

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#63, Page 64 -- §4A1.2

We believe that there is no reason to develop a specific guideline enhancement for prior similar conduct.

We believe that the problems in §4A1.2 application are inherent in Guideline application and cannot be corrected by more specific Application Notes.

We do not believe that Note 3 is too inclusive.

We do not believe that §4B1.2 should be amended to provide a separate set of instruction re prior crimes of violence or controlled substance offenses.

Finally, we do not believe that the Commission should develop a specific guideline enhancement for prior similar conduct.



Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Amendment No. 63.

We believe that the guideline containing definitions and instructions for computing criminal history should be amended so that sentences for separate offenses are not artificially treated as one. The current guideline states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. "Related cases" are defined as those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." Guideline §4A1.2(a)(2), Application Note 3. It is this last factor that is problematic because it arbitrarily counts sentences in unrelated offenses as a single prior sentence. The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. The current



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rule means that defendants whose backgrounds are replete with criminal convictions based on consolidated proceedings benefit from significant undercounting in the computation of their criminal history score.

To cure this problem we suggest that the third category of related cases for purposes of criminal history be limited to those that were consolidated for trial or sentencing if the counts would have been treated as a single group of closely related counts under the multiple count guidelines, guideline §3D1.2. This limitation would require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under the guidelines. Policy Statement §4A1.3, and Application Note 3 to guideline §4A1.2. We believe that the problem should be corrected by a guideline, not a recommendation regarding the appropriateness of departure.



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The Commission has also asked whether the definitions used in connection with the career offender guideline, guideline §§4B1.1 and §4B1.2, should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses to allow counting of convictions unrestricted by the time periods set forth in the criminal history definitions and instructions. Under the current guidelines the definitions generally applicable in computing criminal history apply to the career offender guideline. Guideline §4B1.2, Application Note 4. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense.



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The limitations on career offender scoring imposed by the criminal history definitions are inconsistent with the statutory mandate regarding career offenders. The statute requires the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). Applying the artificial time limits of the criminal history guidelines to career offenders is simply not in keeping with the career offender provision of law, which was designed to look at the defendant's entire criminal past. The same concerns attach to the development of a guideline for the armed career criminal provision discussed earlier. Beyond these two specific statutory provisions requiring an assessment of the defendant's entire criminal



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past, we believe it would make sense in the future for the Commission to consider exempting violent and serious drug offenses from the time constraints of the criminal history provisions for all offenders.

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
480 MAIN STREET
HARTFORD, CONN. 06103

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

D. Amendment 63. I would not favor a specific enhancement for prior similar conduct. The departure authority in § 4A1.3(e) seems adequate. See United States v. Coe, 891 F.2d 405 (2d Cir. 1989).