

Since his conviction on December 1, 2006, Deputy Hernandez has been incarcerated awaiting sentencing. As more fully explained in the accompanying memorandum, WLF submits that a sentence of probation, and possibly a short term of home detention, in addition to the almost four months that Deputy Hernandez has been incarcerated since his conviction, is more than sufficient to satisfy to purposes of punishment for this offense. The Court should reject any lengthy term of incarceration that the prosecutor may propose at the sentencing hearing as unreasonable and not in the interests of justice.

INTERESTS OF WLF

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide, including many in Texas. Founded in 1977, WLF devotes substantial resources to litigating cases and filing amicus curiae briefs in federal and state courts, promoting a limited and accountable government, a strong national security and defense, and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment approximately 20 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of various guidelines. WLF has also taken the Commission to task for failing to operate in an open and transparent manner in the formulation of Commission policy. *See WLF v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *WLF v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

In particular, WLF has been critical of the Guidelines and their application because they often result in excessively harsh prison sentences, and thus, violate the statutory

command that sentencing judges impose sentences that are "sufficient, but not greater than necessary" to achieve the purposes of punishment spelled out in 18 U.S.C. 3553(a), including deterrence, retribution, and rehabilitation. This so-called "parsimony principle" forbids a civilized society from inflicting gratuitous or excessive punishments on its citizens. In that regard, WLF filed briefs in *United States v. Booker*, 543 U.S. 220 (2005), which struck down the mandatory feature of the Guidelines, as well as in the pending companion cases of *Claiborne v. United States*, No. 06-5618 and *Rita v. United States*, No. 06-5754, which raise the issue of whether a sentence imposed within the Guidelines should be afforded a "presumption of reasonableness" by an appellate court. WLF has also filed briefs and memoranda addressing sentencing issues in courts of appeals and district courts. *See, e.g., United States v. Linden Beverage Co.*, Crim. No. 94-122R (W.D. Va) (district court departed from Guideline's 33-month prison sentence urged by prosecutors and instead imposed three years probation on small businessman convicted of minor regulatory infraction). WLF believes that its views on sentencing will assist the Court in selecting an appropriate sentence in this case which has recently received national attention.

WHEREFORE, WLF respectfully requests that the accompanying memorandum as amicus curiae in aid of sentencing be accepted.

Respectfully submitted,

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of home detention, in addition to the almost four months that the defendant has suffered from being incarcerated since his conviction on December 1, 2006, is a suitable sentence that is well within the range of reasonableness; it is more than sufficient to serve the purposes of sentencing under 18 U.S.C. 3553(a) that includes just punishment, deterrence, and rehabilitation.

As further discussed herein, a Guideline sentence for this offense computed under USSG 2H.1 is itself an unreasonable and excessive sentence considering the facts and circumstances of this case and this defendant. It is substantially greater than pre-Guideline sentences, and therefore, is flawed because it violates the congressional directive that Guideline sentences would, for the most part, reflect those average sentences actually *served*. The notion of comparing sentences to those "actually served" is significant because parole has been abolished; thus, defendants are no longer eligible for parole after serving one-third of the sentence originally imposed.

In addition, this Court has other ample reasons that can and should be expressly stated on the record at the sentencing hearing, including "the nature and circumstances of the offense and the history and characteristics of the defendant" (18 U.S.C. 3553(a)(1)), as well as other statutory and non-statutory reasons, to justify a non-Guideline sentence of probation or similar sentence. Such a sentence would be upheld if appealed by the government -- even if the Supreme Court were to rule in the pending Sentencing Guideline cases (*United States v. Rita*; *United States v. Claiborne*) that a Guideline sentence imposed by a district court enjoys a rebuttable "presumption of reasonableness" on appeal-- so long as the sentence imposed is a reasonable one supported by an adequate Statement of Reasons. Indeed, according to public

accounts of this case, the prosecutor made a plea offer to the defendant that would have resulted in a recommendation of probation. While the offer was rejected, presumably because Deputy Hernandez did not believe he wilfully violated the civil rights of the illegal aliens, the offer implicitly suggests that the government believes that a probationary sentence would serve the purposes of sentencing under 18 U.S.C. 3553(a).

I. A SENTENCE OF PROBATION IS REASONABLE AND APPROPRIATE IN THIS CASE CONSIDERING ALL THE SENTENCING FACTORS IN 18 U.S.C. 3553(A).

As the judge that presided over the trial, this Court is well acquainted with the facts of this case and this defendant. In brief, from public news and other accounts of this case, Deputy Hernandez was finishing his duty shift around midnight in Rocksprings, Texas, on April 14, 2005, when a Chevy Suburban ran a stop sign. He turned on his flashing lights and followed the vehicle for some distance before it eventually pulled over. As he approached the stopped vehicle, he noticed several persons lying down in the back and ordered the driver to roll down the window. Deputy Hernandez was no doubt familiar with illegal smuggling of aliens, drugs, gangs, and violent criminals that plague our Southern border.¹

Instead of obeying the deputy, the vehicle suddenly turned towards him and began to accelerate. In self defense, Deputy Hernandez fired several shots from his revolver at the left

¹ See Jerry Seper, *Smugglers seen getting 'sophisticated, organized'*, Washington Times, Oct. 18, 2006 (citing the House Homeland Security subcommittee report that "law enforcement authorities along the U.S-Mexico border are outgunned and outmanned by drug smugglers armed with automatic weapons, grenade launchers, bazookas, improvised explosive devices and state-of-the-art communications and tracking systems" and noting that there is growing concern "about terrorists using Mexican drug and alien smugglers as cover to cross the border").

rear tire of the passing vehicle trying to disable it. He was successful in doing so and the vehicle pulled off the road. Unfortunately and unintentionally, one of the illegal aliens in the van suffered a minor mouth injury and broke a few teeth from a small bullet fragment that apparently ricocheted. She was treated at a local hospital and released. The other occupants of the vehicle had fled from the scene into the night.

Deputy Hernandez was arrested and indicted on two counts of violating the civil rights of two of the illegal aliens under color of law under 18 U.S.C. 242. That law makes it a crime to "willfully" subject "inhabitants of any State, Territory, or District" including inhabitants that are aliens, to a "deprivation" of their rights. As noted, Deputy Hernandez rejected a plea offer that would include probation because he believed he did nothing illegal and certainly did not "willfully" intend to harm the occupants of the vehicle. Nevertheless, on December 1, 2006, the jury convicted him of one count but acquitted him of the other. The sentence that is authorized under 18 U.S.C. 242 ranges from probation to a maximum sentence of 10 years. Since his conviction, Deputy Hernandez has been incarcerated while awaiting sentencing.

Congress mandated in 18 U.S.C. 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in paragraph (2) of this subsection," *viz.*, "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate [general] deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant [specific deterrence]; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional

treatment in the most effective manner." (emphasis added). The directive that the sentence be "sufficient, but not greater than necessary" to comply with these sentencing purposes is the parsimony principle, an important hallmark of a civilized society that does not inflict arbitrary, wanton, or gratuitous punishment on its citizens.

Congress also commanded that in determining the appropriate sentence, the judge must consider six other sentencing factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1) as well as the appropriate Sentencing Guideline range, 18 U.S.C. 3553(a)(4), and any pertinent policy statement issued by the Sentencing Commission, 3553(a)(5).² All the factors listed must be considered by the Court; no special weight is required to be given to the Guidelines or any Commission policy statement. The end result must be a sentence carefully crafted and tailored that is sufficient, but not greater than necessary, to serve the purposes of sentencing specified in 3553(a)(2).

The Sentencing Reform Act of 1984 altered sentencing policy in two major ways. First, it abolished parole and established a determinate sentencing scheme whereby the sentence imposed was essentially the sentence served. Second, Congress established the Sentencing Commission to promulgate Sentencing Guidelines that would effectively dictate

² The other three statutory factors specified in 18 U.S.C. 3553(a) that must be considered by the sentencing court are:

(3) the kinds of sentences available;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

While the Court must consider these statutory factors, it is not precluded from considering any relevant non-statutory factors.

the sentence, within a narrow range, to be imposed on a defendant convicted of a federal offense. 18 U.S.C. 3553(b). In so doing, application of the Sentencing Guidelines under 3553(b) in a particular case would trump any sentencing decision reached solely after considering the seven factors in 3553(a) previously discussed, even if the resultant Guideline sentences were unduly harsh (as they often were), and in clear violation of the parsimony principle. However, it is important to remember that the Sentencing Reform Act was not intended to be a "get tough on crime" measure. Rather, it was intended to restore truth in sentencing by eliminating parole, but at the same time, establish Sentencing Guidelines that would reflect the average sentence *actually* served in the pre-Guideline era in order to reduce what was then perceived to be unwarranted sentencing disparities.

Only the second aspect or purpose of the Sentencing Reform Act changed when the Supreme Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights, and as a remedy, excised 18 U.S.C. 3553(b). In so doing, the Court deleted the mandatory feature of the Guidelines, thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines are to be simply *one* of seven statutory factors a sentencing court must consider in fashioning a just sentence. However, because several courts of appeals have since attempted to restore the strictures of the Guidelines by affording a Guideline sentence on appeal a presumption of reasonableness that effectively makes them mandatory, the Supreme Court is currently considering in the *Rita* and *Claiborne* cases whether Guideline sentences imposed by district courts are "presumptively reasonable," and if so, whether substantial variance from that sentence needs to be justified by extraordinary circumstances. While WLF submits that the

answers to both those questions are emphatically no, this Court has the discretion to impose a non-Guideline sentence in this case.

As noted, in determining a particular sentence, the Court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. 3553(a). Here, the facts show that Deputy Hernandez was carrying out his lawful duties when he stopped and approached the vehicle. The driver of the vehicle attempted to run into him as it sped away with potentially dangerous occupants and cargo. In a split-second decision, he shot at the left rear tire to disable the vehicle. He did not aim or shoot at the window of the vehicle or at any of its occupants. He could have chased the vehicle which, because of the darkness and the winding roads, could easily have crashed or rolled over, thereby causing serious injuries or death. Instead, the resulting minor injury to one of the occupants from a bullet fragment was not a serious one, and certainly not an injury that was "willfully" inflicted by Deputy Hernandez. This conduct is clearly not the kind of "heartland" violation of 18 U.S.C. 242 where law enforcement officers intentionally and willfully inflict bodily harm on persons they are arresting or detaining.³

As for the "history and characteristics of the defendant," it appears from all accounts that Deputy Hernandez is a law-abiding and responsible citizen and law enforcement officer. He is well regarded by the residents of Rocksprings, Texas who know him best and have

³ For example, in March 1986, U.S. District Court Judge Ross Sterling imposed two-year prison terms on six employees of the Texas Department of Corrections for violating 18 U.S.C. 242 after capturing two escapees. While in custody and naked, the inmates were struck several times and beaten by some of the prison guards, including one who struck the inmate in the head and burned him with a cigarette. *Houston Chronicle*, Section 3 (Mar. 16, 1986), 1986 WLNR 1619061; see *United States v. Bigham*, 812 F.2d 943 (5th Cir. 1987). Because that was a pre-Guideline sentence, the defendants would normally have been eligible for parole after serving one-third of their 24 month sentence, *i.e.*, eight months.

rallied behind him. He is 25-years old, married, and has a small baby to provide for. He is not some cocky, trigger-happy, rogue police officer. This is his first offense. Accordingly, both the nature and circumstances of the offense, and the history and characteristics of the defendant, warrant a sentence of probation and/or home detention, as well as time served.

As for the factor that the sentence "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, " 18 U.S.C. 3553(a)(2)(A), WLF submits that a probationary sentence is a proper sentence. As noted, the offense did not result in any serious injuries, nor was it the kind of "willful" violation that would warrant a term of incarceration for this first offender. A probationary sentence would be a "just sentence" and "promote respect for the law." In fact, WLF submits that a term of imprisonment, particularly a long one, would promote disrespect for the law and the judicial system by the public because it would be justifiably viewed an unduly harsh sentence. In fact, a lengthy sentence of incarceration would likely provide a perverse incentive for drug and illegal alien smugglers to disrespect and break our immigration and drug laws, knowing that law enforcement efforts would likely be overly deterred from pursuing or detaining these criminals. In that regard, the Court can take notice of the public outrage at the prosecution of this case as generally reflective of the views of the community about this case. *See, e.g.*, Statements of U.S. Representative Ted Poe (2d Dist. TX), 153 *Cong. Rec.* H255 (Jan. 10, 2007); *id.* at H1398 (Feb. 8, 2007); *id.* at H2209 (Mar. 6, 2007) (excerpts attached hereto).

As for providing "adequate deterrence" and protecting "the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(B)-(C), WLF submits that a term of probation, and the fact that a felony conviction would preclude the defendant from resuming his duties, is

more than sufficient deterrence. With respect to providing the defendant with needed medical care or training as provided in 18 U.S.C. 3553(a)(3), WLF is not familiar with the defendant's person circumstances in that regard to comment.

The Court is also required under 3553(a)(4) to consider "the kind of sentences available." The kind of sentences available besides incarceration include probation, supervised release, home detention, community service, or a combination of such sentences.⁴

The Court is also required to consider the sentencing range under the Sentencing Guidelines and any relevant policy statement under 3553(a)(4)-(5), which WLF will address separately below. In brief, a Sentencing Guideline under USSG 2H.1 would likely call for a substantial prison term; but such a sentence is unreasonable under the circumstances considering all the other sentencing factors as well as the design flaws of the Guidelines themselves.

The Court is also required to consider the "need to avoid unwarranted sentencing disparities" among defendants with similar records and for similar conduct. WLF submits that imposing a term of imprisonment, particularly a lengthy one, would increase unwarranted disparities due to the fact that such prison terms are imposed where the conduct is more aggravated than that in the instant case. The final statutory factor, 3553(a)(7), "the need to provide restitution to any victim," does not seem particularly relevant here inasmuch

⁴ *Cf. United States v. Coughlin*, No. 2:06-cr-20005-RTD (W.D. Ark.) where this Court imposed a reasonable sentence of 27 months of home detention and 5 years probation for a white collar defendant who had severe medical problems, a sentence in which this Court found that home detention, with electronic monitoring, was determined to be "as effective as an imprisonment sentence" and otherwise satisfied the sentencing factors of 18 U.S.C. § 3553(a). The Sentencing Guideline level 18 called for a prison sentence of 27 to 33 months.

as the victim received the necessary medical care; and because she was injured by a public officer, she will likely pursue civil remedies against Edwards County, the employer of the defendant.

In addition to these statutory factors, the Court is free to consider any non-statutory reasons that it believes are relevant to the imposition of the sentence, including public sentiment about the prosecution of the defendant and the overwhelming support for a probationary sentence.

II. ANY SENTENCING GUIDELINE RANGE THAT CALLS FOR A SUBSTANTIAL PRISON TERM FOR THIS OFFENSE AND THIS FIRST OFFENDER IS UNREASONABLE AND SHOULD BE GIVEN LITTLE OR NO WEIGHT IN DETERMINING A PROPER SENTENCE

The Sentencing Guideline applicable to offenses under 18 U.S.C. 242 is USSG 2H

1.1 Offenses Involving Individual Rights. The Base Offense Level is the greatest of "(1) the offense level from the offense guideline to any underlying offense; (2) 12 if the offense involved two or more participants; (3) 10 if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or (4) 6 otherwise." It is likely that the prosecutor and probation office will suggest that the underlying offense that should be cross-referenced under the aggravated assault Guideline under 2A2.2, although WLF believes that the 2A2.3 Guideline for minor assault is more appropriate. If it is a minor assault, the base offense level is 7. If it is categorized as an aggravated assault, the base offense is doubled to 14. In addition, Specific Offense Characteristics 2A2.2(b)(2) will add 5 more levels to the sentence because a firearm was discharged, and 3 more due to bodily injury that was not serious. The subtotal from this

aggravated assault guideline quickly adds up to 22 levels. However, after plugging these two assault scores (7 for minor, and 22 for aggravated) into the 2H1.1 Guideline, an additional 6 levels is added under 2H1.1(b) because the offense was committed "under color of law." The result is 28 levels if the aggravated assault guideline is used, which translates into a prison sentence for a Category I defendant of 78-97 months, a draconian 6 1/2 to 8 year sentence for a first offender where no one was seriously injured.

Plugging the minor assault guideline of 7 into USSG 2H1.1 appears to be trumped by a level 10 under 2H1.1(a)(3), if it is argued that the offense involved the use of force against a person, or there was property damage. In such case, the Guideline sentence level under 2H1.1. would be 10 plus 6 levels for committing the offense under color of law, for a total of 16 levels. That still translates into a substantial prison sentence of 21 to 27 months, or approximately 2 years for a first offender.

WLF submits that these Guideline sentences substantially overstate the seriousness of the offense and the characteristics of the defendant. Accordingly, the Court can depart from the Guideline sentence under USSG 5K2.0 because there are mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. 3553(a)(2), should result in a sentence different from that described." The Sentencing Commission did not fully take into account situations where a law enforcement officer, in the course of apprehending felons fleeing in a vehicle that tried to run into him, shoots at the tires of the car to disable the vehicle, which inadvertently results in a minor injury to one of the occupants. That is clearly not the "heartland" type of case that Commission had in mind in

promulgating USSG 2H1.1. More importantly, a *properly* promulgated Guideline would not dictate such lengthy sentences, as will be shortly discussed. In addition, WLF submits that the Court can depart from the Guideline sentence under USSG §5K2.20, namely, the conduct was aberrant behavior by the defendant who did not plan or intend to commit the offense.

III. SENTENCING GUIDELINE 2H1.1 WAS NOT PROPERLY PROMULGATED

The reason why the Guidelines often generate excessive sentences is primarily due to design defects in their promulgation, as even the Commission itself has acknowledged. All of the sentencing factors of 3553(a) were not fully taken into account, particularly those regarding offender characteristics, nor could they be. *See generally* Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 450 (2006); U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 1 (May 2004) (due to "pressing congressional deadlines," the criminal history rules were not based on "direct empirical evidence"). As a general rule, the Guidelines precluded sentencing courts from fully considering a defendant's personal situation, family responsibilities, education, health status, military service, charitable and community service activities, as they did prior to the promulgation of the Guidelines. This "one-size-fits-all" approach of the Guidelines, which purportedly were designed to reduce unwarranted sentencing disparity, often caused more of it.

More significantly, the Guidelines are fundamentally flawed because they improperly dictate prison terms that are several times longer than terms actually served in the pre-Guideline era for the same offense. Because parole has been abolished, no longer will

offenders be able to be released after serving one-third of their time. Thus, the Guidelines fly in the face of Congress's directive that they were to generally reflect the average sentence *actually served* in the pre-Guideline era. Congress intended that "for the most part the average time *served* [under the Guidelines] should be similar to that *served* today in like cases." S. Rep. No. 225, 98th Cong., 1st Sess. at 116 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3299 (emphasis added). *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988) (Guidelines were primarily to be based on "typical, or average, actual past practice"). WLF submits that a "typical" sentence is better represented by a the median sentence, that is, one where half of all the sentences are above the median, and the other half are below, with the median thus representing the "heartland" or the typical offense. On the other hand, an average sentence can be misleading if there are numerous sentences that are relatively small and a few outliers that consist of extremely lengthy sentences, the result of which is that the "average" sentence will appear to be much higher than what is "typical" or representative of past practice.

Regardless of whether one looks at the "typical" (median) or average (mean) sentence imposed for violating 18 U.S.C. 242, it is clear that the Guideline Sentence of up to 97 months for the defendant in this case is way off the charts in relation to past practice, as it is for many other defendants sentenced under the guidelines for other substantive offenses.

As noted, under the pre-Guideline parole system, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed, with inmates receiving their initial parole

hearing within 120 days after incarceration. 18 U.S.C. § 4205(a) (repealed 1984). Indeed, for those inmates who were considered "very good" candidates for parole, and whose criminal offense level was a Category 3 or less, the customary total time to be served in prison before being paroled would be 10 months or less. *See* Paroling Policy Guidelines for Decisionmaking, 28 C.F.R. 2.20.

Accordingly, sentences imposed under the Guidelines are roughly equivalent to pre-Guideline sentences that are *three times greater*. Therefore, in order to properly compare the length of pre- and post-Guideline sentences, any sentence imposed under the Guidelines should be multiplied by a factor of three in order to get a good sense of what that sentence would have been in a pre-Guideline era, thereby enabling one to gauge whether the Guideline generated sentence is a fair and reasonable one. For example, a pre-Guideline sentence of three years in prison for a first offender who is a good candidate for parole would result in one year of actual time served in prison. Stated otherwise, a Guideline sentence of 12 months in prison is equivalent to a significant pre-Guideline sentence of three years for a first offender; a 24-month Guideline sentence (which would be the approximate sentence if the minor assault Guideline, §2A2.3 were employed in this case) is equivalent to an excessively harsh *six-year* pre-Guideline sentence; and a 36-months Guideline sentence is equivalent to a draconian *nine year* pre-Guideline sentence. Just how reasonable can these Guidelines be when the prosecutor in this case is likely to propose a Guideline range of Offense Level 28 or 78-97 months (approximately 6 1/2 to 8 years), which translates into an absurd pre-Guideline sentence of 19 to 24 years?

The source material allegedly utilized by the Commission in determining past

sentencing practices was a two volume report summarizing some 40,000 sentences imposed from January 1, 1984 to February 28, 1985. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986). In reviewing the sentences imposed for various categories of offenses, one is struck by how frequently probation was imposed in the pre-Guideline era, including the imposition of community service and fines, all of which properly reflect the goals of parsimony in meeting the purposes of punishment, as well as considering the "kind of sentences available" as required by 3553(a)(3). On the other hand, a probation sentence under the Guidelines is rarely an available punishment, even for first offenders. This occurs because the Commission structured the Guidelines in such a way that Base Offense Level scores can be easily increased by adding Specific Offense Characteristics that before the *Booker* decision, took probation off the table as a sentencing option.⁵

The relevant pre-Guideline sentencing data that was supposedly used by the Commission in devising the Guidelines can be found in *Punishments Imposed on Federal Offenders*, specifically Table 8-4 covering all offenders for "Conviction for violating the civil rights of others" (attached hereto), and Table 2-20, "Conviction for felonious assault; weapon brandished or used covering defendants with no prior incarceration" (although it may include defendants with prior convictions where probation was imposed). The average period of imprisonment (time actually served) was one year and 2.2 months. However, it should be noted that almost 45 percent of all defendants received probation, and that fully two-thirds of

⁵ According to a survey conducted by the Federal Judicial Center, 65.8 percent of the judges contacted indicated that the Guidelines do not appropriately identify offenders who should be eligible for alternatives to incarceration; 60.2 percent of Chief Probation Officers similarly agree. *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 101 (1997).

the defendants served sentences of 6 months or less. Clearly, the facts and circumstances surrounding the offense committed by Deputy Hernandez would have likely resulted in a sentence of probation in the pre-Guideline era.

Even if one were to cross-reference the sentences served by those defendants found guilty of felonious assault where a weapon was brandished or used, Table 2-20 shows that the average sentence of imprisonment was 2 years and 0.1 months. However, a full third of the defendants received probation, and almost 50 percent served nine months or less, a median which is the "typical" or heartland case. Again, WLF submits that if the defendant were convicted of felonious assault in the pre-Guideline era, he would have received probation or a small period of incarceration at best.

Thus, the Guidelines are vulnerable from both a procedural and substantive challenge such as any other agency's rules. See Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3 (1991); *id.* at 89 ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines"). In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, USSG 2J1.6, and remanded the case to the district court for resentencing as if the Guideline did not exist. The court did so because the Guideline in question was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the court concluded that the standard of review of agency regulations (guidelines) is whether they are

"sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

Purportedly, it is the Sentencing Commission's policy that "when departures [from past sentencing practice] are substantial, *the reasons departure will be specified.*" Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, reprinted in Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 50 (1988) (emphasis added); *see also id.* at 17 (Guidelines primarily to be based on "typical, or average, actual past practice"). But where are the Commission's reasons to justify the substantial upward departures from pre-guideline sentencing practices for violation of civil rights? They are certainly not found in the Sentencing Guidelines or Commentary. The fact of the matter is that the Guideline sentences applicable for violation of civil rights clearly do not represent the "typical" or "average" pre-guideline sentence, nor has the Commission provided any reasons for the sharp departure which would assist a sentencing or reviewing court in determining whether those pre-Guideline departures are "consistent with the purposes of sentencing" or whether they are, as amicus submit, plainly arbitrary, unreasonable, and inconsistent with the sentencing factors mandated by Congress in 18 U.S.C. 3553(a).

CONCLUSION

For the foregoing reasons, and those offered by counsel for Deputy Hernandez, WLF urges this Court to impose a sentence of probation on Deputy Hernandez for a sufficient

period of time, along with time served.

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