From the discussion above, it should be clear that Sec. 994(h) is easily understood within the context of the Sentencing Reform Act.

Also, it should be recalled that Sec. 994(h) originated in the Senate. As noted above, the United States Senate, in an amicus curiae brief submitted to the Supreme court in Mistretta, characterized Sec. 994(h) as requiring sentences at or near the statutory maximum. Certainly, the representations which the Senate makes before the Supreme Court concerning legislative intent is of strong probative value.

It should be noted that in enacting provisions like Section 6452 of the Anti-Drug Abuse Act of 1988, which requires a mandatory life sentence for three time drug felons, the Congress has taken action fully consistent with the Commission's approach in Sec. 4B1.1 of the guidelines. The same holds true for the mandatory minimum sentences which the Congress has enacted in both the 1986 and 1988 drug bills. In this respect, Congress has ratified the policy choice made by the Commission in Sec. 4B1.1. It would be a grave mistake for the Commission to now weaken the career offender guideline and call into question the widely shared understanding of Sec. 994(h).

Finally, an argument has been made that the Commission must substantially lower available sentences for career offenders because of the demands which would otherwise be placed on available prison capacity. In our view Congress has resolved this issue in favor of stiff sentences at or near the statutory maximum for repeat violent offenders and drug felons. However, even assuming that were not so, we would not be persuaded that reductions in the available sentences for career criminals would be advisable without first obtaining precise knowledge concerning the number of offenders sentenced under Sec. 4B1.1, extensive data on the offender characteristics of those eligible for the proposed lower career offender sentences, and proof that those targeted offenders in particular will not recidivate. General rules do not decide concrete cases and neither will global assumptions justify putting dangerous repeat offenders out on the streets.

The Washington Legal Foundation takes a great interest in the work of the Commission. We believe that its efforts to ensure that the Federal criminal justice system provides sentences which are honest, uniform, and proportionate is of the utmost importance. With respect to the career offender guideline, we

believe that as currently written it not only fully implements the command of 28 U.S.C. Sec 994(h) but also furthers the statutory purposes of imprisonment -- namely, deterrence, incapacitation, and just punishment. See, 18 U.S.C Secs. 3553(a)(2), 3582(a). We urge the Commission to retain guideline Sec. 4B1.1 as currently written.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

Chptr. 2

TO: PHYLLIS NEWTON

FROM: DEAN STOWERS

DATE: NOVEMBER 28, 1989

RE: MY COMMENTS ON PROPOSED DRAFT AMENDMENT SETS 1 AND 2 CIRCULATED TO STAFF FOR COMMENT

Pursuant to the request of the Commission at the meeting today I am furnishing to you my comments on the above referenced proposed amendments. It is my understanding from the Commission meeting that the Commissioners desire access to these materials to inform their decision making. Please distribute as appropriate.

cc: John Steer

STEER

UNITED STATES DISTRICT COURT

OFFICE OF THE PROBATION OFFICER
EASTERN DISTRICT OF TENNESSEE

ROSALIND ANDREWS
CHIEF PROBATION OFFICER
[illegible]0 GAY STREET S. W.
SUITE 308
[illegible]OXVILLE, TN 37902

FTS: 854-4248
COMM: (615) 673-4248

U. S. PROBATION OFFICE
P. O. BOX 430
CHATTANOOGA, TN 37401
FTS: 852-8184
COMM: (615) 266-1288

U. S. PROBATION OFFICE
101 SUMMER STREET, WEST
GREENEVILLE, TN 37743
FTS: 854-0333
COMM: (615) 638-8121

November 28, 1989

2B1.1
2F1.1

The Honorable William W. Wilkins, Jr., Chairman
U.S. Sentencing Commission
1331 Pennsylvania Ave., N/W
Washington, D.C. 20004

Dear Judge Wilkins:

Based upon frequent requests for feedback from the field, I would like the Commission to consider the following:

Guidelines 2B1.1, Larceny, Embezzlement and other forms of theft, and 2F1.1, Fraud and Deceit are driven by monetary amounts with adjustments for other characteristics, e.g. firearms, etc. There are no adjustments under these guidelines or in Chapter III for larcenies or frauds involving very large numbers of victims.

It seems to me that when these criminal activities victimize hundreds or thousands of individuals, substantial upward adjustments should be part of the guidelines. I believe that cases with many victims occur with some frequency and therefore an adjustment in the guidelines is warranted.

Thank you for your consideration of this matter.

Sincerely,

Rosalind Andrews

ROSALIND ANDREWS, CHIEF
U.S. PROBATION OFFICE

RA/g

UNITED STATES GOVERNMENT

memorandum

RECEIVED
US ATTORNEYS OFFICE
OCT 5 10 23 AM '89
MIDDLE DISTRICT OF TENNESSEE

DATE: September 8, 1989

REPLY TO ATTN OF: Kent A. Jordan, AUSA

SUBJECT: **Sentencing Guidelines Suggestions**

TO: WILLIAM C. CARPENTER, JR.
United States Attorney

Bill: For what it's worth I've added my comments
RA 9/8/89

A twix dated August 31, 1989, from Joe B. Brown was circulated on September 6, 1989, to the Assistants. At the close of the twix, USA Brown stated that the Sentencing Guidelines Subcommittee would be meeting on Sunday, September 24th at the beginning of the U.S. Attorneys' conference. With that in mind, I am submitting to you this memorandum to point out three problems I have encountered with the Guidelines in the last several months.

I. Measurement of LSD for Purposes of Establishing Base Offense Level

You may recall that in connection with the prosecution of Kevin Pizzi, we discovered that LSD was measured not by dosage unit but by the weight of the "substance" in which it was contained. In other words, whatever the medium, whether sugar cube, paper, or 30 pound lead weight, the weight of the medium would be included as the weight of the LSD. That measurement system produced what I thought was an absurd result because a relatively small amount of drugs, 200 hits, resulted in a base offense level of "32," which provides for a minimum sentence of 10 years and 1 month. This seems to be clearly out of proportion with the amount of drugs involved, particularly when one considers that at least 5 kilos of cocaine must be involved in a case to produce the same base offense level. I think some consideration should be given to revising the Guidelines to use a different measurement of LSD, perhaps a standard dosage unit, as a preferred alternative to measurement by weight.

I agree with this one.

II. Bank Robbery vs. Bank Larceny

As you are well aware, the recent past has brought to light an enormous discrepancy in the manner in which bank robbery under 18 U.S.C. §2113(a) and bank robbery under 18 U.S.C. §2113(b) are treated. For clarity, I will refer in this memo to a robbery under §2113(b) as "larceny" rather than "robbery."

Under §2B3.1 of the Guidelines, bank robbery, unarmed, results in an offense level of "19" (that's a base offense level

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
☆U.S. GPO: 1985—491-248/20552

---

of 18 plus a 1 level increase because subsection (b) of the Guideline requires that the loss to a financial institution must be considered at least $5,000, which produces a 1 level increase). The resulting sentence, assuming a Criminal History Category of "I," is between two and a half years and three years and one month.

+ I think that bank robbery Guidelines are in the process of being raised.

Bank larceny, however, as in the Trinsey case, for the same amount of money stolen, results in an offense level of "7," if no acceptance of responsibility is involved. That's a 1 to 7 month sentence. If there is acceptance of responsibility, as there has been in Trinsey, the offense level is reduced to a "5" and, under Criminal History Category "I," the sentencing range is 0 to 5 months.

While I can appreciate that it makes sense to distinguish between bank robbery and bank larceny, the distinction is a much narrower one than can justify that huge disparity in sentencing. That fact is particularly evident in the Trinsey case, in which you have juxtaposed the position of the probation office, which has strongly stated that Mr. Trinsey should have been charged as a bank robber in order to face higher Guidelines, and the position of our office that the most readily provable offense was bank larceny.

If it were just my opinion that bank larceny was the right charge, you might conclude that it was simply inexperience or poor judgment which caused that charging decision. However, we both have the greatest respect for Richard's experience and judgment, and he was of the opinion from the outset, and, from later conversations with him appears to still be of the opinion, that bank larceny was the appropriate charge, given the facts of the case. Indeed, the only reason there's an issue about the charging decision in this case is that, unlike the statute, which provides for a maximum sentence of 10 years for bank larceny, the maximum the judge in Trinsey can give without departing from the Guidelines is a few meager months. In other words, it's the ridiculous sentencing discrepancy imposed by the Guidelines which raises the issue, not the facts of the case.

N.B. I saw a case which says the facts here would survive judgment of acquittal for bank robbery. Nevertheless I still believe that when the guy grabs the money himself and makes no threats, bank larceny is a closer description of the offense.

Furthermore, if one compares the two statutory maximums, i.e., 20 years for robbery under §2113(a) and 10 years for larceny under §2113(b), one sees that Congress interpreted robbery to be, at its worst, twice as bad as larceny at its worst. However, the comparison of the maximums under the Sentencing Guidelines (under Criminal History Category I) shows that the sentencing difference

is on the order of a factor of 5, rather than a factor of 2. The Guidelines are thus clearly at odds with the judgment on offense severity inherent in the statute.

Finally, and this to me is the most troubling, the entire scheme of the Guidelines in linking bank larceny to the amount of money involved is, I believe, wholly misguided, as the Trinsey case demonstrates. The amount of loss in that case is approximately $400.00 and the Guideline range is based on that amount, pursuant to the table in §2B1.1. But the seriousness of the offense is totally unrelated to the amount of money taken; that amount was a matter of pure chance. It just so happened that the teller drawer Mr. Trinsey reached into and took money from had recently been cleaned out by the teller, and so had only about $400.00 in it. Had he chosen a teller on either side of the one he did, he would have stolen thousands of dollars rather than a few hundred. What sense does it make to tie his sentence to a quirk of chance rather than to his purposeful behavior?

I think the same analysis could apply to virtually any bank robbery. No thief knows exactly how much he's going to get, although one with a little more on the ball might plan better and, with inside information, know better where the large sums of money are at a particular time in a bank. The vast majority of bank robbery cases, however, involve people just like Mr. Trinsey who go in with the thought of getting as much as they can as quickly as they can and getting away. Accordingly, the seriousness of the offense lies not in the amount of money taken, which will very wildly, regardless of the thief's behavior. The seriousness of the offense lies in the behavior itself. Perhaps the Sentencing Commission should face the reality that not all criminal behavior can be reduced to a mathematical formula and, in cases like this, the mathematical formula tied to the amount of money taken ignores the reality of offense behavior and focuses on a chance circumstance of offense outcome. Far from avoiding senseless sentencing disparity, that formula creates it.

III. Upward Departures Based On Offenses Committed To Facilitate Other Crimes

This last issue was also raised as a result of the Trinsey case. In an attempt to obtain a sentence which more realistically reflects the offense behavior in the case, I

but it's the same thing w/ bank robbe[ry]
I agree w/ Kent but the Sent. Comm'n obviously thought of this—in fact it was part of the survey we answered a couple yrs ago

---

submitted a memorandum motion to the Court requesting an upward departure based in part on §5K2.9 of the Guidelines, which states "If the defendant committed the offense in order to facilitate ... the commission of another offense, the Court may increase the sentence above the Guideline range to reflect the actual seriousness of the defendant's conduct." In Trinsey, the defendant was stealing money as a result of his heroin and cocaine addictions, and he in fact admitted that he spent the $400.00 stolen from the bank on heroin. In other words, the bank robbery was committed to facilitate the commission of another offense - the purchase and possession of heroin. Trinsey therefore comes within the plain language of the quoted section justifying a departure.

When I raised this issue with the Presentence Officer, he acknowledged that it did appear that §5K2.9 suggested a basis for an upward departure. However, he said he had never considered that section or heard of it considered before in that light. And the Chief Probation Officer told me that, were that section so applied, a majority of theft and robbery cases might fall under §5K2.9.

The Probation Office referred the question to the Guidelines Commission staff, which reported to the Probation Office that the issue had never been raised before. The staff acknowledged that a case such as Trinsey does fall within the language of §5K2.9, but they said that they felt the Commission could not have intended for such a case to be the basis of a departure under that section because upward departures would then be the norm rather than the exception, since so many crimes like Trinsey's are committed to support an illegal narcotics habit.

If that is the case, the Guidelines should be amended to clearly reflect what the intention of the Commission is, so that one is not faced with a situation where the plain language of the Guidelines provides for departure but the Probation Office will not suggest it to the Court because they are concerned that the Commission could not have meant what it said.

U.S. Department of Justice

Washington, D.C. 20530

DEC 13 1989

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

Dear Billy:

Since our recent letter to you recommending amendment of the sentencing guidelines, we have become aware of several additional areas where we believe amendments are necessary. We urge the Commission to consider the following matters in preparing amendments for the next regular submission to Congress.

EXPORTATION OF ARMS

Our first area of concern is guideline §2M5.2, concerning the exportation of arms, munitions, or military equipment or services without a required, validated export license. The guideline currently provides a base offense level of 22 if sophisticated weaponry was involved but only 14 otherwise. We believe the guideline should be amended to eliminate this distinction and to provide a base offense level of 22 for the unlawful exportation of all controlled arms and munitions.

Title 22, United States Code, Section 2778, the Arms Export Control Act, authorizes the President, through a licensing system administered by the Department of State, to control exports of defense articles and defense services which he deems critical to the furtherance of world peace and the security and foreign policy of the United States. The items subject to controls constitute the United States Munitions List, which is set out in the Code of Federal Regulations, 22 C.F.R. Part 121.1. Included on this list are such things as military aircraft, helicopters, artillery shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics and certain firearms. No distinction is made in the statute or the regulations between sophisticated and unsophisticated weaponry. All Munitions List items must be licensed by the State Department before they can be exported from the United States.

The distinction in guideline §2M5.2 between sophisticated and unsophisticated weaponry is both artificial and confusing.

Unsophisticated weapons often are as dangerous as, or even more dangerous than, sophisticated weapons. Indeed, many of the most deadly weapons systems in existence today are either outmoded or based on relatively unsophisticated technology. Their export and deployment overseas are just as capable of disrupting world peace and the foreign policy and national security of the United States as is the export of more modern and sophisticated weapons systems. In terms of United States foreign policy, there is little difference between unsophisticated United States bazookas and highly sophisticated wire-guided missiles when obtained by a revolutionary group for use against foreign military vehicles. It does not make sense to predicate sentences in these cases on the simplicity of construction or age of the munitions items involved.

There exists confusion as well as to what the word "sophisticated" means. In a recent case in New Jersey, for example, a compelling argument was made by defense counsel that the chemical Sarin, an extremely toxic nerve gas, was not a sophisticated weapon within the meaning of the guidelines. The defense pointed out that the technology for the manufacture of this agent is simple and that nerve gas has been in existence since 1917. Fortunately, the court ruled in favor of the government on this point, but it could have reached the opposite conclusion and held that Sarin is an unsophisticated weapon.

We currently are litigating several other cases in which the meaning of "sophisticated" will be in issue. One involves the shipment of component parts of a ballistic missile system to Egypt; another involves the illegal export of surface-to-air missiles. Neither of these munitions items incorporates what is normally thought of as advanced technology.

In establishing the base offense level of 14 for unsophisticated weapons, the Sentencing Commission probably had in mind a case in which the defendant is convicted of the illegal shipment of just a few handguns. This, however, is an atypical scenario. The typical case today, insofar as firearms are concerned, involves multiple shipments of large quantities of handguns to, among others, narco-terrorists in Columbia and revolutionaries in the Philippines. Because of the seriousness of the offense and the need to deter it, we believe that the higher offense level of 22 should apply to these transactions, even though the weapons involved can hardly be termed sophisticated.

The President has determined that controls on all of the items on the Munitions List are necessary to further world peace and the security and foreign policy of the United States. The applicable guidelines undermine this determination by arbitrarily selecting for more severe punishment only those exports which involve sophisticated weaponry. All exports of munitions without a license should be treated in the same manner under the guidelines. In those rare instances where a prosecution is maintained for the unlicensed export of a few handguns, or other special

circumstances exist which may merit a more lenient sentence, the Commission could recognize the appropriateness of a downward departure.

FRAUD INVOLVING FINANCIAL INSTITUTIONS

Another area where we believe amendment of the guidelines is necessary concerns fraud involving financial institutions. In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress significantly raised penalties for certain offenses and issued a specific direction to the Sentencing Commission. We believe the Commission should revise the guidelines relevant to the statutes amended in order to respond to the congressional determination that bank fraud is an offense requiring significantly greater punishment than in the past.

FIRREA, section 961(a) through (k), increased the maximum term of imprisonment from five or fewer years to twenty years and the maximum fine from $250,000 to $1,000,000 (from $500,000 to $1,000,000 for an organization) for a violation of the following provisions of title 18, United States Code:

section 215(a) -- receipt of commissions or gifts for procuring loans;

section 656 -- theft, embezzlement, or misapplication by bank officer or employee;

section 657 -- embezzlement involving lending, credit, and insurance institutions;

section 1005 -- bank entries, reports, and transactions;

section 1006 -- federal credit institution entries, reports, and transactions;

section 1007 -- Federal Deposit Insurance Corporation transactions;

section 1014 -- loan and credit applications generally; renewals and discounts; crop insurance;

section 1341 -- mail fraud affecting a financial institution;

section 1343 -- wire fraud affecting a financial institution; and

section 1344 -- bank fraud.

FIRREA also included a specific direction to the Sentencing Commission to establish guidelines ensuring a substantial period of incarceration for a violation of, or a conspiracy to violate,

the above-listed statutes that "substantially jeopardizes the safety and soundness of a federally insured financial institution." FIRREA, section 961(m).

In addition, the amendments established a new offense of receiving property or benefits through a transaction of a Federal Reserve bank, national bank, or certain other financial institutions with the intent to defraud the United States or such financial institution, 18 U.S.C. §1005, and a new obstruction-of-justice provision, 18 U.S.C. §1510. FIRREA also broadened forfeiture provisions of federal law, 18 U.S.C. §§981 and 982, to cover violations of the above-listed statutes.

We believe that these amendments send a strong message to the Commission that Congress now considers fraud offenses involving financial institutions a more serious matter than it had in the past and that greater punishment is in order for such offenses than for most other frauds. Maximum terms of imprisonment were raised four-fold and in some cases ten-fold. In order to respond to the congressional concerns addressed in the penalty increases in FIRREA, we urge the Commission to revise the guidelines applicable to the amended statutes to provide appropriate enhancements relating to financial institutions.

HOME DETENTION

Our next area of concern is the guidelines' treatment of home detention. The first problem is the equivalency between a day of home detention and a day of imprisonment. Guideline §5C1.1(e)(3) provides a schedule of substitute punishments that equates these two penalties. Where a judge has discretion to substitute home confinement for imprisonment, we believe too much potential disparity is created by the day-for-day equivalency. For example, a judge may choose a ten-month term of imprisonment or a five-month term of imprisonment followed by a five-month term of supervised release subject to home confinement to satisfy the minimum sentencing requirements for offense level twelve. Guideline §5C1.1(d). If the full range of potential penalties for this offense level is considered, the disparity is even greater -- e.g., sixteen months of imprisonment followed by a term of supervised release, or five months of imprisonment followed by five months of home detention. This range of choices is too broad for a single offense level.

To reduce the disparity created by the substitution of home detention for imprisonment, a new relationship should be established between these two forms of punishment that represents a more realistic equivalency. Home detention is a much lighter sentence than an equal number of days of imprisonment. Therefore, we recommend that the Commission consider a two-for-one relationship between home detention and imprisonment -- i.e., two days of home detention for one day of imprisonment.

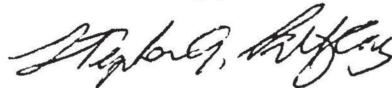
We also believe that allowing a court to impose home detention to satisfy the minimum term, or a portion of the minimum term, of incarceration for a particular guideline range may violate the statutory requirement that the maximum of a range of imprisonment not exceed the minimum by more than six months. 28 U.S.C. §994(b)(2). Where home detention may be substituted for imprisonment to meet the minimum requirements for a particular guideline range, the range is effectively increased. In the example cited above, the imprisonment range is actually five to sixteen months, rather than ten to sixteen months -- a range well in excess of the permissible six-month span. To rectify this problem and to meet the statutory requirement relating to home detention as an alternative to incarceration, 18 U.S.C. §§3563(b)(20) and 3583(d), the Commission would have to permit home detention only when a judge would otherwise impose a term of incarceration above the minimum term established in a guideline range.

ALIEN SMUGGLING

Our final recommendation concerns the guidelines affecting alien smuggling, guideline §2L1.1 and related guidelines concerning entry or citizenship documentation. We have taken the position before and continue to believe that smuggling offenses increase in severity depending upon the number of aliens smuggled. Other factors, such as physical injury and the use of weapons, are also relevant. We urge the Commission to consider these factors and to amend the guidelines in order to punish appropriately the more serious offenses.

We appreciate your consideration of these important matters and would be pleased to offer our assistance to the Commission in its efforts to address our concerns.

Sincerely,



Stephen A. Saltzburg
Member, ex officio
United States Sentencing Commission

COMMENTS OF THE FEDERAL DEFENDERS

ON THE

IMPLEMENTATION OF THE SENTENCING GUIDELINES

(PREPARATORY TO THE 1990 GUIDELINES AMENDMENTS)

SUBMITTED ON BEHALF OF

THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Prepared by

Barry J. Portman
Federal Public Defender
Northern District of California

January 12, 1990

INTRODUCTION

Pursuant to 28 U.S.C. § 994(o) and the Sentencing Commission's call for public comment preparatory to publishing the 1990 proposed sentencing guidelines amendments, the Federal Public and Community Defenders wish to file these written comments on the implementation of the guidelines. The Federal Defenders appreciate the opportunity to participate in the guidelines development process.

Our organizations operate under the authority of the Criminal Justice Act,[1] and exist to provide criminal defense and certain related services in the United States Courts to persons who are financially unable to obtain counsel. There are currently 41 Federal Public and Community Defender organizations, operating in 49 of the 94 judicial districts. In fiscal year 1988, Federal Defenders represented over 36,138 persons, or 55% of the total Criminal Justice Act representations.

CHAPTER TWO - OFFENSE CONDUCT

Guideline §2D1.1(c) - Drug Quantity Table

The Federal Defenders urge the adoption of an amendment to the footnote to the Drug Quantity Table (Guidelines Manual, p. 2.45) providing that the weight of the carrier should not be considered in calculating the quantity of LSD involved in an offense. As the Commission has noted in a previous discussion of this issue, the carrier weight of a sugar cube is 162 times

[1]Title 18 U.S.C. § 3006A.

greater than that of blotter paper. As the potential harm imposed by the ingestion of a given quantity of LSD is not in any way greater in a case involving a sugar cube carrier weighing 2,270 mgs. than in a case involving a blotter carrier weighing 14 mgs., there is no rational reason why the penalty should vary between the two cases. The adoption of an amendment which specifically excludes the weight of the carrier in the calculation of the applicable guideline range will best ensure that cases involving similar quantities of LSD are treated similarly. The present method produces unwarranted sentencing disparities, and could promote disrespect for the law and for the guidelines.

Guideline §2D1.2, Drug Offenses Occurring Near Protected Locations, etc.

This guideline enhances punishment for drug offenses committed near protected locations. As recent events have demonstrated, the place of commission of a drug offense may often be under the control and direction of the investigating agents, and it is subject to manipulation to serve the agents' purposes. We would suggest an addition to the Commentary to this guideline to the effect that the court may consider a downward departure, from the enhanced penalty level to the ordinarily applicable penalty level, if the activities in which the defendant was engaged: 1) were only fortuitously near a

"protected location", 2) were not in any manner directed toward the protected classes who frequent the "protected location", and 3) did not, in fact, expose such persons to the dangers involved in drug transactions.

Such a provision would discourage prosecutors from arbitrarily using the "protected location" statute to enhance penalties in cases in which the conduct happened to occur within the specified distance of a "protected location", but in no way posed the specific dangers which are the object of the statute. Finally, it must be recalled that a statute of this type carries a potential of manipulation by investigating agents who may control the site of the transaction. Such manipulation, in the context of a statute of this type, would produce unwarranted sentencing disparities.

Guideline §2P1.1 - Escape, Instigating or Assisting Escape

The guideline governing escape does not distinguish between escapes from secure custody and escapes from non-secure custody, except when the defendant voluntarily returns to non-secure custody within a period of 96 hours. U.S.S.G. §2P1.1(b)(2). There is, however, a significant difference in the seriousness of the offense conduct between secure and non-secure escapes. Most of our experience with escape prosecutions under 18 U.S.C. § 751 involve "walk-aways" from community treatment centers (half-way houses). Many non-secure "escapes" consist of failing to return from a weekend pass.

An escape from secure custody almost always involves a threat to persons or property. There is a significant potential for violence. The base offense level of 13 seems reasonably calculated to address this potential. The non-violent walk-away, on the other hand, does not present the potential dangers found in "going over the wall." An adjusted base level of 8 for escape from non-secure custody would be in keeping with the relative seriousness of the offense conduct. The Defenders, therefore, propose an amendment to the guideline to add a new §2P1.1(b)(3) (renumbering (b)(3) as (b)(4)):

If the defendant escaped from non-secure custody, decrease the offense level under §2P1.1(a)(1) by 5 levels or the offense level under §2P1.1(a)(2) by 2 levels.

This would also allow, at the guidelines promulgation level, for the collateral consequences of retardation of parole or other administrative sanctions which will often be imposed in the case of a walk-away.

CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

Guideline §4A1.2(c)(1), Sentences Counted and Excluded

The Defenders recommend that the Commission add the offense of passing a worthless check to list of offenses in §4A1.2(c)(1). This would mean that such a conviction would count toward a defendant's criminal history category only if a sentence of probation of at least one year or imprisonment of at least thirty days was imposed, or if the prior offense was similar to an instant offense.

In some jurisdictions, businesses routinely turn insufficient funds checks over to the state court system for issuance of a summons on a worthless check charge. Payment of the check and court costs may result in entry of a conviction without a court proceeding, advise of rights, or other formalities. A person with four such "convictions" over the past ten years would be in Criminal History Category III, whereas a person with a countable armed bank robbery might only be in Category II. Much litigation over the validity of these paperwork convictions could be avoided if worthless check cases were added to the conditional exclusion list of §4A1.2(c)(1).

It should be noted that our proposal does not run to the more serious offense of theft by check, by whatever name it may be known, which may be a misdemeanor or even a felony depending upon the amount of loss. Our proposal seeks to exclude, conditionally, the offense typically punishable by fine only, or by fine and a short jail sentence, of issuance of a worthless check.

Guideline §4B1.1, Career Offender

A year ago, the Commission invited comment on how to improve the career offender guideline. The Commission took note of a number of criticisms, including that the penalties under the guideline were excessive and unfair; that they provide no "marginal deterrence", that they will exacerbate the prison overcrowding problem; and that they do not take into account the age of the offender. Only one major criticism, that the

guideline did not allow accounting for acceptance of responsibility, was addressed in the November 1, 1989 amendments. The present guideline persists in a literal interpretation of 28 U.S.C. § 994(h), taking the language "at or near the maximum authorized" to mean the statutory maximum. The language of § 994(h) could as well be taken to mean the functional maximum as determined by the Commission. The Commission has already undertaken a measure of interpretation in providing, in Application Note 4 of the Commentary, that "[t]he provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History)" are applicable to the counting of convictions under the career offender guideline. Section 994(h) contained none of the limitations which the Commission properly applied to the career offender calculation, yet the Congress approved of this interpretation in permitting the guideline and commentary to take effect.

Most of the statutory maxima for the covered offenses were not set in a rational, comprehensive manner. They are a patchwork of maxima enacted and amended at various times. Even if the federal penalties were to be rationalized, there would still be the problem of wildly varying maxima from state statutes prosecuted under the Assimilative Crimes Act, 18 U.S.C. § 13. The hypermechanical approach of the current guideline leads to unwarranted sentencing disparities. Furthermore, even as amended to allow for acceptance of responsibility, the current guideline all but eliminates any incentive to plead guilty.

The Defenders urge the Commission to revisit this issue in the 1990 amendments process, with a view to ameliorating the unnecessarily harsh results of the current guideline.

CHAPTER FIVE - DETERMINING THE SENTENCE

Guideline §5E1.1, Restitution

In the preliminary draft of Sentencing Guidelines for Organizational Defendants, the Commission posed as a specific issue for comment the expansion of the restitution guideline. (Page 21, issue 3.) The query is raised whether the restitution guideline for individual defendants should be amended to require restitution as a condition of probation, even for offenses not covered by 18 U.S.C. §§ 3663-64. Whatever the merits of the proposal as to organizational defendants, the Defenders object to such an extension as to individual defendants.

The existing authority to order such restitution as a discretionary condition of probation should suffice to achieve the purposes of punishment in general and of restitution in particular. It should be remembered that organizational defendants are not subject to the sanction of imprisonment, while individual defendants are. For individuals, the combined sentence of imprisonment or probation, and fine, is intended to be punitive. U.S.S.G. §5E1.2(e). It is not necessary to extend

the mandatory restitution coverage to achieve a punitive effect, and the proposed guideline would create a needless conflict with the judicial judgment required to be exercised under 18 U.S.C. § 3664.

Policy Statement §5K1.1, Substantial Assistance to Authorities

In the policy statement addressing cooperation, the Defenders recommend that the Commission reconsider the introductory words, "[u]pon motion of the government . . . ." Engrafting a threshold requirement of a motion of the government for consideration for cooperation is not supported by the underlying statute and is at odds with the nature of policy statements. Title 28 U.S.C. § 994(n) directs the Commission to "assure" that the guidelines reflect the general appropriateness of imposing a lower sentence to take into account a defendant's substantial assistance to authorities. Nowhere does that statute suggest that such consideration should have as a condition precedent a motion of the government, and adding such a requirement can thwart Congressional intent. In some areas, there is a prosecutorial practice of exploiting that language in the policy statement by refusing to file a substantial assistance motion, and agreeing only to make the extent of a defendant's cooperation known to the court.[2] Under the existing language, this would have the effect of limiting the reduction for cooperation to placement of the sentence within the indicated guideline range.

[2]See United States v. Coleman, 707 F.Supp. 1101 (W.D.Mo. 1989).

Title 18 U.S.C. § 3553(e), reduction of sentence below a mandatory minimum, does carry the requirement of a motion by the government. It is certainly understandable why Congress would require the government's motion to initiate the extraordinary relief of a sentence reduction below a statutory minimum. It is not understandable why the Commission should require that condition for any departure on account of cooperation. Finally, it is inconsistent with the nature of policy statements, which stand on a different footing from guidelines, see 18 U.S.C. § 3553(a) and (b), to dictate an absolute condition precedent to a particular type of departure.

While the courts are not in agreement on the issue, some courts have held or observed that a downward departure for substantial assistance may be made even in the absence of a motion by the government. See, e.g., United States v. White, 869 F.2d 822 (5th Cir. 1989)("This policy statement obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance."). The lack of unanimity on the point could, of course, produce unwarranted sentencing disparities.

Mandatory Minimum Penalties

Statutory mandatory minimum penalties are inconsistent with the mandatory type of guideline sentencing system in effect. Now that the major question of constitutionality of the system has been resolved, statutory mandatory minima should be

eliminated. As part of its recommendations to the Congress under 28 U.S.C. § 994(r), the Commission should recommend rescission of all mandatory minima. Congress, of course, retains ultimate authority over the effective minima by its approval authority over the guidelines, and its power to issue specific directives to the Commission as it did in the Anti-Drug Abuse Act of 1988.

Pending elimination of the statutory mandatory minima, the Commission should promulgate guidelines for all offenses in light of its own wisdom, informed by the general principles contained in the Sentencing Reform Act, rather than "rigging" the guideline to achieve the statutory mandatory minimum. In such cases, the sentencing range would shrink to a point and the mandatory minimum would become the guideline sentence. U.S.S.G. §5G1.1(b). This would avoid the need for wholesale guideline amendments upon Congressional action rescinding the mandatory minima.

Amendment of Rule 35(b)

As a further part of its recommendations, the Commission should propose that Rule 35(b), F.R.Crim.P., be amended to permit the district court to: (a) upon its own motion or that of any party made within 120 days of judgment, correct an error in its sentence, and (b) upon motion of the defendant made within 120 days of judgment, to amend a sentence based on newly discovered facts.

Many errors of Law and fact occur in sentencing given the complexity of the Guidelines and the bench and bar's unfamiliarity with them. Even where the error is acknowledged by all parties and discovered quickly, the only clear remedy is an appeal or a habeas petition. The proposed amendment would permit the district court to expeditiously resolve such error. Similarly, many defense appeals by defendants would be avoided if defendants were able to present facts discovered within 120 days of sentence to the district court instead of appeals which seek a remand for re-sentencing.

2B1.1
2K2.1

U.S. Department of Justice

United States Attorney
Northern District of Iowa

101 First Street, S.E.
Federal Building, Room 220A
Cedar Rapids, Iowa 52401

319/399-25

DVGHJ5U000.pdf

February 8, 1989

The Honorable
United States ... District Tennessee
Chairman, Sent...ing Guidelines Subcommittee
Attorney General's Advisory Committee

Re: Suggested Changes To Sentencing Guildelines

Dear Joe:

We ask that you present the following to the Sentencing Commission for consideration:

1) The base offense level in §2K2.1 is too low. There also should be a specific offense characteristic calling for an increase if certain ammunition is possessed or used (e.g. hollow or soft point or armor piercing) rather than just having the type of ammunition considered in §2K2.1(b)(2).

2) The increase in offense levels in §2B1.1(b)(1) (K), (L), (M), and (N) appear to be too "flat" (e.g. we had a case in which an attorney serving as a Bankruptcy Trustee embezzled approximately $750,000. However, the increase in his offense level is no greater than if he had embezzled $500,001.

Thank you for giving us the opportunity to submit suggestions.

Sincerely,

Chuck

CHARLES W. LARSON
United States Attorney

CWL/dkj

xc: Roger Pauley

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
PROBATION OFFICE

ANIEL J. Mc MORROW
CHIEF PROBATION OFFICER
404 U.S. COURTHOUSE
BUFFALO 14202
(716) 846-4241
FTS 437-4241

BRANCH OFFICE:
FEDERAL BUILDING ROOM 111
ROCHESTER 14614
(716) 263-6810
FTS 963-6810

REPLY ☒ BUFFALO
☐ ROCHESTER

March 28, 1990

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

Attention: Communications Director

RE: COMMENT ON SENTENCING GUIDELINE PROPOSED AMENDMENTS

Dear Commission:

The following comments are submitted in response to the Commission's Sentencing Guidelines Proposed Amendments for 1990. We have chosen to restrict our comments to selected amendments, to those which we believe to be most significant, or those to which the Commission has specifically requested comment. We are in accord with, and approve of, the remaining amendments. Our comments appear sequentially by amendment number.

PROPOSED AMENDMENT NO. 10:

The proposed amendment to Section 2B3.1 is a positive one in that it corrects a longstanding weakness in the application of the robbery guideline. Option 2 allowing for a two level increase if the defendant committed one or more additional robberies seems to be the better procedure to follow in that it is easier to apply than the instruction provided in Option 1. The Option 2 procedure is easier to manage and will not unnecessarily burden the trial court in protracted litigation at the sentencing hearing. If Option 1 were to be selected, and in view of the frequency of such circumstances, it is likely that in every sentencing hearing the Court would be required to determine if the additional robberies were part of the same course of conduct or common scheme or plan as the offense of conviction. By following Option 2, we avoid the necessity of determining if relevant conduct exists with regard to the additional robberies. However, under Option 2, should the defendant be linked to more than one or two additional robberies, the two level increase might not be sufficient to appropriately address the offense severity level. In this scenerio, the Court would be required to consider an upward departure since the relevant conduct application would not be

available. Perhaps the Commission should consider providing for more than a two level enhancement when, for instance, four or five robberies are involved.

PROPOSED AMENDMENT NO. 14:

The Commission offers two proposals in dealing with the quantity conversion issue on multiple counts of different drugs. The first approach is somewhat confusing and slightly complicated. Rather than to insert an instruction to cap equivalents, it is felt that the removal of the caps and increasing the offense level for larger amounts is easier than to look to instructions and decide whether the conversions meet or go beyond the cap.

PROPOSED AMENDMENT NO. 19:

We recommend that the Commission exclude the amount of drugs under 2D1.2 and not count the quantity as part of any other transaction even though it could be considered the same course of conduct or common scheme or plan. 2D1.2 should be excluded from the operation of grouping under 3D1.2(d). It should become a separate count group and then apply 3D1.4 to reach the combined offense level.

PROPOSED AMENDMENT NO. 31 (ARMED CAREER CRIMINALS):

This proposed amendment concerns the creation of a guideline permitting a range of sentences above the statutory minimum for defendant's sentenced under 18, U.S.C., 924(e). We prefer Option 2 for the creation of Guideline 2K2.6. We have selected Option 2 simply because it is more comprehensive than the proposal set forth in Option 1.

In addition, we provide the following responses to questions raised by the Commission at the end of the proposed guideline amendment. We believe that the Commission should provide for a three level enhancement if the defendant used the weapon or ammunition in connection with the commission of a violent felony as a specific offense characteristic. We also believe that a two level enhancement should be incorporated as a specific offense characteristic if the weapon or ammunition was used in connection with the commission of a serious drug offense. Because of the increasingly violent

nature of criminal activity, we believe it prudent that a guideline be developed to provide for enhancements for those defendants who possess firearms in connection with any instant offense where there are prior convictions for violent or drug type offenses present. Should the career offender guideline be amended to apply to all instant offenses involving possession of a gun? We think not. It is our preference that the guideline for 18, U.S.C., 924(e) cases be incorporated within 2K2.1. We think it inappropriate to have the criminal history guidelines amended to provide for higher adjustments for each prior sentence involving violent or serious drug offenses. Likewise, we do not think that the number of criminal history categories should be expanded to account for these. It seems to us to be the better alternative that a criminal history guideline should be developed that provides additional enhancements for those who exhibit patterns of prior violent and serious drug offenses. We do not think it necessary to make changes in existing Chapter 2 guidelines that incorporate violent activities for gun possession to provide for additional adjustments due to prior violent or serious drug convictions or sentences.

PROPOSED AMENDMENT NO. 32:

We wholeheartedly approve of the proposed amendment to 2K2.1(b)(1) as well as additional subsection (b)(3). Furthermore, we believe it appropriate to provide for a two level enhancement under 2K2.1 for each prior conviction of a serious drug offense or a violent felony when the defendant is not subject to sentencing under 18, U.S.C., 924(e).

PROPOSED AMENDMENT NO. 35:

The Western District of New York, and particularly at Buffalo, sees many alien smugglings due to four border crossings. We are glad to see that the Commission has noted a need for enhanced punishment based on the number of aliens smuggled inasmuch as the current guideline does not take this into consideration. However, we feel strongly that Section 2L1.1(b) not be deleted. Repeated convictions of this type warrants additional punishment. The enhancement, because of the number of aliens, and a two level increase for a prior conviction should not be interdependent but mutually exclusive.

PROPOSED AMENDMENT NO. 44 (OFFENSE LEVELS FOR CERTAIN ESCAPES PER GUIDELINE 2P1.1:

We do not believe that an additional distinction should be made between escape from secure and non-secure custodys for those cases not covered by the seven level reduction for voluntary return within 96 hours. There should be a reduction available for voluntary return but it is questionable in our mind whether the 96 hours distinction currently used is appropriate. Inasmuch as the U.S. Marshal's Service must commit resources to the investigation of any escape, it seems unfair that the escapee should be given a downward adjustment for voluntarily returning to the institution within 96 hours. Within that time period, the Marshal's Service will have committed much time and effort to the investigation. It seems more appropriate to us to reduce the time period to 48 hours.

Before commenting upon any of the proposed amendments found in Chapter 4, Part A (Criminal History), we wish to express our belief that the four point limit provided for under 4A1.1(c) should be abandoned and that no other restriction should apply. We have experienced a number of cases in this district where defendants have had a significant number of one point offenses which were otherwise countable but could not be used in determining the criminal history score. Although we recognize that an upward departure could have been made pursuant to adequacy of the criminal history, it seems to us to be the better method to remove the restriction and count all single point convictions.

PROPOSED AMENDMENT NO. 53 (OBSTRUCTING OR IMPEDING THE INVESTIGATION, PROSECUTION, OR SENTENCING OF THE INSTANT OFFENSE.

It is our position that a two level enhancement is applicable and in order for conduct noted in this section, therefore, we accept the examples in their totality. Specifically, we feel No. 7 should include a clarification that an enhancement should prevail if the defendant, "provides a fraudulent identification document at arrest with the intention to hide his true identity. Item No. 13 proved to be a very appropriate basis for enhancement, especially in consideration

of the possibility that a defendant may attempt to conceal assets to avoid restitution/fine payments. One question wehave concerning Item No. 13 revolves around the defendant's outright failure to comply with the probation officer's request for financial data during the course of the presentence investigation or other investigation for the court. It is our opinion a two level enhancement should apply in such a scenerio.

Item No. 14: This item appears too general. One assumes that this enhancement would not apply in a situation where an individual may lie to the investigating officer concerning high school/college attendance, but may be more applicable in a situation in which, for example, a defendant makes a false claim that he is H.I.V. positive with the intention of gaining sympathy from the Court which would, in turn, lead to a downward departure. The basic intent is noteworthy for Item 14, but the Supervising USPO reviewing the presentence report must be cautious concerning frivolous use of this item.

Item No. 16: It is our understanding that there is a Second Circuit case that states, in layman's terms, that fleeing from arrest is not grounds for obstruction of justice unless the subject is destroying evidence during the course of flight. This item should be fine tuned. We also agree that a separate guideline (under Section 3C1.2) should be formulated providing a two level enhancement for Reckless Endangerment during flight from arrest. We are concerned with an appropriate definition for "Reckless Endangerment."

PROPOSED AMENDMENT NO. 62:

We feel that the Commission should retain the current treatment of expunged convictions by not counting them in the criminal history score. Quite often, records pertaining to expungement are not available making it particularly difficult to determine the circumstances surrounding the order of expungement. To unilaterally count an expungement could be unconstitutional. However, to have a probation officer attempt to obtain adequate information to make a judgment on its use would create problems. In New York State, probation officers legally do not have access to sealed or expunged records.

PROPOSED AMENDMENT NO. 63:

Our office has always had some difficulty with the application of the definition of related offenses in Application Note No. 3. It seems that a defendant receives considerable benefit when he pleads guilty to one offense in lieu of many related or unrelated offenses and then is sentenced to all of the offenses at the same time. When the other convictions are not counted, the defendant's criminal history category clearly underrepresents his criminal behavior. Now, the probation officer must address this issue under Adequacy of Criminal History category. He must then advise the Court that there may be grounds for a departure and then advise the Court at what criminal history category the defendant would be if the additional criminal behavior were counted. The Court then may exercise its discretion and decide whether or not to depart. It would seem much simpler and it certainly would clarify the issue if the Commission directed that separate counts sentenced at the same time be counted for the criminal history category. The end result would certainly be more uniform and equitable with defendants with similar histories being sentenced at the same guideline range.

PROPOSED AMENDMENT NO. 64:

An additional criminal history category is appropriate as it will take into consideration the most serious offenders and eliminate some instances where a departure would be the only way to take into account additional criminal behavior and ultimately enhance the sentence. With reference to 4B1.1, we feel that Option No. 2 is simply easier to understand and apply.

PROPOSED AMENDMENT NO. 66 (SECTION 5E1.2 - FINES FOR INDIVIDUAL DEFENDANTS:

We approve of the proposed amendment to all aspects of USSG 5E1.2, including the added column in the fine table providing for maximums in specified offenses. The proposed amendments concerning the language clarifying "gross pecuniary loss" and "gross pecuniary gain" is welcome. The proposed amendments if adopted, will make for easier calculation of the fine range. With regard to deleting the bracketed language in subsection (c)(1), it is recommended that

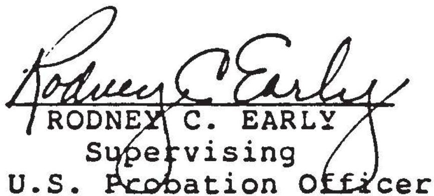
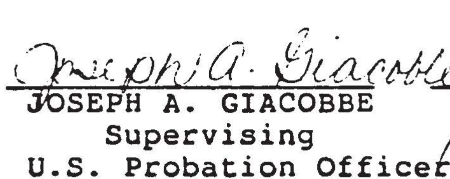
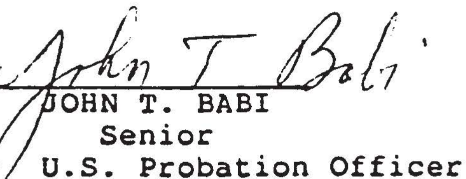
this language be retained. It seems to us to be the better alternative to adopt the bracketed sentence in subsection (c)(2)(A)(iii) and in renumbered application note 8. To adopt the bracketed language would be clarifying in our opinion. Further, it is suggested to the Commission that a policy statement be adopted recommending to the Court that fines imposed in imprisonment cases with supervised release to follow, if unpaid at the time of release from confinement, should be made conditions of supervised release.

PROPOSED AMENDMENT NO. 69 (GUIDELINES FOR REVOCATION OF PROBATION AND SUPERVISED RELEASE):

The two options proposed for the amendment to Chapter 7 have been carefully reviewed. It is our opinion that Option 1 is superior in that it is more easily applied to violations of probation and supervised release. Option 2 is simply too cumbersome and unnecessarily complicated. We urge the Commission to adopt Option 1 of the proposed amendment to Chapter 7.

We wish to express our appreciation for this opportunity to respond to the proposed amendments. If there are any questions, please feel free to contact us.

Very truly yours,

RODNEY C. EARLY
Supervising
U.S. Probation Officer

JOSEPH A. GIACOBBE
Supervising
U.S. Probation Officer

JOHN T. BABI
Senior
U.S. Probation Officer

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 2004

Attention: Paul K. Martin
Communications Director

Dear Mr. Commissioners:

This is a response to the Proposed Amendments to the Sentencing Guidelines.

The clarification and additionally proposed language on p. 14 to 1B1.3 commentary Ap. N. 2 & 4 are greatly helpful. I think it might also be helpful to include language which states that the relevant conduct on a substantive count of conviction in a drug offense may include conspiratorial conduct by a defendant, even absent a conviction on the conspiracy, provided there is a preponderance of evidence that he participated in that conduct.

Page 23, N. 15. 2D1.2 - I do not think that a defendant should be held accountable for the entire quantity of drug obtained from 2D1.1 under 1B1.3(a)(2). It seems more appropriate and fair to hold one accountable only for the quantity of drug that was sold near protected locations or involving underage or pregnant individuals. The easiest way would be to include an additional specific offense characteristic enhancement which is directly correlated to the percentage of the total quantity of drug.

P. 23, N. 16 - I strongly support the proposed amendment to 2D1.6 which directs that the base offense level from 2D1.1 for the underlying offense or 12 (whichever is greater) be used for telephone count convictions. The disparity problem mentioned is serious not only in the amount of downward departure which might result in various courts, but also increased when some courts do depart downward and others do not. I strongly urge additional language to specifically state that when the base of 12 applies on cases where application of 2D1.1 is not possible, no role increase or decrease be applied. The role increase or decrease may be appropriate otherwise in accordance with 3B. This seems especially important to cases where the resulting guideline range does not exceed the four year maximum of 21 U.S.C. 843(b).

P. 36, N. 31 - Option One on p. 37 is strongly recommended. As the Commission has noted, absent the enhanced penalty of 924 (e), the resulting guideline range for a Criminal History Category VI defendant is far below the mandatory minimum of 15 years which becomes the guideline sentence under 5G1.1. Also specific offense characteristics (2) & (3) in Option 2 appear to increase a defendant's sentence based upon the offense conduct of underlying convictions for which the defendant has already been

penalized by some court. It is also increasingly difficult to obtain such detailed information on older convictions, sometimes those as recent as five years prior to the instant offense. The probation system is extremely hard pressed to find, if one has the luxury of time, such details.

P. 40 - Unless the underlying offense for which a 924(e) is more than a possession [922 (g)], I do not think any enhancements are necessary. The mere existence of prior, scored convictions which were not predicate convictions necessary to invoke the 924(e) penalty allow consideration by the court for a guided, upward departure under 4A1.3 and 5K2.0. If the Commission does think that such enhancements are essential, I suggest as an option that they be incorporated with a change in the scaling of the Criminal History Points and Categories. I have seen numerous defendants sentenced in the Middle District of Florida who have many more criminal history points than the maximum of 13 provided for by the Sentencing Table and chapter 4. One such defendant had 33 criminal history points.

Yes, I think that more than the three points available for sentences under 4A1.1 (a) is appropriate for such convictions which involve violence or serious drug trafficking. But only if the Commission expands the current point system for the Criminal History and includes higher categories.

P. 51, N. 50 - I applaud the Commission for this proposed amendment, providing more operational language guiding adjustments for the defendant's role (3B). Also, p.53, #2, line 2, 2nd word is a typo "am" for an.

P. 53, N. 4 - This causes great confusion for me. I have previously interpreted the "otherwise extensive" language of 3B1.1(a) to allow for a 4 level or 3 level enhancement, irrespective of the number of participants, for those offenses which by their length, duration, or seriousness warrant such enhancement above that allowed in 3B1.1(c) which again is fixed by the number of "participants". Clarification of this possible misinterpretation is requested.

P. 55, N. 51 - Yes, an amendment to more clearly specify the types of conduct to which the Abuse of Trust should be applied would be greatly helpful. Also helpful would be more operational definitions to help guide applications on the abuse of a "Special Skill". In Florida, many of our drug cases involve people who are pilots or boat captains who are essential to the importation and distribution of controlled substances, yet seem to have no skill beyond that possessed by other pilots or boat captains.
Also, there is apparent controversy over whether certain occupational or job titles are positions of trust, such as post office workers, bank tellers, et. al.

P. 56,57 questions:

1. yes
2. yes, but only when strongly urged by prosecutor and supported by a preponderance of evidence.
3. no, this presupposes that one would know one was under investigation; during a judicial proceeding, yes, definitely.
4. same as 3.
5. only when "material hinderance"
6. yes
7. yes
8. yes
9. yes
10. yes
11. no
12. yes
13. yes, when provable by preponderance.
14. no
15. overdone, anyone fleeing from arrest qualifies as endangering others, certainly himself and the officer.
16. above. - yes

P. 60 Acceptance of Responsibility: n.58 -
No, when done after adjudication;
Yes, the Commission should provide greater guidance about weight to be given to entry of guilty plea, when that is all one has done.

Differing weights, with various indicia of acceptance. This is a tough one. I have joked with prosecutors, defense attorneys, judges, and other probation officers about this one: 2 points only when one of the commentary qualifiers demonstrates acceptance, 1 point otherwise, no points if he talks a good talk, but tells a fairy tale about his involvement. Better that he be silent than insult the dull minds of P.O.'s and judicial officers!

What would the Commission or the Guidelines suffer if this adjustment were deleted entirely. Is there not enough to give a defendant by charge or plea bargaining, or does true justice suffer if the bluff of those who threaten going to trial is called? The U. S. Attorney can dismiss charges, reduce charges by charge or plea bargaining, giving or withholding penalty enhancements.

P. 61 - Congratulations!! This clarification of "uncounseled misdemeanors" desperately needed. For some time, our report has included a statement that posited a presumption that convictions after 1972 without counsel are counted since courts require oral or written "waiver" of rights to counsel. One must insist that he no have counsel, over and over and over, again. A more crucial issue is those arrests prior to age 18. Can a juvenile intelligently waive counsel? When, at age 18, 17, 12, 13, on

offenses that are handled in county or state courts which pattern their sentences after those given in juvenile courts? Is a commitment to the youth authority, in many cases to juvenile homes, schools, a "sentence" as defined in the guidelines. Fortunately, our courts are aware of the provision of 4A1.3 that allows guided, downward departure upon a finding by the court that the Criminal History Category in such a case may over represent the seriousness of the defendant's prior criminal conduct or the likelihood....

P. 63 - Agree with amendment to 4A1.2(j). Bravo! This brings this into consistency of application with counting diversionary sentences.

P.64, N.63 - Leave as is. 4A1.3 and the proposed expansion of the Criminal History Categories will suffice. The only exception to this is that I favor scoring serious felony offenses involving drug trafficking convictions and crimes of violence as defined in 18 U.S.C. 13 despite their age. If not all of them, at least those which resulted in sentences of 5 years or more.

PP. 64,65 - YES, YES, YES, EXCELLENT AMENDMENT!

P. 74, N.69 - Strong, preference for Option 1. Option 2 would require too much time for a system that has yet to provide the manpower needed to adequately perform the job for the court. The Guidelines demand more time than has been recognized by the Administrative Office, even in the adjusted personnel allocation formulas. Administrators and Managers who have never applied the USSC guidelines or prepared a Guideline Presentence report are forced into playing a guessing game. The clerical staffing formula is also sadly out of step with the times. To implement option 2 would unduly burden an already overworked, understaffed, underpaid group of officers, Magistrates, and Judges.

Finally, I again applaud the Sentencing Commission for its magnificent beginning, its stated and obvious concern for its mission, and its quick, efficient response to the Federal Judicial System needs and suggestions. You have very clearly and convincingly won the appreciation and respect of the Probation System in my district, and court family, and if what I hear from associates across the country is accurate, the entire system.

Sincerely,

Jim Bishop

James B. Bishop
Supervising Probation Officer
Middle District of Florida

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

MAR 23 1990

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:

This is in response to the Sentencing Commission's request for comments on proposed amendments to the sentencing guidelines published in the Federal Register on February 16, 1990.

Initially, we would express our appreciation for the careful consideration the Commission gave our earlier comments on the guidelines in our letter of December 14, 1989. As a result, the proposed new sentencing guideline on arson is a significant improvement.

With respect to firearms, we strongly support Option 2 for the proposed armed career criminal guideline in section 2K2.6. Under Option 1, the only increase above the base offense level of 34 occurs when in connection with the use of the weapon or ammunition in the instant offense a victim sustained death, permanent or life threatening injury, serious bodily injury or bodily injury. Regardless of the seriousness of the defendant's prior convictions, the base offense level cannot be increased above 34.

In our December 14 letter, we discussed pre-guidelines cases where defendants received sentences of more than 15 years under 18 U.S.C. § 924(e), including the case of Warren Bland who had a long history of vicious and sadistic sexual assaults. He received a sentence of life imprisonment under section 924(e). Attachment B to our December 14 letter shows that a firearm was found in Bland's car, but no injury resulted from his use of the firearm in the instant offense. Under Option 1, Bland's offense level could not be increased

above 34. Under option 2, Bland's brutal attacks upon and torture of his victims would result in a sentence at the offense level of 38.

In Attachment A to our December 14 letter, we discussed a pre-guidelines case, United States v. Gourley, 835 F.2d 249 (10th Cir. 1987). Gourley received a life sentence as an armed career criminal. He pressed a loaded sawed-off shotgun against the throat of an undercover police officer and pulled the trigger but the shotgun malfunctioned. Fortunately, the police officer was not injured. Under Option 1, Gourley's offense level could not be increased above 34. Under option 2, Gourley's use and brandishing of a firearm would result in sentencing at the offense level of 38 which we believe would be appropriate in such a case.

Our letter also discussed United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989), where the defendant used a firearm to fire at an off-duty police officer outside the store where the officer was employed as a security officer. Apparently, the officer was not injured. Jordan was sentenced to 20 years in prison. Under Option 1, Jordan's offense level would only be 34. Under Option 2, the offense level would be 38 because he used and brandished a firearm during the instant offense.

We strongly urge the adoption of Option 2 because it takes into account the circumstances surrounding the defendant's prior convictions and the circumstances involving the defendant's instant offense of possessing a firearm. A review of the cases discussed in Attachment A to our December 14 letter demonstrates that judges based their decisions in pre-guidelines cases on these circumstances when sentencing armed career criminals to more than 15 years imprisonment. Option 1 too narrowly restricts the factors used in sentencing under section 924(e).

Section 2K2.1 of the guidelines provides for the sentencing of persons convicted of violations of 18 U.S.C. § 922(g) (felons and other prohibited persons in possession of firearms) and 26 U.S.C. § 5861(d) (possession of unregistered National Firearms Act weapons). A proposed amendment to this section would provide an increase of 2 offense levels if the defendant possesses a loaded firearm or both an

unloaded firearm and ammunition that could be used in the firearm. We support this amendment. A defendant possessing a loaded firearm or the firearm and ammunition for the firearm obviously poses more of a threat to society. For example, the offense level should be increased to 18 if the defendant possessed a loaded machinegun. Moreover, we recommend an increase of 2 levels where the defendant possessed a loaded firearm to which a silencer is attached or possessed a loaded firearm and a silencer which is capable of being attached to the firearm.

The Commission also requested comment on whether an offender who is convicted of possessing a firearm or ammunition, and has one or two prior convictions for serious drug offenses or violent felonies but is not subject to sentencing under 18 U.S.C. § 924(e), should receive a 2-level increase in the offense level for each such prior conviction. We support the 2-level increase for each such prior conviction. As discussed in Attachment C to our December 14 letter, courts under repealed 18 U.S.C. § 3575 repeatedly enhanced sentences for felons in possession of firearms based on their prior convictions for serious crimes. A defendant who possesses a firearm and who has a prior conviction for manslaughter presents more of a threat of violence to society and should receive a more severe sentence than a defendant whose prior conviction is for larceny. Since a firearm is so easily used to commit crimes of violence and is a tool of the trade for drug dealers, defendants who have prior convictions for such crimes should be deterred from possessing firearms.

In 1988, Congress increased the maximum penalty for a violation of 18 U.S.C. § 922(g) (a felon in possession of a firearm) from 5 years to 10 years. ATF concentrates its prosecutions for this offense on defendants who have prior convictions for violent crimes or drug trafficking offenses. The doubling of the maximum sentence by Congress for the offense suggests that Congress believed the defendants actually prosecuted under section 922(g) were serious offenders. The offense levels in the current guidelines are simply too low to adequately deter serious criminals from possessing firearms.

We suggest that the 2-level increase for a defendant with a prior drug offense apply to defendants previously convicted of a "controlled substance offense" (as defined in section

4B1.2 of the guidelines) rather than a "serious drug offense." A serious drug offense requires that a State offense have a maximum penalty of 10 years imprisonment or more. Under section 11379.5(a) of the California Health and Safety Code, the sale or manufacture of PCP is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(b), a person convicted of selling PCP is subject to an additional term of 5 years imprisonment if the substance containing PCP exceeds 10 pounds by weight or 33 1/3 gallons by liquid volume. Under section 11352(a) of the California Health and Safety Code, the sale of heroin is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(a), a person convicted of selling heroin is subject to an additional term of 5 years imprisonment if the substance containing heroin exceed 10 pounds by weight. The term serious drug offense excludes the great majority of drug trafficking offenses committed in California. The term controlled substance offense includes the sale of PCP and heroin. We believe the offense of selling PCP and heroin and similar offenses in California are serious offenses and should result in a 2-level increase in the offense level.

We recommend that any amendment make it clear that the 2-level increase for having prior convictions for drug or violent crimes applies to those convicted of possessing unregistered National Firearms Act weapons as well as to felons and other proscribed persons unlawfully possessing firearms in violation of 18 U.S.C. § 922(g). Defendants who possess contraband (unregistered) National Firearms Act weapons and have such prior convictions impose a significant threat. These defendants should receive stiffer sentences than defendants who have no such prior convictions.

We support the proposed elimination of the reduction in offense level for unlawful possession of National Firearms Act weapons if the defendant "obtained or possessed the firearms solely for lawful sporting purposes or collection." However, we also believe that this reduction in offense level should be eliminated for all other firearms offenses. At a minimum, the provision should be amended to delete reference to the purpose for which firearms were obtained. The fact that the defendant originally acquired the firearm for sporting or collection purposes is immaterial. Rather,

the circumstances surrounding the defendant's possession and use of the firearm should be more significant for purposes of sentencing. This would eliminate frivolous arguments such as that raised by the defendant in United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989), who, having fired a rifle throughout his home after a quarrel with his wife and having been convicted of being a felon in possession of the rifle, argued that his sentence should be reduced because the firearm was obtained for sporting purposes.

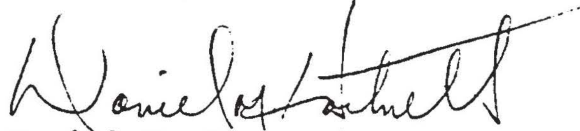
On page 5733 of the Federal Register, the Commission seeks comments on several issues relating to the firearms guidelines. Item 5 asks whether existing guidelines that incorporate violent activities or gun possession should provide additional adjustments due to prior violent or serious drug convictions or sentences. We would favor the amendments, however, the guidelines should apply to controlled substance offenses rather than serious drug offenses. Item 3 proposes an amendment to the criminal history guidelines to provide higher adjustments for each prior conviction involving violent or serious drug offenses. We would favor Item 3 if the adjustments would equal or exceed the 2-level increase for defendants having such prior convictions who are convicted of possessing firearms and if the guidelines covered controlled substance offenses rather than serious drug offenses.

Item 2 asks whether the career offender guideline should be amended to apply to all instant offenses involving possession of a firearm. We recommend that the offense of possession of a firearm by a felon be considered a crime of violence if the circumstances of the offense show that the defendant fired the gun, pointed it at an individual, or otherwise used the gun to threaten an individual. The base offense level as a career offender would be 24 and the criminal history category would be VI, resulting in a sentence of 100-125 months. A felon who in the instant offense used a firearm in a violent or threatening manner and has 2 prior violent felony or controlled substance offenses should receive a substantially longer sentence than a felon who merely possesses a firearm. In United States v. Williams, 892 F.2d 296 (3rd Cir. 1989), the defendant fired a pistol at one person and threatened to shoot another. He was

convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and was sentenced as an armed career criminal under 18 U.S.C § 924(e) because he had three prior convictions for crimes of violence. The court also ruled defendant's current offense of possessing a firearm a crime of violence because he fired it at a person. The court sentenced defendant as a career offender to 360 months imprisonment.

We appreciate this opportunity to comment on the proposed amendments to the guidelines. If we can be of further assistance to the Commission, please let us know.

Sincerely yours,



Daniel M. Hartnett
Associate Director
(Law Enforcement)

Chptr. 3

U.S. Department of Justice

United States Attorney
District of Vermont

United States Courthouse and Federal Building
Post Office Box 570
Burlington, Vermont 05402

802/951-6725
FTS/832-6725

March 9, 1989

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

Attention: Public Comment

Gentlemen:

Please be advised that I have recently been contacted by Gary Peters of your offices relative to our letter concerning Guideline Section 3E1.1 dated 2/16/89. Our letter briefly posed a question concerning the applicability of a three point increment for obstruction of justice when, at a later date, the individual involved also accepts responsibility for his acts. A brief outline of the facts in a case recently handled by our office will highlight the dilemma.

In a recent narcotics case, police officers executing a search warrant, had to forcibly enter the dwelling in which the defendant was storing quantities of cocaine. As the police officers entered the dwelling they were aware of the fact that the defendant attempted to and did in fact, destroy a small amount of the cached narcotics. Almost immediately thereafter the defendant agreed to cooperate with authorities and in fact led them to the source of the cocaine. The defendant later pled guilty and completely admitted his complicity in narcotics trafficking.

At the time of his sentencing, based upon the Guidelines as they existed in February of 1989, the Court felt that because of the defendant's activities in destroying evidence, he thus obstructed justice and deserved to receive an additional three points to his base offense level. The Court further reasoned that one who obstructed justice, based upon the existing

Guidelines and commentary, could hardly receive any credit for having accepted responsibility.

Mr. Peters advises that proposed amendment number 234 would, in fact, advise Courts that there are times when both the penalty for obstruction of justice and the decrease in offense level for acceptance of responsibility, would be appropriate. If this proposed amendment were to be accepted, it would, in fact, allow a Court to, in our opinion, properly treat the situation as described above. That is, an individual would be penalized for an attempt to obstruct justice, however, this penalty would not permeate later efforts to not only to accept responsibility but also aid law enforcement. Such a result would be to the best interest of both the sentencing Court and law enforcement.

Thanking you in advance for your attention to this matter, I remain

Very truly yours,

GEORGE J. TERWILLIGER, III
United States Attorney

By:
CHARLES A. CARUSO
Assistant U.S. Attorney

CAC/kmc

FEB 10 '89 14:15 PAGE.02

FEB 10 '89 15:29 USDA BUFFALO PAGE.02

Memorandum

Subject	Date
RECOMMENDED AMENDMENTS TO SENTENCING GUIDELINES	2/07/89

To: JOE B. BROWN
United States Attorney
Middle District Tennessee
Chairman
Sentencing Guidelines Subcommittee
Attorney General's Advisory Committee

From: DCV
DENNIS C. VACCO
United States Attorney
WDNY

I have the following recommendations for changes to the Sentencing Guidelines:

1. Part L - Offenses involving immigration, naturalization and passports:

   Immigration - Section 2L1.1 should be altered to provide that when more than one alien is involved and separate charges are filed for each alien, that the offenses are not grouped, but rather the multiple offense provisions of 3D1.1 apply.

2. Part T - Offenses involving taxation 3. Custom Taxes

   Additional guidelines should be written which cover instances reflected in application note 2 to Section 2T3.1. With the onset of the Free Trade Agreement and an emphasis in the Customs Service on enforcing export regulations and import quotas, it is important to have a specific guideline directed to these type of violations in which the amount of duty owing is non-existent or not the major harm of the offense. Advising the Court that it should depart upward is inadequate as this permits the defendant an automatic appeal and these types of investigations are a priority with the Customs Service.

3. Chapter 4 - Criminal History and Criminal Livelihood

Application note 3 to Section 4A1.1 indicates that foreign convictions are not counted. This is again specifically noted in Section 4A1.2(H), foreign sentences. The Commission has attempted to deal with this in the policy statement of Section 4A1.3 advising the Court that it may consider a foreign sentence and make a departure. Again, the problem with this is that it then affords the defendant the right to appeal. With the Western District of New York being situated on the Canadian border, numerous of our defendants have Canadian convictions. These convictions can be verified with 100% accuracy and should be considered by the Court in determining the criminal history category. I suggest some thought be given to providing the foreign convictions may be counted when a certified copy of the conviction is available and included in the Pre-Sentence Report.

4. Part F - Offenses involving fraud or deceit, Section 2F1.1, Fraud and Deceit.

Subsection 2 of this section should have an additional increase when there is an intent to defraud the United States or a state or local agency of the honest service of its employee or to defraud the United States of its right to implement the laws and regulations of the United States in violation of Title 18, United States Code, Section 371. These type of violations do not always have a dollar value or a significant dollar value that would increase the base offense level. However, these types of violation are a priority and should therefore warrant a two level increase or a minimal increase to level ten.

5. Subsection S - Money laundering and monetary transaction reporting; Section 2S1.3, failure to report monetary transaction; structuring transactions to evade reporting requirements.

Subsection A provides that the base offense level will be a 13 if the defendant made false statements to conceal or disguise the activity or in two other circumstances described in Subsection A. Otherwise, the offense level is 5. I would like the Commission to describe when it feels offense level 5 would be appropriate. As a criminal offense requires that the defendant knowingly