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December 9, 1991

VIA MESSENGER

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

Re: Federal Register Publication of Proposed Guideline
Amendments

Dear Chairman Wilkins:

Over the past several months, the Practitioners' Advisory Group (PAG) has worked with the Commission's working groups on proposed guideline amendments for the current cycle. In order to engage in this process, the PAG divided itself into a number of subcommittees addressed to the specific working group areas. I would like to thank you and the Commission staff for the opportunity that you have provided to us to work with and review the product of the working groups.

It is my understanding that the Commission will meet on December 12, 1991 to consider which of the various working group and other proposals should be published in the Federal Register. I have asked each of my subcommittee chairmen to communicate with you directly and forward a copy of their subcommittee report, including our position on which proposals should be published in the Federal Register. I am transmitting herewith the report of the subcommittee on the criminal history working group report. The committee was chaired by PAG member Lyle J. Yurko. In addition to the PAG subcommittee's report, I have enclosed four additional amendments which we ask that the Commission consider for publication in the Federal Register. These amendments deal with creation of a Category 0, creation of a Category VII, Career Offenders and the Decay Factor.

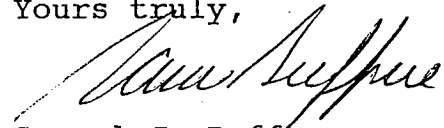
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We have found the availability of the Commission's working group reports to be of invaluable assistance in our review of guideline amendments during the current cycle. We urge the Commission to include within its publication in the Federal Register an indication to the public that working group reports have been prepared, listing the subject matter of each working group report and encouraging the public to obtain copies by writing to the Commission.

Out of town business will preclude my attendance at the December 12, 1991 Commission meeting. The interest of the PAG will be represented by Fred Bennett and other PAG members who will attend.

Thank you for your consideration to these matters.

Yours truly,



Samuel J. Buffone

SJB:sag

cc: Lyle Yurko (letter)
Fred Bennett (via federal express)

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**SUMMARY OF CRIMINAL HISTORY WORKING GROUP
FOR PRACTITIONERS ADVISORY GROUP**

by
Lyle J. Yurko, Member
Practitioners Advisory Group

The Group is considering guideline modifications in the following areas:

1. Creation of a Category O.
2. Creation of a Category VII.
3. Narrowing Qualifying Priors for Career Offenders.
4. Modifying the Decay Factor for Priors.
5. Clarifying Application of Career Offenders.

What follows is a bare bones review of the findings and options in each area.

1. Category O

Because 61% of the offenders in the sample studied (FY 90) were classified as Category I offenders and because some have suggested that Category I is overbroad in including certain offenders in this category, the Group studied creating a Category O. Currently Category I includes:

- A. Persons with no prior contact with justice system, i.e., no arrests.
- B. Persons with 0 points but with some arrests.
- C. Persons with 0 points but some convictions which currently would not be counted.
- D. Persons with one point.

The Group study found that the "no arrest" sub-category had a higher percentage of offenders in the white collar area. All Category I offenders have lower incidences of victim injury and weapon use, but again the lowest are offenders with no arrests. While "no arrest" offenders commit singular acts of crime and act alone more often than other Category I offenders, the seriousness of the "no arrest" sub-group is slightly less than other Category I offenders.

"No arrest" offenders were female, non-black, married, and were better educated.

The report concludes that the "no arrest" offenders were "sufficiently different" on a variety of variables.

The Group attempted to answer only the question of what sub-groups to include in Category 0 and did not comment on what punishment ranges should apply to this category.

These sub-groups were identified for possible inclusion in Category 0:

Class I No arrest or other contact.

Class II No convictions.

Class III Convictions not counted or persons with serious instant convictions.

The report noted that it would be difficult to justify enhanced punishment based on arrest criteria although proof of guilt even though no conviction might be a basis for differentiation.

OPTIONS

Option 1. No change - no prior would continue to be sentenced as harshly as person with priors.

Option 2. Modify to punish less severely one or more of the sub-categories.

CRITIQUE

The statistical justifications for separating out "no arrest" offenders from others who score 0 appears to be too tenuous to support justifying less severe sentences solely on a "no arrest" basis. The constitutional and fairness problems with such a proposal are monumental. Separating out "no arrest" offenders might institutionalize differences in local arrest practices which are racially and sexually discriminatory.

Creating a Category 0 which somehow would exclude offenders based on criteria that was not counted for other criminal history score purposes would likewise upset the internal logic and consistency of the guidelines and again the statistical differentiation supporting such treatment is too tenuous to justify disparate treatment.

There is a continuing problem with basing guidelines action on factors which occur outside of the guidelines setting.

The guidelines system was instituted because of a recognition that other systems tended to foster disparate treatment which often

was based on constitutionally impermissible criteria such as race, sex or religion.

Most criminal history events occurred in such systems. Although criminal history should be taken into account in the guidelines system, over-reliance on criminal history factors to justify different sentencing results has the dangerous possibility of building into the guidelines system factors which the guidelines were designed to exclude from consideration.

The creation of a Category 0 is something which the Practitioners Advisory Group supports, but the proposal which we endorse is that Category 0 be made up of individuals who have 0 criminal history points and that such be based on criterion consistent with all other criminal history categories.

2. Category VII

Eight percent of guidelines cases during the study period were classified as Category VI and in raw numbers that was about 1,500 defendants.

Currently some courts are treating offenders with criminal history scores of greater than 13 as grounds for upward departure. These courts have fashioned a reasonableness standard to review sentencing choices for defendants for which such a departure was selected. Only the 7th Circuit required the District Court to extrapolate a new category.

The Group next assumed a Category VII would be created and then chose to distribute Category VI offenders in new VI and VII in one of two ways:

- | | |
|----------------------|-----------------|
| A. VI - 13-15 points | VII - 16 or 16+ |
| B. VI - 13-19 points | VII - 20 or 20+ |

A statistical profile was then created using these two proposals. Offense type, victim injury and weapon use were not factors in either proposal. Role in offense and offense level factors appear to shift the more serious offenders to Category VII if the second proposal is used. Other factors were examined.

There was very little statistical difference between the two proposals selected, and no statistical justification for creating one rather than the other.

OPTIONS

The Group considered the following issues:

- A. Should VII be added, or should departure be the sole method of sentencing harshly for serious offenders?

The general similarity of Category VI offenders argue against further division.

Offenders with unusually high points may need longer incarceration. A structured departure for such offenders may be recommended in the commentary.

To rely on departure may be to invite disparity, but criminal history points may not truly reflect seriousness.

- B. What should the point spread be if VII is added?

Three points is consistent with the differentiation of other categories, but the higher the point total, the less significant three points becomes. Making the point spread greater can separate out only the most serious offenders for VII.

- C. What new ranges?

Group thought this to be a policy issue.

- D. How to trigger departure?

"Inadequacy" or structure at every three points. The second proposal may reduce disparity, but may not achieve desired result of severe punishment for most serious offender.

- E. Would career offenders be placed in VII or VI?

Because of statutory mandate, problem arises in leaving such offenders in Category VI.

CRITIQUE

This report provides no empirical justification for creating a Category VII. The Practitioners Advisory Group endorses a structured departure commentary to guide but not mandate courts departing for inadequacy as the only change. Allowing a court the continued and supervised authority to depart upward for an "of a kind and to a degree" departure is an adequate avenue to sentence the offender whose crime or crime past demands a greater sentence than called for in Category VI. We oppose any Category VII creation.

3. Narrowing Predicate Career Offenses

Because a crime of violence under the current definition includes barroom brawls and heated verbal disputes, some have suggested that these offenses are not serious enough to constitute predicates for career status. Also minor involvement in predicate drug offenses may harshly include defendants as "career" candidates.

The Group report reviewed the legislative history of the enabling statutes and found that arguments could both be made that this legislation precluded narrowing and allowed narrowing. It appears that "crime of violence" is not defined anywhere in the history. Also because of the "at or near the statutory maximum language", the legislative history might not preclude creating two career offender categories for predicate offenses of lesser and greater severity.

There also appears to be no legislative history impediment to narrow qualification for career status on the basis of age of the prior offenses or on the basis of counting a "spree" as only one offense.

Several cases have ruled that a 4A1.3 downward departure for over-representing an offender's criminal history is inapplicable to career offenders because of the fact that career status is legislatively mandated.

There appears to be disagreement among the circuits as to whether, in determining when a predicate offense is a crime of violence, the court may only consider the statutory definition of the offense or may also look to the individual offender's predicate conduct. In interpreting the "crime of violence" language of 924(e), the Supreme Court has opted for a statutory definition approach.

The Group examined a 50% random sample of career cases for the study period (FY 90) and discovered that the most common instant offense was for drug violations and that weapons or force was used in 40% of instant crimes. Less than one-half of the instant offenses were single acts and in more than one-half of the cases the career offender played a more culpable role in the instant offense. The most common predicate crimes were drug offenses and robberies. Only one-third of the offenders had merely two qualifying predicate offenses. These offenders had a high rate of recidivism. One-half of the sample were convicted of multiple count instant offenses and 37% went to trial. The differential between offense levels before and after career analysis is applied was remarkable. Judges depart downward more often in career cases. Ninety-eight percent of career offenders are male and 48% are black.

The Group indicated an analysis of this sample was continuing but noted that the statistical analysis of the sample indicated more of a problem with application of the existing career guidelines rather than a need to amend.

OPTIONS

- A. (1) Identify and exclude minor offenses from crime of violence definition.

This could prevent harsh results if predicate or instant crime is trivial if allowed by statute, although there may be definitional problems.

(2) Exclude these crimes where the mens rea element is negligence, such as involuntary manslaughter.

Carries out congressional intent.

- B. Disqualifying an offender for career treatment if offender's predicate offenses are both lesser offenses.

- C. Modify career ranges so that serious instant or predicate offenses are at statutory maximum while lesser offenses are near the maximum.

This amendment might mitigate the harsher treatment for minor offenders, but defining lesser offenses may prove difficult.

- D. (1) Restrict crime of violence by modifying the definition of felony so as only to include those crimes so designated by the jurisdiction of conviction.

A better gauge of the seriousness of the offense, although, might foster disparity based on state variances.

(2) Restrict crime of violence to those offenses punishable by more than two years.

- E. (1) Require strict consecutive sequence to limit "spree" inclusions.

By requiring an intervening prosecution between offense career status is accorded to true recidivism.

(2) If predicate offenses were joinable but not related, count as only one offense.

Again, prevents double counting.

CRITIQUE

Obviously Congress failed in not providing a clear definition of crime of violence in its enabling statute. This lack of definition should not now be used nor should it have ever been used to create breadth in determining the scope of career status.

It is clear that bar fights and arguments which do not lead to injury are now absurdly included in the career categories if a jurisdiction happens to provide for more than one year's punishment.

The Practitioners Advisory Group favors total exclusion of such trivial offenses for career qualifiers rather than creating a double career structure.

Exclusion by definition is problematic and indeed has proven quite difficult.

Exclusion by raising the qualifying maximum punishment level to a maximum of greater than two years and by requiring that the jurisdiction of conviction regard the predicate offense as a felony are essential narrowing amendments.

The two-year requirement will eliminate most trivial offenses and should be adopted even though some serious conduct may escape career treatment. Again, career status cannot be tolerated for minor offenders and breadth of coverage must not be the Commission's goal. Rather, lenity should especially limit the harshest punishments to only those who clearly deserve such treatment.

The felony predicate insures that a state conviction was obtained under conditions approaching due process. Many misdemeanants are processed in "meat market", "justice of the peace" type court systems which have spawned the very criticisms which fostered the creation of guidelines sentencing systems. A conviction obtained in such systems should not subject the offender to career treatment. Only felony convictions obtained in record proceedings after indictment under circumstances comporting with traditional notions of fair play and justice should count as predicate offenses when the end result is the harshest of punishments.

The Commission should note that the only appropriate question here is recidivism and not the seriousness of the instant offense which is treated elsewhere in the guidelines or by departure.

The Practitioners Advisory Group also supports requiring sequencing and broadening the definition of "related" to include offenses which would have been joinable for trial to prevent double counting.

4. Modifying the Decay Factor

The premise of this proposition is that career status punishes recidivism so that excluding older convictions does not follow logically.

Six hundred cases were examined and 2.5% were discovered to result in inclusion if the decay factor were eliminated.

OPTIONS

- A. (1) Eliminate entirely the decay factor for career offenders.
(2) Eliminate for all offenders.
- B. (1) Construct a new decay factor requiring a crime-free period, not just simple conviction age for career offenders.
(2) This new factor should apply to all offenders.
- C. Except a career offender only if both predicate offenses are outside the period.
- D. Begin the limitation after parole rather than incarceration.
- E. Modify 4B1.2(3) so that a prior conviction is counted as of the date of arrest and not conviction (for instant offense?)

CRITIQUE

No empirical need has been demonstrated for any of the proposed changes. The Practitioners Advisory Group opposes any modification.

The decay factor recognizes that convictions obtained more than 15 years before the instant offense are simply not reliable enough to cause inclusion in career status. Such convictions may have been obtained in state systems before the full breadth of due process was applicable to those systems. After the passage of time litigating the constitutional validity of such convictions may prove impossible. A 2.5% increase in coverage cannot justify the possibility that ancient convictions may not have been convictions based on actual guilt.

5. Clarification of Application

- A. Eliminate double effect of career offender treatment and statutory enhancement.

B. Insure that career offenders receive acceptance of responsibility.

C/D. Train officers to eliminate error in miscounting excluded convictions.

E. Clarify 4A1.3 applicability to career offenders.

D. Clarify 4A1.2 re: YCA convictions.

CRITIQUE

Previous report totally eliminating mandatory minimums would solve double coverage. Absent adopting double coverage should be eliminated. Increased training is favored by Practitioners Advisory Group. 4A1.3 should apply to career offenders and YCA should not be counted.

AMENDMENTS TO SENTENCING GUIDELINES

The Decay Factor

Option 1:

No change in Guidelines.

Reason for No Amendment: The addition of another 2.5% of offenders¹ as career offenders is statistically insufficient to offset the recognition that convictions obtained more than the required number of years prior to the instant offense may not be reliable enough to be used to justify an instant sentence at or near the statutory maximum.

¹If the decay factor were eliminated for career offenders, the Commission estimates that 2.5% of offenders would qualify for career status.

AMENDMENTS TO SENTENCING GUIDELINES

Career Offenders

Option 1:

The Sentencing Commission shall amend §4B1.2 as follows:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (1) The term "crime of violence" means any offense ~~denominated as a felony~~ under federal or state law ~~which is punishable by imprisonment for a term exceeding one year that~~ ~~two years which~~ --
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
- (2) The term "controlled substance offense" means an offense ~~denominated as a felony~~ under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Reason for Amendment: Because jurisdictions provide for a wide variety of maximum penalties for assaultive behaviors which include minor assaults that should not be counted as predicate career offenses, the above restrictions have been added. Also, requiring that the jurisdiction of conviction treat the prior violent or drug offense as a felony insures that the behavior which led to the conviction was viewed as serious by the jurisdiction of conviction and insures that the procedures utilized in obtaining this conviction comports with contemporary standards of due process. These considerations outweigh the disparity inherent in

utilizing events which occur outside of the guidelines setting as part of the guidelines calculus, especially in the context of determining when an offender qualifies for punishment at or near the maximum.

- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c), and the offender had been arrested, tried, or pled guilty, convicted, and sentenced on the first such offense before the commission of the second or subsequent such offense and the current offense occurred after the offender had been arrested, tried or pled guilty, convicted and sentenced on the second such offense. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

Reason for Amendment: The purpose of career offender status is to severely punish those who are likely to repeat serious criminal behavior. Three instances of criminality separated by prosecution presents a sufficient predilection of recidivism to justify severe sentencing. The requirement that these offenses occur in strict sequence after each predicate offense results in a sentence insures that the predicate sentence be given an opportunity to deter subsequent criminal activity and prevents double counting of spree offenses which were not consolidated for sentencing.

AMENDMENTS TO SENTENCING GUIDELINES

Creation of Category VII

Option 1:

No change in Guidelines.

Reason for No Amendment: There exists no current empirical justification for creating a Criminal History Category VII. Those offenders whose sentencing range under Category VI is not sufficiently severe should be considered for departure.

Option 2:

The policy statement contained in 4A1.3 should be amended as follows:

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted, but the court should be guided in determining the degree of departure by conducting an extrapolation from the sentencing ranges which actually exist in the sentencing table. For example an offense level 10 offender who has 16 criminal history points would have a sentencing range of 24-30 months. If such an offender qualified for the departure authorized by this section, the court should consider the basis for the departure and depart accordingly. The logical next range applicable by extrapolation from the sentencing table would be 30-37 months and under most circumstances a sentence within this range would be appropriate. However, the actual range selected by the court should depend upon the reasons which justify the departure which in appropriate circumstances may result in a

more severe sentence than suggested by mere extrapolation. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

AMENDMENTS TO SENTENCING GUIDELINES

Creation of Category 0

Option 1:

The Sentencing Commission shall create a Category 0. Qualification for Category 0 shall be determined by conducting the analysis called for in Guidelines §4A1.1 (a) through (f), and §4A1.2 (a) through (p). Category 0 offenders shall be offenders who have no criminal history points after the above analysis is conducted. New Category I offenders shall be offenders who have one criminal history point after the above analysis is conducted.

Category 0 shall contain the following sentencing ranges corresponding to offense levels:

SENTENCING TABLE
(in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	0 (0)
1	0 - 6
2	0 - 6
3	0 - 6
4	0 - 6
5	0 - 6
6	0 - 6
7	0 - 6
8	1 - 7
9	2 - 8
10	4 - 10
11	6 - 12
12	8 - 14
13	10 - 16
14	12 - 18
15	15 - 21
16	18 - 24
17	21 - 27
18	24 - 30
19	27 - 33
20	30 - 37
21	33 - 41
22	37 - 46
23	41 - 51
24	46 - 57
25	51 - 63
26	57 - 71
27	63 - 78
28	70 - 87
29	78 - 97
30	87 - 108
31	97 - 121
32	108 - 135
33	121 - 151
34	135 - 168
35	151 - 188
36	168 - 210
37	188 - 235
38	210 - 262
39	235 - 293
40	262 - 327
41	292 - 365
42	324 - 405
43	360 - Life

Reason for Amendment: Current Category I contains a majority of offenders prosecuted in Federal Court. The creation of Category 0 punishes less severely those offenders who have no countable criminal history points according to criteria applicable to all offenders in Chapter Four. Some statistical justification exists for separating Category 0 offenders from other offenders, by utilizing factors which are currently not used to determine criminal history, such as an offender's arrest history when such an arrest does not lead to conviction. However, because problems exist with utilizing such criteria and because the approach selected preserves the internal consistency of Chapter Four, Category 0 offenders are to be determined on the same basis as all other offenders.