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

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

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

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

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

Felons In Possession of Firearms

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

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

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

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

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

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

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

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

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

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

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

Unregistered Weapons Under The National Firearms Act (NFA)

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

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

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

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

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

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

Receipt of Explosives by Felons

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

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

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

Sincerely yours,

Daniel M. Hartnett
Associate Director
(Law Enforcement)

Attachments

Attachment A

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

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

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

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

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

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

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

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

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

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

- how long the defendant had been released from prison before committing the current firearms offense

- the circumstances of the current offense

- whether other State or Federal offenses were committed during the current firearms offense

- whether the current offense involved the use of a firearm or the attempted discharge or the discharge of a firearm

- whether violence was involved in the current offense

- the degree of danger that the defendant posed to society, i.e., the defendant's dangerousness

- the possibility of rehabilitation of the defendant

- deterrence of the defendant

- general deterrence

- incapacitation or prevention of additional crimes by the defendant.

Attachment B

A criminal lack of common sense

BY JOHN LEO

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

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

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

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

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

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

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

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

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

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

In his brief to the court, Burns noted dryly that "a public perception has arisen, in California in particular, that the stewards of our criminal-justice system have failed to come to grips in a realistic and common-sense manner with the mounting crime wave." This is lawyerly understatement. What he might have said is that the state of California botched the Bland case for three decades and is implicated by its incompetence in the savage murder of little Phoebe Ho. It has known for 29 years that Bland is a violent sexual psychopath, yet it let him go five times.

This casual approach did not end with Bland's latest arrest in Pacific Beach. Nearly three years after Ho's death, the Riverside County prosecutor still has not managed to hold even a preliminary hearing in the case. If it continues at its current pace, the case could easily drag on for another three to five years.

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

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

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

Attachment C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attachment D

Courts have consistently held that a defendant may receive a consecutive sentence for possessing an unregistered NFA weapon and for being a felon in receipt or possession of the same weapon. United States v. Gann, 807 F.2d 134 (8th Cir. 1986); United States v. Gann, 732 F.2d 714 (9th Cir. 1984); United States v. Ching, 682 F.2d 799 (9th Cir. 1982); United States v. Wright, 581 F.2d 704 (8th Cir. 1978). In the Wright case, the defendant received a 10-year sentence for possessing an unregistered sawed-off shotgun and a 5-year sentence for being a felon in receipt of the same shotgun. The sentences ran consecutively. It does not appear that Wright used the shotgun in any crime. The shotgun was found when a car being driven by Wright was stopped by local police officers investigating an armed robbery.

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

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

[redacted]

DOJ / TREASUREY
RESPONSE

United States Department of Justice

DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON 20530

APR 14 1989

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

Dear Billy:

Enclosed are comments of the Department of Justice regarding proposed amendments of the sentencing guidelines. These comments are in addition to those we provided by way of written and oral statements to the Commission for purposes of the public hearing held April 7, 1989.

The comments generally address only those proposed amendments that are troubling to us. The package of comments includes many prepared by the Criminal Division, as well as some prepared by the Antitrust, Civil Rights, Land and Natural Resources, and Tax Divisions. In addition, the comments include a number submitted to me by United States Attorney Joe B. Brown for the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee. Although some of the enclosed comments indicate specific views of one of the Divisions or the Subcommittee, I have endorsed them for submission to the Commission, and they should be taken as Department views.

I look forward to Tuesday's meeting.

Sincerely,

Stephen A. Saltzburg
Deputy Assistant Attorney General

Enclosures

AMENDMENT 3

Amendment 3 would set up an intermediate stage between serious bodily harm and bodily harm. We support this amendment since it would provide a specific guideline for the intermediate level and avoid requiring a departure. All departures are an open invitation to appeal.

AMENDMENT 10

Amendment 10 proposes that stipulations of additional offenses be treated as counts of conviction, and that a conspiracy conviction be counted as a conviction of each object of the conspiracy. The reason for the amendment is that some defendants are arguing under the rule of lenity that where a conspiracy alleges several objects, a guilty verdict is counted as being a conviction of the least object of the conspiracy. The District of Arizona uses a special verdict form to allow the jury to communicate which objects it is finding the defendant guilty of, but most districts do not use such special verdicts. It is felt that the procedure often gives a jury another opportunity to err. On the other hand, some attendees felt uncomfortable allowing the judge to serve as factfinder after a verdict. The committee consensus was that the Amendment is acceptable, but that the commentary raises more questions than it settles. The commentary portion in the third paragraph of page 9 which reads,

> "a guideline requiring courts to treat a multiple-objective conspiracy conviction as though the defendant had been convicted of separate conspiracies to commit each objective is unreasonable. In such cases" should be omitted.

Amendment 12. Guideline §1B1.3. Relevant Conduct

Amendment 12 proposes a significant change to the relevant conduct guideline, §1B1.3, regarding conspiracies and offenses involving actions undertaken by more than one person. The proposed change would be made through amendment of an application note. Currently, the note states that the relevant conduct standard for conspiracy convictions includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. Under the amendment the same rules would apply to any offense "undertaken in concert with others, whether or not charged as a conspiracy."

The proposed standard is first set out as conduct of others in furtherance of the execution of the offense that was reasonably foreseeable by the defendant. However, the proposal further defines the new standard through an example relating to an off-loader of one drug shipment in a conspiracy masterminded by others, who also import drugs in several other shipments. The proposal states that the off-loader is not responsible for the other shipments "in which he played no part and from which he was to receive no benefit because those acts were not in furtherance of the execution of the offense that [the defendant] undertook with [the others]."

We point out first that the proposal is unclear. The first standard relates to reasonably foreseeable conduct in furtherance of the execution of "the offense." It is not clear to which offense this refers. For purposes of the example, it appears that "the offense" means the portion of the overall conspiracy in which the defendant was directly involved, as measured by the actions in which he played a part or received a benefit. However, the statement of the rule in the beginning of the discussion does not state this in general terms, and it is not obvious how the example applies to other fact settings or what reasonably foreseeable conduct of others is attributable to the defendant. For example, if two persons conspire to rob three separate banks but one of the conspirators is actually involved in only one of the robberies and receives no benefit from the others, what is the scope of his responsibility for the foreseeable actions of the other conspirator? Is he responsible only for the foreseeable actions of the other conspirator in the one robbery in which the former participates, as in the off-loading example, or is that example inapplicable because this offender actually conspired as to the entire scope of the three robberies? We can expect considerable litigation on these points if the proposed language is adopted.

More importantly, however, we have reservations about a narrowed relevant conduct standard potentially applicable to all joint offenders. We agree with the view that not all joint offenders should be punished alike and that their sentences need not always reflect the full scope of the conspiracy or joint

offense. However, we are wary about applying any reduced standard across-the-board because of a possible adverse impact on sentencing high-level conspirators. In this regard our concerns are similar to those expressed by the Antitrust Division in the attached discussion of this amendment. We believe that a narrowed relevant conduct standard should apply only to low-level participants in a joint offense. We agree, however, with the like treatment of conspiracies and other joint offenses, which the amendment proposes.

Our concerns can be illustrated by the following. In a large drug conspiracy the proposal may call into question the conduct considered relevant vis-a-vis the "lieutenants" one or two levels below the kingpin. While the narrowed language may not affect the very highest-level conspirator, who benefits from all of the actions of others, the next lower level or two -- who should also be accountable for the entire scope of the conspiracy foreseeable to them -- may unjustly benefit from the narrowed rule. For example, a drug kingpin may designate one person to carry out wholesale distributions in New York, another in Philadelphia, and a third in Washington, D.C., with each playing no part in and receiving no benefit from the others' conduct. However, all know about the full scope of the conspiracy. Under the proposed language the three "lieutenants" may successfully argue that they should be held accountable only for the distributions in their designated cities because the offenses they undertook with the kingpin were limited to their assigned territories.

We propose applying a narrower relevant conduct standard only to a joint offender or conspirator who qualifies as a "minimal participant" under §3B1.2. Such a participant's involvement would be reduced by the greater of 4 levels (as now provided) or the number of levels necessary to reach an offense level commensurate with such a participant's actual involvement in the conspiracy or other joint undertaking. The measurement of actual involvement would be determined on the basis of the quantity of drugs, the amount of loss involved in a fraud or theft, or some other quantifiable measure of the type used to group offenses under §3D1.2(d). This proposal would fairly address the concern that not all participants in a joint offense should be punished based on the full extent of the conduct by others and that the current guideline on mitigating role does not reflect an adequate reduction in some cases. However, tampering with the current relevant conduct standard as it may affect high-level conspirators or co-defendants is a move we urge the Commission not to make at present.

Amendment 12. Guideline §1B1.3. Relevant Conduct

The Commission proposes to expand Application Note 1 of the Commentary to §1B1.3 in an effort to clarify what conduct is relevant to sentencing a defendant whose offense was undertaken in concert with others, whether or not the offense is charged as a conspiracy. Because nearly all of the Antitrust Division's prosecutions involve conspiracies, it is of central importance for us to have a clear understanding of the scope of relevant conspiracy conduct for sentencing purposes under the Guidelines.

The Commission's proposed amendment states that relevant conspiracy conduct "includes conduct of others in furtherance of the execution of the offense that was reasonably forseeable by the defendant." This new language does not differ markedly from the comparable language in the existing Commentary, but one of the new examples indicates that it is intended to be interpreted in a somewhat more restrictive manner--that a defendant also must have taken some part in or received some benefit from the actions of his co-conspirators in order for their conduct to be relevant in his sentencing. With respect to its hypothetical marihuana importation conspiracy, the Commission states that Defendant C, who has been hired to off-load a single shipment of marihuana by big-time drug dealers A and B, should only be liable for off-loading the single shipment of marihuana because "he played no part" and "was to receive no benefit" from prior or subsequent shipments and "because those acts were not in furtherance of the execution of the offense that he undertook with Defendants A and B." This example fails to establish the relationship between "furtherance of the offense/reasonable forseeability" and "took no part/received no benefit." Does Defendant C's limited liability turn on his being unaware that A and B were involved in a much larger conspiracy of which C's shipment was a part, or is it his lack of hands-on participation in or benefit from other shipments, or is it both? Whatever the explanation, there is nothing in the newly enunciated relevant conduct standard to support the played-no-part/received-no-benefit gloss in the marihuana example.

It appears that the Commission has primarily drug-dealing conspiracies in mind here, and that the purpose of this amendment is to provide in the Guidelines (rather than as departures) for sentencing low-level, small-volume carriers--even those who have some awareness of a broad scheme--to terms that are considerably less than would be required by the volume associated with a huge conspiracy. However, its approach will affect sentencing in all conspiracy cases, and not necessarily for the better. This issue will come

up all the time in antitrust prosecutions. The relevant "volume of commerce" directly drives the Chapter 2 antitrust guideline. Section 2R1.1 states that "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." Suppose, for example, that Company A is involved in a single, overall unlawful conspiracy to rig bids for a commodity purchased by county governments throughout a particular state. Individual defendant X is responsible for A's government sales in the eastern half of the state and is directly involved in rigging those bids with the representatives of other firms. Individual defendant Y is responsible for A's government sales in the western half of the state and is direclty involved in rigging bids there. X knows (or has reason to believe) that bid rigging is occurring throughout the state and that Y is rigging bids for Company A too, but X and Y never communicate between themselves and X never has anything to do with bids made in the western half of the state, nor does he directly benefit from this activity. Under §2R1.1 and §1B1.3, is X responsible for Company A's volume of commerce of bids rigged in the eastern half of the state only, or statewide?

The Antitrust Division has taken the position that X is responsible for A's entire volume of commerce statewide because that is the volume of commerce "done by his principal" (see §2R1.1) that was affected by the violation and because the bids in Y's half of the state were in furtherance of the conspiracy (see §1B1.3) for which X was convicted and were at least reasonably forseeable by him. We have had different reactions to our interpretation of X's relevant volume of commerce from different courts and probation offices.

The Antitrust Division believes that the "conduct in furtherance/reasonably forseeable" standard currently set out in the Commentary to §1B1.3 in general is an appropriate standard for determining relevant conduct for sentencing purposes, one that is consistent with existing conspiracy law and relatively easy to apply. If, in the example given by the Commission, Defendant C is unaware of the scope of the criminal conspiracy that he has become involved with in off-loading the single shipment of marihuana, the Guidelines as they currently exist would not hold him responsible for all other shipments. However, if C was fully aware of the scope of the enterprise that he was joining, he should be held responsible, at least to some extent, for the conduct of other members of the conspiracy as well. Under the Guidelines, C would receive a 4 level decrease in his offense level under §3B1.2(a) as a minimal participant in the offense and could be sentenced at the bottom

of the guideline range, and a court could conceivably grant C a downward departure as well.

Adding a "played no part/received no benefit" gloss to the concept of "conduct in furtherance of the offense" could lead to significant litigation in many conspiracy prosecutions as defendants attempt to convince a court that they were too remotely connected to specific conduct to be sentenced for it. This certainly would be the case in Antitrust Division prosecutions. We are concerned that this gloss may be inconsistent with the Commission's careful setting of base offense level and specific offense charateristic adjustments in §2R1.1, and could undercut antitrust deterrence.

Amendments 32 and 33. Guideline §2B1.1. Larceny, Embezzlement, and Other Forms of Theft

Amendments 32 and 33 propose revision of the table applicable to the enhancement based on the amount of loss involved in a theft. While both are improvement over the table in the current guideline, we prefer amendment 33. Amendment 33 provides for an increase in the offense level at a faster rate than amendment 32 standing alone. However, we believe that even amendment 33 should be improved. Enhancements should be provided past level 16 for losses greater than $5,000,000.

Amendments 39 and 40. §2B2.1. Burglary of a Residence

Amendments 39 and 40 revise the loss table applicable to burglary, §2B2.1. Amendment 39 eliminates minor gaps in the current table but does not actually revise the current offense levels. Amendment 40 increases the offense levels applicable to burglaries resulting in losses of more than $800,000. Amendment 40 is preferable to amendment 39 in increasing offense levels at a slightly faster rate for large-scale burglaries.

Amendments 47 and 48. §2B3.1. Robbery

These amendments revise the loss table applicable to the robbery guideline. For the reasons set forth in our comments comparing amendments 39 and 40, we prefer amendment 48 to 47.

AMENDMENT 50

Amendment 50 deals with bank robbery. Bank robbery is an issue that has generated a number of comments to members of the Subcommittee. Our belief that the Guidelines a currently written are too low is borne out by the January 12 report to the Commission Research and Development Program by Mr. Baer, Chairman of the United States Parole Commission. From that study, the Parole Commission concluded that 57% of the robbery cases currently under the Guidelines would end up serving less time than they would have under the old parole guideline rangel. Of the 21 cases making up this study, it appeared that one received a more severe sentence than he would have under the old parole guidelines, 7 received the same sentence and 13 received a lesser sentence. The Subcommittee's recommendation is that the basic offense level for robbery under Guideline 2B3.1 be raised substantially from the basic offense level of 18. Two levels would be the minimum.

The Commission has solicited comments on whether additional robberies not covered by the count of conviction should be used to enhance punishment. We believe that they should be and recommend the adoption of option 2 which would provide for increased punishment based on the number of robberies the defendant is found to have committed.

We also believe that there needs to be a very substantial increase in the specific offense characteristics where a firearm or explosive device is involved. Congress has clearly indicated that it feels the use of a firearm in carrying out a serious felony such as robbery warrants a mandatory five-year consecutive sentence. We believe that this specific offense characteristic for robbery carried out with a firearm or explosive device should reflect this Congressional mandate. This could be accomplished by providing, in § 2B3.1(b)(2), that if a firearm or explosive device is discharged the increase shall be 10 levels, if the firearm or explosive device is used, 9 levels, and if the firearm or explosive device is brandished, displayed or possessed, 8 levels. An 8 level increase would be very close to the five-year consecutive minimum mandatory that Congress has provided.

Of course, in those cases where an 18 U.S.C. § 924(c) violation is also charged, the enhancement under this specific offense characteristic would not normally be applied.; However, the application of such a specific guideline would allow the Court to impose the justifiable increase for an armed bank robbery even though § 924(c) was not specifically charged. We believe it would also bring the robbery guidelines more into keeping with existing practices and sentences and adequately punish robbery offenses where a firearm or explosive device is used.

We would also strongly recommend that a specific offense characteristic be put into the Guidelines for those individuals who use a fake or simulated firearm or explosive device. The fear engendered by victims is the same whether the firearm or explosive device is real or fake. In many cases, what appears to be a real firearm or explosive device will be displayed but it may be difficult to establish, even by a preponderance of the evidence, that what was displayed was in fact real. The defendant will normally, of course, claim that it was not real where he is not caught in actual possession of the weapon., A 2 level increase for use of a simulated or fake firearm or explosive device would be entirely appropriate. This would recognize the fear caused to the victims and would also recognize that there is an increased risk in general when even a fake is possessed or displayed. With these additional adjustments, we would also recommend that the cumulative adjustment from Subsections (2) and (3) not be limited but in fact be given full force and effect.

Amendment 66. Guideline §2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Amendment 66 amends the bribery guideline to address the fact that there is currently no enhancement for repeated instances of bribery that do not result in conviction. It also proposes an amendment of the multiple count rules to include the bribery and gratuity guidelines among those subject to grouping under §3D1.2(d) based on aggregate harm. We agree that the bribery and gratuity guidelines should be enhanced for multiple instances that do not result in conviction. However, we disagree with reaching this result by treating unrelated bribery and gratuity offenses according to the aggregate harm approach applicable to fraud.

We note that the first part of the proposal is simply to provide a two-level enhancement if the offense involved more than one bribe or gratuity. This approach is an improvement over the current guideline. However, it does not distinguish between one additional bribery offense and more than one. We favor the approach contained in Option 2 of Amendment 50, pertaining to robbery. There, additional robberies that are part of the same course of conduct or common scheme or plan as the offense of conviction would result in increases of two to five offense levels, depending upon the number of robberies involved. The same type of enhancement could apply to offenses involving bribes and gratuities.

The last part of Amendment 66 amends the multiple count rules to include bribery and gratuity offenses among those subject to grouping based on aggregate harm. First, we note that double counting may result regarding additional bribery or gratuity offenses not resulting in a count of conviction if both the type of enhancement noted above and the amendment of the multiple count rules as proposed were to apply. The bribery and gratuity guidelines themselves would provide an enhancement for additional bribes or gratuities. In addition, the broad, relevant conduct rules applicable to offenses subject to grouping under the aggregate harm theory of §3D1.2(d) would count the uncharged bribes or gratuities if they were part of the same course of conduct or common scheme or plan.

More importantly, we oppose the notion of grouping separate counts of conviction for bribery and gratuity offenses according to the aggregate harm theory of §3D1.2(d). As is true for robbery, the amount of money involved in a bribe or gratuity is generally fortuitous. In our view two unrelated bribes reflected in separate counts of conviction should result in a higher offense level than a single bribe involving an amount equal to the total of the two unrelated bribes. An offender who commits several unrelated bribes is more culpable than one who bribes an official who happens to have a high price. However, the

amendment of the multiple count rules as proposed would provide the same sentence for both offenders.

AMENDMENT 66

Amendment 66 deals with public corruption and Hobbs cases. Another area of considerable concern to the Subcommittee are those violations involving the Hobbs Act, particularly offenses committed under the color of official right. The current Guideline 2C1.1 sets a base level of 10 but then applies the greater of either the value of the bribe or an 8 level increase by an official holding a high level decision making or sensitive position or an elected official. We believe that these two offense characteristics should be added together to arrive at a substantially higher violation for those officials who have used their position to secure substantial sums of money. Offenses involving color of official right are extremely serious since they erode the public confidence in its elected and appointed officials. This erosion of confidence justifies severe punishment. Many of the United States Attorneys who have had experience under the guidelines with the Hobbs Act have pointed out that the current sentences often run well under two years real time. The base level for this offense also needs to be raised at least two levels.

Amendment 82. Guideline §2D1.1. Unlawful Manufacturing, Importing, Exporting, Trafficking

The Commission has asked for comments regarding whether the weight of a carrier substance should be included when determining the weight of LSD. For the following reasons, the weight of the carrier substance should be included when determining the weight of LSD.

First, a plain reading of the statute indicates that Congress intended the weight of the carrier substance to be included, a view supported by two court decisions, United States v. McGeehan, 824 F.2d 667 (8th Cir. 1987) and United States v. Bishop, No. Cr. 88-3005 (N.D. Iowa 1989). Congress did not provide that only a pure drug or a mixture was subject to the weight requirements but also included the term substance. Unlike PCP, which statutorily is separated into pure PCP and a mixture or substance containing PCP, LSD is treated solely under the "mixture or substance" language. Obviously, if Congress had wanted to distinguish pure LSD it could have done so, just as it did with PCP.

Second, if the LSD carrier were excluded for guideline application purposes, there would be large gaps in the sentencing scheme created by the mandatory minimum sentences applicable to specified quantities. That is, if the Commission determined to exclude the carrier under the guidelines but the courts included it for purposes of applying mandatory sentences, the mandatory sentences would override the guidelines for all but the smallest quantities of a mixture or substance containing LSD. There would be no graduated sentences for many amounts subject to the mandatory sentences.

Third, in determining the sentence for a substance such as cocaine, a kilogram is treated as a kilogram, without regard to its purity. Hence, a person is penalized without regard to a dosage unit calculation. Likewise, the possession of LSD should be penalized for whatever form the LSD takes, without regard to dosage units.

Finally, as a practical concern, some laboratories relied upon for drug analysis are not equipped to separate LSD from the carrier substance for purposes of weighing it.

While we recognize that weighing the carrier substance can substantially affect the sentence, this is the result desired by Congress. It may be that the drug sentencing scheme in the Controlled Substances Act should be reconsidered to determine if statutory amendments reflecting a dosage unit approach would be in order. In the interim, however, Congress has indicated a preference for a "mixture or substance" approach that, with only two exceptions, does not consider purity.

Amendment 83. Guideline § 2D1.1. Unlawful Manufacturing, Importing, Exporting, Trafficking

The Commission has asked for comments regarding the relationship of marijuana plants to marijuana in cases involving fewer than 100 marijuana plants. We note that under section 6479 of the Anti-Drug Abuse Act of 1988, all the amendments relating to marijuana plants provide a ratio of one plant to one kilogram, including the amendment of 21 U.S.C. §841(b)(1)(D) for 50 plants. This provision establishes a reduced sentence for marijuana offenses involving 50 kilograms or less. Previously, the reduced sentence did not apply to 100 or more plants, regardless of weight. In the Anti-Drug Abuse Act this 100-plant exception to the reduced sentence was lowered to 50 or more plants.

We believe that the Commission should apply the one-plant-to-one-kilogram ratio to all cases, including those involving fewer than 100 plants. Our primary concern is that application of any other ratio would lead to a gap in sentences as the amount involved reaches the 100-plant level. To avoid this problem and to ensure a steady, even progression to the 100-plant level, we believe the same relationship should apply. Additionally, if another relationship is to be used, we are at a loss as to what the justification would be for that particular relationship and how it would conform to the one-to-one relationship mandated by Congress.

AMENDMENT 92

Amendment 92 deals with school-yard and related violations. As set forth in Maurice O. Ellsworth's letter of March 24, 1989, the Subcommittee supports this amendment with the exception that we would recommend a 2 level enhancement on a floor level of 15 for those offenses near a school or other specified locations but which do not involve persons under 18.

U.S. Department of Justice

United States Attorney
District of Idaho

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FAX to Paula done See FAX also copy

APR 4 8 13 AM '89

March 31, 1989

TO: JOE BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE
CHAIRMAN, SENTENCING GUIDELINES SUBCOMMITTEE

FR: MAURICE O. ELLSWORTH
UNITED STATES ATTORNEY
DISTRICT OF IDAHO

RE: SENTENCING GUIDELINES COMMENTS FOR THE
SENTENCING GUIDELINES COMMITTEE

My comments on the proposed sentencing guidelines amendments assigned to me at the Subcommittee meeting March 23, 1989 are as follows:

No. 92. I have reviewed the proposed Section 2D1.2 drafted by the Commission in response to the Congressional directive contained in the Omnibus Anti-Drug Abuse Act of 1988. Clearly the intent of Congress was to significantly enhance the penalties, essentially creating a mandatory minimum, for individuals convicted of certain drug offenses involving pregnant individuals, persons under 18 years of age, or which take place near various schools, colleges, etc., as well as playgrounds, youth centers, swimming pools, and video arcades. The proposed change, rather than artificially doubling or tripling the quantity of drugs and then referencing the drug quantity table in the guidelines, simply enhances the offense level from Section 2D1.1, and more important, in my opinion, puts a floor level on such an offense.

If the offense involves a person under age 18, it adds two points to the offense level and provides for a level of not lower than 26. If the offense involves a pregnant individual or occurs within 1,000 feet of a school or other designated location but does not involve anyone under age 18, one point is added to the offense level and a level of not lower than 13 is provided for.

The above approach suggested by the Commission is in the form of a proposed Section 2D1.2. It addresses the apparent congressional intent. However, adding only one to the Section 2D1.1 offense level when the offense occurs near a school or other specified location, but does not involve a person under age 18, seems to be an insufficient enhancement. The level 13 floor provided in (a)(2) will result in incarceration but I would suggest a two level enhancement and a floor level of 15 rather than 13.

No. 159, Section 2L1.1, Smuggling, Transporting or Harboring an Unlawful Alien.

I concur in the proposed amendment.

No. 160, Section 2L1.2, Unlawfully Entering or Remaining in the United States.

Attached is a copy of a letter I previously wrote identifying a problem in this District. Illegal aliens, even those with prior criminal records, virtually always get the two level reduction for acceptance of responsibility in this District. As a result, a defendant, even one with a serious prior criminal record, ends up with a sentence of less than the statutory maximum unless an upward departure is made. There are not enough criminal history categories to adequately address the prior record. I suggest adding a criminal history category VII such as that discussed in Option 1 under the career offender proposal (No. 243, page 137) of the proposed amendments. The addition of a new category would allow the maximum statutory sentence for an immigration violation by a defendant with a prior criminal record notwithstanding a two-point acceptance of responsibility reduction.

The Commission's suggested addition of a new specific offense characteristic in the proposed (b)(1) would give the option of adding 2, 3 or 4 levels. This proposal would address the problem identified above. However, insufficient criminal history categories to address a defendant's record is a problem in areas other than immigration offenses. Additional criminal history categories would be appropriate in these situations as well. The suggested remedy of recommending an upward departure in immigration and other offenses is inadequate for the simple reason that some judges are absolutely unwilling to make upward departures. An adequate guidelines sentence in these situations is critical.

Amendment 96. Guideline § 2D1.5. Continuing Criminal Enterprise

The Commission has asked for comments regarding the base offense level for a continuing criminal enterprise (CCE) offense in light of an increase in the minimum sentence from 10 years to 20 years. The Commission is considering a base level of 37 or 38.

We believe that the base offense level should at least be 38, given that the new minimum sentence is 240 months. If the offense level were 37, 240 months would be in the upper half of the range for a person with a low criminal history score. This is an undue restriction on the judge, especially in light of the seriousness of a CCE violation. When enacted in 1970, CCE was considered the premier drug enforcement statute, and its importance was recently reinforced by the 1988 drug act wherein the mandatory minimum sentence was raised to 20 years. The guideline for CCE offenses should allow a judge to impose a sentence well beyond the minimum 240 months.

Amendment 97. §2D1.6. Use of a Communications Facility in Committing Drug Offenses

This amendment proposes revision of the guideline for the offense of using a communications facility to facilitate a drug offense (telephone count). Currently, the guideline calls for a base offense level of 12. The amendment proposes two alternatives. The first is to apply the greater of either level 12 or three levels below the offense level from the drug distribution table applicable to the controlled substance offense committed, caused, or facilitated. The second approach is to apply the greater of level 12 or the offense level from the drug distribution table. We believe that the current guideline should be amended to reflect the quantity of drugs involved in the offense and that the second approach is preferable to the first.

We favor amendment 97 because it would reflect the seriousness of the offense and have the effect in some cases of discouraging the inappropriate use of telephone counts when a count of distribution or possession with intent to distribute is readily provable. In this regard, it would help implement the memorandum of the Attorney General on plea bargaining. However, we believe that the amendment should not provide for an offense level that is three levels lower than that applicable to the corresponding distribution count. The explanation accompanying the proposal states that the guideline generally applicable to attempts and incomplete conspiracies provides for an offense level three levels below that for the underlying offense, §2X1.1. However, the conspiracy guideline applicable to drug offenses provides for application of the guideline for the underlying offense with no reduction, even (under the current guideline) if the conspiracy is incomplete, §2D1.4. We believe that telephone offenses are generally analogous to conspiracies or attempts to commit an underlying drug offense and that the offense level applicable to that offense should control.

Amendment 102. §2D2.3. Operating or Directing the Operation of a Common Carrier under the Influence of Alcohol or Drugs

Amendment 102 responds to an amendment in the Anti-Drug Abuse Act of 1988 regarding the offense of operating a common carrier under the influence of alcohol or drugs, 18 U.S.C. §342. The maximum penalty for the offense was increased in the Anti-Drug Abuse Act of 1988 from five years to fifteen years. Because of the potential seriousness of this offense, we believe the guidelines should be amended to assure adequate sentences.

The Commission proposes leaving the base offense level at 8 unless death or serious bodily injury results. This offense level is too low. In our view it is inadequate to respond to the new fifteen-year maximum only by providing greater sentences if death or serious bodily injury results. The risk of serious harm is always present when this offense occurs, whether or not death or serious bodily injury actually results. A base offense level of 8 would result in a sentence of only two to eight months for a first offender, and a reduction for acceptance of responsibility could mean straight probation. Offense level 8 applied to this offense when the prior five-year maximum controlled. Therefore, we believe the base offense level should be increased at least to level 10.

The statute provides a specific direction to the Commission for cases in which death or serious bodily injury results. An offense level not less than 26 is mandated if death results and 21 if serious bodily injury results. We believe that if these minimum levels of enhancement under the statute are adopted by the Commission, there should be a specific offense characteristic applicable to the number of victims. The bracketed material proposed for a new subsection b would be a reasonable solution to the need to account for more than one victim where there is only one count of conviction.

Amendment 103. Guideline § 2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

Amendment 103 adds an application note to clarify the treatment of certain conduct (i.e., RICO predicate acts) for which the defendant has been previously sentenced. The amendment states that where such a previously imposed sentence resulted from a conviction prior to the last overt act of the RICO offense, the prior sentence should be treated as part of the defendant's criminal history (under § 4A1.2(a)(1)) and not as a part of the RICO offense. This means that a RICO predicate which has resulted in a prior conviction and sentence should not be counted in computing the RICO offense level; the prior conviction would only be used to increase the defendant's criminal history category.

The problem with this amendment is that it will reduce the offense level of a RICO violation where a RICO predicate has resulted in a prior conviction and sentence. We see no reason why such a RICO predicate should not be counted both as part of the RICO offense and as part of the defendant's criminal history. While the Sentencing Commission apparently believes that including the prior conviction in both computations is an unwarranted "double banging," the purpose of the RICO statute is precisely to deal with serious, repeat criminal offenders who commit multiple offenses as part of a pattern. Defendants have often challenged RICO prosecutions on double jeopardy grounds where RICO prosecutions have incorporated previously prosecuted offenses as part of a RICO pattern. These challenges have been repeatedly rejected by the courts, which have discerned Congressional intent to allow separate prosecution and punishment of predicate offenses and a subsequent RICO offense based in large part on those predicate offenses. See, e.g., United States v. Persico, 832 F.2d 705 (2d Cir. 1987) ("Congress intended to permit conduct resulting in prior convictions to be used as predicate acts of racketeering activity to establish subsequent RICO convictions").

In light of the clear Congressional intent and repeated judicial approval of RICO prosecutions utilizing offenses which have resulted in prior convictions, there is no legitimate reason to exclude these prior convictions from the computation of the RICO offense level. The punishment of these crimes in the context of a criminal pattern and in relation to a criminal enterprise warrants their being included in the RICO offense level and as part of the criminal history. The Commission's apparent reason for the amendment is to treat RICO consistently

Amendments 115 and 116. §2F1.1. Fraud and Deceit

These amendments provide revisions of the loss table applicable to fraud. Both amendments are preferable to the current table in that they increase applicable offense levels based on dollar loss at a faster rate than under the current table. However, amendment 116 is preferable to 115 (standing alone) in rising faster for frauds of more than $70,000. A faster rate of increase is needed because under the current table, for example, a fraud of $200,001 is treated in the same manner as a fraud of $500,000.

Either revision should be adjusted to provide for increases in the offense level for frauds of more than $5,000,000. Particularly in defense procurement fraud significantly higher figures are not unusual. However, our concerns are not limited to defense procurement. Other large-scale frauds and insider trading offenses, also subject to the fraud loss table, can represent losses in excess of $5,000,000, which should not require a departure from the guidelines to reflect the extent of loss.

Amendment 117. §2F1.1. Fraud and Deceit

Amendment 117 amends a specific offense characteristic applicable to fraud that establishes a floor of 10 for the offense level if the offense involved any of the following factors: (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization or a government agency; or (D) violation of any judicial or administrative order. The proposed amendment makes this minimum offense level of 10 inapplicable to categories (A) and (B). We oppose this amendment.

The stated reason for this amendment is to bring about consistency between the fraud guideline and certain other guidelines, including that relating to theft. We believe that if such consistency is needed, it can be achieved by adding an appropriate floor to the other guidelines rather than deleting it from the fraud guideline for factors (A) and (B). The dollar loss in a fraud is not an adequate measure in many cases of the defendant's culpability or the degree of planning reflected in the offense. It is often difficult to establish the monetary extent of a fraud or loss because of the need to find victims and the fact that defendants often move from one location to another to carry out their fraudulent activities. The floor of 10 is important in relatively small-scale cases, such as "boiler-room" operations, where, despite the inability to prove the full extent of the fraud, it is obvious that the offense involved considerable planning. A scheme to defraud more than one victim is also important in this regard in punishing small-scale frauds. Both of these factors go to the defendant's intent and are a valid basis for distinguishing among frauds.

Amendment 130. Guideline 2H1.4 Interference With Civil Rights Under Color of Law

This amendment, appropriately in our view, increases the base offense level from 2 to 6 and recognizes a statutory change for an enhanced penalty where bodily injury results from the offense.

The only problem with the proposed amendment is that it appears inadvertently to have omitted several words from the Commentary, which were undoubtedly meant to be included. The affected portions of the Commission's amendments are set out verbatim below and our suggested additions thereto are underlined:

1. "The Commentary to §2H1.4 captioned 'Application Notes' is amended in Note 1 by deleting '2 plus' and inserting in lieu thereof 'means 6 levels above the offense level for any underlying criminal conduct. See the discussion' <u>in the COmmentary to §2H1.1</u>."

2. "The Commentary to §2H1.4 captioned 'Background' is amended by deleting 'except where death results, in which case the maximum term of imprisonment authorized is life imprisonment' and inserting in lieu thereof 'if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results,' by deleting 'Given this one-year statutory maximum' and inserting in lieu thereof 'A', by inserting 'one year' immediately following 'near the,' and by inserting 'or bodily <u>injury</u>' immediately following 'resulting in death.'"

It is submitted that these proposed minor additions to the Commission's amendments are appropriate and comport with the Commission's intent.

Amendment 142. Guideline §2J1.7. Commission of Offense While on Release

Amendment 142 revises the guideline applicable to offenses committed while on release, the subject of 18 U.S.C. §3147. We agree that the present guideline should be amended in light of its treatment of section 3147 as a separate offense instead of a sentence enhancement. This issue was discussed in the Prosecutors Handbook on Sentencing Guidelines at pp. 94-95, in which the Criminal Division criticized the separate-offense theory for section 3147.

While we agree with the restructuring of the guideline to provide a sentence enhancement for an offense committed while on release, we disagree with applying an enhancement that does not depend on the seriousness of the offense. The current guideline, although structurally flawed, provides for a 2, 4, or 6-level enhancement (in addition to the base offense level of 6), depending upon the maximum punishment applicable to the offense committed while on release. We believe this approach should be used in the proposed amendment. We note that under the statute the maximum term of imprisonment applicable to the enhancement for committing an offense while on release depends upon whether the offense is a felony (in which case the additional term is up to ten years) or a misdemeanor (in which case it is only one year). An across-the-board increase of only two levels, regardless of the seriousness of the offense committed while on release, as proposed by one of the options, would provide an insignificant increase in sentence for many felonies. While it is true that the guideline applicable to the offense committed while on release takes seriousness into account, this fact ignores the scheme enacted by Congress, which mandates an additional sentence that varies with the seriousness of the underlying offense. If, however, the Commission does not believe that the enhancement under §2J1.7 should vary with the nature of the offense, we urge the Commission to adopt an enhancement that is no less than 4 levels.

We also strongly object to the proposed language for Application Note 2, which states that in order to avoid double counting the court must ensure that the total punishment is in accord with the guideline range for the offense committed while on release. The note also provides that the total punishment for the underlying offense and the enhancement for its commission while on release should fall within the range for the underlying offense. This approach negates the effect of 18 U.S.C. §3147 requiring an additional sentence for the fact that the offense was committed while on release. The court should first determine the appropriate sentence for the underlying offense, as if it had not been committed while on release, and then apply the enhancement from §2J1.7. A specific instruction should be provided to this effect; otherwise, two defendants could receive the same

punishment, despite the fact that one committed the offense while on release while the other did not.

Amendments 147 and 148. §§2K1.3 and 2K1.4. Unlawfully Trafficking in, Receiving, or Transporting Explosives; Arson; Property Damage by Use of Explosives

Amendments 147 and 148 are supposed to clarify the guidelines applicable to explosives trafficking and arson offenses by specifying that if more than one of the specific offense characteristics applies, the one providing the greatest enhancement level is to be used. Currently, the instruction reads: "If any of the following applies, use the greatest." We oppose the amendment because of its implication that if only one of the specific offense characteristics in subsection b applies, there is to be no enhancement. We believe the instruction as it presently reads is clearer and that the amendment will only create confusion.

Amendment 150. §2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

We oppose this amendment for the reasons set forth in the discussion of Amendments 147 and 148. This proposed revision is present in other guideline amendments we have not specifically identified. However, we oppose its adoption in general.

AMENDMENT 153

The Subcommittee proposes the following Guideline § 2K2.3 for possession of a destructive device in a federal building or certain airport facilities.

PROPOSED GUIDELINE

§ 2K2.3 Possession of a Destructive Device in Federal Building or Certain Airport Facilities

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

If any of the following applies, use the greatest:

(1) If the defendant willfully and intentionally created a substantial risk of death or serious bodily injury, increase by 9 levels.

(2) If defendant recklessly endangered the safety of another, increase by 7 levels.

(3) If the destructive device was designed for remote or timed detonation, increase by 11 levels.

(4) If the destructive device was intentionally packaged in material that could not be detected by a magnotometer, increase by 11 levels.

(5) If the defendant was a convicted felon, increase 7 levels.

COMMENTARY

Statutory Provisions: 18 U.S.C. § 844(g)

Application Notes:

1. "Destructive device" means any article described in 18 U.S.C. § 921(a)(4)(A) and (C) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices).

2. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Amendment 154. §§2K2.1, 2K2.2, 2K2.3. Firearms

This amendment restructures the firearms guidelines. These guidelines under the proposed amendments should be substantially strengthened. First, a base offense level of only 12 in proposed guideline §2K2.1 is too low for offenses that carry a maximum term of imprisonment of 10 years. These include possession-related offenses for convicted felons and the possession of National Firearms Act (NFA) weapons, such as machineguns and short-barrelled shotguns and rifles. Offense level 12 provides only a three-year sentence for an offender in the highest criminal history category. While this is an improvement over the current guideline relating to convicted felons (but is the same for NFA violations), the base offense level should be increased to at least 16 for any firearms offense subject to a 10-year maximum penalty. Level 16 provides a maximum sentence of close to five years for an offender in the highest criminal history category. Such an offense level would leave room for enhancement because of an applicable specific offense characteristic.

Second, the enhancement for mufflers and silencers in proposed §2K2.1(b)(3) should be expanded to all unlawfully possessed NFA firearms, as the term is defined in 26 U.S.C. §5845. (The proposed guideline would have to be restructured to avoid double counting for convictions under the NFA or 18 U.S.C. §922(o).) Under the proposal the receipt of a machinegun or sawed-off shotgun by a convicted felon being sentenced under 18 U.S.C. §924 is subject to no greater guideline sentence than the receipt by a felon of an ordinary rifle. We believe that since Congress has isolated particular weapons defined in the National Firearms Act for special treatment and required the registration of such weapons, an enhancement should apply. In our view there is no basis to distinguish only firearms mufflers or silencers for this special treatment. The NFA includes machineguns, sawed-off shotguns and rifles, cane-guns, and destructive devices. Violation of the NFA relating to all such weapons, as well as others specified, would be subject to a maximum term of imprisonment of 10 years.

In proposed §2K2.2, regarding firearms trafficking, the base offense level should be at least 16 if the defendant is convicted of a felony carrying a 10-year maximum. For example, subsection (b)(4) provides a 2-level enhancement for selling a firearm to a person the seller knows or has reasonable cause to believe is a convicted felon. If the firearm involved was a non-NFA weapon, this enhancement would apply to a base offense level of 6, and the total would be only 8, allowing the imposition of probation for offenders in low criminal history categories and a maximum of only two years for offenders in the highest category. This is far too low for a serious weapons violation carrying a 10-year maximum sentence. It retains the same modest 2-level increase included in the current guideline and does not reflect the increase in the maximum sentence from five years as enacted

by the Anti-Drug Abuse Act of 1988. Such a violation -- knowingly selling a firearm to a convicted felon -- should not be treated as a regulatory violation. We also note that this enhancement would apply "if more than one of the following [enhancements] applies ...." This language should be changed to "if any of the following applies ..." in order to assure its applicability if only one of the enhancements in subsection (b)(4) applies.

Under proposed §2K2.2 option 2 is preferable to option 1 in providing increases for trafficking offenses based on the number of firearms involved. However, we believe it should provide for an additional category of 100 or more firearms with a 7-level increase. For the reasons set forth above, the enhancement in proposed §2K2.2(b)(3) should apply to all NFA weapons.

Proposed §2K2.3 concerns receiving, transporting, or shipping a firearm with intent to commit another offense or with the knowledge that it will be used in committing another offense. These offenses are punishable by a maximum of 10 years' imprisonment. The proposed guideline cross-references the greater of the offense level from the attempt and conspiracy guideline (relating to the offense the defendant intended or knew was to be committed) or one of the other firearms guidelines. If the intended offense does not carry a high offense level, (e.g., a distribution of a small quantity of controlled substances), the cross-reference to the other firearms guidelines will not assure an appropriate sentence. For example, the applicable offense level from the trafficking guideline may be as low as 6. Proposed §2K2.3 should be revised to incorporate a floor, such as level 16, as proposed above for other firearms offenses carrying a 10-year maximum.

Amendment 159. §2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien.

The proposed amendment makes a change to the alien smuggling guideline for a defendant who had been deported prior to the instant offense. The purpose of this amendment is to conform to a proposed revision of guideline §2L1.2, regarding unlawfully entering or remaining in the United States. As indicated in the written statement to the Commission of Assistant Attorney General Dennis on the proposed guideline amendments, the proposed revision of §2L1.2 is inadequate to meet the increased statutory penalties applicable to the reentry offense. The conforming amendment to §2L1.1, therefore, also should be increased accordingly.

We also have a greater concern with amendment 159: it fails to amend the present guideline to take into account several important factors, including the number of aliens smuggled or transported, bodily injury resulting from the offense, and the use of weapons. Enclosed is material we previously submitted to Commission staff explaining the need for these amendments and proposing specific guideline language for §§2L1.1, 2L2.1 (trafficking in evidence of citizenship), and 2L2.3 (trafficking in a United States passport. We urge the Commission to adopt the changes incorporated in our recommended guidelines.

U.S. Department of Justice

RAP:VP:vp
#890001893

Washington, D.C. 20530

JAN 5 1989

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

Dear Peter:

Enclosed are draft guidelines regarding immigration offenses. We believe that the enhancements relating to the number of aliens involved in the offense, the use or possession of weapons, and bodily injury are important aggravators that should be included in a revised guideline.

We have also consulted with our pornography experts and have concluded that a guideline for "cable-porn," 18 U.S.C. §1468 (§7523 of the Anti-Drug Abuse Act of 1988), should be similar to the draft guideline we recently submitted to you on "dial-a-porn." That is, the base offense level for cable-porn should be 6, and there should be a 2-level increase for material that describes sadomasochistic conduct or that contains other depictions of violence. There is no need in the cable-porn guideline for the dial-a-porn specific offense characteristic relating to receipt of the communication by a person under 18 years of age.

If you have any questions or would like to discuss the draft guidelines, please contact Vicki Portney (633-4182) or me (633-3202).

Sincerely,

Roger A. Pauley

Roger A. Pauley
Sentencing Coordinator
Criminal Division