

CRIMINAL HISTORY WORKING GROUP REPORT

CATEGORY 0

CATEGORY VII

CAREER OFFENDER

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I. INTRODUCTION

During the past two amendment cycles, the Criminal History Working Group has studied two provisions of the Criminal History Guidelines the Commission identified as potentially problematic: the criminal history "categories" and the "career offender" provisions.

Criminal History Categories

The Working Group first studied amending the criminal history categories during the 1990 amendment cycle. The concern was that use of present categories I and VI resulted in an inaccurate measure of and punishment for a defendant's past criminal behavior inasmuch as the range of prior criminal behavior exhibited by defendants in both of these categories was found to be great. To avoid potential disparity in the types of defendants who are categorized together, the group researched the possibility of creating additional criminal history categories at either, or both, ends of the guideline spectrum: that is, Categories 0 and VII.

With regard to Category I, the guidelines assign defendants with no criminal history points or with one criminal history point to Category I.¹ Accordingly, the following types of defendants are classified together: (1) defendants who have no prior record; that is, no prior arrests, no pending charges, no dismissed charges, and no prior convictions (0 points); (2) defendants who have prior arrests, pending charges or dismissals, but no prior convictions (0 points); (3) defendants who have prior convictions that are not counted under the guidelines because of definitions and instructions under §4A1.2 (0 points);² and (4) defendants who have a prior countable conviction that totals only one point. Thus, while all defendants in category I are treated similarly for purposes of criminal history, the members of the category have dissimilar levels of previous contact with the criminal justice system. That being the case, at the Commission's request, the group has examined the feasibility and consequences of establishing a Category 0 for the "true first offender."³

¹ See §§4A1.1 and 4A1.2.

² E.g., "stale" convictions, military convictions, tribal convictions, foreign convictions, etc.

³ The precise definition of "true first offender" has yet to be articulated. For Monitoring's purpose, however, the "true first offender" is that defendant with no known criminal justice encounter of any kind, that is, no arrests, indictments, or convictions.

At the other end of the criminal history spectrum, defendants with 13 or more Criminal History points are assigned to Category VI.⁴ Unlike the other five criminal history categories, Category VI contains no upper point limit. Accordingly, this open-ended feature results in defendants with criminal history points significantly higher than 13 being treated the same as defendants with only 13 points. The Working Group studied the creation of a new Category VII to the sentencing table as an option to better distinguish between defendants with numerous criminal history points.

Career Offender

The Working Group's analysis of the "career offender" guideline continues work begun during the 1991 amendment cycle. The group considered the advisability of two possible amendments to §4B1.1. One amendment would widen the scope of the guideline by eliminating the requirement that qualifying prior offenses occur within a specified number of years of the instant offense, or, in other words, by eliminating the "decay factor." The other amendment would narrow the scope of the guideline, possibly by identifying and excluding certain types of "less serious" offenses from the definition of "crimes of violence."

In recent years, some have suggested that the existence of a decay factor in determining career offender status is illogical; that is, if an individual has truly made a career out of crime, one might expect that at least one of his qualifying prior crimes might lie outside the ten- or fifteen-year time limit imposed by the decay factor. Yet, notwithstanding a life of crime, this person is not considered a career offender because of the decay factor. Furthermore, it has been noted that the statutory directive makes no mention of a decay factor -- nor do other statutory enhancements, including the Armed Career Criminal Act. It is this criticism that has prompted the Working Group's present study.

The Working Group has also considered narrowing the scope of the career offender guideline by identifying and excluding certain types of "less serious" offenses from the definition of "crime of violence" and "controlled substance offense." Some express concerns that the present definition of these sweeps too broadly and thus overrepresents the seriousness of some defendants' past criminal conduct.

⁴ A defendant may also be in Category VI if he is designated a career offender in §4B1.1 or an armed career criminal in §4B1.4(c)(2).

Note on Options

The options listed within each section below have been identified by the Working Group as having some degree of utility in resolving the issues and problems outlined above. The Working Group has attempted to be inclusive, rather than exclusive, in providing options.

To the extent possible, the options are derived from, and supported by, monitoring data, case file review, and relevant legal considerations. A brief discussion of the policy considerations, advantages, and disadvantages of the amendment follows each option, when appropriate. The discussion is not comprehensive, but touches only on general implications of each option. The Working Group recognizes the existence of additional implications of each option, and intends to explore more fully those implications in the coming period of study and discussion.

The Working Group has not attempted to narrow the list of options to a suggested list of recommended solutions.

II. CATEGORY 0

A. RELEVANT LEGISLATIVE HISTORY

With respect to the issue of creating new criminal history categories, the statute and legislative history do not provide any impediment. The only provision that bears on this issue is 28 U.S.C. § 944(j), which requires the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" This language could be relied on to justify a Category Zero if the Commission determines that the guidelines fall short of the statutory directive to insure that first offenders committing non-serious offenses are given alternative punishments.

B. EMPIRICAL FINDINGS

Methodology:

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used for the empirical analysis. Offenders in Criminal History Category I, for whom court information (SOR) was available, were selected and grouped into three subcategories:

1. True first offenders with 0 points and with no known criminal history of any kind, (i.e. no juvenile or adult arrests or convictions);
2. Offenders with 0 points, but some known criminal history, that is, prior arrests, or convictions; and
3. Offenders with 1 criminal history point.

A statistical profile of the subcategories was constructed to compare the three groups in terms of offense and offender characteristics, and to examine whether true first offenders are significantly different and distinct from the other two groups of offenders included in Criminal History Category I.

Findings:

Cases in Criminal History Category I constitute 61 percent of the total number of guideline cases in FY90. The 9,424 cases in Category I with available court determination form the base figure for the analysis in this section.⁵

A series of criminal history variables from Monitoring data were analyzed to divide Category I cases into three subcategories: defendants with no known criminal justice encounter of any kind (true "First Offenders"), defendants with some past criminal activity (arrests only, or uncounted convictions) and 0 criminal history points ("Offenders with 0 Points"), and defendants with 1 criminal history point, ("Offenders with 1 Point"). Of the 9,424 defendants in Category I, 5,426 (or 57.6%) are First Offenders; 2,554 (or 27.1%) are Offenders with 0 Points, and 1,444 (or 15.3%) are Offenders with 1 Point.

The three subcategories of defendants were compared on a variety of offense, offender, and case processing variables, as reported in Tables 1 to 15 in Appendix B-A. Following are some of the findings from these comparative analyses.

Offense Behavior Characteristics:

1. **Offense Type:** There seems to be some difference between first offenders and other offenders in Category I in terms of their offenses of conviction (see Table 1). First offenders seem to be comparatively more concentrated in embezzlement, less in robbery, drug distribution (which is still at least 40% within each subcategory), and firearms violations. This fact, in many ways, drives the remainder of the findings in this section, for the severity of offense behavior, its processing and punishment are closely related to the offense type itself.
2. **Injury to Victim:** While victim injury figures for the instant offense are overall low in Category I cases (see Table 2), it is lowest for first offenders (0.7%), followed by offenders with 1 point (1.8%), and offenders with 0 points (2.8%).
3. **Weapon or Threat:** Similarly, the presence or use of threats and weapons in the instant offense is lowest in the subcategory of first offenders (2.7% of cases), compared to offenders with 0 points (6.3%) and offenders with 1 point (5.8%) (see Table 3).

⁵ The total number of cases for specific tables may vary, due to the exclusion of cases for which one or more of the variables analyzed is missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

4. **Scope of Criminal Activity:** It appears that first offenders are much more often involved in single criminal acts, and less often in ongoing criminal activity, than are the two other offender subcategories (see Table 4).

5. **Role:** First offenders also tend to act alone more often, and when acting with others, they seem to share slightly less culpable roles (see Table 5).

6. **Offense Level:** First offenders show a higher concentration in the lower offense levels than do the two other subcategories of defendants (see Table 6). Fifty two percent (52%) of first offenders, compared to only 44.6 percent of offenders with 0 points and 46.5 percent of offenders with 1 point are at offense levels providing for alternative sentencing options (Level 12 or below); while 14.3 percent, 18.4 percent and 17.6 percent of these subcategories, respectively, are in the highest offense levels (Level 27 or above).

Case Processing Characteristics:

7. **Counts of Conviction:** While the majority of all cases have single count convictions, this finding is somewhat more so for first offender cases (79.5% versus 75.9% and 75.5 % in the other subcategories) (see Table 7).

8. **Sentence Type:** Corresponding to a generally lower offense level, (see Table 6), first offenders also benefit more from alternative community based sentences than do their counterparts with 0 or 1 criminal history points (see Table 8). Fully 36 percent of the first offenders, compared to only 24.5 percent and 27.5 percent of the other subcategories, respectively, receive probation of some form.

9. **Length of Probation:** When given probation, first offenders also tend to receive shorter terms (15.5% up to 12 months, 37% up to 24 months) than offenders with 0 points (10.9% up to 12 months, 28% up to 24 months) and offenders with 1 point (11.5% up to 12 months, 31% up to 24 months) (see Table 9).

10. **Length of Incarceration:** Of those Category I offenders sentenced to incarceration, there seems to be little variation by category (see Table 10), other than perhaps first offenders receiving slightly more of the shortest sentences (up to 12 months), and slightly less of the longest ones (120 months and above).

11. **Sentence Relative to Guideline Range:** In relation to their final guideline range, many more of the first offenders receive lower sentences (29% below range, 40.5% at the bottom of the range) than do the other subcategories (25.6% and 24.1% below range, 33.6% and 35.4% at the bottom of the range, respectively); with less above range departures as well (see Table 11).

Offender Characteristics:

12. **Offender's Sex:** Both in relation to the entire federal population of defendants, and those in Criminal History Category I, the percent of females is significantly higher (27% versus 15% and 15%) in the first offender subcategory (see Table 12).
13. **Offender's Race:** Proportionately more Hispanics and less Blacks comprise the first offender group than the other two subcategories (see Table 13).
14. **Offender's Marital Status:** A significantly higher percent of first offenders compared to offenders with 0 or 1 points are married, (47% versus 38% and 37%) a fact perhaps linked to the sex variation found between the categories (see Table 14).
15. **Offender's Education:** Considerably more of the first offenders than offenders with 0 or 1 points completed at least high school or more (see Table 15).

Some other variables, such as circuit, mode of conviction, and offender's age show either no or only slight variations among the subcategories of offenders, without any discernable pattern.

In summary, it seems that the group identified as First Offenders for the purposes of this analysis seems to be sufficiently different on a host of offense, offender, and case processing variables. Specifically, they are engaged proportionately more in **non-violent white collar crimes** and less in violent or drug offenses, a factor reflected in some of their offense behavior characteristics, case processing, and sentence type. Adding to the above, the existence of no prior encounter of any kind with the criminal justice system might justify some form of consideration for this offender subcategory at sentencing.

C. OPTIONS

Two general questions require attention in connection with this issue: (1) what class of "first offender" might be placed in a new Category 0; and (2) what specific alternative punishments should be applied to that class? The Criminal History Working Group proposes only to address the first issue; the second issue of developing specific alternative penalties that apply to the first offender will be left to the Alternatives Working Group.⁶

⁶ Such alternatives might include, for example, Chapter Two adjustments to the offense level, Chapter Four adjustments, the establishment of a separate criminal history category, or expansion of the availability of probation or other alternatives to imprisonment.

Issue 1 -- Establishing Classes of Offenders

Various classes of offenders might be established with the objective that they receive alternative, less severe, punishment. Such a division of Category I offenders into two classes -- Category 0 offenders and Category I offenders, with the former being punished less severely than the latter -- presumably would be based on two foundations: different offender and offense characteristics, or different criminal histories, might vary in some way.

Class I -- "True First Offender" -- a person with no criminal history points, and no known criminal history of any kind, as either a juvenile or an adult, including no contact with any criminal justice system of any kind.⁷

Class II -- "First Offender" -- a person with no criminal history points who may have had contacts with the criminal justice system, such as arrests, or dismissed charges, that, for constitutional reasons, generally could not be considered in determining a criminal history score. Such persons might or might not have been proven to have committed the criminal conduct that was the subject of an arrest or a dismissed charge, or even of a conviction reversed on constitutional grounds, when it was clear that the defendant was factually guilty of the conduct for which he was charged.⁸

Class III -- "Offender with 0 Points" -- a person with no criminal history points, but (1) convictions that are presently not countable by the guidelines; that is, stale convictions, foreign or tribal convictions, expunged convictions, or (2) with certain types of "serious" prior or instant convictions. (These two groups are not necessarily mutually exclusive, and some combinations are possible).

Implications of Distinguishing the Classes: it would appear difficult for the Commission to justify a criminal history score enhancement as a result of unadjudicated charges on the ground that the existence of such charges suggests that the defendant has in fact been guilty of wrong-doing.⁹ Indeed, there would appear to be serious constitutional obstacles to the use of an arrest record, by itself, to enhance a criminal history score,

⁷ Such offenders might be considered to include persons who simply admit to having illegally entered the United States. Such admitted entry might be considered at least as serious as an arrest, where an arrestee/detainee has not necessarily admitted the unlawful conduct. Nevertheless, this admittedly illegal alien status does not rise to the level of a contact with the criminal justice system. An offender in such a situation might be more appropriately compared with the offender whose criminal conduct, whether or not admitted, was otherwise unknown to the criminal justice system.

⁸ Departure language addressing such situations might be included in commentary.

⁹ As now written, §4A1.3 provides that "a prior arrest record itself will not be considered" as a ground for departure based on inadequacy of the criminal history.

although proof of the conduct underlying the charge arguably could be a basis for refusing to give "true" first offender treatment, just as it is now a ground for upward departure. In addition, if the Commission did decide to enhance punishment for persons with arrest records, such a decision would have to be based on the notion that the commission of a crime following exposure to the criminal justice system, even if only an arrest, suggests a greater prediction of recidivism. Of course, use of classes II or III present some practical difficulties in determining the existence of certain aged, tribal, foreign, or expunged sentences.

Option 1:

No change from the present system.

Implications: offenders with no prior arrests or with no prior convictions who generally have less serious offender characteristics and offenses than Category I offenders with prior uncounted convictions, would continue to be treated as harshly as the latter offenders. On the other hand, white collar offenders, who some believe to be traditionally overpunished, are disproportionately in the "true first offender" class, and would receive an additional reduction in sentence, if the Commission lowered the present sentencing range for true first offenders.

Option 2:

Modify the existing sentencing table, or other guidelines, to punish one of the above classes of offenders less severely than other classes who make up all Category I offenders.

Implications: The Commission would have to identify the offenders that it wished to benefit by creating a new classification and then would have to determine how to quantify the reduction for the new group. Notwithstanding these drafting challenges, however, the modification would appear useful if offenders with differing levels of prior contact with the system, in a constitutionally acceptable manner, given the correlation between prior contacts and pertinent offender characteristics.

Option 3 – Alternative Punishments for First Offender Class:

Having identified the various classes of first offenders for whom alternative penalties might be indicated, the Criminal History Working Group defers to the findings and recommendations of the Alternatives Working Group with respect to specific alternative punishments for the selected class of first offenders (see footnote 7 and accompanying text, supra).

III. CATEGORY VII:

A. RELEVANT CASE LAW

Upward Departures Due to Inadequacy of Criminal History Score

One aspect of guidelines application that bears on the proposal to add a Category VII to the Sentencing Table is the manner in which courts presently deal with defendants who have criminal history points in excess of 13. Reported appellate decisions show three different approaches to reviewing upward departures in such cases. One approach is to use a rather loose standard of "reasonableness" or "proportionality" in determining whether a departure was proper. United States v. Russell, 905 F.2d 1450 (10th Cir.), cert. denied, 111 S.Ct. 267 (1990); United States v. Brown, 899 F.2d 94 (1st Cir. 1990); United States v. Rogers, 917 F.2d 165 (5th Cir. 1990), cert. denied, 111 S.Ct. 1318 (1991); United States v. Christoph, 904 F.2d 1036 (6th Cir. 1990), cert. denied, 111 S.Ct. 713 (1991).

Another approach is to extrapolate new categories on the criminal history axis of the sentencing table. Only the Seventh Circuit has required district courts to follow this method when departing beyond Category VI. United States v. Schmude, 901 F.2d 555 (7th Cir. 1990). The Fifth and Tenth Circuits have held that such an approach satisfied the reasonableness test. See e.g., United States v. Kalady, ___ F.2d ___, 1991 WL 153144 (10th Cir. 1991); accord, United States v. Suarez, 939 F.2d 929 (11th Cir. 1991).

A final approach is to treat a defendant with an especially aggravated prior criminal history as if he were a career offender. United States v. Joan, 883 F.2d 491 (6th Cir. 1989); United States v. Gardner, 905 F.2d 1432 (10th Cir.), cert. denied, 111 S.Ct. 202 (1990).

B. EMPIRICAL FINDINGS

Methodology:

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used for the empirical analysis. Offenders in Criminal History Category VI, for whom court information (SOR) was available, were selected and divided following two options:

1. Category VI = 13-15 points, Category VII = 16 or more points;
2. Category VI = 13-19 points, Category VII = 20 or more points.

Offender profiles were constructed for both options, including offense and offender characteristics, for a comparative analysis of cases that would constitute a new Category VII.

Findings:

The cases in Criminal History Category VI constitute approximately 7.9 percent of all the guideline cases in FY90. The 1,590 defendants in this category with available court determination form the basis of an empirical comparison of two options to create a new category VII.¹⁰ Option I would limit category VI to 13-15 points, thereby dividing the 1,590 applicable cases to 32 percent in Category VI, 68 percent in Category VII. Option II would cap category VI at 19 points, placing 44 percent of the 1,590 applicable cases in Category VI and 56 percent in Category VII.

Following is an initial comparison of the two proposals, based on empirical findings of the offense, offender, case processing and criminal history profiles of relevant cases. (See Tables 16-30 in Appendix B-B).

One note of caution in interpreting findings of this section is in order: all of the defendants sentenced as career offenders are included in current Category VI, independent of the number of their criminal history points, thus affecting the distribution of a series of variables such as primary offense type and offense level, plea rate, departures, and sentence length. Under both options for alternate Categories VI and VII, career offenders would remain in Category VI (unless the Commission decides to amend §4B1.1), except when a career offender's criminal history points exceed the cap for Category VI.

Offense Behavior Characteristics:

1. **Offense Type:** There is no clear indication in the findings that the two options used in creating Category VII would significantly alter the internal distribution of within-category cases by primary offense type (see Table 16).
2. **Victim Injury:** Approximately three percent of all cases in Category VI involve some degree of victim injury, and that percentage would remain fairly constant under both options in the new categories.
3. **Weapon or Threat:** Seventeen percent of all cases in Category VI involve some form of threat or weapon in the offense conduct, with 8 percent of cases in the category having a firearm as the weapon used. Again, this percentage seems to remain unaffected by either option in creating the new categories.

¹⁰ The total number of cases for specific tables may vary due to the exclusion of cases for which one or more of the variables analyzed is missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

4. **Role in the Offense:** The two proposals appear to create some shift in the types of cases included in the new categories by offender's role. While option I leaves an equal proportion (57%) of cases where the offender acted alone in Categories VI and VII, option II shifts proportionately more of these cases to Category VI (61.5% versus 53.4%). Similarly, for cases where the offender was not acting alone, option II seems to move proportionately more of the higher role/culpability cases to Category VII than does option I (see Table 17). There is no similar pattern apparent, however, when examining the scope of criminal activity.

5. **Offense Level:** The within-category distribution by offense level seems to shift toward a somewhat higher concentration of the more serious offenses in Category VII under option II than under option I (see Table 18).

Case Processing Characteristics:

6. There is no discernable variation between the alternate categories by circuit, by number of charges (with approximately 69% of all cases single count), or by plea rate (approximately 83% in both categories under either option).

7. **Sentence Type and Length of Incarceration:** The majority of all Category VI cases received a sentence of incarceration. Only 32 (2.1%) of all cases were given probation, with 11 of those sentenced to a term of probation longer than three years. The remaining 98 percent of cases were sentenced to prison, with the length of imprisonment varying somewhat between Categories VI and VII based on the option applied (see Table 19). There is also a similar though slight shift between options in the position of sentences relative to the guideline range (see Table 20).

Criminal History:

8. **Career Offender:** The career offender guideline was applied in 30 percent of all cases in Category VI. Not surprisingly, the proportion staying in the new Category VI is considerably affected by the option chosen: 42 percent of the category capped at 15 points would be comprised of career offenders compared to 35.8 percent of the category capped at 19 points (see Table 21).

9. **Commission of the Instant Offense Under Criminal Justice Sentence, and/or within Two Years of Release:** On both of these measures, the two options create different within-category distributions, in the general direction of less recent criminality in Category VI when capped at 15 as compared to when capped at 19 (see Tables 22 and 23). Findings on the offender's criminal justice status at the time of the offense show a similar trend (see Table 24).

10. **Indicators of Prior Encounters with the Criminal Justice System:** A set of available factors on criminal history was reviewed in constructing a comparable profile of offenders who would be included in Categories VI and VII under the two alternatives. While the alternatives would create little difference in the distribution of offenders by juvenile convictions (with approximately 24 percent of all current Category VI cases having one or more such conviction), they differentiate between the subgroups of offenders by their numbers of adult convictions (see Table 25).

The incarceration history of offenders in current Category VI is varied: 41 percent of them had received at least one prison term of five years or longer, this percentage being consistently higher for new Category VI (46%) than for new Category VII (38.5%) under either option (see Table 26). The difference is more pronounced, but in the same direction, for offenders who had received at least one prison term one to five years long (see Table 27), and offenders sentenced to one or more prison terms of 31 days to one year, (see Table 28).

There is some variation in the number of prior revocations offenders have had in optional Categories VI and VII (see Table 29), with the caveat that there might be an inverse relationship between the number of criminal history points (based on the number and severity of prior sentences), and the number of revocations (possible only once the offender is on probation/parole).

Finally, the percentage of offenders with prior convictions for offenses similar to their instant one appears to be higher for Category VI under both alternatives (see Table 30). Again, this possibly reflects the presence of career offenders in that category, defined as a prior and instant combination of only two offense types (*i.e.*, violent or controlled substance offenses).

Offender Characteristics:

11. **Reviewing background factors** such as the offender's sex, race, age, marital status, and education, no clear discernable patterns emerge in the within-category distributions between the two options for dividing Category VI.

In summary, although a numerically more even division of cases into alternative categories occurs when capping the new Category VI at 19 points, neither option seems to create two naturally distinct groups, partially due no doubt to the confounding effect of career offenders within this group of cases. Another issue to consider is the possible reversal of the meaning of criminal history points beyond a certain number. Some offenders, for having the opportunity to accumulate a large number of points, must have committed less serious/violent crimes, resulting in shorter, less incapacitating sentences. Conversely, the offender accumulating a number of serious violent crimes would be more likely to have been stopped from repeat offending by a lengthy prison term.

C. OPTIONS

The following issues arise with respect to increasing penalties for defendants with higher criminal history point totals. Various options to address the proposed Category VII might be drawn from virtually any combination of resolutions of the issues listed below.

Issue 1:

Should the sentencing table be changed to add a new Category VII? Or should the more serious offenders continue to be sentenced more harshly solely through departure?

Implications: a system requiring departures in order to sentence offenders higher than Category VI would allow sentences of the majority of persons with higher point totals to remain where they are currently, while permitting the most serious offenders to receive higher sentences. The general similarity of Category VI offenders in terms of offender and offense character tends to argue against a further division of the category -- such a division might arbitrarily punish relatively similar offenders differently, particularly where a difference in three points at these high point levels becomes less and less meaningful. Nevertheless, there can be little question that offenders with unusually high criminal history point totals (e.g. twenty or more) might be extremely recalcitrant and serious offenders who may deserve appropriately severe sentences. A structured departure might be recommended in commentary. Nevertheless, since even structured departures are less frequently used, and less consistently applied, mere reliance on departures to execute such sentences may result in disparity. The creation of a Category VII may reduce the number of departures now felt to be necessary.

Finally, data show that in a number of cases, the more serious offender is not necessarily the one with the greatest number of points, but could be the offender with a small number of convictions for serious offenses resulting in lengthy terms of imprisonment that precluded commission of additional countable crimes. Increasing punishment based on point totals alone may not capture the serious offender.

Issue 2:

If a new Category is added, what should be the point spread of the new Category (three points, seven points, or more)?

Implications: consistency with the current sentencing table might indicate the need for a three-point spread within the Category. Such a spread approximates the points received for a lengthy sentence. Nevertheless, as the total number of criminal history points increases, the addition of only three points is proportionately less significant -- a larger point

spread of perhaps seven points might be called for, thus restricting to the most serious offenders any penalty that is increased under the new Category. A three point spread also results in a category with a relatively small population.

Issue 3:

If a new Category is added, what should be the appropriate guideline ranges for the new Category?

Implications: this appears to be almost exclusively a policy decision for the Commission to consider. Consistency with the current graduated penalty structure may be called for, or increased ranges appropriate to the seriousness of the offenders in the new Category may be required. Empirical data suggest no particular choice of range will result in a well-differentiated population.

Issue 4:

If the offender with high criminal history point totals is subject to departures, (1) under what conditions might a departure be entered (general sense of inadequacy of criminal history; or more strict triggering for every [three] criminal history points); and (2) how would the departure be structured (by some principle of reasonableness, analogy to career offender, 10-15% extrapolation of the guideline range)?

Implications: Where a 10-15 percent extrapolation is not required, relatively severe and unstructured sentences might occasionally result from these departures although such severe, less structured departures have sometimes been considered essential to a just punishment of unusually serious offenders (see section on case law).¹¹

A departure system based on specific point total increase (e.g., every three points) may overrepresent the importance of points at these upper levels. See empirical data suggesting more serious offenders in Category VII may have fewer points. Such a system would, however, provide additional structure, and reduce disparity in sentencing of persons with similar criminal history point totals.

¹¹ Judge Stephen Anderson of the Tenth Circuit has written the Commission calling for commentary guidance in the area of structuring §4A1.3 departures for serious offenders. Judge Anderson also suggests that the commentary endorse the approach taken by the Seventh Circuit, and expressly permitted by the Tenth Circuit. See Relevant Case Law discussion at Section A, supra. Letter from Judge Stephen H. Anderson to Chairman William W. Wilkins, Jr., and Commissioner Julie E. Carnes (August 2, 1991).

Note that the present guideline provides for upward departures based on §4A1.3 (Inadequacy of Criminal History), and the extent of the departure must remain consistent with that circuit's particular practice (reasonableness requirement, 10-15 percent increase in range, career offender analogy).

Issue 5:

How will career offenders be treated where the career offender lacks the "earned" criminal history points to be subject to the new Category VII? Should the career offender with inadequate points to achieve Category VII remain in Criminal History Category VI, or should the offender be placed in the newly created Category VII?

Implications: The current sentencing table has been established so that combinations of Category VI and the appropriate offense level generally trigger a sentence "at or near the statutory maximum," as required by statute. However, placement in Category VII generally would achieve similar sentences at the maximum, and such a rule might appropriately require career offenders to be sentenced at least as high as any other offender. Of course, in combination with placing career offenders in Category VII, the offense level for each type of career offender could be lowered to result in the same range as would currently apply.

IV. CAREER OFFENDER -- NARROWING QUALIFYING PRIOR CRIMES

A. INTRODUCTION

The Working Group has considered narrowing the scope of the career offender guideline by identifying and excluding certain types of "less serious" offenses from the definition of "crime of violence" and "controlled substance offense". Some express concern(s) that the present definition sweeps too broadly and thus over-represents the seriousness of some defendants' past criminal conduct.

"Crime of violence" is defined in §4B1.2(1) as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another...." Pursuant to this definition, some statutes may meet the elements of threatened or actual use of force, but the conduct needed to satisfy those statutes may be less serious in nature than the conduct that one generally envisions as constituting a crime of violence. For example, in some states, a barroom brawl is subject to conviction under a felony assault statute or a heated verbal dispute with an acquaintance can constitute a violation of a terroristic threat statute.

Likewise, the definition of a "controlled substance offense" stated in §4B1.1(2) as--"an offense under federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance..."--can include drug related offenses in which a defendant was a minimal participant, as well as conduct in which the defendant was a more active player. As a result, individuals whose prior conduct has not been perceived previously by courts to warrant severe imprisonment may meet the definition of a career offender and find themselves facing a more severe punishment than more serious offenders involved in the instant offense.

B. RELEVANT LEGISLATIVE HISTORY

The career offender provision is the result of a congressional directive to the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the **maximum** term authorized" for adult defendants who have been convicted of a felony that is "a crime of violence" or one of a list of controlled substance offenses, and who have "previously been convicted of two or more prior felonies, each of which is a crime of violence" or one of the same list of controlled substance offenses. 28 U.S.C. § 994(h). This provision has raised three questions of statutory interpretation concerning the narrowing of the present guideline definition concerning career offender status:

- (1) Does the Commission have latitude to narrow the definition of "a crime of violence"?

(2) Does the language "at or near the maximum term authorized" permit the Commission to create different ranges for career offenders who have committed different types of prior offenses?

(3) Did Congress express any intent on whether the application of a career offender guideline should be affected by:

- (A) the age of a defendant's qualifying prior convictions;
- (B) how close, in time, the defendant's qualifying prior convictions were to each other?
- (C) the timing of the qualifying prior offenses. Specifically, does the phrase "previously been convicted of two or more felonies" permit the Commission to require that the offense underlying the second prior felony follow conviction for the first felony or does this language require the triggering of career offender status when there merely exists two instances of qualifying prior conduct constituting two separate convictions.

1. Does the Commission Have Latitude to Refine "Crime of Violence" Definition?

The definition of "a crime of violence" under the career offender guideline has been amended three times since the guidelines went into effect. In the original version, the Commission simply referenced 18 U.S.C. § 16 in the guideline and the commentary to §4B1.2 stated:

"a crime of violence" is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.

U.S.S.G. §4B1.2, comment. (n.1).

The Commission amended this definition in 1989. In the guideline, itself, the Commission deleted its reference to 18 U.S.C. § 16 and instead provided a definition that

tracked the definition of a "violent felony" found in §924(e) (Armed Career Criminal Statute) . The first prong remained the same ("has as an element the use, attempted use, or threatened use of physical force against the person of another"), but the second prong was modified to read that the offense is a "crime of violence" if it "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." The commentary continued to list certain "included" offenses, and basically restated the language from the guideline.¹² In fact, the 1989 amendment made the guideline definition identical to the section 924(e) definition of "violent felony," except that the guideline requires "burglary of a dwelling" rather than just a "burglary," as is specified by §924(e).

The 1991 amendments make two more changes to the commentary. The second prong now reads:

(B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

U.S.S.G. §4B1.2, comment. (n.2). The commentary also now states that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. As noted in the case law summary section of this report, this approach -- focusing on the elements for which the defendant was actually convicted -- is the same approach that the Supreme Court recently took in interpreting 18 U.S.C. § 924(e). See discussion of Taylor v. United States, 110 S.Ct. 2143 (1990), *infra*.

From the very beginning, the Commission has stated that certain offenses (*e.g.*, murder and robbery) are always crimes of violence. A related question is whether the Commission may also state in the guideline that certain offenses that would otherwise meet the definition of a crime of violence should not be considered in determining career offender status. This question was addressed in a memo last year by General Counsel John Steer. See Appendix. That memo, which was part of last year's Criminal History Working Group Report, concluded that a sound argument could be made that the Commission has the latitude to exclude less serious crimes from the definition of "crime of violence" under the career offender guideline.

Reaching this conclusion requires an examination of the legislative history of §994(h), which refers to instant and prior offenses that are "crime[s] of violence." The Senate Report on the Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, in the portion

¹² According to Appendix C, Amendment 268, "[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)."

discussing this subsection, does not elaborate on the meaning of the term "crime of violence." Elsewhere in the Act, however, Congress added a new section to Chapter 1 of Title 18 of the United States Code, 18 U.S.C. § 16¹³ which defines the term "crime of violence." Thus, the inquiry is two-fold: (1) did Congress intend to apply the definition of "crime of violence" found in section 18 U.S.C. § 16 to 28 U.S.C. § 994(h); and if so (2) does that definition prevent the Commission from providing a narrower definition of the term for purposes of the career offender guideline?

As noted above, the Senate Report does not define "crime of violence" in its discussion of section 994(h). In fact, nowhere in the Report's discussion of any of the new Title 28 provisions does it define that term. Nor does it even make a reference to the other part of the Comprehensive Crime Control Act [CCCA] -- Title II, Section 1001(a), which creates 18 U.S.C. § 16 -- that provides a definition of the term "crime of violence" in Title 18. This omission arguably supports the notion that Congress did not mean to tie the Commission's hands in drafting this aspect of the career offender guideline. That conclusion is buttressed by the fact that in discussing other titles of the Comprehensive Crime Control Act, the Report makes explicit reference to § 1001(a) of the Act. For example, the portion of the Report dealing with Part A of Title X, Miscellaneous Violent Crime Amendments, Murder for Hire and Violent Crime in Aid of Racketeering Activity states:

The term "crime of violence" is defined, for purposes of all of Title 18, United States Code, in section 1001 of the bill . . . Although the term is occasionally used in present law, it is not defined, and no body of case law has arisen with respect to it. However, the phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18 U.S.C. § 16, which defines the term "crime of violence." The definition is taken from S. 1630 as reported in the 97th Congress.¹⁴

Senate Report at 307. This passage also suggests, by negative implication, that this new title 18 provision was meant to be the authoritative definition of "crime of violence" only where that term appears in title 18, rather than title 28.

A contrary argument could just as easily be made, however. That is, Congress having just defined a "crime of violence" in the CCA, if it would seem strange that if intended that a different definition should apply in the Sentencing Reform Act [SRA]. Indeed, supporting this contrary argument is a comment in a House Report to a later bill amending the Sentencing Reform Act. In that report on the Sentencing Guidelines Act of 1986 (H. Rep. No. 99-614, May 28, 1986), the Judiciary Committee made certain "fine-tuning" amendments to the Sentencing Reform Act. In commenting on the Commission's duty in 28 U.S.C. §

¹³ See Pub. L. 98-473, Title II, § 1001(a), 98 Stat. 2136.

¹⁴ See S. 1630, as reported, § 111; S. Rep. No. 97-307.

994(j) to assure that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury," the Report observes that the term "crime of violence" is defined in 18 U.S.C. § 16. H. Rep. at 3, n.21. This comment in a House committee report to a later statute of course is not a binding interpretation of the S.R.A. Waterman's S.S. Corp. v. United States, 381 U.S. 252, 269 (1965) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). This is especially true in light of the fact that the 1986 Act did not alter portions of the S.R.A. dealing with the term "crime of violence." Nonetheless, this passage arguably does give at least a general sense of what Congress meant by a "crime of violence."

Even if Congress had the title 18 definition of "crime of violence" in mind when it drafted 28 U.S.C. § 994(h), however, the question remains whether Congress meant to deprive the Commission of some leeway in deciding whether particular offenses should be included in such a general definition. The definition in 18 U.S.C. § 16, as noted previously, is: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Assuming 18 U.S.C. § 16 applies then, the Commission arguably could not disqualify felony offenses that have as an essential element such a use of physical force given Congress' evident concern with the application of force against persons.¹⁵ The Commission also would arguably be disqualified from excluding offenses where an element is an attempt or threat to use force, even though the offense does not, by its nature, involve a substantial risk of the use of such force.¹⁶

If, however, the Commission was able to isolate certain types of offenses that by their nature do not routinely present a real risk of the use of force -- and do not have as elements the use or attempted or threatened use of force -- the Commission could arguably exclude

¹⁵ Assuming 18 U.S.C. § 16 applied here, a question might be raised regarding congressional concern with application of force against property.

¹⁶ One risk in trying to carve out a set of "non-violent crimes" from the general class of offenses that have, as an element, the attempted or threatened use of physical force is that the courts would still be bound when applying other statutes that involve the terms "crime of violence" or "violent felony" to treat that set of crimes as "violent" in those contexts. Although, as noted below, the Commission has some flexibility in interpreting its own enabling statute, the courts have less leeway. Confusion may result if a crime is considered a crime of violence under title 18 statutes (including statutory sentencing provisions such as 18 U.S.C. § 924(e)), but not under sentencing guidelines that purport to follow those same title 18 definitions.

such offenses. Such narrowing would be an example of the Commission using its special expertise to achieve its statutory mission to interpret 18 U.S.C. §16(b). See, e.g., *Batterton v. Francis*, 432 U.S. 416, 424-25 (1977). Indeed, the Commission essentially exercised this expertise in excluding "stale" prior convictions for crimes of violence or drug offenses, even though the statute makes no mention of drawing such a distinction.

Of course, while the Commission could decide to identify and exclude certain offenses that do not routinely involve the risk of force, this exercise may accomplish little to remedy the perceived harshness of the career offender guideline. That is, such a revision would not exclude petty assault cases, since force would have been used. The revision would exclude offenses such as involuntary manslaughter which some consider to be crimes of violence.

2. Does the Language "At or Near the Maximum Term Authorized" Permit the Commission to Create Different Ranges for Career Offenders Who Have Different Types of Qualifying Prior Offenses?

The second question involving interpretation of Congressional intent is whether the Commission can structure the career offender guideline in such a way that career offenders convicted of violating the same instant offense can be sentenced under different ranges if their qualifying prior crimes differ in nature? If so, this would allow the Commission to differentiate, for example, between defendants who had different types and numbers of prior convictions or different periods of time in which they remained "crime free."

The guideline states that the Commission should assure that the guidelines specify a term of imprisonment "at or near the maximum term authorized." The legislative history indicates no intent by Congress to limit the guidelines to one career offender sentence range per instant offense. Such a limitation would derive, if at all, from a narrow construction of the word "near" in the above-quoted sentence. In commenting on a proposed amendment to a previous version of the Sentencing Reform Act, Senator Kennedy noted that the provision would assure that a career criminal "shall receive the maximum or approximately the maximum penalty for the current offense." Sen. Edward Kennedy, 128 Cong. Record 26511 - 512, 26515, 26517 - 518 (Sept. 30, 1982). Thus, if the different ranges all assure that the defendant receives "approximately" the maximum for the instant offense, the statute would be satisfied. It is also worth noting that the guidelines currently allow for different treatment of career offenders convicted of the same offense by making an acceptance of responsibility adjustment available. U.S.S.G. §4B1.1.

Accordingly, the Commission could set out two sentencing ranges for a career offender: one range would be "at" the statutory maximum and would likely be the range presently set out in the guideline. The other range would be "near" the statutory maximum and would be lower than this first range.

Determining what criteria would be used to determine which of the two ranges a defendant received could be difficult. Further, as a policy matter, the Commission would have to determine whether the need for a dual system was sufficient to justify the resulting complexity in the guidelines.

3. Did Congress Express any Intent on Whether Application of a Career Offender Guideline Should be Affected by:

- (A) the age of a defendant's qualifying prior convictions;
- (B) how close, in time, the defendant's qualifying prior convictions were to each other?
- (C) the timing of offenses in terms of intervening convictions?

Finally, the question remains whether Congress intended that the operation of the guideline be affected by factors related to the timing of the prior offenses. One such factor is the recency of the defendant's prior conviction. Indeed, the present guidelines require the existence of two qualifying prior offenses that meet the guidelines' "recency" rule. In providing this standard, the Commission obviously felt that it was not contradicting legislative intent. Indeed, the statements of Senators Kennedy and Biden in the Congressional Record focus on the fact that a small number of defendants are responsible for a significant number of serious offenses and that a career will usually begin between the ages of 16 and 22. (Sen. Edward Kennedy, 128 Congressional Record 26517-518, September 30, 1982; Sen. Joseph Biden, 128 Congressional Record 26570, September 30, 1982). These remarks arguably support the exclusion of defendants with older convictions. See Section V Decay Factor, *infra*.

Similarly, the Commission might consider a rule that is more lenient toward a defendant whose qualifying prior convictions were close in time to each other (e.g., an aberrant mini-spree). Can the Commission do this?

Again, the statute makes no mention of this scenario and the Senate Report is similarly silent. Whether or not the legislative history speaks to this question, the Commission decided from the beginning that the rule concerning related cases applies to the career offender guideline. Thus, the defendant with a prior conviction for a crime spree will receive credit for only one prior conviction if the multiple crimes were consolidated for sentencing. If these multiple crimes were not so consolidated, the defendant would be credited for more than one conviction, unless the convictions were otherwise construed to be related. The Commission may wish to amend the guidelines to equalize the treatment for these two offenders. If the SRA does not prevent the present use of the "related cases" rule, it should not prohibit an amended rule that achieves consistency between these two offenders.

Finally, the Commission must consider whether the SRA would prevent an amendment of the guidelines that would make the career offender guideline a true recidivist guideline. That is, the present guideline requires that the defendant commit the instant offense subsequent to sustaining at least two qualifying prior offenses. The Commission might wish to amend this guideline to require that the two qualifying prior offenses also be separated by an intervening conviction or arrest. Again, the legislative history does not speak to this issue.

One could argue that Congress knew how to require such timing of offenses when it wished that result,¹⁷ and did not articulate such a standard in 28 U.S.C. This argument would suggest that Congress was interested in the number of incidents of prior qualifying offenses, not the timing of the behavior with regard to convictions. Nevertheless, as noted above, the fact that the Commission has already provided that only one conviction results when qualifying prior offenses satisfy the related cases definition indicates the Commission's earlier belief that it could look to factors other than the number of occurrences of criminal behavior.

C. RELEVANT CASE LAW

1. Downward departures for career offenders

One issue relevant to the career offender guideline is whether downward departures may be justified by any of the reasons discussed in section 4A1.3 (Adequacy of Criminal History Category). That policy statement embodies the Commission's acknowledgment that the criminal history score may under- or over-represent the seriousness of a defendant's criminal history or the likelihood that he will commit further crimes, and that departures may therefore be warranted. It also provides an example of when a downward departure may be warranted.

One district court has held that the rationale of § 4A1.3 cannot be used in the case of a career offender, because the career offender guideline uses mandatory language, the guideline is legislatively required, and the career offender guideline incorporates other parts of chapter 4A, but not § 4A1.3. United States v. Saunders, 743 F.Supp. 444 (E.D. Va. 1990), aff'd, No. 90-5515, 1991 WL 15433 (4th Cir. Aug. 15, 1991). Despite affirming Saunders, the Fourth Circuit has since ruled that a departure on such a ground is possible. United States v. Adkins, 937 F.2d 947 (4th Cir. 1991). Accord, United States v. Brown, 903 F.2d

¹⁷ See 21 USC § 841(a)(1)(A) to (a)(1)(C) for a sentence enhancement as a result of a prior drug offense, the instant offense must have been committed after the conviction for the prior offense was final.

540 (8th Cir. 1990), and United States v. Hughes, 901 F.2d 830 (10th Cir.), cert. denied, 111 S.Ct. 163 (1990).

On the other hand, three circuits have held that departures based on the relative insignificance of the severity of the instant offense or the prior offenses are improper. United States v. Richardson, 923 F.2d 13 (2d Cir. 1991) (small drug quantity and age of priors were considered by Commission); United States v. Pinckney, 938 F.2d 519 (4th Cir. 1991) (the Commission considered variations of drug quantities in the prior offenses); United States v. Hays, 899 F.2d 515 (6th Cir. 1990) (departure based on quantity of drugs and lack of violence in instant offense is improper). On a related issue, the Seventh Circuit has held that a downward departure for substantial assistance is permitted for a career offender. United States v. Gant, 902 F.2d 570 (7th Cir. 1990).

On this general subject, the Department of Justice recently has requested that the Commission amend the guidelines to prevent a downward departure from career offender status on the ground that the criminal history score overstates the defendant's criminal history.

2. Whether a prior conviction is a "crime of violence"

Another common issue in application of the career offender guideline is how to determine whether an offense is a "crime of violence." Such a determination is important because the guideline applies if the instant offense is a "crime of violence" or a "controlled substance offense," and the defendant has at least two prior convictions for such types of offenses. The commentary to the guideline specifically lists certain offenses that are crimes of violence (these are murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling). U.S.S.G. §4B1.2, comment. (n.2). The guideline also includes offenses that have, as an element of the offense, the "use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. §4B1.2(1)(i). Finally, the guideline includes offenses involving "conduct that presents a serious potential risk of physical injury to another." U.S.S.G. §4B1.2(1)(ii). An application problem has developed concerning this last provision. In particular, the courts have struggled with whether to look beyond the elements of the offense of conviction--either to the language of the charging document or to the manner in which the offense was actually committed--to determine whether the defendant has previously been convicted of a "crime of violence."

Some circuit courts, in analyzing whether the offense of felon in possession of a firearm is a "crime of violence," have shown a willingness to look beyond the elements of the offense, and beyond the manner in which the offense is described in the charging document, to determine whether the defendant's actual conduct presented "a serious potential risk of physical injury to another." These courts have held that if the manner in which the defendant used or possessed the firearm created such a risk, the offense was a

"crime of violence." See, e.g., United States v. Williams, 892 F.2d 296 (3d Cir. 1989) (mere possession is insufficient, but if the defendant fired the firearm he has committed a crime of violence), cert. denied, 110 S.Ct. 3221 (1990); United States v. Thompson, 891 F.2d 507 (4th Cir. 1989) (felon in possession is a crime of violence if the defendant points the firearm at another), cert. denied, 110 S.Ct. 1957 (1990); United States v. Goodman, 914 F.2d 696 (5th Cir. 1990) (felon in possession of a firearm is a crime of violence where there is evidence of an intent to fire the weapon); United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990) (same), cert. denied, 111 S.Ct. 2057 (1991); United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991) (may look to underlying conduct to determine whether defendant's conduct presented a serious potential risk of physical injury); United States v. Walker, 930 F.2d 789 (10th Cir. 1991) (court may consider underlying conduct of defendant). The Ninth Circuit has adopted a categorical approach, holding that this offense is, by its nature, a "crime of violence" due to the inherent serious potential risk of physical injury. United States v. Dunn, 935 F.2d 1053 (9th Cir.), (citing legislative history to 18 U.S.C. § 16), modified, 1991 WL 191645 (9th Cir. Oct 1, 1991) (correcting error unrelated to holding).

The Commission has recently amended the commentary to the career offender guideline (effective November 1, 1991) to address directly the issue whether the conduct underlying an offense may be considered in determining whether that offense is a "crime of violence" for career offender purposes. (USSG § 4B1.2, comment (n.2). The Commission has also explicitly excluded felon in possession of a firearm from the definition of "crime of violence." U.S.S.G. §4B1.2, comment. (n.2). "Under this section, the conduct of which the defendant was convicted is the focus of the inquiry." Id.

In interpreting the prior version, circuit courts have held that the conduct underlying the conviction, even when not part of the charging document, may be examined to determine whether the offense qualifies. This approach operates in both directions. The Seventh Circuit has held that an offense that has an element that would qualify it as a "crime of violence" under section 4B1.2, comment. (n.2), may nonetheless not be a crime of violence if the underlying facts show that physical force was not in fact involved. United States v. Terry, 900 F.2d 1039 (7th Cir. 1990). The D.C. Circuit goes even further by permitting such an inquiry even where the offense is specifically enumerated in the guideline (e.g., robbery). United States v. Butler, 924 F.2d 1124 (D.C. Cir. 1991) (the court may look at the manner the robbery was committed to determine if force was involved); but cf. United States v. Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (interpreting Commission's previous definition of "crime of violence"; may not examine underlying facts to disqualify an offense as a "crime of violence"). In the same vein, the Third Circuit has held that a crime that, by its elements, is not a "crime of violence," may become one if the defendant's conduct presented the requisite risk of injury. United States v. John, 936 F.2d 764 (3d Cir. 1991) (larceny). This, of course, is the same line of reasoning that permitted the courts to conclude that felon in possession of a firearm can be a "crime of violence."

The Ninth Circuit takes a different approach, which seems closest in line with the Commission's 1991 version. It does not permit looking beyond the statutory definition of

an offense in determining whether it is a crime of violence. United States v. Becker, 919 F.2d 568 (9th Cir.), cert. denied, 111 S.Ct. 1118 (1991). Furthermore, when a prior conviction was for violation of a general statute that does not distinguish, for purposes of establishing guilt, between committing a crime in a manner that satisfies the "crime of violence" definition and in a manner that does not, it is not a "crime of violence." United States v. Faulkner, 934 F.2d 190 (9th Cir. 1990).

The Commission's new approach does not appear to go quite this far, because it allows examination of the charging document to see if the "conduct set forth" involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. U.S.S.G. §4B1.2 (n.2) (Nov. 1, 1991).

The Supreme Court has addressed a related issue in the case of Taylor v. United States, 110 S.Ct. 2143 (1990). There the court interpreted language from the "crime of violence" definition in 18 U.S.C. § 924(e) (Armed Career Criminal). (The definition of "crime of violence" in the career offender guideline is derived from section 924(e). U.S.S.G. App. C (Amendment 268)). In particular, the Court decided that the word "burglary" was meant to be a universal one applied equally across the country, regardless of how each state defines the term in its criminal code. The Supreme Court directed that in determining whether an offense fits this universal definition of burglary -- unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime -- lower courts must use a categorical approach, rather than looking at the facts underlying the conviction. That is, a court may look only at the statutory definition of the prior offense, or in those cases where a general statute may be violated in two or more specific ways the court can examine the charging document and jury instructions to see if the defendant was only charged with a burglary or if the jury necessarily had to find all of the elements of a burglary to convict. This rule presumably applies beyond the part of the definition of "crime of violence" dealing with burglary.¹⁸

With these various approaches in mind, a brief summary of what types of offenses have been included and excluded from the "crime of violence" definition is in order. At least two courts have held that larceny can be a "crime of violence." United States v. McVicar, 907 F.2d 1 (1st Cir. 1990) (Tennessee's larceny from a person statute qualifies

¹⁸In footnote 9, the Court noted that it was only dealing with whether offenses should count as "burglaries" for enhancement purposes, and that the government remains free to argue that an offense should count toward enhancement on the basis that it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Despite this limitation of the holding, the three reasons for applying a categorical approach to determining whether an offense is a burglary -- the general language of section 924(e), the legislative history, and the practical difficulties and potential unfairness of a factual approach -- apply equally to determining whether an offense otherwise involves conduct that presents a serious potential risk of physical injury to another.

under any approach, including the categorical one, because it requires the larceny to be directly from the person); United States v. John, 936 F.2d 764 (3d Cir. 1991) (examining underlying facts under the "serious potential risk of physical injury" prong). The Ninth Circuit, following the categorical approach, has included **involuntary manslaughter** as a qualifying prior crime in the context of 18 U.S.C. § 924(c) (using or carrying a gun during and in relation to a crime of violence). United States v. Springfield, 829 F.2d 860 (9th Cir. 1987). Three circuits have included various "threatening communications" statutes. United States v. Leavitt, 925 F.2d 516 (1st Cir. 1991) (state offense of "high and aggravated oral threatening"; court looked at the facts as alleged in the indictment); United States v. Poff, 926 F.2d 588 (7th Cir. 1991) (*en banc*) (categorical approach to "threatening the life of the President"); United States v. Left Hand Bull, 901 F.2d 647 (8th Cir. 1990) (categorical approach to "mailing a threatening communication").

Robberies are specifically mentioned in the commentary to the career offender guideline as "included" offenses. The courts have routinely held that they are indeed included, although not all courts have clearly indicated whether they would be excluded in certain circumstances. See, e.g., United States v. Davis, 915 F.2d 132 (4th Cir. 1990) (analyzing the prior offense under a fact-specific and a categorical approach and concluding that it fits under either); United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same).

D. EMPIRICAL FINDINGS

In examining whether the career offender guideline follows the original intent of the Commission and Congress, one of the specific issues raised was: Is the guideline "narrow" enough in excluding offenders whose qualifying convictions (qualifying prior and instant) are for trivial violent and/or controlled substance offenses?

The Monitoring data base of approximately 30,000 guideline cases sentenced in FY90 was used to generate a sample to study the question of narrowing the range of applicable career offender cases. Actual research findings for this question will be described in the next section.

Methodology:

A 50 percent random sample of all career offender cases was selected, reviewed, and analyzed, to study the offense characteristics and criminal history of the defendant. Specifically, the qualifying prior convictions were analyzed in terms of offense components, type, and severity, in addition to the instant conviction, guideline application, sentence, departure, etc.

Findings:

In the Monitoring data base of guideline cases for fiscal year 1990, 653 cases of career offenders were identified. A 50 percent random sample of these was generated for case review and analysis with the aid of a detailed coding instrument.¹⁹ The following initial analysis is based on the 327 sampled files, and combines information from both the case reviews and precoded monitoring items.²⁰ The coding instrument for sample cases, and Tables 31-50 reporting on findings pertaining to the "narrowing factors" question, are in Appendix B-C.

General Sample Characteristics:

Offense Behavior:

The most common type of instant offense type is controlled substance violations (57.4%), followed by robberies (31.4%). Some form of weapon, force, or threat of force is used in over 40 percent of the actual conduct of these crimes, or as a part of their generic component (see Table 31).

Less than half of the cases are single criminal acts, with nearly 30 percent of them constituting part of some ongoing criminal activity (see Table 32). Concomitantly, in more than half the cases the offender was involved with other codefendants or participants, playing relatively more culpable roles in the offense (see Table 33). The same direction of findings is indicated when analyzing offenders' specific roles in the 170 available drug offenses (see Table 34).

Criminal History:

Tables 35 to 39 detail the sample offenders' prior conviction history for violent or controlled substance offenses, from their first (oldest) to their last (most current) conviction (up to 5). Drugs, robberies, and burglaries are invariably the most common convictions (see Tables 35 and 36). It is interesting to note that one-third of the sample had no more than two qualifying prior convictions (see Table 37). The convictions are also characterized by

¹⁹ See Appendix B for the coding instrument: "Career Offender Case File Summary: Narrowing Factors."

²⁰ The total number of cases included in the various tables may vary due to the exclusion of cases for which one or more of the variables analyzed was missing. In addition, for variables drawn from the FPSSIS files data were no longer available for approximately the last month of FY90.

a high incidence of force used in various forms (weapons, force, or threat of force) in these prior offenses.

The offenders in the sample show a high rate of recidivism, when defined by the number of prior adult convictions, including felonies and misdemeanors, with all "stale" convictions counted as well (see Table 40). The first quartile is three prior convictions, the median is five, and the third quartile is eight.

The most frequent sentence length that sample offenders have had for prior convictions is one to five years, but over 60 percent of the offenders received at least one term over five years, with 80 percent having at least three terms of over five years (see Table 41). More than half of the offenders have at least two instances in which their probation or parole has been revoked (see Table 42). Finally, this sample of career offenders has been free, on the average, for 21 months prior to their instant offense (with the first quartile 6 months, the third quartile 61 months free).

Case Processing:

Almost half of the offenders in the sample were convicted of multi-count cases (see Table 43). Trial is the mode of conviction in 37 percent of the cases, considerably higher than the proportion in the entire guideline population, reflecting the seriousness of career offender cases (see Table 44).

Thirteen percent of the offenders received two or more points for aggravating role in the offense, with only 2 percent receiving point-reductions for mitigating roles. Four percent of the cases were given 1-5 point enhancements for some level of victim injury. Weapon enhancements were imposed in 3.3 percent of the drug violations, and in 10.3 percent of the robberies.

The difference between the original, instant-offense guideline offense level of these cases, and the enhanced offense levels recalculated based on the career offender Guideline are considerable (see Table 45). Perhaps this difference becomes more apparent by comparing the points of offense levels describing the three sample quartiles: 25 percent of the cases are below and 75 percent above ("first quartile") offense level 18 before, and level 30 after career offender application; 50 percent of the cases are below and 50 percent above ("second quartile" or "median") offense level 24 before and level 32 after; and 75 percent of the cases are below and 25 percent above ("third quartile") offense level 30 before and level 35 after. Judges, perhaps as a consequence, tend to depart more often in career offender cases, usually with a departure downward from the guideline range minimum (see Table 46).

The actual sentences imposed are detailed in Table 47. Again, the first quartile point is a 125 months term, the second quartile (or median) is 210 months, and the third quartile is 292 months.

Offender Characteristics:

Virtually all (98%) of the cases processed as career offenders involve male offenders, (see Table 48), with 48.6 percent being Black and 40.1 percent being white (see Table 49). Finally, in clear correlation with the sheer volume and length of their criminal careers, these offenders are on the average older (with a median age of 36) than the general population of guideline cases (see Table 50).

Sample Case Review and Content Analysis

The case review of the over 300 career offender cases is still proceeding, with a painstaking legal analysis of issues such as the exact nature, severity, statutory status (*i.e.*, State definition of the particular violation as a felony or misdemeanor) and penalty ranges of qualifying priors; the possible application of actual offense components instead of elements of the convicted offense; questions about acceptance of responsibility; ratcheting,²¹ etc.

First results seem to indicate more of a problem with definitional issues, interpretations and applications of the guideline than a need to amend it. Beyond this initial phase, however, there is a clear need for more indepth acquaintance with the specifics of these complex cases before any final analysis, conclusions, and recommendations can be presented to the Commission.

²¹ "Ratcheting" in this context occurs when the offender is convicted under a penalty enhancement statute (*e.g.*, 21 U.S.C. § 841(a) (enhancement for prior drug conviction); 18 U.S.C. § 924(e) (enhancement for felons in possession of firearms with prior violent or drug crimes), and where the enhanced statutory maximum, instead of the unenhanced maximum, is used in calculating the career offender guideline.

E. OPTIONS

The following options for narrowing factors might be considered:

Option 1(a):

Identify and exclude categories of offenses that are considered to be "lesser" crimes of violence, even though they have as an element the use or threatened use of force (e.g., non-aggravated assault and/or battery, extortion, threatening communications).

Policy Considerations: The Commissions must determine whether the exclusion of offenses that otherwise meet the statutory definition of a crime of violence is permissible, given 28 U.S.C. § 994(h). Second, if it does decide to exclude specified "lesser" crimes of violence, the Commission must determine whether it wishes to apply this exclusion to cases in which the instant offense is one of those lesser offenses. For example, if the instant offense is a "lesser" crime, it frequently will have a lower statutory maximum penalty anyway--e.g., threatening communications offense- 5 year statutory maximum--such that with the existence of two qualifying prior crimes, whether "lesser" or otherwise, a sentence at or near this lower statutory maximum penalty might be considered appropriate. In contrast, where the instant crime is an offense with a higher statutory maximum--e.g., a drug offense with a 20 year statutory maximum penalty--the use of two "lesser" qualifying prior offenses to trigger career offender status frequently results in a sentence that may appear to be unduly harsh.

Advantages: Could prevent unduly harsh sentences for more trivial crimes of violence. Could prevent courts from departing, with predictably disparate results, when these courts feel that the career offender status is inappropriate. Conversely, inasmuch as some courts are already departing on the ground of overstatement of the seriousness of the criminal history, this amendment would accord similar treatment to offenders whose sentencing court may not choose to depart.

Disadvantages: Identifying "lesser" crimes of violence, either generically or specifically, could be difficult. Further, certain offenses with an element involving force are broad enough to include truly minor, as well as truly serious offenses, particularly where a particular statute is used as a plea statute for more serious offenses.

Option 1(b):

Exclude categories of offenses where the mens rea element is negligence, recklessness, or the like. Offenses excluded might include involuntary manslaughter or

vehicular manslaughter (typically in connection with driving under the influence of alcohol or controlled substances).

Policy considerations: Presumably, few would argue that this amendment contravenes Congressional intent. While crimes such as vehicular homicide arguably fit the definition of crime of violence, it is highly unlikely that Congress envisioned these types of offenses when it referred to crimes of violence.

Option 2:

Exclude the use of two "lesser" prior offenses (e.g., assaults, threatening communications) in determining career offender status. (The above options eliminate the use of any of the lesser offenses.) Similar to the options above, this option prevents the more unjust, if more unusual, situation where a person becomes a career offender solely on the basis of two "lesser" offenses (e.g., two barroom brawls).

Option 3:

Modify the career offender ranges based on statutory maxima so that "serious" instant or prior crimes of violence receive guideline ranges "at the statutory maximum" and "lesser" instant or prior crimes of violence receive guideline ranges "near the statutory maximum" - that is, at a lower level than the more serious offenses.

Similar to Options 1 and 2, this amendment would identify offenses that are "lesser." However, instead of not counting such offenses at all, the offenses would be punished somewhat less severely with a lower offense level than more serious offenses. Such an approach requires a belief that 28 U.S.C. § 994(h)'s "at or near the statutory maximum" permits two separate ranges to be applied -- one at the maximum, and one near the maximum.

Policy Considerations: As noted in Option 1, the Commission would have to determine whether it wished to treat "lesser" instant offenses with a low statutory max (e.g., threatening communication, with a 5 year statutory maximum where the two qualifying prior offenses are armed bank robberies) the same as cases in which the qualifying prior crimes are "lesser" or in which the instant crime is "lesser" (minimal participant in drug deal; 20 year statutory max), but the statutory max is great.

Advantages: This amendment would clearly comport with the Congressional mandate of sentences "at or near" the statutory maximum. It would better calibrate the career offender guideline.

Disadvantages: Again, identifying "lesser" crimes of violence would be difficult. Moreover, determining the offense level and/ or criminal history category of a career offender whose sentence should be only "near" the statutory maximum level would necessarily be arbitrary.

Option 4(a):

Restrict "crime of violence" by modifying the definition of "felony" conviction to include only those felonies so designated by the State in which the offense was convicted.

Advantages: Arguably, looking to a state's classification of an offense as a felony or a misdemeanor, instead of looking to whether the state has set a maximum penalty of more than one year, reveals more about the seriousness of that offense. This option might improve ease of application, since the probation officer would need to review only the state designation of the offense, although it is may well be no more difficult to determine the maximum penalty for a particular offense than it is to determine the label that a State places on it.

Disadvantages: The Commission thrashed this issue out when it originally promulgated the guidelines and apparently decided that use of State labels could create disparity among offenders with similar criminal histories. That is, state definitions of felonies vary widely, with some states considering serious offenses to be only misdemeanors, even though the statutory maximum may be as high as 5 years and the conduct involved may be quite serious (e.g., some drug offenses in some Southern states).

Option 4(b):

Restrict "crime of violence" by modifying the definition of "felony" conviction to include only those offenses with statutory maxima greater than [two] years and a day.

Policy considerations: Further study is necessary in order to determine whether this change would constitute any improvement in the present guideline; that is, are there enough "lesser" qualifying prior crimes that would be included by the present "one year and one month" statutory maximum definition, but excluded by a definition of felony calling for a two year statutory maximum to justify the change. Moreover, research is necessary to determine whether more serious qualifying prior crimes are included in statutes with statutory maxima of two years.

Advantages: Similar to Option 4(a), this approach avoids resort to State labels that may not accurately reflect the seriousness of the offense.

Option 5(a):

Modify the requisite sequence requirement in §4B1.2(3) to require that the prior offenses occur in a strictly consecutive sequence (e.g., prior offense number 1; arrest, conviction, or sentence; prior offense number 2; arrest, conviction, sentence; commission of instant offense). Departures in the case of numerous armed robberies, rapes, and serious violent crimes, not otherwise counted under the modified rule, might be allowable.

Policy considerations: In requiring that each qualifying prior offense be separated by a contact with the criminal justice system, this revision causes the career offender provision to resemble more closely a true recidivist statute. This revision would narrow not the type of crime of violence considered, but the number of such offenses that could be counted. The Commission would have to consider whether such an amendment would comport with Congressional intent, although the Commission's refusal to count "related" qualifying prior offenses in the present guidelines suggests that the Commission has already determined that such a restriction on the timing of qualifying prior offenses is permissible. Further study is necessary to determine how many offenders who are presently classified as career offenders would be excluded by this approach.

Advantages: This approach would exclude double counting, for career offender purposes, of multiple "lesser" offenses or of offenses that by their nature are sometimes committed on multiple occasions in a short period of time; e.g., multiple burglaries, multiple sales of a small quantity of drugs.

Disadvantages: Some offenses may be so serious--e.g., armed robbery, rape, murder--that the multiple commission of these offenses may warrant career offender status, notwithstanding the absence of an intervening contact with the law. For this reason, a departure for such offenses that would otherwise be counted as only one qualifying prior conviction might be necessary.

Option 5(b):

Expand the requirement that the two prior offenses must not be related to provide that even if the offenses are not related--for example, consolidated for trial or sentence-- they should be counted as only one prior conviction if they could properly have been consolidated for trial; that is, joinable offenses under F.R. Crim. P. 8(a).

Advantages: Like 5(a), this option would prevent counting as more than one conviction, multiple qualifying prior crimes that are not separated by a contact with the criminal justice system (arrest, conviction, or sentence) and that could have been properly consolidated by trial. The result removes the disparity of treatment that presently exists as a result of the fortuity of whether the offender was sentenced in one jurisdiction or multiple jurisdictions. Less far sweeping a change than 5(a), however, this provision would still count

as two qualifying prior offenses two convictions for different types of crimes, or non-joinable offenses. Thus, under 5(a), a prior bank robbery and rape that are not separated by an arrest/conviction would count as only one conviction. Under 5(b), these two offenses would not be joinable under Rule 8(a) and thus would count as two prior offenses.

Disadvantages: As noted above, multiple occurrences of particularly serious qualifying prior offenses--e.g., armed robbery, rape--whether or not properly joinable might warrant career offender treatment, given Congressional statements that multiple serious offenses committed by youthful offenders represented a large part of the violent crime in our country. An upward departure for such offenses might be necessary. Application concerns: courts are generally not required to rule on Rule 8(a) questions and this requirement will give them a new rule to learn.

V. CAREER OFFENDER -- MODIFYING THE DECAY FACTOR

A. INTRODUCTION

In drafting the guideline provisions governing career offenders, the Commission employed the same "decay factor" that is used in calculating criminal history, generally. Specifically, with regard to qualifying prior offenses for which the defendant received a sentence of more than one (1) year and one (1) month, the defendant must have served part of his sentence for that offense within fifteen (15) years of the commission of the instant offense in order for the prior offense to count as a qualifying prior offense for the purpose of determining career offender status. For a prior offense in which the sentence was less than one year and one month incarceration, the defendant must have committed the instant offense within ten (10) years of imposition of that prior sentence.²²

In recent years, some have suggested that the existence of a decay factor in determining career offender status is illogical; that is, if an individual has truly made a career out of crime, one might expect that at least one of his qualifying prior crimes might lie outside the ten- or fifteen-year time limit imposed by the decay factor. Yet, notwithstanding a life of crime, this person is not considered a career offender because of the decay factor. Furthermore, it has been noted that the statutory directive makes no mention of a decay factor -- nor do other statutory enhancements, including the Armed Career Criminal Act. It is this criticism that has prompted the Working Group's present study.

B. RELEVANT LEGISLATIVE HISTORY

See discussion, supra, at Subsection B of Section IV (Career Offender -- Narrowing the Qualifying Prior Crimes).

C. RELEVANT CASE LAW

Relevant Sequence and Timing Issues

A relevant issue in the application of the career offender guideline is whether the sentencing for both of the qualifying prior convictions, as opposed to the conviction, alone must pre-date the commission of the instant offense. Under U.S.S.G. §4B1.2(3), (the guideline applies if the defendant committed the instant offense subsequent to sustaining at least two prior felony convictions of either a crime of violence or a controlled substance

²² See U.S.S.G. §4B1.2, comment. (n.4); §4A1.2(e).

offense; the date that a conviction is sustained is the date on which the judgment of conviction was entered. Obviously, the date of entry of the judgment will be later than the date of conviction and will be no sooner than the date of sentencing, although if the court formally enters the judgment several days after sentencing, as some courts do, the date on which a conviction is sustained will be later than the date of sentencing.

Indeed in United States v. Bassil, 932 F.2d 342 (4th Cir. 1991), the Fourth Circuit ruled that the defendant was not a career offender, even though he had been convicted of his second prior offense before committing the instant offense, because the defendant had not been sentenced before commission of the instant offense, inasmuch as he had escaped prison after the second conviction, but before sentencing on it.²³ See also United States v. Belton, 890 F.2d 9 (7th Cir. 1989) (the career offender guidelines applies to a defendant convicted of the second qualifying prior offense **during** the time he committed the instant offense, a conspiracy, because part of the instant offense was committed after the second prior conviction).

Accordingly, to avoid the unintended result that would occur in situations such as that found in Bassil, the Commission might want to amend its definition of the "date a conviction is sustained."²⁴

A related question is whether the conviction (i.e., sentencing) for the first qualifying prior offense must take place before commission of the second qualifying prior offense. In other words, it is clear that the career offender guideline applies to a defendant whose prior history occurs in the following sequence: commission of bank robbery, conviction for the bank robbery, commission of drug distribution offense, conviction for the drug distribution, commission of instant offense. But does the guideline also apply to a defendant whose prior history occurs in this sequence: commission of bank robbery, commission of drug distribution offense, conviction for the bank robbery, (separate and unrelated) conviction for the drug distribution, commission of instant offense?

The Second Circuit has held that the guideline does apply to the second scenario as well. United States v. Chartier, 933 F.2d 111 (2d Cir. 1991). This is consistent with the courts' application of the Armed Career Criminal statute. United States v. Anderson, 921 F.2d 335 (1st Cir. 1990); United States v. Schoolcraft, 879 F.2d 64 (3d Cir.), cert. denied, 110

²³ The court did note the possibility of an upward departure on these facts.

²⁴ Inasmuch as the Commission amended §4A1.2 in the 1991 amendments to provide that prior cases are not related if they were separated by an arrest, it may wish to make the date of the arrest, as opposed to the formal date that a conviction is entered onto the docket, the pivotal date in determining whether the prior convictions satisfy the appropriate sequence.

S.Ct. 546 (1990); but see United States v. Balascsak, 873 F.2d 673 (3d Cir.) (third qualifying prior offense must follow convictions for the first two qualifying priors), cert. denied, 111 S.Ct. 173 (1990). No circuit has held that a prior qualifying prior offense is excluded on the basis that it occurred too soon after the other qualifying prior.

The career offender guideline has a built-in measure of protection in this area by requiring that the convictions be counted separately under chapter 4A before qualifying as separate qualifying prior offenses. U.S.S.G. §4B1.2(3)(B). Nonetheless, some courts have permitted downward departures on the ground that the career criminal's "career" was brief. See, e.g., United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), cert. denied, 111 S.Ct. 691 (1991) (the length and scope of the career are appropriate grounds for either an upward or downward departure from the career offender guideline range); United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) (closeness in time of prior convictions to each other, when combined with other factors, justifies departure).

Use of "Stale" Convictions to Depart Upward

Another issue that relates to possible amendments to the career offender guideline is whether "stale" convictions (*i.e.*, those that are too old to be counted under the guidelines) are valid bases for upward departures. In a number of cases, the courts have permitted such departures. United States v. Gardner, 905 F.2d 1432 (10th Cir.) (departure to bottom of range that would have applied if defendant was a career offender based on two "stale" bank robbery convictions plus more recent firearms offenses), cert. denied, 111 S.Ct. 202 (1990); United States v. Lang, 898 F.2d 1378 (8th Cir. 1990); United States v. Cota-Guerrero, 907 F.2d 87 (9th Cir. 1990) (number and similarity of "stale" priors shows propensity for violence); United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991) (number and dangerousness of "stale" priors justifies departure); United States v. Russell, 905 F.2d 1439 (10th Cir. 1990) ("stale" priors were "reliable information" under §4A1.3 justifying upward departure, in light of fact that defendant spent eleven of the prior fifteen years in jail and had routinely committed a new offense shortly after being released from prison). Such a basis for departure is limited in the Ninth Circuit to those prior offenses that are similar to the instant offense. United States v. Leake, 908 F.2d 550 (9th Cir. 1990).

The Sixth Circuit has sent conflicting signals on this issue. It has held that an upward departure on the basis of a "stale" conviction was an arbitrary change in the requirements for career offender status, United States v. Robison, 904 F.2d 365 (6th Cir. 1990), cert. denied, 111 S.Ct. 360 (1990), and it has also held that a departure upward to the career offender range is allowed where consolidation of two prior drug convictions prevented use of the career offender guideline.

D. EMPIRICAL FINDINGS

The Working Group examined empirically the possible elimination of the decay factor in counting qualifying prior offenses for career offender status. The Monitoring data base of approximately 30,000 FY90 guideline cases was used for studying this question.

Methodology:

A random sample of 600 cases was selected from all cases with a qualifying instant offense, an indication of some prior criminal behavior, and a defendant aged 28 or older, to study the effect no decay factor would have on applying the career offender guideline. Specifically, the cases were reviewed to identify qualifying prior convictions that are not counted under the current decay specifications of the guideline, but could qualify the case as a career offender case if the decay factor was eliminated. The survey instrument for case review of the sample examining "decay factor" questions is in Appendix B-D.

Chart I follows the case review of sample cases. Eleven percent (64 defendants) were sentenced as career offenders, with another set of cases possibly eligible under the guideline in its present form. From the documents available, there were 15 additional cases that seemed to qualify as career offenders with no decay factor applied to the guideline. Some issues, relating to a number of violent and drug offenses, need further clarification before the qualification of certain other cases, with or without the decay factor, can be determined.

Based on the 15 cases unambiguously identified in the sample to qualify as career offenders if the decay factor were abolished, the best point estimate is that an additional 2.5 percent of the affected population (i.e., drug and violent offenders over 27 with some criminal history) could become career offenders. Based on FY90 figures, this would generate 168 more career offender cases. (For the technique used in the estimation, see Appendix B-D.)

E. OPTIONS

Option 1(a):

Eliminate entirely the requirement that convictions for career offender qualifying prior offenses occur within certain time periods; that is, abolish the decay factor for purposes of determining career offender status.

Implications: The existence of stale prior convictions may have little relevance to whether an offender is likely to recidivate, or commit serious offenses in the future, particularly where the enhancement in sentence is as dramatic as that required by the career

CHART I*****PRELIMINARY***
SUMMARY OF CASE FILES
DECAY FACTOR REVIEW****Number of Case Files Involved:**

Number of FY1990 Offenders:	29,011 cases
Number of Drug Offenders, Over Age 27, with <u>some</u> criminal history:	5,559 cases
Number of Violent Offenders, Over Age 27, with <u>some</u> criminal history:	1,148 cases

Number of Case Files Reviewed:

Number of Drug Offender Files Identified (Random Sample):	350 cases
Number of Violent Offender Files Identified (Random Sample):	250 cases
TOTAL FILES PULLED, SUMMARIZED, QC'ED:	590 cases

Case Files Screened Out:

Insufficient COV/CSO Priors:	425 cases (71%)
(Includes cases with 0 or 1 qualifying prior convictions for COV/CSO -- including prior convictions that definitely are or might possibly qualify (e.g., commercial burglary, involuntary manslaughter, assault, etc.)	
Defendant Sentenced as Career Offender:	64 cases (11%)
Instant Offense Is Not a COV/CSO:	11 cases (2%)
(Includes cases with any number of qualifying prior convictions for COV/CSO, but an instant offense that is not a COV/CSO)	

TOTAL SCREENED OUT:	500 cases
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Potential Career Offender Without Changing Decay Factor:

Qualify as Career Offender, But Not Sentenced as Career Offender: 12 cases (2%)

- * already has 2 or more qualifying, felony priors
- * may have decayed priors, but none needed to make career offender
- * no changes in COV/CSO definition required
- * not actually sentenced as career offender
(includes 1 att. sexual battery, 1 DWI manslaughter)

Would Qualify as Career Offender If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: 19 cases (3%)

- * no decayed prior needed to make 2 or more priors
- * need to research the felony nature of an A/B or threatening communications prior (14 cases) or residential nature of a burglary prior (5 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If Commercial Burglary and Felony Drug Possession Rules Were Changed: 18 cases (3%)

- * no decayed prior needed to make 2 or more priors
- * need to change COV/CSO definition to include commercial burglary (7 cases) and felony drug possession (11 cases)
- * could only be a career offender if this factor were changed

TOTAL CAREER OFFENDER REGARDLESS OF DECAY FACTOR CHANGE: 49 cases (8%)

Potential Career Offender If Decay Factor Modified:

Would Qualify as Career Offender If No Decay: 15 cases (2%)

- * decayed prior needed to make 2 or more priors
- * no changes in COV/CSO definition required
(includes 3 non-aggravated assaults, 1 manslaughter)

Would Qualify as Career Offender If No Decay and If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: 19 cases (3%)

- * decayed prior needed to make 2 or more priors
- * need to research the felony nature of an A/B prior (8 cases) or residential nature of a burglary prior (11 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If No Decay and If Commercial Burglary and Felony Drug Possession Rules Were Changed: 7 cases (1%)

- * decayed prior needed to make 2 or more priors
- * need to change COV/CSO definition to include commercial burglary (4 cases) and felony drug possession (3 cases)

TOTAL QUALIFYING WITH DECAY MODIFICATIONS: 41 cases (7%)

offender statute. Indeed, it may seem "unjust" to punish as a career offender an offender who has led a law-abiding life for a lengthy period of time, following earlier convictions. Nevertheless, stale prior convictions are in fact part of the offender's career, may be relevant indicators of recidivism, and may have been intended by Congress (see section B on Relevant Legislative History, supra). Finally, with respect to application of the new provisions, the absence of a decay factor would technically render the career offender provision simpler to apply, but complication in application of the guidelines overall would occur since different rules would be used when counting qualifying prior career offender crimes, than would be used when counting criminal history points.

Option 1(b):

Eliminate the decay factor for purposes of calculating both career offender status and criminal history points, generally.

Implications: Similar to those above. If the decay factor were eliminated for purposes of calculating career offender status, where the ramifications are enormous, it makes little sense to keep a decay factor for purposes of calculating criminal history points, where the ramifications on a sentence are much milder; that is counting a stale conviction will never raise a defendant's category more than one level. While elimination of the decay factor across the board would create more uniformity in application than elimination of it for just one kind of calculations, its elimination would radically change the theoretical and practical underpinnings of the current system.

Option 2(a):

Construct a new decay factor based on some "crime free period," following which period prior offenses would not be counted for purposes of the career offender provisions. "Crime free period" might be defined variously as a period without arrest, without conviction, without conviction for a felony, without conviction for a "serious offense." The period might run variously from sentencing on the last offense to commission or conviction on the subsequent offense. The new applicable time period might also be applied to counting criminal history points.

Implications: Complications involved in application of such a new system might be considerable. Lack of uniformity with the criminal history rules for counting prior convictions would add to complexity of the guidelines. Some notion, however, of crime free periods might more faithfully represent likelihood of recidivism, or other relevant criminal history factors. Additional implications arise where the applicable time period for career offenders differs from that applicable to counting criminal history points. Accordingly, if the Commission preferred a revised decay factor that focused on a particular period of time in

which the defendant had been "crime free," the Commission would have to decide whether to use that revised decay factor for calculating criminal history generally.

Option 2(b):

Apply this revised decay factor to calculation for both criminal history points and career offender status.

Implications: See above discussion following Option 2(a).

Option 3:

Alter the application of the decay factor such that an offender can be exempted from career offender status only if both of his qualifying prior crimes occurred outside the relevant time period prescribed by the decay factor.

Implications: This amendment would have a similar impact to that of Option 2, without the complexity of that option, without requiring the drafting of a revised decay factor, and without creating any of the conflicts with use of the decay factor for the calculation of criminal history points that Option 2 would create. It would have some of the disadvantages of Option 1, however, and its specific ramifications would have to be studied further.

Option 4:

Modify §4A1.2(e) (applicable time period) so that the ten- and fifteen-year period follows not release from incarceration, but expiration of parole.

Implications: Modification would reduce the need for a complete elimination of decay factor and the attendant negative implications of such an elimination, while permitting some of the positive implications, all of which are outlined above.

Option 5:

Modify §4B1.2(3) (definition of "prior felony conviction") so that a prior conviction is counted as of the date of conviction, or as of the date of arrest, and not the date of sentencing.

Implications: modification would reduce the need for a complete elimination of decay factor and the attendant negative implications of such an elimination, while permitting

some of the positive implications, all of which are detailed above. The result in U.S. v. Bassil would also be tempered (see Subsection C on Relevant Case Law, supra). This would, of course, represent a modification of the standard understanding of conviction as requiring the entry of judgment as well as sentencing. Additional defendants likely would be considered career offenders under this expanded definition of "prior conviction."

VI. CAREER OFFENDER -- CLARIFICATION OF APPLICATION

A. INTRODUCTION

In light of the complex, and at times problematic, nature of the definitions involved in and the application of the Career Offender Guideline, this section recommends options for the Commission to consider in order to address some of the issues in the application of 4B1.1. Many of the changes can be made without an amendment to the career offender guideline -- many options involve additional training of court officers, or commentary change. (Indeed, a considerable number of hotline calls request information regarding the proper application of the career offender guideline, as noted below.) In light of the severe sentences required to be imposed pursuant to 28 U.S.C. § 994(h), clarification of the appropriate application of the career offender guideline may be particularly indicated.

B. RELEVANT CASE LAW

One of the application questions relevant to the career offender guideline involves the Federal Youth Corrections Act (Y.C.A.), which was enacted in 1950 and repealed in 1984 (as part of the Comprehensive Crime Control Act of 1984). While it was in effect, the Y.C.A. provided the courts with an added degree of flexibility in dealing with young offenders. The courts could commit the offender to the custody of the Attorney General for institutional treatment and rehabilitation under the Act, which in turn afforded the Attorney General a broad range of discretion in providing institutional treatment. The courts could also place a youthful offender on probation, or it could sentence him according to any of the penalty provisions applicable to adult offenders. See Tuten v. United States, 460 U.S. 660, 663-64. A major advantage to the offender is that the Act provided avenues for him to obtain a certificate setting aside his conviction. 18 U.S.C. § 5021. If he was unconditionally discharged from prison before the expiration of his term, the conviction would be "automatically set aside." 18 U.S.C. § 5021(a). If he was sentenced to a term of probation and unconditionally discharged before that term expired, the conviction in that case would also be "automatically set aside." 18 U.S.C. § 5012(b). Prior convictions that were sentenced pursuant to the Y.C.A. raise two issues under the criminal history guidelines. The first issue was addressed by the Commission in the last amendment cycle. This issue was whether a Y.C.A. sentence is an "adult" conviction under the career offender guideline. U.S.S.G. §4B1.2, comment. (n.3). Under the amendment, any conviction for an offense committed at age eighteen or older is an adult conviction. *Id.* Virtually all defendants sentenced under the Act will have been over age eighteen. See Tuten, 460 U.S. at 663 n.3. For those under the age of eighteen, the commentary indicates that if the defendant was proceeded against as an adult, then the conviction counts as an adult conviction. U.S.S.G. §4B1.2, comment. (n.3). All defendants who go to trial in federal court are proceeded against as adults, because those not proceeded against as adults are surrendered to state authorities. 18 U.S.C. § 5032. There does remain a second issue, though, which is whether

a conviction "set aside" under the Act is excluded from the criminal history score on the ground that it is an "expunged" conviction. See U.S.S.G. §4A1.2(j) ("Sentences for expunged convictions are not counted . . ."). This affects calculation of the criminal history score, in general, as well as the operation of career offender guideline (which only counts prior convictions that would otherwise be counted in the criminal history score). Although the guideline appears to direct the counting of prior Y.C.A. convictions, the issue is unclear.

The commentary to section 4A1.2, at application note 10, states:

A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

Thus, the language of the guideline and the commentary draw a distinction between convictions that are "set aside" and those that are "expunged." A Y.C.A. "set aside" appears to fit the guideline's definition of "set aside," both in name and effect. When a conviction is set aside under the Y.C.A., it is for reasons unrelated to innocence or errors in law. The purpose is to restore civil rights and remove the stigma associated with a criminal conviction. Tuten, 460 U.S. at 664-65. The defendant will have been duly convicted, and the set aside takes place without any re-examination of the legality of the conviction. See 18 U.S.C. § 5021.²⁵

Nonetheless, the last sentence of the commentary and the sole sentence of the guideline itself -- both of which state that "expunged" convictions do not count -- complicate the issue, because some courts (including the Supreme Court) have referred to the Y.C.A.'s "set aside" provisions as "expungement" provisions.

²⁵This is consistent with the fact the guidelines count a prior "diversionary disposition," where there was an admission or finding of guilt, even though there was no conviction. U.S.S.G. §4A1.2(f), & comment. (n.9). During the time the Y.C.A. was in effect, diversionary dispositions undoubtedly were given to defendants whose offenses or prior records were less serious than those prosecuted and sentenced under the Y.C.A. A defendant facing the prospect of prosecution and sentencing under the Y.C.A. would have preferred a diversionary disposition. Therefore, it would be incongruous to treat a prior diversionary disposition (which is made available for less serious offenses committed by less serious offenders) more severely than a prior Y.C.A. conviction. Furthermore, a diversionary disposition is counted because it "reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." That same reasoning applies to a defendant sentenced under the Y.C.A.

In United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991), the Ninth Circuit held that a prior state conviction that was "set aside" under state law was "expunged" as that term is used in section 4A1.2(j), and thus that prior conviction was not used in determining the defendant's criminal history score. The court criticized the language of the commentary (application note 10) as confusing and "somewhat internally contradictory." Id. 932 F.2d at 807. In deciding whether the state conviction had been "expunged," the court first looked to the Y.C.A. as a "useful analogy." Because the Supreme Court has referred to the Y.C.A. set aside provision as an expungement provision, the Ninth Circuit determined that the guidelines would not count a Y.C.A. conviction. Id. (citing Tuten, 460 U.S. at 664-65 n.6-9). Further, because the state set aside provision is like the Y.C.A., and because the case law interpreting the state provision refers to as an "expungement" provision, the court held that the conviction does not count. Id.

C. FIELD COMMENTS

TAS Hotline:

The TAS hotline data base was reviewed for additional information concerning the field's application of the career offender guideline. A total of 196 calls regarding the career offender guideline were received by the Commission's Hotline staff between January 1989, and September 1991. The questions fell into the following broad categories.

Definition of "Crime of Violence" and "Controlled Substance Offense".

Of the 196 calls received, 64 were questions regarding definitional problems within the career offender guideline. The most frequently asked question was whether or not the instant and/or qualifying prior offenses meet the definition of "crime of violence" or "controlled substance offense". Specifically, the probation officers inquired whether the application of the career offender guideline is based upon the offense of conviction (i.e., the statutory violation for which the defendant was convicted) or the real offense behavior.

Forty-six (46) of those sixty-four calls were questions regarding the definition of a "crime of violence". Many of these were inquiries about the applicability of the term to specific crimes (i.e., statutory rape, bank larceny, involuntary manslaughter). Approximately half of these forty-six (46) callers asked specifically about the use of felon in possession of a weapon as both the instant and the qualifying prior offenses.

There were also eighteen (18) calls regarding the definition of a "controlled substance offense". Fifteen (15) of these calls question the applicability of simple possession of drugs as a "controlled substance offense". Other examples include:

- Is Obtaining Drugs by Forgery a controlled substance offense?

- Is Use of a Communication Facility considered a drug trafficking offense?

General Application Issues

The second largest category of calls (63) relates to general application issues. Examples of these questions include:

- The defendant pleaded to felon in possession, but stipulated to the more serious offense of bank robbery. Is this a crime of violence?
- Does the mandatory consecutive penalty for a violation of §18 USC 924(c) still apply if the career offender provision is applicable?
- Is the career offender guideline optional?
- Do you apply Chapter Two and all specific offense characteristics, plus Chapter Three adjustments prior to the application of §4B1.1?
- If the offense level "otherwise applicable" is higher than the offense level from the career offender table; which one do you apply?
- In the case of multiple counts which trigger the career offender guideline, how do you determine the offense statutory maximum?

Acceptance of Responsibility

Twenty-six calls (26) were related to the use of acceptance of responsibility and the career offender guideline prior to the clarification of this issue in the 1989 amendments.

Chapter Four, Part A

The only other significant category of calls are actually criminal history issues covered by Chapter Four, Part A. Thirty-five (35) calls were received regarding Chapter Four definitions and rules (i.e., related cases, definition of a prior sentence). Twelve (12) of these questions were related to the applicable time frames used for qualifying prior offenses. Examples of other questions include:

- Do the provisions of §4A1.2(e) apply to counting prior convictions for the career offender guideline?
- The defendant has a prior conviction for three bank robberies that were consolidated for sentencing? Can they be used as qualifying prior offenses for the career offender guideline or does the related cases rule apply?
- Can a prior diversionary sentence be used in considering whether or not the career offender provision applies?
- Can we use an offense that occurred after the instant offense to determine career offender status?

- The defendant's prior state conviction represents conduct that is part of the instant offense. Does this qualify as a prior conviction when determining career offender status?

Departure Issues

TAS received nine (9) calls regarding departure issues. Examples include:

- Can the court depart upward based upon inadequacy of the criminal record if the defendant is determined to be a career offender?
- If the career offender guideline over represents the seriousness of the defendant's prior record, can the court departure down?

Probation Officer Comments

In addition to hotline calls received by TAS, approximately 30 probation officers from the Chapter Eight Worksheets field tests held in Chicago and California in September 1990, were given a summary of the considerations before the Criminal History Working Group. The probation officer groups were questioned regarding their concerns about the career offender guideline and the addition of criminal history categories O and VII.

Career Offender

The probation officers were strongly opposed to the elimination of the decay factor for qualifying prior offenses in the consideration of career offender status. The consensus among the probation officers was that the career offender guideline, as it stands, is extremely punitive. Drawing from their professional experience, the group saw no need to increase the number of individuals eligible for career offender status. They recommended that if the Commission felt compelled to address the issue of serious offenders who did not qualify for career offender status because of "stale" convictions, it could best be done through departure language.

More importantly, the groups considered that narrowing the definition of "crime of violence" and "controlled substance offense" to exclude less serious offenses is a much more pressing issue for the Commission to decide. The groups were very concerned about the extreme effect the career offender guideline has on the guideline ranges of individuals with less serious qualifying prior offenses. The results were described as "draconian" and "inherently unjust." For example, a prior conviction for distribution of a relatively small amount of a controlled substance currently meets the definition of a "controlled substance offense," despite the sentence received. Therefore, a defendant who has been convicted twice of distribution of drugs, yet has never received more than a ninety day term of

imprisonment, is punished as severely as the defendant who has sustained two convictions for distribution of large amounts of illegal drugs and has received substantial sentences of imprisonment. Another example given is the defendant whose prior conviction for a minor assault may trigger the career offender provision due to the state's classification of such a crime as a felony.

D. OPTIONS

Option 1 -- Eliminate Ratcheting:

Commentary or guidelines might be clarified to explicitly permit or preclude courts from utilizing an enhanced statutory maximum for career offender purposes.

Implications: the clarification might apply particularly to the following relatively common situations:

- (1) an 18 U.S.C. § 922(g) (ten-year statutory maximum for felon in possession of a firearm) offender's sentence is enhanced under 18 U.S.C. § 924(e) (life maximum under Armed Career Criminal Act), where the court considers the firearm possession offense to be a crime of violence;
- (2) a 21 U.S.C. § 841(a)(1)(C) offender's sentence is enhanced from twenty to thirty years as a result of the offender having one or more prior drug convictions;
- (3) a 21 U.S.C. § 841(a)(1)(B) offender's sentence is enhanced from forty years to life as a result of the offender having one or more prior drug convictions; or
- (4) a 21 U.S.C. § 844 offender's sentence is enhanced from one year to three years.

Care must be taken to determine exactly the offenders whose career offender range should or should not be increased. For example, it may be relevant to distinguish between sentences that have been enhanced based solely on prior offenses (e.g., under the Armed Career Criminal Act), and sentences that have increased penalties as a result of the offender engaging in more serious conduct. Some consideration should be given to legislative intent with respect to the relevant statutory maximum in such situations (see legislative history).

Option 2 -- Ensure Application of Acceptance of Responsibility:

Training or other non-amendment options may be required to ensure that offenders receive their acceptance of responsibility reduction where it applies. Courts, probation officers, and counsel apparently, in rare instances, fail to calculate the career offender range

with the acceptance of responsibility reduction, even where it has been earned and applied to the pre-career offender calculations.

Option 3 -- Ensure Proper Application of §4B1.2 Rules:

Training or other non-amendment action may be required to ensure that courts do not count prior convictions for misdemeanors, decayed prior convictions, and improperly classified crimes of violence (e.g., non-residential burglaries) or controlled substance offenses (e.g., felony drug possession offenses).

Option 4 -- Ensure Consistent Application of Actual Conduct Rule:

Training or other non-amendment action may be required to ensure that any new or prior rules regarding application of §4B1.2(1) are understood and consistently applied.

Option 5 -- Clarify Applicability of §4A1.3 to Career Offenders:

Clarify whether §4A1.3 (Inadequacy of Criminal History) applies to career offenders, thus permitting departures from the career offender range.

Implications: As noted in the section on case law, some courts have determined that §4A1.3 (Inadequacy of Criminal History) does not apply to career offenders since §4A1.3 precedes the career offender provisions at §4B1.1, *et seq.*, and since §4A1.3 addresses itself only to inadequacies in the counting of criminal history points. Other circuits find the career offender provisions to be an integral element of the overall criminal history determination, with §4A1.3 applying to all relevant criminal history provisions. Eliminating application of §4A1.3 to §4B1.1 determinations would prevent downward departures for over representation of criminal history, and upward departures for under representation. A clarification permitting application of §4A1.3 in the case of a stale offense, would ameliorate the need for a more complete elimination of the decay factor.

Option 6 -- Clarify §4A1.2 Re: Use of Expunged Y.C.A. Convictions:

Clarify whether expunged/set-aside federal Youth Corrections Act (Y.C.A.) convictions count as qualifying prior offenses for career offender purposes. (A similar issue arises with respect to how such convictions should be counted for purposes of criminal history points.)

Implications: Prior convictions under the Y.C.A. may be considered adult convictions for purposes of criminal history provisions. The set-aside provisions of the Act are not "expungements" related to innocence, guilt, or errors of law (and not counted for criminal history purposes) or if classified as "set aside" under the guidelines, they would count in chapter 4A and 4B. Or are they such that they merely eliminated social stigma or restore civil rights ("set-asides" counted for criminal history purposes)?

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February 21, 1992

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton *pin*
Staff Director

SUBJECT: Changes to the Staff Working Group Report on Criminal History with respect to Proposed Category VII

Susan Katzenelson has provided revised numbers as they apply to consideration of an amendment to include Category VII in the Criminal History Category. Errors were detected in the original report; these figures should be inserted at Amendment 28(B) for proper consideration of this amendment.

Attachment

MEMORANDUM

TO: Phyllis Newton
Staff Director

FROM: Susan Katzenelson *S.K.*
Criminal History Working Group

DATE: February 21, 1992

SUBJECT: Proposed Criminal History Category VII

Following are some revised figures from FY1990 data for proposed amendment #28(B) relating to the restructuring of Criminal History Category VI and options to establish a Category VII:

Option (1):

Category VI with a three point spread (13-15 points),
Category VII with 16 points or more:

Of the defendants presently in Category VI, 61 percent would remain in the new (capped) category VI, 39 percent would move to Category VII.

Option (2):

Category VI with a seven point spread (13-19 points),
Category VII with 20 points or more:

Of the defendants presently in Category VI, 82.7 percent would remain in the new (capped) Category VI, 17.3 percent would move to Category VII.

Option (3):

Category VI with a three point spread (13-15 points),
Category VII with a three point spread (16-18 points):

Of the defendants presently in Category VI, 61 percent would remain in the new (capped) Category VI, 18.4 percent would move to the new (capped) Category VII, and 20.6 percent would move above it.

Note that all these options would leave the Career Offender in Category VI, unless the offender's criminal history points are high enough for the next category.