violate the provision, I am hard pressed to think of a prosecutable case in which the defendant has not made a false statement to conceal or disguise the act of importing or exporting the currency. Typically, the defendant has completed a Customs Declaration form and have answered "no" to the currency question. Thus, he has made a false statement and is subjected to a level 13 base offense. However, the application note which indicates that a 5 is for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believes that the funds were from legitimate sources permits defense attorneys to argue when they can show legitimate funds and a legitimate use that their client should get a level 5. I do not believe that this is the intent of the Sentencing Commission and suggest that they delete the reference to the level 5, making all offenses a level 13.

6. The guideline ranges for distribution of and conspiring to distribute controlled substances should be amended to reflect longer terms of incarceration. As currently drafted, the guidelines for Title 21 offenses are inadequate and in several instances have caused defendants to be sentenced to terms of incarceration of shorter duration then they would have been sentenced to outside the guideline range. I believe the current guidelines send a mixed signal at a time when drug defendants should be receiving stiffer sentences.

DCV:jw
cc: Roger Pauley, Director
Office of Legislation
Criminal Division

MEMORANDUM

To: Sid Moore
John Steer
Peter Hoffman
Phyllis Newton
Ronnie Scotkin

From: Andy Purdy

Date: February 8, 1989

Re: Guideline Amendment Suggestions from U.S. Attorneys

I am circulating correspondence for your information from two U.S. Attorneys to Joe Brown about amendments to the Sentencing Guidelines.

U.S. Department of Justice

United States Attorney

Southern District of Indiana

5th Floor United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204

317/269-6333
FTS/331-6333

February 8, 1989

The Honorable Joe B. Brown
United States Attorney
Middle District of Tennessee
Room 879, U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Dear Joe:

I have conferred with my staff, and we have the following concerns and suggestions about the Sentencing Guidelines which we would like brought to the attention of the Sentencing Commission at its February 14 meeting.

INDIVIDUAL GUIDELINES

1. The guidelines do not reflect a distinction between an escape from a maximum security penitentiary and a "walkaway" from a minimum security facility or even a "work-release" type facility. Therefore, we see a need for amelioration of the guidelines in the form of an offense level reduction in the latter type situations.

2. As the Commission is well aware, the guidelines for bank robbery do not accurately reflect the seriousness of that offense, and a person who commits multiple bank robberies is not adequately punished for each one. As I understand it, there are suggested amendments under consideration already in this area.

3. It is an inaccurate reflection of a defendant's criminal history to say that, if that defendant was sentenced for two separate offenses on the same day in the same court, and received consecutive sentences, those offenses must be treated as one crime in computing the criminal history score. [See Guideline 4A1.2(a)(2).] This is absolutely wrong and should be amended to provide that, if the defendant committed two separate offenses at two different times and/or places, even if he received concurrent

sentencing, each prior crime counts individually toward his criminal history. Any other interpretation skews the true criminal history in the direction of leniency toward the defendant merely because of an exercise of judicial economy in consolidating separate cases for sentencing.

4. It seems everyone agrees that the "acceptance of responsibility" factor (see Guideline 3E1.1) is not working as the Commission intended, and is being given to almost every defendant who pleads guilty along with a number who go to trial and then at sentencing utter the magic words. We propose the following solution:

   a. Allow a total of three (3) potential "points" for acceptance of responsibility.

   b. Allow the Court to give one (1) point without stating any reason other than that the Court feels the defendant has accepted responsibility.

   c. Require the Court, if it wishes to award more than one point, to state as reasons one or more of the specific factors listed in the Commentary to 3E1.1 (for example, that the facts demonstrate that the defendant voluntarily terminated his criminal conduct prior to learning of the investigation).

   It may be that the Commission, if considering this change, will want to be more specific about these factors, and/or move them from the Commentary section into the actual language of the Guidelines in order to bind the Courts to this plan.

5. Finally, we have encountered the quandary that, while it is distressing at times to include even the most minimal participants in the same general guideline range as the organizers of a drug conspiracy (the reference is to my comments at the last meeting), it is more distressing that the substantive drug sales of lesser amounts carry only insignificant time. For example: The sale of anything less than 25 grams of cocaine will net a federal defendant as little as 10 months and a maximum (assuming a Criminal History category of VI) of 37 months. Further, a guilty plea will undoubtedly net the defendant a 2-level reduction for acceptance of responsibility, thereby reducing his exposure to as little as 6 months, which can be served on weekends or in work release.

   The same defendant charged under Indiana State law will receive a mandatory minimum sentence of 20 years and a

maximum of 50 years. In fact, this sentence applies to any defendant convicted of the distribution of over 3 grams of cocaine. Perhaps the federal guidelines need not reach this level, but they certainly should be raised to the point that the distribution of any more than a miniscule amount of drugs will result in a significant sentence.

ORGANIZATIONAL GUIDELINES

1. The section on Civil History [Section 8D1.2] provides for a one-level increase for "similar misconduct not part of the instant offense". Similarly, Section 8C1.1 (Violation of Order or Permit) provides that "if the commission of the offense violated a judicial or administrative order . . ." the offense level should be increased by three. The Commission should make clear whether such a violation counts twice, or if one section prevails.

2. Also with respect to the Civil History section: the Commentary should specify the definition of the term "not part of the instant offense". For example, if a cease and desist order requires the defendant organization not to do a particular act which it may have done in the past, and the criminal charges result from a violation of that cease and desist order, is the conduct leading to the cease and desist order "not part of the instant offense"?

3. The language in both the Civil and Criminal History sections provides:

> If the defendant includes an organizational component that was previously within another organization and was responsible for a prior [civil adjudication/criminal conviction], such prior [civil adjudication/criminal conviction], if known by the defendant at the time it acquired or merged with the organization involved in the prior [civil adjudication/criminal conviction], shall be treated as a [civil adjudication/criminal conviction] of the defendant. [See Sections 8D1.1, 8D1.2; emphasis added.]

We are concerned about the difficulty of proving that the defendant organization actually knew of the wrongdoing by the acquired organization, and would suggest language such as "knew or should have known", indicating a "due diligence" standard on the part of the organization.

4. As a rather technical point, we would suggest that the commentary to Section 8D1.1 should not utilize the term "pierce the corporate veil" ("The court should pierce the corporate veil in applying this guideline"), as that term indicates the court should look past the corporation to the individual. What the Commission seems to have intended is that the court should look to the reality of the situation rather than stopping with the current organizational structure of the defendant. We also hope that the language of these sections and their commentary will prevent large corporations from being able to avoid liability by spinning off a string of small companies whose ownership is difficult to trace.

5. In his letter to Chairman Wilkins, Steve Saltzburg indicates:

> If the defendant merely has to pay a fine equal to the amount of his gain from the offense, he is no worse off for having committed it and may as well commit further offenses after considering his chances of being detected, prosecuted, and convicted. Furthermore, if restitution is deducted from the defendant's gain, he may be left with no minimum fine at all.

It is clear, then, that the defendant should not have the opportunity to avoid a monetary penalty by merely paying restitution. However, Section 8E1.3(a)(2) provides that:

> The court may impose a fine which is below the fine range provided in 8E1.1 if the defendant establishes that . . . imposition of the fine within the range provided would impair its ability to make restitution ordered as a result of conviction.

I believe that this language emasculates the efforts of the Guidelines to impose a serious penalty on the defendant organization rather than just permitting it to pay back what it "stole". I would suggest the Commission consider revising the language.

6. The Guidelines do not specify whether they apply to de facto associations such as drug distribution "partnerships". I would suggest that the Commission consider extending (or clarifying) the Guidelines to cover such associations in fact, particularly in light of the language in such sections as the Fine Table [see Section 8E1.1(b)(6)] which makes reference to whether or not the organization "operates primarily for a criminal purpose".

I would appreciate it if you would add these suggestions to those being forwarded to the Commission for consideration at its upcoming meeting. I would be glad to discuss them further with you and/or Commission staff, if that would be helpful.

Sincerely,

DEBORAH J. DANIELS
United States Attorney

c: Andrew Purdy

Memorandum

Subject	Date
Amendments to the Sentencing Guidelines	February 8, 1989

To

Joe B. Brown
Chairman, Sentencing Guidelines
Subcommittee

From

Robert L. Barr, Jr.
United States Attorney
Northern District of
Georgia

In response to your request that we submit any recommended changes to the guidelines, we have discovered a few areas in which there are ambiguities that could result in disparate sentencings or in sentences that greatly understate the risk to society posed by a particular defendant. We are aware that the Commission purposely left some potential questions of application unanswered in order to provide some flexibility to the sentencing court or to allow the questions to be decided by caselaw. It may be that the matters discussed below fit into that category. Nevertheless, we have encountered some problems with these matters and thought that they should be brought to the attention of the Commission.

I. Criminal History/Career Offender

Most of the problems that we have encountered, thus far, have resulted from calculation of the criminal history score and the application of the career offender category.

A. Counting of Sentences on Direct Appeal

The Guidelines do not address the question whether a conviction that is on direct appeal can be counted as a prior conviction. In the memorandum distributed by Judge Wilkins concerning the most frequently asked guidelines questions, Judge Wilkins indicates that cases on direct appeal are counted, which would certainly be the sense that one gets from reading the guidelines. In our circuit, however, cases that are on direct appeal are not considered convictions for purposes of 21 U.S.C. § 841, a drug statute that enhances the sentence if there are prior convictions. See United States v. Lippner, 676 F.2d 456 (11th Cir. 1982). Granted, § 841 specifically requires that the prior conviction be "final," whereas the guidelines do not; nevertheless, since courts in our circuit may apply similar reasoning to the guidelines, it might be helpful if the Commission would draft a specific application note to state that convictions on direct appeal are counted as prior convictions.

B. Expunged Convictions

Section 4A1.2(j) provides that expunged convictions are not counted, but may be considered under Section 4A1.3, which allows a court to depart if the calculated criminal history does not adequately represent the seriousness of the defendant's actual criminal history. What we see happening in our district, in virtually every case, is the probation officer's recommendation to the court to depart upward by counting the expunged conviction, such that when the judge honors that request, we will get an

appeal in every instance. If the court is always going to depart upward, the factor causing departure might as well be converted to a guideline, particularly since the guidelines provide no guidance as to which expunged convictions justify an upward departure.

Further, in the State of Georgia, it seems that a very large percentage of first offenders indiscriminately get first offender treatment, even for fairly serious crimes. After serving their sentence on these convictions, those offenders then have their convictions expunged.

It seems to us a better idea that expunged convictions should be treated like those convictions described in Commentary # 10, which requires a court to count convictions that have been set aside for reasons unrelated to innocence, such as to restore civil rights. Convictions that are expunged for reasons other than guilt or errors of law are really very similar to convictions that are set aside because the defendant, after a period of time has been rehabilitated and wants to have his civil rights restored. We see no reason to treat the two differently. Further, Dickerson v. New Banner Institute, 460 U.S. 103 (1983), held that federal law determines whether a state crime is a conviction for federal purposes. We think the Commission should reconsider whether to count a conviction that is expunged for reasons other than innocence or legal error.

C. Definition of "Related Cases"

§ 4A1.2 provides that prior sentences imposed in "related cases" are to be treated as one sentence for purposes of

determining the criminal history. Application Note Number 3 defines "related cases" as, among other things, cases that were consolidated for trial or sentencing. The application note recognizes that this definition might be overly broad and might underrepresent the seriousness of the defendant's criminal history. Further, the note suggests that when such underrepresentation occurs, counting merely three points for the prior conviction may be inadequate and, in that circumstance, the court should consider whether to depart.

We think that there will be many instances in which this particular definition will be overly broad and will result in criminal history scores that underrepresent the defendant's criminal past. For that reason, we recommend a narrower definition that will reduce the need for frequent departures, which departures trigger the right to an appeal by the defendant.

A recent case out of this district, now on appeal in the Eleventh Circuit, best illustrates the potential problem with the present definition of "related cases". In particular, this case demonstrates the undesirable sentence that can result from the interaction of this definition of "related cases" with the standard for career offender status and the existence of Rule 20 pleas.

In this case, the defendant had robbed two banks in Florida, one bank in Louisiana and one bank in Georgia. He plead guilty to the bank robbery in Georgia and, pursuant to Rule 20, also plead guilty to the other three bank robberies at the same time. Because these four bank robberies were all sentenced at one

proceeding, the defendant received no enhanced sentence as a result of the three additional robberies outside the district, beyond that enhancement that occurred as a result of the grouping rules.

Arguably, had defendant plead separately in each district to each of the robberies, he would have received consecutive sentences on each of the four robberies, which sentences would have been substantially greater than that sentence resulting from his single plea of guilt to these four incidents. See Section 5G1.3, which requires that a consecutive sentence be imposed when a defendant is already serving one or more expired sentences.

Our Assistant agreed to the Rule 20 from the other three districts, however, because there was a concern in the other districts that even if they had prosecuted the defendant separately for each bank robbery, their district court judges might have departed downward based on the commentary to § 5G1.3, which provides that a departure is warranted when independent prosecutions produce anomalous results that circumvent the intent of the guidelines. Specifically, the other three district courts might not have imposed any greater consecutive time than defendant would have received had all the bank robberies been sentenced at our one proceeding.

Second, since there was always the possibility that the other districts might forego prosecution after our sentencing, our Assistant felt it was better to at least get these three other bank robberies figured into our sentencing calculation so that the

defendant's sentence would be enhanced somewhat by the additional points added by the grouping rules.

In addition, this same defendant had committed four other bank robberies in New York and Florida within the last five years. Again, however, because the defendant had plead guilty, pursuant to Rule 20, to those four robberies at one proceeding, he was only given a three point enhancement for the prior robberies.

The district court judge reasoned that, but for the fortuity of the Rule 20 mechanism, this defendant would clearly have had more than two prior convictions for crimes of violence and would have been a career offender. To further aggravate the situation, this defendant, who had committed the instant four bank robberies immediately after his escape from prison, had been in prison during most of the five (5) year period in which these eight (8) bank robberies were committed. Hence, he had committed eight (8) bank robberies in just a matter of months.

For all of these reasons, the district court judge reasoned that this defendant showed a "cussed determination" to be a bank robber and he departed upward to find that the defendant had committed two prior convictions of violence and to hold that the defendant was a career offender.

Obviously, the defendant has appealed. We have attempted to defend the district court on appeal, and believe that the Eleventh Circuit would have approved an upward departure from Criminal History Category III to a Category VI, although the language of Application Note 3 specifically suggests a departure only when the defendant commits a number of offenses "separated by arrest"; the

four prior bank robberies here were not separated by arrests. We frankly do not know, however, whether the appellate court is going to adopt the lower court's creative reading of the career offender provision.

It seems to us that it would be far better to have a narrower definition of "related cases" in order to avoid the frequently necessary departures and the resulting appeals from those departures. A possible suggestion would be that in defining related cases, the Commission distinguish between those kind of prior offenses that would be grouped together, were they being sentenced under the guidelines, and those kind of prior offenses that would be counted separately under the guidelines. For example, if a defendant has plead in the past in a single proceeding to ten prior counts of drug distribution, it makes no sense to count those as ten prior convictions since, under the guidelines, the harm is assessed by the quantity of drugs actually distributed, not the number of times drugs were distributed. Hence, if separate counts of prior convictions that were sentenced on one day would have been grouped together, then it makes sense to count them as a related case and to give the defendant credit for only one conviction.

If, on the other hand, the prior offenses that were sentenced on the same date were offenses that would not be grouped together under the guidelines, such as bank robberies, then it also makes sense to refuse to consider those prior offenses as related cases for purposes of assessing a criminal history score. That is, the logic of counting each bank robbery separately under the

FROM US ATTY.ATLANTA 02/08/89 18:08 P. 5

guidelines is that each robbery, in itself, constitutes a separate harm to society. Thus, with an offense that is powered by quantity, such as drug offenses, it may not matter much how many times the defendant committed the illegal acts. In a crime such as bank robbery, however, each incidence of the violent conduct threatens society and the greater the number of times that the defendant commits such conduct, the greater is the threat that he poses in the future. This factor of enhanced dangerousness by repeated violent acts should be calculated in computing the criminal history score.

Accordingly, using the proposed definition in the above-described case, the defendant's four prior bank robberies would not be related cases because they would not be grouped under the guidelines and thus each robbery should be counted as a separate conviction. It may be that the Commission would never wish a single conviction, no matter how many counts of violent conduct are involved, to cause someone to be considered a career offender since the Commission may believe that someone must have been adjudicated guilty in court on two separate occasions -- that is, be a "two time loser" -- before he be considered to have shown a propensity for a life of crime. If that is the case, the Commission could still narrow the definition of related cases, but could also amend the definition of career offender to make clear that a defendant must have been adjudicated guilty on two separate occasions before that person is considered to be a career offender.

D. Rule 20 Pleas

As discussed above, the Rule 20 plea is not adressed precisely by the guidelines. As noted earlier, Section 5G1.3, Commentary, suggests that where prosecutors have purposely staggered indictments in order to avoid the grouping rules, the district court should depart if a substantially lower sentence would have resulted had the separate counts been joined in one indictment.

This may be a matter that the Commission purposefully left vague, since it is difficult to enumerate the circumstances in which a departure would be warranted and the circumstances in which it would be undesirable. We do feel, however, that the Commission should be aware that there is the potential for greatly disparate sentences as a result of this vagueness because some district court judges may depart downward for staggered indictments, whereas others will impose consecutive sentences on each separate indictment.

Should the Commission decide it wants to address more specifically the situation, it could draft a commentary that would explain that where offenses that could have properly been joined in one indictment have become the focus of separate, staggered indictments, then the resulting sentence should be the same sentence that would have occurred if all the offenses had been joined in one indictment. For example, if a defendant has committed five bank robberies in one district, those robberies could all have been joined in one indictment. If the prosecutor has attempted to obtain a heavier sentence by staggering the indictments, and thereby avoiding the grouping rules, to get consecutive

sentences, he would be unable to do so under the commentary.

Of course, such a rule would mean that a person who committed four bank robberies in four different districts would receive consecutive sentences on each offense, since none of these individual bank robberies out of different districts could have been joined in one indictment in one district. That result makes sense only if one believes that the bank robber in a cross-country crime spree is more deserving of punishment than the bank robber who keeps all his crimes close to home.

One result that the commentary would likely want to avoid, however, is the imposition of concurrent sentences in unrelated crimes that have been the subject of simultaneous investigations in different districts or in one district. For example, if the defendant has committed a bank robbery in Georgia during the same time period that he has done a drug deal in New York, those kinds of offenses would not be properly joined. Accordingly, a downward departure or imposition of a concurrent sentence by the second sentencing judge on the ground that, if all of these crimes had been joined together in one indictment, the grouping rules would have resulted in a substantially lower sentence, would not result in a sentence that properly represents the seriousness of the offense. In the above situation, the crimes are clearly not joinable and the defendant should receive no diminishment of his sentences merely as a result of the fact that he has been an industrious, well-rounded criminal, instead of a criminal who focuses on only one activity at a time.

II. Telephone Counts

21 U.S.C. § 843(b) provides for a felony conviction with a maximum penalty of four years' incarceration for a person who uses a telephone to further a drug offense. The guidelines assign only a level twelve to this offense, with no specific offense characteristics that would allow enhancement of the sentence based on aggravating factors, such as a conspiracy involving a large quantity of drugs. In some cases, a plea to a telephone count may be appropriate: for example, where a person in a drug conspiracy occupies a very minor role in that conspiracy, where he has cooperated substantially with the government, but where the judge before whom the defendant is appearing generally refuses to depart downward from the guidelines even when the defendant cooperates. The prosecutor may feel it appropriate to allow such a defendant to plead to a count that sets a ceiling of four years on the offense, with the theory being that the defendant's role was so minor and his cooperation so substantial that a departure down to a four year sentence in a distribution count would have been appropriate.

A level twelve, which the guideline for telephone counts provides, permits only a 10 to 16 month sentence at a criminal history category of one. Yet, while it may be that the prosecutor does not feel that the defendant deserves more than a four year sentence, the prosecutor may well feel that the defendant does deserve the entire four years allowed by statute. The guidelines, however, do not give the court any ability to enhance the sentence based on the amount of drugs involved in the conspiracy or on

other aggravating factors. We would like to see some specific offense characteristic in the telephone count that enhances the sentence based on the quantity of drugs involved, such that for a small scale conspiracy, the defendant may well get the level 12, with 10 to 16 months to serve, but in a ten kilo cocaine deal, that same defendant should get the whole four years.

III. Acceptance of Responsibility

We continue to perceive a trend whereby probation officers recommend acceptance of responsibility for everyone: both people who plead guilty and people who go to trial. The requirement seems to be merely that a defendant say "I'm sorry" at the end of the case and then he receives the acceptance or responsibility credit. We are aware of the difficulties in articulating more precisely when the credit should be given, but we feel the Commission should be aware that there is a possibility that the credit may be accorded routinely in all cases.

IV. Application of the Guidelines to Conspiracy Cases

Defense attorneys in our district are beginning to challenge the way in which our probation officers are applying the guidelines in conspiracy cases in which the conspiracy alleges multiple objects. Specifically, if the objects of the conspiracy are not equal in seriousness -- that is one might have a lesser penalty or a lesser guidelines score -- the defendants are arguing that, under the rule of lenity, the district court must assume that the

jury convicted the defendant of conspiring to commit the least serious object of the conspiracy and that it must therefore impose the guideline applicable to the least serious object of the conspiracy. Of course our position, and the position of the probation officers, has been that in determining what guideline to apply, the judge makes the appropriate determination by a preponderance of the evidence standard at sentencing and that it is not the jury's function to make findings as to specific sentencing factors. Accordingly, our argument is that if, by preponderance of the evidence, we have shown that the defendant conspired to commit the most serious object of the crime, then that is the guideline that should be applied. There is, however, some caselaw in our circuit that offers some support for the defendant's argument.

We are not sure whether this is the kind of problem that the Sentencing Commission would choose to address in the guidelines or whether it will have to be resolved through the appellate process, but we feel that the Commission should be aware that this may well become a fairly routine attack on application of the guidelines in conspiracy cases.

cc: Roger Pauley, DOJ
Andy Purdy, Sentencing Commission

U.S. Department of Justice

Washington, D.C. 20530

OCT 18 1989

The Honoroable 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,

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

Roger A. Pauley
Sentencing Coordinator
Criminal Division

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

J. WILLIAM DITTER, JR.
JUDGE

6614 UNITED STATES COURT HOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PA. 19106-1769
597-9640

November 3, 1989

The Honorable Edward R. Becker
Third Circuit Court of Appeals
19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106

3E1.1

Dear Ed:

It is my understanding that on November 6 you will be considering with members of our court guideline sentencing problems.

May I invite your attention to one I have encountered: Section 3E1.1 deals with acceptance of responsibility. Application Note 1 suggests the type of thing that may constitute an acceptance of responsibility. Application Note 2 provides that going to trial does not preclude consideration under this section and Application Note 3 states that a guilty plea may not necessarily constitute acceptance of responsibility.

If in the course of plea negotiations, a defendant admits his participation in the criminal activity for which he has been indicted but eventually pleads not guilty because a satisfactory plea agreement is not worked out, has he accepted responsibility? These negotiations would not be admissible at trial under Fed. R. Evid. 410 or Fed. R. Crim. P. 11(e)(6).

The examples given under Application Note 1 of the conduct which constitutes the acceptance of responsibility are obviously different than statements made by a defendant during plea bargaining, or at least, so it seems to me.

Should any consideration be given to another application note which would set forth the type of conduct that

would not constitute an acceptance of responsibility? For example, statements made to a probation officer preparing a pre-sentence report after conviction, statements that are inadmissible for trial purposes, statements made just before sentencing, etc., might not be considered an acceptance of responsibility.

There is another fundamental problem about this section. At the time of sentencing, a defendant is put into a difficult position. If he has been convicted and intends to appeal, can he safely "accept responsibility"? Suppose at sentencing and for the purposes of getting the two-point reduction for accepting responsibility, he admits his guilt, expresses contrition, and sets forth his intention to never err again. If he gets a new trial, will those statements be admissible against him? If they are, I see a certain amount of unconstitutional coercion. If they are not, I see a defendant getting the best of both worlds, but maybe that is how it should be.

Best regards.

Sincerely,

Bill

JWD:RMC

cc: Chief Judge Fullam

CHAMBERS OF
THOMAS C. PLATT
CHIEF JUDGE

United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N. Y. 11201

3E1.1

December 6, 1989

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

Dear Judge Wilkins:

In reply to your memorandum dated November 6, 1989, and speaking only for myself and not for the Court, I have felt from the inception of the Guidelines and feel even more strongly today that the fixed two level reduction for "acceptance of responsibility" (in most cases a plea of guilty) is inadequate for the great majority of cases. Either discretion should be given to the sentencing judge to adjust such reduction up to some additional level such as perhaps four levels or the level adjustment should be graded in fixed amounts, depending upon the severity of the crime, between one and four.

The low fixed level of two is causing more and more defendants to opt for trial, particularly in the protracted mega multi-defendant cases and this is of considerable concern to courts such as the one in which I sit. In short, there is too little incentive to plead.

I would hope that the Commission would give serious consideration to this suggestion.

Sincerely yours,

Thomas C. Platt

THOMAS C. PLATT
Chief Judge

MEMORANDUM

To: John Steer
Peter Hoffman

3E1.1

From: Julie Carnes JC

Re: Amendment #243 (Acceptance of Responsibility)

I just received this memorandum from my U. S. Attorney's Office. It concerns an appeal that the Solicitor has authorized of a case where the court gave an enhancement for obstruction of justice, while at the same time it gave a reduction for acceptance of responsibility. The defendant pled guilty and later, taking all the blame for the crime, testified for his co-defendant. The court found that the defendant, in exculpating his coconspirator, had perjured himself and hence it enhanced the sentence for the obstruction. Because, however, the defendant had pled guilty and, in his testimony, had accepted responsibility for the entire crime, the court also gave him that enhancement.

Under the guidelines as now written, the court erred. Under the amendment, however, the court could give both adjustments in "extraordinary cases".

I believe that the Commission intends "extraordinary cases" to apply to those cases where the defendant's obstruction is in the past and cannot be undone--e.g. flushing the drugs down the toilet during arrest-- but yet at the time of sentencing he has pled guilty and accepted responsibility. I do not believe that the

Commission intends this term to apply to the fact situation in the case from Atlanta. Yet, without such a qualifier, many judges will feel inclined to believe that the extraordinary case is any case where they want to give both adjustments.

Accordingly, it appears to me that it might be a good idea to explicity put in an example, like that described above, to make clear the Commission's intention.

Memorandum

Subject	Date
Adverse Decision: Misapplication of Sentencing Guidelines Regarding Upward Adjustment for Obstruction of Justice - United States v. Torres DeJesus CR88-378A	March 16, 1989

To
Ann Wallace
Appellate Section

From
Janet F. King
Assistant U.S. Attorney
Northern District of Georgia

DEADLINE FOR FILING NOTICE OF APPEAL - APRIL 10, 1989

This is a case in which the district court transparently disregarded the Sentencing Guidelines with respect to imposition of an upward adjustment for obstruction of justice while simultaneously imposing a downward adjustment for acceptance of responsibility.

Here, the Government had argued that the defendant, who was convicted after a plea of guilty for a drug trafficking offense, had obstructed justice by testifying falsely at the trial of his co-defendant. Sentencing Guidelines (SG) § 3C1.1 provides that if a defendant willfully impedes or obstructs the administration of justice, or attempts to do so, the offense level shall be increased by two levels. SG § 3E1.1 provides that if a defendant clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, the offense level shall be reduced by two levels; however, a defendant who enters a guilty plea is not entitled to sentencing reduction as a matter of right. The commentary for this adjustment provides that the adjustment "under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (See § 3C1.1), regardless of other factors."

BACKGROUND

The defendant entered a guilty plea to one count of distributing in excess of 500 grams of cocaine, approximately 1 kilogram, in violation of 21 U.S.C. § 841. (The defendant had also sold approximately 111 grams of cocaine to an undercover agent. That count and a conspiracy count were dismissed as part of the plea agreement). The Government did not recommend a reduction of offense level for acceptance of responsibility as part of the negotiated plea. Thereafter, the defendant testified as a witness for the defense at the trial of his co-defendant. The defendant

testified that he was guilty and that he was responsible for the distribution of the cocaine but that his co-defendant, Inez Martinez, was innocent. The defendant testified that Martinez did not know about the cocaine or about the reason for their trip to Atlanta. The circumstances surrounding the delivery of the cocaine and the testimony of a cooperating individual directly contradicted the defendant's testimony. The jury found Martinez guilty as charged.

ATTACK ON DISTRICT COURT'S REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY

The Probation Office, in agreement with the Government, found that the defendant had attempted to obstruct justice by testifying falsely for his co-defendant and that a downward adjustment was not warranted for acceptance of responsibility. The district court agreed that an upward adjustment for obstruction of justice was appropriate, stating that: "I tend to agree with the jury that Ms. Martinez participated in this activity knowingly or else she willfully closed her eyes to what was going on. And I think he [the defendant], I think he did attempt to bail her out in this case."

The S.G. clearly direct that upon imposition of an upward adjustment for obstruction of justice, a downward adjustment for acceptance of responsibility is not warranted---irregardless of any other factors in the case. In spite of the S.G. direction, the district court stated, ". . . but I do think he gets the acceptance of responsibility adjustment." The district court totally ignored the Guidelines and reduced the offense level by two.

The S.G. restriction on imposing a downward adjustment in these circumstances is entirely reasonable. A defendant who is caught red-handed and decides to enter a guilty plea but who falsifies his testimony in an attempt to help a co-defendant should not receive credit for acceptance of responsibility. The defendant herein did not truly show remorse nor was he honest with the court, the Probation Office or the trial jury about the circumstances of the charged offense.

The correct offense level should have been a level 28 for a guideline range of 78 to 97 months. The district court arrived at an offense level of 26 for a guideline range of 63 to 78 months and imposed a sentence of 72 months. The district court's decision effectively wiped out the upward adjustment for obstruction and thwarted the intent of the Commission to impose a harsher sentence on an individual such as the defendant.

In short, the defendant is the type of individual whom the Commission intended to receive an upward adjustment for obstruction of justice and no credit for acceptance of responsibility.

We are concerned that unless we challenge this kind of undermining of the Guidelines, our district court judges are going to engage in this kind of behavior on a wide basis, meaning that they will ignore the Guidelines and we will be back to business as usual. As previously pointed out in an Adverse Decision memorandum for United States v. Gonzalez-Lopez, CR88-315A, dated January 24, 1989, one of our district court judges and a local defense attorney were reported in a local newspaper as stating that the Guidelines can be manipulated to produce any result that a particular judge wishes. This is a good case on which to answer their dare. Even were we to lose on appeal, which I doubt, we have shown the court that we will not quietly acquiesce in its manipulation of the Guidelines. We strongly recommend an appeal.

[redacted]

John Steer
done
4 Bl. 4

UNITED STATES SENTENCING COMMISSION
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)

October 31, 1989

Dexter W. Lehtinen, Esquire
United States Attorney
Southern District of Florida
155 S. Miami Avenue
Suite 700
Miami, FL 33130-1769

Re: Guideline Sentencing for Violations of 18 U.S.C. §924(e); Armed Career Criminal Act

Dear Mr. Lehtinen:

Thank you for your letter dated October 17, 1989, concerning the Armed Career Criminal Act and the need for guidelines relating to defendants convicted under that statute.

As we have now begun the 1990 amendment process, I have set up working groups to examine various guideline areas, including violent offenses. One aspect of the working group task will be to address the problem of armed career criminals and guideline sentencing, I have forwarded a copy of your letter to all Commissioners, as well as to the members of the violent offenses working group for their consideration. You might be interested to know that in a letter dated October 17, 1989, Roger A. Pauley, Sentencing Coordinator, Criminal Division, raised similar concerns in behalf of the Department.

Again, thank you for your interest in the work of the Commission, and we welcome your suggestions at any time.

With highest personal regards and best wishes, I am,

Sincerely,

William W. Wilkins, Jr.
Chairman

U. S. Department of Justice

United States Attorney
Southern District of Florida

Refer To :
☐ *155 S. Miami Ave., Suite 700 Miami, Florida 33130-1693*
☐ *299 E. Broward Blvd., Rm. 203B Ft. Lauderdale, Florida 33301*
☐ *701 Clematis Street, Room 317 West Palm Beach, Florida 33401*

October 17, 1989

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

Re: Guidelines sentencing for violations of 18 USC 924(e); Armed Career Criminal Act.

Dear Judge Wilkins:

I am writing to call to your attention a problem within the Sentencing Guidelines as they apply to violations of the Armed Career Criminal Act, 18 U.S.C. section 924(e). This office recently co-hosted the National Career Criminal Conference held in Miami, Florida, and at this conference, many of the United States Attorneys represented also expressed the concerns raised herein.

The Armed Career Criminal Act provides that any individual who violates 18 U.S.C. section 922(g)(1) after having three prior convictions for a violent felony or serious drug offense "shall be . . . imprisoned not less than fifteen years", without possibility of probation or parole. The Act has been judicially determined to be a sentence enhancement applicable to certain individuals who have violated section 922(g)(1). Since it is not an offense separate from section 922(g)(1), there is no specific base offense level to use in computing the sentence range for a defendant subject to the enhancement.

Herein lies the problem, since the applicable base offense level for a violation of section 922(g)(1) -- 9 -- will lead to a sentence range, even with a criminal history category of VI, of only 21 to 27 months. As you can see, this sentence range is well below the minimum fifteen year sentence required by section 924(e). In such a case, the Guidelines, at section 5G1.1, specify that the minimum mandatory sentence is the guidelines sentence, effectively taking the top end off of the statute.

By specifying the minimum mandatory sentence as the guidelines sentence, the possibility of obtaining more than fifteen years (as allowed by statute) is eliminated unless the proof at trial establishes use of a weapon, allowing cross-referencing to higher base offense levels for violent crimes, or the sentencing court is willing and able to depart from the guidelines. Such a result defeats the intent of Congress in passing the Armed Career Criminal Act and could not have been the intent of the Commission.

Nor is this a problem which can be resolved by use of the "Career Offender" provision found at Section 4B1.1 of the Sentencing Guidelines. Application of the "career offender" provision requires, inter alia, that the instant conviction be for a "crime of violence" as defined by 18 U.S.C. section 16. However, because a violation of section 922(g)(1), "felon in possession of a firearm," is not a conviction for a "crime of violence", the career offender provision is not applicable.

The Congressional intent behind the Armed Career Criminal Act was to give sentencing judges a powerful tool to use against some of the most serious offenders in our society. This tool was not simply a fifteen year sentence in every case; it was fifteen years at a minimum, with sentences reaching up to life in prison without parole for the most serious offenders. Accordingly, the Sentencing Commission should provide a base offense level designed specifically for offenders satisfying the enhancement requirements of section 924(e). And this should be substantially higher than the base offense level normally applicable for violations of section 922(g)(1). Ideally, this base offense level would allow sentences in excess of the minimum fifteen years for virtually all violations of the Armed Career Criminal Act.

This office stands ready to provide you with any further information or assistance you might require in support of the position set out herein.

Sincerely,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

PERRY D. MATHIS
CHIEF PROBATION OFFICER

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March 29, 1990

Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington DC 20004

Dear Sir:

The following comments will reflect the ideas of U.S. Probation Officer John J. Cahill and U.S. Probation Officer William H. Martin from the District of Kansas. The comments made by the two writers will undoubtedly reflect a philosophy developed from their positions as presentence writers.

Page 6, No. 4(a), Real Offense vs. Charge Offense Sentencing. The writers believe that a serious problem exists in that U.S. Attorneys are able to dismiss numerous counts of an Indictment in exchange for a plea of guilty to one count of the Indictment, and the presentence writers are thus left to determine all of the relevant conduct which usually results in a significantly higher offense level than had the presentence writer merely determined an offense level based upon the count of conviction. The fact that the U.S. Attorney can reduce the actual elements of the real offense to a charge offense puts the Probation Officer in the position of being an investigative agent, jury, and ultimately judge of the defendant's actual conduct.

Page 8, No. 4(b), Departures. The writers believe that the Sentencing Commission should enlarge the number of reasons for a Court to depart from the guidelines. Several factors that were considered important in pre-Guideline presentence reports (age, lack of any criminal record, and the defendant's attitude and motive for the offense) are subjected to parameters in the Guidelines that are inflexible and oftentimes incapable of truly reflecting the subtleties of each offense. The writers also believe that re-writing the Guidelines will create numerous problems unforeseen at this time in the presentence writers applying Guidelines which have been amended. We ask for clear and complete instructions on the specific implementation of the amendments. The overall effect of these continuing amendments will result in defendants receiving longer or shorter sentences based merely on the date of the commission of the offense. The writers would recommend that the Sentencing Commission allow itself greater time to study all of the problems surrounding the Guidelines and attempt to resolve these problems at one time rather than constantly amending and updating the Guidelines. The writers wish to note that changes are certainly neces-

sary but often confusing and difficult for defense counsels, U.S. Attorneys, and presentence writers at the implementation stage.

Page 9, No. 4(c), Plea Agreements. Paragraph 3 of this section reflects that the Guidelines are expected to create a clear, definite expectation in respect to the sentence that a Court will impose if a trial takes place and that a prosecutor and defense attorney should seek to agree about a likely sentence or range of sentences and no longer will be working in the dark. The writers feel that, three years after implementation of the Guidelines, the U.S. Attorneys and defense attorneys continue to enter into plea agreements which are meaningless in light of the offense conduct and appropriate Guideline calculations. The writers feel that this problem is escalating and we are often put in a position where we must, based upon the facts of the offense, which are known to both attorneys, determine a guideline range that is significantly higher than that reflected in the plea agreement.

Page 11, No. 4(g), Sentencing Ranges. The presentence writers feel that the sentencing ranges pertaining to first-time offenders with no prior record require much lengthier sentences than those imposed prior to the Guidelines. Based upon the experience of the writers, the average sentences imposed under the Guidelines are not reflective of the average sentence imposed prior to implementation of the Guidelines. The writers note that two-level enhancements at the upper range of the Sentencing Table often punish a defendant more for behavior as an offense characteristic than if the defendant had been convicted of a separate crime, based upon the same behavior.

Page 74, Chapter Seven, No. 69. The writers feel that Option 2 would require probation officers to complete an entirely new presentence investigation based upon investigative materials and prosecutorial judgments made in city, county and state courts. The probation officer would be put in an untenable position with respect to making judgments that could be wholly inappropriate. For instance, an individual could be convicted of possession of 20 grams of cocaine base in a state court and receive a sentence of 1 - 5 years imprisonment. After proper investigation, and determining the relevant conduct pertaining to that offense, the probation officer could be put in a position of determining that there was actually over 500 grams of cocaine base that could be directly attributed to the defendant, and a combination of specific offense characteristics and other adjustments might result in the probation officer interpreting the guidelines to reflect that a defendant should be sentenced to life imprisonment. While the writers are aware that the Court would probably be restricted by the statutory maximum of the original sentence, there is nothing in No. 69 that would so indicate. In any event, the writers feel that Option 2 is wholly unworkable and would most often result in a defendant being sentenced at the statutory maximum authorized by his original offense. The writers strongly feel that the current procedure pertaining to violations of probation and supervised release allowing the Court to

impose any sentence authorized by statute is markedly superior to the proposed amendment.

Respectfully submitted,

John J. Cahill
U.S. Probation Officer

William H. Martin
U.S. Probation Officer

JJC/WHM/dms

CHARLIE E. VARNON
CHIEF U. S. PROBATION OFFICER

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REPLY TO Fresno

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March 20, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, DC 20004

attention: Communications Director

RE: **COMMENT ON PROPOSED AMENDMENTS**
WAB:sj

Dear Sir/Madam:

After reviewing the proposed amendments, I agree with the direction the Commission is taking and I appreciate the clarifying language. As a practitioner who deals with the guidelines on a daily basis, I wish I had time to comment on each of the many changes. Instead, I intend to comment on the three or four issues which seem most significant.

Guideline 2B3.1

The need to include unconvicted robberies in the guideline range is overdue considering the current state of plea bargaining. However, why limit the consideration of the defendant's real criminal conduct in this fashion to robberies only? Why not burglaries and many other non-fungible offenses where the defendant is being allowed to plead guilty to only one or two of several counts? Further, I don't think you will be able to define a common scheme or plan or same course of conduct in such a way as to avoid interminable arguments.

I suggest you either modify Guideline 1B1.4 or create a new policy statement to establish a presumption the court should depart in such cases. I realize the guidelines already allow for such departures but the district and appellate courts seem reluctant to consider conduct outside the count of conviction where the harms are non-fungible.

Guideline 2D1.4

In California at least, we have numerous cases involving the manufacture or attempted manufacture of illegal drugs. Where there is no specific quantity on which to base the offense level, we spend countless hours debating with all parties the defendant's intent. In case after case, the defendant has enough of one chemical to manufacture 50 pounds but only enough of another chemical to manufacture 10 pounds. We need a

guideline for cases involving the manufacture of illegal drugs where no specific quantity has been seized or cannot easily be determined. In my view, a new guideline to deal with this problem is the single most important amendment you could propose to alleviate problems in the field.

I also believe the two-level enhancement for possession of a firearm during the commission of an offense is both unclear and too limited. This specific offense characteristic does not define what constitutes possession or what constitutes "during." There should be an additional enhancement if the defendant or his co-conspirators possess multiple weapons, particularly of the automatic type. I believe the mere presence of a weapon during the course of a drug offense is a serious matter.

Guideline 3E1.1

I do not agree with the suggestion that the two-level reduction not be available unless the defendant accepts responsibility before adjudication of guilt. Some defendants forthrightly acknowledge their responsibility after adjudication of guilt. They go to trial in some instances on the advice of their attorney for reasons not related to their willingness to admit guilt or not. However, I would like to see greater flexibility in the offense level reduction possible under this guideline. At the present time, to obtain the reduction the defendant must clearly accept personal responsibility. By itself, a guilty plea is not sufficient. The guideline is essentially black and white with really no room for shading. As a practical matter, many defendants plead guilty and are willing to discuss the matter with the court or probation officer but do not do so because of their attorney's advice. Other defendants accept partial responsibility, for example for the counts of conviction, but not for other aspects of their criminal conduct. Some defendants submit letters accepting personal responsibility but do not discuss their criminal behavior verbally. I suggest the Commission consider a reduction of between one and three levels depending on the nature of the acceptance of responsibility. A defendant who pleads guilty but refuses to discuss the offense on advice of counsel might receive a one-level reduction. A defendant who accepts full personal responsibility verbally but who can't remember where the fruits of the crime disappeared might receive a two-level reduction. A defendant who accepts full responsibility verbally and who assists in the recovery of the fruits of the crime or who assists in some way in making the victim whole might receive a three-level reduction.

Guideline for Drunk Driving

We have several felony drunk driving cases pending in our district at this time. This is such a common offense and a matter of such national interest that I believe it justifies a separate guideline.

Guideline 5E1.2

Based on my own observation and discussions with others, the guideline range for fines seems somewhat unrealistic for most of our clients. According to the fine table, for an offense level as low as eight, the

miminum fine is $1,000. When one includes the costs of supervision, confinement or incarceration, the minimum is substantially higher. While I realize we can recommend only a portion of these fines according to ability to pay, I think officers frequently recommend no fine at all rather than justify why they are not recommending according to the fine table. For many of our clients, a fine of a few hundred dollars is substantial punishment. While I am not in a position to suggest what appropriate fines might be, I do suggest you lower the minimum amounts, narrow the ranges throughout, and clarify the relationship between a fine from the fine table with a fine imposed as costs of supervision or confinement.

Thank you for your consideration of these suggestions. I think you are doing a great job and the guidelines are achieving their intended purpose. Of the suggestions made, far and away the most important is our need to more easily determine the base offense level for drug laboratories when no actual quantity is known.

Sincerely,

William A Barrett

WILLIAM A. BARRETT
Deputy Chief U.S. Probation Officer

WAB:sj

JRS

done

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)

September 29, 1989

MEMORANDUM

TO: Chairman Wilkins

FROM: John Steer

RE: Whether being a fugitive from an active probation violation warrant constitutes a criminal justice sentence under §4A1.1(d)

I have reviewed the letter and attachments from Judge Conlon regarding the above issue and have discussed the matter with Peter Hoffman. We believe that Judge Conlon correctly determined that the defendant should receive criminal history points under §4A1.1(d) because he was subject to an active warrant for an alleged probation violation and, therefore, properly should have been considered under a criminal justice sentence within the meaning of the guideline.

Whether or not the issuance of the warrant acted to toll the running of the term of probation is not determinative of whether the defendant would be considered to be "under any criminal justice sentence" for purposes of computing the defendant's criminal history guideline score. The Guidelines' treatment of a defendant in escape status is somewhat analogous. Under the express terms of §4A1.1(d),[1] a defendant in

[1] Guideline §4A1.1(d) provides that 2 points are added to the criminal history score "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status" (emphasis added). Although an argument could be made that the failure to list being a fugitive from a probation violation warrant precludes its consideration under the rule of construction inclusio unius est exclusio alterius, I believe the better view is that this rule is inapplicable to the federal sentencing guidelines. Rather, the court should look to the purpose of the guideline and include other similar forms of criminal justice control where similar sentencing considerations apply.

escape status is considered to be under a criminal justice sentence (regardless of whether the term of confinement otherwise would have expired had the defendant not escaped). In both cases, the commission of an offense at a time when the defendant was subject to some form of criminal justice control is a factor that is relevant to assessing criminal history seriousness and the appropriate length of the guideline sentence for the instant offense.

Although we believe that Judge Conlon's interpretation is correct, we also agree that a clarifying amendment may be needed. Accordingly, we have noted her suggestion for consideration by the Commission in the next round of amendments.

Attachments

UNITED STATES SENTENCING COMMISSION
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SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

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Ronald L. Gainer (ex officio)

September 29, 1989

The Honorable Suzanne B. Conlon
United States District Judge
219 S. Dearborn Street
Chicago, IL 60604

Dear Suzanne:

Attached for your review is a copy of John Steer's memorandum to me concerning whether criminal history points should be assessed for a defendant subject to an active probation violation warrant.

I appreciate your bringing this matter to the attention of the Commission and have asked John to work with Peter Hoffman in drafting an appropriate amendment for Commission consideration and possible submission to Congress next year.

With highest personal regards, I am,

Sincerely,

Billy

William W. Wilkins, Jr.
Chairman

Enclosure

United States Court of Appeals
For The Fourth Circuit
Post Office Box 10857
Greenville, South Carolina 29603

William W. Wilkins, Jr.
United States Circuit Judge

September 22, 1989

The Honorable Suzanne B. Conlon
United States District Judge
219 South Dearborn Street
Chicago, Illinois 60604

Dear Suzanne:

Your letter and accompanying documents regarding the Criminal History guidelines have been forwarded to John Steer. I will talk with him when I am in the Commission office next week and we will address this problem and send you a reply. I appreciate your bringing this to our attention.

Thank you for your continued interest and support.

With highest personal regards, I am

Sincerely,

Billy

William W. Wilkins, Jr.

WWWjr:be

cc: Mr. John Steer

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Suzanne B. Conlon
Judge

RECEIVED
SEP 21 1989
WILLIAM W. WILKINS, JR.
U. S. CIRCUIT JUDGE

September 18, 1989

Honorable William W. Wilkins, Jr.
P. O. Box 10857
Greenville, S.C. 29603

Dear Billy:

Thank you for the Commission's 1988 annual report. I found it most interesting.

Enclosed is a problem I encountered in the Criminal History guidelines. It seemed to me that an enhancement was appropriate under § 4A1.1 for a defendant who is a fugitive from a probation violation warrant.

Hope all is well with you.

Sincerely,

Suzanne B. Conlon

SBC:mkw
Enclosure

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	Suzanne B. Conlon	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	89 CR 538-2	Date	September 12, 1989
Case Title	United States v. Keith Husband		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Defendant's Objections to the Presentence Investigation Report

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☐ [Other docket entry:]

Defendant's objections to the presentence report categorizing his criminal history as IV are overruled. The court finds that § 4A1.1(d) of the sentencing guidelines is applicable to a fugitive with an outstanding arrest warrant for failing to appear at a probation revocation hearing. Alternatively, the court finds that if § 4A1.1(d) does not apply to this situation, the Sentencing Commission did not adequately take these circumstances into consideration in formulating § 4A1.1(d). See 18 U.S.C. § 3553(b). Departure from a criminal history category III to category IV would therefore be appropriate.

Suzanne B. Conlon

(3) ☐ Filed motion of [use listing in "MOTION" box above].

(4) ☐ Brief in support of motion due _____.

(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____.

(6) ☐ Hearing ☐ Ruling on _____ set for _____ at _____.

(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____.

(9) ☐ Trial ☐ set for ☐ reset for _____ at _____.

(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____.

(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(12) ☐ (For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

	No notices required.			number of notices
	Notices mailed by judge's staff.			date docketed
	Notified counsel by telephone.			docketing dpty. initials
X	Docketing to mail notices.			date mld. notices
	Mail AO 450 form.			mailing dpty. initials
	Copy to judge/magistrate.			
	courtroom deputy's initials	mkw	Date/time received in central Clerk's Office	

Document #

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
SEP 11 1989
SUZANNE B. CONLON, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 89 CR 538
	)	Judge Suzanne B. Conlon
KEITH HUSBAND, et. al.	)	
	)	

DEFENDANT KEITH HUSBAND'S OBJECTION
TO THE PRESENTENCE INVESTIGATION REPORT

Defendant KEITH HUSBAND, by the Federal Defender Program and its attorney, JOHN F. MURPHY, makes the following specific objection to the Presentence Investigation Report (PSI) prepared by United States Probation Officer Donald Schoen:

Criminal History Category

Defendant Husband's total criminal history points were increased in the PSI two points pursuant to Federal Sentencing Guideline §4A1.1(d) for committing the instant offense while on probation. This upward adjustment resulted in a conclusion by the probation officer that Mr. Husband's criminal history category was IV, rather than III, which counsel for the government and the defendant proposed in the plea agreement. Mr. Husband specifically objects to the application of §4A1.1(d) here.

Mr. Schoen bases the applicability here of §4A1.1(d) on the presence of an outstanding arrest warrant issued by the United States District Court in Springfield, Massachusetts on October 7, 1977. This warrant apparently issued following Mr. Husband's failure to appear at a Rule To Show Cause why Mr. Husband's

probation should not be revoked. The defendant had been placed on a two-year probation term on June 9, 1977. The probation officer concluded that "the warrant is active and the case is pending. Thus, the defendant was still serving this sentence at the time he was arrested for the instant offense, pursuant to §4A1.1(d)". PSI at 6.

Apparently, the probation officer believes that the timely issuance of a warrant for a probationer acts to extend the term of probation indefinitely. Thus, any crimes committed subsequent to the issuance of the warrant, and prior to its execution, would constitute violations irrespective of the original probation term. Yet, the law in effect at the time the warrant was issued held only that the warrant allowed the court to retain jurisdiction of the case after the probation term ran.

> ...At any time within the probation period, or within the maximum probation period permitted by Section 3651 of the title, the Court for the district in which the probationer is being supervised...may issue a warrant for his arrest for violation of probation occurring during the probation period. Law of June 9, 1977, 18 U.S.C. §3653 (repealed Nov. 1. 1987)(emphasis added).

Not surprisingly, federal case law has interpreted this plain language as allowing sentencing courts to revoke probation subsequent to the probation term so long as the violation occurred within that term. See, United States v. O'Quinn, 689 F.2d 1359 (11th Cir. 1982); United States v. Swanson, 454 F.2d 1263 (7th Cir. 1972).

The instant offense occurred more than a decade after the probation warrant was issued, and more than eight years after the