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March 26, 1991

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Mike Courlander

SUBJECT: Comment on Proposed Amendments to Guidelines

Attached for your review are comments from the United States District Court, Eastern District of Michigan. These comments, which just arrived today, were formulated by the Pretrial and Probation Committee after receiving input from the district's Probation Office, their U.S. Attorney and Chief Federal Defender.

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

March 18, 1991

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Commission Members:

This letter is in response to your request for the views of federal judges on proposed amendments to the sentencing guidelines. Unfortunately, your request came late in the comment period and the format used to present the proposed amendments has made them somewhat difficult to comprehend. Nevertheless, I shall attempt to respond as insightfully as possible under the circumstances.

In an effort to analyze the proposed amendments, the judges on our bench went through a deliberative process in considering the proposed amendments. We first asked our Probation Office to comment. Thereafter, the United States Attorney and Chief Federal Defender, as a surrogate for the defense bar, were solicited for their comments. Our Pretrial and Probation Committee then considered the proposed amendments in light of the views and opinions of the three groups. Copies of these comments are attached.

The United States Attorney frequently stated that the Department of Justice had not yet taken an official position with regard to the specific proposed amendments. This response was especially disappointing since the Guidelines have worked a substantial shift in discretion from the judges to the local United States Attorney. The Chief Federal Defender, who currently serves as the chair of the American Bar Association Committee, is directly involved with the Guidelines. Thus, he has acquired a superior knowledge about the proposed amendments as well as a developed particular view.

As a result of these collective opinions, our Pretrial and Probation Committee has reached the following conclusions:

1. A substantially better job could be done in presenting proposed amendments to the public for comment.

2. The proposed amendments are too complicated and lengthy for a detailed comment given the time constraints imposed.

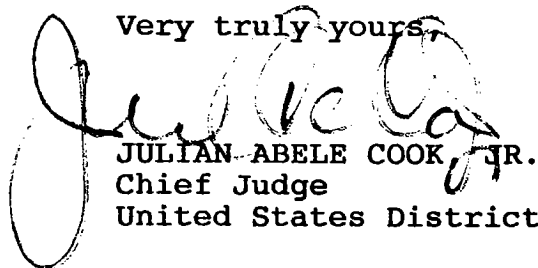
3. A guidelines should be amended only (a) if there is a demonstrated need for change and (b) to clarify and simplify as well as to eliminate clear unfairness.

4. An amendment should not have the effect of lengthening a sentence or providing any additional limitation upon the discretion of a judge unless there is a good reason to do so. In general, the sentences under the current guidelines are too long and the discretion of the judge to consider offender characteristics, as well as the circumstances of the crime, are too limited.

5. Amendment 11 has merit. At the present time, there is too much of a reliance upon drug quantities in punishing drug offenders. In our judgment, Guideline 3B1.2 does not offer a sufficient basis for differentiating the hierarchy of culpability in multi-defendant conspiracies. The scale of drug quantities establishes a basis that is too simplistic for determining punishment in situations (a) where an offender's criminal expectations are unlikely or fulfillment and (b) when the offender is only a "mule."

Thank you for the opportunity to comment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Julian Abele Cook, Jr.", is written over the typed name and title.

JULIAN ABELE COOK, JR.
Chief Judge
United States District Court

JAC:pf

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Attached are comments on various proposed amendments. For each proposal, the Probation Department's comments to the relevant amendment are included first, followed by the United States Attorney's Office's response and then the Federal Defender's Office's response.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7A

From studies of the United States Sentencing Commission requested and received by this district, there appear to be no clear reasons for changing 2B3.1(b)(1), increasing the enhancement for the robbery of a financial institution. Why should the robbery of a financial institution be considered more serious or treated differently than any other robbery?

**United States Attorney's Comment on
Proposed Amendment 7(A). Bank Robbery.**

The Department of Justice has not yet adopted an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 7(A)

We agree with the draft letter -- no clear reasons for changing 2B3.1(b)(1).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7B

An increase of two levels to the firearm offense characteristic appears to be the best alternative to lessen the disparity in those bank robbery cases where a firearm is used but due to prosecutorial discretion, an additional charge under 18:924(c) is not charged. Any larger increase in the enhancement would cause additional disparity in those cases of defendants in the higher criminal history categories.

**United States Attorney's Comment on
Proposed Amendment 7(B). Bank Robbery.**

The Department of Justice has not yet adopted an official position on this proposed amendment.

This office does take issue with the rationale behind the proposal. The reason the Commission gives for this proposed amendment is that the government has not been consistently prosecuting section 924(c) violations. The United States Attorney's Office in this district takes that obligation of consistency seriously. Although we do not have the data necessary to speak for other districts, we believe that we have been faithfully adhering to the policy of the Department of Justice not to bargain away section 924(c) charges that are "readily provable." On occasion a guidelines gun enhancement will apply even though the defendant has not pleaded to a section 924(c) violation. The reason is that the guidelines require proof by only a preponderance of the evidence (that a gun was used or possessed), but a section 924(c) violation must be proved by the higher standard of "beyond a reasonable doubt."

Federal Defender Office - Detroit, Michigan
Proposed Amendment 7(B)

We oppose the draft letter's support for a 2 level increase.

We concur in the U.S. Attorney's objection to the rationale provided by the Commission -- Justice Department shenanigans or ineptness.

Defender analysis:

The Commission's prime concern with the present weapon enhancement appears to be with prosecutorial handling of violations of 18 U.S.C. § 924(c). The Commission states that it is clear from the cases sentenced that, notwithstanding the clear intent of the Justice Department's 'Thornburg Memorandum' on the plea bargaining, prosecutors are not consistently charging 924(c) when a weapon is possessed during a bank robber. Therefore, the Commission faces a policy question whether it should act to eliminate or limit the resulting disparity.

The Commission, however, has no data about why prosecutors are not charging under § 924(c). A failure to charge may be based upon a variety of reasons, from a weak case to a perception that the penalty is sufficient without a mandatory 5 year consecutive term. Before making any change, the Commission should collect and analyze data about the reasons for failing to utilize § 924(c).

The Commission has also suggested that the weapon enhancement should be increased in order "to more closely accommodate Congress' view of the seriousness of committing a

felony while possessing a weapon". The Commission does not provide any evidence that the present enhancement fails to accommodate Congress' view about severity. The available evidence does not indicate that sentences in bank robbery cases where a weapon is used or possessed are inadequate. Commission data show that, in bank robbery cases under 18 U.S.C. § 2113(a) sentenced from January 1, 1989, through June 30, 1990, courts sentenced below or at the bottom of the guideline range in 39.1% of the cases (below = 8.6%; bottom = 30.5%), and above or at the top of the range in 32.2% of the cases (above = 5.8%; top = 26.4%). For cases sentenced after the November 1, 1989 amendment, the data is even more striking: Courts sentenced below or at the bottom of the range in 43.4% of the cases (below 6.7%; bottom = 36.7%), and above or at the top of the range in 30.0% of the cases (above - 6.7%; top = 23.3%).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7C

This proposed amendment recognizes and accounts for multiple bank robberies in guideline calculations even if they are not charged. It provides some structure and guidance to the Court which could eliminate the need for an unguided and unstructured departures in cases such as these.

**United States Attorney's Comment on
Proposed Amendment 7(C). Bank Robbery.**

The Department of Justice has not yet taken an official position on this proposed amendment. It does appear, however, that this amendment will be supported by the Department. It will help to ensure that bank robbers are held accountable for the entirety of their criminal conduct.

Proposed Amendment 7C

We oppose the draft letter's support for this amendment for the following reasons:

The Commission, in proposed amendment 7C, seeks to address its concern that

the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guidelines practice, and that variations in plea bargaining practices in different U.S. Attorney's offices with respect to dismissing or not pursuing provable counts of bank robbery may result in unwarranted disparity.

The Commission apparently uses "may" because there is no data that indicate that sentences in multiple robbery cases are lower under the guidelines than under pre-guideline practice or that plea bargaining practices have resulted in unwarranted disparity.

There is, moreover, no evidence that the failure to account for uncharged or dismissed robberies is perceived by courts as resulting in sentences that are too low. The Commission's data is, at best, inconclusive. For example, while the upward departure rate for defendants with uncharged or dismissed

robberies is roughly twice that for defendants without uncharged or dismissed robberies, so is the downward departure rate.¹

The special instruction is unnecessary because § 4A1.3, which recommends a departure if the defendant's criminal history score is inadequate, enables the court to account for dismissed or uncharged robberies. Further, the special instruction is a move towards a real offense system of sentencing, a system that the Commission has rejected as impractical and risking "return to wide disparity in sentencing practice."² If the Commission wants to move to a real offense system, it should amend Chapter 1, part A(4)(a) and § 1B1.2. The Commission should not, ad hoc and without further study, move toward a system in which the charge that the government must prove beyond a reasonable doubt is irrelevant to determining the sentence (other than setting a maximum).

1 See, A. Purdy, Report of the Bank Robbery Working Group, at Appendix H.

The Commission staff memorandum concludes that "on balance it appears that in cases in which robberies were committed, but not reflected in the guideline range either because the charges were dismissed or not brought, the judges tended to sentence the defendant more harshly relative to the applicable guideline range--as compared to cases in which the guideline range was relatively higher because all robberies were accounted for by conviction." Id. at 20. The memorandum notes that "of those cases involving dismissed or uncharged bank robberies the sentences fell less often at the bottom of the guideline range than cases in which all robberies resulted in conviction (28.5% of cases with dismissed or uncharged counts versus 45.1% of cases with all robberies accounted for by conviction)." Id.

Appendix H of the staff memorandum, however, indicates that sentences below, or at the bottom of, the guideline range occurred in 58% of the cases with all robberies accounted for by convictions (below = 12.9%; bottom = 45.1%), and in 54.6% of the cases with uncharged or dismissed robberies (below = 26.1%; bottom 28.5%). Appendix H also discloses that sentences above, or at the top of, the guideline range occurred in 20.4% of the cases with all robberies accounted for by convictions (above = 4.3%; top = 16.1%), and in 21.4% of the case with uncharged or dismissed robberies (above = 9.5%; top = 11.9%).

2 See, United States Sentencing Guidelines, Chapter 1, part A(4)(a), intro. comment.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 11

There is a "gut" feeling in the field that greater differentiation is needed between leaders and less culpable members of large scale drug conspiracies. Leaders, having more knowledge of the criminal operation, are more apt to receive consideration for downward departure under Guideline 5K1.1. Less culpable members of a drug operation can end up serving more time because they do not have as much information to give authorities and therefore are not eligible for 5K1.1 departures. Although we are not sure that drug quantities are the area that should be targeted to correct or reduce this disparity, some means is necessary, besides departures, to recognize individuals who have little knowledge of and are less culpable members of large scale drug conspiracies.

**United States Attorney's Comment on
Proposed Amendment 11. Comment on Drug Guidelines.**

The Department of Justice has not yet determined what comment, if any, it will be offering with respect to the drug guidelines.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 11

We concur with the draft letter's support of a study relating to the Mitigating Role aspect of drug sentencing, given the reality that there is significant over-punishment due to over-reliance on the quantity of drugs.

We also believe that this study of mitigating roles should include other non-drug similar case scenarios, e.g., Ivan Boesky's secretary.

The Commission requests comment about whether the guidelines rely too heavily on drug quantity to determine punishment, particularly for less culpable aiders and abettors. We believe that basing the offense level primarily on quantity in drug cases results in an offense level for a minimal or minor participant that is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect the defendant's lesser role.

Once a drug offense reaches a certain scale, no significant purpose is served by making the offense level of a minimal or minor participant dependent upon quantity. As a former Assistant U.S. Attorney has noted, "many drug defendants appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the king pins who dominate the drug business."

United States Probation Department
Eastern District of Michigan

Proposed Amendments 21 and 22

Due to the similar nature of these offenses, these amendments are being discussed together except for number 3 as noted below.

1. These proposed amendments simplify and consolidate the current Guidelines. They eliminate duplication and confusion in the application of the current ones, particularly with respect to multiple cross references and the potential application of more than Guideline to the same statute.
2. From the studies of the United States Sentencing Commission, the current sentencing patterns show that sentences for these offenses have generally been in the upper end of the guideline range which supports a raising of the offense level. In addition, the raising of the offense level is also supported by the new statutes which increase the penalty for these offenses.
3. For Guideline 2K2.1, the preferred option is "convictions for a violent felony or serious drug offense", as this language tracks the definition used in 18:924(c). For Guideline 2K1.1, the option of "or explosive offense" is preferred as it takes into consideration other offenses which wouldn't necessarily be captured under the term "crime of violence".
4. This proposed amendment changes wording from "if the defendant is convicted" to "if the offense conduct involved" which limits the potential disparity caused by prosecutorial charging patterns.
5. An offense level enhancement of four is preferred to reflect the seriousness of unlawfully possessing a firearm in a federal court facility.
6. In addition, these proposed amendments consider the number of firearms and amount of explosives for crimes such as Felon in Possession which was one of the concerns expressed by practitioners in the field.

**United States Attorney's Comment on
Proposed Amendments 21 and 22. Firearms.**

The Department of Justice is in favor of these proposed amendments. The proposals will help narrow the gap between defendants who qualify for treatment as armed career criminals and those that fall one or two serious crimes short of career criminal status. For these intermediate career criminals, the proposed higher offense levels will help to ensure proportionality.

With respect to the third proposed comment in the court's letter, the government prefers using the option using the language "convictions for a crime of violence or controlled substance offense." This language is found later in the career offender definitions section. (Section 4B1.2). It is preferable for the sentencing guidelines to use language found elsewhere in the guidelines so that consistency is maintained. We also favor having increases in the offense level for the number of weapons possessed by a felon. This reflects the greater seriousness of an offense which is committed by a felon with multiple weapons.

Federal Defender Office - Detroit, Michigan

Proposed Amendments 21 and 22

We oppose the draft letters support of these amendments for the following reasons:

Amendment 21 -- new § 2K1.1 (Unlawfully Trafficking in, Receiving, or Transporting Explosive Materials; Improper Storage and Failure to Report Theft of Explosive Material)

The Commission proposes to combine present §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6 into a single guideline designated § 2K1.1. The Commission has indicated five objectives for proposed amendment 21 -- (1) to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law"; (2) to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline to the same statute"; (3) to "reduce departures and potential sentencing disparity by relying more heavily on

specific offense characteristics and real offense conduct and less on the statute of conviction"; (4) to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel"; and (5) to "avoid the need to revisit firearms and explosive materials guidelines".

We do not believe that any useful purpose would be served by this comprehensive rewriting of the explosive materials guidelines. There has not been a sufficient number of cases involving these guidelines to warrant such an extensive revision. The Commission staff memorandum reports on only 22 single-guideline cases under § 2K1.3 and 7 single-guideline cases under § 2K1.6; the memorandum does not report any cases under §§ 2K1.1 and 2K1.2.²⁴

With regard to the Commission's first objective, the Commission has not identified what concerns of judges, probation officers, and practitioners are being addressed. Consequently, we cannot evaluate this objective.

The Commission's second objective is to eliminate "duplication and confusion in the application of the current guidelines". The statutory provisions notes indicate an overlap with regard to 18 U.S.C. 842(j) and (k).²⁵ While there is duplication, there should

²⁴See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

²⁵The statutory provision note to § 2K1.2 lists 18 U.S.C. § 842(j), and the statutory provisions note to § 2K1.3 lists 18 U.S.C. § 842(k). The statutory provisions note of § 2K1.3 lists 18 U.S.C. § 844(b), which sets forth misdemeanor penalties for violating 18 U.S.C. § 842(j) and (k). Thus, statutory provision notes indicate that §§ 2K1.2 and 2K1.3 apply to 18 U.S.C. § 842(j)

be no confusion because the Commission has promulgated a guideline to deal with such situations -- § 1B1.2 ("Applicable Guidelines"). That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted". Thus, whether §2K1.2 or § 2K1.3 applies to a defendant convicted under 18 U.S.C. § 842(j), for example, will turn on what conduct is charged in the indictment". If the Commission wishes to clarify the matter, an amendment to the application notes or statutory provisions notes would seem to be preferable to a comprehensive revision of the explosives guidelines.

With regard to the Commission's third objective (to "reduce departures and potential sentencing disparity"), the Commission staff memorandum reports on only 29 single-guideline cases under §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6.²⁶ There is, therefore, insufficient data upon which to base a conclusion that departures are a significant problem.

The Commission's fourth objective, simplifying "application of the guidelines by making the explosive materials and firearms guidelines more parallel", would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater

and that §§ 2K1.1 and 2K1.3 apply to 18 U.S.C. § 842(k).

²⁶See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 21.

The Commission's final objective, avoiding the "need to revisit" the explosive materials guidelines", is laudable but based upon an assumption that there is a need to visit those guidelines in the first place. So far, nothing has been presented to justify such an assumption.

**Amendment 22 -- new § 2K2.1
(Prohibited Transactions Involving Firearms)**

The Commission proposes to combine present §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.5 into a single guideline designated § 2K2.1. The proposed new guideline uses a "real offense" approach. Thus, proposed subsections (a)(2), (3), and (4) apply if a defendant is a "prohibited person" described in 18 U.S.C. 922(g), even if the defendant is not convicted under that provision.²⁷ The proposed new guideline also increases offense levels. For example, the base offense level for a defendant with a dishonorable discharge from the Air Force (a prohibited person as described in 18 U.S.C. § 922(g)) who is convicted under that provision of shipping a .22 caliber rifle to his wife, is 12 under present § 2K2.1(a)(2). The base offense level for the same offense under proposed § 2K2.1(a)(4) is [14-16] (the level is 20 under proposed §

²⁷See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at 13-15.

2K2.1(a)(3) if the defendant has a prior conviction of specified offenses, such as possession of marijuana with intent to distribute).²⁸ In addition, the defendant's base offense level would be enhanced [1-2] levels under proposed §2K2.1(b)(8) because of defendant's status as a prohibited person.²⁹

We do not believe that any useful purpose would be served by comprehensively rewriting the firearms guidelines at this time. The Commission, effective November 1, 1989, extensively revised §§ 2K2.1, 2K2.2, and 2K2.3, increasing offense levels.³⁰ There has not been a sufficient number of cases involving the revised guidelines to warrant an extensive revision.³¹ The limited data

²⁸See *id.* at 28-32.

²⁹The proposed new guideline has double counting problems. If the defendant is in fact a prohibited person described in 18 U.S.C. § 922(g), the applicable base offense level depends upon whether the defendant has any prior convictions for specified types of offenses. With 2 such prior convictions, the base offense level is 24; with one such prior conviction, the base offense level is 20; and with no such prior conviction, the base offense level is [14-16] (proposed § 2K2.1(a)(2), (3), (4)). A prior offense counted in determining the base offense level, however, is also counted in determining the criminal history score. Moreover, the enhancement of proposed subsection (b)(8) is applicable only to prohibited persons.

³⁰U.S.S.G. App. C at c.97 (amend. no. 189).

³¹There have been 59 single-guideline cases under the version of § 2K2.1 that took effect November 1, 1989; 17 single-guideline cases under the version of § 2K2.2 that took effect November 1, 1989; 29 single-guideline cases under the version of § 2K2.3 that took effect November 1, 1989; and 6 single-guideline cases under the version of § 2K2.5 that took effect November 1, 1989. See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A; appendix G, table II-A; appendix K; appendix L.

available, however, indicate that courts do not believe that the present guideline, as amended November 1, 1989, results in inadequate sentences.³²

The Commission has indicated that amendment 22 has 5 objectives. They are, first, to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law". The Commission has not identified what those concerns are, however, so we cannot evaluate this objective.

A second objective identified by the Commission is to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline

³²For § 2K2.1, in the 59 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (6.8% of the cases) and at the bottom of the range in 25 cases (42.4% of the cases), and was above the range in 3 cases (5.1% of the cases) and at the top of the range in 14 cases (23.7% of the cases). Id. at appendix D, table I-A.

For § 2K2.2, in the 17 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range other than for substantial assistance in 4 cases (23.5 % of the cases) and at the bottom of the range in 8 cases (47% of the cases), and above the range in one case (5.9% of the cases) and at the top of the range in no cases. Id. at appendix G, table II-A.

For § 2K2.3, in the 29 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (13.8% of the cases) and at the bottom of the range in 11 cases (37.9% of the cases), and above the range in 3 cases (10.3% of the cases) and at the top of the range in 3 cases (10.3%). Id. at appendix K.

For § 2K2.5, in the 6 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was at the bottom of the guideline range in 5 cases (83.3% of the cases) and above the top of the range in one case (16.7% of the cases). Id. at appendix L.

to the same statute". The statutory provisions notes to the present guidelines do not indicate that the latter problem exists.³³ It is not evident, moreover, that the proposal is less confusing and has fewer cross references than the present guidelines.

The Commission's third objective is to "reduce departures and potential sentencing disparity by relying more heavily on specific offense characteristics and real offense conduct and less on the statute of conviction". There are only 111 cases under the November 1, 1989 version of §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.4 -- inadequate data upon which to base a conclusion that departures are a significant problem. The data available on § 2K2.1, the most plentiful data available, fail to indicate that departures are a problem.³⁴

The Commission, moreover, deliberately chose a guideline system that is offense of conviction based, with limited real

³³Even if there were some overlap in the coverage of certain offenses, there is no indication that § 1B1.2 ("Applicable Guidelines"), the guideline that the Commission promulgated to deal with such situations, is inadequate. That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted".

³⁴The downward departure rate under § 2K2.1 is 6.8%, and the upward departure rate is 5.1%. *Id.*

The data available for the other three guidelines involved are so limited as to make the departure rates meaningless. There are 29 cases under § 2K2.3; the downward departure rate is 13.8% and the upward departure rate is 10.3%. *Id.* at appendix K. There are 17 cases under § 2K2.2; the downward departure rate is 35.3% and the upward departure rate is 5.9%. *Id.* at appendix G, table II-A. There are 6 cases under § 2K2.5; the downward departure rate is 0% and the upward departure rate is 16.7%. *Id.* at appendix L.

offense characteristics, out of a concern that a real-offense system "risked return to wide disparity in sentencing practices".³⁵ It is not clear why it is necessary to rely on real offense conduct to a greater extent than the guidelines do at present. Greater reliance on real offense conduct is not needed in order to get adequately high offense levels. The data indicate that, under the November 1, 1989 version of § 2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) -- suggesting that the offense levels under the guideline are too high.³⁶

The Commission's fourth objective is to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel". This objective would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 22.

The Commission's final objective is to "avoid the need to revisit firearms and explosive materials guidelines". Nothing indicates that the Commission failed substantially to achieve this goal with the November 1, 1989 amendment.

³⁵U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

³⁶See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 29(c)

Option number one is preferred and 4A1.1(a)(b)(c) and (d) should apply to convictions pending appeal as the conviction stands until the Appellate Court rules. Since a defendant has been convicted, not awarding points in these cases creates a new area of disparity.

**United States Attorney's Comment on
Proposed Amendment 29(C). Criminal History for Cases on Appeal.**

Although the Department of Justice has not yet taken an official position on this proposal, it appears that the Department will be supporting the option that is favored by the court's letter. Defendants who have already been sentenced and are awaiting appeal should be treated the same as other defendants who have not been fortunate enough to have an appeal bond granted.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 29(C)

We oppose the draft letter's recommendation of option #1
for the reasons that follows:

Federal Defender Office - Detroit, Michigan

Amendment 29(C) -- § 4A1.2 (Definitions and Instructions
for Computing Criminal History)

The Commission proposes to add a new subsection to § 4A1.2 that would deal with prior sentences that are being appealed. The new subsection would direct counting such sentences unless execution of the sentence has been stayed pending appeal. The Commission proposes two options for dealing with sentences stayed pending appeal. The difference between the two options is whether to apply subsection (d) of § 4A1.1. Subsection (d) calls for adding 2 criminal history points "if the defendant committed the instant offense while under any criminal justice sentence". Under option one, subsection (d) would apply to sentences stayed pending appeal; under option two, subsection (d) would not apply.

The options address a problem that we do not expect to arise very often. In our judgment, option two is better because option one presents an insurmountable problem of application.

Option one is premised upon the assumption that the sentencing court can readily ascertain whether the defendant would have been "under any criminal justice sentence" at the time of the subsequent offense. That assumption, in our view, is incorrect. Suppose, for example, that a defendant is sentenced under the old federal law to a term of 18 months, appeals the conviction, and commits a second offense 16 months later. Would subsection (d) apply? No definite answer is possible. Subsection (d) would apply if defendant were on parole at the time of the later offense, because defendant would have been in the custody of the Attorney General at

the time of that offense. Subsection (d) would not apply, however, if defendant were not paroled, because defendant (by virtue of the good time rules) would have been discharged from custody and therefore not "under any criminal justice sentence" at the time of the later offense -- unless the defendant would have misbehaved in prison and forfeited all good time allowance.

Federal sentences will not be the only ones causing this problem. The problem will also arise with state sentences because state laws vary widely concerning good time, parole, and discharge from custody. Option one does not have the application problem.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 30

The awarding or not awarding of criminal history points for "related cases" has been a difficult area to interpret. However, the three options offered under the amendment seem to complicate the matter rather than simplify it. Additional study may be needed to present other alternatives to solve this problem. For example, option number one is limited to crimes of violence. Option number two requires additional investigation of prior convictions by probation officers in order to apply the grouping rules. Option three makes use of "time served" as a measure of seriousness which may reflect prison overcrowding, jurisdictional differences, and other unknown factors.

**United States Attorney's Comment on
Proposed Amendment 30. Criminal History for Related Cases.**

The Department of Justice favors the second option for dealing with related cases. Some amendment is necessary to deal with the situation where sentences for unrelated offenses are artificially combined together in a criminal history calculation based on their consolidation for sentencing purposes. Prior sentences should not be considered to be part of related offenses where the offenses were separated by an arrest. Furthermore, as option number two provides, where the offenses would not have been grouped under the guidelines they should not be considered related for purposes of determining criminal history. The grouping rules were written to distinguish between offenses which are serious enough that they should not be grouped together in calculating offense levels. The same rationale applies when the offenses are prior criminal convictions. The advantage of using the grouping rules in this context is that they are already developed and will not require the creation of an entirely new standard. The test can be applied without having to look into the underlying circumstances of the prior crimes.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 30

We agree with the draft letter's conclusion that additional study is needed, because all three options complicate rather than simplify.

The following analysis supports our position:

Amendment 30 -- § 4A1.1 (Criminal History Category)

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score, treat as one sentence "prior sentences imposed in related cases". Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."

The Commission has proposed three options for modifying the treatment of cases consolidated for trial or sentencing. Under all three options, sentences would not be considered related if they were for sentences separated by an intervening arrest. We see no reason to modify the related cases rule. None of the options will improve the ability of the criminal history score to predict the

likelihood of future criminal behavior, the function of the criminal history score.

The concern about the related cases rule may result from a failure to appreciate the purpose served by the criminal history score and what that score is intended to measure. The criminal history score is not intended to, and does not, measure simply the extent of a defendant's previous convictions. Rather, the criminal history score is intended to measure the likelihood of future criminal conduct.³⁷ Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence", and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.³⁸

The criminal history score is based primarily upon the U.S. Parole Commission's salient factor score,³⁹ and the Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future

³⁷See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

³⁸Only one point is added for the latter factor if two points are added for the former.

³⁹U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

criminal behavior.⁴⁰ Sentencing Commission data indicates that the Sentencing Commission was correct in its belief.⁴¹

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days applies is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., called for a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing a punishment experience is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

⁴⁰Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

⁴¹See U.S. Sentencing Com'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

The Commission has presented no data indicating that the present rule results in sentences that are inadequate. Instead, the available data suggest that the present rule calls for appropriate sentences.⁴² Moreover, the Commission has presented no data to indicate that any of the three options will improve the predictive power of the criminal history score.

The Commission's three options yield strange results. For example, defendant A served 15 years for murder and was released from prison three years ago. Defendant B served concurrent 14

⁴²The Commission staff memorandum reports that, based on "a 25% sample of monitoring cases", 17.3% of the upward departures for inadequacy of the criminal history score were due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing. See Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990). That data is interesting but not particularly relevant because it does not represent the rate of departure. What is missing is the total number of cases in which a court might have departed. Only with that number can the departure rate be calculated.

Another staff memorandum suggests that the departure rate is much lower than the overall upward departure rate. A Commission staff memorandum reports that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 cases fell within criminal history category VI. J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). That memorandum further indicates that there were 52 departures involving defendants in criminal history category VI. (Commission data show 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000.) *Id.* Assuming that the percentage of upward departures due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing is constant for all criminal history categories at 17.3% (the figure calculated in Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990)), then the departure rate for criminal history category VI due to the consolidated for trial or sentencing rule is 0.4% (9 departures -- 17.3% of 52 -- in 2,141 cases). The overall upward departure rate is nine times that rate (3.5%). U.S. Sentencing Com'n, Annual Report 1989, at table B-6.

month terms for two embezzlements and was also released from prison three years ago. All three options result in defendant B getting more criminal history points than defendant A, who gets 3 criminal history points. If defendant B's offenses were separated by an intervening arrest, defendant B gets 6 points under all three options. If there is no intervening arrest, defendant B gets 4 or 5 points under option 1,⁴³ and 4 points under option 3. ⁴⁴

⁴³ The number of points depends upon what the Commission determines with regard to the number of points to add under proposed new subsection (f).

⁴⁴ Option 2 applies only if there is an intervening arrest.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 31

It is our opinion that the Sentencing Commission should create another criminal history category, category VII. Option number three of this proposed amendment is preferred as it defines two additional criminal history categories and encompasses approximately 98% of the criminal history points of those defendants already sentenced under the guidelines. This would further reduce the need for departure for adequacy of criminal history. Career offenders should be sentenced under criminal history category VII because 28:994(h) requires those career offenders to be sentenced at or near the maximum term authorized.

**United States Attorney's Comment on
Proposed Amendment 31. Criminal History Category VII.**

The Department of Justice agrees with the endorsement of option number three. A defendant with 18 criminal history points should not be treated the same as a defendant with only 13 points. The third option follows the pattern established for other categories in that there is a three-point spread between criminal history categories. By authorizing upward departures for defendants who exceed 18 criminal history points, the option provides flexibility for judges at the time of sentencing.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 31

We oppose the draft letter's support for the creation of a Category VII. In addition to the analysis set forth below, we want to oppose the draft letter's assumption that career offenders would automatically come under Category VII. The Commission indicated, when hearing testimony, that such was not the case.

Amendment 31 -- Chapter 5, part A (Sentencing Table)

The Commission has proposed three options for establishing a new criminal history category VII for defendants with high criminal history scores. Option one calls for category VII to cover 15 or more criminal history points. Option two calls for Category VII to cover 20 or more criminal history points.. Option three calls for category VII to cover 16-18 criminal history points; for scores of 19 or more, the court could use category VII or depart. The Commission seeks comment about whether there should be a new category and, if so, which option should be adopted. In addition, the Commission seeks comment about how to deal with career offenders if a new category VII is established.

We believe that there is no need to add a new criminal history category.

When sentencing defendants in criminal history category

VI, courts currently depart upward under § 4A1.3 very infrequently. Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.⁴⁵ Commission data show that, out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI.⁴⁶ The data further indicate that there were 52 departures involving defendants in criminal history category VI, a departure rate of 2.4%.⁴⁷ The data, therefore, do not support a conclusion that there is a need for a new criminal history category.⁴⁸

Finally, none of the options will enhance the predictive power of the criminal history score. The criminal history categories are based upon predicting the likelihood of future criminal conduct,⁴⁹

⁴⁵See J. Meyer, Report on Criminal History Categories "0" and "VII", at 4 (Nov. 20, 1990) ("in most cases, inadequacy of Category VI penalties was cited as only one rationale for the departure") (discussing reported cases).

⁴⁶Id. at 3.

⁴⁷Id. Commission data shows 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

⁴⁸Commission staff speculates that "it seems plausible to infer that some courts might have refrained from departing beyond category VI in the past because of the uncertainty of structuring a departure beyond the sentencing table". Id. at 8. No evidence (letters or calls from judges or probation officers, for example) is presented to support such speculation. It is more plausible to conclude from the data that courts are departing whenever they believe departure appropriate. There should be little uncertainty about structuring a departure from category VI; the only constraint upon a court's ability to depart from category VI is that the departure be reasonable.

⁴⁹See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987).

and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior." There is no evidence that a new category VII will enhance the predictive power of the criminal history score.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 33

This amendment deals with imposition of sentences for defendants serving an unexpired term of imprisonment. Option number two creating a policy statement is preferred as it provides for the most judicial discretion of any of the options. (See 18:3584).

**United States Attorney's Comment on
Proposed Amendment 33. Consecutive versus Concurrent Sentencing.**

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 33

We object to the draft letter's recommendation of option number two. We prefer option number one for the following reasons:

Amendment 33 -- § 5G1.3 (Imposition of a Sentence on a Defendant Servicing an Unexpired Term of Imprisonment)

The Commission proposes to rewrite this guideline completely. Proposed subsection (a) would require consecutive terms if the defendant committed the offense while "serving a term of imprisonment (including work release, furlough, or escape status)", after sentencing for, but before starting service of, such a term of imprisonment, or while "on bail or other release status:. Proposed subsection (b) would require the sentence for a new offense to be imposed "to result in a combined sentence equal to the total punishment that would have been imposed under § 5G1.2 . . . had all the sentences been imposed at the same time:, if (1) subsection (a) is inapplicable and the new offense constitutes part of the same course of conduct as the offense whose term is undischarged, or (2) the prior undischarged term was imposed under the Sentencing Reform Act.

The Commission has set forth three options for subsection (c), which would deal with "any other case". Option one would require concurrent terms, with commentary recommending a departure for

"anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishment for multiple offenses". Option two, labelled a policy statement, would recommend consecutive sentences "to the extent necessary to result in a total combined term of imprisonment [for the new and the old offenses] . . . so that a reasonable incremental punishment is imposed" for the new offense. Option three would require consecutive terms, with commentary recommending a departure for "anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishments, but not more than necessary to comply with the purposes of sentencing for multiple offenses".

We believe that proposed subsections (a) and (b), except for expanding the guideline to require consecutive sentences if the offense was committed while defendant was on bail or other release status, improve the present guideline. That part of proposed subsection (a) should not be promulgated. The Commission has offered no justification for the expansion. In light of § 2J1.7 (commission of offense while on release), it is unclear why this guideline should cover offenses committed while on bail. It is also unclear how the policy of this guideline (consecutive sentences) could be effectuated when federal and state offenses are involved and the federal sentence is imposed first.

With regard to proposed subsection (c), we believe that option one is best. Option one is consistent with the goals of the Sentencing Reform Act and gives the court flexibility in dealing

with cases not adequately covered by the general rule. In the great majority of instances, concurrent sentences will be sufficient to impose additional punishment and therefore are consistent with the statutory directive that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing (18 U.S.C. § 3553(a)). The sentence for the later offense will reflect that the defendant committed that offense while serving a sentence for a previous offense (because of chapter 4's criminal history rules).

If the court believes that a consecutive sentence might not result in incremental punishment (e.g., where the earlier sentence is very long), the court has 2 ways to adjust the sentence for the later offense in order to result in greater punishment -- (1) depart under § 4A1.3 (adequacy of criminal history category), or (2) depart by making part or all of the sentence for the later offense consecutive to the sentence for the earlier offense. The risk with consecutive sentences is excessively long sentences. The court's ability to adjust for an excessively long sentence is limited to departing to make the sentences concurrent.

We believe that option two would be the next best approach. The principal criticisms of option two are that it requires additional work by the sentencing court and that its policy cannot be effectuated because state sentencing laws vary in the determinacy of sentences. While option two may require additional calculations by the sentencing court, the additional work is not significant other than in a few cases. Option two addresses the

concern about fashioning a sentencing order that accounts for the variety of determinacy among the sentencing laws of the states -- the order can direct that the federal term begin on the earlier of a date certain or release from state custody.

We believe that it would be unwise for the Commission to adopt option three because option three would result in sentences that in most instances will be excessive. Option three, therefore, is inconsistent with the mandate of 28 U.S.C. § 994(1)(1) that the guidelines "reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses committed in the same course of conduct . . . and multiple offenses committed at different times", as well as with the statutory directive of 18 U.S.C. § 3553(a) that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

**United States Probation Department
Eastern District of Michigan**

Proposed Amendment 37B

Guideline 1B1.2(a) should be amended to read that stipulations should be made a part of a formal written plea agreement. Such a practice would greatly assist the Court in determining the applicable guideline range.

**United States Attorney's Comment on
Proposed Amendment 37(B). Stipulations.**

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 37B

It is our understanding that the Sentencing Commission has removed this proposal from consideration this year.