

UNITED STATES SENTENCING COMMISSION

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December 18, 1989

MEMORANDUM

TO: Phyllis Newton, Staff Director
Senior Staff

FROM: Pam Barron
Sharon Henegan
Jeff Lawrence
Andy Purdy

RE: Report of the Working Group on Drugs, Firearms, and
Violent Offenses

I. INTRODUCTION

A. Overview

It is envisioned that this report is but one important step in what should be a long-term role for this working group. Subsequent to this report, for example, we will focus on bank robbery, as requested by Commissioner Nagel, and review late arriving information and proposals, including the new Justice Department proposals contained in Steve Saltzburg's letter to the Chairman on December 14, and proposals contained in the letter from the Bureau of Alcohol, Tobacco, and Firearms to the Chairman on the same date.

This report is divided into five parts: this introduction, arson (prepared by Pam Barron), drugs (Sharon Henegan), firearms (Jeff Lawrence), and violent offenses (Andy Purdy). While the working group has had time to reach consensus on the major conclusions in each crime area, the specific recommendations are by the individual named. Based on the feedback to these recommendations we will attempt to reach consensus on specific proposals.

In addition to making recommendations, areas of concern that need further work are identified, sometimes with possible solutions presented. We will work to draft formal proposals in the days ahead as warranted.

B. Summary of Conclusions

1. Arson

We recommend that the guideline for arson (§2K1.4) be restructured significantly:

- to take into account the fact that malicious mischief is not an important part of federal arson prosecutions;
- to eliminate the application difficulty of the distinction between "recklessly" and "knowingly" endangering persons; and
- to appropriately punish for arson-for-profit, the danger to emergency personnel, and the danger posed by multiple ignition points.

2. Drugs

a. We recommend changes in several drug guidelines:

- in §2D1.1, the intent of the application note about purity of drugs should be clarified;
- in §2D1.2, the application note should be clarified on how to proceed when drugs were also involved that were beyond 1000 feet from a school, not sold to a minor, and did not involve a pregnant woman; and

b. We recommend that the following potential changes be published and circulated for public comment, and be considered for eventual amendment:

- drug quantity, where subject to proof, should drive the offense levels for both use of a communication facility in connection with a drug offense (§2D1.6, now an offense level 12) and renting or managing a drug establishment (§2D1.8, now an offense level 16);

3. Firearms

We recommend the creation of a guideline for 924(e) offenses that would set the base offense level at 34, with a starting minimum criminal history category of III. To the extent that the offender's criminal record would warrant a higher criminal history category, that higher category (potentially a V or a VI) would apply. A reduction for acceptance of responsibility would be available where appropriate. The rule for potential departures would not change, although no departure could go below the mandatory minimum, absent a motion under §5K1.1 for substantial assistance.

4. Violent Offenses

a. We recommend that the guideline for assault with intent to commit murder (§2A2.1) be revised to achieve the following:

- to structure the guideline in two parts; an offense level of 26 is assigned if the offense involved substantial planning, was committed in the course of another felony, or involved use of a weapon; otherwise, a level 20 is applicable.

- enhancements are retained for injury, contract murder (applicable to attempts and solicitations, as well as conspiracies and assaults).

b. We recommend that a new guideline be promulgated for conspiracy or solicitation to murder, with a base offense level of 26 and an adjustment where the offense involved the offer of a thing of pecuniary value.

c. We recommend that the base offense level for murder-for-hire (§2E1.4) be increased from 23 to 26.

d. We recommend that the Commentary to §3D1.2(b) be clarified with respect to offenses against the person (Chapter Two, Part A), so that multiple counts charged against an offender will not be grouped, even if involving the same victim, unless they occurred as part of the same incident. It might be advisable to clearly state that this rule applies generally to offenses of the type EXCLUDED from grouping under §3D1.2(d), which would include violent offenses.

C. Focus of the Working Group

We examined the offenses covered by the following guidelines in Chapter Two:

Part A Offenses Against the Person

Part B Offenses Against Property:

- §2B2.1 Burglary of a Residence
- §2B2.2 Burglary of Other Structures
- §2B3.1 Robbery
- §2B3.2 Extortion by Force or Threat of Injury or Serious Damage
- §2B3.3 Blackmail and Similar Forms of Extortion

Part D Drugs

Part E selected RICO offenses:

- §2E1.3 Violent Crimes in Aid of Racketeering Activity
- §2E1.4 Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire
- §2E2.1 Making, Financing, or Collecting an Extortionate Extension of Credit

Part K Firearms

Part M selected Offenses Involving National Defense:

- §2M5.2 Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License
- §2M6.1 Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities

Part P selected Offenses Involving Taxation:

- §2T3.1 Evading Import Duties or Restrictions (Smuggling)
- §2T3.2 Receiving or Trafficking in Smuggled Property

[Note that we did not list Criminal Sexual Abuse offenses (§§2A3.1-2A3.4), or Part H, Offenses Involving Individual Rights, that are under the aegis of the Pornography and Hate Crimes working group.]

D. Overall Assignment

The group studied the subject guidelines in the light of all available information and in this report is advising the Commission of the following:

- generally, those observations that can be made or conclusions reached, based on our analysis of the guideline areas;
- all major problem areas that can be identified at this time;
- which of those problem areas should be the subject of draft guideline amendments;
- what guidelines should be seriously considered for amendment because of legislation, litigation, or application problems as reported from the field; and
- specific guideline amendments to be considered.

E. Information Resources

The group studied all available information resources in furtherance of the goal of the group, and has attempted to analyze the most significant findings.

The group obtained and reviewed the following pertaining to relevant guidelines:

1. Technical Assistance reports.
2. Monitoring information regarding departures.
3. Past Practice findings.
4. Penalties Review analysis to date.
5. Peter Hoffman's files and comments on the subject guidelines.
6. Key Litigation cases.
7. Department of Justice proposals.
8. Problem areas identified by the informal Wednesday "amendment" group.

9. Recent legislative changes enacted and pending.

10. An analysis from Charles Betsey data relevant to formulating a 924(e) guideline and a possible amendment to the telephone count guideline (§2D1.6).

11. Bureau of Alcohol, Tobacco, and Firearms recommendations and law enforcement information concerning prosecution data regarding arson and firearms.

12. Information from Dean Stowers regarding determination of dosage quantities and the relationship to purity in the drug table.

F. Areas Initially Identified

We began our work by considering whether or not guideline amendments are needed in the following areas:

1. The Justice Department recommendations regarding §924(e) and arson.

2. §2A2.1 - Attempted murder.

3. §2A2.2 - Threatening Communications - should the commentary to the grouping rule be amended so that separate multiple incidents are not grouped under 3D1.2(b)?

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January 11, 1990

MEMORANDUM

TO: Andy Purdy, Coordinator
Working Group on Violent Offenses, Drug Offenses, and Firearms

FROM: Pam Barron

RE: Part II - Arson

I. INTRODUCTION

Several technical and conforming amendments were made to the Arson guideline during the 1989 amendment season. Amendment #182, Appendix C.100, amended §2K1.4(c) and §2K1.5(c) to correct a clerical error, by deleting the word "higher" whenever it appeared and inserting in lieu thereof the word "greater". Amendment #184, Appendix C.101, clarified §2K1.4(b) by deleting the phrase "any of the following", and inserting in lieu thereof "more than one". Amendment 185, Appendix C.101, added a subsection to §2K1.4 to conform the guideline to the statutory revision to 18 U.S.C. §844(h). (These amendments are appended at Tab A). This working group was tasked with examining the Arson guideline from a substantive viewpoint, for possible revisions to be promulgated during the 1990 season. Reports from the Technical Assistance Service reflect some of the difficulties the field has encountered in applying this guideline (see Tab E, Hotline questions), and agencies involved in investigating and prosecuting these cases have also contacted the Commission to suggest needed changes. (See Tab B, letter from Department of Justice to Commissioner Saltzburg, dated October 17, 1989, p.4; Tab C, letter from the Bureau of Alcohol, Tobacco and Firearms to Judge Wilkins, dated December 14, 1989).

II. SOURCES CONSULTED

In examining possible areas for amendment, we reviewed the following information: the Department of Justice's comments and proposed draft guideline for §2K1.4; comments from the Bureau of Alcohol, Tobacco and Firearms, which included a meeting with their Chief Counsel, their guidelines counsel, and two field agents; the

Technical Assistance Service "Hotline" Questions and Answers; issues identified by the Drafting staff, which included a consultation with Peter Hoffman; data and case files from the Monitoring staff; and legislative history.

A. Statutory Provisions

The statutory provisions covered by §2K1.4, the Arson guideline, are by code section and title: 18 U.S.C. §32 (Destruction of aircraft or aircraft facilities), 18 U.S.C. §33 (Destruction of motor vehicles or motor vehicle facilities), 18 U.S.C. §81 (Arson), 18 U.S.C. §844 (f), (h) and (i) (use of fire or explosives), 18 U.S.C. §1153 (Indian country), 18 U.S.C. §1855 (Timber set afire), and 18 U.S.C. §2275 (Fire or tampering with vessels).

The statutory penalties are as follows:

18 U.S.C. §1153	same as penalty under applicable statute
18 U.S.C. §81	5 years maximum
18 U.S.C. §1855	5 years maximum
18 U.S.C. §32	20 years maximum, 5 years for conveying a threat
18 U.S.C. §33	20 years maximum
18 U.S.C. §2275	20 years maximum
18 U.S.C. §844(f)	10 years maximum, 20 if injury results, death or life imprisonment or any term of years if death results
18 U.S.C. §844(h)	1-10 years for first offense, second offense 5-25 years without suspension or probation
18 U.S.C. §844(i)	10 years maximum, 20 if injury results, death or life imprisonment or any term of years if death results.

B. Monitoring Data

Monitoring data was obtained for all prosecutions under these code sections with sentencing dates from the inception of the guidelines November 1, 1987, through July 31, 1989. The data listed two cases under 18 U.S.C. §81, one under 18 U.S.C. §2275, two cases under 18 U.S.C. §844(h), and 20 cases under 18 U.S.C. §844(i). The Department of Justice and the Bureau of Alcohol, Tobacco and Firearms have indicated that the bulk of their Arson prosecutions are brought under 18 U.S.C. §844(i), and it is the area to which their comments are addressed. The sentences for those cases prosecuted under 18 U.S.C. §844(h) and (i) that received guidelines sentences ranged from a high of 48 years, to a low of probation (one 48 years, two 240 months, two 120 months or more, one 6 years, one 67 months, six at 30-40 months, and five at 6 months or less). The sentences listed below are for 18 U.S.C. §844(i), except for the two cases under 18 U.S.C. §844(h), as noted in the summaries.

USSC#

NAME

SENTENCE

48 years

N.D. Texas, guilty plea (acceptance given). Use of an explosive to destroy vehicle, resulting in death. Drug turf-war killing. Cross-reference to §2A1.1 applied. Level 43, Category III.

240 months

E.D. Louisiana, guilty plea (acceptance given). Use of an explosive, attempting unsuccessfully to kill one, but severely injuring two persons. Revenge motive -- victim defeated defendant in a political election for Sheriff. Cross-reference to §2A1.1 applied. Level 38, Category I.

240 months

E.D. Louisiana, guilty plea (acceptance given). Same as above (co-defendant). Level 37, Category I.

132 months

E.D. Louisiana, guilty plea (acceptance given). Same as above (co-defendant). Level 32, Category I.

120 months

E.D. Michigan, guilty plea (acceptance given). Set fire to furniture store, destroying it, several apartments, and the adjacent county government offices. Upward departure from 46-57 months (Level 22, Category II) to 120 months. Reasons for departure:
1. Inadequacy of criminal history. Two prior felonies if tried separately would have qualified defendant as a career offender.
2. Physical injury to firefighters not adequately considered by the guidelines.

3. \$2 million in property damage resulted.

4. Offense caused interference with government function -- local government facilities were forced to close.

6 years

S.D. West Virginia, guilty plea (acceptance given). Destruction by explosive of property affecting interstate commerce, causing personal injury to defendant's girlfriend. Pipebomb damaged trailer -- motive insurance proceeds. Level 24, Category III.

67 months

D. Oregon, guilty plea (acceptance given). Arson for hire. Restaurant owners wanted to destroy restaurant to collect insurance proceeds. Level 18, Category VI.

37 months

C.D. California, trial (no acceptance). 18 U.S.C. §844(h). Arson, burning a cross. Level 17, Category III.

36 months

E.D. Texas, guilty plea (acceptance given). Destruction of gun shop using destructive device (seeking to cover-up burglary). Departure from Level 11, Category IV (18-24 months) to 36 months, based on inadequate representation of criminal history.

35 months

S.D. Mississippi, trial (no acceptance). 18 U.S.C. §844(h). Defendant hired her boyfriend to burn her property -- motive insurance proceeds. Level 19, Category I.

30 months

S.D. Mississippi, trial (no acceptance). 18 U.S.C. §844(h). Same as above (co-defendant). Level 17, Category II.

30 months

N.D. Texas, trial (no acceptance). Burned own bar to collect insurance money. Over \$500,000 damage. Cross-reference to §2B1.3. Level 18, Category I.

30 months

N.D. Texas, trial (no acceptance). Same as above (co-defendant). Level 17, Category I.

6 months (time served)
N.D. California, guilty plea (acceptance given). Set fire to mail collection box to destroy letter to girlfriend. Successfully appealed the 7-level increase applied to him under 2K1.4(b)(4). Level 4, Category III.¹

2 months
W.D. North Carolina, guilty plea (acceptance given). PSI missing.

2 months
D. Montana, guilty plea (acceptance given). \$6,150 damage caused to a bar (no insurance motive). Level 8, Category I.

probation
D. New Mexico, guilty plea (acceptance given). Bombed Dairy Queen, \$8,000 damage, woman injured (\$1,000 medical bills). Level 8, Category I.

probation
W.D. Washington, guilty plea (acceptance given). Bombed schools, and made a 4 x 3 feet crater at an airport. Level 6, Category I. (Note that defendant mentally distraught, but not departure).

(Tab G, Monitoring Data).

C. Department of Justice and Bureau of Alcohol, Tobacco and Firearms

The Department of Justice and the Bureau of Alcohol, Tobacco and Firearms assert that the majority of the Arson cases they prosecute are prosecuted under 18 U.S.C. §844(i). In his letter to Commissioner Saltzburg, (Tab B, p. 4), Roger Pauley discusses the current guideline and makes several suggestions for change:

First, we believe the Commission should restructure the guideline by: (1) significantly raising the base offense level to take into account the inherent seriousness of explosives and arson offenses as prosecuted federally, and (2) providing a reduction to offense level 6 if the offense amounts only to "malicious mischief." Although the commentary states that many arson cases involve "malicious mischief," prosecutors and investigative personnel from the Bureau of Alcohol, Tobacco, and

¹ (See letter to John Steer from Susan Raffanti, dated July 8, 1988, appended at Tab H).

Firearms have indicated to us their belief that "malicious mischief" does not properly characterize the typical federal arson prosecution. Most federal arson cases, in their view, are serious offenses involving substantial damage or risk of damage or danger to persons. We recommend that the Commission reconsider the data upon which the guideline was based to determine if the offense has changed over the last several years so that a restructuring of the guideline would be in order.

We also believe that establishing the applicability of the specific offense characteristic on risk of harm can be extremely difficult and that other more objective factors would be preferable. For example, the guideline is not clear regarding the applicability of the factors . . . to the dangers faced by emergency personnel called upon to respond to a fire. Generally, whenever the crime of arson is committed, even in a vacant building, there is either knowledge that emergency personnel will be endangered or a reckless disregard for their safety. Injury to public safety officers responding to arson or explosives offenses is a factor specifically recognized in 18 U.S.C. §844(f) and (i). Because of these difficulties, we recommend that guideline §2K1.4 be amended to include the following specific offense characteristics, which rely on objective factors: committing the offense in a large building or a location where other buildings are in close proximity; committing the offense in a commercial or other district in which a rapid emergency response is difficult; setting fire or placing explosives in more than one location; and committing the offense to conceal another offense. Moreover, the two-level increase for the use of a destructive device under §2K1.4(b)(6) is not enough.

The Justice Department's proposal is appended at Tab D. It recommends a base offense level of 16, with a reduction of 10 levels (to the current guideline's base offense level 6) for "malicious mischief" cases ("minor property damage under circumstances that did not present an appreciable danger"). It features several specific offense characteristics, including a 4-level enhancement "if the defendant recklessly endangered the safety of another; if the offense was committed in a large building or in a location in which other structures were in close proximity; or if the offense was committed in circumstances in which there was a reasonable expectation that a rapid emergency response would have been difficult."

The Bureau of Alcohol, Tobacco and Firearms also recommended changes, based on their experience with the guidelines. (See Tab C, letter from the Associate

Director (Law Enforcement) to Judge Wilkins, dated December 14, 1989). In his letter, Associate Director Hartnett details the types of cases the Bureau is involved in:

... ATF's law enforcement program with respect to arson emphasizes the use of [18 U.S.C.] section 844(i) in combatting arson-for-profit, a major economic crime of national magnitude. This program instructs ATF law enforcement personnel to direct their investigations toward those incidents involving industrial or commercial activities where the suspected perpetrators are members of organized arson rings, and violent criminals whose illegal activities impact upon the community at large.

A review of the reported cases under section 844(i) reveals no case predicated upon malicious mischief. The reported cases fall within the following categories: arson and bombings for profit (including insurance fraud) or some other commercial motive; arson and bombings to injure a person or damage property for revenge; and other serious arsons and bombings. In setting the base offense level at only 6, the guidelines appear to ignore the risk of injury to emergency personnel and private citizens when emergency

firefighters in large commercial buildings is substantial. The guidelines do not take these risks into account and seem to ignore congressional intent to severely punish violations of section 844(i) resulting in injury to emergency personnel. In 1984, Congress amended section 844(i) to make explicit that an injury to or the death of a public safety officer would result in an increased sentence.

The letter quotes the congressional committee report (appended at Tab F) which specifically addresses injury to firefighters and other emergency personnel:

The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in section 844(d), (f), or (i), if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians. S. Rep. No. 98-225, 98th Cong., 2d Sess. 359, reprinted in 1984 U.S. Code Cong. & Ad. News 3508.

The Bureau recommends a base offense level of 24 for Arson in violation of 18 U.S.C. §844(i):

Arson in violation of section 844(i) is a serious offense and is a crime of violence for purposes of the Career Offender provisions.

* * *

Information from Assistant U.S. Attorneys handling these cases indicate that these guidelines are confusing and not easy to apply. For example, uncertainty exists with respect to the appropriate sentencing level where a fireman or private citizen is injured while firefighters are driving to the scene, and the defendant did not intend this consequence.

* * *

If the base offense level is increased to 24, the increase in offense level for endangering the safety of another person could be eliminated; the increase for recklessly endangering the safety of another person could be reduced from 14 to 4 levels; and the increase for knowingly creating a substantial risk of death or serious bodily injury could be reduced from 18 to 8 levels.

Hotline data indicates that there is difficulty in applying phrases such as "recklessly endangered" and "knowingly created a substantial risk." (See Tab E, p. 2, Question 3041A, and p. 12, Question 4188A). These concepts may best be handled by providing examples in the Commentary. The working group proposes two options. Option I begins with a base offense level of 20, which would incorporate the sanction for recklessly endangering, and provides a 4-level enhancement where a defendant "knowingly created a substantial risk of death or serious bodily injury," which would equate to a level 24 -- the same level Justice reaches for that specific offense characteristic. Option II sets forth three alternate offense levels: (a) level 24 for knowingly creating a substantial risk of death or serious bodily injury; (b) level 18 if (1) the defendant recklessly created a substantial risk of death or serious bodily injury, or (2) if the object of the offense was a residence or other kind of building; (3) 2 + the offense level from the fraud (§2F1.1) or theft (§2B1.3) guideline, if applicable. The working group proposals also address the issue of inclusion of firefighters and other emergency personnel (see Tab E, p. 25, Question 4384A).

II. SUMMARY OF CONCLUSIONS

The Recommended Amendment provides a significantly different approach to the structure of the Arson guideline. The current guideline (Tab A) begins with a low base offense level (6), based upon an observation that:

many arson cases involve "malicious mischief," i.e., minor property damage under circumstances that do not present an appreciable danger. A low base offense level is provided for these cases. However, aggravating factors are provided for instances where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used a destructive device, or otherwise endangered others.

§2K1.4 Commentary, Background p. 2.101.

As discussed above, the Department of Justice (Tab B, p. 4) and the Bureau of Alcohol, Tobacco, and Firearms (Tab C, p. 1) have taken issue with this characterization, and with the structure of the current guideline. The working group has considered their comments, data, and suggestions, along with Commission data, information resources, and legislative history. Based upon this information, the working group recommends that the guideline be restructured to:

1. Account for the fact that malicious mischief is not an important part of federal arson prosecutions;
2. Delete as unnecessary the current 14 level increase for "recklessly endanger[ing] the safety of another" (see Tab E, Hotline question 3041A 1), thereby eliminating the difficulty and confusion in application engendered by that term;
3. More appropriately punish the bulk of arson cases, such as arson-for-profit (insurance fraud), arson and bombings to injure a person or damage property for revenge, etc.;
4. Provide an enhancement to recognize the complexity of cases involving an offense committed to conceal another offense; and
5. Recognize through an Application Note that Congress intended to sanction the danger and risk posed to firefighters and other personnel involved in arson cases.

The proposed amendment restructures the guideline. Rather than building from a level 6, there are several alternative base offense levels: level 24 for offenses which intentionally create a risk of serious bodily injury or death, (substituting "intentionally" for the problematic "knowingly") or involve a dwelling; level 20 for those offenses where a substantial risk of death or serious bodily injury is created, or where a commercial building or sizeable structure is involved or endangered (subsuming the earlier problem with "reckless endangerment"), minor property crimes and frauds are referenced to those

respective guidelines ("malicious mischief" cases are still accounted for), and risk to firefighters and other personnel is addressed in an application note.

§2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level (Apply the Greatest):

- (1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created intentionally, or (B) involved the destruction or attempted destruction of a dwelling;
- (2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved a commercial building or any sizeable structure; or (C) endangered a dwelling, commercial building, or any sizable structure;
- (3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a plan to defraud; or
- (4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristic

- (1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) Cross Reference

- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).
2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

3. Although the term 'sizeable structure' is not subject to precise definition, comparability in size to a building may be used for guidance. Thus, for example, an automobile, a small boat, or a small detached shed would not be considered a sizeable structure. But a ship or oil storage complex would be a sizeable structure under this provision.

APPENDICES

TAB A	1989 Amendments to Arson
TAB B	Letter from Department of Justice to Commissioner Saltzburg, dated October 17, 1989
TAB C	Letter from Director Hartnett, Bureau of Alcohol, Tobacco and Firearms to Judge Wilkins, dated December 14, 1989
TAB D	Department of Justice Proposed Amendment
TAB E	"Hotline" Questions
TAB F	S. Rep. No. 98-225, 98th Cong., 2d Sess. 359, <u>reprinted in</u> 1984 U.S. Code Cong. & Ad. News 358
TAB G	Monitoring Data -- Number of Prosecutions under Arson statutes
TAB H	Letter from Susan Raffanti to John Steer, dated July 8, 1988

TAB A

- TAP 4
- (3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.
 - (4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels.
 - (5) If a recordkeeping offense reflected an effort to conceal a substantive offense involving explosives, apply the guideline for the substantive offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a), (h), (i), 844(b).

Application Note:

1. "A person prohibited from receiving explosives under 18 U.S.C. § 842(i)" is anyone who is under indictment for or has been convicted of a crime punishable by imprisonment for more than one year; who is a fugitive from justice; who is an unlawful user of or addicted to marijuana, any depressant or stimulant or narcotic drug; or who has been adjudicated as a mental defective or has been committed to a mental institution.

Background: This section applies to conduct ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce to more serious violations that involve substantial danger to public safety.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 183).

§2K1.4. Arson; Property Damage By Use of Explosives

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

If more than one applies, use the greatest:

- (1) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.
- (2) If the defendant recklessly endangered the safety of another, increase by 14 levels.
- (3) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.

- (4) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (*i.e.*, the defendant is convicted under 18 U.S.C. § 844(h)), increase by 7 levels.
- (5) If the defendant endangered the safety of another person, increase by 4 levels.
- (6) If a destructive device was used, increase by 2 levels.

(c) Cross References

- (1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person), if the resulting offense level is greater than that determined above.
- (2) Apply §2B1.3 (Property Damage or Destruction) if the resulting offense level is greater than that determined above.

(d) Note

- (1) The specific offense characteristic in subsection (b)(4) applies only in the case of an offense committed prior to November 18, 1988.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

- 1. "Destructive device" means any article described in 18 U.S.C. § 921(a)(4) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices and certain rockets, missiles, and large bore weapons).
- 2. If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

Background: Review of presentence reports indicates that many arson cases involve "malicious mischief," *i.e.*, minor property damage under circumstances that do not present an appreciable danger. A low base offense level is provided for these cases. However, aggravating factors are provided for instances where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used a destructive device, or otherwise endangered others. As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. § 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. *See* §2K1.7.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendments 182, 184, and 185).

The amendment converts this section into an offense level adjustment for the offense committed while on release, a treatment that is considerably more consistent with the treatment of other offense/offender characteristics. The effective date of this amendment is November 1, 1989.

179. Section 2J1.8(b)(1) is amended by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

Section 2J1.8(c)(1) is amended by deleting "conduct was" and inserting in lieu thereof "offense involved", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in" immediately before "a premature".

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 2 by deleting the first sentence as follows: "This section applies only in the case of a conviction under the above referenced (or equivalent) statute."

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

180. The Commentary to §2J1.9 captioned "Application Notes" is amended in Note 2 by deleting the first sentence as follows: "This section applies only in the case of a conviction under the above referenced (or equivalent) statute."

The purpose of this amendment is to clarify the commentary. The effective date of this amendment is November 1, 1989.

181. Section 2J1.9(b)(1) is amended by deleting "for refusing to testify" and inserting in lieu thereof "made or offered for refusing to testify or for the witness absenting himself to avoid testifying".

The Commentary to §2J1.9 captioned "Application Notes" is amended by deleting:

- "1. 'Refusing to testify' includes absenting oneself for the purpose of avoiding testifying."

and by renumbering Notes 2 and 3 as 1 and 2 respectively.

The purpose of this amendment is to move material from the commentary to the guideline itself where it more properly belongs. The effective date of this amendment is November 1, 1989.

182. Sections 2K1.4(c) and 2K1.5(c) are amended by deleting "higher" whenever it appears and inserting in lieu thereof "greater".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is November 1, 1989.

183. Section 2K1.3(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

Section 2K1.3(b)(5) is amended by deleting "firearm offense" and inserting in lieu thereof "offense involving explosives".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

184. Section 2K1.4(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

185. Section 2K1.4 is amended by inserting the following additional subsection:

"(d) Note

- (1) The specific offense characteristic in subsection (b)(4) applies only in the case of an offense committed prior to November 18, 1988."

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by inserting "(only in the case of an offense committed prior to November 18, 1988)" immediately following "(b)".

The Commentary to §2K1.4 captioned "Background", is amended by deleting "used fire or an explosive in the commission of a felony," immediately before "used a destructive device", and by inserting the following additional sentences at the end of the paragraph:

"As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. § 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. See §2K1.7."

The purpose of this amendment is to conform the guideline to a statutory revision to 18 U.S.C. § 844(h). The effective date of this amendment is November 1, 1989.

186. Section 2K1.5(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

187. Section 2K1.5(b)(1) is amended by deleting "(i.e., the defendant is convicted under 49 U.S.C. § 1472(l)(2))" immediately following "human life", and by inserting "is convicted under 49 U.S.C. § 1472(i)(2) (i.e., the defendant" immediately before "acted".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

TAB B



U.S. Department of Justice

Washington, D.C. 20530

OCT 18 1989

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

Dear Billy:

Enclosed is a letter from Roger A. Pauley, Sentencing Coordinator of the Criminal Division of the Department of Justice, recommending areas for guideline improvement. These suggestions were discussed within the Department, and I believe they would enhance the operation of the guidelines. I urge the Commission to give these proposals expeditious consideration so that they can be implemented in time for the next submission of guideline amendments to the Congress.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stephen A. Saltzburg".

Stephen A. Saltzburg
Member (ex officio)
United States Sentencing Commission

Enclosure



U.S. Department of Justice

Washington, D.C. 20530

OCT 17 1989

Stephen A. Saltzburg, Esq.
Member (ex officio)
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Steve:

Under the Sentencing Reform Act the Criminal Division is required at least annually to submit to the Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. §994(o). We believe that on the whole the guidelines are working well and that the Commission has met its statutory responsibilities in an exemplary fashion. The experience of the past several years has indicated, however, that there are areas in which the guideline can be improved. We urge the Commission to consider the following recommendations, which we believe will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act of 1984. It is further our understanding that these recommendations are consistent with the views of the Sentencing Subcommittee of the Attorney General's Advisory Committee of United States Attorneys and other components of the Department of Justice.

1. Acceptance of Responsibility

Guideline §3E1.1 on acceptance of responsibility should be amended to prevent its improper application. We understand that the guideline is now applied in many instances in which guilt is determined through trial. We recognize that while in some cases a defendant may proceed to trial and, nevertheless, accept responsibility for having committed the offense, this combination of events is rare, as the guideline should reflect.

We recommend amending subsection (b) of §3E1.1 to limit the guideline's applicability to situations in which the defendant has taken action to accept responsibility before the government has borne its burden of proof. The guideline should, however, include an exception making it applicable to a defendant who does not plead guilty in advance of trial because of a legal issue that requires resolution at trial, such as the constitutionality of the statute under which the defendant is charged as such

statute is applied in the defendant's case. We believe that the revision we recommend would fairly compensate defendants for accepting responsibility for their offenses while preventing misapplication of the reduction for acceptance of responsibility to cases in which the defendant merely states his acceptance but takes no action confirming it.

2. Criminal History

We have several recommendations regarding criminal history. First, guideline §4A1.2, which contains definitions and instructions for computing criminal history, should be amended so that sentences for separate offenses are not artificially treated as one. Section 4A1.2(a)(2) states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. Application Note 3 provides that related cases are those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." This last factor artificially counts sentences in unrelated offenses as a single prior sentence and needlessly encourages separate trials and sentencing proceedings. The mere fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. We suggest that this third category of related cases be limited to those that were consolidated for trial or sentencing if the counts would have been treated as a single group of closely related counts under guideline §3D1.2. This limitation would at least require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under guideline §4A1.3 on the adequacy of criminal history. See also application note 3 to guideline §4A1.2. We believe that the problem needs to be corrected by a guideline, not a recommendation regarding the appropriateness of departure. The definition of prior sentence also applies with respect to career offenders, §4B1.2(3), and produces results that are inconsistent with the career offender statute, 28 U.S.C. §994(h).

Our next criminal history concern is that the guidelines should include an additional criminal history category. We have been advised by prosecutors that they have dealt with defendants whose criminal history scores were 20 or more and that equal treatment of all defendants with scores of 13 or more, as now provided, fails to distinguish properly among defendants. While the court may depart from the guidelines for such defendants, it is not bound to do so and may wish to avoid triggering an appeal. One additional category would at least provide some increase for the most serious recidivists.

We have also noted that whether to count for criminal history purposes a sentence imposed in a case that is on direct appeal should be clarified. An application note should be added that such convictions are to be used in computing the criminal

history score. Application note 6 to guideline §4A1.2 suggests that such sentences are to be counted. However, questions have arisen in this context and will likely continue to arise.

Some expunged convictions should count in computing the criminal history score. Under guideline §4A1.2(j) expunged convictions are not counted but may be considered under §4A1.3 (adequacy of criminal history). If the conviction is expunged for reasons unrelated to innocence or error of law, it should count. Application Note 10 to guideline §4A1.2 provides this result for convictions which are set aside or where the defendant is pardoned.

3. Probation Revocation

The guidelines do not specifically address resentencing upon probation revocation. The relevant statutory provision generally directs the court upon revoking probation to impose "any other sentence that was available under subchapter A [of chapter 227, title 18, United States Code] at the time of the initial sentencing." 18 U.S.C. §3565(a)(2). If the court concludes that under this language it should apply the guidelines in resentencing that were applied at the time of the initial sentencing, the court would find that they fail to provide an increase based on the probation revocation, even for a subsequent criminal violation. This issue may be addressed by the court through a departure from the guidelines under a policy statement on the adequacy of criminal history, §4A1.3. However, resentencing upon probation revocation is too serious a matter for treatment under the departure standards. The guidelines should address resentencing upon probation revocation generally and should provide an increase based on the fact of revocation and the reason for such revocation.

4. Firearms

There is presently no guideline for 18 U.S.C. §924(e), an enhanced sentencing provision for a violation of section 922(g) (felon in possession of a firearm) by a defendant with three previous convictions for a violent felony or a serious drug offense. Section 924(e) establishes a mandatory minimum 15-year prison term and leaves the maximum prison term to the discretion of the court. We believe there should be a guideline applicable to sentences subject to section 924(e) that includes a range of factors and is consistent with the fact that Congress established 15 years as only the minimum sentence available under this provision.

A court determining the applicable guideline sentence when section 924(e) applies must proceed through several steps of guideline application. Since the guidelines do not include a separate provision for section 924(e), the guideline applicable to section 922(g) applies to sentences subject to section 924(e). On November 1 this guideline, §2K2.1, will provide for offense

level 12, which at the highest criminal history category means a sentence of 30-37 months. However, since the 15-year statutory minimum controls where section 924(e) applies and is greater than the guideline sentence under §2K2.1, the statutory minimum becomes the guideline sentence. See guideline §5G1.1(b). Higher sentences would be authorized only if a basis for departing from the guidelines existed in accordance with 18 U.S.C. §3553(b).

We believe that the guidelines should provide for a range of sentences under 18 U.S.C. §924(e). That is, not all offenders should receive the same guideline sentence under this provision when relevant factors are considered. Since Congress established 15 years as only a minimum sentence, a judge should not be required to search for a basis for departure in order to impose a sentence greater than 15 years. Under pre-guidelines law judges imposed sentences well in excess of 15 years in numerous cases. See, e.g., United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987), cert. denied, 108 S. Ct. 1244 (1988); United States v. Gourley, 835 F.2d 249 (10th Cir. 1987), cert. denied, 108 S. Ct. 1741 (1988), in which life sentences were affirmed under the predecessor of 18 U.S.C. §924(e). We recommend that the Commission amend the guidelines to take into account the nature of the underlying conduct, including the type of weapon involved, and the defendant's criminal history in order to develop a guideline which establishes 15 years' imprisonment as a guideline floor, not as a guideline maximum.

5. Arson; Property Damage by Use of Explosives

Guideline §2K1.4, applicable to arson and property damage by use of explosives, should be amended to reflect the inherent seriousness of the offense and to include more readily applicable specific offense characteristics. The guideline currently provides a base offense level of six -- an offense level that permits a probationary sentence -- and numerous specific offense characteristics. The major relevant statute makes the offense punishable by imprisonment for up to ten years generally, twenty years if personal injury results, or life or the death penalty if death results. 18 U.S.C. §844(f) and (i). Clearly, Congress has treated arson and explosives offenses as a very serious matter.

Guideline §2K1.4 takes risk of personal injury into account in three specific offense characteristics and one cross reference. Knowingly creating a substantial risk of death or serious bodily injury results in an increase of 18 levels; recklessly endangering the safety of another results in an increase of 14 levels; otherwise endangering the safety of another results in an increase of four levels; and causing death or intending to cause bodily injury results in application of the most analogous guideline from Part A of Chapter Two of the guidelines if a higher offense level is so achieved.

First, we believe the Commission should restructure the guideline by: (1) significantly raising the base offense level

to take into account the inherent seriousness of explosives and arson offenses as prosecuted federally, and (2) providing a reduction to offense level 6 if the offense amounts only to "malicious mischief." Although the commentary states that many arson cases involve "malicious mischief," prosecutors and investigative personnel from the Bureau of Alcohol, Tobacco, and Firearms have indicated to us their belief that "malicious mischief" does not properly characterize the typical federal arson prosecution. Most federal arson cases, in their view, are serious offenses involving substantial damage or risk of damage or danger to persons. We recommend that the Commission reconsider the data upon which the guideline was based to determine if the offense has changed over the last several years so that a restructuring of the guideline would be in order.

We also believe that establishing the applicability of the specific offense characteristics on risk of harm can be extremely difficult and that other more objective factors would be preferable. For example, the guideline is not clear regarding the applicability of the factors listed above to the dangers faced by emergency personnel called upon to respond to a fire. Generally, whenever the crime of arson is committed, even in a vacant building, there is either knowledge that emergency personnel will be endangered or a reckless disregard for their safety. Injury to public safety officers responding to arson or explosives offenses is a factor specifically recognized in 18 U.S.C. §844(f) and (i). Because of these difficulties, we recommend that guideline §2K1.4 be amended to include the following specific offense characteristics, which rely on objective factors: committing the offense in a large building or a location where other buildings are in close proximity; committing the offense in a commercial or other district in which a rapid emergency response is difficult; setting fire or placing explosives in more than one location; and committing the offense to conceal another offense. Moreover, the two-level increase for the use of a destructive device under §2K1.4(b)(6) is not enough.

6. Murder

As the Department has previously pointed out, the commentary to guideline §2A1.1, regarding first degree murder, should be amended to indicate that life imprisonment is a mandatory sanction under 18 U.S.C. §1111. (The statute also includes the death penalty for first degree murder.) Both Application Note 1 as it now reads and the background commentary as amended to take effect November 1 should be changed in this regard. The explanation in the amended commentary incorrectly relies on provisions of the Sentencing Reform Act of 1984 relating to the classification of offenses to conclude that life imprisonment is not mandatory for first degree murder under section 1111. At least one court of appeals has ruled that life imprisonment is now mandatory for first degree murder, United States v. Donley, 878 F.2d 735 (3d Cir. 1989), and we believe the guidelines commentary should reflect this view.

7. Homicide-Related Offenses

Guideline §2A2.1 on assault with intent to commit murder, conspiracy or solicitation to commit murder, or attempted murder should be amended by increasing the base offense level and including specific offense characteristics that reflect statutory distinctions. The current base offense level is 20. An offender in the lowest criminal history category would receive a sentence of 33-41 months and in the highest category 70-87 months (just over seven years at the top of the range). Most of the statutory maxima for the offenses subject to this guideline are 20 years' imprisonment, while some are as high as life imprisonment. Offense level 20 is too low for these serious offenses. A defendant could receive a three-year sentence despite the fact that he had taken practically all steps necessary to commit a murder but was intercepted by law enforcement officers at the last minute. (If the base offense level is raised substantially, it would be appropriate to retain a lower offense level for attempt to commit manslaughter, a violation of 18 U.S.C. §1113, which is subject to imprisonment for only three years.)

In addition to raising the base offense level, we recommend establishing specific offense characteristics that link the sanction under guideline §2A2.1 to the offense which was the object of the attempt, solicitation, or conspiracy, rather than treating all of these offenses equally regardless of who the victim is. For example, an attempt to kill the President or certain other government officials, is punishable by life imprisonment, 18 U.S.C. §§1751(c) and 351(c), and should result in an enhanced guideline penalty.

8. Career Offender

The career offender guidelines include an objectionable application note to the definitional section. Specifically, application note 4 to guideline §4B1.2 will provide as of November 1 that the definitions from §4A1.2 on criminal history will apply in determining which past convictions are covered by the career offender guideline, §4B1.1. These include, for example, the guideline on the applicable time period, foreign sentences, expunged convictions, and the commentary concerning invalid convictions. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense. These limitations are inconsistent with the statutory mandate that the Commission "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for

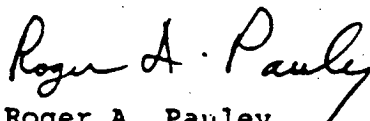
criminal history purposes to the career offender provision, which is designed to look at the defendant's entire lifespan.

9. Extortion Under Color of Official Right

We recommend that the guideline concerning bribery and extortion under color of official right, §2C1.1, be amended to provide a higher base offense level. The guideline establishes a base offense level of 10 and provides specific offense characteristics based on the amount of the bribe involved and whether the offense involved an elected or high-level official. An offense level of 10 allows a probationary sentence (with intermittent, community, or home confinement). In our view a person convicted of a bribery offense should be incarcerated, regardless of the amount of the bribe involved. Sentences of incarceration should not be reserved for cases involving officials who accept large bribes and for high-level officials. The amount of the bribe is generally unimportant in determining the level of the defendant's culpability or the harm caused by the offense. We recommend that the base offense level for guideline §2C1.1 be raised to 13 or 14 to assure a sentence of imprisonment even for a defendant who accepts responsibility for his offense.

We appreciate your bringing these recommendations to the attention of the Commission and hope that it can approve guideline amendments in the above areas for the next submission to Congress. We would be pleased to provide our assistance to the Commission in its efforts to implement these suggestions.

Sincerely,



Roger A. Pauley
Sentencing Coordinator
Criminal Division

RELEVANT CONDUCT EXERCISE: I

Variation #1

During the robbery an alert teller activates the silent alarm, notifying the police. Defendant A hear the squad car sirens and immediately leaves the scene without his two codefendants. Defendants B and C also hear the sirens upon exiting the bank, and steal a nearby car by forcing out the owner. In their attempt to escape, their vehicle strikes a child, causing permanent paralysis of her legs?

1. Should the offense level for Defendant A include a 6 level increase for "permanent or life-threatening bodily injury" under §2B3.1(b)(3)(C)?

- Why or why not?

TAB C



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

DEC 14 1989

CC-38,342 FE:JBP

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Your staff has contacted us and requested that we review the sentencing guidelines and make recommendations with respect to possible changes in those areas within the jurisdiction of the Bureau Alcohol, Tobacco and Firearms (ATF). The changes recommended in this letter are based on our experience with the guidelines.

Arson

Under 18 U.S.C. § 844(i), it is unlawful to damage or destroy or attempt to damage or destroy by means of fire or an explosive any property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Under section 2K1.4 of the guidelines, the base offense level for this offense is only 6. (For example, a defendant with two serious prior convictions would only receive a sentence of 2-3 months, and the defendant could be placed on probation.) The Commentary to the guidelines states that a review of presentence reports indicates that many arson cases involve malicious mischief, *i.e.*, minor property damage under circumstances that do not present an appreciable danger. We believe that the Commentary is an inaccurate description of prosecutions under section 844(i).

Title XI of the Organized Crime Control Act of 1970, of which section 844(i) is a part, was enacted by the Congress to combat bombings and other serious criminal misuses of explosives. The focus of the title was not upon malicious mischief or minor damage to property, not presenting an appreciable danger. When amending the statute in 1982 to cover fires as well as explosions, the Congress accurately described the purpose of Title XI--to provide Federal jurisdiction over the criminal use of explosives (*e.g.*, extortion, terrorism, and revenge). H.R. Rep. No. 97-678, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Ad. News 2631-2635.

- 2 -

Honorable William W. Wilkins, Jr.

The House Report also alluded to the types of serious arson cases prosecuted under section 844(i), stating that "Identifying fires caused by explosives is technically difficult. Determining the cause of a deliberately set fire involves an extensive physical and chemical inventory of the debris at the fire scene, and extensive chemical laboratory analysis of the debris. Determining the persons responsible for causing the fire involves laborious analysis of insurance policy applications, records of property transfers, extensive corporate ownership records, balance sheets, profit and loss statements, and comparison with information concerning other suspicious fires. Fire is used extensively not only for the criminal purposes of extortion, terrorism and revenge, but to conceal other crimes such as homicide, and for fraud against insurance companies." Id at 2632.

The report also states that in a 1981 hearing "numerous representatives of the fire fighting profession, the law enforcement profession, and the insurance industry testified that the arson investigations performed by BATF were of critical importance, and if anything, ought to be expanded." Id at 2632.

Significantly, ATF does not utilize section 844(i) to prosecute arson incidents involving malicious mischief. Rather, ATF's law enforcement program with respect to arson emphasizes the use of section 844(i) in combatting arson-for-profit, a major economic crime of national magnitude. This program instructs ATF law enforcement personnel to direct their investigations toward those incidents involving industrial or commercial activities where the suspected perpetrators are members of organized crime, white-collar criminals, members of organized arson rings, and violent criminals whose illegal activities impact upon the community at large.

A review of the reported cases under section 844(i) reveals no case predicated upon malicious mischief. The reported cases fall within the following categories: arson and bombings for profit (including insurance fraud) or some other commercial motive; arson and bombings to injure a person or damage property for revenge; and other serious arsons and bombings.

- 3 -

Honorable William W. Wilkins, Jr.

In setting the base offense level at only 6, the guidelines appear to ignore the risk of injury to emergency personnel and private citizens when emergency personnel respond to an arson scene. The risk to firefighters in large commercial buildings is substantial. The guidelines do not take these risks into account and seem to ignore congressional intent to severely punish violations of section 844(i), resulting in injury to emergency personnel. In 1984, Congress amended section 844(i) to make explicit that an injury to or the death of a public safety officer would result in an increased sentence. The committee report accompanying the legislation states: "The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in section 844(d), (f), or (i), if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians." S. Rep. No. 98-225, 98th Cong., 2d Sess. 359, reprinted in 1984 U.S. Code Cong. & Ad. News 3508.

We recommend that the base offense level for arson should be increased to 24. Arson in violation of section 844(i) is a serious offense and is a crime of violence for purposes of the Career Offender provisions.

Under the current guidelines, if the defendant "endangered" the safety of another person, an increase of 4 levels is made. If the defendant "recklessly endangered" the safety of another person, an increase of 14 levels is made. If the defendant knowingly created a "substantial risk of death or serious bodily injury," an increase of 18 levels is made. Information from Assistant U.S. Attorneys handling these cases indicate that these guidelines are confusing and not easy to apply. For example, uncertainty exists with respect to the appropriate sentencing level where a fireman or private citizen is injured while firefighters are driving to the scene, and the defendant did not intend this consequence.

- 4 -

Honorable William W. Wilkins, Jr.

Arson cases under section 844(i) are, by their nature, difficult and complex cases to prosecute. United States Attorneys are more reluctant to prosecute these cases when the sentencing guidelines for increasing the base offense level above 6 are difficult to apply.

If the base offense level is increased to 24, the increase in offense level for endangering the safety of another person could be eliminated; the increase for recklessly endangering the safety of another person could be reduced from 14 levels to 4 levels; and the increase for knowingly creating a substantial risk of death or serious bodily injury could be reduced from 18 levels to 8 levels. United States Attorneys will be more willing to prosecute arson cases under section 844(i) when they are certain that a reasonable sentence will be imposed even if the increases for recklessly endangering the safety of another or for knowingly creating a substantial risk of death or serious bodily injury are not imposed by the sentencing judge.

Maximum Sentences Under The Armed
Career Criminal Act, 18 U.S.C. § 924(e)

Under 18 U.S.C. § 924(e), an individual such as a felon who has three prior convictions for a violent felony or a serious drug offense and who violates 18 U.S.C. § 922(g) by possessing a firearm is subject to a mandatory minimum sentence of 15 years imprisonment. Section 924(e) does not state a maximum term. However, in United States v. Savage, 863 F.2d 595 (8th Cir. 1988), the court held that the maximum sentence under section 5G1.1(b) of the guidelines is 15 years.

In numerous cases where armed career criminals possessed firearms before the sentencing guidelines became effective, judges imposed more than the mandatory minimum 15-year sentence. In reported cases, defendants received the following sentences: life (2 cases); 30 years (1 case); 25 years (1 case); 23 years (1 case); 20 years (5 cases, including 1 case in which the defendant received consecutive sentences of 20 years each on two counts); and 18 years (1 case). In Attachment A to this letter, the reported cases are analyzed in some detail and the factors judges used in imposing more than the minimum 15-year sentence are discussed.

- 5 -

Honorable William W. Wilkins, Jr.

In a recent unreported case, Warren Bland was sentenced to life imprisonment for being an armed career criminal in possession of a firearm. Fortunately, Mr. Bland possessed the firearm before the sentencing guidelines became effective. If he possessed the firearm today, the maximum sentence he could receive would be 15 years. Mr. Bland had a long history of vicious and sadistic sexual assaults. This case is discussed in an article in U.S. News and World Report which is contained in Attachment B. Upon the Commission's request, we would be glad to provide examples of unreported cases in which defendants received more than a 15-year sentence.

A review of the cases shows that a 15-year maximum sentence for armed career criminals is inappropriate. Many factors may warrant sentences in excess of 15 years. A specific guideline should be created to cover sentencing under section 924(e) that would allow judges to sentence defendants to more than 15 years and to a maximum of life imprisonment in appropriate cases.

Under 28 U.S.C. § 994(h), Congress directed the Commission to specify a term of imprisonment at or near the maximum term authorized for defendants who were currently being convicted of a crime of violence or a controlled substance offense and have two previous convictions for crimes of violence or controlled substance offenses. Pursuant to this directive, the Commission promulgated the career offender guidelines in Chapter 4, Part B. "Armed career criminals" under 18 U.S.C. § 924(e) are by definition more serious and more hardcore offenders than are "career offenders." That is to say, armed career criminals must have already committed three prior violent felonies or serious drug offenses and, in addition, be found in unlawful possession of a firearm. Every armed career criminal under section 924(e) would have qualified as a career offender upon the commission of his third violent felony or serious drug offense if the third offense had been prosecuted in Federal court.

Under section 5G1.1 of the guidelines, the maximum sentence that may be imposed under section 924(e) is 15 years or 180 months. Under section 4B1.1 of the guidelines, career offenders will receive longer sentences than armed career criminals even though the criminal record of the career offender may well be shorter and the nature of his

- 6 -

Honorable William W. Wilkins, Jr.

criminality less serious. For example, when the statutory maximum for an offense is life (as it is under section 924(e)) and the defendant is a career offender, the guideline range specified by section 4B1.1 is 360 months (30 years) to life. The armed career criminal can only receive a maximum of 180 months or 15 years. The congressional intent embodied in section 994(h) is that hardcore offenders receive sentences at or near the statutory maximum. It is inconsistent with this intent to limit sentences under section 924(e) to the statutory minimum of 15 years. Judges should be able to sentence armed career criminals to the statutory maximum provided in the statute--life imprisonment in appropriate cases.

Felons In Possession of Firearms

Under 18 U.S.C. § 922(g), it is generally unlawful for a felon to receive or possess a firearm. In November 1988, the Congress increased the maximum penalty for this offense from 5 years to 10-years imprisonment. The current sentencing guideline applicable to this offense in section 2K2.1 provides a base offense level of 12 and requires a decrease to level 6 if the defendant obtained or possessed the firearm solely for lawful sporting purposes or for collection. The offense level for felons who possess concealable or non-sporting firearms and who have prior convictions for crimes of violence or for controlled substance offenses is too low.

The 1986 amendments to the Gun Control Act of 1968 (18 U.S.C. Chapter 44) significantly decreased the number of felons prohibited by section 922(g) from possessing firearms. Effective November 15, 1986, under 18 U.S.C. § 921(a)(20), a felon who has received an expunction, pardon, set aside, or restoration of civil rights and who is not prohibited by the law of the jurisdiction in which convicted from possessing firearms is no longer prohibited under Federal law from possessing firearms. Thus, a section 922(g) offense has become more serious because only individuals not having any of these indicia of rehabilitation are prohibited from possessing firearms.

Because of the insignificant sentences provided for by the guidelines, ATF has experienced difficulty in having individuals prosecuted who possess firearms and who have

- 7 -

Honorable William W. Wilkins, Jr.

committed a prior crime of violence or a controlled substance offense. The guidelines should provide an increase in the offense level to 18 if the defendant is in possession of a concealable or non-sporting firearm, the firearm is loaded or the defendant possesses ammunition for the firearm, and the prior felony conviction is for a controlled substance offense or a crime of violence. This class of individuals poses a serious threat to society if they possess these types of firearms and a significant deterrent to such possession should be implemented. Furthermore, the decrease in offense level if the defendant obtained or possessed the firearm solely for lawful sporting purposes or collection should be eliminated for this class of defendants. If the defendant used a firearm in the prior felony, the offense level should be increased to 22. For purposes of our recommendation, the term "non-sporting firearm" would mean a firearm not meeting the sporting purposes criteria for importation into the United States under 18 U.S.C. § 925(d)(3).

If the defendant has two prior convictions for controlled substance offenses or crimes of violence and is in possession of a concealable or non-sporting firearm and the firearm is loaded or the defendant is in possession of ammunition for the firearm, the offense level should be increased to 26. These individuals pose a serious threat but do not qualify for sentencing as "career offenders" or as "armed career criminals." If the defendant used a firearm in two prior offenses, the offense level should be increased to 30.

Under former 18 U.S.C. § 3575, which was repealed for offenses committed on or after November 1, 1987, a defendant who had two prior felony convictions and was convicted of a third felony could be sentenced as a dangerous special offender and receive an enhanced sentence. Attachment C provides examples of cases where the defendants were sentenced to 8 and 10-years imprisonment for being a felon in possession of a firearm but where, under the sentencing guidelines, the sentence would only be 15-21 months. Under the guidelines, if the defendant received the 2 level reduction for acceptance of personal responsibility the sentence would only be 10-16 months. Also, these defendants could qualify for home detention or community confinement rather than imprisonment for up to one-half of their sentence. Attachment C also contains a discussion of other

- 8 -

Honorable William W. Wilkins, Jr.

cases where the defendant received a substantial sentence for being a felon in possession of a firearm.

Being a felon in possession of a firearm is a serious offense. In United States v. Jones, 651 F. Supp. 1309 (E.D. Mich. 1987), the court held that this offense is a crime of violence for purposes of detaining a defendant without bail. The court found that there was a substantial and continuing risk that a convicted felon will commit a violent act during the period the felon possesses the firearm. A felon possessing a firearm is especially serious when the felon has a prior record for crimes of violence or drug offenses. In United States v. Burton, 629 F.2d 975, 977 (4th Cir. 1980), the court stated: "Convicted felons, particularly those who have been convicted of violent crimes, constitute a greater threat to society if armed than if they were not." In United States v. Oliver, 683 F.2d 224, 234 (7th Cir. 1982), the court described the offense as "a serious offense with potentially violent overtones." In United States v. Felder, 744 F.2d 18, 21 (3rd Cir. 1984), the court observed that the offense "was particularly heinous in view of the defendant's long and serious history of assaultive behavior which involves, inter alia, separate convictions for robbery and voluntary manslaughter."

In some cases, a defendant may have committed three prior violent felonies or serious drug offenses but may not qualify for sentencing as an armed career criminal under section 924(e) because of a defect in one of the convictions. In United States v. Clawson, 831 F.2d 909 (9th Cir. 1987), the court held that a defendant may challenge the constitutional validity of his three prior convictions in an armed career criminal case. If a defendant is convicted of three violent crimes but the record is silent on whether he was represented by counsel in pleading guilty to one of the crimes, he cannot be sentenced as an armed career criminal. This defendant would have an offense level of 12 and he would probably be in Criminal History Category III. His sentence would be 15-21 months, and if he accepted personal responsibility for the offense, the sentence would be reduced to 10-16 months. He could serve one-half of this in home detention or community confinement. Our proposal would result in a more reasonable sentence for this defendant.

- 9 -

Honorable William W. Wilkins, Jr.

We believe our proposal narrowly targets those individuals whose possession of firearms poses a significant threat to society. For example, the offense level for an individual in possession of a sporting firearm, e.g., a conventional hunting rifle or shotgun, would remain at 12 even if the individual had previously been convicted of a crime of violence or a controlled substance offense.

We also believe that the reduction to offense level 6 if the defendant obtained or possessed the firearm solely for lawful sporting purposes or collection should be eliminated or severely curtailed. As a basis for sentence reduction, defendants are asserting this provision in clearly inappropriate cases. In United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989), a convicted felon fired a rifle throughout his home after a quarrel with his wife. His sole argument on appeal was that his offense level should be reduced because he had obtained the rifle solely for sporting purposes. This argument was rejected by the court. In United States v. Pope, 871 F.2d 506, 508 (5th Cir. 1989), a felon claimed that he possessed a silencer as part of a gun collection. The court stated that only a lawful collection of guns can be considered a mitigating factor under section 2K2.2(b)(3): "it would be contrary to the clear intent of this provision to find that an illegal gun collection, such as one possessed by a convicted felon, should be used to reduce the sentence of a person guilty of violating a firearms statute." This case appears to be in conflict with section 2K2.1(b)(1) of the current guidelines which requires a reduction of the offense level to level 6 if the defendant possessed the silencer solely for lawful sporting purposes or for collection.

Unregistered Weapons Under The National Firearms Act (NFA)

Under 26 U.S.C. § 5861(d), it is unlawful for an individual to possess a National Firearms Act firearm which is not registered to that individual. Firearms under the NFA include weapons such as machineguns, sawed-off rifles and shotguns, silencers, and bombs. Section 2K2.1 of the guidelines specifies an offense level of 16 for the possession of an unregistered NFA weapon. The offense levels for felons who possess NFA weapons and who have a prior felony conviction for a crime of violence or a controlled substance offense should be increased from 16 to

- 10 -

Honorable William W. Wilkins, Jr.

20. This class of individuals poses an extremely serious threat to society if they possess NFA weapons and a significant deterrent to their possession of these weapons should be implemented. If the prior felony conviction involved the use of a firearm, the offense level should be increased to 24. The offense level should be increased to 28 if the defendant has two prior convictions for controlled substance offenses or crimes of violence. While these individuals pose a serious threat, they do not qualify for sentencing as "career offenders" or as "armed career criminals." The offense level should be increased to 32 if the defendant has two prior convictions which involved the use of firearms.

Congress recently amended 18 U.S.C. § 924(c) to increase the penalty for using a machinegun or a firearm equipped with a silencer during a crime of violence or a drug trafficking crime to a mandatory term of imprisonment of 30 years. This penalty is in addition to the penalty for the drug trafficking crime or crime of violence and shows the seriousness with which the Congress views the association of NFA weapons with violent crimes and drug offenses.

In United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989), the district court made an upward departure from the guidelines in sentencing Lopez for possession of machineguns in part because he was a multi-convicted felon. The appellate court ruled that the district court's grounds for departure were not sufficient. In cases arising before the sentencing guidelines took effect, courts held that it was proper to impose consecutive sentences for possessing an unregistered NFA weapon and for being a felon in possession of the same firearm. In other cases, courts have imposed lengthy sentences on felons who possessed NFA weapons. These cases are discussed in Attachment D.

This guideline also requires a decrease to level 6 if the defendant obtained or possessed the NFA weapon solely for lawful sporting purposes or for collection. This decrease should be eliminated because under 26 U.S.C. § 5861(d) it is illegal to possess an NFA weapon unless it is registered to the person possessing it. These weapons are contraband. (See 49 U.S.C. § 781(b)(2) which provides that any firearm with respect to which a violation of the NFA has occurred is a contraband article and a vehicle used to transport the

- 11 -

Honorable William W. Wilkins, Jr.

firearm is subject to forfeiture.) Most certainly, this decrease to level 6 should not be available to any defendant who possess an unregistered NFA weapon after being convicted of a controlled substance offense or a crime of violence.

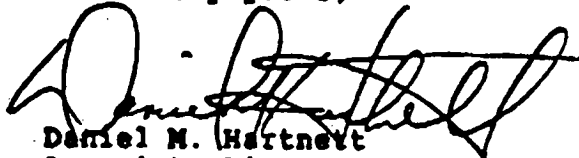
Receipt of Explosives by Felons

Under 18 U.S.C. § 842(i)(1), it is generally unlawful for any person who has been convicted of a felony to receive explosives. Under section 2K1.3 of the guidelines, the base offense level for unlawfully receiving explosives is 6 and if the defendant is prohibited under section 842(i) from receiving explosives, the offense level is increased 10 levels to 16. We recommend an increase in the offense level to 20 for individuals who receive explosives and who have been convicted of a crime of violence or a controlled substance offense. If the defendant used a firearm or explosive in the prior felony, the offense level should be increased to 26.

If the defendant has two prior convictions for controlled substance offenses or crimes of violence, the offense level should be increased to 30. These individuals pose a serious threat but do not qualify for sentencing as "career offenders" or as "armed career criminals." If the defendant used a firearm or explosive in two prior offenses the offense level should be increased to 34.

We appreciate this opportunity to comment on the sentencing guidelines. If additional information is desired, please let us know.

Sincerely yours,


Daniel M. Hartnett
Associate Director
(Law Enforcement)

Attachments

Attachment A

In two reported cases, the defendants received life sentences for being armed career criminals in possession of a firearm. United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987); United States v. Gourley, 835 F.2d 249 (10th Cir. 1987).

In United States v. Jackson, *supra*, 30 minutes after being released from prison as part of a "work release program," Jackson robbed another bank. He had been serving a sentence for two bank robbery convictions. Jackson had previously been convicted of a total of four armed bank robberies and one armed robbery. The court stated that armed bank robbery on the day of release--following earlier armed robbery convictions going back to 1973--marked Jackson as a career criminal. The court also stated that specific deterrence had failed in Jackson's case.

In United States v. Gourley, *supra*, the trial judge reviewed Gourley's criminal record--11 convictions including two armed robberies and two burglaries. The trial judge also considered the fact that more than one-half of his prior crimes involved the use of firearms. Two undercover officers went to a room at a motel to attempt to buy narcotics. While the two officers were waiting in the room, Gourley burst in and pressed a sawed-off shotgun against the throat of one of the officers. A struggle ensued during which Gourley tried to pull out a .357 magnum from his waistband. Evidence produced at the sentencing hearing showed there were firing pin impressions on a shotgun shell taken from the shotgun Gourley pressed to the officer's throat. The trial judge concluded that had it not been for the malfunction of the weapon at least one police officer probably would have been killed. The Seventh Circuit stated that the circumstances surrounding Gourley's arrest and his 11 prior felony convictions justified the life sentence. The court concluded that Gourley's record demonstrated that convictions and imprisonment did not deter him from returning to crime after he was released. The court stated that because the hope of rehabilitation was unrealistic in Gourley's case, the sentencing judge had to look to other factors in reaching his decision, such as the desire to prevent repeated crimes by the defendant and the deterrence of others who would commit similar crimes.

In the following cases, the defendants received more than 20 years. In United States v. Shagoo, 787 F.2d 420 (8th Cir. 1986), the defendant was sentenced to 30 years as an armed

career criminal. He was also convicted of possession of PCP with intent to distribute. In United States v. Cloyd, 819 F.2d 836 (8th Cir. 1987), the defendant was sentenced to 25 years as an armed career criminal by the trial judge and the Eighth Circuit deferred a decision on whether he should have been sentenced as an armed career criminal. Cloyd used the firearm in a bank robbery for which he was also convicted. He was also convicted of violating 18 U.S.C. § 924(c). In United States v. Rush, 840 F.2d 574 (8th Cir. 1988) (en banc), Cloyd's 25-year sentence as an armed career criminal was affirmed. In United States v. Blannon, 836 F.2d 843 (4th Cir. 1988), the defendant was sentenced to 23 years. The court mentioned that the defendant had been arrested 19 times between the ages of 14 and 18 and had 3 prior robbery or burglary convictions. The court in Blannon stated that the maximum penalty is life imprisonment and that the trial judge has broad discretion. The court observed that the trial judge had specifically set out the reasons for the 23-year sentence. The trial court had stated that it wished to incapacitate the defendant to prevent him from committing crimes and that incapacitation had always been viewed as one of the appropriate ends of punishment.

In the following cases the defendants received sentences of 20 years. In United States v. Quintero, 872 F.2d 107 (5th Cir. 1989), the defendant received consecutive 20-year prison terms on each of two counts of being an armed career criminal in possession of a firearm. On May 27, 1987, Quintero was found to have heroin in his pocket when encountered by police and in a search of an apartment police found two rifles. On October 13, 1987, police found a gun on the floor of Quintero's car after apprehending him in a high speed chase. He had two prior convictions for burglary with intent to commit theft and one prior conviction for assault with intent to rob while armed. In United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989), the defendant had pled guilty to attempted murder. Jordan had used a firearm to fire at an off-duty police officer outside the store where the officer was employed as a security officer. The court mentioned that Jordan had three prior robbery convictions. In United States v. Pirovolos, 844 F.2d 415 (7th Cir. 1988), the defendant was sentenced to 20 years imprisonment with a mandatory term of 15 years without probation or parole. The court mentioned that Pirovolos had 3 prior convictions for armed robbery.

In United States v. Clawson, 644 F. Supp. 187 (D. Or. 1986), affirmed 831 F.2d 909 (9th Cir. 1987), police officers dressed in plain clothes encountered Clawson and identified themselves. Clawson began to run. After taking a few steps, he reached for the small of his back, as if to draw a gun from his waistband. One officer drew his gun and ordered him to "freeze." An altercation developed between another officer and an associate of Clawson's. Clawson began to edge away from the officer who had ordered him to stop. The officer told him to stop or he would shoot. The officer ordered Clawson to lay down and he handcuffed Clawson. When the officer was distracted by the altercation, Clawson sat up and began to move around. The officer pushed Clawson down and heard metal strike the pavement. The officer looked down and saw a handgun on the ground behind Clawson. In United States v. Jackson, 824 F.2d 21 (D.C. Cir. 1987), the defendant was apprehended in an apartment in possession of two .38 caliber pistols. The opinion states that he had one prior bank robbery conviction.

In United States v. Lego, 855 F.2d 542 (8th Cir. 1988), the defendant was sentenced to 18 years. The defendant was under indictment on two counts of being a felon in possession of a firearm, two handguns, when local police officers arrested him for possession of a third handgun.

An examination of the reported cases shows the courts have considered the following factors in sentencing defendants to more than the required 15-year minimum sentence as armed career criminals:

- the number of times the defendant had been arrested
- the number and the nature of the defendant's prior offenses
- whether the prior offenses involved the use of a firearm or the attempted discharge or the discharge of a firearm
- whether the prior offenses involved violence
- whether the defendant was on probation or parole or under indictment when he possessed the firearm
- the periods of time the defendant spent out of prison without being arrested or convicted

- how long the defendant had been released from prison before committing the current firearms offense
- the circumstances of the current offense
- whether other State or Federal offenses were committed during the current firearms offense
- whether the current offense involved the use of a firearm or the attempted discharge or the discharge of a firearm
- whether violence was involved in the current offense
- the degree of danger that the defendant posed to society, i.e., the defendant's dangerousness
- the possibility of rehabilitation of the defendant
- deterrence of the defendant
- general deterrence
- incapacitation or prevention of additional crimes by the defendant.

Attachment C

In United States v. Felder, 744 F.2d 18 (3rd Cir. 1984), the defendant received an enhanced 10-year sentence as a dangerous special offender for being a felon in possession of a firearm under 18 U.S.C. App. § 1202(a). Section 1202 has since been repealed. The maximum sentence under section 1202 was only 2 years. He had only two prior convictions so under the sentencing guidelines he would not qualify as a career offender and he would not qualify as an armed career criminal under 18 U.S.C. § 924(a). Under the guidelines, Felder's offense would have an offense level of 12 and he would probably be in Criminal History Category III. His sentence would be 15-21 months and if he accepted personal responsibility for the offense the sentence would be reduced to 10-16 months. He could serve one-half of this in home detention or community confinement.

In the Felder case, the court considered nine of defendant's arrests, including arrests for rape and two arrests for aggravated assault, as well as his convictions. At page 21, the appellate court noted the the trial court's observation that "Felder's offense, possession of a gun by a felon was particularly heinous in view of the defendant's long and serious history of assaultive behavior which involves, inter alia, separate convictions for robbery and voluntary manslaughter." There is no indication in the opinion that Felder was misusing the firearm. It appears he was merely in possession of the firearm.

In United States v. Williamson, 567 F.2d 610 (4th Cir. 1977), the defendant received an 8-year enhanced sentence as a dangerous special offender for being a convicted felon in possession of a firearm under 18 U.S.C. App. § 1202. The only convictions mentioned in the opinion are a conviction for housebreaking and larceny and another conviction for manslaughter. Under the guidelines, Williamson's offense would have an offense level of 12 and he would probably be in Criminal History Category III. His sentence would be 15-21 months and if he accepted personal responsibility for the offense the sentence would be reduced to 10-16 months. He could serve one-half of this in home detention or community confinement. There is no indication in the opinion that Williamson was misusing the firearm. It appears he was merely in possession of the firearm.

In United States v. Scott, 804 F.2d 104 (8th Cir. 1986), the defendant received a 10-year enhanced sentence as a dangerous special offender for being a convicted felon in

possession of a firearm under section 1202. The only convictions mentioned in the opinion are convictions for armed robbery and robbery and conveying a weapon in a Federal prison. It appears that under the sentencing guidelines he would not qualify as a career offender and he would not qualify as an armed career criminal under 18 U.S.C. § 924(e). Under the guidelines, Scott's offense would have an offense level of 12 and he would probably be in Criminal History Category IV. His sentence would be 21-27 months and, if he accepted personal responsibility for the offense, the sentence would be reduced to 15-21 months. There is no indication in the opinion that Scott was misusing the firearm. It appears he was merely in possession of the firearm.

In United States v. Oliveri, 806 F.2d 61 (3rd Cir. 1986), the defendant received an 8-year enhanced sentence as a dangerous special offender for being a convicted felon in possession of a firearm under 18 U.S.C. App. § 1202. The opinion mentions eight convictions but the defendant had only two convictions for violent crimes and no convictions for drug offenses. Under the sentencing guidelines, he would not qualify as a career offender and he would not qualify as an armed career criminal under 18 U.S.C. § 924(e). Under the guidelines, Oliveri's offense would have an offense level of 12 and he would probably be in Criminal History Category VI. His sentence would be 30-37 months and, if he accepted personal responsibility for the offense, the sentence would be reduced to 24-30 months. There is no indication in the opinion that Oliveri was misusing the firearm. It appears he was merely in possession of the firearm.

In United States v. Ouimette, 798 F.2d 47 (2nd Cir. 1986), police officers heard a muffled shot from within a bar and discovered confusion and brawling inside the bar. The police officers observed Ouimette dropping a revolver and a pair of gloves to the floor. There was only one firearm involved in this case. Ouimette received a sentence as a dangerous special offender of 18 years--9 years for being a felon in receipt of a firearm under 18 U.S.C. § 922(h) and 9 years for receiving a firearm with an obliterated serial number under 18 U.S.C. § 922(k). The appellate court upheld the consecutive sentences for violations of sections 922(h) and 922(k). The case was remanded to the trial court for a decision on whether Ouimette was entitled to a new trial based on newly discovered evidence. In an earlier reported

decision on this case--United States v. Ouimette, 753 F.2d 188, 194 (1st Cir. 1985)--the appellate court had rejected a challenge to the severity of the sentence. The court stated that in light of Ouimette's extensive criminal record which showed a marked propensity for violence, the sentence was not disproportionately severe. The court did not list Ouimette's prior convictions.

In other cases, defendants received enhanced sentences as dangerous special offenders for being a felon in possession or receipt of a firearm--

United States v. Grier, 851 F.2d 982 (7th Cir. 1988)
(10 years for a violation of 18 U.S.C. § 1202)

United States v. Porter, 831 F.2d 760 (8th Cir. 1987)
(15 years for a violation of section 1202)

United States v. Vigil, 818 F.2d 738 (10th Cir. 1987)
(5 years for a violation of section 1202)

United States v. Blade, 811 F.2d 461 (8th Cir. 1987)
(9 years for a violation of section 1202)

United States v. Hanahan, 798 F.2d 187 (7th Cir. 1986)
(10 years for a violation of section 1202)

United States v. Oliver, 787 F.2d 124 (3rd Cir. 1986)
(12 years for a violation of section 1202)

United States v. Adams, 771 F.2d 783 (3rd Cir. 1985)
(10 years for a violation of section 1202)

United States v. Davis, 710 F.2d 104 (3rd Cir. 1983)
(12 years for a violation of section 1202)

In other firearms cases, defendants received lengthy sentences. In United States v. Gardner, 579 F.2d 474 (8th Cir. 1978), the court affirmed the sentence of the defendant. The defendant was sentenced to 10 years--two consecutive 5-year terms for being a felon in receipt of a firearm and for falsifying the firearms transaction form in purchasing the firearm from a licensed firearms dealer. In United States v. Gardner, 605 F.2d 1076 (8th Cir. 1979), the court again upheld the sentence imposed on Gardner. Example B.10 of the supplementary illustrations promulgated by the Commission

states that a count for being a felon in possession of a firearm and a count for making a false statement in the acquisition of a firearm are grouped together. This means that the defendant can only be sentenced for being a felon in possession of a firearm and the false statement in acquiring the firearm is totally ignored.

In United States v. Santiago-Fraticelli, 730 F.2d 828 (1st Cir. 1984), the defendant also received a 10-year sentence--two consecutive 5-year terms for being a felon in receipt of a firearm and for falsifying the firearms transaction form in purchasing the firearm from a licensed firearms dealer. The court did not discuss the defendant's prior criminal record in detail. The opinion states that in 1970 the defendant was convicted of a felony in New York. The defendant argued that pretrial publicity portrayed him as a Mafia boss and the mastermind behind the murder of an assistant district attorney.

In United States v. Mazak, 789 F.2d 580 (7th Cir. 1986), the defendant received a 6-year sentence--two consecutive 3-year terms for being a felon in receipt of a firearm and for falsifying the firearms transaction form in purchasing the firearm from a licensed firearms dealer. The court did not discuss the defendant's prior criminal record.

In United States v. Oliver, 683 F.2d 224 (7th Cir. 1982), the defendant received a 5-year sentence for being a felon in receipt of ammunition under 18 U.S.C. § 922(h) and a consecutive sentence of 5 years probation for being a felon in possession of a firearm in violation of 18 U.S.C. App. § 1202.

Attachment D

Courts have consistently held that a defendant may receive a consecutive sentence for possessing an unregistered NFA weapon and for being a felon in receipt or possession of the same weapon. United States v. Gann, 807 F.2d 134 (8th Cir. 1986); United States v. Gann, 732 F.2d 714 (9th Cir. 1984); United States v. Ching, 682 F.2d 799 (9th Cir. 1982); United States v. Wright, 581 F.2d 704 (8th Cir. 1978). In the Wright case, the defendant received a 10-year sentence for possessing an unregistered sawed-off shotgun and a 3-year sentence for being a felon in receipt of the same shotgun. The sentences ran consecutively. It does not appear that Wright used the shotgun in any crime. The shotgun was found when a car being driven by Wright was stopped by local police officers investigating an armed robbery.

In United States v. Pleasant, 730 F.2d 657 (11th Cir. 1984), a defendant received a 21-year sentence as a dangerous special offender under 18 U.S.C. § 3575 for possessing an unregistered sawed-off shotgun. The court stated that he had been convicted for stabbing a man in prison and for second degree murder when he beat a man to death with a shovel.

In United States v. Scott, 859 F.2d 792 (9th Cir. 1988), Scott received a 25-year sentence when an ATF agent purchased two NFA weapons from Scott and his companions. Scott received a 10-year sentence as a dangerous special offender for conspiracy to unlawfully possess NFA weapons and a sentence of 15 years as a dangerous special offender for possessing and transferring unregistered NFA weapons. The opinion stated that he had three prior felony convictions but did not discuss the convictions in detail.

A criminal lack of common sense

BY JOHN LEO

The life story of Warren Bland is one of those tales evenly divided between the viciousness of the criminal and the folly of the criminal-justice system. Consider this career:

In 1958, Bland stuck a knife in the stomach of a man in a Los Angeles bar and got off with probation. In 1960, he was arrested in a series of sexual assaults on women in Los Angeles County. Three women fought back and avoided rape. One had her jaw broken in the process. Originally charged with one rape, three attempted rapes, a kidnapping and a robbery, he plea-bargained down to one rape and one kidnapping and was sent to a state mental hospital under the state's "mentally disordered sex offender" program, which has since been abandoned. The hospital warned that Bland was a sexual psychopath who would be "assaultive and/or homicidal toward women" if released.

For seven years, Bland was studied, interviewed, counseled, psychoanalyzed and "treated." In the process, the hospital disregarded its own warning. Always expert at simulating rehabilitation, Bland was hailed in a probation report for his "complete change and attitude toward his problem," and the hospital set him free.

Within months, he was back at his chosen life's work, violent sexual attacks. He was convicted of two more rapes. At his sentencing, another dark report announced that Bland was "clearly a dangerous individual who warrants segregation from society for the longest time that is possible under existing laws."

Existing laws being what they are, Bland served just seven years. Shortly after his release, he kidnapped an 11-year-old girl and her mother. The mother was molested. The girl was sexually assaulted and tortured.

In yet another of those compassionate criminal-justice breaks that kept coming his way, Bland plea-bargained and served only three years for those crimes. The crimes were growing more violent; the jail terms were getting shorter.

Lethal habits. Eight months after his release, Bland was back in jail, this time for sodomizing and torturing a small boy. At this point, in any sensible society, Bland would have been tossed into a dungeon for the rest of his life, but in California he plea-bargained for 9 years and served only 4½ years.

Bland got out again in early 1986. In December, Phoebe Ho, age 7, disappeared while walking to school in South Pasadena. She was found dead in a ditch in Riverside County, mutilated with the kind of instruments Bland had used before. A 14-year-old girl in Orange County died the same way, and an 81-year-old San Diego woman was found bound, nude and choked to death, with Bland as the chief suspect.

Sought in the Ho murder, Bland fled and was found by police working under an alias in a McDonald's in Pacific Beach. He was wounded in the buttocks while trying to escape. In his car, police found a gun and

evidence linking him to Ho. He was charged with her murder.

Enter the Feds. Larry Burns, an assistant U.S. Attorney in San Diego, filed federal charges against Bland under the Armed Career Criminal Act, the brainchild of Senator Arlen Specter (R-Pa.). This fairly new, fairly obscure legislation was passed in 1984. As originally written, it provided that anyone caught with a gun after three burglaries or robbery felonies will go to jail for a minimum of 15 years to a maximum of life imprisonment, with no possibility of parole. The act was amended and enlarged in 1986 to apply to anyone who had committed three crimes of violence or serious drug offenses.

In his brief to the court, Burns noted dryly that "a public perception has arisen, in California in particular, that the stewards of our criminal-justice system have

failed to come to grips in a realistic and common-sense manner with the mounting crime wave." This is lawyerly understatement. What he might have said is that the state of California botched the Bland case for three decades and is implicated by its incompetence in the savage murder of little Phoebe Ho. It has known for 29 years that Bland is a violent sexual psychopath, yet it let him go five times.

This casual approach did not end with Bland's latest arrest in Pacific Beach. Nearly three years after Ho's death, the Riverside County prosecutor still has not managed to hold even a preliminary hearing in the case. If it

continues at its current pace, the case could easily drag on for another three to five years.

As Burns notes, if the criminal-justice system fails to protect the citizens, the public will lose confidence and turn to vigilantism. Yes. And if the nation is serious about crime, it will not release sexual monsters like Bland every few years and simply let victims pay the price for the next brief round of confinement.

The lack of seriousness about violence was the real source of the outrage over Willie Horton, just as it was in the outrage over the misguided policies at the Patuxent Institution in Maryland, where a triple-murderer serving a life sentence was allowed unsupervised furloughs. The Patuxent program is being revamped, a straw in the wind. Another such straw is the announcement by New York Governor Mario Cuomo that he now favors a lifetime sentence without parole for some hardened criminals, a position he adopted when opponents of his seventh annual veto of the death penalty appeared to have enough votes to override.

The Armed Career Criminal Act also fits this new realism. Under this act, it took only 30 minutes in court for Larry Burns to accomplish what the state of California failed to do for 30 years—take Bland off the streets permanently. With no fanfare at all, the sentencing came last week. Warren Bland will stay in federal prison for the rest of his life.



ILLUSTRATION BY JIMMYE

A criminal lack of common sense

The life story of Warren Bland is one of those tales evenly divided between the viciousness of the criminal and the folly of the criminal-justice system. Consider this career:

In 1958, Bland stuck a knife in the stomach of a man in a Los Angeles bar and got off with probation. In 1960, he was arrested in a series of sexual assaults on women in Los Angeles County. Three women fought back and avoided rape. One had her jaw broken in the process. Originally charged with one rape, three attempted rapes, a kidnapping and a robbery, he plea-bargained down to one rape and one kidnapping and was sent to a state mental hospital under the state's "mentally disordered sex offender" program, which has since been abandoned. The hospital warned that Bland was a sexual psychopath who would be "assaultive and/or homicidal toward women" if released.

For seven years, Bland was studied, interviewed, counseled, psychoanalyzed and "treated." In the process, the hospital disregarded its own warning. Always expert at simulating rehabilitation, Bland was hailed in a probation report for his "complete change and attitude toward his problem," and the hospital set him free.

Within months, he was back at his chosen life's work, violent sexual attacks. He was convicted of two more rapes. At his sentencing, another dark report announced that Bland was "clearly a dangerous individual who warrants segregation from society for the longest time that is possible under existing laws."

Existing laws being what they are, Bland served just seven years. Shortly after his release, he kidnapped an 11-year-old girl and her mother. The mother was molested. The girl was sexually assaulted and tortured.

In yet another of those compassionate criminal-justice breaks that kept coming his way, Bland plea-bargained and served only three years for those crimes. The crimes were growing more violent; the jail terms were getting shorter.

Lethal habits. Eight months after his release, Bland was back in jail, this time for sodomizing and torturing a small boy. At this point, in any sensible society, Bland would have been tossed into a dungeon for the rest of his life, but in California he plea-bargained for 9 years and served only 4½ years.

Bland got out again in early 1986. In December, Phoebe Ho, age 7, disappeared while walking to school in South Pasadena. She was found dead in a ditch in Riverside County, mutilated with the kind of instruments Bland had used before. A 14-year-old girl in Orange County died the same way, and an 81-year-old San Diego woman was found bound, nude and choked to death, with Bland as the chief suspect.

Sought in the Ho murder, Bland fled and was found by police—working under an alias in a McDonald's in Pacific Beach. He was wounded in the buttocks while trying to escape. In his car, police found a gun and

evidence linking him to Ho. He was charged with her murder.

Enter the Fed. Larry Burns, an assistant U.S. Attorney in San Diego, filed federal charges against Bland under the Armed Career Criminal Act, the brainchild of Senator Arlen Specter (R-Pa.). This fairly new, fairly obscure legislation was passed in 1984. As originally written, it provided that anyone caught with a gun after three burglaries or robbery felonies will go to jail for a minimum of 15 years to a maximum of life imprisonment, with no possibility of parole. The act was amended and enlarged in 1986 to apply to anyone who had committed three crimes of violence or serious drug offenses.

In his brief to the court, Burns noted dryly that "a public perception has arisen, in California in particular, that the stewards of our criminal-justice system have

failed to come to grips in a realistic and common-sense manner with the mounting crime wave." This is lawyerly understatement. What he might have said is that the state of California botched the Bland case for three decades and is implicated by its incompetence in the savage murder of little Phoebe Ho. It has known for 29 years that Bland is a violent sexual psychopath, yet it let him go five times.

This casual approach did not end with Bland's latest arrest in Pacific Beach. Nearly three years after Ho's death, the Riverside County prosecutor still has not managed to hold even a preliminary hearing in the case. If it

continues at its current pace, the case could easily drag on for another three to five years.

As Burns notes, if the criminal-justice system fails to protect the citizens, the public will lose confidence and turn to vigilantism. Yes. And if the nation is serious about crime, it will not release sexual monsters like Bland every few years and simply let victims pay the price for the next brief round of confinement.

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The Armed Career Criminal Act also fits this new realism. Under this act, it took only 30 minutes in court for Larry Burns to accomplish what the state of California failed to do for 30 years—take Bland off the streets permanently. With no fanfare at all, the sentencing came last week. Warren Bland will stay in federal prison for the rest of his life.



Illustration by [illegible]

TAB D

§2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level: 16

(b) Specific Offense Characteristics

(1) If more than one applies, use the greatest:

(A) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 8 levels.

(B) If the defendant recklessly endangered the safety of another; if the offense was committed in a large building or in a location in which other structures were in close proximity; or if the offense was committed in circumstances in which there was a reasonable expectation that a rapid emergency response would have been difficult; increase by 4 levels.

(C) If the offense involved destruction or attempted destruction of a residence, increase by 2 levels.

(2) If the offense was committed to conceal another offense, increase by 4 levels.

(3) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (i.e., the defendant is convicted under 18 U.S.C. §844(h)), increase by 2 levels.

(4) If fire was set or if explosives were placed in more than one location; or if a destructive device was used; increase by 2 levels.

(5) If the offense involved only minor property damage under circumstances that did not present an appreciable danger, decrease by 10 levels.

(c) Cross References

* * * *

(d) Note

(1) The specific offense characteristic in subsection (b)(3) applies only in the case of an offense committed prior to November 18, 1988.

- (2) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. §844(h), for an offense committed on or after November 18, 1988, the term of imprisonment is that required by statute.

Application Notes:

* * * *

3. Circumstances in which there is a reasonable expectation that a rapid emergency response may be difficult would include, for example, arson committed in a busy commercial district in which response times are delayed by inner-city traffic.
4. Creating a risk of death or serious bodily injury or endangering the safety of another includes risk or danger to emergency and law enforcement personnel who respond to or investigate an offense.

TAB E

then keep the matter within the structure of the Guidelines. Also spoke about the last paragraph on page 2.97 which provides commentary background on how firearm charges are sometimes utilized in the Federal Court to enable it to exercise jurisdiction over offenses that otherwise could be prosecuted only under State law.

LOGNUM QUESTION

2908A 1 The defendant was charged in a three count indictment: Count 1 charged Illegal Possession of a Machine Gun. Count 2 also charged Illegal Possession of a Machine Gun. Finally, Count 3 charged Illegal Possession of Silencers. The defendant pled guilty to Count 1. The defendant's behavior involved two sales of machine guns to an undercover agent. Later a search of the defendant's residence produced two silencers. The Guideline for the offense of conviction is 2K2.2 which has a Specific Offense Characteristic which enhances the base level by four levels if the firearm was a silencer. Should the enhancement be applied in this case?

LOGNUM ANSWER

2908A 1 Advised caller that the silencer could be included in the consideration if it meets the standards for inclusion under Relevant Conduct 1B1.3(a)(1), which was a decision to be made by the Court. In this scenerio the silencers were not directly a part of the offense of conviction, were discovered at a seperate and distinct time from the conviction offense, and had no direct relationship to the machine guns.

LOGNUM QUESTION

2931A 1 Defendant is convicted of Possession of Firearm by a Convicted Felon. In applying the guideline, the cross reference sends me to another offense if the defendant used the firearm to commit or attempt another offense and the level is higher than for the firearm guideline. I have no problem doing that, but the AUSA is arguing that it can't be done because the other offense is not a federally prosecutable offense. The state could prosecute, but chose not to. The other offense would be robbery (of an individual), described as follows. The defendant entered a young man's house, confronted him with the gun, waved it around and demanded money that he said the victim stole from him in a drug deal. The victim said he didn't have the money, at which point the defendant picked up a VCR and left with it. Does the cross-referenced offense have to also be a federal offense?

LOGNUM ANSWER

2931A 1 No. See the last paragraph under Commentary to 2K2.1. It states, "firearm statutes often are used as a device to enable the federal court to exzercise jurisdiction over offenses that otherwise could be prosecuted only under state law" and then goes on to give the example of the robbery of a gasoline staton. It seems clear that the case you describe is similar to that. You could apply the robbery guideline, but would be limited by the statutory maximum for the offense of conviction, that is, the firearm.

LOGNUM QUESTION

3041A 1 * The defendant is convicted of placing a bomb in a telephone booth at 2:00 A.M. when he believed all the adjacent buildings would be empty. Subsequently, the bomb exploded and a waitress at a cafe over 500 feet away and across a roadway claims that the shock waves caused her to hit a wall causing her some injury. The offense of conviction takes the caller to Guideline 2K1.4 which has a Special Offense Characteristic that increases the base offense level by 14 levels if the defendant recklessly endangered the safety of another. What is meant by recklessly endangering the safety of another?

LOGNUM ANSWER

3041A 1 Suggested that the caller review the definition of reckless at Application Note 1 to 2A1.4 which is as follows: "Reckless refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. Advised caller that he should consider this definition along with the statutory

definition which he was researching, and that he and his Court would then have to make a final determination based on their knowledge of the facts.

LOGNUM QUESTION

3071A 1 We have a defendant who was originally charged in a drug-related conspiracy, but who is now pleading to Possession of a Firarm, (2K.1). Since he was essentially sitting in the car with a gun in his coat, waiting for his codefendants to complete a drug transaction, I am wondering if the specific offense characteristic, (c) (1) which references a firearm being "used" in committing or attempting another offense, applies?

LOGNUM ANSWER

3071A 1 Reviewed 2K2.1 (c)(1) that states if the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense. Discussed with caller other guidelines that differentiate possessing a firearm from using a firearm by assigning fewer level increases for possessing. Advised that there is no definition of "using a firearm" in the guideline manual under 1B1.1, Application Instructions. Emphasized that 2K2.1 (c)(1) uses the word "use", not "possess". Advised caller that it appears that a case would need to be made that by possessing the gun in the car, the defendant was using the firearm.

LOGNUM QUESTION

3130A 1 Defendant pleaded guilty to two counts--count 1, possessing an unregistered firearm, which was in fact a bomb; and count 2, manufacturing explosives (similar to the bomb possessed). I'm not clear on whether they should be grouped under 3D1.2(d) or not, even though 2K1.3 (Trafficking in explosives) is included in the list of offenses you can aggregate.

NUM ANSWER

30A 1 You must be looking at an older edition of the guidelines, because no Chapter Two, part K guidelines are included on the list of offenses that can be aggregated. Just because grouping under 3D1.2(d) is not appropriate doesn't mean you can't group under another rule. If you feel that the bomb the defendant possessed and the manufacturing count are connected by a common criminal objective or are part of a common scheme or plan, you might consider grouping under rule (b)--same victim (societal interest in this case) and two or more acts that involve substantially the same harm. Look at the language in the guideline, and see if the case falls within it. You might also want to look at the Supplementary Illustrations, Chapter Three, for examples of grouping under (b) and the other rules.

LOGNUM QUESTION

3183A 1 I have a defendant who has been convicted of drug distribution and an 18 USC 924 (c) charge. The latter carries a mandatory five year consecutive. Must the Court also consider a monetary fine for the 924 (c) conviction?

LOGNUM ANSWER

3183A 1 Guideline 2K2.4, Use of Firearm During or in Relation to Certain Crimes, instructs one to impose those penalties as required by statute. Since 18 USC 924 (c) specifically requires only a term of imprisonment, a fine or term of supervised release would not be imposed. If the 924 (c) is the only offense of conviction, it would be consistent with the general policies of the Commission for the court to order a term of supervised release and also a fine if there is an ability to pay. Technically, ordering a term of supervised release and/or imposing a fine in such a case would be considered a departure from the guidelines, since as indicated, only imprisonment is required by statute.

LOGNUM ANSWER

4034A 1 Caller was told that there are amendments that have been approved by the commission and are awaiting congressional review. The changes include one in reference to 2K2.3 The new language makes it clear that the "he" refers to the other individual. Caller was told that the language in Section 1B1.5 makes it clear that you do apply all Chapter 3 adjustments. He was advised that the commission would like all sentencing material in violation of supervised released cases.

LOGNUM QUESTION

4071A 1 Caller had question about 18:USC:924(c)(1) where the statute requires a 5 year consecutive sentence. Is this actually a guideline sentence?

LOGNUM ANSWER

4071A 1 18:USC:924(c) refers one to 2K2.4 of the Guidelines. The guideline states that the penalties are those that are required by statute. The statutory penalty becomes the guideline range.

LOGNUM QUESTION

4096A 1 How do I group the following:

Count I Drug Distribution 21 USC 841

Count II Felon in Possession of a Firearm 18 USC 922(g)

Count III Use of Firearm 18 USC 924 (c)

LOGNUM ANSWER

4096A 1 You have two options.

Option #1. Although the grouping rules indicate that 924 (c) counts are excluded from the grouping rules, you are more mindful of the fact that you do not want to punish the defendant twice for the same gun. Therefore, you could group Count II with Count III, using Rule C because Count III does embody Count II.

Option #2. You could group Count II with Count I, but not give the two-level increase for possession of the gun, because the gun will be punished by the 924 (c) consecutive five-year sentence.

Either way you will lose the 922 (g) count so, that the gun will not be taken into account twice.

LOGNUM QUESTION

4117A 1 The defendant was convicted of 924(c), and a count of conspiracy to distribute cocaine was dismissed. In the plea agreement, the defendant admitted to possession of 300 rocks of crack; there was no stipulation. What is the guideline? How can you take into consideration the offense behavior of crack possession with intent to distribute?

LOGNUM ANSWER

4117A 1 2K2.4 directs you to apply the statutory penalty for conviction on a 924(c). This makes the guideline 60 months - 60 months. You may not depart above the statutory maximum; therefore there is no provision for using the drug behavior as a basis for departure.

LOGNUM QUESTION

4188A 1 Under 2K1.4 Arson, how should "knowingly created a substantial risk of injury" be interpreted?

LOGNUM ANSWER

4188A 1 This could be interpreted as the defendant's intent or motive for committing the offense. Did the defendant intentionally create a dangerous situation knowing that death or serious bodily injury could result? This ultimately must be interpreted by the court for the guidelines do not provide any further explanation.

LOGNUM QUESTION

4314A 2 In the guideline 2K2.2, defense attorney argues that because there is a specific offense characteristic giving a reduction for lawful use of the weapon, that indicates the guideline already incorporates unlawful use. Therefore the defendant shouldn't be punished for burglary. Is this correct?

LOGNUM ANSWER

4314A 2 No. The cross reference is not to be disregarded. Think of the purpose of the cross reference. Yes, there is unlawful use incorporated into the guideline, but the nature of the unlawful use would be important in determining the level. For example, shouldn't the intent to murder someone be punished more severely than the intent to burglarize a warehouse?

LOGNUM QUESTION

4366A 1 We have a complex case where four defendants were convicted of a variety of counts, including kidnapping a DEA agent, attempt to kidnap, possession of a firearm, a 924(c), and a 924(e). What do we do with the gun counts? It was all the same gun used in the same manner.

LOGNUM ANSWER

4366A 1 Here is a suggested approach that would be consistent with the guidelines. First, group the 924(c), the 924(e), and the 922(g) together under Rule (a) (same act, same victim). Since the guidelines are not applied when the count of conviction is a 924(c), the guidelines would then not be applied to this group of counts. Sometimes different guideline rules come into conflict. The overriding rule to keep in mind is that you do not double count. Figure out a way to apply the guidelines without double counting. (We talked about these examples at the training under "creative grouping," and it is in the Trainer's Manual, the Multiple Counts Section, Tab A, VII.E.) However, the statutory minimum mandatory of 924(e) would apply in imposing the sentence.

Next, apply the kidnapping guideline (grouping the attempt with the substantive count). Do not add the enhancement for weapon as it will be covered in the 924(c) mandatory consecutive term. The 924(c) sentence is to run consecutive to any other statute and cannot run concurrently with any other sentence, according to the statute. If the guideline range determined through application of the kidnap guideline does not reach the mandatory minimum of 15 years required by the 924(e), 15 years becomes the guideline sentence under 5G1.1(b). Once the sentence has been determined for the kidnapping guideline, always keeping in mind the minimum mandatory 15 years, the five year consecutive is added.

LOGNUM QUESTION

4369A 1 CAN A MACHINE-GUN AND SILENCER, SOLD DURING ONE TRANSACTION, BE GROUPED UNDER 3D1.2(A).

LOGNUM ANSWER

4369A 1 CALLER WAS REFERRED TO SUPPLEMENTAL ILLUSTRATIONS A6,A7,AND B11. CALLER WAS ALSO REFERRED TO U.S.V POPE(5TH CIR).THE COURT WILL RULE ON THE AUSA'S ARGUMENT THAT THE FIREARMS SHOULD NOT BE GROUPED TOGETHER UNDER ANY GROUPING GUIDELINE BECAUSE ONCE THE SILENCER IS ASSIGNED THE BASE OFFENSE LEVEL(12) AND THE SPECIFIC OFFENSE CHARACTERISTIC(4), THERE IS NO INCREASE FOR THE MACHINE-GUN.

LOGNUM QUESTION

4384A 1 The defendant was convicted of arson (2K1.4). He was a bar owner who waited for everyone to get out of the bar before he burned it down. Can I give him the enhancement under 2K1.4(b)(5) for endangering the safety of another person, in this case the firefighters who fought the blaze? No one was actually hurt in this fire.

LOGNUM ANSWER

384A 1 This enhancement was not meant to cover firefighters. The guidelines do not provide enhancements for situations that happen every time the crime in question is committed. In the case of arson, the fire department responds to every case, and danger is inherent in the job of firefighting.

LOGNUM QUESTION

4417A 1 This is a question on grouping for drug distribution and weapons counts. The counts of conviction are as follows:

Counts 1-3	drug distribution, grouped under 3D1.2(d)	
Count 4	924(c)	
Count 5	2K2.2 - weapon, obliterated serial number	
Count 6	2K2.2 - unregistered weapon (sawed-off	shotgun
Count 7	922(g) - felon in possession	

The defendants were found to be in possession of the two weapons described in Counts 5 and 6 at the time of arrest for drug distribution. All charges are a result of that arrest. The PO has grouped the 924(c) and 922(g) charges in a "pseudo-group" and not given the enhancement for weapon possession under 2D1.1. He believes that the types of weapons charges in Counts 5 and 6, although the same weapons as in Counts 4 and 7, constitute an additional harm by virtue of being something worse than "ordinary" weapons and therefore should not be grouped. Could this additional harm be sanctioned by not grouping them with other counts and adding units?

LOGNUM ANSWER

4417A 1 There may be another way of looking at it: The "pseudo-grouping" of counts 4 and 7 in order to avoid double counting is an appropriate way of handling those two counts. For counts 5 and 6, you would apply the cross-reference to the underlying offense, i.e., the drug distribution. You could then group those two counts with the three drug counts pursuant to either rule (a) or (b). The implication that grouping of more than one weapons count is appropriate can be found in the Supplementary Illustrations to Multiple Counts, Example A.6. In effect, you "lose" all the weapons counts within the scope of the 924(c); however, if you did not have the 924(c) count of conviction, you would end up with the drug table offense level plus two for the weapons, which would in all cases be less than the drug distribution counts plus five years consecutive. If you feel that the type of weapons calls for an additional sanction, one way to do it would be to sentence at the high end of the range after grouping, or even depart upward. It will be up to the court to decide, considering the type and circumstances of weapons possessed, if additional punishment is warranted.

LOGNUM QUESTION

4420A 1 The PO inquired about any guideline changes addressing Felons in possession of a Firearm(2K2.1) or additional considerations in determining whether a defendant qualifies of acceptance of responsibility (3E1.1).

LOGNUM ANSWER

4420A 1 The guideline amendments for 2K2.1 and 3E1.1 effective 11/1/89 were reviewed with the PO and copies of these amended guidelines were faxed to him this date. The PO was unaware of 18 USC 3553(a)(4) which states that the court is to use the guidelines "...that are in effect on the date the defendant is sentenced." The PO states that there is no local district policy on guideline amendments and he will inform the court of both the guideline now in effect and the amended guideline.

LOGNUM QUESTION

4465A 1 How would you group these three counts?
I Distribution of Cocaine
II Felon in Possession of a Firearm (explosives)
III Possession of Explosives

TAB F

PART N—ARSON AMENDMENTS

1. In general and present Federal law

Part N of title X makes technical amendments to subsections (d), (f), and (i) of 18 U.S.C. 844. Subsection (d) prohibits the transportation or receipt, or attempted transportation or receipt, of any explosive in interstate commerce with the knowledge or intent that it will be used to kill, injure, or intimidate another individual or damage property. Subsection (f) proscribes the malicious damage or attempt to damage by means of fire or an explosive, any property owned, possessed or used by the United States, or by any institution or organization receiving Federal financial assistance. Subsection (i) prohibits the malicious damage or attempted damage by means of fire or explosive of any building or other real or personal property used in or affecting interstate or foreign commerce. Subsections (f) and (i) were amended in the last Congress by the insertion of the word "fire" in the phrase "by means of fire or an explosive" to ensure that these sections could be used in all arson cases, especially those arsons caused by gasoline.¹

All of these subsections contain enhanced penalty provisions that apply if personal injury² or death³ results that represent a substantial increase over the ten years of imprisonment and \$10,000 authorized as the maximum punishment for their violation if injury or death results. On their face, these enhanced penalty provisions would appear to apply to the death or injury of a fireman or police officer who responded to an arson or other offense committed in violation of subsection (d), (f), or (i). However, a Federal district court has recently held that the enhanced penalty provisions did not apply to injuries to or deaths of firefighters that occurred while fighting an arson fire set in violation of subsection 844(i).⁴

Part N is designed to clarify congressional intent in this regard to ensure that the enhanced punishment provisions of subsections (d), (f), and (i) apply if personal injury or death results to any person including a fireman, policeman or other public safety officer, because of a violation.

2. Provisions of the bill, as reported

Part N of title X amends subsections (d), (f), and (i) of section 844 of title 18 by deleting the phrase "personal injury results" in each one and substituting the phrase "personal injury results to any person, including any public safety officer performing duties as a

¹ Public Law 97-298. See 1982 U.S. Code Cong. and Adm. News, p. 2631.

² The penalty if personal injury results is up to twenty years imprisonment and a \$20,000 fine.

³ The penalty if death results is a fine of up to \$20,000 and imprisonment for any term of years up to life.

⁴ See the statement of Senator Grassley on introduction of S. 1716, a bill substantively identical to Part N, 129 Cong. Rec., S. 11275 (August 1, 1983 (daily ed.)).

718 F

direct or proximate result of action." It also amends the three phrase "death results" in each "death results to any person, performing duties as a direct pr ed by this subsection."

As discussed, the purpose of the congressional intent that subsections in a manner that injury or death is subject to the subsections. The Committee safety officer" include such persons their equivalent of sheriffs and drivers and laboratory technicians by a police or fire department of a State or municipal fire organization charged with investigation.

The Committee intends that proximate result of conduct pros (i) if it is reasonably foreseeable. sonably foreseeable consequences an explosive of a building affect tion of subsection 844(i) would be (including high speed driving of crowd control by policemen, and the building and undetonated explosive law enforcement officers and technically foreseeable consequences of plosive in interstate commerce would be the interception or disc forcement officers, and its subsequent the explosive was concealed

ion of S. 1716, a bill substantively identical ed.)).

The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in subsection 844 (d), (f), or (i) if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians. Included in the reasonably foreseeable consequences of transporting or receiving an explosive in interstate commerce in violation of subsection 844(d) would be the interception or discovery of the explosive by law enforcement officers, and its subsequent examination, no matter how cleverly the explosive was concealed.

TAB G

USSCIDN	TITLE1	SECTION1	TITLE2	SECTION2
5303	18	81	18	661
11151	18	2275		
13360	18	81		

Tab 6

SAS 11:46 Thursday, December 7, 1989 1

USSCIDN	TITLE1	SECTION1	SUBSECT1	TITLE2	SECTION2	SUBSECT2
41✓	18	844	I			
5064✓	18	844	I			
3065✓	18	844	I			
4402✓	18	844	I			
4456✓	18	844	I			
4973✓	18	844	I			
5448✓	18	844	I	18	371	
5449✓	18	844	I	18	371	
9996✓	18	844	I			
10722✓	18	844	I			
11895✓	18	241		18	844	H
13306✓	18	844	I			
14265✓	18	844	I			
14851✓	18	844	I	18	1341	
14989✓	18	844	H	18	1341	
14990✓	18	844	H	18	1341	
15143✓	18	844	I			
15530✓	18	844	I	18	1341	
18655✓	18	844	I	18	371	
20769✓	18	844	I	26	5861	D
20770✓	18	844	I	18	373	
20872✓	18	844	I	26	5861	D

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12/8

1:00 PM

[Signature]

Due Monday a.m.

TAB H

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July 8, 1988

John Steer, Esq.
General Counsel
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: U.S. v. Daniel Everette King, CR-87-0930 RFP

Dear Mr. Steer:

Enclosed please find a copy of the appellate decision in the case which we discussed on the telephone today. Again, I would like to thank you for your helpful suggestions regarding this appeal.

When we first discussed this case several months ago, I remember that you felt that Mr. King's offense (dropping a lighted newspaper into a U.S. mail box in order to destroy a letter within) was not the type of offense for which a seven-level increase should be applied under Sentencing Guidelines §2K1.4(b)(4). You noted that this section was meant to track the statutory language of 18 U.S.C. §844(h). You also noted that the statutory reference to §844(h) in §2K1.4(b)(4) was meant to limit the application of the seven-level increase to convictions under that statute. I did some research on §844(h) and §844(i) in preparing this appeal. I came to the conclusion that Dan King could have been charged with §844(h). The case law under that section seems to indicate that one act of arson which can be characterized as another federal felony constitutes a violation of §844(h). The Assistant United States Attorney in this case came to the same conclusion, and said that the next time she had a case such as Dan King's, she would simply charge it under §844(h) so that the seven-level increase would apply.

I am bringing this letter to your attention because you informed me when we spoke last May that you were going to submit §2K1.4(b)(4) as one of the Guidelines sections which requires clarification. I believe that if you simply clarify the

John Steer, Esq.

July 8, 1988

Page two

Guideline to more expressly pertain only to convictions under §844(h), the result will be that offenses such as Dan King's, will simply be charged under that statute. If, as we discussed several months ago, the seven-level increase of §2K1.4(b)(4) is meant to apply only to cases in which a defendant uses arson as a means to the commission of another, entirely separate crime (such as insurance fraud), I believe the subsection will have to be rewritten to clearly state that intended application.

Thank you very much for your assistance, and your attention to this matter.

Very truly yours,



Susan Raffanti

SR:di
Enclosure

pc Barry L. Portman, Esq.

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December 18, 1989

MEMORANDUM

TO: Andy Purdy, Coordinator of the Working Group on
Drugs, Firearms, and Violent Offenses

FROM: Sharon Henegar *SH*

RE: Part III - Drugs

The working group reviewed all guidelines in Chapter Two, Part D, in conjunction with the other resources cited to determine where amendments were needed. Some areas are being recommended for amendment now, while other areas are identified as needing further study.

GUIDELINES RECOMMENDED FOR AMENDMENT

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

Application Note 9 to §2D1.1 appears to be clear when read in its entirety, however, there are several cases of upward departure based on the purity of the drugs, that do not appear consistent with the intent and instruction of note 9. Restructuring this note may reduce misapplication, and this has been attempted in Amendment (1).

Application Note 11 to §2D1.1 introduces an alternative method of establishing the weight of controlled substances by reference to a "Typical Weight Per Unit Table" when the actual weight is not known. This table does not list the actual weight of the pill, but the amount of drug contained in the pill or dosage. As a result, when this table is used the weight determined does not refer to "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Thus, there exists

substantial disparity when the weight is not known. It seems that this problem could be resolved by recalculating the "Typical Weight Per Unit Table" to reflect the actual weight of the pill or dosage, including the weight of the substances with which the drug is mixed. This change constitutes Amendment (2).

With the high percentage of drug cases being prosecuted in federal court, this guideline is the among the most frequently used in Chapter Two. The recent compliance study revealed 306 departures on drug importation and distribution cases, which represents departures in 26.2% of these cases. Downward departures for Substantial Assistance occurred in 10.8% of the cases, upward departures in 1.6% of the cases, and other downward departures in 13.8% of the cases. Among the frequent reasons cited for other downward departures was the defendants role in the offense. This is consistent with frequent questions on the hotline regarding the interrelationship between the role and drug distribution guidelines. The field has frequently commented that this guideline is too high for the defendant who had the role of courier/mule or is a "more than minimal participant".

The group considered establishing a specific offense characteristic to this guideline that imposed a ceiling on the offense level when the defendant is a minor or minimal participant in a large scale drug case. This would be used in lieu of Chapter Three, Part B and would incorporate the same two or four offense level reduction, but adds a ceiling that has varying offense levels dependant on the type (and relative seriousness) of the drug(s) involved. However, the group was not convinced that this approach offered a solution, as it incorporated the same definition of minor and minimal participant that is presently used in Chapter Three, Part B and is seen as inadequate. Accordingly, we note the frequent expressions from the field that these guidelines need amendment, and refer this matter to the Role working group. We encourage the Commission to explore the possibility of amending this guideline or the role guideline and to solicit public comment on this topic.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals

This guideline was amended in 1989, following a specific Congressional directive in Section 6454 of the Anti-Drug Abuse Act of 1988. The operation of this guideline is clear when the only count of conviction is for a statute covered by this guideline. However, it commonly occurs that a defendant is convicted of an offense covered by this guideline and is also convicted of a count(s) of distribution (guideline §2D1.1). When this occurs it is not clear how/if the drugs are to be aggregated, and how an offense level is to be determined.

If separate offense levels are determined for the different guidelines, it will often be the case that the offense level

produced at §2D1.2 will be substantially less than the one produced at §2D1.1 because it frequently occurs that several kilos have been distributed with only a fraction of those having been distributed near a protected location or involving underage or pregnant individuals. When units are calculated per §3D1.4, this will not result in any increase to the offense level, and the §2D1.2 count(s) will produce no additional penalty.

If the drugs are to be aggregated a formula for doing so is needed. This matter was discussed with drafting staff who were aware of the problem and are preparing an amendment on this. The simplest way of proceeding would be to total the drugs distributed, and if any had been distributed near a protected location or involved an underage or pregnant individual, then two offense levels would be added. Unfortunately, this would be overly punitive of the defendant who had distributed a small amount of drugs under §2D1.2 in comparison with the drugs distributed at §2D1.1.

If Congress had allowed us the flexibility to draft this guideline, the simplest manner of proceeding would be to incorporate §2D1.2 into §2D1.1, using the offense conduct of distributing drugs at a prohibited location or to underage or pregnant persons as specific offense characteristics to the §2D1.1. This alternative would be the easiest for the field to use because it does not require any grouping or aggregation decision, however, it would go counter to the Congressional directive to the Commission. Is this negotiable?

We understand that drafting's proposed amendment will provide instruction for aggregating the drugs by introducing a formula. We recommend that an amendment or perhaps two alternative amendments be offered for public comment in 1990 because this guideline is sure to produce many application problems. This change would represent Amendment (3).

RECOMMENDED AMENDMENTS

(1) Application Note 9 to §2D1.1:

The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of a small amount of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs and may warrant an upward departure. (Except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity. See the footnote to the Drug Quantity Table.). As large quantities are normally associated with high purities,

this factor is usually not relevant for departure consideration when there are large quantities involved or the defendant's position in the criminal enterprise is otherwise known.

(2) Application Note 11 to §2D1.1:

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

[All weight for the listed drugs should be recalculated in conjunction with the Drug Enforcement Administration to offer a weight that includes the mixture or compound contained in the dose, pill, or capsule.]

(3) Application Note 1 to §2D1.2:

If, in addition to those drug offenses that are covered by this guideline, other drug offenses occurred that are covered by §2D1.1, then the total amount of drugs involved is to be aggregated, rendering the counts groupable under §3D1.2(d). In determining §2D1.2(a)(1), first determine the offense level from the Drug Quantity Table for all drugs involved, then add two offense levels.

AREAS NEEDING FURTHER STUDY

§2D1.6 Use of Communication Facility in Committing Drug Offenses

The Commission previously considered but did not adopt an amendment to this guideline that offered an alternative base offense level determined by the quantity of drugs involved in the offense. We understand that this proposal was abandoned, in part, because some public comment suggested that the proposed amendment would encourage plea agreements to this lesser charge that does not have statutory minimums and has a maximum penalty of four years. The Department of Justice reportedly favors the adoption of an amendment that incorporates the offense level from §2D1.1. We believe that this is a topic worthy of further study, perhaps, it is one that could be discussed in meetings with the field in various districts. No amendment is suggested at this time.

§2D1.8 Renting or Managing a Drug Establishment

Under the same rationale as stated above in §2D1.6, this may be a guideline where an alternative base offense level determined by the quantity of drugs involved in the offense would be appropriate. (The statutory maximum penalty for this offense is twenty years.). This too should be studied further. No amendment is suggested at this time.

§2N2.1 Violations of Statutes and Regulations Dealing With Any

Food, Drug, Biological Product, Devise, Cosmetic, or
Agricultural Product

The above guideline is referenced for a violation of 21 USC § 331, for importation of steroids. This seems inappropriate as the base offense level is six, with no specific offense characteristics. This appears to be too low an offense level for what many consider a serious offense. This matter was discussed with the drafting staff, who have been studying the matter. It bears further study and consideration, as it appears that an amendment is needed.

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December 18, 1989

MEMORANDUM

TO: Andy Purdy, Coordinator
Working Group on Violent Crimes, Drug Offenses and Firearms Offenses

FROM: Jeffrey W. Lawrence

RE: Part IV - Firearms

I. INTRODUCTION

The 1989 amendment cycle saw the firearms guidelines, Chapter Two, Part K, undergo substantial amendment, indeed, almost complete revision. Although the Technical Assistance Service reports that a number of questions were received regarding the new guidelines, the working group focused on those amendments that are most necessary, and does not recommend significantly altering the changes made in the 1989 amendment cycle. Specifically, the working group focused on fashioning a guideline for armed career criminals, determining changes to be made in the arson guideline, making any clarifying changes which are necessary in connection with the currently existing guidelines, and attempting to determine areas in which further revision needs to be made.

II. SOURCES CONSULTED

In addition to the generalized outreach by the Commission in the various sentencing law reporters throughout the country, the Department of Justice and the Bureau of Alcohol, Tobacco and Firearms provided specific suggestions that they propose to have the Commission examine for implementation in the 1990 amendment cycle. (Copies of these suggestions are appended hereto as Tab A.) The working group makes the following suggestions of changes in the firearms guidelines:

- * The armed career criminal statute, 18 U.S.C. §924(e) should be added to §2K2.1 and provide for a separate base offense level for individuals so qualifying.
- * The background commentary to §2K2.1 should be amended to make clear that the cross reference also applies when the firearm is possessed in connection with an underlying federal criminal act.
- * §2M5.2, Exportation of Arms, Munitions or Military Equipment, should be reexamined with particular focus on the question of whether the distinctions for "sophisticated weaponry" adequately capture the conduct to be prohibited. It is suggested that the Commission consider providing a graduated base offense level table, akin to §2K2.2, for individuals who are involved in repeated acts of exportation.

III. ARMED CAREER CRIMINAL – 18 U.S.C. §924(e)

As one of the priorities of our working group we agreed to examine the cases where an individual was sentenced as an armed career criminal pursuant to 18 U.S.C. §924(e) in an effort to determine (1) whether a separate guideline should be written for such convictions and offenders and (2) if such a guideline is appropriate, what factors should be taken into account in establishing guideline ranges. Presently, the armed career criminal enhancement is applicable where the defendant is found to have violated §922(g), possession of a firearm, after a previous conviction for a felony. The base offense level for a §922(g) conviction is found in §2K2.2 and is 12; thus, even assuming a criminal history category level 6, the sentencing range will never reach the mandatory minimum fifteen years. Therefore, the fifteen year mandatory minimum becomes the guideline maximum. The Commission has recognized this problem in the past, see Memorandum of Gary Peters and Phyllis Newton attached hereto as Tab B. As Phyllis Newton's memorandum indicates, when the guidelines were initially promulgated there was insufficient data upon which to draft a guideline, as the number of cases under the armed career criminal statute was extremely low.

IV. GUIDELINES CASES IN WHICH §924(e) SENTENCES WERE IMPOSED

According to Monitoring, from the inception of the guidelines, November 1, 1987, through July 31, 1989, there have been 17,269 cases. Of these, 62 cases have resulted in sentences of 15 years or more in which 18 U.S.C. §922(g) was one of the counts of conviction. The following memorandum represents a summary of these cases and an assessment of the types of offenders who are convicted pursuant to that statute. The following section consists of two types of analyses--section A reviews a random sampling of 27 of the 62 cases analyzing the count of conviction, underlying

conduct which gave rise to the conviction, the prior history of defendant and the comments of the court at the imposition of sentence. Section B provides a summary table of some of the data in Section A for all §924(e) cases.

A. Sample Cases

USSCIDN

CASE NAME

- 1. #1283 United States of America v.**

(A) Conviction: 18 U.S.C. §922(g)(1) and §924(e) Possession of a firearm by a person convicted of at least three violent felonies. Defendant was arrested after a search of a car driven by him revealed a .38 caliber Smith & Wesson revolver. The weapon had been stolen in a 1972 residence burglary in Kansas City, MO. Defendant was found guilty after a jury trial.

(B) Number and Nature of Prior Convictions: At the time of the offense defendant had suffered five prior convictions and was currently being held on a pending forgery charge. The convictions and sentences were as follows: assault with intent to kill without malice (7/27/66, age 17), two years; tampering with a motor vehicle (5/10/70, age 21), five years probation (6/26/73 probation revoked, five years imprisonment); first-degree robbery (12/31/70, age 21), twenty years imprisonment; bank robbery (6/7/71, age 22), fifteen years custody of the Attorney General; first degree murder (5/14/76, age 27), custody of the Attorney General for life.

(C) Comments/Reasons for Imposition of Sentence: Court sentenced defendant to the minimum of fifteen years. In imposing sentence the court stated the following

it is obvious you can't live in a free society. They wanted to take you out of society and I agree with them, for fifteen years. If I had my choice, I would order you out for the rest of your life. I don't have that choice, so fifteen years is what you'll be stuck with. You understand that. I think there is a point we've got to stop the revolving doors in prison and you have run them for six times for violent crimes. I think it is time to shut the door on you Mr. . . . But they won't let me do it so I won't do it but that is the reason I think you are fortunate, you are getting off in fifteen years."

2. #1605

(A) Conviction: 18 U.S.C. §922(g). Defendant pleaded guilty to possession of a firearm having been previously convicted of a felony. In addition, the presentence

report revealed that the defendant used the sawed-off shotgun in connection with the robbery of a convenience store. At the time defendant pleaded guilty in federal court he was facing two state indictments arising out of the same robbery.

(B) Number and Nature of Prior Convictions: Defendant suffered one juvenile adjudication for delinquency and eight prior adult convictions. The prior adult convictions were as follows: unauthorized use of a motor vehicle (4/22/79, age 17), initially received probation which was revoked--defendant was sentenced to two years imprisonment; possession of marijuana (4/22/79, age 17), \$200 fine; burglary with intent to commit theft (1/30/80, age 18), two years imprisonment; burglary of a vehicle with intent to commit theft (1/30/80, age 18), two years imprisonment; aggravated robbery--two counts (12/2/81), fifteen years imprisonment (paroled on 1/14/87); aggravated robbery (12/3/81), fifteen years imprisonment. As noted defendant was then facing two additional prosecutions for aggravated robbery and a state prosecution for being a felon in possession of a firearm.

(C) Comments/Reasons for Imposition of Sentence: Judge indicated in a two page memorandum that the defendant would be sentenced to the minimum range of fifteen years and observed "the defendant has been incarcerated for most of his adult life and the nature of his prior convictions indicate that he poses a danger to the safety and welfare community, and he further has a history of drug abuse and mental health problems." It should be noted that the probation officer recommended an upward departure on the grounds that the defendant's criminal history underrepresented the seriousness of the defendant's criminal conduct since many of the prior offenses were grouped together for computing the criminal history. However, even the probation officer recognized that at most his guideline range would be 63-78 months under the count to which he pleaded guilty.

3. #2216

(A) Conviction: After a court trial defendant was convicted of 21 U.S.C. §841(a)(1), possession with intent to distribute approximately 20 grams of heroin; 18 U.S.C. §924(c), use of a firearm in relation to a drug trafficking crime; and 18 U.S.C. §922(g)(1) and §924(e), armed career criminal, ex-felon in possession of a firearm. Defendant was arrested after a search of his person revealed his possession of 20 grams of heroin, a loaded .38 caliber and a two-shot derringer.

(B) Number and Nature of Prior Convictions: Defendant had three prior convictions as follows: burglary (2/8/51, age 20), five years imprisonment; misdemeanor possession of marijuana (10/16/71, age 41); felon in possession of a firearm (2/2/85, age 54), two years custody of the Attorney General. Additionally the defendant had a number of other convictions which were not specifically included because his representation by counsel was not confirmed. These included assault with intent to murder at the age of 15 and a number of marijuana convictions (seemingly minor). Further, defendant had 16 other arrests between 1947 and 1987 for charges ranging from car theft, aggravated robbery to marijuana possession.

(C) Comments/Reasons for Imposition of Sentence: The court simply state that it was imposing the mandatory required sentence of twenty years and noted that it was the defendant's second conviction for a weapons offense.

4. #2940 United States v.

(A) Conviction: Defendant pleaded guilty to violation of 18 U.S.C. §922(g) arising out of his having sold four guns to an undercover Alcohol, Tobacco and Firearms agent on November 9, 1987.

(B) Number and Nature of Prior Convictions: Defendant had suffered three prior convictions: assault (2/3/81, age 18); second degree burglary (11/5/83, age 19); second degree burglary (8/3/85, age 20); additionally, according to the presentence report as defendant suffered each of these convictions a number of other burglary convictions were dropped all of which included burglary of a dwelling.

(C) Comments/Reasons for Imposition of Sentence: The sentencing judge indicated in his view the sentence was adequate.

5. #3333 United States v.

(A) Conviction: 18 U.S.C. §922(g). A gun was found beneath the defendant's seat after he was arrested for driving while intoxicated. It should be noted that defendant denied any responsibility in the offense.

(B) Number and Nature of Prior Convictions: Defendant had suffered eight prior convictions including malicious injury to a building, stealing under \$50, stealing over \$150 without consent and stealing over \$150 without consent. Additionally he suffered the following more serious convictions: accessory after the fact to burglary (12/5/69, age 19); assault with intent to rob (1/30/71, age 20); first-degree robbery with a dangerous weapon and assault with intent to kill (10/21/71, age 21), sentenced to ten years on each count of robbery and five years consecutive on assault with intent to kill; third-degree assault (8/14/81, age 31). Defendant had no pending charges at the time of the offense.

(C) Comments/Reasons for Imposition of Sentence: The court imposed the minimum fifteen year sentence and no departures were recommended.

6. #3861 United States v.

(A) Conviction: 21 U.S.C. §841(a)(1), possession with intent to distribute cocaine, 18 U.S.C. §924(c), use of a firearm in connection with a drug trafficking crime

and 18 U.S.C. §922(g) and §924(e). After a high speed chase defendant was arrested and found to possess approximately 112 grams of cocaine and a weapon. Defendant refused to be interviewed by the probation office and consequently no acceptance adjustment was applied. Additionally, defendant based upon his priors, was adjudged to be a career offender under the guidelines.

(B) Number and Nature of Prior Convictions: Defendant suffered nine prior adult convictions, two prior juvenile convictions (for larceny and grand larceny) and was arrested on seven additional charges which resulted in dismissals or took place prior to 15 years before the present offense (these arrests were for forgery, first-degree robbery, shoplifting, forgery, resisting arrest, auto theft and escape). The prior convictions consisted of first-degree robbery (1/21/70, age 23); four convictions for stealing over \$50 (ages 28, 29, 31 and 32); assault with intent to rob and flourishing a deadly weapon (age 32) and convicted as an armed career criminal; second-degree assault, brandishing a deadly weapon (8/13/81, age 35); unlawful possession of a firearm and obstruction of legal process (age 36). The defendant's total criminal history (excluding the counts outside the fifteen year period and the juvenile convictions) was 27 points.

(C) Comments/Reasons for Imposition of Sentence: Because the defendant was convicted of crimes other than §922(g)(1) the court's sentence was substantially in excess of the minimum fifteen years based upon those charges (in fact the sentence on the §924(e) count was concurrent to the other sentences). Nevertheless, in imposing its sentence, the court observed the following:

It seems to me like there's no way you could live outside the institution. You've just been in and out ever since you've become an adult. You apparently adjust pretty well when you are confined but when you are out it's just 'Kitty bar the door.' So, you know, under the sentence I'm going to give you, I hate to say that I'm giving up on any human being, but I don't think there is any way that you could ever adjust to living in society. So my sentence is going to be to such effect that you are going to have to live most of the rest of your life in the penitentiary.

The court then imposed a sentence of twenty-five years.

7. #4455 United States v.

(A) Conviction: 26 U.S.C. §5861(d) and 18 U.S.C. §922(g)(1) and §924(e). Defendant was discovered attempting to hide a sawed-off shotgun as police were executing a search warrant in his house for heroin. At trial defendant denied his possession of the weapon and has no made affirmative acknowledgement so that an adjustment for acceptance of responsibility would be applied.

(B) Number and Nature of Prior Convictions: Defendant had five prior convictions consisting of second-degree burglary, first-degree robbery, second-degree burglary, stealing in excess of \$50 and tampering. The first conviction, was at age 15 at which time defendant was certified and booked and tried as an adult. Additionally he was arrested in 1987 for possession of heroin, however, in light of the federal prosecution that charge was dismissed.

(C) Comments/Reasons for Imposition of Sentence: The court imposed the fifteen year mandatory sentence and found no reasons for departure.

8. #4468 United States v.
Texas)

(A) Conviction: After a gun battle between defendant and another individual in which the defendant was wounded, defendant was apprehended by the police having various weapons in or near his possession. Defendant has not admitted or accepted responsibility. The defendant was adjudged to be a career offender.

(B) Number and Nature of Prior Convictions: Defendant suffered four prior convictions: attempted burglary (6/25/73, age 19); burglary (8/14/73, age 19); delivery of a controlled substance (10/25/74, age 20), fifteen years imprisonment; delivery of a controlled substance (12/5/74), fifteen years imprisonment; delivery of a controlled substance (2/23/80, age 25), fifteen years imprisonment.

(C) Comments/Reasons for Imposition of Sentence: Defendant was sentenced to 480 months imprisonment. No statement of reasons was given, however, this is obviously far in excess of the fifteen years for the armed career criminal and was obviously the result of the finding that he was a career offender.

9. #4927 United States v.

(A) Conviction: 18 U.S.C. §922(g) and §924(e). After a jury trial defendant was convicted of possessing a number of firearms, one of which he used to "pistol whip" an individual at a night club. Defendant declined to comment on the offense on the advice of counsel.

(B) Number and Nature of Prior Convictions: Defendant suffered seven prior convictions consisting of: petty larceny (4/2/73, age 17); accessory after the fact of armed robbery (4/2/73); first-degree, second-degree burglary, larceny, grand larceny, burglary and grand larceny (two indictments, 4/1/74, age 18), sentenced to five to ten years; simple assault and battery (8/2/82, age 26); felonious assault (6/3/85, age 29); secreting the property of another (6/3/86, age 30); assault and battery (10/15/86, age 30). At the time of the present offense the defendant was under indictment for petty

larceny, receiving and concealing stolen property under \$200, bribery or felonious intent to influence a witness and aggravated assault.

(C) Comments/Reasons for Imposition of Sentence: We received no information from the district court, however, they did impose a fifteen-year sentence. No departures were recommended by the probation officer.

10. #4955

United States v.

(A) Conviction: 18 U.S.C. §922(g), 26 U.S.C. §5861 and 18 U.S.C. §924(e)-- possession of a sawed-off shotgun. After a jury trial defendant was found to have possessed a sawed-off shotgun with which he had reportedly threatened one of the complaining witnesses which resulted in his arrest. Defendant maintains innocence and accepted no personal responsibility for the charges.

(B) Number and Nature of Prior Convictions: Defendant suffered eight prior convictions which consisted of the following: robbery (3/13/70, age 22); armed robbery (1/15/75, age 26); armed robbery (4/17/75, age 26), sentenced to ten years imprisonment; possession of controlled substance with intent to sell (5/7/76); possession of a controlled substance with intent to deliver (10/1/82, age 33); assault and battery (5/24/84, age 35); aggravated assault, possession with intent to sell marijuana (7/6/85, age 36); driving while intoxicated (5/20/86); unlawful possession of a controlled substance with intent to sell (4/26/87, age 38); unlawful possession of a controlled substance with intent to sell (4/9/88). In addition, defendant had been previously convicted for burglary which was beyond the fifteen year period under the guidelines. He also was arrested in 1984 for robbery with a deadly weapon and charged with habitual criminal statute in Tennessee. These charges were dropped. Finally, he was arrested with threatening or coercing a witness, this was also dismissed.

(C) Comments/Reasons for Imposition of Sentence: The court imposed a twenty-five year sentence departing upward from the statutory requirement and observing that there were aggravating circumstances that are of a kind or degree not adequately taken into consideration by the Commission. The court stated

The statutory requirements of 18 U.S.C. §924 contain a minimum 15 year sentence which is above the highest applicable guideline range. Moreover, the court believes that the provisions of the sentencing guidelines with respect to the defendant's prior record do not adequately take into account the seriousness of each of the seven crimes of which this defendant has been convicted nor the length of years over which he has committed these crimes.

11. #5691

United States v.

(A) Conviction: 18 U.S.C. §922(g). Defendant was arrested in a residence after the execution of a search warrant revealed that he possessed a shotgun. Defendant did admit his involvement in the case, however, the probation officer noted that acceptance of responsibility adjustments did not apply because of the mandatory minimum.

(B) Number and Nature of Prior Convictions: Defendant had previously suffered six prior convictions as an adult: burglary (6/29/69, age 20); burglary (2/21/72, age 23); burglary of a building (1/17/77, age 28), for which he received life imprisonment; burglary of a habitation (1/17/77, age 28), concurrent sentence with prior conviction; theft (9/5/85, age 37); robbery (10/11/86, age 38), ten years. Additionally, defendant had a number of prior petty offenses such as drunkenness and vagrancy. At the time of his conviction defendant had the following pending charges: theft, delivery of heroin. These state court prosecutions were to be dismissed upon defendant's sentencing in federal court.

(C) Comments/Reasons for Imposition of Sentence: The court indicated that the sentence of fifteen years was adequate in this case.

12. #5944

United States v.

(A) Conviction: 18 U.S.C. §922(g). A firearm was discovered on defendant's person during a pat-down search. It is not clear whether defendant sought to admit his actions in this case as the probation officer concluded that the two-point reduction would have no application.

(B) Number and Nature of Prior Convictions: Defendant suffered nine prior convictions as a juvenile ranging from larceny (3/20/69, age 13); burglary of a residence (4/27/69, age 13); burglary of a residence (5/27/69, age 14); auto theft (10/1/69, age 14); trespassing and carrying a concealed weapon (10/2/69, age 14); trespassing on school property (10/21/69, age 14); trespassing on school property (11/12/69, age 14); attempted robbery of a person (11/28/69, age 14); armed robbery of a person (1/16/70, age 14). Defendant suffered thirteen criminal convictions as an adult: stealing from a person (9/19/71, age 16), three years imprisonment; first-degree robbery (3/13/75, age 19); attempted escape from state prison (8/4/76, age 21); felonious assault (8/21/78, age 23); carrying a concealed weapon (1/30/81, age 25); soliciting for immoral purposes and carrying a concealed weapon (9/18/81, age 26); felon in possession of a firearm (5/20/82, age 27); theft from a person (8/1/84, age 29); shoplifting, larceny (6/28/85, age 30); attempted theft (8/5/85, age 30); aiding and abetting theft (9/24/86, age 31); assault (10/9/86, age 31); misdemeanor theft (10/22/86, age 31). The total criminal history points was 28 for the defendant.

(C) Comments/Reasons for Imposition of Sentence: The court imposed a fifteen year sentence stating "extensive criminal history record justifies imposition of statutory penalty of fifteen years without parole."

13. #6260

United States v.

(A) Conviction: Felon in possession under armed career criminal. The underlying facts appear to be that the defendant was arrested having broken into the dwelling house of another person in possession of a firearm. (It appears that the presentence report is simply an adopted state of Illinois presentence report.)

(B) Number and Nature of Prior Convictions: Defendant had three prior convictions: aggravated assault (5/16/83); six counts of residential burglary (6/6/83); two counts of residential burglary (9/5/85). (Again these may be limited only to the local Illinois county.)

(C) Comments/Reasons for Imposition of Sentence: Judge indicated in his statement of reasons that he was extremely troubled by the fact that the defendant, a 23 year-old individual, could have committed "such a spree of home invasions and criminal actions like this" in such a short time. He recognized that he would have to send the defendant to prison for fifteen years. Imposing the sentence he noted, "it is very rare that we have a man of your age who comes in here with this kind of background, and we've got to send him away for this period of time. If it weren't for this minimum, even under the guidelines, we're talking ten to sixteen months, about a year, but no it's got to be fifteen. Very depressing, Mr. It should also be noted under the number and nature of priors section that the defendant was involved with possession of explosives, punji sticks and firearms in connection with some of his offenses.

14. #6755

United States v.

(A) Conviction: 18 U.S.C. §2113, bank robbery and possession of a firearm with three previous felonies. Defendant was arrested in connection with a bank robbery investigation. A search of his apartment revealed the money taken from the bank and a .32 caliber automatic pistol. Defendant pleaded guilty and was given the two points for acceptance of responsibility. Defendant was also found to be a career offender and thus was sentenced at the high end of the guideline range.

(B) Number and Nature of Prior Convictions: Defendant suffered two priors for auto larceny (3/12/44, age 16) and burglary (7/17/44, age 16). Defendant has suffered seven convictions as an adult: burglary (7/31/47, age 19); homicide (9/19/51, age 24) (defendant given a maximum term of thirty years and paroled after approximately 14 year); burglary (12/15/64, age 37); drunk and disorderly; bank robbery (4/22/69, age 41) three counts (15 years concurrent); armed robbery (6/27/78, age 50) twelve to fifteen years; and obtaining a handgun without permit

(6/27/78, age 50). There were no pending charges other than the parole revocation for the instant bank robbery.

(C) Comments/Reasons for Imposition of Sentence: In its statement of reasons the court indicated that it was sentencing the defendant to 327 months because of the seriousness of the convictions, the use of threats of violence, and "the defendant's prior criminal record displays a continuous disregard of the law and a patten of repeated bank robberies and a lack of concern for the safety of others." The court also stated that the defendant had no capacity for effective rehabilitation.

15. #6839

United States v. .

(A) Conviction: Possession of firearm by convicted felon with enhanced penalty. While investigating a burglary defendant was confronted by Police, was personally searched and a .357 Magnum was found on his person. Defendant accepted responsibility in connection with the offense and offered an explanation that he had been harassed and shot at as the reason for his purchasing and owning the 357 Magnum.

(B) Number and Nature of Prior Convictions: Defendant has five prior convictions: armed robbery, possession of heroin, possession of a sawed-off shotgun (2/1/71, age 26), eight years; grand larceny (2/19/71, age 26), two years; armed robbery (5/13/71, age 26); armed robbery (6/24/71, age 26), 16 years; two counts of unlawful bodily injury with intent to maim, disfigure, disable or kill (5/4/74, age 29).

(C) Comments/Reasons for Imposition of Sentence: The court imposed fifteen years; no reasons were given nor provided by the court.

16. #8752

United States v.

(A) Conviction: Possession of firearm by convicted felon and 18 U.S.C. §924(e). Defendant was found in possession of a firearm during a car stop based upon a federal arrest warrant when it was revealed that he had been seen in possession of a firearm. Defendant gave an extended story about how it was his girlfriend who purchased the gun and not him. He denied being guilty of the offense and as a result was not given the two points for acceptance of responsibility.

(B) Number and Nature of Prior Convictions: Defendant had suffered fifteen prior convictions. The following represents the most significant of the bunch: second-degree burglary (1957, age 17); grand larceny (11/28/59, age 19); assault and battery with intent to commit felony and murder (1/16/61, age 20); receiving stolen goods (3/23/62, age 21); burglary and stealing (10/15/65, age 25); assault and battery (1/31/66, age 25); second-degree burglary and stealing (3/11/66, age 25); mail theft

and forgery (4/1/69, age 29); second-degree burglary and first-degree arson (8/26/69, age 29); possession of illegal firearms (9/4/69, age 29); post office burglary (4/13/70, age 30); bank burglary and failure to appear (3/1/74, age 33); burglary (12/11/77, age 37); burglary, aiding and abetting an offense and failure to appear (1/21/83).

(C) Comments/Reasons for Imposition of Sentence: No comments were provided by the court who sentenced to the mandatory minimum fifteen years.

17. #8257 United States v.

(A) Conviction: 18 U.S.C. §922(g), ex-felon in possession. Defendant was arrested after having shot at the victim who allegedly owed the defendant some money. Defendant was convicted after a trial. Defendant did not accept responsibility and stated that he is being treated very unfairly by the government. Defendant was found to be a career offender and was sentenced to 360 months as a result of this determination.

(B) Number and Nature of Prior Convictions: Defendant has suffered ten adult convictions. The most significant of which are as follows: assault and battery (6/2/63, age 19); burglary, larceny, receiving stolen goods (11/15/63, age 19); burglary (1/16/66, age 22); burglary (3/6/66, age 22); rape (10/5/73, age 29), 11 1/2 to 23 months state regional correction facility; recklessly endangering another person (7/15/76, age 32); aggravated assault (8/31/77, age 33), four to eight years at state prison.

(C) Comments/Reasons for Imposition of Sentence: Because defendant was found to be a career offender his guideline range was 360 months to life. In sentencing the defendant to 360 months the court indicated that the sentence was imposed because of the possibility of death to the victim but that given the guideline range the defendant would be sentenced to the bottom.

18. #8356 United States v.

(A) Conviction: Defendant was convicted of 18 U.S.C. §922(g), §924(a)(1)(B). Defendant was arrested after having fired a shot from a pistol into a moving vehicle in an effort to rob the driver. He was convicted after a jury trial. Defendant gave no version of his offense relying instead on his trial testimony. He, therefore, did not accept responsibility. Finally defendant was sentenced to 240 months imprisonment.

(B) Number and Nature of Prior Convictions: Defendant has an extensive criminal record including juvenile and adult offenses. His juvenile record: robbery, breaking and entering, grand larceny (6/2/73, age 16); using a motor vehicle without

owner's consent (4/19/74, age 16); robbery (5/14/74, age 16); receiving stolen property (8/10/74, age 17); robbery (9/25/74, age 17); grand larceny (10/5/74, age 17); carrying a concealed firearm (11/1/74, age 17). (Because of the Florida system the facts underlying these offenses is not known; the last two offenses are reflected as having been dismissed.) Defendant's adult record consists of the following: armed robbery, possession of a firearm during the commission of a felony (5/19/75, age 17), twelve years state prison; assault with intent to commit robbery, use of a firearm during the commission of a felony (6/16/75, age 18), concurrent sentence with prior conviction; robbery (7/19/75, age 18), concurrent with prior cases; attempted first-degree murder, possession of a weapon by a state prisoner, battery on a law enforcement officer, habitual felony offender (3/21/79, age 21), five years consecutive; carrying a concealed firearm (6/18/87, age 30); possession of cocaine, carrying a concealed firearm (9/3/87, age 30); grand theft auto (10/11/87, age 30), pending charges. The instant offense gave rise to a number of charges among which was first-degree murder in which the defendant shot another individual.

(C) Comments/Reasons for Imposition of Sentence: The court imposed a twenty year sentence. The probation officer had the following assessment:

[t]his defendant has essentially accomplished nothing in his life other than his criminal record. A perusal of this criminal record reflects an individual that is totally and absolutely devoid of any hope of rehabilitation. . . . There is absolutely nothing to mitigate the defendant's conduct and it is therefore recommended that a period of incarceration be imposed to protect society from the violent acts of this career criminal. The term of that incarceration should be of sufficient length to ensure that if the defendant is ever released, he will be so elderly that his physical condition will prevent him from committing additional crimes reflective of his callous indifference to the value of human life.

19. #8941

United States v.

(A) Conviction: Possession with intent to distribute cocaine, 21 U.S.C. §841; 18 U.S.C. §922(g) and 26 U.S.C. §5651 (possession of a sawed-off shotgun). Defendant was convicted of possession with intent to distribute approximately 195 grams of cocaine and was found in possession of the sawed-off shotgun. He was sentenced to the minimum fifteen years. He did not receive any adjustment for acceptance of responsibility because although he continued to provide information to law enforcement he continued to use controlled substances and was evading law enforcement when it was revealed that there were attempted bond violations.

(B) Number and Nature of Prior Convictions: Defendant has ten priors as follows: burglary and assault with intent to rob (8/2/68, age 18); escape from jail (8/23/68, age 19); attempted breaking and entering, possession of burglary tools

(8/21/71, age 21); breaking and entering, possession of burglar's tools (2/18/74, age 24), breaking and entering (3/30/74, age 24), breaking and entering (4/9/74, age 24), it should be noted that in terms of calculating defendant's criminal history these three convictions were counted as one; theft from an interstate shipment (4/17/74, age 24); second-degree burglary (2/14/79, age 30); theft (7/9/84, age 30); four counts of assault (8/25/86, age 38).

(C) Comments/Reasons for Imposition of Sentence: The court indicated that it was imposing the mandatory minimum 180 months believing the prosecutor's representation that it appeared that the defendant was attempting to "turn over a new leaf." In the presentence report the probation officer indicated that the defendant's criminal history might be underrepresentative of the seriousness of his prior record and might form a basis for an upward departure. This was not done by the court.

20. #9373 United States v.

(A) Conviction: 21 U.S.C. §841(a)(1), §846, 18 U.S.C. §924(c) and 18 U.S.C. §922(g). Defendant was the source of cocaine and was arrested at a buy-bust. He was found in possession of a 38 special at the time of his arrest. Defendant declined to talk to the probation officer on advice of counsel and thus no acceptance reduction was given.

(B) Number and Nature of Prior Convictions: Defendant has suffered eleven prior felony convictions: breaking and entering, grand larceny (11/17/72, age 19); breaking and entering, grand larceny (12/18/72, age 19); attempting to break and enter (1/16/73, age 19); petty larceny (1/24/75, age 21); grand larceny (12/14/76, age 23); burglary and grand larceny (4/7/77, age 23) (defendant was convicted of three other counts of burglary and grand larceny which were not used in computing the criminal history since they were treated at one conviction), defendant received ten years Florida state prison; burglary (12/8/81, age 28); burglary of a dwelling, grand theft (6/21/82, age 28). Because of the computation of the criminal history defendant's first three convictions of breaking and entering were not counted as they occurred over 15 years ago and three of defendant's other convictions of breaking and entering were not counted because of the grouping rule. His criminal history points would have been five. However, he was adjudged to be a career offender based on the other requisites under the guidelines. Defendant was sentenced to 262 months.

(C) Comments/Reasons for Imposition of Sentence: The probation officer acknowledged that the defendant's criminal history may well have been underrepresentative of his criminal conduct since the grouping requirements resulted in an artificially deflated criminal history category. The court indicated that it was sentencing the defendant within the guideline range but to 262 months because of "the defendant's extensive past criminal convictions and the possession of a firearm during the conducting of the drug trafficking offense."

21. #9441

United States v.

(A) Conviction: 21 U.S.C. §841, possession with intent to distribute cocaine base; 18 U.S.C. §924(c), use of a firearm in connection with a drug trafficking crime; 18 U.S.C. §922(g). Defendant was arrested after a car chase and foot chase in possession of a weapon as well as cocaine base. There was some suggestion that the defendant may have attempted to fire at the police officer who was arresting him during a struggle. Defendant denied any involvement in the case, denied having a weapon, denied having the cocaine (although he later admitted having the cocaine). He maintains that he is innocent.

(B) Number and Nature of Prior Convictions: Defendant had five prior convictions: possession with intent to distribute a controlled substance (12/23/82, age 29); carrying a firearm without a license (10/31/83, age 30); delivery of a controlled substance (6/4/84, age 31); possession of a controlled substance with intent to deliver (10/10/86, age 23); and knowing possession of a controlled substance (10/27/86, age 33). Defendant was found to be a career offender with a guideline range of 262 to 327 months.

(C) Comments/Reasons for Imposition of Sentence: The court sentenced the defendant to 360 months stating in its view the defendant was clearly a drug dealer who, had been convicted on prior occasions of weapons offenses and small drug offenses. The court indicated that in its view the defendant would inevitably commit future offenses and viewed the small sentences which he had received in the past as a license with a fee for doing business. Additionally, the court noted that the defendant continually used weapons in connection with his criminal activity.

22. #1021

United States v.

(A) Conviction: Defendant was convicted of two drug counts (18 U.S.C. §924(c)), interstate transportation in aid of racketeering and 18 U.S.C. §922(g). Defendant was convicted of the offenses after a controlled delivery and subsequent search warrant revealed approximately two kilograms of cocaine and weapons in his residence. He was convicted after jury trial and did not demonstrate a recognition and affirmative acceptance of responsibility.

(B) Number and Nature of Prior Convictions: Defendant had two criminal charges as a juvenile: assault and battery by means of a dangerous weapon (5/18/51, age 15); kidnapping (7/1/52, age 16). As an adult: petty theft (2/20/61, age 25); forgery (7/5/61, age 25); first-degree robbery (1/29/63, age 27); robbery (7/26/72), five years imprisonment; murder, concealing a death (7/16/75, age 39), sentenced to life imprisonment. Defendant was adjudged to be a career offender by virtue of the robbery conviction in 1972 and the five years imprisonment and the murder conviction. His guideline range was 262-327 months.

(C) Comments/Reasons for Imposition of Sentence: Defendant was sentenced to a total of 276 months imprisonment. The court sentenced within the guideline range stating only that "the defendant's age and the magnitude of the term of the imprisonment" made the guideline range appropriate.

23. #10573 United States v.

(A) Conviction: 18 U.S.C. §922(g) and 26 U.S.C. §5861(d), possession of a sawed-off shotgun. Defendant was convicted after a jury trial, the evidence showed that he threatened to kill the victim with a sawed-off shotgun. Defendant admitted that he possessed the weapon but denied information connected to his arrest, however, the probation officer gave him a two-point reduction for acceptance of responsibility.

(B) Number and Nature of Prior Convictions: Adult: second-degree burglary (6/1/78); battery on a police officer (2/8/79); burglary (7/26/79); second-degree burglary (7/26/79), concurrent sentence; possession of a dangerous weapon (9/29/81); robbery (12/11/81), five years state prison; burglary (12/11/81), concurrent with prior sentence; felon in possession of a firearm (9/18/85), four years state prison. Defendant's criminal history resulted in a total criminal history of 24 points. Defendant was found to be a career offender and the probation officer calculated the sentencing range of 120 to 150 months.

(C) Comments/Reasons for Imposition of Sentence: The court simply imposed judgment of fifteen years. No statements and no recommendations by the probation officer with respect to the departures.

24. #10958 United States v.

(A) Conviction: 18 U.S.C. §922(g). A search warrant of defendant's residence revealed numerous firearms, drug paraphernalia and cocaine. Defendant was arrested with approximately 17 weapons. Defendant pleaded guilty and apparently gave a truthful and voluntary admission, thus received an adjustment for acceptance.

(B) Number and Nature of Prior Convictions: Defendant's adult prior conviction was as follows: burglary (4/5/56, age 23); burglary (8/31/59, age 26); passing forged instruments (8/31/59, age 26); burglary (9/28/64, age 32); keeping a gambling house (6/14/68, age 35); robbery by assault (6/27/72, age 40). It should be noted that because of the length of time of these criminal convictions, only the last one was counted in formulating his criminal history. In addition, defendant was facing charges of possession with intent to deliver cocaine and a state habitual felony offender charge.

(C) Comments/Reasons for Imposition of Sentence: The court simply sentenced the defendant to the mandatory 180 months "due to the serious nature of

this offense, specifically, illegal possession of a firearm by a convicted felon, a class A felony." The probation officer indicated that an upward departure may have been warranted since the criminal history category underrepresented the seriousness of the defendant's prior convictions.

25. #11175

United States v.

(A) Conviction: 18 U.S.C. §922(g). Defendant was arrested after a traffic stop in which a methamphetamine laboratory as well as some firearms were found. More firearms were found at the defendant's residence. Defendant was convicted after a trial and the judge declared a mistrial on two possession with intent to distribute methamphetamine and manufacturing of methamphetamine counts. Defendant received no adjustment for acceptance of responsibility.

(B) Number and Nature of Prior Convictions: Defendant had one juvenile adjudication for auto theft in August 1955 (age 16). Defendant had the following adult convictions: petty theft (8/6/57, age 18); robbery (5/31/59, age 19); burglary (11/19/65, age 26), sentenced five years to life (it should be noted that none of these convictions was counted in the criminal history because it is outside the fifteen year period); importation of a controlled substance (9/16/70, age 31), sentenced to ten years imprisonment.

(C) Comments/Reasons for Imposition of Sentence: The judge sentenced the defendant to the mandatory fifteen years, although it was his opinion that the defendant was clearly guilty of possession with intent to distribute methamphetamine beyond a reasonable doubt, notwithstanding the hung jury on those two counts.

26. #11303

United States v.

(A) Conviction: Bank robbery, 18 U.S.C. §8213(a), (b) and (d) and 18 U.S.C. §922(g). Defendant was arrested for a bank robbery committed in Asheville, North Carolina, in which he brandished a weapon during the robbery. Defendant was indicted in two separate cases, one for the bank robbery and one for the possession of the weapon. He was found guilty in both cases. Defendant received no adjustment for acceptance of responsibility since he maintained his innocence in both cases. Defendant was found to be a career offender and thus his guideline range was 262-327 months.

(B) Number and Nature of Prior Convictions: Defendant had the following adult convictions: extortion (5/9/84, age 37), five years state prison; failure to appear for attempted armed robbery (1/28/84, age 36), five years state prison; failure to appear for assault with intent to kill or inflict injury (1/28/84, age 36); delivery of a schedule II controlled substance (1/28/84, age 36); delivery of a controlled substance (1/28/84, age 36); possession with intent to distribute dilaudid, a schedule II controlled

substance (1/28/84, age 36) (all of these convictions on the same date were consolidated for criminal history purposes). Defendant was found to be a career offender as noted.

(C) Comments/Reasons for Imposition of Sentence: There was no judgment and commitment order although the printout from Monitoring indicates that the defendant was sentenced to 286 months imprisonment. No reasons or statements were given.

27. #11322 United States v. :

(A) Conviction: 18 U.S.C. §922(g). Defendant was found in a house with a gun in the waistline of the back of his pants. Defendant was on parole at the time of the offense. According to the presentence report, defendant accepted responsibility for his behavior and "verbalized his remorse."

(B) Number and Nature of Prior Convictions: Defendant has the following adult convictions: burglary of a habitation (9/29/84, age 18); robbery (9/29/84, age 18); burglary of a building (4/25/85, age 19), defendant received six years in Texas prison system. At the time of the instant offense defendant had approximately eight bad check charges pending in the Texas state court.

(C) Comments/Reasons for Imposition of Sentence: Defendant was sentenced to the mandatory fifteen years imprisonment. No statement from the court nor a recommendation from the probation officer in connection with any departures.

B. Table of All §924(e) Cases

The following table reflects the cases in which a defendant was convicted of a violation of 18 U.S.C. §922(g) and sentenced to a term of imprisonment of fifteen years or more. The column labeled "conviction" reflects a conviction in addition to the §922(g) offense; the column labeled "underlying crime shown" indicates the criminal activity that the defendant was engaged when he was convicted for the possession of the firearm. (Where there is more than one count of conviction, this column will be blank, as that conviction is the underlying criminal conduct); the column labeled "Prior convictions" reflects the total number of adult convictions of the defendant (this does not include juvenile convictions or minor offenses):

<u>USSC#</u>	<u>Conviction</u>	<u>Underlying Crime</u>	<u>Adult Priors</u>
1283	no	no	5
1605	no	robbery	8
2216	yes (drugs)	n/a	3
3333	no	no	8

2940	no	sale of weapons	3
3861	yes (drugs)	n/a	9
4455	no	drug trafficking	5
4468	no	attempted murder	4
4927	no	assault with intent to kill	7
4955	no	threat to kill witness	8
5691	no	no	6
5944	no	no	13
6260	no	burglary	3
6755	yes (robbery)	n/a	7
6839	no	no	5
8752	no	no	15
8257	no	attempted murder	10
8356	no	attempted murder	10
8941	yes (drugs)	n/a	10
9373	yes (drugs)	n/a	11
9441	yes (drugs)	drugs-attempted murder	5
10211	yes (drugs)	n/a	5
10573	no	threat to kill victim	9
10958	no	drug distribution	6
11175	no	drug distribution	4
11303	yes (bank robbery)	n/a	6
11322	no	no	3
11504	no	no	3
06011	no	assault	4
11546	no	bank robbery	5
12094	yes (bank robbery)	n/a	3
12224	no	assault w/ weapon	8
13016	no	drug distribution	3
13462	yes (drugs)	n/a	4
13796	yes (drugs)	n/a	2*
13797	no	drug distribution	7
13825	no	burglary	7
14214	no	no	9
14382	yes (escape)	no	12
14644	no	burglary	5
14652	no	armed robbery	10
14658	no	drug distribution	7
14822	no	no	8
14883	no	no	10
14931	yes (drugs)	n/a	3
15342	no	no	10
15616	no	robbery	8
15958	no	no	9
16553	no	no	7
16582	no	no	13
16855	yes (drugs)	n/a	8

16879	yes (escape)	n/a	7
16911	no	no	8
17019	yes (bank robbery)	n/a	2*
17062	no	drug distribution	4
17112	no	sale of guns	10
17255	yes (kidnaping)	n/a	2*
17472	no	no	4
17501	no	no	7
17557	no	no	9
18366	no	bank robberies	5
20624	yes (drugs)	n/a	10

* These cases were not enhanced by virtue of the armed career criminal enhancement provisions of §924(e). In these cases, the defendants were convicted of violating section §922(g) and were given a sentence greater than fifteen years under some other statutory provision (e.g., 21 U.S.C. §851, enhancement for a prior drug felony).

IV. ANALYSIS AND RECOMMENDATIONS

Based upon the foregoing cases and the past practice data provided by the Bureau of Alcohol, Tobacco & Firearms (see Arson section, Tab C) the armed career criminal enhancement of §924(e) is used in connection with particularly violent career criminals who have amassed far in excess of the three requisite serious drug or violent felonies necessary for the application of the fifteen year minimum sentence. Furthermore, in many of these cases, criminal history scores of well over 13 points are not uncommon. Under the present guideline structure, defendants are avoiding the consequences of their lengthy life of crime. In cases in which a sentence greater than the minimum has been imposed, it appears that the principal basis has been the fact that the defendant has an extremely lengthy and violent criminal past. On the other hand, there are situations where an individual has suffered three qualifying convictions but does not have the extensive record warranting a sentence far in excess of the minimum mandatory fifteen years. There is, therefore, a compelling reason to strike a balance between these competing concerns.

The working group recommends that Guideline §2K2.1 be amended to provide that in computing the base offense level under subsection (a), for a defendant who has been convicted under §922(g) and is an armed career criminal under 18 U.S.C. §924(e), the base offense level shall be Level 34 and the Criminal History Category shall have a floor of Level III (to minimize double-counting). The defendant would therefore be subject to a guideline range of 168-210 months (a range with the minimum that just exceeds the mandatory 180 month minimum). The court would then be able to increase the criminal history category based upon the computation in Chapter 4. Thus, for individuals with extensive and lengthy criminal records the guideline range could be increased to 262-327 months, assuming that the upper limit for criminal history remains a Category VI. (The working group believes that an

additional category should be added to allow for the defendants who have scores well in excess of 13 criminal history points, many of whom are armed career criminals). In addition, the proposed offense level would permit a meaningful finding of acceptance of responsibility, that would still permit imposition of the mandatory minimum sentence of 180 months.

Additionally, armed career criminal prosecutions, like many firearms prosecutions, arise out of transactions in which the underlying conduct constitutes separate state and/or federal crimes. As currently written, the "Background" to §2K2.1 provides that in using the cross reference, the underlying conduct is to be used in determining the offense level for "offenses that otherwise could be prosecuted under state law." There have been instances where this language has been used to preclude the operation of the cross-reference when the underlying offense behavior was a separate federal offense. The working group recommends that this language be modified so that it applies to federal conduct as well.

The working group will study the other recommendations made separately on December 14, 1989, by the Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms.

Attachments.



U.S. Department of Justice

TAB A

(See Arson TAB C
FOR ATF LETTER)

Washington, D.C. 20530

OCT 17 1989

Stephen A. Saltzburg, Esq.
Member (ex officio)
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Steve:

Under the Sentencing Reform Act the Criminal Division is required at least annually to submit to the Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. §994(o). We believe that on the whole the guidelines are working well and that the Commission has met its statutory responsibilities in an exemplary fashion. The experience of the past several years has indicated, however, that there are areas in which the guideline can be improved. We urge the Commission to consider the following recommendations, which we believe will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act of 1984. It is further our understanding that these recommendations are consistent with the views of the Sentencing Subcommittee of the Attorney General's Advisory Committee of United States Attorneys and other components of the Department of Justice.

1. Acceptance of Responsibility

Guideline §3E1.1 on acceptance of responsibility should be amended to prevent its improper application. We understand that the guideline is now applied in many instances in which guilt is determined through trial. We recognize that while in some cases a defendant may proceed to trial and, nevertheless, accept responsibility for having committed the offense, this combination of events is rare, as the guideline should reflect.

We recommend amending subsection (b) of §3E1.1 to limit the guideline's applicability to situations in which the defendant has taken action to accept responsibility before the government has borne its burden of proof. The guideline should, however, include an exception making it applicable to a defendant who does not plead guilty in advance of trial because of a legal issue that requires resolution at trial, such as the constitutionality of the statute under which the defendant is charged as such

statute is applied in the defendant's case. We believe that the revision we recommend would fairly compensate defendants for accepting responsibility for their offenses while preventing misapplication of the reduction for acceptance of responsibility to cases in which the defendant merely states his acceptance but takes no action confirming it.

2. Criminal History

We have several recommendations regarding criminal history. First, guideline §4A1.2, which contains definitions and instructions for computing criminal history, should be amended so that sentences for separate offenses are not artificially treated as one. Section 4A1.2(a)(2) states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. Application Note 3 provides that related cases are those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." This last factor artificially counts sentences in unrelated offenses as a single prior sentence and needlessly encourages separate trials and sentencing proceedings. The mere fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. We suggest that this third category of related cases be limited to those that were consolidated for trial or sentencing if the counts would have been treated as a single group of closely related counts under guideline §3D1.2. This limitation would at least require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under guideline §4A1.3 on the adequacy of criminal history. See also application note 3 to guideline §4A1.2. We believe that the problem needs to be corrected by a guideline, not a recommendation regarding the appropriateness of departure. The definition of prior sentence also applies with respect to career offenders, §4B1.2(3), and produces results that are inconsistent with the career offender statute, 28 U.S.C. §994(h).

Our next criminal history concern is that the guidelines should include an additional criminal history category. We have been advised by prosecutors that they have dealt with defendants whose criminal history scores were 20 or more and that equal treatment of all defendants with scores of 13 or more, as now provided, fails to distinguish properly among defendants. While the court may depart from the guidelines for such defendants, it is not bound to do so and may wish to avoid triggering an appeal. One additional category would at least provide some increase for the most serious recidivists.

We have also noted that whether to count for criminal history purposes a sentence imposed in a case that is on direct appeal should be clarified. An application note should be added that such convictions are to be used in computing the criminal

history score. Application note 6 to guideline §4A1.2 suggests that such sentences are to be counted. However, questions have arisen in this context and will likely continue to arise.

Some expunged convictions should count in computing the criminal history score. Under guideline §4A1.2(j) expunged convictions are not counted but may be considered under §4A1.3 (adequacy of criminal history). If the conviction is expunged for reasons unrelated to innocence or error of law, it should count. Application Note 10 to guideline §4A1.2 provides this result for convictions which are set aside or where the defendant is pardoned.

3. Probation Revocation

The guidelines do not specifically address resentencing upon probation revocation. The relevant statutory provision generally directs the court upon revoking probation to impose "any other sentence that was available under subchapter A [of chapter 227, title 18, United States Code] at the time of the initial sentencing." 18 U.S.C. §3565(a)(2). If the court concludes that under this language it should apply the guidelines in resentencing that were applied at the time of the initial sentencing, the court would find that they fail to provide an increase based on the probation revocation, even for a subsequent criminal violation. This issue may be addressed by the court through a departure from the guidelines under a policy statement on the adequacy of criminal history, §4A1.3. However, resentencing upon probation revocation is too serious a matter for treatment under the departure standards. The guidelines should address resentencing upon probation revocation generally and should provide an increase based on the fact of revocation and the reason for such revocation.

4. Firearms

There is presently no guideline for 18 U.S.C. §924(e), an enhanced sentencing provision for a violation of section 922(g) (felon in possession of a firearm) by a defendant with three previous convictions for a violent felony or a serious drug offense. Section 924(e) establishes a mandatory minimum 15-year prison term and leaves the maximum prison term to the discretion of the court. We believe there should be a guideline applicable to sentences subject to section 924(e) that includes a range of factors and is consistent with the fact that Congress established 15 years as only the minimum sentence available under this provision.

A court determining the applicable guideline sentence when section 924(e) applies must proceed through several steps of guideline application. Since the guidelines do not include a separate provision for section 924(e), the guideline applicable to section 922(g) applies to sentences subject to section 924(e). On November 1 this guideline, §2K2.1, will provide for offense

level 12, which at the highest criminal history category means a sentence of 30-37 months. However, since the 15-year statutory minimum controls where section 924(e) applies and is greater than the guideline sentence under §2K2.1, the statutory minimum becomes the guideline sentence. See guideline §5G1.1(b). Higher sentences would be authorized only if a basis for departing from the guidelines existed in accordance with 18 U.S.C. §3553(b).

We believe that the guidelines should provide for a range of sentences under 18 U.S.C. §924(e). That is, not all offenders should receive the same guideline sentence under this provision when relevant factors are considered. Since Congress established 15 years as only a minimum sentence, a judge should not be required to search for a basis for departure in order to impose a sentence greater than 15 years. Under pre-guidelines law judges imposed sentences well in excess of 15 years in numerous cases. See, e.g., United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987), cert. denied, 108 S. Ct. 1244 (1988); United States v. Gourley, 835 F.2d 249 (10th Cir. 1987), cert. denied, 108 S. Ct. 1741 (1988), in which life sentences were affirmed under the predecessor of 18 U.S.C. §924(e). We recommend that the Commission amend the guidelines to take into account the nature of the underlying conduct, including the type of weapon involved, and the defendant's criminal history in order to develop a guideline which establishes 15 years' imprisonment as a guideline floor, not as a guideline maximum.

5. Arson; Property Damage by Use of Explosives

Guideline §2K1.4, applicable to arson and property damage by use of explosives, should be amended to reflect the inherent seriousness of the offense and to include more readily applicable specific offense characteristics. The guideline currently provides a base offense level of six -- an offense level that permits a probationary sentence -- and numerous specific offense characteristics. The major relevant statute makes the offense punishable by imprisonment for up to ten years generally, twenty years if personal injury results, or life or the death penalty if death results. 18 U.S.C. §844(f) and (i). Clearly, Congress has treated arson and explosives offenses as a very serious matter.

Guideline §2K1.4 takes risk of personal injury into account in three specific offense characteristics and one cross reference. Knowingly creating a substantial risk of death or serious bodily injury results in an increase of 18 levels; recklessly endangering the safety of another results in an increase of 14 levels; otherwise endangering the safety of another results in an increase of four levels; and causing death or intending to cause bodily injury results in application of the most analogous guideline from Part A of Chapter Two of the guidelines if a higher offense level is so achieved.

First, we believe the Commission should restructure the guideline by: (1) significantly raising the base offense level

to take into account the inherent seriousness of explosives and arson offenses as prosecuted federally, and (2) providing a reduction to offense level 6 if the offense amounts only to "malicious mischief." Although the commentary states that many arson cases involve "malicious mischief," prosecutors and investigative personnel from the Bureau of Alcohol, Tobacco, and Firearms have indicated to us their belief that "malicious mischief" does not properly characterize the typical federal arson prosecution. Most federal arson cases, in their view, are serious offenses involving substantial damage or risk of damage or danger to persons. We recommend that the Commission reconsider the data upon which the guideline was based to determine if the offense has changed over the last several years so that a restructuring of the guideline would be in order.

We also believe that establishing the applicability of the specific offense characteristics on risk of harm can be extremely difficult and that other more objective factors would be preferable. For example, the guideline is not clear regarding the applicability of the factors listed above to the dangers faced by emergency personnel called upon to respond to a fire. Generally, whenever the crime of arson is committed, even in a vacant building, there is either knowledge that emergency personnel will be endangered or a reckless disregard for their safety. Injury to public safety officers responding to arson or explosives offenses is a factor specifically recognized in 18 U.S.C. §844(f) and (i). Because of these difficulties, we recommend that guideline §2K1.4 be amended to include the following specific offense characteristics, which rely on objective factors: committing the offense in a large building or a location where other buildings are in close proximity; committing the offense in a commercial or other district in which a rapid emergency response is difficult; setting fire or placing explosives in more than one location; and committing the offense to conceal another offense. Moreover, the two-level increase for the use of a destructive device under §2K1.4(b)(6) is not enough.

6. Murder

As the Department has previously pointed out, the commentary to guideline §2A1.1, regarding first degree murder, should be amended to indicate that life imprisonment is a mandatory sanction under 18 U.S.C. §1111. (The statute also includes the death penalty for first degree murder.) Both Application Note 1 as it now reads and the background commentary as amended to take effect November 1 should be changed in this regard. The explanation in the amended commentary incorrectly relies on provisions of the Sentencing Reform Act of 1984 relating to the classification of offenses to conclude that life imprisonment is not mandatory for first degree murder under section 1111. At least one court of appeals has ruled that life imprisonment is now mandatory for first degree murder, United States v. Donley, 878 F.2d 735 (3d Cir. 1989), and we believe the guidelines commentary should reflect this view.

7. Homicide-Related Offenses

Guideline §2A2.1 on assault with intent to commit murder, conspiracy or solicitation to commit murder, or attempted murder should be amended by increasing the base offense level and including specific offense characteristics that reflect statutory distinctions. The current base offense level is 20. An offender in the lowest criminal history category would receive a sentence of 33-41 months and in the highest category 70-87 months (just over seven years at the top of the range). Most of the statutory maxima for the offenses subject to this guideline are 20 years' imprisonment, while some are as high as life imprisonment. Offense level 20 is too low for these serious offenses. A defendant could receive a three-year sentence despite the fact that he had taken practically all steps necessary to commit a murder but was intercepted by law enforcement officers at the last minute. (If the base offense level is raised substantially, it would be appropriate to retain a lower offense level for attempt to commit manslaughter, a violation of 18 U.S.C. §1113, which is subject to imprisonment for only three years.)

In addition to raising the base offense level, we recommend establishing specific offense characteristics that link the sanction under guideline §2A2.1 to the offense which was the object of the attempt, solicitation, or conspiracy, rather than treating all of these offenses equally regardless of who the victim is. For example, an attempt to kill the President or certain other government officials, is punishable by life imprisonment, 18 U.S.C. §§1751(c) and 351(c), and should result in an enhanced guideline penalty.

8. Career Offender

The career offender guidelines include an objectionable application note to the definitional section. Specifically, application note 4 to guideline §4B1.2 will provide as of November 1 that the definitions from §4A1.2 on criminal history will apply in determining which past convictions are covered by the career offender guideline, §4B1.1. These include, for example, the guideline on the applicable time period, foreign sentences, expunged convictions, and the commentary concerning invalid convictions. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense. These limitations are inconsistent with the statutory mandate that the Commission "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for

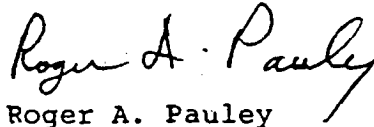
criminal history purposes to the career offender provision, which is designed to look at the defendant's entire lifespan.

9. Extortion Under Color of Official Right

We recommend that the guideline concerning bribery and extortion under color of official right, §2C1.1, be amended to provide a higher base offense level. The guideline establishes a base offense level of 10 and provides specific offense characteristics based on the amount of the bribe involved and whether the offense involved an elected or high-level official. An offense level of 10 allows a probationary sentence (with intermittent, community, or home confinement). In our view a person convicted of a bribery offense should be incarcerated, regardless of the amount of the bribe involved. Sentences of incarceration should not be reserved for cases involving officials who accept large bribes and for high-level officials. The amount of the bribe is generally unimportant in determining the level of the defendant's culpability or the harm caused by the offense. We recommend that the base offense level for guideline §2C1.1 be raised to 13 or 14 to assure a sentence of imprisonment even for a defendant who accepts responsibility for his offense.

We appreciate your bringing these recommendations to the attention of the Commission and hope that it can approve guideline amendments in the above areas for the next submission to Congress. We would be pleased to provide our assistance to the Commission in its efforts to implement these suggestions.

Sincerely,



Roger A. Pauley
Sentencing Coordinator
Criminal Division

TAB B

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March 25, 1988

MEMORANDUM

TO: All Commissioners
Sid Moore
Guideline Drafting Staff
Legal Staff
Research Staff

FROM: Gary J. Peters

SUBJECT: Career Offender Guidelines

A working group was created to examine questions and problems that have arisen with respect to the Career Offender guideline. The group consisted of Phyllis Newton, Donna Triptow, Ronald Weich and myself. The group's report follows.

I. INTRODUCTION

In general terms, the Career Offender guideline did not result in much confusion during the training seminars sponsored by the Commission, particularly as compared to other provisions in the Criminal History chapter. The following results from the Commission's survey of "Training the Trainer" participants illustrates a general understanding of the application principles:

	No Problems	Minor Problems	Serious Problems	Total
Judges	18 (90%)	1 (5%)	1 (5%)	20 (18.3%)
Prob. Officers	69 (77.5%)	19 (21.3%)	1 (1.1%)	89 (81.7%)
Total	87 (79.8%)	20 (18.3%)	2 (1.8%)	109 (100%)

Nevertheless, the participants did have a number of questions about this guideline, including the following:

- are violent offenses counted if they occurred more than 15 years ago?
- are the time periods applicable to criminal history also applicable in career offender decisions?
- are felony convictions for possession of a controlled substance counted as "controlled substance offenses?"
- would a prior conviction for escape which involved violence be considered a "crime of violence?"

Since the Career Offender guidelines have begun to be applied to actual cases, however, problems have arisen. The Technical Assistance Service (TAS) has received a number of calls questioning whether operation of the guideline depends solely on the offense of conviction (both as to the instant offense and prior convictions), or underlying conduct, as well. The use of

underlying conduct as a standard poses practical problems for probation officers, who would have to review each conviction in an attempt to determine if the underlying conduct constituted a "crime of violence." The Commission alleviated this problem in the January 15 amendments by changing the phrase "the instant offense is a crime of violence or trafficking in a controlled substance" to read "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense"

Other questions that have arisen on TAS relate to questions about what crimes are and are not covered by the "crime of violence" definition, and the guideline's applicability to convictions under 18 U.S.C. § 924(e), a statutory sentence enhancement carrying a mandatory minimum penalty of fifteen years' imprisonment and a maximum of life. This statute, the content of which is substantially similar to the Career Offender guideline, is specifically designed to punish repeat offenders.

The questions about §924(e) convictions have come from at least two sources. The first source was probation officers in Sacramento, who called the TAS about a defendant who was subject to the §924(e) enhancement, for whom they wanted to recommend a sentence above the mandatory minimum of fifteen years. They did not feel the guidelines allowed them to do so, because the guideline for the count of conviction [18 U.S.C. § 922(g)-§2K2.1] carries an offense level of 9. Because that offense level provides for a sentence well below the statutory minimum,

even at criminal history level VI (21-27 months), the statutory minimum automatically becomes the guideline sentence. See §5G1.1(b).

The second source involved a recent Seventh Circuit case, United States v. Jackson, 835 F.2d 1195 (dec. Dec. 14, 1987), where Judge Frank Easterbrook expressed the hope that the Commission would address what he referred to as an "ambiguity" in the guidelines, namely, whether a conviction under 18 U.S.C. § 924(e) was a "crime of violence" under the guidelines. The judge noted that neither §924(e) nor its predecessor statute, 18 U.S.C. § 1202(a), is listed in the statutory index. Other ambiguities raised by the judge are whether the "offense statutory maximum" under §4B1.1 refers to the maximum lawful sentence for the crime of violence or the maximum for any of the crimes that would be part of a single "group" under §3D1.2 of the guidelines, and, more broadly, what the Commission would consider to be a "crime of violence." The latter concern was addressed by the Commission in its January 15 amendments. A copy of a memorandum from Phyllis Newton to Judge MacKinnon, specifically addressing certain aspects of Judge Easterbrook's decision, is annexed hereto as Appendix A.

The working group has attempted to address these questions, additional issues presented to us by David Lombardero and Peter Hoffman, and other issues raised within the group. The remainder of this memorandum addresses our attempts to resolve these issues. Wherever possible, we have tried to include both

advantages and disadvantages of possible approaches. If a consensus was reached on a particular approach, we have noted that. In other instances, where the group did not agree on an approach, we have merely presented the issue for your consideration.

In attempting to include as many options as possible, without presenting one "model" revision, we are aware that some options would conflict with others. Therefore, if you decide to make any of the changes discussed herein, you may wish to consider them in various combinations. We are prepared to take any changes you request and redraft the suggested amendment in an internally consistent manner.

II. DESCRIPTION OF 18 U.S.C. § 924(e)

There are substantial similarities between 18 U.S.C. § 924(e) and the Career Offender guideline, such that we believe a discussion of the statute may be helpful in considering whether and in what manner to amend the guideline.

A. The Development of the Statute

The forerunner of §924(e) was the Armed Career Criminal Act of 1984, 18 U.S.C. Appendix II § 1202(a) (the "ACCA"). The ACCA amended 18 U.S.C. App. 1202(a)(1) to raise the penalty for possession of a firearm by a thrice-convicted felon from two years to a mandatory minimum of fifteen years imprisonment. The ACCA, enacted as part of the Comprehensive Crime Control Act of

1984, Pub. L. 98-473, Title II, §§ 1802, 1803, 98 Stat. 2185, stated:

In the case of a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions by any court referred to in paragraph (1) of this subsection for robbery or burglary, or both, such person shall be fined not more than \$25,000 and imprisoned not less than 15 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under this subsection, and such a person shall not be eligible for parole with respect to the sentence imposed under this subsection.

Subsection 1, to which the statute refers, is the Gun Control Act of 1968, Pub. L. 90-351, Title VII, 82 Stat. 236 (formerly codified at 18 U.S.C. Appendix II § 1202(a)), which makes it a crime for certain categories of persons to possess a firearm in or affecting commerce. Effective November 15, 1986, the first sentence of 18 U.S.C. App. § 1202(a) was incorporated into 18 U.S.C. § 922(g), while the ACCA provision was incorporated into 18 U.S.C. § 924(e)(1). Firearm Owners' Protection Act, Pub. L. No. 99-308, §§ 102(6), 104(a)(4), 106 (1986). Section 924(e)(1) was amended by Congress twice during the 1986 Session. The first version carried over the ACCA provision of prior convictions for "robbery or burglary, or both." Before the effective date, however, the provision was amended to provide for prior convictions of a "violent felony or a serious drug offense, or both."

B. Legislative History of the Statute

The legislative history of the ACCA is detailed in United States v. Gantt, 659 F. Supp. 73, 78-79 (W.D. Pa. 1987):

. . . the purpose of the ACCA is not to regulate the possession of firearms. In fact, the legislative history indicates that the ACCA became a part of the firearm statutes only as an afterthought. Identification and incapacitation of dangerous repeat offenders, not control of firearm possession, were the statute's purposes. See H. Rep. No. 98-1073, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. Code Cong. and Admin. News 3661; United States v. Hawkins, at 216-17. Finding that a small number of recidivists were responsible for a great number of street crimes, Congress concluded that targeting these criminals for federal prosecution and prolonged incarceration would greatly reduce crime. H. Rep. No. 98-1073; 129 Cong. Rec. S295-297 (January 26, 1983) (remarks of Senator Spector, the bill's sponsor). As originally proposed by Senator Spector, the bill was a federal robbery statute, to be added to chapter 103 of Title 18, the chapter dealing with federal robbery offenses. See 129 Cong. Rec. S297. However, problems arose with federalizing what was an offense traditionally left to state prosecutors. The National District Attorneys Association objected. See H. Rep. No. 98-1073, p. 4; 130 Cong. Rec. S1561 (February 23, 1984) (remarks of Sen. Kennedy, Exhibit 1). In response, Senator Spector proposed giving state prosecutors essentially a veto power over federal prosecutions under this bill. See 129 Cong. Rec. S297; 130 Cong. Rec. S1560 (February 23, 1984). In turn, the Justice Department objected to that proposal. See 130 Cong. Rec. S1562 (February 23, 1984). Senators Kennedy and Thurmond offered an amendment that would have restricted the bill to robberies which were already prosecuted in federal court, such as bank robberies. 130 Cong. Rec. S1558-69. Finally, to solve these jurisdictional difficulties, Congress settled upon attaching repeat offender provisions to the Gun Control Act. See 130 Cong. Rec. H10550-51 (October 4, 1984); H. Rep. No. 98-1073, pp. 4-5.

Senator Arlen Specter (R-Pa.), who introduced the enhanced penalty provision in the Senate, explained it as follows:

Robberies and burglaries are the most damaging crimes to society Robberies involve physical violence

or the threat thereof, being deliberately directed against innocent individuals. Burglaries involve invasion of their homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions Most robberies and burglaries are committed by career criminals. A high percentage of robberies and burglaries are committed by a limited number of repeat offenders. Many commit scores of offenses. Some studies estimated that the majority of these offenses are committed by career criminals. Career criminals often have no lawful employment; their full-time occupation is crime for profit and many commit crimes on a daily basis H.R. Rep. No. 1073, 98th Cong. 2d Sess. 3, reprinted in 1984 U.S. Code, Cong. & Admin. News at 3663 (quoting 129 Cong. Rec. S296 (daily ed. Jan. 26, 1983)).

United States v. Hawkins, *supra*, 811 F. 2d at 216-17.

In light of this legislative history, those courts which have considered the issue have concluded that the purpose of the ACCA was punitive and not regulatory, namely, the incapacitation of repeat offenders. United States v. Hawkins, *supra*, 811 F. 2d at 216; United States v. Gantt, 659 F. Supp. 73, 78 (W.D.Pa. 1987).

C. The Operation of the Statute

As it now operates, no defendant is subject to the penalties of §924(e)(1) unless he is first convicted of violating 18 U.S.C. § 922(g). That section makes it a crime for any person to ship, transport, or possess in or affecting commerce, any firearm or ammunition, if the person falls into one of the following seven categories: (1) the defendant has a prior state or federal felony conviction; (2) the defendant is a state or federal fugitive; (3) the defendant is a drug user or addict; (4) the defendant is an adjudicated mental defective or has previously

been committed to a mental institution; (5) the defendant is an illegal alien; (6) the defendant is a veteran with a dishonorable discharge; (7) the defendant has renounced his U.S. citizenship.

The penalty for a conviction of §922(g), set forth at 18 U.S.C. § 924(a)(1), is a maximum of five years in prison. The relevant guideline is §2K2.1, which carries a base offense level of 9. However, if the defendant has three prior state or federal convictions for "a violent felony or a serious drug offense," then (and only then) he is eligible for the sanction of §924(e). That sanction cannot be triggered without a conviction for §922(g). If the defendant is sentenced pursuant to §924(e), he faces a minimum mandatory sentence of fifteen years imprisonment without parole. The statute imposes no upper limit. By implication, the maximum penalty is life imprisonment.

An issue with relevance to the guidelines is whether §924(e) is merely a sentence enhancement or constitutes a separate federal offense. To date, eight circuit courts have considered that issue with respect to the predecessor statute, 18 U.S.C. App. § 1202(a). Six of them - the Third, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits - have held that the ACCA did not establish a separate offense. See United States v. Blannon, 836 F.2d 843 (4th Cir. 1988); United States v. Gregg, 803 F. 2d 568 (10th Cir. 1986); United States v. Hawkins, 811 F. 2d 210 (3rd Cir. 1987); United States v. Jackson, 824 F. 2d 21 (D.C. Cir. 1987); United States v. West, 826 F.2d 909 (9th Cir. 1987); and United States v. Rush, No. 86-1811, 42 Cr. L. Rep. 2417 (8th

Cir. Feb. 25, 1988) (en banc). In those circuits, therefore, the §924(e) penalty need not be separately charged; once a defendant has been convicted under 18 U.S.C. §1202(a) [now 18 U.S.C. §922(g)], and after proper notice and information is provided by the Government, the sentencing judge must apply the enhanced penalties provided for in §924(e) upon proof of three prior violent felonies or serious drug offenses. Presumably, it is now resolved that the requisite standard of proof for the prior felonies is a preponderance of the evidence. See McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986). The Fifth and Sixth Circuits, however, have concluded that the ACCA is not merely a sentence enhancement provision but creates a new offense for which a defendant must be indicted and convicted beyond a reasonable doubt before being sentenced thereunder. United States v. Davis, 801 F. 2d 754 (5th Cir. 1986); United States v. Brewer, No. 86-6155, 42 Cr. L. Rep. 2417 (6th Cir. Feb. 26, 1988).

III. THE CAREER OFFENDER GUIDELINES

The Career Offender Guidelines are similar in their content and operation to 18 U.S.C. § 924(e). The working group has suggested amending the guideline to conform even more closely to the statute, particularly with respect to the definitions used for predicate offenses. See discussion, infra. Preliminarily, however, it should be noted that virtually any defendant who is sentenced pursuant to §924(e) will have the requisite prior

offenses to qualify as a "career offender." However, because the guidelines and most courts do not consider §924(e) to be an "offense of conviction" (as previously stated, 18 U.S.C. § 924(e) does not appear in the statutory index), and because the offense of conviction that triggers the §924(e) sanction [18 U.S.C. § 922(g)] is not a "crime of violence or a controlled substance offense," the §924(e) defendant will normally not be subject to the Career Offender guideline.

A. The Development of the Guideline

An early version of the Career Offender guideline appeared in the Commission's Preliminary Draft of September 1986 (pages 127-28), in the form of a policy statement:

C321. If the offense of conviction is a violent offense or a controlled substance offense and the offender has at least two prior felony convictions, each of which is either a violent offense or a controlled substance offense, then the sentence shall equal the maximum term of imprisonment authorized for the offense. This policy statement implements 28 U.S.C. § 924(h). Violent offenses are the state and federal counterpart of offenses in Chapter Two, Part A, Offenses involving the Person, and any other offense that involves force or threat of force against a person, including burglary of a dwelling. Controlled substance offenses are described in Section 401 of the Controlled Substance Act (21 U.S.C. § 841); Sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959); and Section 1 of the Act of September 15, 1980 (21 U.S.C. § 955a).

In the Revised Draft of January 1987, the following version appeared as a guideline (page 165):

§B311. Special Offenders Defined

If (1) the defendant was at least eighteen years old at the time of the current offense, and (2) more than a minor participant in the current offense, and (3) the current offense is a crime of violence or trafficking in a controlled substance, and (4) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense, the sentence shall be at or near the maximum term of imprisonment authorized by statute for the offense of conviction.

Linda Clemons could find no entries in the computerized index of public comment pertaining to the Career Offender guideline.

B. The Legislative History of the Guideline

The Career Offender guideline was issued pursuant to the directive in 28 U.S.C. §994(h) that "the Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years or older and --" has been convicted of an instant felony that is either a crime of violence or a drug trafficking offense and has two or more prior similar felony convictions. The prior convictions may be equivalent state offenses.

The relevant legislative history of this provision was summarized by John Steer a year ago. A copy of his memorandum, including his interpretation of the statutory directive and his recommendations to the Commission, is annexed hereto as Appendix B [hereinafter "the Steer Memorandum"].

C. The Operation of the Guideline

In its current form, the Career Offender guideline is potentially both under-inclusive and over-inclusive. It is potentially under-inclusive in that it fails to apply to defendants convicted of violating 18 U.S.C. §922(g) and sentenced pursuant to §924(e). As amended, the guideline focuses exclusively on the count of conviction, rather than the conduct involved, both as to the instant offense and the prior offenses. Since there is no separate guideline for §924(e), any defendant sentenced pursuant to that enhancement but convicted of violating 18 U.S.C. § 922(g) would necessarily receive the mandatory minimum statutory sentence, regardless of the seriousness of the underlying offense. See §5G1.1(b). In much the same way, the guideline is also potentially over-inclusive. It makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions. For example, two defendants convicted of the same federal drug felony [e.g., 21 U.S.C. §841(a)(1)], each with two prior drug offenses, would be subject to the same career offender sanction, even if one defendant was a drug "kingpin" with serious prior offenses, while the other defendant was a low-level street dealer whose two prior convictions for distributing small amounts of drugs resulted in actual sentences of probation. Under federal law, both defendants are likely to be convicted under the same statute. For the instant offense, even if the amount distributed was no greater than that involved in the prior

offenses, the low-level defendant would face a minimum offense level of 32 under this guideline (210-262 months). Possible approaches to this perceived problem, and others, are discussed below.

IV. SPECIFIC ISSUES AND PROPOSALS

A. Should the Commission adopt a guideline which reflects a more flexible approach to the statutory language?

Some staff members believe that the Commission should consider adopting a career offender guideline that is less mechanical and more related to offense conduct. Peter Hoffman has drafted such a proposal, annexed hereto as Appendix C. The Steer Memorandum (Appendix B) concluded that the legislative history of the guideline supported such an approach. Peter's proposal places the career offender in criminal history category VI, but at the adjusted offense level resulting from the underlying offense conduct, enhanced by [four] levels. Peter claims a four-level enhancement is most consistent with current practice, but that an enhancement "penalty" of as few as two levels or as many as six levels could be justified.

This approach offers certain advantages: it takes into account the defendant's real offense behavior; it allows for multiple count analysis, where applicable, with a resulting combined offense level; and it ensures that the severe penalties of this guideline would be more closely tied to the defendant's actual conduct in committing the instant offense rather than simply to the statutory penalties for the count of conviction.

Thus, in the previously described example, the low-level drug seller would be penalized for his recidivism, but the penalty would still be tied to the quantity of drugs involved, as opposed to simply the offense of conviction. The low-level dealer would thus receive a lesser sentence than the "kingpin."

However, other staff members believe the Commission should not change its conceptual approach to this guideline. Assuming the primary purpose of this guideline is to incapacitate repeat offenders simply because of their repetitive commission of certain categories of crimes, then the seriousness of the instant offense conduct is not particularly important. The philosophical question is left to the consideration of the Commission.

B. Should the guideline otherwise attempt to distinguish the seriousness of prior offenses?

Another way of ameliorating the potentially unfair impact of this guideline would be to distinguish between the seriousness of prior offenses of career offenders, whereas the proposal discussed above in (A) is based on the seriousness of the instant offense conduct. One proposal, either as an alternative or an addition to (A), is to require that the sentences imposed for the prior offenses of conviction exceed one year and one month, paralleling the threshold of §4A1.1(a). Thus, in the previously described example, the prior convictions of the low-level drug seller would not be counted for career offender purposes because they resulted in sentences of probation.

This approach distinguishes between career offenders who have committed serious prior offenses and those whose prior

offenses were relatively minor, but nonetheless carried a substantial possible sentence. It also furthers the purposes of specific deterrence, since the defendant who received only probationary sentences before may well need a prison sentence to deter him from future criminal conduct, but not a sentence of 210 months (the minimum sentence for a career offender convicted of distributing any quantity of drugs). Providing a reasonable mechanism for reducing the lengthy prison terms of career offenders would also ameliorate the prison impact potential of this guideline.

However, this approach is subject to the same criticism as the conceptual change suggested in (A); that is, it qualifies the punishment of recidivism for its own sake. In addition, it could be argued that it perpetuates past sentencing disparities, in the same way that argument has been made with respect to §4A1.1 by a number of the defendants who have filed guideline challenges to date. However, the legal staff believes this particular legal challenge to be extremely weak, and thus far no reviewing court has shown any interest in it. We therefore believe the threshold of one year and one month in §4A1.1 is a reasonable standard for distinguishing the seriousness of previous offenses.

C. Should Acceptance of Responsibility (§3E1.1) Be Available to Career Offenders?

The Career Offender guideline, like Criminal Livelihood, is applied after the Chapter 3 adjustment for Acceptance of Responsibility. Therefore, a defendant subject to this guideline

who pleads guilty and otherwise evinces acceptance of responsibility does not benefit from a two-level reduction in his offense level. The argument for making the reduction available is that it would give defendants some incentive to plead guilty. On the other hand, the guideline sentences for career offenders are so high that the two-level reduction, by itself, is unlikely to induce many guilty pleas. In addition, the notion of "acceptance of responsibility," is eroded by permitting a defendant to "accept responsibility" for the third in a continuing series of major felonies. A defendant in these circumstances who was repentant could cooperate and thereby win a departure. However, if the Commission were to adopt the changes discussed in proposal (A), supra, then "acceptance of responsibility" would appropriately be calculated in determining the defendant's adjusted offense level. In those circumstances, it would be likely to result in more guilty pleas.

D. Should the guideline be amended to account for sentences imposed more than fifteen years before the instant offense?

It was pointed out to the working group that a habitual criminal might avoid application of the career offender guideline because he previously served a lengthy sentence. For example, a defendant may have committed a series of predicate felony offenses more than fifteen years before the instant offense, culminating in an offense for which he served fifteen years in prison, and immediately upon his release committed the instant

offense. Although the offense resulting in the fifteen year imprisonment would be counted both for purposes of computing the defendant's criminal history (see Application Note #1 to §4A1.1) and for purposes of the career offender guideline, the other previous convictions would not be counted for either purpose. Hence, the instant offense would not qualify this defendant as a career offender. The working group does not believe this problem warrants adopting a more inclusive approach for prior offenses under the Career Offender guideline than under Criminal History, in general. In addition, some of those defendants who would escape the Career Offender guideline for this reason would probably be subject to the enhancement of 18 U.S.C. §924(e), which has no applicable time bar for predicate convictions.

E. Should the guideline be amended to account for multiple convictions?

As it currently operates, the Career Offender guideline is predicated on the statutory maximum for the instant crime of violence or controlled substance crime, and is not affected by the commission of multiple offenses. For example, the guideline offense level for a career offender whose instant offense was armed bank robbery is 37, regardless of whether the defendant was convicted of holding up one bank or three. The working group does not believe this amendment is necessary because the guideline's offense levels are already so high. If the Commissioners want the guideline to reflect the commission of multiple offenses, we recommend further consideration of the sort

of proposal discussed above in (A), reflecting a defendant's underlying offense behavior, which would include accounting for multiple offenses, as well as acceptance of responsibility, etc., in determining the adjusted/combined offense level prior to the enhancement "penalty."

F. Should a policy statement be added to the guideline suggesting that age might be a relevant factor to imposition of this guideline?

A good deal of empirical evidence suggests that a criminal's likelihood to recidivate declines substantially after he reaches his mid to late thirties. See, e.g., Cusson and Pinsonneault, "The Decision To Give Up Crime," Cornish and Clarke (eds.), The Reasoning Criminal, New York: Springer-Verlag, 1986. Since the Career Offender guideline may impact on many defendants just before or as they reach that age, subjecting them to very lengthy prison terms, David and Peter asked the group to consider whether a policy statement suggesting age as a potentially relevant factor should be added to this guideline.

Our short answer is "no." Such a policy statement would be completely inconsistent with the guidelines in their entirety, and §5H1.1, in particular. Whatever merit there may be to this proposal, it should apply with equal force throughout the guidelines. Obviously, that is an issue well beyond the scope of this memorandum.

Moreover, while our review of the literature was by no means exhaustive, some authorities believe recent patterns of

recidivism may be changing. In her new book, Crimewarps: The Future of Crime in America (Anchor Press/Doubleday), criminologist Georgette Bennett opines that the traditional criminal profile of "young, male, poor and uneducated" will increasingly be replaced by older and more affluent offenders. Of course, it is arguable whether this segment of society will have the same rate of recidivism as the young and poor.

- G. Should the Application Notes be amended to clarify the meaning of "offense statutory maximum" in the guideline?

We propose that the Application Notes to §4B1.1 be amended to specify that "the term 'offense statutory maximum' under §4B1.1 refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or a controlled substance crime. If the defendant is convicted of committing two or more crimes of violence or controlled substance offenses, apply the highest maximum term of imprisonment for any single such count of conviction." This amendment would clarify ambiguities raised by callers to the TAS and by Judge Easterbrook in the Jackson case, supra.

- H. Should the Application Notes be amended to clarify the applicability of prior sentences imposed in unrelated cases?

The working group recommends that the provisions of §4A1.2(a)(2) should be added to those already listed in

Application Note #4 to §4B1.2. Currently, a prosecutor could argue that two prior sentences imposed in related cases satisfied the predicate offense requirement of the Career Offender guideline. Section 4A1.2(a)(2) states, in part, "Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." We believe the Commission intended this provision to apply to the Career Offender guideline, as is suggested by §4B1.2(3)(B). However, the failure to include §4A1.2(a)(2) in Application Note #4 with the other specified provisions creates an unnecessary ambiguity.

- I. Should the application notes be amended to clarify whether the guideline applies to a defendant convicted of aiding and abetting a "crime of violence"?

Application Note #2 to §4B1.2, which discusses the term "controlled substance offense," includes the sentence: "This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed." This sentence is noticeably absent from Application Note #1, which discusses the term "crime of violence." We take no position as to whether the sentence should be included in both definitional paragraphs; rather, we simply note the discrepancy, as have probation officers in the field. There are justifiable practical reasons for maintaining the discrepancy, including the fact that, in practice, prosecutors often accept a plea to a Title 18 conspiracy count (18 U.S.C. §371, which carries a maximum term of

five years imprisonment) from defendants with very low levels of culpability. However, it may be helpful to formally recognize the discrepancy if the Commission wishes to maintain it, in order to avoid different interpretations. This amendment should be considered regardless of whether or not the Commission decides to adopt different definitions for the predicate felony offenses in the guideline (see next section).

J. Should the definitions of the predicate offenses be amended to parallel those in 18 U.S.C. §924(e)?

The working group believes that the terms "crime of violence" and "controlled substance offense," together with their definitions, should be deleted from the guideline. In their place, we recommend that the Commission adopt the terms "violent felony" and "serious drug offense" from 18 U.S.C. §924 (e), along with the definitions from that statute. The definitions from §924(e) were not considered by the Commission prior to issuance of the guidelines. They are more comprehensive and of more recent vintage than the current guideline terms and definitions.

Staff members have expressed concern about the definitions of the terms "crime of violence" and "controlled substance offense" in the Career Offender guideline prior to the last set of amendments. The current use of the term "controlled substance offense" introduces a new offense description into the drug law, one which will have no legislative history and less interpretive case law than would a term already adopted by Congress. Also, the listing of offenses by section number will

necessitate the continuous review of new drug laws, both in terms of their substantive similarity to those already listed in the guideline and simply in terms of the revised section numbers.

It was generally agreed that a more generic classification would be preferable. One suggestion was to adopt the language of the RICO statute for predicate narcotics offenses. However, that approach would include drug offenses often used for peripheral defendants (e.g., telephone counts) and might go well beyond the intent of the enabling legislation.

We believe a better approach would be to adopt the term "serious drug offense" already adopted by Congress in 18 U.S.C. §924(e), along with the definition from that section. Such a definition would solve the problems inherent in the use of the term "controlled substance offense," take advantage of a term specifically adopted by Congress and subject to case law interpretation, and avoid the problem of including relatively minor drug offenses that are not already included within the current guideline definition. At the same time, the adoption of this "generic" statutory term and definition will minimize the likelihood that a serious drug offender whose convictions do not fit neatly into one of the specifically numbered statutes included in the guideline (now or in the future) will avoid the sanction imposed by the Career Offender provision.

Likewise, the group favors adoption of the "violent felony" term from §924(e). It is more specific than the definition of a "crime of violence" in 18 U.S.C. § 16, and more narrowly drawn.

The group's general feeling is that because the penalties imposed by this guideline are so severe, linking the definitions of predicate crimes to those already approved, defined and joined together by Congress for the heavy sanction of §924(e) would facilitate both the acceptance of the guideline and its proper application.

Peter Hoffman has drafted a tentative proposal incorporating these definitional changes, annexed hereto as Appendix C. Peter's draft also addresses the issues raised in Sections (G), (H) and (I), above. However, we have the following comments about the draft:

(1) The draft proposal essentially adopts verbatim the definitions from §924(e)(2). However, Peter has changed "burglary" to "burglary of a dwelling." This limitation conforms to the current guideline, which defines "crime of violence" to include convictions for burglary of a dwelling, but not convictions for burglary of "other structures." See Application Note #1 to §4B1.2. However, both on its face and as intended, the statutory definition of "violent felony" in §924(e) is not limited to burglaries of dwellings. Prior to its amendment in 1986, only convictions for "robbery" or "burglary," as those terms were defined in 18 U.S.C. § 1202(c), triggered the sentence enhancement provisions of the ACCA. Burglary was defined in 18 U.S.C. §1202(c)(9) to cover a wide variety of private property, as follows:

"[A]ny felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense."

Moreover, the legislative history of the ACCA and the 1986 amendments thereto, as discussed above, shows that the drafters of the statute were concerned about burglaries both in homes and workplaces. The 1986 amendments sought to broaden the reach of the ACCA by expanding the types of prior convictions which could be used to trigger the sentence enhancement provisions of the Act.

(2) The draft proposal essentially merges the "serious drug offense" definitions of §924(e)(2)(A)(i) and (ii) into one generic category, which we favor. However, it fails to adopt the statutory reference for the term "controlled substance" found in §924(e)(2)(ii), which could lead to unnecessary confusion, litigation, and disparity. We favor including the reference.

(3) In attempting to further define "violent felony" by the use of examples, the draft proposal departs from the statutory model and again invites argument as to why other offenses were not specifically listed. Representatives of the training staff and TAS staff report that where examples are used, people in the field tend to limit the definitions to those examples. Most of us (but not all) therefore favor adopting both the language and form of the statute, without the use of examples. An alternative approach acceptable to all members of the group is to emphasize in the Commentary that the examples are merely illustrative, and not comprehensive.

A copy of the proposal reflecting these suggestions is appended to Peter's draft in Appendix C.

A related question is whether the court may go beyond the text of an ambiguous statute of conviction and examine the factual circumstances of the offense to determine whether it falls within the enhancement provisions of the guideline. One court that has studied this issue with respect to the "violent felony" definition in 18 U.S.C. §924(e) concluded that the court could look to the factual circumstances of a state conviction for preventing or dissuading the trial testimony of a victim/witness to see if it came within that definition, because the emphasis of the property crime definition in 924(e)(1)(B)(ii) is on conduct. See United States v. Sherbondy, 652 F. Supp. 1267, 1269 (C.D. Cal. 1987). If the Commission were to permit a similar approach, there would be even less value to including examples within the definition.

- K. Should the Commission adopt a guideline or policy statement relating to defendants who are subject to the enhancement provisions of 18 U.S.C. §924(e), and if so, what should it be?

In light of Judge Easterbrook's opinion in United States v. Jackson, supra, and some of the TAS calls, the Commission may wish to adopt a guideline or policy statement specifically addressed to defendants who are subject to the enhancement provisions of 18 U.S.C. §924(e). The recommendation of the working group is that we should not issue any such guideline or

policy statement at the present time. As the Commission monitors the application of §2K2.1, §4B1.1, and §5G1.1, it will be better prepared to address the necessity of such a guideline.

Should the Commission elect to issue a guideline, one approach would be to add 18 U.S.C. §924(e) to the statutory index and/or create a new guideline, numbered §2K2.5. Such a guideline might be assigned a base offense level of 37, which would allow for life imprisonment at the top of the range (360 months - life). It should be noted that while the suggested guideline offense level of 37 is the lowest offense level in Criminal History Category VI carrying a maximum guideline range of life, the minimum of that range of 360 months, which is twice the minimum of fifteen years required by statute in §924(e). Thus, under this proposal, a judge would have to depart to give a §924(e) defendant less than thirty years. To rectify this problem, the Commission might elect to adopt a new guideline applicable to §924(e) defendants predicated on the minimum statutory sentence (Level 30) with a guideline range of 168-210 months. This approach would require the judge to depart in order to impose a higher sentence.

A new guideline might provide for distinctions among defendants in the form of specific offense characteristics related to the underlying conduct of the possession offense - 18 U.S.C. §922(g). Importantly, §922(g) is a mere possessory offense, not requiring any use of the firearm or ammunition. Moreover, the Commission has no data for this offense or its

predecessor [18 U.S.C. §1202(a)] to provide insight as to distinctions in current sentencing practices. Consequently, the working group does not believe we can legitimately devise specific offense characteristics that would replicate existing sentencing practices. See page 1.12 of the guidelines.

Another way for the Commission to address the absence of a §924(e) guideline is by including commentary in §2K2.1 (the current guideline for convictions of 18 U.S.C. §922(g)) stating that the Career Offender guideline should be considered for any defendant who is being sentenced pursuant to 18 U.S.C. §924(e). And, finally, the Commission might consider including §924(e) sentences as "crimes of violence" in the Career Offender guideline. However, as discussed above, the prevailing view in the circuit courts is that §924(e) is not a separate crime at all, but rather a sentence enhancement provision. That suggests that it does not require a guideline nor does it properly belong in the statutory index.

For the present, therefore, the working group recommends leaving the sentence to be imposed pursuant to 18 U.S.C. §924(e) completely within the discretion of the sentencing judge. In so doing, the Commission will avoid the likely claims of arbitrariness and the unfairness of predicating a guideline based on either the minimum or maximum statutory sentence, but not both.

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MEMORANDUM

TO: Judge MacKinnon
FROM: Phyllis Newton, J¹
SUBJECT: Easterbrook Decision
DATE: 1 February 1988

I have talked to a number of people regarding the Easterbrook question and would like to provide you with the current thinking of the Commission staff regarding this issue. As I expressed to you, we generally do not see his concern to be serious, particularly in light of the emergency amendments.

There are three basic issues encompassed in Easterbrook's decision. The first concerns the lack of a specific guideline for 18 U.S.C. 924(e). He is correct that there is no guideline for that offense. The question is whether or not that is a serious problem. Section 924(e) has replaced the old 18 U.S.C. App. 1202 that prohibited career criminals from possessing a dangerous weapon. While there is no reference to 924(e) in the Statutory Index, that section is an enhancement statute for

922(g), which is listed in the Statutory Index. Even if there had been no reference for 922(g), guideline 2X5.1 that directs the court to the most analogous guideline would lead one to 2K2.1 (Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons). This guideline carries a base offense level of 9, specific offense characteristics for altered or obliterated serial numbers and for possession for sport or recreation, and a cross reference to an offense committed or attempted while possessing the firearm. The problem arises because 18 U.S.C. 924(e) carries a mandatory minimum term of fifteen years, and it is probable that there is no means of reaching this minimum (much less the maximum of life) through the base offense and specific offense characteristics. However, 5G1.1(b) assures that should a guideline sentencing range be below the statutory minimum, that minimum becomes the guideline sentence. If multiple counts are involved, 924(e) does not require a consecutive term as is true for 924(c). Some would argue that this is not a satisfactory solution because any sentence above the statutory minimum would result in a departure from the guidelines, and, as a direct result of the mandatory fifteen year minimum, potentially no additional harm would result from a multiple count case involving 924(e).

There are several possible solutions to this first concern. A separate guideline could be written for 18 U.S.C. 924(e), but without data it is not clear what the base offense level should be. One might argue that the base offense level could be the

first level at which the mandatory minimum enters the sentencing table (level 29). But what characteristics distinguish the offender who should receive the mandatory minimum from the offender who might well receive life? The underlying conduct tends to provide distinctions, and that is precisely what 2K2.1 does in its cross reference. This suggests a different potential solution. The Commission might well add 18 U.S.C. 924(e) to the Statutory Index, referring the court to 2K2.1, and add a specific offense characteristic to that guideline that provides an increase if the offender is convicted of 924(e). But, again, it is not clear the number of levels to be increased. Related to this solution is the possibility of adding a cross reference to 2K2.1 that directs one to apply the career offender guideline to a felon in possession convicted of 924(e). While we suspect that this statute is used for bad actors, this suggested solution seems particularly onerous given our lack of data. What seems most appealing at this time is that the Commission make no changes. The Commission through its monitoring efforts will see how many departures or even how many sentences result from application of 5G1.1(a) and will be in a better position to determine the appropriate base offense level and the need for specific offense characteristics.

Easterbrook's second concern relates to whether the heading "Offense Statutory Maximum" at 4B1.1 refers to the maximum lawful sentence for the crime of violence or the maximum for any of the crimes that would be part of a single 'group' under 3D1.2 of the

guidelines. While Judge Easterbrook did not have the clarifying language in the January 15 amendments at the time of his decision, we believe that those emergency amendments have helped to clarify this issue. The April version of 4B1.1 referred at (2) to the instant offense as a crime of violence, suggesting that relevant violent conduct might be sufficient to trigger the career offender guideline. Under the January 15 version, (2) makes clear that it is the instant offense of conviction that must be a crime of violence. Therefore, it is the statutory maximum for the offense of conviction that applies when determining the appropriate level to apply for career offender. It is true that there is nothing in the commentary that says specifically that the offense that triggers the career offender guideline is also the offense one must turn to in order to determine the appropriate statutory maximum. We did not view this as a problem, particularly with the clarifying language of the amendment. If the Commission wishes, we might suggest clarifying language to the commentary.

The third concern is with the definition of crime of violence. Judge Easterbrook makes a solid point, here, when he suggests that the possession may be a crime of violence under the Commission's definition; i.e., "by its nature [it] involves a substantial risk that physical force against the person or property of another may be used." However, this is an issue that the Commission has previously addressed. The Commission decided not to interfere with the language and definitions of federal

statutes and elected to use the language of 18 U.S.C. 16 to define a crime of violence. Judge Easterbrook's concern seems to be with the language of the statute, since that is the language we have used. In an effort to more precisely define violent crime, Congress made another attempt in 18 U.S.C. 924(e), and yet again it refers to risk of harm. There is currently a working group looking into problems with the career offender guideline, and this definition is one of their areas of concern.

This obviously does not point to a solution but does offer you the possible directions the Commission might take in addressing the concerns of Judge Easterbrook. We believe that the career offender working group is well aware of the judge's concerns, and will be considering them in making any suggested changes to the Commission.

If you have any questions related to this case (or others), please give me a call. I hope that this addresses your concern.

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March 26, 1987

LEGAL MEMORANDUM:

TO: The Commission

FROM: *JS* John Steer

SUBJECT: Interpretation of 28 U.S.C. § 994 (h), Special Offender Provision

The Commission has asked for a legal opinion construing the provision in 28 U.S.C. § 994 (h) which directs the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and - "... has been convicted of an instant felony offense which is either a crime of violence or a federal drug trafficking offense and has a prior record of 2 or more felony crimes of violence or drug trafficking offenses. The precise question is whether the phrase "maximum term authorized" means the maximum term of imprisonment authorized by the statute for the instant offense or, alternatively, whether it means the maximum term authorized under the Commission's guidelines for categories of defendants whose present and past criminal behavior meet the statutory criteria.

Counsel's conclusion is that a literal reading of the language suggests that it means "maximum term authorized by statute", an interpretation which finds support in the legislative history. However, this literalistic interpretation conflicts with the larger context of the provision and probably goes further than intended by the author of the original provision, Senator Kennedy.

Counsel's recommendation is that the Commission adopt an interpretation which is consistent with the overall context of the provision and the probable Congressional objective sought to be achieved. That apparent objective is to punish repeat violent offenders and repeat drug traffickers (as defined in section 994(h)) among the most severe of any defendant category involving those offense circumstances, with the punishment to include very substantial terms of imprisonment often approaching, if not reaching, the statutory maximum. Counsel further recommends that the guideline provision be called "Career Criminal Provision" instead of "Special Offender Provision" and that the Commentary briefly explain the Commission's rationale for a less literalistic reading of the statutory language.

Background and Discussion

As enacted in the Sentencing Reform chapter of the 1984 Comprehensive Crime Control Act (98 STAT. 1837, Pub. L. 98-473), the first sentence of the provision at issue read as follows:

"(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendant is eighteen years old or older and -..." (underlining added).

Section 3581(b) is the section of the Sentencing Reform Act which purports to list the maximum authorized terms of imprisonment for various classes of offenses. In fact, however, section 3559 (b)(2) overrides this provision, stating that "the maximum term of imprisonment is the term authorized by the statute describing the offense." Later recognizing that this made section 3581(b) largely superfluous, and cross-references to it erroneous, Congress enacted corrective legislation.

The Criminal Law and Procedure Technical Amendments of 1986, Pub. L. 99-646 (November 10, 1986), amended 28 U.S.C. §994(h) by striking the reference to section 3581(b) of title 18, U.S. Code. This left the first sentence of section 994(h) in its present form, reading:

"(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants..."

There is no direct explanation in the legislative history for this recent technical amendment, but it is helpful to note that another provision in the same bill struck the reference to section 3581(b), previously contained in

section 3563(b)(11), pertaining to conditions of probation.¹ The legislative history for this latter change states that it simply was "a technical change to eliminate an improper cross-reference to 18 U.S.C. 3581(b)." S.REP. 99-278, 99th Cong., 2d Sess. 3 (1986). The reason, of course, why it was an improper cross-reference was because 3559(b)(2), through its reference to the statute describing each criminal offense, controls the maximum authorized imprisonment, not section 3581(b). Note, however, that the context for this latter technical amendment does not readily lend itself to an interpretation that the "authorized" in (b)(11) could have any meaning other than "authorized by statute". This suggests that the amended 994(h) should be interpreted in a parallel fashion.

Yet, a more careful reading of the legislative history surrounding the origin of section 994(h) casts doubt on whether Congress and the section's principal author really intended for the present language to compel the Sentencing Commission to construct its guidelines in a fashion that will require a near statutory maximum, determinate sentence (with no parole and greatly reduced good time credit) for all defendants meeting the "career criminal" criteria in 994(h). The Senate Committee Report on the Comprehensive Crime Control Act of 1984 briefly described the rationale and background of 994(h) as follows:

Subsection (h) was added to the 98th Congress to replace a provision proposed by Senator Kennedy enacted in S.2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers. S. REP. 98-225, 98th Cong., 1st Sess. 175 (1983) (emphasis added).

¹ Section 3563(b)(11), with the language stricken shown here with a line through it, reads as follows:

"(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;"

The Kennedy Amendment to S. 2572,² as the above Committee Report states, was not a directive to the Sentencing Commission, but rather was a mandate to the sentencing court contained in section 3581. The provision read as follows:

CAREER CRIMINAL

"(1) For the purposes of this section, a career criminal is defined as a person sixteen years of age or older who has been found guilty of a crime of violence which is a felony offense or an offense described in section 841, 952(a), 955, or 959 of title 21, and has been convicted of two prior felony offenses, each of which is either a crime of violence in violation of State or Federal law or an offense described in section 841, 952(a), 955 or 959 of title 21.

"(2) A career criminal shall receive the maximum or approximately the maximum penalty for the current offense.

"(3) Prior to full implementation of the provisions of Title V, relating to sentencing reform, a career criminal may receive a sentence of imprisonment without parole prior to the expiration of the full term of imprisonment imposed by the court.

Note, first of all, that this original Kennedy proposal was clearly a part of section 3581 and the maximum punishment reference in part (2) of the Career Criminals amendment clearly was the maximum in section 3581, not the maximum in the statute governing the criminal offense.³ The implications of this are substantial. For example, any offense statute carrying a maximum term of imprisonment of less than 20 but ten or more years would under section 3559(a) be classified as a Class C felony, but the maximum term of imprisonment actually imposeable under section 3581(b) for Class C felonies is 12 years. Thus, in many instances, the combination of sections 3559 and 3581 in S. 2572 had the effect of lowering the statutory maximum sentence, and the Kennedy amendment clearly was tied to those lower maximums.

Note, secondly, that the third part of the Kennedy amendment, which appeared to address the application of the amendment in the time between enactment and "full implementation of ... sentencing reform," left it discretionary with the judge

² S. 2572 was the immediate predecessor to the 1984 Comprehensive Crime Control bill. This bill passed the Senate September 30, 1982. The House, however, stripped out all of the sentencing provisions, and President Reagan ultimately vetoed the legislation for other reasons.

³ Unlike the 1984 legislation, S. 2572 did not contain a Section 3559(b)(2) provision which overrode the maximums in section 3581.

as to whether the individual would be eligible for parole. If, on the one hand, the judge decided to permit parole, then the actual time served could be substantially less than the statutory maximum because of parole and good time. If, on the other hand, the judge decided not to permit parole, the defendant still would probably serve slightly less than two-thirds of the statutory maximum because of the greater good time which could be accumulated under the law prior to sentencing.⁴

S. 2572, had it been enacted, would have abolished parole and reduced good time credits to 36 days (10 percent) per year. There is no indication, however, that the author of the Career Criminals provision, nor any other members of Congress, intended for the implementation of the bill's determinate sentencing system and substantially reduced good time to have the effect of drastically increasing the time to be served by Career Criminals convicted after sentencing reform was fully implemented. Yet, of course, that would have been the result.

When the Kennedy amendment was brought forward to the 1983-1984 Comprehensive Crime bill, several significant changes were made. Most importantly, as the above-cited Committee Report passage indicates, the provision was made a directive to the Sentencing Commission rather than to the sentencing judge. The reach of the provision was also limited to defendants 18 years old or older (increased from 16 in the original version).

In Counsel's opinion, the effect of changing the provision to a directive to the Sentencing Commission is to leave it the Commission to construe this directive as consistently as it can with the numerous other Congressional directives in the Commission's governing statute. The phrase "at or near the maximum authorized", together with the Committee Report expression of an intent that "substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers" (emphasis added) provide some latitude to the Commission. More importantly, the larger Commission objectives of categorizing defendants and offenses can, as the same Report paragraph states, "assure consistent and rational implementation of the Committee's view...". Finally, the 1986 technical amendments should not be taken as an effort to further increase or lengthen the terms of imprisonment for career criminals. As earlier indicated, the maximum specified in the statute for the offense may exceed the maximum derived from sections 3559(a) and 3581(b) in some instances.

Reasonably construing the provision in its present context

⁴ In actuality, the third part of the amendment likely would have been completely ineffective, for the effective date provisions for section 3581, of which the Kennedy amendment was a part, delayed the implementation of this provision until the sentencing guidelines went into effect.

and in light of the total legislative history, it is sensible to conclude that Congress did not intend a purely mechanical application which would be unduly harsh in some instances and inconsistent with the overall instructions to the Sentencing Commission. Counsel further doubts that Congress would desire the Commission to adopt a strict, literalistic reading which exacerbates prison impact. Most members of the legislative body would probably appreciate a less extreme, more flexible approach, so long as it clearly achieved the fundamental objective of severely punishing career criminals.

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a ~~crime of violence~~ ^{VIOLENT FELONY} or a ~~controlled substance offense~~ ^{SERIOUS DRUG OFFENSE}, and (3) the defendant has at least two prior felony convictions of either a ~~crime of violence~~ ^{VIOLENT FELONY} or a ~~controlled substance offense~~ ^{SERIOUS DRUG OFFENSE}. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

CommentaryApplication Note:

1. ^{VIOLENT FELONY} "Crime of violence," ^{SERIOUS DRUG OFFENSE} "controlled substance offense," and "felony conviction" are defined in §4B1.2.

Background: 28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ("Career Criminals" amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy).

§4B1.2. Definitions

- (1) The term ^{VIOLENT FELONY} "crime of violence" as used in this provision is ~~defined under 18 U.S.C. § 16~~ **SEE INSERT A**
- (2) The term ^{SERIOUS DRUG OFFENSE} "controlled substance offense" as used in this provision means an ~~offense identified in 21 U.S.C. §§ 841, 845b, 856, 852(a), 855, 855a, 859, and similar offenses.~~ **SEE INSERT B**

2. 'OFFENSE STATUTORY MAXIMUM' REFERS TO THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED FOR THE OFFENSE OF CONVICTION THAT IS A CRIME OF VIOLENCE OR SERIOUS DRUG OFFENSE.

- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a ~~crime of violence or a controlled substance offense~~ ^{felony offense} (i.e. two felony convictions of a ~~crime of violence~~ ^{felony offense}, two felony convictions of a ~~controlled substance offense~~ ^{felony offense}, or one felony conviction of a ~~crime of violence~~ ^{felony offense} and one felony conviction of a ~~controlled substance offense~~ ^{felony offense}), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

Commentary

Application Notes:

SEE INSERT C

1. "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 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.
2. "Controlled substance offense" includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.
3. "Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. § 4A1.2(k) (Prior Sentence Deducted).
4. The provisions of § 4A1.2(e) (Applicable Time Period), § 4A1.2(h) (Foreign Sentences), and § 4A1.2(j) (Expunged Convictions) are applicable to the counting of convictions under § 4B1.1. Also applicable is the Commentary to § 4A1.2 pertaining to invalid convictions.

SEE INSERT D

§ 4B1.3. Criminal Livelihood.

If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.

INSERT A

means any offense under federal or state law punishable by imprisonment for a term exceeding one year that -

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INSERT B

an offense under federal or state law, involving the manufacturing, importing, distributing, or possession with intent to manufacture, import, or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law.

INSERT C

- *1. The terms "violent felony" and "serious drug offense" include aiding and abetting, conspiring, and attempting to commit such offenses.
- 2. "Violent felony" includes murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use, of physical force against the person of another, or (B) the offense of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

INSERT D

"Background: The definitions of "violent felony" and serious drug offense" are derived from 18 U.S.C. §924(e), which was enacted in 1986."

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a ~~crime of violence~~ ^{VIOLENT FELONY} or a ~~controlled substance offense~~ ^{SERIOUS DRUG OFFENSE}, and (3) the defendant has at least two prior felony convictions of either a ~~crime of violence~~ ^{VIOLENT FELONY} or a ~~controlled substance offense~~ ^{SERIOUS DRUG OFFENSE}. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category V1.

Offense Statutory Maximum	Offense Level
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

Commentary

Application Note:

1. ^{VIOLENT FELONY} "Crime of violence," ^{SERIOUS DRUG OFFENSE} "controlled substance offense," and "felony conviction" are defined in §4B1.2.

Background: 28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ("Career Criminals" amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy).

§4B1.2. Definitions

- (1) The term ^{VIOLENT FELONY} "crime of violence" as used in this provision is defined under ~~18 U.S.C. § 16~~ **SEE INSERT A**
- (2) The term ^{SERIOUS DRUG OFFENSE} "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 845b, 856, 852(a), 855, 855a, 859, and similar offenses. **SEE INSERT B**

4.11

January 15, 1988

2. "Offense Statutory Maximum" refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or serious drug offense.

* add { If the defendant is convicted of committing two or more crimes of violence or controlled substance offenses, apply the highest maximum term of imprisonment for any single such count of conviction. 152

- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a ~~crime of violence~~ ^{violent felony} or a ~~controlled substance offense~~ ^{drug offense} (i.e., two felony convictions of a ~~crime of violence~~ ^{violent felony}, two felony convictions of a ~~controlled substance offense~~ ^{drug offense}, or one felony conviction of a ~~crime of violence~~ ^{violent felony} and one felony conviction of a ~~controlled substance offense~~ ^{drug offense}), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

Commentary

Application Notes:

SEE INSERT C

1. "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 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.
2. "Controlled substance offense" includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.
3. "Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. § 4A1.2(k) (Prior Sentence Determined).
4. The provisions of § 4A1.2(e) (Applicable Time Period), § 4A1.2(h) (Foreign Sentences), and § 4A1.2(j) (Expunged Convictions) are applicable to the counting of convictions under § 4B1.1. Also applicable is the Commentary to § 4A1.2 pertaining to invalid convictions.

SEE INSERT D

§ 4B1.3. Criminal Livelihood.

If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13. In no such case will the defendant be eligible for a sentence of probation.

INSERT A

means any offense under federal or state law punishable by imprisonment for a term exceeding one year that -

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INSERT B

an offense under federal or state law, involving the manufacturing, importing, distributing, or possession with intent to manufacture, import, or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law.

(as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)), } add *

INSERT C

1. The terms "violent felony" and "serious drug offense" include aiding and abetting, conspiring, and attempting to commit such offenses.

2. "Violent felony" includes murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use, of physical force against the person of another, or (B) the offense of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

*
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are illustrated
& not comprehens

INSERT D

"Background: The definitions of "violent felony" and "serious drug offense" are derived from 18 U.S.C. §924(e), which was enacted in 1986."

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December 18, 1989

MEMORANDUM

TO: Working Group on Drugs, Firearms,
and Violent Offenses

FROM: Andy Purdy

RE: PART V. REPORT ON VIOLENT OFFENSES

A. Overview of Violent Offenses

Our main focus in the violent offense area was to formulate an amended guideline for assault to commit murder that is more consistent with the statutory intent and the other violent offenses against the person in Chapter Two, Part A. A review of the Technical Advisory Service calls, training problems, and monitoring information revealed some additional areas of focus.

The most recent compliance study for the period January 19, 1989 through September 30, 1989 (See Tab A) shows the most cases involving robbery (115), extortion and racketeering (29) and assault (21). The departure rates for those offenses are, respectively, 20% for robbery, (8.7% up, 9.6% down), 31.1% for extortion and racketeering (6.9% up, 20.7% down), and 23.8% for assault (0% up, 23.8% down). The highest departure rates for violent offenses occur in the rarest of offenses: kidnapping (7 cases, 43.9% departures, 2 up, 2 down) and homicide (9 cases, 33.4% departures, 2 up, 2 down) making it difficult to draw statistically significant conclusions.

In the compliance study for the period November 1, 1987 through February 28, 1989 the most violent offense cases involved robbery (78 cases, 9% departures - 2 cases up, 5 down), assault (27 cases, 22.2% departures - 0 cases up, down), and extortion and racketeering (21 cases, 57.1% departures - 1 case up, 11 down). For the rarest offense with reported cases, homicide, there were 8 cases and no departures (the report does not list any kidnapping cases).

The working group reviewed cases from the departure study involving Chapter Two, Parts A and B (excluding robbery for now). The results of that review by Mary McDowell are attached (See Tab B).

As recently requested by the Commission, the working group has begun an in depth study of robberies under the guidelines, which to date has proven to be a frequent crime and one characterized by relatively frequent departures.

B. Summary of Conclusions

1. We recommend that the guideline for assault with intent to commit murder (§2A2.1) be revised to achieve the following:

- to structure the guideline in two parts; an offense level of 26 is assigned if the offense involved substantial planning, was committed in the course of another felony, or involved use of a weapon; otherwise, a level 20 is applicable.

- enhancements are retained for injury, contract murder (applicable to attempts and solicitations, as well as conspiracies and assaults).

2. We recommend that a new guideline be promulgated for conspiracy or solicitation to murder, with a base offense level of 26 and an adjustment where the offense involved the offer of a thing of pecuniary value.

3. We recommend that the base offense level for murder-for-hire (§2E1.4) be increased from 23 to 26.

4. We recommend that the Commentary to §3D1.2(b) be clarified with respect to offenses against the person (Chapter Two, Part A), so that multiple counts charged against an offender will not be grouped, even if involving the same victim, unless they occurred as part of the same incident. It might be advisable to clearly state that this rule applies generally to offenses of the type EXCLUDED from grouping under §3D1.2(d), that would include violent offenses.

C. Amendment to §2A2.1 Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder (p. 2.4)

A review of the relevant statutes, aided by the work of the Penalties Review Project on violent offenses, together with study

of the relevant guidelines led the working group to conclude that some amendments are called for. The working group appreciates the assistance of David Anderson in the analysis of the guidelines and recommendations for guideline amendments. The Department of Justice proposal of October 18, 1989 for amending this guideline is attached (See Tab C).

The first proposed amendment provides a simplified guideline for attempted murder. In the opinion of the working group the current guideline unduly complicates the sentencing determination, by treating all murder attempts and conspiracies as assaults with intent to kill, and also fails to take into account the seriousness of the intended offense. Under the current guideline an attempted poisoning which, if it had been completed, would have amounted to first degree murder is punished less severely (level 20) than what would amount to an attempted second degree murder involving the discharge of a firearm (level 26).

The current guideline results in disparate treatment of attempted murders and conspiracies depending on how far the defendant has gone in making the attempt. Thus, the defendant who is stopped before he can discharge his firearm receives a sentence 2 levels lower than the defendant who fires but misses even though both had formulated an intent to kill and would have done so were it not for events beyond their control.

Under the proposed guideline attempted murders are judged by whether the offense involved substantial planning, whether it was committed in the course of another felony, and whether or not weapons were used. The current base offense level of 20 is replaced with a higher base offense level of 26 for such offenses (thus treating them as one level more serious than voluntary manslaughter). The existing offense level is retained for other forms of attempted murder, assault with intent to kill, etc., falling under the guideline.

The proposed guideline would retain the current enhancement where the victim suffered bodily injury and (starting with the base level 20) and for instances when a weapon is brandished but not used (actual use of the weapon would result in base offense level 26). In addition, unlike the current guideline, the proposal contains a specific offense characteristic dealing with contract murder that is applicable to attempts and solicitations as well as to conspiracies and assaults.

Finally, this amendment would make several changes to the commentary section of the guideline. It would make simple conforming amendments to Application Note 1 by eliminating references to terms no longer used in the revised guideline. The "Background" section of the commentary would be amended by deleting the second and third paragraphs. The second paragraph

of the existing guideline concerns disparities in statutory penalties. As a result of recent legislation, those disparities no longer exist. Accordingly, the paragraph is no longer accurate and should be eliminated. The third paragraph concerns elements of the existing guideline that would not be present under the revision. Finally, a sentence concerning the proper treatment of cases where the assault, if completed, would amount to voluntary manslaughter is inserted into the "Background" section of the commentary.

§2A2.1 Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder (pp. 2.4-2.6)

Recommended Amendment:

1. §2A2.1 is amended by deleting "Conspiracy or Solicitation to Commit Murder" from the title and by deleting subsection (a) and inserting the following in lieu thereof:

 "(a) Base Offense Level:

 (1) 26, if the offense involved substantial planning, or was committed during the course of another felony, or involved use of a dangerous weapon.

 (2) 20, otherwise."
2. §2A2.1 is amended by deleting subsections (b)(1) and (b)(2)(A) and (B) and renumbering (b)(2)(C) as (b)(1); by deleting the following sentence from subsection (b)(3): "Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels."; and by deleting subsection (b)(4).
3. §2A2.1 is amended by renumbering subsection (b)(3) as subsection (b)(2).
4. §2A2.1 is amended by inserting the following new subsection at the end of the guideline:

 "(3) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 2 levels."
5. The Commentary to §2A2.1 captioned "Application Notes" is amended by deleting the following from Note 1: "'more than minimal planning,' 'firearm,' 'brandished,' 'otherwise used,'".

6. The Commentary to §2A2.1 captioned "Background" is amended by deleting the second and third paragraphs.
-

D. Amendment to create a separate guideline for conspiracy or solicitation to murder.

This amendment creates a separate guideline for conspiracy or solicitation to murder to ensure that such conduct is punished appropriately relative to §2A2.1 Assault with Intent to Commit Murder. The new guideline would provide a base offense level of 26 and include an adjustment where the offense involved the offer of a thing of pecuniary value. The proposed amendment also contains conforming changes to §2A2.1 which currently covers conspiracies and solicitations.

Recommended Amendment:

1. The guidelines are amended by inserting the following new guideline following the commentary to §2A1.4 (involuntary manslaughter):

"§2A1.5 Conspiracy or Solicitation to Commit Murder

- (a) Base Offense Level: 26
- (b) Specific Offense Characteristics
 - (1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 2 levels.
- (c) Cross Reference
 - (1) If the conduct resulted in the commission of a murder, apply §2A1.1 (First Degree Murder).
 - (2) If the conduct constituted attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 373, 1117, 1751(d)."

1. The title to §2A2.1 is amended by deleting "Conspiracy or Solicitation to Commit Murder";.
2. The commentary to §2A2.1 captioned "Statutory provisions" is amended by deleting "(d), 373"; by deleting "1117"; and by deleting the "(d)" following "1751(c)".

E. Amendment to murder-for-hire (§2E1.4).

This Amendment would provide an increased base offense level of 26 (up from 23) for murder-for-hire (§2E1.4). The apparent rationale for the current level of 23 is that it falls mid-way between assault with intent to commit murder (level 20) and voluntary manslaughter (25). As noted above, the proposed amendments to §2A1.2 provide a more rational structure of penalties for attempted murder. Increasing the base offense level for murder-for-hire to 26 would make it equivalent to an attempted murder involving substantial planning and premeditation. Where the conduct under §2E1.4 results in death, the guideline for the underlying offense would apply if it results in a more severe penalty.

Recommended amendment:

1. §2E1.4 is amended by deleting "23" from subsection (a)(1) and inserting in lieu thereof "26".

F. Commentary to §3D1.2(b) as applied to violent offenses

A review of Technical Assistance Service calls indicated a significant potential problem in how the grouping rules are applied to offenses in Chapter Two, Part A. In a couple instances, apparently in the early days of the TAS (see e.g. LOGNUM 2801A 3), callers were advised that when faced with a situation involving multiple instances of threatening communications they could group the counts under §3D1.2(d) when multiple counts involving the President fit the criteria that the "acts or transactions [were] connected by a common criminal objective or constituting part of a common scheme or plan". What was not stated explicitly is that only in the event that the multiple acts were part of the same INCIDENT should they be grouped, and in no other circumstance. Other separate violent

acts against the person are not part of the composite harm envisioned for grouping by §3D1.2(b).

We recommend that the Commentary to §3D1.2(b) be clarified with respect to offenses against the person (Chapter Two, Part A), so that multiple counts charged against an offender will not be grouped, even if involving the same victim, unless they occurred as part of the same incident. If the acts occurred on separate occasions it is not enough that they involved the same victim and the same criminal objective (i.e. hurting that person) to warrant grouping. More broadly, it is advisable to clearly state that this rule applies generally to offenses of the type EXCLUDED from grouping under §3D1.2(d), which would include violent offenses, as well as other offenses that properly are considered separate and distinct criminal acts warranting incremental punishment (and not grouping).

G. Murder (§2A1.1) - is life imprisonment mandatory?

The working group has not reached a conclusion on whether to support the Justice Department recommendation of October 18, 1989 that the Commentary to §2A1.1 be amended to state that life imprisonment is a mandatory sanction under 18 U.S.C. §1111, contrary to the recently amended commentary that refers a range of 20 years to life, under certain circumstances.

TABLE 5:
DEPARTURES BY PRIMARY OFFENSE CATEGORY*
(January 19, 1989 through July 31, 1989)

<u>Primary Offense</u>	<u>No Departure</u>	<u>Upward Departure</u>	<u>Downward Departure</u>	<u>Substantial Assistance</u>	<u>Total</u>
Homicide	6 (66.6%)	2 (22.2%)	1 (11.1%)	0 (0.0%)	9
Kidnapping	4 (57.1%)	2 (28.6%)	1 (14.3%)	0 (0.0%)	7
Robbery	92 (80.0%)	10 (8.7%)	11 (9.6%)	2 (1.7%)	115
Assault	16 (76.2%)	0 (0.0%)	5 (23.8%)	0 (0.0%)	21
Burglary/B&E	8 (88.9%)	0 (0.0%)	1 (11.1%)	0 (0.0%)	9
Larceny	144 (91.7%)	7 (4.5%)	3 (1.9%)	3 (1.9%)	157
Embezzlement	90 (87.4%)	0 (0.0%)	12 (11.7%)	1 (1.0%)	103
Fraud	149 (88.2%)	4 (2.4%)	14 (8.3%)	2 (1.2%)	169
Auto Theft	12 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	12
Forgery/Counterfeiting	71 (87.7%)	2 (2.5%)	5 (6.2%)	3 (3.7%)	81
Sex Offenses	13 (68.4%)	3 (15.8%)	2 (10.5%)	1 (5.3%)	19
Escape	35 (85.4%)	0 (0.0%)	5 (12.2%)	1 (2.4%)	41
Arms	122 (84.1%)	16 (11.0%)	6 (4.1%)	1 (.7%)	145
Immigration	150 (89.8%)	6 (3.6%)	8 (4.8%)	3 (1.8%)	167
Drugs					
-Importation, Distribution	834 (73.8%)	18 (1.6%)	156 (13.8%)	122 (10.8%)	1130
-Simple Possession	70 (97.2%)	2 (2.8%)	0 (0.0%)	0 (0.0%)	72
-Communications Facilities	28 (84.8%)	4 (12.1%)	0 (0.0%)	1 (3.0%)	33
Extortion and Racketeering	20 (68.9%)	2 (6.9%)	6 (20.7%)	1 (3.4%)	29
Gambling and Lottery	9 (90.0%)	0 (0.0%)	0 (0.0%)	1 (10.0%)	10
<u>Other</u>	<u>88 (86.2%)</u>	<u>4 (3.9%)</u>	<u>6 (7.8%)</u>	<u>2 (2.0%)</u>	<u>102</u>
TOTAL	1961 (80.7%)	82 (3.4%)	244 (10.0%)	144 (5.9%)	2431 (100%)

* Due to the unavailability of recent FPSSIS data for matching purposes, offense information is only consistently available for cases sentenced through July 31, 1989. Thus fewer cases are included for analysis. FPSSIS data on primary offense was also not available for 202 cases sentenced prior to July 31, 1989. Mixed law cases (30) have also been excluded due to unknown offense category of the guideline count.

TAB B

will be distributed

7. Homicide-Related Offenses

Guideline §2A2.1 on assault with intent to commit murder, conspiracy or solicitation to commit murder, or attempted murder should be amended by increasing the base offense level and including specific offense characteristics that reflect statutory distinctions. The current base offense level is 20. An offender in the lowest criminal history category would receive a sentence of 33-41 months and in the highest category 70-87 months (just over seven years at the top of the range). Most of the statutory maxima for the offenses subject to this guideline are 20 years' imprisonment, while some are as high as life imprisonment. Offense level 20 is too low for these serious offenses. A defendant could receive a three-year sentence despite the fact that he had taken practically all steps necessary to commit a murder but was intercepted by law enforcement officers at the last minute. (If the base offense level is raised substantially, it would be appropriate to retain a lower offense level for attempt to commit manslaughter, a violation of 18 U.S.C. §1113, which is subject to imprisonment for only three years.)

In addition to raising the base offense level, we recommend establishing specific offense characteristics that link the sanction under guideline §2A2.1 to the offense which was the object of the attempt, solicitation, or conspiracy, rather than treating all of these offenses equally regardless of who the victim is. For example, an attempt to kill the President or certain other government officials, is punishable by life imprisonment, 18 U.S.C. §§1751(c) and 351(c), and should result in an enhanced guideline penalty.

8. Career Offender

The career offender guidelines include an objectionable application note to the definitional section. Specifically, application note 4 to guideline §4B1.2 will provide as of November 1 that the definitions from §4A1.2 on criminal history will apply in determining which past convictions are covered by the career offender guideline, §4B1.1. These include, for example, the guideline on the applicable time period, foreign sentences, expunged convictions, and the commentary concerning invalid convictions. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense. These limitations are inconsistent with the statutory mandate that the Commission "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for

TO: Andy Purdy
FROM: Mary E. McDowell
DATE: 18 December 1989
RE: Violent Crimes Case Studies

Applicable Guideline

2A2.2(a)

Criminal History

Category III

A)

Synopsis: Defendant was identified as the assailant at the Job Corps Center who had stabbed a Corpsman in the back with a knife when a fight had broken out between members of two dormitories.

Counts of Indictment:

i) 18 U.S.C. §113(c)

Count(s) of conviction:

Pled guilty to count i.

Aggravating or mitigating factors: §2A2.2(b)(2)(B), §2A2.2(b)(3)(C), §3E1.1

Guideline Range: 51-63 months

Stat. Max.: 5 years

Probation:

gl max.: ineligible

stat.: eligible (1-5 yrs)

Sup. Rel. (gl) 2-3 yrs

Stat. Prov.: 2 years

Sentence imposed: 3 yrs imprisonment and 2 yrs supervised release

Notes:

A statement of reasons was not attached to this case file.

Applicable Guideline

2A2.2(a)

Criminal History

Category IV

A)

Synopsis: The subsequent injured victim and defendant had been drinking. According to the defendant, the victim approached said defendant and began an argument concerning painting. A knife fight ensued, with the victim having pulled his knife out first.

Counts of indictment

i) 18 U.S.C. §§ 113(f), 1153

Count(s) of conviction

Pled guilty to count i.

Aggravating or mitigating factors: §2A2.2(b)(2)(B), §2A2.2(b)(3)(B), §3E1.1

Guideline Range: 57-71 monthsStat. Max.: 10 yearsProbation:

gl: ineligible

stat.: 1-5 yrs w/conditions

Sup. Rel. (gl) 2-3 yrsStat. Prov.: 3 years

Sentence imposed: 2 yrs imprisonment, suspended after defendant serves 18 months, 3 yrs supervised release and 3 yrs probation

Notes:

A statement of reason was not attached to this case. An upward departure might have been warranted based upon inadequate reflection of criminal history.

Applicable Guideline

2A2.3

Criminal History

Category VI

A)

Synopsis: The defendant, in the process of resisting arrest from FBI agents who had a bench warrant for him, bit the thumb of one of the agents.

Counts of indictment

i) 18 U.S.C. § 1501

Count(s) of conviction

Pled guilty to count i.

Aggravating or mitigating factors: §3A1.2Guideline Range: 12-18 monthsStat. Max.: 1 yearProbation:gl: prohibitedstat.: not prohibitedSup. Rel. (gl) 1 yr.Stat. Prov.: 1 yearSentence imposed: 5 months and 18 days imprisonment w/credit for time servedNotes:

A statement of reason was not attached to this case file. Factors were available that might warrant a departure downward (nature of the offense) or departure upward (criminal history).

B)

Synopsis: Defendant was in a cell with codefendant when they were subjected to a routine pat-down by the guards. The defendant ran past the guards and flushed something down the toilet. As the guards attempted to stop him, said defendant began to strike a guard in the head and face with his fist.

Counts of indictment

i) 18 U.S.C. § 3

Count(s) of conviction

Pursuant to a plea negotiation, pled guilty to count i.

Aggravating or mitigating factors: §2A2.4(b)(1), §3E1.1Sentence imposed: 15 months imprisonment and 1 yr supervised rel.Notes:

Pursuant to the plea agreement, the government agreed that the offense level was 7, criminal history category VI, with a gl range of 15-21 months. The government also argued for the court to depart downward and not calculate defendant as a career offender. The court agreed and the PSR was waived.

Applicable Guideline

2A6.1(a)

Criminal History

Category II

A)

Synopsis: The common-law wife with the children left defendant in and moved in with her parents in Defendant then proceeded to telephone the wife and her parents and threaten them with harm and/or death.

Counts of indictment

- i) 18 U.S.C. §875(c)
- ii)
- iii)

Count(s) of conviction

Pled guilty to count
i. Counts ii, iii,
(charged similar
conduct, different
dates) were dismissed.

Aggravating or mitigating factors: §3E1.1

Guideline Range: 8-14 months

Stat. Max.: 5 years

Probation:

gl.: ineligible

stat.: 1-5 years w/conditions

Sup. Rel. (gl) 2-3 yrs
if impr. 12 or more mo.

Stat. Prov.: 3 years

Sentence imposed: 3 years probation with 6 months to be served in a community service center

Notes:

The court departed based upon lack of action taken to carry out the threats and that the defendant suffered from significant reduced mental capacity caused by defendant's emotional state in the domestic dispute over custody of the children and separation from his wife - §5K2.13.

Applicable Guideline

2D1.1(a)
also, 2D1.1(a)(3), 2D1.6(a)
2D1.5(a)(1), 3D1.2(d)

Criminal History

Category I

A)

Synopsis: from December 1986 - March 1988, Federal and local authorities were investigating a major crack cocaine distribution ring. The defendant was considered the "right hand man" who assisted in the general operations of the organization. He was considered the supervisor/manager whose duties included the overseeing of the delivery of cocaine to the street dealers and contractors.

Counts of indictment

20 defendants - 95 counts
 Defendant named in 47 counts. Only
 gl counts will be listed.

- 1) 21 U.S.C. § 846
- 2) 21 U.S.C. § 848
- 23) 21 U.S.C. § 841(a)(1)
- 18 U.S.C. § 2
- 89) 21 U.S.C. § 843(b)
- 90) 21 U.S.C. § 843(b)
- 93) 21 U.S.C. § 843(b)
- 94) 21 U.S.C. § 843(b)
- 95) 21 U.S.C. § 843(b)

Count(s) of conviction
 convicted on all 47
 counts.

Aggravating and mitigating factors: §3B1.1(b)

Guideline Range: 262-327 months
Stat. Max.: 25 yrs to life, plus 40

Sup. Rel. (gl) 3-5 yrs

Sentence imposed:

- 1) 20 yrs imprisonment to run concurrent w/non-gl counts
- 2 & 23) 21 yrs, 10 months, concurrent w/each other and all prior counts
- 89, 90, 93, 94 & 95) 4 years, concurrent w/each other and all prior counts
- 1, 2 & 23) 5 yrs supervised release, concurrent with each other & w/ special parole terms ordered in all prior counts
- 89, 90, 93, 94 & 95) 1 yr supervised release, concurrent w/each other & w/special parole terms ordered in all prior counts

Notes:

The original gl range was 292-365 months and criminal history category II. In the statement of reasons, the court stated that it departed downward because it considered criminal history category II as an overrepresentation of defendant's criminal history. Also, the J&C listed count #23 as receiving a special parole term of 5 years. This may be a typo?

Applicable Guideline

2D1.5

Criminal History

Category I

A)

Synopsis: Defendant and codefendant operated a major cocaine distribution network. The Sheriff's Office, with help of a Q-H runner and two men, were successful in arranging two minor transactions and then the 50 kg transaction, which resulted in defendant's arrest.

Counts of indictment

- i) 21 U.S.C. §§ 848(h), 841
846, 854, 952, 963
- ii) 21 U.S.C. §§ 848, 846, 854
- iii) 21 U.S.C. §§ 841, 846
- iv) 21 U.S.C. §§ 841(a)(1), (b)(1)(3)
18 U.S.C. § 2
- v) 21 U.S.C. § 841(a)(1), (b)(1)(3)
18 U.S.C. § 2
- vi) 21 U.S.C. §§ 841(a)(1), (b)(1)(C)
18 U.S.C. § 2
- vii) 16 U.S.C. § 7206(1)

Count(s) of conviction

Pled guilty to count
i & vii. Counts ii-
vi were dismissed.

Aggravating or mitigating factors: none

Guideline Range: 121-151 months
Stat. Max.: count i - 10 yrs-life
count vii - 0-3 yrs

Sup. Rel. (gl) 3-5 yrs

Probation:

gl: ineligible
stat.: count i - unauthorized
count vii - 1-5 years

Sentence imposed: 176 months imprisonment & 5 yrs supervised release. 3 years on the tax count, to run concurrently.

Notes:

There was some discussion that the offense level should be 36 since the plea agreement significantly reduced the severity of the counts. The court disagreed. The court departed upward because he considered the gls as being stupid and that they do not consider "role" properly.

Applicable Guideline

2D1.8(a)

Criminal History

Category I

A)

Synopsis: An informant advised the DEA Task Force that codefendant and others distributed cocaine. Surveillance was established, which eventually resulted in the arrest of the defendant.

Counts of indictment

i) 21 U.S.C. § 856(a)(2)
18 U.S.C. § 2(a)

Count(s) of conviction

plea agreement

Aggravating or mitigating factors: none

Guideline Range: 21-27 months

Stat. Max.: 20 years

Sup. Rel. (gl) 3-5 yrs

Stat. Prov.: 3 yrs

Sentence imposed: 60 months

Notes:

Both parties agreed in the plea agreement to an upward departure from the gl range of 21-27 months to 60 months. In return for this plea, the government dismissed another indictment which charged the defendant with one count of violating 21 U.S.C. § 846 and one count of violating 21 U.S.C. § 841(a)(1). (the P.O. recommended 188 months). The judge accepted the plea since he had serious doubts as to whether the defendant would be convicted on the dismissed indictment. He accepted the departure to 60 months based on U.S.S.G. 5K2.9 and 5K2.14.

TO: Andy Purdy
FROM: Mary E. McDowell
RE: Violent Crimes Case Studies

Applicable Guideline

2D1.1(a) (3)

Criminal History

Category I

A)

Synopsis: Defendant and codefendant obtained 14 llbs of marijuana which they brought from : to sell.

Counts of indictment

- i) 21 U.S.C. §§ 963, 841(a)(1) & 841(D)
- ii) 21 U.S.C. §§ 841(a)(1) & 841(D)
- iii) 21 U.S.C. §§ 841(a)(1) & 841 (d)
- iv) 21 U.S.C. §§ 843 (b) & 841(a)(1)
- v) 21 U.S.C. §§ 843(b) & 841(a)(1)

Count(s) of conviction

pled guilty to count
iii - distribution of
14 lbs marijuana.
Counts i, ii, iv, v
were dismissed.

Aggravating or mitigating factors: none

Guideline Range: 10 - 16 months
Statutory Max.: 5 years

Sup. Rel. (gl) 3-5 yrs
Stat. Prov.: 2 years

Sentence imposed: 12 months imprisonment & 3 yrs. supervised rel.

Notes:

A loaded .25 caliber pistol was found under the seat of the rent-a-car. No determination of this issue was made in reference to this defendant.

B)

Synopsis: DEA agents were investigating drug trafficking of a codefendant. A drug transaction had been arranged. Defendant was arrested during this transaction. Defendant was present to help load the marijuana.

Counts of indictmentCount(s) of conviction

i) 21 U.S.C. §§ 841(a)(1) & (b)(1)(C)	Pled guilty to count
ii) 21 U.S.C. §§ 841(a)(1) & (b)(1)(C)	i. Counts ii, iii, iv,
18 U.S.C. § 2	were dismissed.
iii) 21 U.S.C. §§ 963, 952(a), 960(b)(3)	
iv) 21 U.S.C. §§ 952(a) & 960(b)(3)	
18 U.S.C. § 2	

Aggravating or mitigating factors: §3E1.1, §3B1.2(b)

Guideline Range: 30 - 37 months

Sup. Rel. (gl): 3 yrs.

Statutory Max.: 20 years

Stat. Prov.: inappl.

Sentence imposed: 30 months imprisonment & 3 yrs. supervised rel.

Notes:

The original gl range was 33-41 months. Pursuant to the plea agreement, the defendant was given a 1-level deduction for "doubt as to the amount of marijuana being over or under 80 kilograms."

c)

Synopsis: A cooperating codefendant arranged a drug transaction for DEA agents in Defendant drove with another codefendant from to assist the cooperating codefendant in furthering hid delivery of cocaine. Defendant was to receive money for her assistance.

Counts of indictmentCount(s) of conviction

ii) 21 U.S.C. § 846	Pled guilty to count
	ii - ~1 kg cocaine.

Aggravating or mitigating factors: §3E1.1, §3B1.2(a)

Guideline Range: 33 - 41 months

Sup. Rel. (gl): 3yrs.

Statutory Max.: 40 years

Stat. Prov.: 3 yrs.

Sentence imposed: 33 months imprisonment & 3 yrs. supervised rel.

Notes:

Applicable Guideline

2D1.1(a) (3)

Criminal History

Category II

A)

Synopsis: DEA agent arranged a drug transaction through a confidential informant with defendant as the target. Defendant distributed the requested cocaine to a codefendant who then completed the transaction.

Counts of indictment:

- i) 21 U.S.C. § 841(a) (1)
18 U.S.C. § 2
- ii) 21 U.S.C. § 841 (a) (1)
- iii) 21 U.S.C. § 846

Count(s) of conviction:

Pled guilty to count
ii - ~1 kg cocaine.
Counts i, iii were
dismissed.

Aggravating or mitigating factors: §3E1.1, §3B1.1(c)

Guideline Range: 70 - 87 months

Statutory Max: 5 years

Sup. Rel. (gl): 3-5 yrs

Stat. Prov.: 8 years

Sentence imposed: 87 months imprisonment & 8 yrs. supervised rel.

Notes:

The original gl range was 87-108 months with a mandatory minimum of 10 years. The judge ruled that the prior (state) conviction could not be used as a sentence enhancement due to a chronology of events problem but then applied the prior sentence to criminal history. Also, pursuant to the sentencing hearing, the defendant received acceptance of responsibility.

Applicable Guideline

2D1.1(c)

Criminal History

Category I

A)

Synopsis: Defendant and codefendants were arrested enroute to delivering heroin to DEA agents who had arranged this transaction with a codefendant.

Counts of indictmentCount(s) of conviction

- i) 21 U.S.C. § 846
- ii) 21 U.S.C. §§ 841(a)(1), (b)(1)(B)
- iii) 21 U.S.C. § 846
- iv) 21 U.S.C. §§ 841(a)(1), (b)(1)(B)
- v) 18 U.S.C. §1324(a)(1)(B)
- xi) 21 U.S.C. § 843(b)

Found guilty by trial
on counts i, ii, iii,
iv, xi.

Aggravating or mitigating factors: none

Guideline Range: 78-97 months

Sup. Rel. (gl): 3 yrs

Statutory Max.: 40 yrs (21:841(a)(1), 846)
4 yrs (21:843(b))

Stat. Prov.: 3 yrs

Sentence imposed: 7 yrs imprisonment & 3 yrs supervised release

Notes:

§3D1.2(b)(1) required grouping of counts i, ii, iii, iv, & xi. The combined total of heroin, including the cocaine conversion, involved 624.25 grams. This amount includes heroin from 2 deliveries made by a codefendant on 10/27/87 & 08/26/87 - §1B1.3(a)(2). Also, the judge imposed a dual sentence with the gl sentence to be in effect. The non-gl sentence was 7 yrs on each count i -iv, 4 years on count xi, w/all counts to run concurrent w/count i.

An unloaded .45 caliber automatic pistol, accompanied by 6-rounds of hollow points, was found in the trunk of the vehicle defendant was driving. A codefendant claimed it belong to his (codefendant) half-brother.

Applicable GuidelineCriminal History

2D1.4(e)

Category II

A)

Synopsis: An unindicted codefendant, with DEA's authority, spent the night at defendant's house where he observed cocaine. This information was used to obtain a search warrant. Defendant was arrested.

Counts of indictmentCount(s) of conviction

- i) 21 U.S.C. § 846

Pursuant to a plea
agreement, 21:846.

Aggravating or mitigating factors: §3E1.1

Guideline Range: 57 - 71 months
Statutory Max. 20 years

Sup. Rel. (gl): 3 yrs.
Stat. Prov.: 3yrs.

Sentence imposed: 57 months imprisonment & 3 yrs. supervised rel.

Notes:

Pursuant to the plea agreement, the guideline range was dependent upon defendant's cooperation. Forfeiture was also included in this agreement.

Applicable Guideline

2D2.1(a)(3)

Criminal History

Category I

A)

Synopsis: Defendant smuggled marijuana into the U.S. for Defendant was to receive money for this.

Counts of indictment

i) 21 U.S.C. §844(a)

Count(s) of conviction

Pled guilty to count
 i. Felony complaint
 pending was dismissed.

Aggravating or mitigating factors: §3E1.1

Guideline Range: 0 - 2 months
Statutory Max.: 1 year

Sup. Rel. (gl): 1 yr.
Stat. Prov.: 1 year

Probation: eligible
gl. max.: 3 years
stat. max.: 5 years

Sentence imposed: not able to determine

Notes:

The PSR is the only document in this case file.

B)

Synopsis: Defendant was in a car being chased by DEA agents for possibly carrying illegal drugs. The car was stopped and the drugs were eventually recovered. Defendant was to receive money for participating.

Counts of indictment

i) 21 U.S.C. § 844(a)

Count(s) of conviction

Pled guilty to count
i. Felony complaint
pending was dismissed.

Aggravating or mitigating factors: §3C1.1Guideline Range: 0 - 6 monthsStatutory Max.: 1 yearProbation: eligiblegl. max: 1 - 5 yearsstat. max.: 5 yearsSup. Rel. (gl): opt.Stat. Prov.: 1 yr.Sentence imposed: not able to determineNotes:

The PSR is the only document in this case file.

C)

Synopsis: Defendant was to be paid by codefendant to drive the car, which contained marijuana, over the bridge from Mexico to

Counts of indictment:

i) 21 U.S.C. § 841(a)

Count(s) of conviction

Pled guilty to count
i - 75 lbs marijuana.

Aggravating or mitigating factors: noneGuideline Range: 27 - 33 monthsStatutory Max.: 5 yearsProbation: eligible by statute; not gls.Sup. Rel. (gl): 3-5 yr.Stat. Prov.: 3 yearsSentence imposed: not able to determineNotes:

The PSR is the only document in this case file.

D)

Synopsis: Defendant was stopped while attempting to cross into from Mexico. Marijuana was found in the gas tank of the car. Defendant claims to not know of the marijuana.

Counts of indictmentCount(s) of conviction

i) 21 U.S.C. § 844(a)

Pled guilty to count
i. Pursuant to a plea
agreement, gov't dismissed the 2-count
felony of importation of marijuana and
possession of less than 50 kg of
marijuana w/intent to distribute.

Aggravating or mitigating factors: none

Range: Guideline 0-4 months
Statutory Max.: 1 year
Probation: eligible
gl max.: 3 years
stat. max.: 5 years

Sup. Rel. (gl): 1 yr.
Stat. Prov.: 1 year

Sentence imposed: 4 months imprisonment

Notes: The J&C did not mention imposition of supervised release which is required with a term of imprisonment.

E)

Synopsis: Defendant was stopped after entering from Mexico. A search of his car revealed marijuana. Defendant was to have been paid for transporting the marijuana across the border.

Counts of indictmentCount(s) of conviction

i) 21 U.S.C. § 844(a)

Pled guilty to count
i. Pending felony
complaint dismissed.

Aggravating or mitigating factors: \$3E1.1

Guideline Range: 0-2 months
Statutory Max.: 1 year
Probation: eligible
gl max.: 3 years
stat. max.: 5 years

Sup. Rel. (gl): opt.
Stat. Prov.: opt.

Sentence imposed: 5 years unsupervised probation

Notes:

F)

Counts of indictment

i) 21 U.S.C. § 844(a)

Count(s) of convictionPled guilty to count
i. Pending felony
charges dismissed.Aggravating or mitigating factors: §3E1.1Guideline Range: 0-2 monthsSup. Rel. (gl): opt.Fines:gl max.: \$1000.00Stat. min.: \$1000.00Sentence imposed: \$1000.00 fineNotes: There was an oral plea agreement and no PSR.

G)

Synopsis: Defendant was stopped after entering into from
Mexico. The search revealed marijuana in the gas tank of the car.
Defendant was to have been paid money for transporting the
marijuana across the border.Counts of indictment

i) 21 U.S.C. § 844(a)

Count(s) of convictionPled guilty to count
i. Pending felony
complaint dismissed.Aggravating or mitigating factors: noneGuideline Range: 0-4 monthsSup. Rel. (gl): opt.Statutory Max.: 1 yearStat. Prov.: opt.Probation: eligibleygl max.: 3 yearsstat. max.: 5 yearsSentence imposed: 5 years probation without supervisionNotes:

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
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MEMORANDUM

TO: Peter Hoffman
FROM: Donna Triptow *DT*
RE: Drug Guideline Working Group
DATE: March 15, 1988

You have asked me for a brief report regarding the working group considering possible changes to the drug guidelines.

As a group, we discussed two issues. The first was the CCE guideline and, as you know, our conclusions were presented to the Commission in memorandum form.

The second issue we considered related to the effects of the guideline on the so-called "mules" or "fringe players" in a drug conspiracy. Concern has been expressed that the guideline on drug conspiracies would treat such individuals too harshly by counting against them all the drugs of the conspiracy. Much of this issue turns upon the interpretations the courts will give the guideline on drug conspiracies (§2D1.5) and the relevant conduct guideline (§1B1.3 and .4) which was amended in January. After considering various methods for changing the conspiracy guideline--including setting an independent base offense level for the offense--it was our view that it is premature to change this guideline at this time, and we should wait to see how the courts interpret the relevant conduct guidelines.

A third "drug" issue I evaluated at the request of Judge Wilkins. He asked me to consider the advisability of adding additional levels to the drug tables beyond the current top level of 36. I consulted with our research staff and determined that, based upon rough estimates, less than five percent of drug convictions in our data base involved quantities in excess of current level 36. (This calculation is difficult to make because drug quantities have been measured in different ways in the past four years. At one time, the weights had to be mathematically converted to 100 percent pure amounts, a requirement based upon a

previous version of the drug trafficking statutes.) According to figures I requested and received from DEA, seizures of amounts in excess of level 36 during fiscal year 1987 totalled 30 for all drug categories.

Based upon this data, I suggested to Judge Wilkins that we make no change at this time but add a note to the commentary suggesting that in cases where the quantities exceed those appearing in level 36, an upward departure may be warranted. The language I drafted was based upon commentary appearing in the fraud guideline and was previously forwarded to you.

My work on the drug table demonstrated to me some anomalous results in the current guideline with respect to marijuana, marijuana plants, hashish and hashish oil. I attach a memorandum summarizing my thoughts on that subject.

At this point, given the travel schedules of many members of the drug working group we have no further meetings or activities scheduled.

UNITED STATES SENTENCING COMMISSION

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Ronald L. Gainer (ex officio)



MEMORANDUM

TO: Peter Hoffman

FROM: Donna Triptow

RE: Marijuana and the Sentencing Guidelines Drug Table

DATE: March 15, 1988

Under the relevant statute, 21 U.S.C. 841, marijuana, marijuana plants, hashish and hashish oil are treated the same in terms of weight. In other words, the same amount of any of these substances will result in the same potential mandatory minimum and maximum sentences. The only exception concerns small amounts of the substances (less than 50 kilograms of marijuana, less than 100 marijuana plants, less than 10 kilograms of hashish and less than 1 kilogram of hashish oil) which carry a 5-year maximum penalty. See 21 U.S.C. §841(b)(1)(D). The statute provides a penalty of from 5 to 40 years for possession of between 100 and 1,000 kilograms of marijuana, hashish or hashish oil and a penalty of from 10 years to life for possession of more than 1000 kilograms of marijuana. Section 812 of Title 21 defines marijuana to include the resins of the marijuana plant; hashish and hashish oil are essentially the resinous products of marijuana. Thus, under the statute, once beyond the minimal amounts specified in 841(b)(1)(D), marijuana, hashish oil and hashish are treated the same.

The guidelines, however, differentiate between hashish, hashish oil and marijuana. For instance, 1000 kilograms of marijuana results in a base offense level of 32. However, it takes only 200 kilograms of hashish and 20 kilograms of hashish oil to reach the same level 32. As a result, a person with 200 kilograms of hashish or 20 kilograms of hashish oil will have a minimum guideline range of 121 months (ten years) even though far greater amounts of these substances (1000 kilograms to be exact) are required for the 10 years minimum mandatory of the statute to apply.

A similar distinction is drawn in the guidelines between marijuana plants and marijuana. The statute does not distinguish

between plants and marijuana except at very low levels. See Section 841(b)(1)(D). Above that minimal amount, marijuana plants are treated under the statute the same as marijuana itself. Possession of 1000 kilograms of marijuana and 1000 kilograms of marijuana plants carries the same 10 year minimum mandatory penalty.

In contrast, the guidelines quantify numbers of marijuana plants. As a result, a defendant could fall into dramatically different categories, depending upon whether his marijuana plants were weighed or counted. If for instance, he has 8,000 plants he is at level 30; if the plants weigh 4000 kilograms he is at level 34. (The weight of the plants obviously changes depending on what parts are included in the weight and whether they are weighed wet or dry.) This distinction between number of plants and weight is not made in the statute except at the very low levels where Congress sought to exempt from the very severe penalties small-time cultivators of marijuana.

These distinctions may have been intentionally incorporated into the guidelines. Hashish and hashish oil are more potent than marijuana, thus justifying lesser quantities for higher penalties. However, particularly hashish oil is not viewed as being 50 times more potent, the inference suggested by the guideline/statute comparison set forth above.¹ Moreover, the drug table ostensibly was drafted to reflect guideline ranges that correspond to the statutory minimum mandatory penalties. (I.e., level 32, 121 months, corresponds to the quantities that activate the 10 year minimum mandatory of the statute).

If these distinctions were not intentional, I would be happy to suggest modifications to the drug table to address the problem. Specifically, I would suggest dropping all distinctions from the table that are not part of the statute itself. An edited version of the table is attached reflecting this approach. However, I personally think it preferable that we make no changes to the table at this time, instead making such changes to the drug table next year, when we will have the benefit of identifying other anomalies through the application process.

cc: Sid Moore

¹A DEA chemist suggested to me that an average dosage unit of marijuana plant material is .2 grams; for hashish and hashish oil the amount is .05 grams.

DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)	Level 36
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil	Level 34
1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, .4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marihuana, 10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil	Level 32**
700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marihuana, 7000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil	Level 30
400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marihuana, 4000-6999 Marihuana Plants, 80-139 KG Hashish, 8-0-13.9 KG Hashish Oil	Level 28
100-399 G Heroin or equivalent Schedule I or II Opiates, .5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marihuana, 1000-3999 Marihuana Plants, 20-79 KG Hashish, 2-0-7.9 KG Hashish Oil	Level 26**
80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marihuana, 800-999 Marihuana Plants, 16-19.9 KG Hashish, 1-6-1.9 KG Hashish Oil	Level 24
60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600-799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marihuana, 600-799 Marihuana Plants, 12-15.9 KG Hashish, 1-2-1.5 KG Hashish Oil	Level 22
40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants 8-11.9 KG Hashish, .8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances	Level 20

20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Fentanyl or 2-3.9 G Fentanyl Analogue, 20-39 KG Marihuana, ~~200-399 Marihuana Plants~~, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances Level 18

10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Fentanyl or 1-1.9 G Fentanyl Analogue, 10-19 KG Marihuana, ~~100-199 Marihuana Plants~~, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances Level 16

5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Fentanyl or 5-9 G Fentanyl Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances Level 14

Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Fentanyl or 500 MG Fentanyl Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG+ Schedule IV Level 12

1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-19 G Hashish Oil, 50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV Level 10

250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG+ Schedule V Level 8

Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V Level 6

- * The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

- ** Statute specifies a mandatory minimum sentence.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841, 960.

Application Notes:

1. "Similar drug offense" as used in §2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. §§ 841(b) or 962(b).

1

MEMORANDUM

To: Andy Purdy
From: Pam Barron
Date: Dec. 5, 1989
Re: Violent Offenses, Drug Offenses, and Firearms Offenses
Working Group; Arson

This is a brief progress report concerning the arson guideline amendments.

1. To date, I have reviewed the following information:

Hotline questions and answers; legislative history (Senate Report No. 98-225, page 358-9); DOJ comments and draft guideline for 2K1.4; Alcohol, Tobacco and Firearms counsels' comments; and issues identified by the drafting staff (consulted with Peter Hoffman and reviewed the issues he wishes to have considered).

To be reviewed: case files from the monitoring staff; case law. When we hear from ATF, any useful data they can supply will be incorporated.

2. There are several issues we may want to address.

Base Offense Level

ATF and DOJ advocate adopting a system opposite of that currently in use. They recommend starting with a higher base offense level (DOJ recommends 16), and would accomodate the "malicious mischief" case by a specific offense characteristic which would provide a 10 level decrease "If the offense involved only minor property damage under circumstances that did not present an appreciable danger"

ATF focused on these areas:

1. profit motive (e.g., insurance fraud cases)
2. risk to firefighter
3. multiple ignition points
4. decrease for unoccupied building

The DOJ proposal addresses all of ATF's concerns except profit motive.

Peter has mentioned that there appears to be an anomaly between arson and burglary. "A residential burglary with more than minimal planning and less than \$2,500 taken is offense level 19 (2B2.1). But a well-planned residential arson causing \$1 million damage is level 18."

Firefighters Enhancement

The DOJ proposal in an application note accomodates ATF's desire that emergency and law enforcement personnel be counted where the offense creates a "risk of death or serious bodily injury or endangering the safety of another." Whether firefighter count has been a question on the Hotline (Chapter 2, Part K, p. 16), and the Commission's position has been that there was no enhancement for the firefighters ("The guidelines do not provide enhancements for situations that happen every time the crime in question is committed. In the case of arson, the fire department responds to every case, and danger is inherent in the job of firefighting."). As ATF pointed out, Congress has expressed its intent that firefighters be counted. See Senate Report No. 98-225, pp. 358-9.

Multiple Points of Ignition

DOJ proposes a specific offense characteristic which provides a 2 level increase (to a level 18) if "the fire was set or if explosives were placed in more than one location; or if a destructive device was used."

Definition of Terms, and Examples

Hotline has had a question concerning the interpretation of "knowingly creating a substantial risk of death or serious bodily injury." Peter suggests that we give an example for that term, and for "recklessly endangering the safety of another." He also suggests a definition for "destructive device."

The DOJ draft looks like a good starting point. We can debate its approach and the merits of the other suggestions, and hopefully we'll have the benefit of some ATF data.

§2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level: 16

(b) Specific Offense Characteristics

(1) If more than one applies, use the greatest:

(A) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 8 levels.

(B) If the defendant recklessly endangered the safety of another; if the offense was committed in a large building or in a location in which other structures were in close proximity; or if the offense was committed in circumstances in which there was a reasonable expectation that a rapid emergency response would have been difficult; increase by 4 levels.

(C) If the offense involved destruction or attempted destruction of a residence, increase by 2 levels.

(2) If the offense was committed to conceal another offense, increase by 4 levels.

(3) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (i.e., the defendant is convicted under 18 U.S.C. §844(h)), increase by 2 levels.

(4) If fire was set or if explosives were placed in more than one location; or if a destructive device was used; increase by 2 levels.

(5) If the offense involved only minor property damage under circumstances that did not present an appreciable danger, decrease by 10 levels.

(c) Cross References

* * * *

(d) Note

(1) The specific offense characteristic in subsection (b)(3) applies only in the case of an offense committed prior to November 18, 1988.

- (2) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. §844(h), for an offense committed on or after November 18, 1988, the term of imprisonment is that required by statute.

Application Notes:

* * * *

3. Circumstances in which there is a reasonable expectation that a rapid emergency response may be difficult would include, for example, arson committed in a busy commercial district in which response times are delayed by inner-city traffic.
4. Creating a risk of death or serious bodily injury or endangering the safety of another includes risk or danger to emergency and law enforcement personnel who respond to or investigate an offense.

Arson

The base offense level for arson - section 2kl.4 - is only 6. The Commentary states that a review of presentence reports indicates that many arson cases involve malicious mischief i.e., minor property damage under circumstances that do not present an appreciable danger. Under 18 U.S.C. § 844(i), the property involved must be used in commerce or in an activity affecting commerce. A review of the reported federal cases under section § 844(i) would establish that few, if any, of the cases prosecuted under this statute involve malicious mischief. Section 844(i) provides penalties of up to 20 years if any person is injured and life imprisonment if any person dies as a result of the arson.

The Guidelines add 12 levels if the offense involved the destruction or attempted destruction of a residence. The Guidelines allow the application of the Guidelines for Property Damage or Destruction if the resulting offense level will be higher. If the amount of property damage is substantial these Guidelines may result in higher sentences. Otherwise, the Guidelines ignore commercial buildings. The risk to firefighters in large commercial buildings is substantial. The Guidelines do not take this into account. The Guidelines also ignore the issue of whether the arsonist attempted to profit from the arson. The Guidelines ignore the issue of whether the fire was set at one point or more than one point.

The Guidelines seem to ignore Congressional intent. In amending, 18 U.S.C. § 844(i) in 1984 a relevant Senate Committee Report states: "The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in section 844 (d), (f) or (i) if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians." Senate Report No. 98-225, page 359, reprinted in 1984 U.S. Code Congressional and Administrative News at page 3508.

The Guidelines could use clarification. If the defendant caused death or intended to cause bodily injury, the Guidelines allow the use of the Guidelines for the more serious offenses contained in Part A. Offenses Against the Person. The Guidelines appear to ignore the risk of injury to emergency personnel and to private citizens incurred merely by responding to an arson scene. If the defendant endangered the safety of another person, an increase of 4 levels is made. If the defendant recklessly endangered the safety of another person an increase of 14 levels is made. If the defendant knowingly created a substantial risk of death or serious bodily injury, an increase of 18 levels is made. Telephone inquiries from Assistant U.S. Attorneys handling these cases indicate that these Guidelines are not that easy to apply. If a fireman or a private citizen is injured while firefighters are driving to the scene and the defendant did not intend this to happen is the offense level increased? If the arsonist sets fire to a residence or a building and knows or should know that firefighters will make an emergency response, is the offense level not increased at all, increased by 4 levels, or by 14 levels?

PART N—ARSON AMENDMENTS

1. In general and present Federal law

Part N of title X makes technical amendments to subsections (d), (f), and (i) of 18 U.S.C. 844. Subsection (d) prohibits the transportation or receipt, or attempted transportation or receipt, of any explosive in interstate commerce with the knowledge or intent that it will be used to kill, injure, or intimidate another individual or damage property. Subsection (f) proscribes the malicious damage or attempt to damage by means of fire or an explosive, any property owned, possessed or used by the United States, or by any institution or organization receiving Federal financial assistance. Subsection (i) prohibits the malicious damage or attempted damage by means of fire or explosive of any building or other real or personal property used in or affecting interstate or foreign commerce. Subsections (f) and (i) were amended in the last Congress by the insertion of the word "fire" in the phrase "by means of fire or an explosive" to ensure that these sections could be used in all arson cases, especially those arsons caused by gasoline.¹

All of these subsections contain enhanced penalty provisions that apply if personal injury² or death³ results that represent a substantial increase over the ten years of imprisonment and \$10,000 authorized as the maximum punishment for their violation if no injury or death results. On their face, these enhanced penalty provisions would appear to apply to the death or injury of a fireman or police officer who responded to an arson or other offense committed in violation of subsection (d), (f), or (i). However, a Federal district court has recently held that the enhanced penalty provisions did not apply to injuries to or deaths of firefighters that occurred while fighting an arson fire set in violation of subsection 844(i).⁴

Part N is designed to clarify congressional intent in this regard to ensure that the enhanced punishment provisions of subsections (d), (f), and (i) apply if personal injury or death results to any person including a fireman, policeman or other public safety officer, because of a violation.

2. Provisions of the bill, as reported

Part N of title X amends subsections (d), (f), and (i) of section 844 of title 18 by deleting the phrase "personal injury results" in each one and substituting the phrase "personal injury results to any person, including any public safety officer performing duties as a

direct or proximate result of tion." It also amends the three phrase "death results" in each "death results to any person, performing duties as a direct p by this subsection."

As discussed, the purpose of the congressional intent that subsections in a manner that injury or death is subject to the subsections. The Committee safety officer" include such persons their equivalent of sheriffs and drivers and laboratory technicians by a police or fire department of a State or municipal fire organization charged with investigating

The Committee intends that proximate result of conduct prox (i) if it is reasonably foreseeable sonably foreseeable consequence an explosive of a building affecting of subsection 844(i) would be (including high speed driving or crowd control by policemen, and the building and undetonated explosion law enforcement officers and terribly foreseeable consequences of explosive in interstate commerce would be the interception or disbursement officers, and its subsection cleverly the explosive was concealed

¹ Public Law 97-298. See 1982 U.S. Code Cong. and Adm. News, p. 2631.

² The penalty if personal injury results is up to twenty years imprisonment and a \$20,000 fine.

³ The penalty if death results is a fine of up to \$20,000 and imprisonment for any term of years up to life.

⁴ See the statement of Senator Grassley on introduction of S. 1716, a bill substantively identical to Part N, 129 Cong. Rec., S. 11275 (August 1, 1983 (daily ed.)).

direct or proximate result of conduct prohibited by this subsection." It also amends the three subsections by deleting the present phrase "death results" in each one and substituting the phrase, "death results to any person, including any public safety officer performing duties as a direct proximate result of conduct prohibited by this subsection."

As discussed, the purpose of these amendments is to make clear the congressional intent that any person who violates one of the subsections in a manner that results in a public safety officer's injury or death is subject to the enhanced punishments provided in the subsections. The Committee intends that the term "public safety officer" include such persons as firemen and policemen (and their equivalent of sheriffs and deputies), as well as ambulance drivers and laboratory technicians employed in a "civilian" capacity by a police or fire department. Also included would be employees of a State or municipal fire marshal's office or comparable organization charged with investigating fires or explosions.

The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in subsection 844 (d), (f), or (i) if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians. Included in the reasonably foreseeable consequences of transporting or receiving an explosive in interstate commerce in violation of subsection 844(d) would be the interception or discovery of the explosive by law enforcement officers, and its subsequent examination, no matter how cleverly the explosive was concealed.

AMENDMENTS

amendments to subsections (d), (f), and (i) prohibits the transportation or receipt, of any explosive with the knowledge or intent that it will cause the death or injury of another individual or cause the malicious damage or destruction of an explosive, any property in the United States, or by any institution of financial assistance. Subsection (d) prohibits attempted damage by arson or other real or personal injury or death or foreign commerce. Subsection (f) prohibits the last Congress by the insertion of "by means of fire or an explosive" to be used in all arson cases,

and penalty provisions that result in a term of imprisonment and \$10,000 fine for their violation if, in fact, these enhanced penalty provisions apply to the death or injury of a fireman or other public safety officer (d), (f), or (i). However, a Federal death of firefighters that occurs in violation of subsection

congressional intent in this regard to amend provisions of subsections (d), (f), or (i) that result in a death or injury to any person or other public safety officer.

Subsections (d), (f), and (i) of section 844 prohibit "personal injury results" in each subsection. The Committee intends that the phrase "personal injury results to any person, including any public safety officer performing duties as a

See Adm. News, p. 2631. Twenty years imprisonment and a \$20,000 fine. \$20,000 and imprisonment for any term of

Inclusion of S. 1716, a bill substantively identical to S. 1716 (daily ed.).

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November 15, 1989

MEMORANDUM

TO: Phyllis Newton
Staff Director

FROM: Andy Purdy
Deputy General Counsel

RE: Preliminary Report of Working Group on
Violent Offenses, Drug Offenses, and Firearms
Offenses

This is the Preliminary Report of the Working Group. The group is composed of Pam Barron, Sharon Henegan, Jeff Lawrence and Andy Purdy.

FOCUS OF WORKING GROUP

We determined that our report should examine the offenses covered by the following guidelines in Chapter Two:

- Part A Offenses Against the Person
- Part B Offenses Against Property:
- §2B2.1 Burglary of a Residence
 - §2B2.2 Burglary of Other Structures
 - §2B3.1 Robbery
 - §2B3.2 Extortion by Force or Threat of Injury or Serious Damage
 - §2B3.3 Blackmail and Similar Forms of Extortion
- Part D Drugs

Phyllis Newton
November 15, 1989
Page 2

Part E selected RICO offenses:

- \$2E1.3 Violent Crimes in Aid of Racketeering Activity
- \$2E1.4 Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire
- \$2E2.1 Making, Financing, or Collecting an Extortionate Extension of Credit

Part K Firearms

Part M selected Offenses Involving National Defense:

- \$2M5.2 Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License
- \$2M6.1 Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities

Part P selected Offenses Involving Taxation:

- \$2T3.1 Evading Import Duties or Restrictions (Smuggling)
- \$2T3.2 Receiving or Trafficking in Smuggled Property

[Note that we did not list Criminal Sexual Abuse offenses (\$\$2A3.1-2A3.4), or Part H, Offenses Involving Individual Rights, in that it appears to be part of the Pornography and Hate Crimes working groups, respectively.]

OVERALL ASSIGNMENT

The group will study the subject guidelines in the light of all available information and advise the Commission of the following:

- generally, those observations that can be made or conclusions reached, based on our analysis of the guideline areas;
- all specific identifiable problem areas;

- which of those problem areas should be the subject of draft guideline amendments;
- what guidelines should be seriously considered for amendment because of legislation, litigation, or application problems as reported from the field; and
- specific guideline amendments for their consideration.

INFORMATION RESOURCES

The group will study all available information resources in furtherance of the goal of the group, and make specific reports of the analysis of the most significant findings.

The group has obtained and will review the following pertaining to all relevant guidelines:

1. Technical Assistance reports.
2. Monitoring information regarding departures.
3. Past Practice findings.
4. Penalties Review analysis to date.
5. Peter Hoffman's files and comments on the subject guidelines.
6. Key Litigation cases.
7. Department of Justice proposals.
8. Problem areas identified by the informal Wednesday "amendment" group.

We are in the process of obtaining the following:

1. Recent legislative changes enacted and pending.
2. An analysis from Charles Betsey re: past practice data that may be helpful in formulating a 924(e) guideline. Specifically, we have requested a look at sentencings prior to the enactment of the statute that have the same elements, for example, three prior convictions.

Phyllis Newton
November 15, 1989
Page 4

3. Bureau of Alcohol, Tobacco, and Firearms recommendations and law enforcement information concerning prosecution data regarding arson and firearms. For example, we are interested in their data on the prevalence of malicious mischief in federal prosecutions.

4. Information from Dean Stowers regarding determination of dosage quantities and the relationship to purity in the drug table.

5. Any recommendations of Ronnie Scotkin re: drug table, generally.

AREAS IDENTIFIED TO DATE

To date, we are seriously considering whether or not guideline amendments are needed in the following areas:

1. The Justice Department recommendations regarding §924(e) and arson.
2. §2A2.1 - Attempted murder.
3. §2A2.2 - Threatening Communications - should the commentary to the grouping rule be amended so that separate multiple incidents are not grouped under 3D1.2(b)?
4. §2D1.1 - Drug rip-off situation.
5. Firearm cross references - to clarify effect.

GAME PLAN

By December 4, the group intends to largely complete its information resource review and identify its internal recommendations of guideline amendment areas and the elements those amendments should consist of.

MEMORANDUM

To: Andy Purdy
From: Pam Barron
Date: November 7, 1989
Re: Violent Offenses, Drugs and Firearms

Andy, since you are now the Coordinator of this group, I took notes for you at the meeting Phyllis had with the coordinators yesterday, and at the meeting she and Judge Wilkins had with us today. There are several key points:

1. Initial project plan should be submitted to Phyllis on Nov. 15.
2. Plan to get proposed amendments to Peter on Dec. 15.
3. Judge Wilkins suggests that we make a list of all of the potential amendments, and then prioritize it, concentrating on those guidelines that need to be developed, or "really need fixing."
4. Our report should suggest which amendments we recommend the Commission consider this year, and which may not need to be done this year.
5. Certain comments were made relative to our group:
924(e) is a priority.
Try to define "sophisticated weapon."
6. In some instances, we may wish to illustrate (but not define) by example, and cite a case.
7. Phyllis suggested we look at the DOJ proposals up front. Peter said he is responding to the DOJ list.
8. We need to get the new legislation and proposed legislation from John. The Judge said we may want to change some base offense levels in the violent offense area, and I understand some legislation is pending.

The 10th floor conference room is reserved for our meeting Thursday, Nov. 9, at 9:30.

8

MEMORANDUM

To: Phyllis Newton

Through: John Steer

From: Pam Barron

Date: November 6, 1989

Re: Working Group on Violent Offenses, Drug Offenses, and Firearms Offenses

This working group composed of Sharon Henegan, Andy Purdy, Jeff Lawrence, and Pam Barron had its third meeting on November 6, 1989. This memorandum provides a brief update on our efforts to assist the 1990 amendment process regarding the referenced guidelines.

In our first meeting, October 17, 1989, we attempted to determine which offenses our group would examine. We also divided the information gathering effort into two categories: 1. In-house sources; and 2. outreach sources. See memo of Oct. 18, 1989 (attached). I also met with Peter Hoffman to get his insights, and suggestions. Peter also provided several files with information concerning prior drafts.

Our in-house resources have been very helpful. Linda Clemons provided us with the TAS Log Records of hotline questions and answers for calendar year 1989 for the guidelines we listed. Candy Johnson also provided us with a computer run of departures for those guidelines. We also have available research data, which was prepared for the Penalties Review project. We have begun reviewing this information. We also have the Department of Justice suggestions which were relayed to the Commission by Commissioner Saltzburg.

As part of the outreach effort, Andy Purdy has contacted the Bureau of Alcohol, Tobacco, and Firearms, the ABA, NACDL, and Federal Defenders. Paul Martin has also placed a letter in the publications of the FJC, the AO, the U.S. Attorney's Bulletin, and the U.S. Defenders' Newsletter, soliciting suggestions for guideline amendments generally. At this time, I am unclear whether we are going to contact the probation officers, judges, and counsel from the 5 districts which have the greatest portion of drug cases (S.D. and W.D. Texas, Arizona, S.D. California, S.D. Florida). This was considered at a portion of a staff meeting which I did not attend.

We have begun the preliminary process of determining which guidelines need drafting or amending. The group plans to meet again Thurs. November 9, at 9:30.

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MEMORANDUM

To: Violent Offenses Working Group

From: Pam Barron

Date: October 18, 1989

Re: Memorandum (attached) to John Steer, and his suggestions.

I sent the attached memorandum to John today in order to obtain his comments and guidance before tomorrow's Commission meeting. John suggests that we hold off on any solicitation of outside comments, and that we hold off on our requests for in-house monitoring and research data at this time.

He agreed that we could go ahead and obtain the TAS information, if Phyllis and Sharon agree. Meanwhile, he suggested that we take a look at pending legislation, such as the drug bill, the firearms bill, the Comprehensive Violent Crime Act of 1989 (S. 1225), and the death penalty bill for signals of what direction Congress may be taking. We can also go ahead and collect the legislative history from the pertinent sections in the Penalties Review project, and the case law on departures.

Let's check our calendars and try to meet next week to discuss what we're going to do, and divide up tasks.

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MEMORANDUM

To: John Steer

From: Pam Barron

Date: October 18, 1989

Re: Working Group on Violent Offenses, Drug Offenses, and Firearms Offenses

This working group composed of Sharon Henegan, Andy Purdy, Jeff Lawrence, and Pam Barron met October 17, 1989 to determine what preliminary steps need to be taken in order to prepare a report for the Commission by the December 1, 1989 timetable.

We determined that our report should examine the offenses covered by the following guidelines in Chapter 2:

- Part A - Offenses Against the Person
- Part B - selected Offenses Against Property:
 - 3. Robbery
- Part D - Drugs
- Part E - selected RICO offenses:
 - §2E1.3 Violent Crimes in Aid of Racketeering Activities,
 - §2E1.4 Use of Interstate Commerce Activities in the Commission of Murder-for-Hire, §2E2.1 Extortionate Extension of Credit
- Part K - Firearms
- Part M - selected Offenses Involving National Defense:
 - §2M5.2 Exportation of Arms, Munitions, etc.
- Part P - selected Offenses Involving Prisons:
 - §2P1.3 Inciting a Riot
- Part T - selected Offenses Involving Taxation:
 - §2T3.1 Evading Import Duties (Smuggling), §2T3.2 Receiving or Trafficking in Smuggled Property

[Note that we did not list Part H, Offenses Involving Individual Rights, in that it appears to be part of the Hate Crimes working group.]

We divided the information gathering effort into two categories: 1. In-house sources, such as Hotline, monitoring, and research (past practice) data, legislative history (some of which is available from the Penalties Review materials), and case law (including departures in these areas); and, 2. Outreach sources. We would need Commission permission to conduct any outreach program.

Our current plan is to assemble the in-house computer and hotline data for presentation by the November 7 Commission meeting.

As part of any outreach, the working group suggests that it may be useful to send a letter signed by the Chairman seeking the comments and suggestions of judges, probation officers, government and defense counsel on the guidelines in these areas. Additionally, it would be useful to solicit comments and suggestions from the Department of Justice, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, and the Federal Bureau of Investigation. Andy Purdy has already had occasion to contact the American Bar Association, the NACDL, and the Federal Defenders. We have been informed that the five key districts which have the largest concentration of drug cases are the Southern District of Texas, Western District of Texas, Arizona, Southern District of California, and Southern District of Florida. We would request permission to contact the personnel in these districts, since they have extensive experience in implementing the drug guidelines.

As soon as practicable, we would like to have the Commission's determination of whether outreach is appropriate, and if so, what types of information the Commission would like us to seek.

I look forward to your comments and suggestions.

MEMORANDUM

To: John Steer

From: Pam Barron *PB*

Date: October 18, 1989

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