Nos. 09-479 and 09-7073

IN THE
Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Fifth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CAROLYN B. LAMM
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
clamm@whitecase.com

Counsel for Amicus Curiae American Bar Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Title 18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?

2. If not, does it include another offense for possessing the same firearm in the same transaction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NOS. 09-479 and 09-7073

KEVIN ABBOTT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Third and Fifth Circuits

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae,* respectfully submits this brief in support of Petitioners.[1] The ABA

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any

requests this Court to hold that under the plain language of § 924(c), a defendant is exempt from the mandatory minimum sentences provided in § 924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of § 924(c) or under any other provision of law.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions. It includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

Since the ABA's inception, and as one of the cornerstones of its mission, the ABA has "work[ed] for just laws, including human rights, and a fair legal process."[3] The ABA Standards for Criminal Justice are among the ABA's most prominent efforts to improve the criminal justice system, including sentencing. Begun in 1964 under then-ABA President (and later Associate Justice) Lewis F. Powell, Jr., the ABA Standards were originally

---

party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, available at http://www.abanet.org/about/goals.html.

published in 17 volumes, separated by topical area.[4] When the first full edition of the *ABA Standards* was issued, Chief Justice Burger called them "a balanced, practical work designed to walk the fine line between the protection of society and the protection of the constitutional rights of accused individuals." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-52 (1974).[5] The ABA has continued to develop and refine these Standards over the ensuing 42 years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public, and other groups that have special interests in the subject, as well as the diverse general membership of the ABA.[6]

---

[4] A history of the development of the ABA Standards is available at http://www.abanet.org/crimjust/standards/home.html. See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the ABA Standards are developed and promulgated), which is available at the same website.

[5] The ABA Standards became official ABA policy only after they were approved by vote of the ABA's House of Delegates ("HOD"). The HOD is composed of more than 500 representatives from States and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards have been amended over the years by the same process. See *ABA General Information*, available at http://www.abanet.org/leadership/delegates.html.

[6] The ABA Standards have been referred to and adopted by courts, legislatures, and executive branch enforcement agencies. This Court has taken note of the ABA Standards when considering issues of criminal justice as well. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003); *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 440-41 (1986); *Spaziano* v. *Florida*, 468 U.S. 447, 463 n.8 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

Most recently, in response to Justice Anthony Kennedy's address to the ABA at its 2003 annual meeting, the ABA formed the Justice Kennedy Commission to investigate the state of the criminal justice system in the United States, including criminal sentencing, and to make recommendations for improvement. The Commission presented its report (the "*Kennedy Commission Report*") to the ABA House of Delegates at its 2004 annual meeting, where its recommendations were adopted as ABA policy.[7]

The issue in this case—how the "except" clause ("Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law") of 18 U.S.C. § 924(c)[8] is to be applied to

---

[7] While the report bears Justice Kennedy's name, Justice Kennedy did not participate in the work of the Commission, nor did Justice Kennedy endorse or otherwise approve the positions taken in the report. The *Kennedy Commission Report* is available through the ABA's website: http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf.

[8] Section 924(c)(1)(A) of Title 18 of the United States Code, in full, provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

the mandatory minimum sentences set out in that statute—lies at the core of many policies articulated in the *ABA Standards* and the *Kennedy Commission Report*. These include the ABA's long-standing position that, while the use of a firearm in the commission of a crime should result in serious punishment, the resulting sentence should be no longer than necessary to serve society's goals and that judicial discretion must be retained throughout the sentencing process. The ABA believes that Congress struck the appropriate balance, reflected in that position, when it included the "except" clause in the 1998 amendments to § 924(c). The ABA respectfully suggests that its views on this issue, which are based on the perspectives of a broad range of practitioners and others who are involved with sentencing issues, will be of assistance to the Court in considering the question of statutory construction now before it.

SUMMARY OF ARGUMENT

In the 1998 amendments to § 924(c), Congress introduced an exception—commonly referred to as the "except" clause—to the required mandatory minimum sentences of § 924(c). Petitioners assert that, pursuant to the "except" clause, the mandatory minimums of § 924(c)(1)(A) are applicable except to the extent that a greater minimum sentence is "otherwise provided by this subsection or by any other provision of law."

The ABA supports petitioners' construction because—even apart from its fidelity to the plain language of the statutory text—it properly aligns § 924(c) with the con-

---

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

sensus view of the legal profession at the time of the 1998 amendments. When § 924(c) was enacted in 1968, it included judicial discretion to set the applicable mandatory consecutive sentence within stated ranges of years. This kind of "stacking" was not inconsistent with the legal profession's consensus views at that time. By 1998, however, judicial discretion to determine a sentence within a range of years had been replaced by the requirement to "stack" the applicable flat sentence on top of the mandatory minimum sentence contained in the other provision. During the same period, the consensus of the legal profession had hardened against mandatory minimum sentences, especially when "stacking" could result in overly harsh sentencing. The "except" clause of the 1998 amendments, accordingly, reflects a move toward the consensus, rejecting "stacking" where the subsection or another provision of law provided a mandatory minimum sentence that exceeded the minimum sentence provided in § 924(c)(1)(A), and restoring discretion so that judges could impose a sentence of greater severity under the other mandatory minimum sentence when warranted by the specific offense and offender.

Petitioners' construction of § 924(c), accordingly, remains faithful to Congress's intent to impose a harsh penalty for a crime of violence or drug trafficking involving firearms that is at least the minimum required under § 924(c), while allowing courts to impose a greater sentence that "is otherwise provided by § 924(c) or any other provision of law," where warranted to achieve society's purposes.

ARGUMENT

The "Except" Clause Aligns § 924(c) With Congressional Intent To Treat Applicable Crimes Severely And With The Consensus View Of The Legal Profession At The Time Of The 1998 Amendments.

Petitioners assert that, under the plain language of § 924(c), a defendant is exempt from the mandatory minimum sentences provided in § 924(c)(1)(A) if that defendant receives a higher mandatory minimum sentence either under another subsection of § 924(c) or under any other provision of law.[9] The ABA supports this construction because it is not only faithful to the statute's text, but also aligns § 924(c) with Congressional intent to treat drug crimes and crimes of violence that involve firearms seriously and with the legal profession's views on sentencing issues at the time of the 1998 amendments.

Petitioners construe § 924(c) to say "what it means and mean[] * * * what it says." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). As they explain, the "except" clause does not eliminate the mandatory minimum sentences set out in § 924(c). Rather, by giving meaning to all of the language in § 924(c), it ensures that possession or use, in any manner, of a firearm in connection with a crime of violence or a drug trafficking crime shall result in sufficiently serious punishment, while eliminating mandatory "stacking" of minimum sentences only where stacking would result in a sentence that is more than double the pertinent mandatory minimum set out in § 924(c).

This construction reflects the legal profession's consensus in 1998 regarding the propriety of mandatory minimum sentences and sentencing policy generally.

---

[9] Section 924(c) is quoted in note 8, *supra*.

While the "except" clause did not eliminate mandatory minimum sentences, it nevertheless restored the element of judicial discretion (obedient, of course, to the dictates of other applicable statutes containing mandatory minimum sentences and the then-mandatory sentencing guidelines) to ensure that the sentence imposed is the sentence necessary to achieve society's goals.

A. Petitioners' Construction Is Consistent With The Legal Profession's Consensus In 1998, As Reflected In ABA Policies And Other Secondary Sources.

When Congress passed the Gun Control Act of 1968, P.L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. § 921 *et seq.*) (the "Act"), § 924(c) required courts to stack the applicable mandatory minimum sentence on top of a defendant's sentence for a predicate felony.[10] At that time, the mandatory minimum sentence was stated as a range of "not less than one year nor more than ten years" for a first qualifying conviction, and a term of "not less than two years nor more than twenty-five years" for a second or subsequent qualifying conviction. This was not inconsistent with the consensus of the legal community at that time, since § 924(c) required the courts to determine the number of years within these ranges that were to be imposed. For example, Standard 18-2.2 of the *ABA Standards for Criminal Justice, Sentencing Alter-*

---

[10] As codified in 1968, § 924(c) stated:

> (c) Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

natives and Procedures (1st ed. 1968) ("*1968 Standards*"), provided, "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."[11] App., *infra*, 19a.

However, even in 1968, the legal profession was concerned with mandatory minimum sentences: Standard 18-3.2(a) of the *1968 Standards* cautioned that it was generally "unsound for the legislature to require that the court impose a minimum period of imprisonment." App., *infra*, 19a. The second edition of the *ABA Sentencing Standards* ("*1980 Standards*") repeated this caution in Standard 18-4.3(a). App., *infra*, 16a.

By the time the third edition of the *ABA Sentencing Standards* was published in 1994 (the "*1994 Standards*"), § 924(c) required a flat five, ten or thirty year consecutive sentence, based on the type of weapon, for the first qualifying conviction and higher flat sentences for subsequent qualifying convictions.[12] By that same time, the legal con-

---

[11] This consensus was also reflected in a 1975 ABA policy in support of strengthening the Act, which stated that "the Judiciary [should] be encouraged to impose severe penalties, to the extent consistent with the American Bar Association [Standards for Criminal Justice], for the possession or use of a firearm or facsimile in the commission of a crime, as provided for by Section 924(c) of the Act." This policy was based on the conclusion that the Act was consistent with Standard 18-2.2. The *Report with Recommendation of the Section of Criminal Justice to the House of Delegates, 1975 ABA Annual Meeting*, is available from the ABA.

[12] In 1994, § 924(c)(1) stated:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United

sensus had hardened against mandatory minimums, and Standard 18-3.21(b) of the *1994 Standards* stated, "A legislature should not prescribe a minimum term of confinement for any offense." App., *infra*, 3a. This "long-standing [ABA] policy" was based on research showing that "fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors." Standard 18-3.21 Commentary, App., *infra*, 7a.

By the time Congress considered the 1998 amendments to § 924(c), this conclusion was echoed in many secondary sources. See, *e.g.*, Orrin Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185 (1993) ("Hatch"); United

---

States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

States Sentencing Commission, *1991 Special Report to Congress: "Mandatory Minimum Penalties in the Federal Criminal Justice System"* (the "*1991 Sentencing Commission Report*").[13]

For example, Senator Hatch noted that in 1990, Congress had "formally directed the [U.S. Sentencing Commission] to study the effectiveness of mandatory minimum sentencing," Hatch at 192, and that its findings, as well as those of the congressionally chartered Federal Courts Study Committee and the Judicial Conference had "prompted a growing number of legislators to question the merit and efficacy of mandatory minimum sentences." *Id.* at 193. Senator Hatch also stated:

> A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purposes of sentencing articulated in the [Sentencing Reform Act of 1984].

Id. at 195.

Moreover, in the *1991 Sentencing Commission Report*, the United States Sentencing Commission, in reporting on the impact of mandatory minimum sentencing provisions on the federal criminal justice system and the federal prisons, summarized the positions of the Judicial Conference of the United States and the Federal Courts Study Committee, and its interviews with judges, assistant U.S. attorneys, defense attorneys, and probation officers. *1991 Sentencing Commission Report* at 54. Specifically:

---

[13] The *1991 Sentencing Commission Report* is available at http://www.ussc.gov/r_congress/manmin.pdf.

- The Judicial Conference of the United States and the judges of twelve circuit courts of appeal had adopted resolutions that opposed mandatory minimums sentences, and in the Conference's formal resolution, it had urged Congress "to reconsider the wisdom of mandatory sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act." *Ibid.*
- The Federal Courts Study Committee, in its 1990 report, wrote: "Congress should repeal mandatory minimum sentence provisions[.]" *Id.* at 55.
- Of the interviews conducted, a preliminary finding was that "[a] majority of judges, panel attorneys and federal defenders are in favor of [mandatory minimum sentence] elimination and/or reduction for both drug distribution and possession of a firearm," while "[p]robation officers and especially U.S. attorneys show[ed] more support for the current system." *Id.* at 64. A second preliminary finding was that, "without exception, each of these groups would prefer [that Congress] raise sentences for individual offenses by some means other than mandatory minimum sentences." *Id.*[14]

While the ABA's *Kennedy Commission Report* was not presented until 2004, it also reflected these concerns,

---

[14] The *1991 Sentencing Commission Report* also stated that the effect of mandatory minimum sentences on the federal prison population based on offenders sentenced during Fiscal Year 1990 was as much as an estimated 6,971 *additional* years of prison imposed, and between $79 million and $125 million of *additional* costs, above those attributable to the guidelines. *Id.* at 68.

as well as other social and fiscal results that were being confronted when Congress considered the 1998 amendments to § 924(c). After considering this report, the ABA adopted policy that included the following: "[T]he American Bar Association urges that states, territories and the federal government (1) Repeal mandatory minimum sentence statutes[.]" *ABA Report with Recommendation #121A* (Policy adopted Aug. 2004), available from the ABA.

This policy was based, *inter alia*, on the Commission's conclusions that mandatory minimum sentences had an overall tendency merely to shift sentencing discretion away from courts to prosecutors:

> Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Kennedy Commission Report at 27, citing David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 215 (2004); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentences*, 152 U. Penn. L. Rev. 33 (2003) (arguing that mandatory sentenc-

ing provisions also invade both the judge's and the jury's function). See also, Hatch at 195 ("mandatory minimums are basically a 'charge-specific' approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts"); *1991 Sentencing Commission Report* at 60 (of 46 Assistant United States Attorneys interviewed, 26 reported that they did not always charge a mandatory minimum even when it was warranted by the facts in the case).

The Justice Kennedy Commission also noted that, despite the increased number of people incarcerated and the increased costs from incarceration, it was unclear what effect increased incarceration had had on crime rates. For example, between 1991 and 2001, there was a 51.6% increase in the national incarceration rate and a 29.5% reduction in the crime rate, but in Texas, the incarceration rate rose 139% but the crime rate was reduced only by 34.1%, while in New York, the incarceration rate rose 10.9% and the crime rate was reduced by 53.2%. *Kennedy Commission Report* at 18.[15]

The Commission concluded that all sentencing options should be consistent with two principles that were at the core of the ABA's 1994 Standards: (1) unwarranted and inequitable disparities in sentencing between like offenses and offenders should be avoided; and (2) manda-

---

[15] Nor did mandatory minimums ensure equal treatment of defendants. Instead, the Commission reported that statistics indicated that minority defendants were more likely to be charged with a mandatory minimum offense than whites. *Kennedy Commission Report* at 28-29 (discussing, *inter alia*, that California's "three strikes" rule had resulted in an incarceration rate for African-Americans that was 12 times higher than that for whites, while the Latino rate was 45 percent higher than that for whites).

tory minimum sentences should be avoided, so that sentencing courts may consider the unique characteristics of offenses and offenders that warrant an increase or decrease in sentence. *Kennedy Commission Report* at 26.

As reflected in the conclusions in Senator Hatch's article, the *1991 Sentencing Commission Report*, the *Kennedy Commission Report*, and the *1994 Standards*, it had become the legal profession's consensus view by 1998 that mandatory minimum sentences were neither necessary nor an appropriate means for meeting the goal of establishing serious penalties for serious crimes.

B. Petitioners' Construction Of The "Except" Clause Avoids Sentences That, As A Result Of Stacking Mandatory Minimum Sentences, Are Greater Than Necessary To Achieve Society's Goals.

Congress, of course, did not eliminate mandatory minimum sentences in the 1998 amendments. But petitioners' construction of the "except" clause is consistent with the consensus of the legal profession in 1998, as stated in the *1991 Sentencing Commission Report*, that Congress should "reconsider the wisdom of mandatory sentence statutes." *1991 Sentencing Commission Report* at 33; see also, *1994 Standards* 18-2.4, App., *infra*, 1a ("consistent with rational, civilized, and humane values," criminal sentences "authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized").

First, the "except" clause as construed by petitioners maintains harsh punishment for crimes of violence and drug trafficking crimes involving firearms, because courts can never impose a sentence that is less severe than the 5-, 7-, or 10-year sentence Congress deemed

necessary for the firearm offense. By its terms, the "except" clause is only operative where another statutory provision requires that the defendant receive "a greater minimum sentence" than the ones provided in § 924(c)(1)(A)(i)-(iii).

Second, where § 924(c) is applicable, the "except" clause as construed by petitioners recognizes that, when another minimum sentence exceeding the minimum provided by § 924(c)(1)(A) must be imposed, society's sentencing goals provide no basis on which to mandate additional punishment if those goals have been achieved already through the minimum specified for the predicate violation.[16]

---

[16] Congress could not have overlooked the fact that, by 1998, the phrase "any other provision of law" would encompass myriad other laws. See, *e.g.*, Hatch at 192-193 (from 1984 to 1990, Congress enacted "an array of mandatory minimum sentences," turning "an occasional phenomenon" into "a decided trend" that resulted in "over one hundred separate mandatory minimum penalty provisions," but Congress had recently "begun to reconsider the merits of these statutes."). In 1998, the offenses carrying mandatory minimum sentences included:

10-year minimum: 21 U.S.C. § 841(b)(1)(A) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 841(b)(1)(B) (1998) (second offense: manufacturing, distributing, or possessing with intent to distribute smaller amounts of certain controlled substances); 21 U.S.C. § 960(b) (1998) (first offense: unlawful import or export of narcotics); 18 U.S.C. § 2113(e) (1998) (taking hostage during bank robbery or escape from bank robbery).

20-year minimum: 21 U.S.C. § 841(b)(1)(A), (B), & (C) (1998) (first offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances, if death results); 21 U.S.C. § 841(b)(1)(A) (1998) (second or subsequent offense: manufacturing, distributing, or possessing with intent to distribute certain controlled substances); 21 U.S.C. § 848 (1998) (first offense: continuing criminal narcotics enterprise); 21 U.S.C. § 960(b) (1998) (first offense:

Finally, the "except" clause as construed by petitioners restores discretion to the judiciary to individualize a sentence that may be greater than the minimum provided by § 924(c)(1)(A), where greater severity is warranted to achieve society's purposes. It is the court that crafts the sentence so that it is "sufficient, but not greater than necessary," taking into account, among other things, "the nature and circumstances of the offense and the history and characteristics of the offender." 18 U.S.C. § 3553(a). See also *1994 Standards* 18-2.4, App., *infra*, 1a (severity), 18-3.2, App., *infra*, 1a (consideration of mitigating factors), and 18-3.3(b), App., *infra*, 2a (consideration of aggravating factors).

In short, the ABA supports petitioners' construction of § 924(c) because it is faithful to the plain language of the statute and also strikes the appropriate balance between assuring that a defendant receives warranted punishment and ensuring that the sentence, as determined by the trial court, is no more severe than necessary to achieve the societal purposes the sentence is intended to serve. As stated by the Second Circuit, it is not inconsistent with the purpose of enhancing firearms penalties for Congress to provide "a series of increased minimum sentences and also to have made a reasoned judgment

---

unlawful import or export of narcotics, if death results); 21 U.S.C. § 960(b) (1998) (second or subsequent offense: unlawful import or export of narcotics); 18 U.S.C. § 1121(b)(1) (1998) (murder of state correctional officer in performance of officer's duties); 18 U.S.C. § 2113(a) (1998) (bank robbery); 21 U.S.C. § 848 (1998) (murder of law enforcement officer during continuing criminal narcotics enterprise); 49 U.S.C. § 46502(a)(2) (1998) (aircraft piracy).

25-year minimum: 18 U.S.C. § 2113(e) (1998) (assault or use of dangerous weapon or device in commission of bank robbery).

30-year minimum: 21 U.S.C. § 848 (1998) (second and subsequent offenses: continuing criminal narcotics enterprise).

that where a defendant is exposed to two minimum sentences, * * * only the higher minimum should apply." *United States* v. *Whitley,* 529 F.3d 150, 155 (2d Cir. 2008). This balance also reflects the consensus of the legal profession regarding mandatory minimum sentences at the time of the 1998 amendments.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgments of the Third and Fifth Circuits be reversed.

Respectfully submitted.

CAROLYN B. LAMM
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
clamm@whitecase.com

Counsel for Amicus Curiae American Bar Association

May 2010

APPENDIX A

The *ABA Standards for Criminal Justice, Sentencing* (3d ed. 1994), provide in relevant part as follows:

* * * * *

Standard 18-2.4 Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

* * * * *

Standard 18-3.2 Mitigating factors

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

* * * * *

Standard 18-3.3 Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offense.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sen-

tences within the range and, if the factors are substantial, in departing upward from the range.

* * * * *

Standard 18-3.21 Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same con-

duct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive dates of release or in considering the release date of a specific individual, the provisions in this standard.

History of Standard

The third edition's treatment of total confinement differs in a number of ways from the prior edition's.[1] First,

---

[1] *See generally* former Standards 18-2.5, 18-4.1 through 18-4.3, and 18-4.7 (2d ed. 1979).

the former Standards advocated a system of relative indeterminacy in incarcerative sentences. Former Standard 18-4.1 stated that the legislature "should exercise caution in curtailing indeterminacy" and recommended retention of an "early release mechanism independent of the sentencing court." The present Standards would allow for early release only in jurisdictions that fail to create an adequately determinate sentencing structure.[2] Further, the prior Standards retained the indeterminate device of maximum and minimum terms of total confinement, and suggested that the "proportion of indeterminacy in the sentence [should] increase as the sentence's length increases."[3] In contrast, this edition's conception of presumptive sentences does not allow for widely divergent maximum and minimum terms, and treats disparity as undesirable for sentences of all lengths.[4]

The second edition endorsed the idea of an "extended sentence" for dangerous or habitual offenders, where sufficient proof of future dangerousness was assembled.[5] The current Standards disfavor sentences based on such projections of future conduct.[6]

Former Standards 18-2.1(e) and 18-2.5(b), in black letter, expressed views concerning the appropriate overall levels of incarceration in this country, circa 1979. For this edition, the drafters believed that such issues, which change year by year, should be addressed in the

---

[2] *See* Standards 18-3.21(g) and 18-2.5.

[3] Former Standards 18-4.2 (2d ed. 1979) (Maximum term); 18-4.3 (Minimum term); 18-4.l(b) (General principles; indeterminacy).

[4] *See* Standards 18-2.5 and 18-3.1.

[5] Former Standard 18-2.5(b)(i) through (v) (2d ed. 1979).

[6] *See* Standard 18-3.5 and Commentary.

Introduction and Appendix rather than in a black-letter Standard.

Paragraph (e) of this Standard, concerning good time credit, departs from the prior edition, which expressly took no position on that subject.[7]

Paragraph (f) of this Standard, regarding credits against sentences to total confinement, is a streamlined restatement of former Standard 184.7.

Related Standards

The conditions necessary for the imposition of a sanction of total confinement are set out in Standards 18-3.12(c) and 18-6.4(a). Paragraph (b) of this Standard should be read in conjunction with Standard 183.11(c).

Commentary

Paragraph (a) provides that the legislature should make the sanction of total confinement available in all cases involving an individual offender. Given the scope of this chapter, the statement in paragraph (a) is circular: As set out in Standard 18-1.1(a), the chapter does not extend to those minor offenses for which only nonincarcerative sanctions are provided.[8]

Paragraph (b) continues long-standing ABA policy that the legislature should not prescribe mandatory terms of total confinement for any offense. The length of incarceration for individual offenders is better addressed through shared efforts of the sentencing agency, which

---

[7] *See* former Standard 18-4.7(g) (2d ed. 1979).

[8] The Standards' scope includes offenses typically classified as felonies and misdemeanors. Although such classifications and the relevant penalty structures differ across jurisdictions, the drafters intended the Standards to address sentencing for offenses carrying maximum incarcerative penalties of six months or more. Standard 18-1.1(a).

can consider severity issues from a systemic perspective, and sentencing courts, which can exercise individualized discretion in appropriate cases. It is a fundamental precept of the Standards that fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors.[9]

Beyond this, experience with mandatory minimum terms of total confinement has demonstrated that the goal of uniformity in sentencing is ill served by such laws. There is uncontroverted evidence that prosecutors' charging discretion, the vicissitudes of the plea bargaining process, and the heightened reluctance of juries to convict when penalties are inflexibly severe, all contribute to patterns of irregular enforcement of mandatory minimum provisions.[10] A recent study of such federal laws conducted by the United States Sentencing Commission reached the further disturbing conclusion that uneven enforcement works particularly to the disadvantage of nonwhite offenders.[11] Paradoxically, in practice,

---

[9] *See* Standard 18-2.6.

[10] *See* UNITED STATES SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Special Report to Congress, August 1991) (finding a lack of uniform application and unwarranted disparity in sentencing under the more than 60 federal statutes containing mandatory minimum penalties); Michael Tonry, *Mandatory Penalties*, *in* 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 1992) (surveying history of mandatory sentencing provisions).

[11] UNITED STATES SENTENCING COMMISSION, *supra* note 10, at ii, 76-82. On the subject of race-based and other disparities, the Commission reported:

> Disparity may be entering the federal criminal justice system through mandatory minimums in two ways: defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon

the seeming blanket uniformity of mandated terms exacerbates the worst features of disparity in the system.

One argument offered in favor of mandatory minimum sentencing laws is that they can control judicial discretion when, in the view of the legislature, the courts would otherwise be too lenient in sentencing decisions. Much of this argument evaporates, however, in the system of determinate, presumptive sentences advocated by these Standards. Presumptive sentences established by the sentencing agency, with the oversight of the legislature, set forth baseline penalty levels for all offenses. The experience in all state guidelines systems is that judges follow such guidance in the vast majority of cases. Further, as a legal matter, the courts' departure power is not unconstrained, and is subject to appellate review. Thus, systemic decisions regarding appropriate harshness of penalties can be implemented and enforced, while still leaving space for cases that demand individualized treatment.

In drafting the new edition of these Standards, the Task Force and Standards Committee recognized that most or all American jurisdictions have sentencing provisions inconsistent with the terms of paragraph (b). Indeed, the current trend appears to be in the direction of enacting *additional* mandatory minimum sentencing laws. As observed by Professor Tonry, the political and symbolic appeal of such measures can overwhelm the empirical and historic evidence that they do not serve

---

such factors as race, circuit, and prosecutorial practices; and defendants who appear to be quite different with respect to distinguishing characteristics (*e.g.*, role and nature of the offense) receive similar reductions in sentences below the mandatory minimum provisions.

Id. at 89.

their expected ends.[12] For the Standards' drafters, the sharp divide between policy analysis and the current political atmosphere posed the following question: Can the ABA announce a "standard" for criminal justice that few or no jurisdictions now follow? In most settings such a concern would militate against the adoption of black-letter policy. In the case of mandatory minimums, however, the drafting groups concluded that no credible defense of such laws can be offered, and their acknowledged political and symbolic benefits do not overcome the operational defects exposed by long experience.

Paragraph (b) must be read alongside Standard 18-3.11(c), which provides: "The legislature should not mandate the use of the sanction of total confinement unless the legislature can contemplate no mitigating circumstance that would justify a less severe sanction." Standard 18-3.11(c) contemplates that for a very narrow group of crimes, the legislature may provide that *some* period of incarceration is a necessary part of the overall sentence, without fixing a required length of term. Where such commands are made, the sentencing agency and courts establish the duration of total confinement. The sentencing agency, however, would not be free to create a presumptive sentence without a component of total confinement, and the sentencing court could not fashion a departure sentence lacking any term of total confinement.

Paragraph (c) highlights the role of the sentencing agency in providing guidance to sentencing courts in the

---

[12] Tonry, *supra* note 10, at 270.

appropriate use of total confinement.[13] Elsewhere the Standards explore in some detail the concerns that should influence the agency in promulgating such guidance. Many of these concerns drive judicial decision making, as well.[14] Standard 18-3.12(c) outlines necessary conditions for imposition of any term of total confinement.[15] Standard 18-3.12(a) and (b) speak more generally to policies relating to the selection of some types of sanctions over others in presumptive sentences.[16] On the issue of sentence severity, Standard 18-2.4 states that "[s]entences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."[17] Standard 18-2.3 recognizes the factor of cost in overall confinement policy, and states that "the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and

---

[13] Similar provisions exist for all other sanctions discussed in this chapter. *See* Standards 18-3.13(c) (compliance programs for individuals), 18-3.14(c) (compliance programs for organizations), 18-3.15(c) (restitution or reparation), 18-3.16(c) (fines), 18-3.17(c) (community service), 18-3.18(c) (acknowledgment sanctions), 18-3.19(c) (intermittent confinement in a facility), and 18-3.20(c) (home detention).

[14] Standard 18-6.4 traces the intellectual steps a sentencing judge should take before pronouncing a sentence that includes a term of total confinement.

[15] The conditions of Standard 18-3.12(c) are echoed in Standard 18-6.4(a).

[16] For example, Standard 18-3.12(a)(ii) states that the sentencing agency should recognize that "[s]anctions other than total confinement may serve to punish and incapacitate offenders."

[17] Sentencing courts are directed to the same precept in Standard 18-6.1(a).

jail system of the state."[18] Similarly, for states with sentencing commissions, Standard 18-4.4(c)(i) directs the legislature to require that "the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations."[19]

Paragraph (d) provides that, as a matter of statutory law, individuals sentenced to total confinement should be committed to the custody of the department or bureau charged with operation of the prison or jail system. As with all other sanctions, there is a need to designate the governmental agency with ongoing responsibility for supervision of an offender during the term of his sentence. Unlike other sanctions, however, the unique degree of control associated with total confinement demands that jurisdiction over the offender be transferred from the sentencing court to correctional authorities.

Under the view of determinacy advocated by this chapter, sentences served should bear close proximity to sentences imposed.[20] Unwarranted disparities in individual punishment, and serious systemic distortions, can occur if release decisions from total confinement

---

[18] Standard 18-2.3(e). This is not to say that states may not adopt confinement programs that expand existing prison and jail capacities. Such policies are permissible under these Standards so long as the legislature appropriates the necessary resources. *See* Standard 18-2.3 and Commentary.

[19] Cost concerns are best addressed on the systemic rather than the case-specific level. Thus, there is no analogue to the resource-sensitivity provisions of Standards 18-2.3 and 18-4.4 in the Standards applicable to judicial discretion.

[20] *See* Standards 18-2.5 and 18-4.4(c).

eventuate in widely divergent sentences served. Despite this concern, the Standards' drafters recognized that institutional discipline and morale require that incarcerated inmates have palpable incentive to cooperate with prison and jail officials. Paragraph (e) therefore asserts that the legislature should provide for substantial "good time" credit toward service of sentences to total confinement. While the word "substantial" is not quantified in black letter, the drafters thought that potential good time credit in the range of 15 to 25 percent would satisfy the requirement. To preserve the integrity of sentences imposed, and limit the possibility of disparate release decisions, paragraph (e) further states that the legislature should determine a specific formula for the awarding of good time credit.

Paragraph (f) addresses a panoply of situations in which the effective length of a current sentence to total confinement should be adjusted to take account of time the offender has previously served in custody. The legislature should provide that the department or bureau assuming custody of the offender make such calculations in setting a release date.

The Standards have long asserted that there should be no distinction in treatment between time served in custody before and after conviction or sentencing.[21] All incarcerative experiences of offenders stemming from the current offense should be counted toward service of any final sentence pronounced by the sentencing judge. Subparagraph (f)(i) reaffirms this view. Subparagraph (f)(ii) extends similar reasoning to circumstances in which an offender's conviction or sentence has been overturned on

---

[21] *See* former Standard 18-4.7 (2d ed. 1979); former Standard 18-3.6 (1st ed. 1969).

review, but where the offender eventually receives a new sentence for the original offense conduct. Such scenarios can occur in a number of ways: A reviewing court may invalidate a sentence and remand for resentencing; alternatively, a reviewing court may invalidate a conviction and remand for further proceedings that result in reconviction for the same offense or for a different offense arising from the same criminal conduct-again presenting the offender for a resentencing. Subparagraph (f)(ii) is intended to reach the full variety of processes that can produce a new sentence for conduct that had given rise to a prior sentence.

Subparagraph (f)(iii) extends to situations where an offender has been incarcerated subsequent to the instant offense conduct, but where the custody was based on arrest for a different charge. In some cases, under subparagraph (f)(i), such periods of confinement will be credited against a total confinement sentence for the other charge. Where such credit has not been given, however, subparagraph (f)(iii) would award credit against the instant sentence. This is sensible for a number of reasons. From the offender's experiential point of view, incarceration is incarceration, regardless of the formal legal basis for its imposition at any moment in time.[22] Further, it is not unknown for pretrial detention to be predicated on charges different than those reflected in the ultimate conviction and sentence. It elevates form over substance to ignore such periods of custody, when they occur after the offense of conviction, simply because the eventual prosecution embarked in an alternate direction. Finally,

---

[22] It does not make sense, on the other hand, to bestow credit for periods of incarceration that occurred before the instant offense. Such a policy would allow offenders to "bank" confinement credits against future charges.

from a public policy perspective, the purposes of sentencing are overserved if the actual length of an offender's confinement exceeds that deemed justified by the sentencing court. This is both an unnecessary use of resources and a violation of the principle of parsimony embodied in Standard 18-2.4.

The final provision of paragraph (f) applies to circumstances where an offender has been sentenced for multiple offenses and one or more of the convictions or sentences is overturned on review. In such circumstance, if that reprosecution or resentencing does not occur on the challenged counts, credit should be awarded against any remaining sentence of total confinement for convictions untouched on review. As a practical matter, this provision has import only for consecutive sentences, which are disfavored by the Standards and should occur infrequently.[23] Where multiple convictions give rise to a consolidated sentence, as recommended in Standard 18-3.7, or a concurrent sentence under traditional practice, the time served by an offender for an invalidated sentence will already have been credited against the sentence left intact on review, irrespective of the final provision of paragraph (f).

Paragraph (g) is addressed only to jurisdictions that fail to create a sentencing system that meets the basic requirement of determinacy in Standard 18-2.5. Briefly stated, that Standard defines adequate determinacy in terms of the ability of systemic actors to predict, control, and manipulate future sentencing patterns with reasonable accuracy, and in terms of the success of the system in imposing sentences that are reasonably uniform, so that unwarranted disparities in individual sentences are

---

[23] *See* Standards 18-3.7, 18-6.5 and Commentary.

avoided.[24] Because the determinacy Standard is foundational to the overall functioning of the sentencing system, jurisdictions that fail to comply with Standard 18-2.5 will operate in nonconformity with the bulk of the Standards contained in this chapter.[25] Still, such jurisdictions now exist in substantial numbers. For states that adhere to the traditional system of indeterminate sentencing, or follow determinate schemes that fail to satisfy the components of Standard 18-2.5, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released.

The logic of paragraph (g) is that, where jurisdictions lack "front end" control over the use of scarce prison resources, as achieved through an effectual determinate sentencing system, recourse must instead be made to "back-end" control. Historically, adjustments to overcrowding have occurred through parole release or emergency release mechanisms. Many states today, when correctional facilities cannot support sentences imposed, must resort to such back-end measures. The Standards Committee, while clearly opposed to regimes of indeterminate sentencing,[26] recognized that, in such systems, a release authority with substantial discretion over the length of sentences served is an indispensable player in the sentencing structure.

---

[24] For a fuller discussion, see Standard 18-2.5 and Commentary.

[25] On the fundamental importance of the determinacy Standard, see Standards 18-2.5, 18-2.6 and Commentary.

[26] *See* Standard 18-2.5 and Commentary.

APPENDIX B

The *ABA Standards for Criminal Justice, Sentencing* (2d ed. 1980), provide in relevant part as follows:

* * * * *

Standard 18-4.3 Minimum term.

(a) Because there are so many factors in an individual case which cannot be assessed in advance and because a guideline drafting agency can respond to changed circumstances and factual complexity with greater flexibility and precision than can the legislature, it is unsound for the legislature to prescribe a minimum or mandatory period of imprisonment.

(b) In order to mitigate the possibility of excessive severity and to preserve a meaningful system of early review, a sound sentencing structure should require the proportion of indeterminacy in the sentence to increase with the sentence's length. The following standards are recommended as boundaries on the extent of indeterminacy which is desirable:

(i) In the case of short-term sentences (*e.g.*, those having a maximum term of three years or less), little justification exists for a substantial ranges between the minimum and maximum terms, and "flat time" sentences should be authorized but not required.

(ii) In the case of intermediate-range sentences (*e.g.*, those having a maximum term between three and ten years), a "flat time" sentence should not authorized, and the margin between the minimum and maximum term should be required to increase as the maximum term imposed increases. A ceiling on the maximum degree of indeterminacy permitted within this intermediate range is also

desirable to curtail the frequency of sentences as open-ended as one to ten years and to minimize the disparity which results when offenders sentenced for offenses of moderate severity obtain early release prior to the expiration of "flat time" sentences imposed for less serious offenses; and

(iii) In the case of long-term sentences (*e.g.*, where the term imposed exceeds ten years), periodic review by the agency administering early release should being no later than the tenth year or such earlier date as would be more reasonably related to the longest minimum term recommended by guidelines adopted under subparagraph (b)(ii) above.

(c) Substantial minimum terms are generally inappropriate. Authority to impose a minimum term should be circumscribed by the following limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to standard 18-2.1(a) the highest minimum period of confinement which can be imposed, and the guideline drafting agency should establish presumptive ranges within that limit depending on the circumstances of the offense and the offender;

(ii) Minimum sentences as long as ten years should only be employed in exceptional cases, and longer minimums should not be authorized by the legislature;

(iii) The court should not be authorized to impose a minimum sentence until a presentence report (standards 18-5.1 to 18-5.5), supplemented where necessary by report of the examination of the defendant's mental, emotional, and physical

conditions (standard 18-5.6), has been obtained and considered.

* * * * *

APPENDIX C

The *ABA Standards for Criminal Justice, Sentencing* (1st ed. 1968), provide in relevant part as follows:

* * * * *

Standard 18-2.2 General principle: judicial discretion.

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

* * * * *

Standard 18-3.2 Minimum term.

(a) Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parole eligibility upon service of a specified portion of the maximum term.

(b) While recognizing that there are in addition substantial arguments against judicial authority to select and impose minimum sentences, a majority of the Advisory Committee would support a statute which authorized but does not require the sentencing court to impose, within carefully prescribed legislative limits, a minimum sentence which must be served before an offender becomes eligible for parole.

(c) Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;

(ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

(iii) In order to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;

(iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered;

(v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);

(vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to

protect the public from further criminal conduct by the defendant;

(vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time served upon motion of the corrections authorities made at any time.

* * * * *