 212% of capacity. Other State institutions were similarly affected. Inevitably, a federal court order was issued, mandating reductions in population at these institutions, and the State was forced to embark on a massive building program that has, in the decade, required new facilities in Norton, Stockton, Ellsworth, Hutchinson, Lansing, Topeka, and Eldorado.

SB 50, the bill that formed the Commission, was considered in this background. For many, if not most of the conferees, the basis of support for sentencing guidelines was their ability to control prison population. That concern was reflected in the bill, which directs the Commission to take into account "correctional resources, including but not limited to the capacities of local and state correctional facilities."

The current plan does not adequately honor this legislative intent. The Commission's present estimate is that its plan will reduce total "person months" by 9%. It is not clear, given our rate of increase, whether this decrease will be enough to stabilize prison population. Any plan adopted by the Legislature should come with a genuine assurance that prison population will not increase. We do not need, and we no longer can afford, more prison construction on the scale of the 1980's.

Moreover, the Commission estimates may understate the incarceration that will occur.

The criminal history scores upon which its estimates are based are probably understated, since there is at present no great incentive to discover every last out-of-state conviction and no accurate account of misdemeanor convictions. Guideline states have consistently found that imprisonment occurs at a greater rate than estimated. Some authorities have suggested this is so because prosecutors become more adept at finding prior convictions, thereby raising the criminal history score. Moreover, the Commission's estimates ignore the upward "bracket creep" that inevitably occurs as legislatures react to crises by creating mandatory penalties. The federal system, with its mandatory minimum drug sentences, provides an example where minimum sentences have combined with guidelines to produce tremendous increases in prison population.

Finally, the guidelines should be set at a point sufficient to guarantee that we will not need either a mandatory "cap" on prison population or an "early warning" system. While both of

those suggestions make sense in a system on the verge of unconstitutional overcrowding, a purpose of the guidelines should be to insure that we do not need either provision. In sum, the legislature should move the Commission's "in-out" line to reflect a more realistic and stable use of incarceration. I recommend the Oregon classification system as a starting point for the Commission's task.

II THE COMMISSION'S PENALTIES ARE UNREALISTICALLY HARSH

The overuse of imprisonment, and the rigid nature of the guidelines, promise to produce results that are terribly harsh and that may produce tragedy for individual citizens. For example, the following crimes are rated as category five, and will require a minimum of 36 months imprisonment.

a. Robbery--thus, an 18 year-old with no prior convictions who pushes a fellow high school student and takes his lunch money will be required to serve 3 years' imprisonment.

b. Aggravated burglary--an 18 year-old with no prior convictions who gets drunk, climbs through an open window of an occupied dwelling looking for money, and leaves immediately without taking anything must serve 3 years' imprisonment.

c. The Commission's standards also require first-time sellers of small amounts of drugs, marijuana, to be imprisoned. The drug sale provisions do not reflect current practice and are unrealistically harsh.

The Commission's criminal history scoring, by providing no tolling period on felonies, mandates that any individual with two prior person felonies must be incarcerated upon conviction of a subsequent felony, no matter how remote in time that felony may be, or how unlikely the individual may be to repeat the offense. This decision is directly contrary to the stated position of the Commission that punishment should be proportional to the harm caused, and it varies markedly from the Oregon grid upon which the criminal history scale is based. Thus, an individual who at age twenty committed two unarmed robberies, who thereafter conducted himself in a law abiding manner, and who at age 60 is found guilty of bigamy, non-support, bouncing a check, pirating a sound recording, or any of the other category 10 crimes, must be sentenced to imprisonment. The failure to have either a tolling period or create some crimes for which imprisonment is simply not appropriate insures that the state will continue to incarcerate individuals guilty of relatively minor transgressions who pose no present threat to public safety. The Commission should redo its guidelines to make category 9 and 10 offenses probatable for all offenders, with the following exceptions: terroristic threats, theft over 5,000, theft of services over 5,000, burglary, possession of burglary tools, criminal damage and use of a financial card of over 5,000, perjury, weapons and explosives violations, driving while

suspended and a habitual violator (if there are previous auto-related offenses) and fleeing a Law Enforcement officer.

Finally, the Commission has usurped the function of the legislature by proposing terms of imprisonment for crimes that require some or all offenders to serve a greater amount of time than would be possible under current law. Senate Bill 50 charged the commission to eliminate the disparities caused by unguided judicial or parole discretion. There is absolutely nothing to indicate that the legislature intended the Commission to second-guess the legislature's determination of the maximum sentences possible under present law and to override that determination. Rather, the Commission was charged to take into substantial consideration current practice.

Current Kansas good time law mandates that an inmate who observes prison rules will be released, at the latest, at one-half the maximum sentence. Thus, for a class E felony, release must occur at 30 months. Despite this legal minimum, the Commission has decided, for some class E crimes, to require ALL inmates, even those with no prior convictions, to serve in excess of the maximum required by present law. The court has required all inmates convicted of class E felonies of aggravated vehicular homicide or abandonment of a child to serve a minimum of 36 months with good behavior, 6 months more than that possible under current law. In level 6, the Commission has included 6 class E felonies that will require service of more than the current maximum for any individual with a single prior non-violent felony or 3 person misdemeanors. The Commission's decision, which substitutes its judgment for that of the legislature, in addition to requiring substantial imprisonment for precisely those felonies our representatives have found to be least serious, should be reconsidered by the Commission.

RECOMMENDATION:

1. The Commission's in-out line should be set to produce not only a substantial reduction in the rate of imprisonment, but a real projected reduction in total prison population.

2. The Legislature should make most category 5 crimes, particularly robbery and aggravated burglary, presumptively probatable for first offenders.

3. A first-time sale of small amounts of drugs should be probatable.

4. All category 10 crimes, and most category 9 offenses, should be presumptively probatable for all offenders.

5. The Legislature should not propose terms of imprisonment that exceed the amount of time an inmate with good behavior legally can serve under current law.

My recommendations are neither soft on crime nor unrealistic. Indeed, they resemble the system that was recently enacted in Oregon.

III. THE COMMISSION'S "BAD TIME" PROPOSAL IS UNWIELDY, UNNECESSARY, AND PERHAPS UNCONSTITUTIONAL

In an effort to promote "truth in sentencing," the Commission plans to adopt a system where the presumptive sentence becomes the minimum rather than the maximum sentence imposed, and where additional "bad time" may be added on by the Department of Corrections. This idea, unprecedented in the United States, is terribly ill-advised, and it should be scrapped and replaced with a system that provides for modest amounts of good time.

First, the system, if implemented in earnest, would be unconstitutional. The constitution requires that no individual be deprived of liberty without due process of law. In the criminal context, that means that an individual may not be punished without a trial and sentence. The maximum penalty to which the individual may be subjected is the penalty set by the judge. Thus, if the judge were to express the guideline sentence as the maximum, any further increase could not be imposed by the Department of Corrections, but rather could only be imposed by another judge at a subsequent trial.

The Commission seeks to avoid this problem by announcing the maximum sentence as the guideline "plus 20%." It is difficult to comprehend how this system differs, in terms of truth in sentencing, from a good time system that would express its sentence as the guideline "minus 20%" possible for good time. In either system, one group of inmates will serve the guideline term, one group will serve a different time. Indeed, if any system is deceptive, it is the Commission's, for the "bad time" system seeks to disguise from criminal defendants and the public the true maximum sentence imposed by the judge.

While the "bad time" concept will not further truth in sentencing, it will have at least two negative consequences. First, it will require the Department of Corrections to implement cumbersome procedures for adding on "bad time," procedures that the Department correctly recognizes are more onerous than currently are required. The Supreme Court, in many contexts, has held that far more in the way of due process is required when one seeks to impose a penalty than may be required in the granting of a benefit. Thus, in Greenholtz v. Inmates of Nebraska Penitentiary, 442 U.S. 1 (1979), the Supreme Court held that an institution need to follow the same procedures in deciding whether to grant parole that it would be required to follow when revoking a parole it had granted. Thus, the Department will be required to develop elaborate procedures to litigate these "bad time" hearings.

Second, the "bad time" procedure is yet another means by which the Commission has produced unnecessarily long prison terms and contributed to prison overcrowding. In contrast, a decision to keep the same presumptive terms and substitute a limited amount of good time would have a salutory effect in alleviating the severe overcrowding and budget problems the Department of Corrections is presently facing.

Finally, this proposal trivializes the concept of truth in sentencing. For years, many of us have been concerned with sentences that have no relationship to the actual time being served. A 15 year term that really means five years and parole, or a 15 year sentence that really means 7 years after good time (our current system) fails to provide either the public or the prisoner with a clear idea of the time served. Presumptive sentences, which assure us that the time imposed will approximate the time served, are a remedy. However, small reductions in time for good behavior do no violence whatsoever to this principle. The public understands and does not disapprove these reductions, as long as they are small in relation to the total sentence. Indeed, there is no evidence whatsoever of criticism of small good time reductions in any of the States that have enacted guideline systems.

RECOMMENDATION--The legislature should institute a "Good Time" system providing for reductions of up to 20% off the guideline sentence for inmates who maintain acceptable behavior in prison.

IV THE GUIDELINES ARE TOO RIGID

A. The guidelines fail to recognize, as factors for departure, mitigating factors relevant to culpability. The Commission, in its criminal history score, recognizes that prior misconduct is relevant to culpability and dangerousness. It is far less willing, however, to recognize mitigating offender characteristics. The failure to consider the characteristics of the defendant will make impossible fair and appropriate sentences. In order to more fairly sentence, the following offender characteristics should be included as reasons for departure.

1. Youth and age. Although the Commission provides a departure for diminished capacity, it does not provide one for age. However, it is difficult to deny that age is relevant in determining the culpability of offenders. Offenses may represent the exercise of youthful poor judgment rather than calculated mature criminality. Age is particularly relevant when there is evidence that a youth has been influenced or led astray by an order co-participant. Similarly, in cases involving older defendants, concerns regarding life expectancy or health should be relevant to determining a proper sentence.

2. Amenability to probation. There is no doubt that one of the faults of our current system is the extent to which it proclaims rehabilitation as a basis for a prison sentence. It is clear by now that no individual should be sent to prison primarily to rehabilitate that person. However, it is shortsighted completely to eliminate rehabilitation as a consideration in sentencing. A limited discretion to consider amenability to probation may save the lives of some criminal defendants and considerable financial resources for the state. Individuals who are suitable candidates for probation should be able to argue that suitability as a reason for departure. It is appropriate to require the court to document its justification for probation, and the Commission may choose to limit this departure option to individuals one or two grids above the "in-out" line. The failure to provide this limited discretion has been one of the most frequently cited criticisms of the federal guideline system. We should avoid repeating that mistake.

RECOMMENDATION: The Commission should recognize youth, age and amenability for probation as departure factors. At the same time, the Commission should build in failure on probation as one of the factors in its Criminal History score.

V. IF THE COMMISSION INTENDS TO REDUCE DISPARITY IN TREATMENT, IT MUST RECOMMEND THAT THE LEGISLATURE CONSIDER ADOPTING STANDARDS TO GOVERN THE EXERCISE OF PROSECUTORIAL DISCRETION.

The principal claim articulated by the Sentencing Commission supporting adoption of its guidelines is that it will reduce the disparity in treatment between similarly situated offenders. Indeed, the guidelines do drastically reduce judicial discretion and eliminate parole discretion. However, the guidelines recommend no change in the unguided prosecutorial discretion that currently exists in Kansas. Unless some attention is given to this question, the guidelines will fail to reduce discretion, but will merely transfer it to the prosecution.

At a November 26, 1990 public hearing, the Attorney General seemed to take the position that the Sentencing Commission did not have the power to recommend changes in prosecutorial practice. This view seems at odds with the charge given to the Subcommittee on Legal Issues and Procedures, which was convened to issue recommendations on, among other issues, "plea bargaining rules." In any event, it is clear beyond argument that the legislature may study the problem before the guidelines become effective.

Unregulated prosecutorial discretion threatens to destroy the efforts of a guideline system to reduce disparity. It is well and good to require that all people convicted of armed robbery be treated the same. However, that decision will not reduce disparity if some people who commit armed robbery are charged with armed robbery, some are charged with simple robbery,

and some are just charged with theft. Nothing in the guideline system proposed by the Commission precludes or even speaks to this kind of disparate treatment.

Guideline sentencing schemes increase the importance of the prosecutorial charging decision. In our current system, the prosecution has unregulated discretion to choose the crime it will charge. However, when it comes to sentencing, the judge has the power to mitigate any prosecutorial disparity by moderating the ultimate sentence. Thus, the court, if it believes that a robber who has been given a plea bargain is as culpable as an armed robber who hasn't been able to bargain, might give a maximum sentence to the robber, and a lesser term to the armed robber. Moreover, the Parole Board, in reviewing release decisions, is also positioned to reduce unwarranted prosecutorial discretion.

Under guideline sentencing, there is no control on prosecutorial power. The prosecutor has control not only of the charge that is going to be selected, but of the sentence that will be imposed. In the robbery example, the prosecutor's decision to charge armed robbery will require a sentence of imprisonment 50% greater than if simple robbery were charged.

Because of the options available to him, the prosecutor is free to introduce as much disparity into the system as he may choose. Prosecutors, for good and bad reasons, have done just that in jurisdictions that have adopted the guidelines. In numerous cases and reports, judges and attorneys have complained about the bringing of disparate charges against defendants whose conduct was essentially identical.

For at least three reasons, this kind of disparity ought to be more troubling than judicial disparity. First, prosecutorial disparities occur off-the-record. While judicial judgments are pronounced in a recorded sentencing hearing, prosecutorial judgments are made off the record in the County Attorney's office. Second, judges are elected or appointed to be neutral. The prosecutor, of course, is a partisan for one side in the dispute. Finally, judges tend to be some of the most experienced practitioners in the State. Prosecutors, on the other hand, are often barely out of law school.

This transfer of power, discretion, and unfortunately, disparity, has been noted in many of the jurisdictions that have moved to more determinate sentencing systems. For example, the recent report of the Federal Courts Study Committee concludes:

> We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system...The result, it appears, is that some prosecutors (and some

defense counsel) have manipulated the guidelines in order to induce the pleas necessary to keep the system afloat...."

Federal Courts Study Committee, Tentative Recommendations for Public Comment, pp. 61-62, Dec. 22, 1989. See also Special Issue, The Sentencing Commission and its Critics, 2 Fed. Sent. R. 210 (1990); Chambers, Prosecutors Take Charge of Sentences, Nat'l Law Journal, p. 13 (Nov. 26, 1990). Similar problems have been reported in Minnesota, Washington, and Pennsylvania, states that have served as models for the Commission in implementing its guidelines. See Minnesota Sentencing Guidelines Commission, The Impact of the Minnesota Sentencing Guidelines 71 (The power of prosecutors unquestionably increased with the implementation of the Sentencing guidelines); Nat'l Inst. of Justice, Sentencing Reform Impacts 71-73. In fact, the State of Washington has recognized this problem and has adopted, along with the guidelines, recommended prosecuting standards for charging and plea dispositions. See 9.94A.440 RCWA (Supp. 1990).

RECOMMENDATION: The legislature should study the adoption of guidelines for the exercise of prosecutorial discretion.

Kansas Peace Officers' Association

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February 6, 1991

Mr. Chairman and Members of the Committee:

My name is Helen Stephens, representing the 3,000 members of the Kansas Peace Officers Association.

KPOA has studied the recommendations of the Sentencing Commission, had briefings from Ben Coates and his staff, and visited with some of the opponents.

We are here to support passage of these guidelines without amendment.

I was one of the few who attended at least half of the full commission meetings. I watched as these people wound their way through the maze of parochial interests, the victim's interest, the public's interest, the felon's interests, and the state's interests and made it to the document you have before you today. I can speak first-hand on the direct and open discussions that took place and the considerations they gave, and I can honestly say this report reflects many hours of thoughtful discussion, and, most importantly, compromise. The commission should be highly commended for their efforts. It is because we have heard the discussions and know of the compromising that has taken place, that KPOA would like to see this passed without amendment.

I will not deny that KPOA, like others, do have areas we would like to see strengthened, at least strengthened from our viewpoint; but, we firmly believe that if you start tinkering with any part of this proposal you would be severely diluting the much-needed changes to our present system. We need to put these guidelines in place, monitor them, and then consider changes if they are needed.

We would ask that you pass this report with the following recommendations:

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In Unity There Is Strength

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1. The Kansas Sentencing Commission be kept in existence, and a plan developed to have the Commission monitor all phases of the new system and to review and recommend any changes before they are presented to the legislature.

2. The Legislature should direct the Commission to study and report back to them no later than 2/1/92 their recommendations for enacting the following:

    a: Retroactivity;
    b: A trigger mechanism for monitoring prison population;
    c: A plan for implementing the forwarding of criminal history (including A and B misdemeanors) to the KBI; and
    d: Consolidation of court services and community corrections.

3. The Commission should develop a plan to educate all who have a role in implementing the guidelines and start that process this Fall.

Thank you for the opportunity to speak to you today. If you have any questions, I will try to answer them for you.

Kansas Peace Officers' Association

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TESTIMONY
GEORGE J. SCHUREMAN
PAST PRESIDENT, KANSAS PEACE OFFICERS' ASSOCIATION
SPECIAL AGENT IN CHARGE, KANSAS BUREAU OF INVESTIGATION
SENATE JUDICIARY COMMITTEE
FEBRUARY 1, 1991

RE: Recommendations of the Kansas Sentencing Commission

Chairperson and Members of the Committee:

Thank you for allowing me the opportunity to appear before you today and express my views on sentencing with you. These views I share are personal and may or may not agree with the thoughts of the staff of the Kansas Bureau of Investigation (KBI). These views may be looked upon as being hard-nosed and are the result of my being a law enforcement officer for the past 31 years. The ideas shared here are in agreement with the Kansas Peace Officers' Association (KPOA).

The KPOA feels that sentencing should be uniform across the State of Kansas. Sentences for crimes against persons should be severe and have less emphasis placed on rehabilitation and parole programs. Severity of the injury to the victim should be taken into account when sentencing

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criminals. Sentencing in property crime should be guided by the severity of loss suffered by the victim and the affect the loss had on the victim.

Sentencing in crimes relating to drugs should differentiate between the dealer, trafficker, financier, manufacturer and the user. The dealer, trafficker, financier or manufacturer of drugs should receive severe mandatory sentencing. The drug involvement of these types of criminals are caused by greed and the desire to make large amounts of money. Sentencing must be severe enough where the money made is not worth the risk of getting arrested. There is nothing wrong with attempting to educate and treat the drug user up to a point. The influence of drugs must not be used as an excuse for justifying committing a crime.

The KPOA feels that it is important for the offender to understand that when sentenced the offender will be required to serve the time specified. The offender must be made aware that if the crime is repeated the offender can expect to be dealt with more severely each time he returns to prison.

Less emphasis should be placed on parole and on the early release of criminals. It seems that the consideration of good time for good behavior is being used in the wrong way. If a criminal is sentenced to 3-5 years

for committing a crime, that criminal is eligible to get out of prison at a time earlier than the 3 years with the accumulation of good time. I would suggest that the criminal understand that he must serve three years and that if the offender misbehaves, time will be added on to the sentence. This policy could serve as a motivating factor for good behavior just as easily as the current policy.

The argument will be heard that there is not enough space to house criminals if this hard-nose approach is adhered to. Lack of space must not be used as a criteria for determining sentences of criminals, especially criminals who commit crimes against persons.

The argument will be heard that the poor souls need rehabilitated. I have presented to you with a paper written by FBI Agent Thomas Strentz, who was on the staff of the Behavioral Science Unit of the FBI National Academy when I attended the 104th session of that academy. This paper was part of the handout material which was distributed during the applied criminology course that I took. This study determined that 40% of the prison population can be classified as sociopaths and that 90% of the criminal acts are committed by persons with a sociopathic personality.

Agent Strentz made the following observations reference sociopaths and I would like to quote for a brief moment: "It's against this group that the American criminal justice system must mount a defense. At present the battle lines appear to be ill-conceived and poorly drawn. This appears to be especially true in the field of corrections. In the present non-system there is no agreement on the goals of specific components. The correctional lexicon includes reference to such terms as protection of society, rehabilitation, treatment, prevention and many more nebulous and ill-defined concepts.

The modern trend in corrections seems to be the halfway house or the community treatment center. It is felt that the prisoner should live with or have contact with non-criminals on the theory that he must learn to deal with the outside world prior to his release. Toward this end we have seen the establishment of work release and early release programs and liberalized parole and probation. Any concept which involves the isolation of the prisoner from society is felt to be about as destructive a policy as could be devised and goes against every conceivable principal or rehabilitation, and further we hear that the community must become more involved with our prisons and our prisoners must have some opportunity to become involved with the community." He goes on,

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"corrective treatment or rehabilitation has not been effective with the sociopathic personality. Many methods have been tried and all have failed. Until the suspected causes, learned behavior, (environment) or physiological malfunction in the brain, (heredity) can be identified and treated psychiatry is helpless in it's endeavors.

Until psychiatry is able to cure the sociopath of his malady which so adversely affects our society, we as police officers must learn to identify, predict and control his anti-social behavior."

I submit to you that we must deal with the anti-social personality, one who has committed criminal acts, in a manner that restricts his involvement with society. The only way to do this is by sentencing the sociopath to serving a specific time in prison based upon the nature of the crime and number of times the crime has been committed.

Thank you for your time.

THE SOCIOPATH

FBI National Academy

SA Thomas Strentz

Instructor_____

Date_____

6-6/80

THE SOCIOPATH

On a warm day in 1964, a tall 15-year-old boy regarded by his classmates as well-mannered but a shy lone-wolf, calmly shot his grandmother to death with two bullets to the head. When his grandfather returned from the grocery store, the youth murdered him in similar fashion. He then telephoned his mother and reported his activity. His explanation was, "I just wondered how it would feel to shoot grandma." After six years of penal and psychiatric institutionalization and treatment, he was released. In September, 1972, two psychiatrists reported, "He has made an excellent response to treatment." One was so convinced that he said, "I see no psychiatric reason to consider him a threat to himself or any other member of society." Tragically, four days before this psychiatric evaluation, he had murdered a 15-year-old girl. Before turning himself in during May, 1973, and after the above psychiatric evaluation had succeeded in sealing his juvenile record of double murder, he murdered and dismembered six young girls. Three days prior to confessing to these murders, he bludgeoned his mother to death with a hammer and strangled one of her friends. A total of ten human lives were taken by Edmund Kemper before his personal reign of terror ceased.[1]

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THE SOCIOPATH

What common thread runs through the lives of Charles Manson,[2] Gary Steven Krist,[3] Herman Goering,[4] and "The Great Imposter," Ferdinan Waldo Demara, Jr.?[5] These are personifications of the question which asks why the sociopath? Why is he different? How did he become deviant? These are a few of the questions this article will explore.

Of what interest is this term sociopath to the police? Is he only the subject of the rare, headline consuming murders? The sociopath, psychopath or antisocial personality, all closely related, are categories of abnormal behavior. Depending upon the research project which is quoted, the sociopath reflects 30 to 40% of the population of our prisons. The Dallas, Texas, Police Department, publication said in 1/73 that psychiatrists of the Texas Department of Correction report that though the sociopath comprises 40% of the criminal population, they are responsible for 80 to 90% of all crime.[6] If these statistics are even close to reality, it would follow that most police officers have met the sociopath. Let us examine this personality and perhaps each of us will recall our experience with one or more of them.

Legally speaking, he is sane. Sanity is a legal term not a medical or psychiatric classification. Generally speaking, if one is not sane, or legally insane, a psychiatrist would classify him as suffering from a psychosis. The

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American Psychiatric Association classifies the Psychopath or Sociopath quite differently. In their eyes he is one type of Personality Disorder which they call the Antisocial Personality.[7] According to Diagnostic and Statistical Manual of Mental Disorders, 2nd edition, this term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups or social values. They are grossly selfish, callous, irresponsible, impulsive and unable to feel guilt or learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their deviant behavior.[8] They are, under the law, responsible for their impulsive, self-serving behavior. This category of individuals includes unprincipled businessmen, shyster lawyers, high pressure salesmen, imposters, and a great assortment of criminal types.[9]

An example of a "noncriminal" sociopath would be the unprincipled used car salesman. A young man or woman might come to his lot with the idea of purchasing a $600 automobile. The salesman would then finally interest the prospective buyer in a car and tell him the price was $600. A few days later, the purchaser would receive his payment book from the bank. Upon examining the book, he would find that the automobile was, in fact, a $1200 purchase. This person would take the payment book and comment that the bank has made a mistake again. He would dial

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the weather, pretend to speak to the bank, and after some strong conversation, state that he would correct their error but they should endeavor to keep their records straight next time. Then, he would remove the last $600 worth of payments from the book, tear them up, throw them away, and assure the purchaser that the matter had been resolved. About a year later, when the bank repossessed the car for nonpayment, the salesman would be elsewhere and would have chalked up another victim. The overriding personality trait of the sociopath is a lack of concern for other people. His behavior is self-serving.

The incidence of major maladaptive behavior patterns in our nation in 1970 can be presented in the following percentages. Fortunately, about 80% of us are normal. The remaining 20% can be categorized as follows; these figures are approximate and based upon the 1970 U. S. Census:

Psychotic individuals - 1% or about 2 m

Criminals - about the same

Abnormal children - 3% or about 6 m

The Mentally retarded - about the same

The Neurotic - about 5% or 10 m

The personality disorders are the largest maladaptive group at 7% or about 15 m.[10]

This last group includes drug addicts and alcoholics. It can be argued that most alcoholics are probably neurotic and not personality disorders. However, the fact remains that even the most conservative estimate of the number of antisocial personalities or sociopaths to be found on our streets exceeds

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four million or about 2% or our population. Harrington[11] claims that there are about ten million sociopaths in our population. This 2 to 5%, though a small number of the total, is very disproportionately represented in our criminal population. Holbrook states that this represents about 40% of the prison population of Texas.[12] A study in New York in 1963 claimed the sociopath accounted for 35% of the inmate population of Sing Sing.[13]

An especially frustrating aspect of the sociopath is his ability to avoid punishment or incarceration. They frequently turn on charm that proves hard to resist, time and again deceiving police, judges, juries, hospital authorities, employers, wives, families and psychiatrists into accepting their argument that the latest incident was a mistake. He feigns repentance, tearful self-denunciation, and the like. This disappears as soon as the immediate objective (freedom or forgiveness) has been attained.[14] He seems to possess a sixth sense which enables him to tell people what they want to hear.

The questions asked earlier can best be answered by looking at the more common characteristics of the sociopath. A sociopath is a person whose behavior pattern of life style is characterized by the following factors, and according to Mannheim, the sociopath has most of these characteristics in excess.[15]

1. Perhaps the most lucid psychological explanation of the sociopath is that he feels any type of attachment to or affection for other people are traps.[16] He fears loss of freedom if he becomes in any way dependent on others, so this is to be avoided at all costs. It is thought that his acts are in fact

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"normal" for a person who has absolutely no concern for others.[17] All his other characteristics; need for immediate gratification, failure to learn from punishment, lack of guilt feelings, etc., stem from, and are the natural result of, his lack of concern for others. In other words, he acts in a perfectly rational manner for one who considers other persons as truly insignificant, chattles to be used or abused to suit his priorities.

2. His is antisocial. He does not make friends as you and I do. He has no qualms about working against his associates to gain personal recognition, advancement or self-satisfaction. He enjoys the suffering of people he has "defeated."

3. Given the first two characteristics one can see that the sociopath would not feel guilt. He understands guilt and can feign guilt readily, but his behavior pattern belies his expressions of remorse. Upon commission of a crime he feels as remorseful as a Protestant who eats meat on Friday.

4. In a word, he is impulsive. The consequences of an act are inconsequential. He lives for today: The future is now. Unlike other criminals who develop a criminal speciality and stick with it, such as burglary or forgery, the sociopath can, and sometimes will, engage in varieties of crime. He can run the gamut from sodomy to armed robbery.[18] Many rapists are sociopaths.[19] Because of an inherent, emotionally immature need for immediate gratification, and the belief that he is above the law, his crimes are extremely unpredictable. Furthermore, when engaged in a robbery he will not hesitate to shoot nonresisting victims or witnesses just to experience the stimulation of killing.

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5. One can see that the sociopath is not a man who will benefit from incarceration. He is a recidivist. Many check writers fit this personality pattern. This perhaps serves to explain, at least in part, why the check writer is so inclined to return to prison. To the sociopath the penal institution is truly an institution of higher learning. His adjustment to prison life is good, he usually has "respectable position," not just a job while institutionalized. Authorities agree that most correctional institutions only further criminalize inmates, this is especially true of the sociopath.

6. This man is unable to engage in a meaningful, loving relationship with a member of the opposite sex. Through life he satisfies his sexual desires by impulse. He is frequently bi-sexual and is given to act out perversions with animals.

A sociopath who is married and caught in an extra-marital relationship would probably convince his wife that it was all a mistake. He would claim he had been seduced while drunk. If he was more thorough in his story, he would probably confess his sins with a long story of how each time he became involved with other women, he was reminded how much more meaningful and enjoyable their sexual relationship has been. He would then play on her feelings, her desire to have him back, and convince her that the more he sees of other women, the more convinced he is that she is the only one for him. She believes this lie. Soon things quiet down and he is out again chasing around with other women. If caught, he cons his way back into her good graces.

7. He is very dependent; he must be in contact with people to constantly prove to himself that he is better than others. He copes with anxiety by abusing people. In fact, Holbrook reports that within 24 hours of a stressful experience, an experience which the sociopath considers threatening (ego threatening) he will commit an antisocial act.[20] Whenever one sociopath and his mother would argue, he left home to seek out and kill a female - any female.

8. Finally, most authorities state the sociopath is an extrovert. He gains stimulation by interacting with and abusing people. His personality lacks depth, but he exudes warmth and has a friendly disposition. He makes an excellent first impression but lacks the emotional maturity to follow through with commitments that are not self-serving. He thrives on social stimulation; a swinger. The most common criminal activity of this individual is the confidence game. Though he is, due to his impulsive nature, capable of any antisocial act.

Holbrook reports,[21] and Coleman agrees, that the sociopath is generally above average in intelligence. Characteristically, sociopaths are males between the ages of 15 - 40. The general theory holds that weaker biological drives, the cumulative effect of social conditioning and some insight, cause sociopaths to "burn out" after age 40.[22] This point is not universally held, but few police officers doubt this opinion. Further, he is always seeking ways and means to "con" the police officer. When he knows that the officer has a solid case against him, the sociopath will appear humble, remorseful, and anxious to cooperate. If, however,

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there seems to be a shadow of doubt in the officer's mind, the sociopath seems to have the ability to detect and play upon this doubt to gain his freedom. The police are not alone in their role of victim to the smooth, cunning manipulations of the sociopath. The psychiatrist who examined Kemper was convinced he had benefited from treatment that the statement was made, "I see no psychiatric reason to consider him a threat to himself or any other member of society."

People who deal with the sociopath are more than sure he is normal. They are positive. Perhaps we can benefit from the ability of the sociopath to sell himself, perhaps oversell himself. Recall Shakespeare where in Hamlet he said, "Methinks the lady doth protest too much."[23] We, as police, are professionally paranoid; we suspect everyone is up to "no good." When we encounter a person who convinces us of his absolute innocence, that he is as pure as the driven snow, this can be an indication that we are dealing with a sociopath. This is especially true when the subject has a history of criminal activity.

The question that frequently arises is: How does a person become so desocialized? How is a sociopath developed? Though the argument of heredity vs. environment goes on, the preponderance of evidence is beginning to weigh heavily on the side of heredity or early organic brain damage. Dr. George L. Thompson, former Chief of the Neuro-Psychiatric Unit of the L.A. County Hospital, is convinced that a form of childhood encephalitis is a cause.[24] This disease leaves the victim - the future sociopath - with minimal organic brain damage. Other authorities report an

80 to 90% incidence of irregular, abnormal, brain waves reflected in EEG tests administered to individuals previously diagnosed as sociopaths. (Holbrook,[25] Coleman,[26] Cleckley[27])

The bench mark in publications on the sociopath is "The Mask of Sanity" by Hervey Cleckley, M.D., and is recommended for any officer who wishes to pursue this subject. A second text, which seems oriented toward the police, is Coleman, 4th edition. He discusses the sociopath in some 40 pages of readable facts. Also, Alan Harrington's book entitled, "Psychopaths" is interesting and informative reading.

A modern sociopath, by his own admission, is Jerry Rubin.[28] His bock, "Do It," his courtroom behavior, and now his apparent acceptance of the system, indicates that he may be sociopathic. He used the Yippie movement to his own end and made a fortune.

Early identification of the sociopath is important for the officer on the street. Once he has tentatively labeled an individual as a sociopath he can react appropriately. Some methods of identification are complicated. One such method is the Galvanic Skin Response (GSR). Studies show that the sociopath's lack of response to normal anxiety provoking stimuli will be easily detected on the GSR test.[29] The operator of a polygraph certainly recognizes the sociopath. On the polygraph, the sociopath will have a bland or inconclusive response to all questions. The polygraph will register the same, or similar responses to test questions, routine questions and questions designed to provoke anxiety.

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Most parole or probation officers are able to tentatively classify an individual as a sociopath by reviewing his arrest record. The record of the sociopath reflects a variety of antisocial, impulsive acts which frequently include rape. The variety is perhaps they key in most instances. Perhaps the best key for the officer on the street is the ability to recognize the glib tongue, con artist style of conversation coupled with the inability to follow through or engage in any behavior that is not self-serving.

Sociopaths are, in fact, a marauding army operating within the U. S. Their number is unknown, but thought to exceed four million,[30] twice as many people as we have in all branches of the U. S. military. It is against this group that the American criminal justice system must mount a defense. At present, the battle lines appear to be ill-conceived and poorly drawn. This appears to be especially true in the field of corrections.[31] In the present nonsystem there is no agreement on goals of specific components. The correctional lexicon includes reference to such terms as protection of society, rehabilitation, treatment, prevention and many more nebulous and ill-defined concepts.

The modern trend in corrections seems to be the halfway house or the community treatment center. It is felt that the prisoner should live with or have contact with noncriminals on the theory that he must learn to deal with the outside world prior to his release. Toward this end we have seen the establishment of work release and early release programs and liberalized parole and probation. Any concept which involves the isolation of the prisoner from society is felt to be "about as destructive a policy as could be devised and goes against every conceivable principle

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or rehabilitation" and further we hear "that the community must become more involved with our prisons and our prisoners must have some opportunity to become involved with the community."[32]

Corrective treatment, or rehabilitation, has not been effective with the sociopathic personality. Many methods have been tried and all have failed. Until the suspected causes, learned behavior (environment) or a physiological manfunction in the brain, (heredity) can be identified and treated, psychiatry is helpless in its endeavors.

Until psychiatry is able to cure the sociopath of his malady which so adversely affects our society, we as police officers must learn to identify, predict and control his antisocial behavior.

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FOOTNOTES

1. News Week, June 4, 1973, p. 69.

2. Alan Harrington, Psychopaths, Simon and Schuster, New York, 1972, p. 35.

3. Ibid., p. 19.

4. James C. Coleman, William E. Broen, Jr., Abnormal Psychology and Modern Life, 4th Edition, Scott, Foresman and Co., Glenview, 1972, p. 368.

5. Ibid., p. 369.

6. Planning and Research Section, Dallas Police Department, The Dallas Repeat Offender Study, Dallas, Texas, January, 1973, pp. 10, 11.

7. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 2nd Edition, Washington, D. C., APA 1968, p. 43.

8. Ibid., p. 43.

9. Coleman, op. cit., p. 366.

10. Coleman, op. cit., p. 10.

11. Harrington, op. cit., p. 24.

12. Planning and Research Section, Dallas Police Department, op. cit., p. 10.

13. Coleman, op. cit., p. 396.

14. Harrington, op. cit., p. 16.

15. Hermann Mannheim, Comparative Criminology, Houghton Mifflin, Boston, 1965, p. 264.

16. Seymour L. Halleck, Psychiatry and the Dilemmas of Crime, Harper and Row, New York, 1967, p. 103.

17. Ibid., p. 106.

18. Richard M. Suinn, Fundamentals of Behavior Pathology, John Wiley and Sons, Inc., New York, 1970, pp. 273-4.

19. Coleman, op. cit., p. 471.

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20. Planning and Research Section, Dallas Police Department, op. cit., p. 10, 11.

21. Planning and Research Section, Dallas Police Department, op. cit.

22. Coleman, op. cit., p. 375.

23. Shakespeare, Hamlet, III.ii.

24. James M. Reinhardt, The Psychology of Strange Killers, Charles C. Thomas Pub., Springfield, 1953, p. 193.

25. Harrington, op. cit., p. 10, 11.

26. Coleman, op. cit., p. 372.

27. Hervey Cleckley, The Mask of Sanity, C. V. Mosby Co., St. Louis, 1964, p. 453.

28. Harrington, op. cit., p. 199.

29. Planning and Research Section, Dallas Police Department, op. cit., p. 11.

30. Coleman, op. cit., p. 366.

31. Earl Parsons, MD, "New Directions in Corrections," Federal Probation, Vol. XXXIII, No. 3, September, 1969, p. 3.

32. Halleck, op. cit., pp. 345-6.

3/6/91

To the Sentencing Commission:

I would like to go on record for the commission as a concerned citizen, voter, pastor, and religious leader. I pastor the Antioch Missionary Baptist Church, 1100 Washington, Topeka, Kansas. Also, I serve as the president of the Ministers' Division of the Kaw Valley District Baptist Association, which has a membership of over 52 churches in the Topeka, Lawrence, and Kansas City area. Along with this, I serve as the General Coordinator of the City Wide Revival Committee.

Accolades go to the commission for the desire to bring order, efficiency, and some semblance of racial equality to the correctional system. Yet, there is still more to be done. I would like to make two suggestions concerning the outlined guidelines for sentencing.

One, I would hope that the commission would make the grid and guidelines retroactive for the persons who are currently incarcerated. In a very small way, this could help to rectify the past injustice of racism in sentencing and in the court system. Such a move would show the sincere desire of the state to begin to alleviate and remedy its past wrongs. This could be financed thru the 17 - 25,000 dollars per prisoner spent annually by the state. Ten prisoners released allows $250,000; 100 persons released equals 2,500,000!

Second, in light of grid sentencing and to safeguard against racial and socio-economic prejudice, all departures by judges should be monitored by a state committee or commission. This group would monitor the factors that were involved in each case of departure.

Finallly, I hope the commission recognizes that this grid increases the possibility of an escalated Black prison population in maximal security prisons. Because of its nature of sentencing, based on crimes committed against persons, this is a stark reality that needs to be investigated.

Again, thank you for the efforts on your part that begin to address a problem that has long plagued not only Kansas, but also our country.

Respectfully,

Averil E. Royal, pastor

Senate Judiciary Committee
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