UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 626-8500
FAX (202) 662-7631

October 14, 1992

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Working Group Report on Drugs and Violent Crime, Firearms, and Gang-Related Activity

Attached for your review is the report from the Working Group on Drugs and Violent Crimes, Firearms, and Gang-Related Activity. Issues presented in this report will be considered at the October 20th Commission Meeting.

Attachments

VIOLENT CRIMES/FIREARMS/GANGS

WORKING GROUP REPORT

submitted by:

Susan Winarsky
Bonney Adams
Bob Bentsen
Mike Courlander
Deborah Dealy-Browning
Susan Katzenelson
Richard McNeil
Pam Montgomery
Barbara Nienstedt
Katherine Rosich
Rebecca Schwartz
Melissa Selick
Vince Ventimiglia

October 14, 1992

United States Sentencing Commission

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I. Introduction

The U.S. Congress, the Attorney General, the public, and others have expressed concern about recent increases in violent crime. In response, the Commission directed this working group to examine issues relevant to violent crime to determine if the guidelines adequately address this concern. More specifically, the group has been asked to focus on the topics of violent crimes, firearms, and gangs. The examination of violent crimes and firearms focused on 1) whether or not the present guideline penalties for these offense types are adequate; and 2) whether or not there are specific application problems associated with these guidelines. The purpose of the gang study was to lay the groundwork for an examination of issues pertinent to incorporating gang membership and gang-related crime as a sentencing factor.

II. Violent Crimes -- Chapter Two, Part A Guidelines (Offenses Against the Person)

A. Background

As part of its response to the Commission's directive, the working group conducted a systematic study of the Part 2A guidelines. These guidelines apply to offenses ranging from first degree murder, which has a statutory maximum penalty of death, to certain specified assaults, which have a maximum statutory penalty of three years. The federal government does not have jurisdiction over the majority of the violent crimes committed in the United States. Federal jurisdiction is limited to the special maritime and territorial jurisdiction of the United States, to acts against certain specified persons, such as the President, members of Congress, or internationally- protected persons, or to classes of acts that have an impact on interstate commerce[1]. Therefore, the number of persons convicted of these statutes and subject to the Part 2A guidelines each year is relatively small. In fiscal year 1991, 628 out of 33,000 cases sentenced in federal court were subject to these guidelines.

The Part 2A guidelines have been the subject of considerable study and amendment since the promulgation of the guidelines in 1987. The Commission has enacted amendments to these guidelines in 1988, 1989, 1990, and 1991. Over the past five years, the 2A guidelines have been amended on several occasions to reflect statutory changes (§§2A1.1, 2A4.1), to increase penalties (§§2A1.5, 2A2.1, 2A3.2, 2A3.4, 2A4.1), to clarify application of Chapter Three adjustments (§§2A2.4, 2A3.1, 2A3.2, 2A3.4), to clarify specific offense characteristics and commentary (§§2A1.1, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A4.1, 2A5.3), and to create cross-references (§§2A1.5, 2A3.2, 2A3.4, 2A4.1). Additionally, three new guidelines have been created, two have been restructured, and one has been given a new title.

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[1] See the discussion in the Case Law subsection of the Firearms section of this report.

Additional amendments to the Sexual Assault and Kidnapping guidelines will take effect November 1, 1992. The Kidnapping guideline has been amended to clarify that the first degree murder guideline is the appropriate guideline to which to cross reference (pursuant to §2A4.1(b)(7)) if an offense involves conspiracy to kidnap for the purposes of committing murder, or if the offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death resulted. The Sexual Assault guidelines have been amended to add cross references and to add application notes clarifying the scope of the specific offense characteristic that applies when the victim was in the custody, care, or supervising control of the defendant. As shown by these amendments, past and pending, the Commission has shown keen and continued interest in the sentencing of violent crimes.

Also, as part of the Commission's statutory mandate to inform Congress of inconsistencies in criminal penalties, the Commission has recommended legislation to: 1) change the statutory maximums for assault offenses to make them consistent with each other; 2) change the statutory maximums for certain Travel Act offenses so that they are consistent with similar underlying offenses; and 3) change the penalty for involuntary manslaughter from three years to six years. Each of these recommendations has been passed by the Senate or House in one form or another. A summary of the Commission's report appears in Appendix A, pages A-1 and A-2.

In undertaking the study of the Part 2A guidelines, the working group focused on two main questions:

- Are the present penalties for the Part 2A guidelines adequate?
- Are there application problems associated with specific Part 2A guidelines?

The remainder of the violent crimes section of the report summarizes the working group's research and findings with respect to these two questions by presenting a profile of Part 2A guidelines.

B. Monitoring Data

The working group adopted two methodological approaches to provide an initial empirical look at Part 2A offenses:

- Statistical analysis of Monitoring files;
- Case file reviews.

1. Data Sources

The data set included guideline cases sentenced in fiscal year 1991 that were received by the Commission's Monitoring unit. An initial pool of 757 cases involving offenses against the person was identified, using two criteria: the application of a Part 2A guideline to the case, or a statute-based offense code (for any of the counts of conviction) denoting a violent offense.[2] This data set forms the basis of the aggregate analyses providing a statistical profile of offenses against the person. See Tables 1 - 14.

Individual case file reviews were performed on two sets of cases: offenses against the person in which no Part 2A guideline was applied, or, if the Part 2A guideline was applied, it did not have the highest offense level; and offenses against the person in which the court departed upward or downward from the final sentencing range.

2. Findings

A review of violent offenses sentenced under the Part 2A guidelines provided no unexpected results; the findings represent the range of violent behaviors that fall under federal jurisdiction, and the guidelines applied to them seem to lead, in general, to appropriate sentence ranges and penalties for these behaviors.

The majority of federal offenses against the person are in the category of Aggravated Assaults, sentenced under §2A2.2. See Table 1. Of the cases in which a Part 2A guideline provided the highest offense level (hereinafter referred to as "highest guideline"[3]), Aggravated Assaults constitute 23.6 percent of the cases, followed by Threatening Communications (13.2%), and Sexual Abuse (10.4%).

Tables 1 to 11 concentrate only on violent offenses where the Part 2A guideline applied is the "highest guideline." Table 2 compares the distribution of final offense levels for Part 2A offenses with that for all guideline offenses. Generally, final offense levels for violent offenses are higher than for all offenses. One quarter (25%) of these offenders, respectively, had final offense level 12 and 7, or lower. The median offense level (dividing the population to 50-50%) is 18 and 14 for violent and all offenses respectively, and 75% of these offenders had final offense level 26 and 24, or lower.

Violent defendants seem, on the average, to have more serious criminal histories than guideline defendants in general. See Tables 3 and 4. Only 54.8 percent of the

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[2] See Appendix A, page A-3, for a list of offense codes included in the analysis.

[3] Refers to either the only guideline applied, or, in a multicount case with more than one guideline applied, to the guideline resulting in the highest offense level.

Table 1

OFFENSES AGAINST THE PERSON, WITH A PART 2A GUIDELINE APPLIED* (October 1, 1990 through September 30, 1991)

Guideline Applied with Highest Offense Level	Offenses Against the Person	
	N	Percent
2A1.1 - 1st Degree Murder	23	3.7
2A1.2 - 2nd Degree Murder	15	2.4
2A1.3 - Voluntary Manslaughter	14	2.2
2A1.4 - Involuntary Manslaughter	44	7.0
2A1.5 - Conspiracy/Solic. to Commit Murder	0	0.0
2A2.1 - Assault w/Intent to Commit Murder	24	3.8
2A2.2 - Aggravated Assault	148	23.6
2A2.3 - Minor Assault	17	2.7
2A2.4 - Obstructing or Impeding Officers	57	9.1
2A3.1 - Criminal Sexual Abuse	65	10.4
2A3.2 - Criminal Sexual Abuse of a Minor	21	3.3
2A3.3 - Criminal Sexual Abuse of a Ward	0	0.0
2A3.4 - Abusive Sexual Contact	57	9.1
2A4.1 - Kidnapping	49	7.8
2A4.2 - Demanding or Receiving Ransom Money	4	0.6
2A5.1 - Aircraft Piracy	2	0.3
2A5.2 - Interference w/Flight Crew Member	5	0.8
2A5.3 - Committing Certain Crimes Aboard Aircraft	0	0.0
2A6.1 - Threatening Communications	83	13.2
TOTAL	628	100.0

*Of 33,419 guideline cases, the Commission received guideline application information for 32,029. Of the 32,029 cases with such information, 310 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, 5 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 2

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY FINAL OFFENSE LEVEL*
(October 1, 1990 through September 30, 1991)

Final Offense Level	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
1	2	0.4	15	0.1
2	0	0.0	562	2.1
3	0	0.0	264	1.0
4	13	2.5	1,904	7.2
5	1	0.2	500	1.9
6	17	3.2	1,280	4.8
7	23	4.4	1,236	4.7
8	20	3.8	1,010	3.8
9	13	2.5	830	3.1
10	32	6.1	2,480	9.4
11	7	1.3	799	3.0
12	35	6.7	1,336	5.1
13	18	3.4	581	2.2
14	24	4.6	1,075	4.1
15	22	4.2	288	1.1
16	16	3.0	1,017	3.9
17	9	1.7	204	0.8
18	16	3.0	733	2.8
19	27	5.1	157	0.6
20	12	2.3	797	3.0
21	28	5.3	178	0.7
22	21	4.0	838	3.2
23	21	4.0	213	0.8
24	6	1.1	1,613	6.1
25	9	1.7	152	0.6
26	9	1.7	1,267	4.8
27	9	1.7	114	0.4
28	1	0.2	727	2.8
29	11	2.1	84	0.3
30	6	1.1	1,087	4.1
31	24	4.6	74	0.3
32	7	1.3	1,070	4.1
33	11	2.1	78	0.3
34	3	0.6	655	2.5
35	8	1.5	111	0.4
36	0	0.0	350	1.3
37	14	2.7	133	0.5
38	3	0.6	244	0.9
39	2	0.4	36	0.1
40	1	0.2	137	0.5
41	3	0.6	36	0.1
42	1	0.2	87	0.3
43	21	4.0	85	0.3
TOTAL	526	100.0	26,437	100.0

*Of 33,419 guideline cases, the Commission received SOR final offense level information for 26,683. Of the 26,683 cases with such information, 246 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received SOR final offense level information for 530. Of the 530 cases with such information, 4 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 3

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY DEFENDANT'S CRIMINAL HISTORY CATEGORY* (October 1, 1990 through September 30, 1991)

Criminal History Category	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
1	344	54.8	20,147	62.3
2	84	13.4	3,595	11.1
3	87	13.9	3,607	11.2
4	37	5.9	1,821	5.6
5	23	3.7	1,043	3.2
6	53	8.4	2,115	6.5
TOTAL	628	100.0	32,328	100.0

*Of 33,419 guideline cases, the Commission received criminal history information for 32,647. Of the 32,647 cases with such information, 319 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, 5 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 4

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY CAREER OFFENDER APPLICATION* (October 1, 1990 through September 30, 1991)

Career Offender Application	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
Applied	19	3.6	619	2.3
Not Applied	506	96.4	25,890	97.7
TOTAL	525	100.0	26,509	100.0

*Of 33,419 guideline cases, the Commission received SOR career offender information for 26,756. Of the 26,756 cases with such information, 247 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received SOR career offender information for 528. Of the 528 cases with such information, 3 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

violent defendants, compared to 62.3 percent of all defendants, were placed in Criminal History Category I, while 8.4 percent of the violent defendants and 6.5 percent of all defendants were placed in Criminal History Category VI (partially explained by the higher rate of Career Offenders among violent defendants).

Corresponding to higher offense levels and criminal histories, Part 2A offenses result in higher guideline sentencing ranges when compared to all offenses. See Table 5. Ranges for the first quartile are 10-16 and 4-10, respectively, for the second quartile (or median) 33-41 and 21-27, and for the third quartile 78-97 and 63-78.

The mode of conviction is much more likely to be a trial in Part 2A offenses than in all offenses, 27.1 percent compared to 14.4 percent trials, see Table 6, and defendants in violent cases are less likely to receive an adjustment for acceptance of responsibility, 68.6 percent compared to 80.5 percent. See Table 7.

Table 8 describes the types of sentences imposed in Part 2A offenses, compared to all offenses. Violent defendants are more likely to receive a prison term with a supervised release sentence, and less likely to receive probation with or without alternatives. Table 9 provides a more detailed look at the length of sentence imposed in Part 2A offenses, by specific Part 2A guideline.

Table 10 describes whether sentences were imposed within the guideline range or as a departure above or below it. In addition, departures for cases with a Part 2A "highest guideline" are further analyzed in Table 10 by specific Part 2A guideline. While both upward and downward departures initiated by the court are higher for these violent offenses than for all offenses, the overall departure rate is somewhat lower due to the small number of substantial assistance departures. A closer examination of the table reveals that in only four of the Part 2A guidelines were the percentage of cases sentenced within the appropriate guideline range less than the national "within the guideline range" rate of 80.5 percent. These guidelines were §2A1.2 (Second Degree Murder); §2A1.3 (Voluntary Manslaughter); §2A2.2 (Aggravated Assault); and §2A4.1 (Kidnapping, Abduction, and Unlawful Restraint).

The working group reviewed the departure cases for each of these four guidelines in order to verify and further elaborate on the reason(s) for the departures. While the percentage of departures was 40.0 percent for §2A1.2 cases and 28.4 percent for §2A1.3 cases, only a few cases were sentenced under each of these guidelines (§2A1.2, n=15; §2A1.3, n=14). The reason cited for the three upward departures in the Second Degree Murder cases, §2A1.2, was the extreme conduct of the defendant during the commission of the offense. The reasons cited for the three downward departures in the Second Degree Murder cases, §2A1.2, were: no death was caused, pursuant to a written plea agreement, and the criminal history category overrepresented the defendant's prior criminal history. The reason cited for the one upward departure in the Voluntary Manslaughter case, §2A1.3, was pursuant to a plea agreement, while the reasons cited for

Table 5

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY GUIDELINE SENTENCING RANGE*
(October 1, 1990 through September 30, 1991)

Guideline Range	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
0-6	24	4.6	3,816	14.5
1-7	16	3.1	965	3.7
2-8	24	4.6	1,007	3.8
3-9	0	0.0	11	0.0
4-10	19	3.6	870	3.3
6-12	19	3.6	1,488	5.7
8-14	9	1.7	883	3.4
9-15	1	0.2	65	0.3
10-16	26	5.0	1,200	4.6
12-18	15	2.9	767	2.9
15-21	21	4.0	1,260	4.8
18-24	20	3.8	473	1.8
21-27	17	3.3	1,159	4.4
24-30	19	3.6	621	2.4
27-33	12	2.3	811	3.1
30-37	16	3.1	329	1.3
33-41	17	3.3	688	2.6
37-46	19	3.6	316	1.2
41-51	24	4.6	739	2.8
46-57	20	3.8	272	1.0
51-63	12	2.3	1,246	4.7
57-71	17	3.3	364	1.4
63-78	9	1.7	1,103	4.2
70-87	11	2.1	310	1.2
77-96	4	0.8	120	0.5
78-97	4	0.8	647	2.5
84-105	2	0.4	62	0.2
87-108	11	2.1	167	0.6
92-115	3	0.6	110	0.4
97-121	6	1.2	696	2.6
100-125	2	0.4	55	0.2
108-135	14	2.7	183	0.7
110-137	1	0.2	85	0.3
120-150	3	0.6	31	0.1
121-151	10	1.9	719	2.7
130-162	0	0.0	28	0.1
135-168	12	2.3	220	0.8
140-175	0	0.0	0	0.0
151-188	8	1.5	538	2.0
168-210	7	1.3	361	1.4
188-235	1	0.2	336	1.3
210-262	7	1.3	302	1.2
235-293	2	0.4	217	0.8
262-327	3	0.6	157	0.6
292-365	5	1.0	169	0.6
324-405	2	0.4	68	0.3
360-life	9	1.7	239	0.9
life	20	3.8	85	0.3
TOTAL	523	100.0	26,358	100.0

*Of 33,419 guideline cases, the Commission received SOR guideline range information for 26,606. Of the 26,606 cases with such information, 248 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received SOR guideline range information for 527. Of the 527 cases with such information, 4 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 6

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY MODE OF CONVICTION*
(October 1, 1990 through September 30, 1991)

Mode of Conviction	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
Plea	457	72.9	28,183	85.6
Trial	170	27.1	4,735	14.4
TOTAL	627	100.0	32,918	100.0

*Of 33,419 guideline cases, the Commission received mode of conviction information for 33,237. Of the 33,237 cases with such information, 319 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received mode of conviction information for 632. Of the 632 cases with such information, 5 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 7

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY ACCEPTANCE OF RESPONSIBILITY*
(October 1, 1990 through September 30, 1991)

Acceptance of Responsibility	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
Adjustment Applied	362	68.6	21,382	80.5
No Adjustment	166	31.4	5,188	19.5
TOTAL	528	100.0	26,570	100.0

*Of 33,419 guideline cases, the Commission received SOR acceptance of responsibility information for 26,818. Of the 26,818 cases with such information, 248 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received SOR acceptance of responsibility information for 532. Of the 532 cases with such information, 4 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 8

OFFENSES AGAINST THE PERSON, AND ALL CASES, BY TYPE OF SENTENCE IMPOSED*
(October 1, 1990 through September 30, 1991)

Type of Sentence Imposed	Offenses Against the Person		All Guideline Cases	
	N	Percent	N	Percent
No Prison or Probation	0	0.0	108	0.3
Probation Only	35	5.6	4,737	14.4
Probation/Alternative	29	4.7	2,872	8.8
Prison Only	7	1.1	691	2.1
Prison/Sup Rel	539	86.7	23,703	72.3
Prison/Sup Rel/Alternative	12	1.9	694	2.1
TOTAL	622	100.0	32,805	100.0

*Of 33,419 guideline cases, the Commission received sentencing information for 33,128. Of the 33,128 cases with such information, 323 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received sentencing information for 627. Of the 627 cases with such information, 5 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 9

OFFENSES AGAINST THE PERSON, BY LENGTH OF SENTENCE IMPOSED*
(October 1, 1990 through September 30, 1991)

Guideline Applied With Highest Offense Level	Total	Total Months Imprisonment											
		0		1 - 12		13 - 59		60 - 119		120 - 179		180 or more	
		N	%	N	%	N	%	N	%	N	%	N	%
2A1.1 - 1st Degree Murder	22	0	0.0	0	0.0	0	0.0	1	4.6	0	0.0	21	95.5
2A1.2 - 2nd Degree Murder	14	0	0.0	0	0.0	0	0.0	4	28.6	3	21.4	7	50.0
2A1.3 - Voluntary Manslaughter	14	1	7.1	0	0.0	8	57.1	4	28.6	1	7.1	0	0.0
2A1.4 - Involuntary Manslaughter	44	6	13.6	16	36.4	22	50.0	0	0.0	0	0.0	0	0.0
2A2.1 - Assault w/Intent to Commit Murder	24	0	0.0	0	0.0	5	20.8	11	45.8	4	16.7	4	16.7
2A2.2 - Aggravated Assault	147	4	2.7	11	7.5	92	62.6	37	25.2	0	0.0	3	2.0
2A2.3 - Minor Assault	16	10	62.5	6	37.5	0	0.0	0	0.0	0	0.0	0	0.0
2A2.4 - Obstructing or Impeding Officers	54	20	37.0	27	50.0	7	13.0	0	0.0	0	0.0	0	0.0
2A3.1 - Criminal Sexual Abuse	65	0	0.0	0	0.0	5	7.7	20	30.8	17	26.2	23	35.4
2A3.2 - Criminal Sexual Abuse of a Minor	21	0	0.0	4	19.1	16	76.2	1	4.8	0	0.0	0	0.0
2A3.4 - Abusive Sexual Contact	57	5	8.8	16	28.1	35	61.4	1	1.8	0	0.0	0	0.0
2A4.1 - Kidnapping	48	0	0.0	1	2.1	11	22.9	15	31.3	9	18.8	12	25.0
2A4.2 - Demanding or Receiving Ransom Money	4	1	25.0	0	0.0	1	25.0	2	50.0	0	0.0	0	0.0
2A5.1 - Aircraft Piracy	2	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	100.0
2A5.2 - Interference w/Flight Crew Member	5	0	0.0	2	40.0	3	60.0	0	0.0	0	0.0	0	0.0
2A6.1 - Threatening Communications	82	17	20.7	20	24.4	39	47.6	3	3.7	2	2.4	1	1.2
TOTAL	619	64	10.5	103	16.9	244	39.9	99	16.2	36	5.9	73	12.0

*Of 33,419 guideline cases, the Commission received sentence length information for 32,654. Of the 32,654 cases with such information, 318 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received sentence length information for 624. Of the 624 cases with such information, 5 mixed law cases were excluded. Of the 73 cases receiving 180 months or more, 14 received sentences of life imprisonment. Probation, community confinement, intermittent confinement, and home detention cases were included in zero month imprisonment calculations.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 10

OFFENSES AGAINST THE PERSON, BY DEPARTURE STATUS*
(October 1, 1990 through September 30, 1991)

Guideline Applied With Highest Offense Level	Total	Departure Status							
		No Departure		Upward Departure		Downward Departure		Substantial Assistance	
		N	%	N	%	N	%	N	%
2A1.1 - 1st Degree Murder	22	19	86.4	0	0.0	1	4.6	2	9.1
2A1.2 - 2nd Degree Murder	15	9	60.0	3	20.0	3	20.0	0	0.0
2A1.3 - Voluntary Manslaughter	14	10	71.4	1	7.1	3	21.4	0	0.0
2A1.4 - Involuntary Manslaughter	44	40	90.9	1	2.3	3	6.8	0	0.0
2A2.1 - Assault w/Intent to Commit Murder	23	19	82.6	3	13.0	0	0.0	1	4.4
2A2.2 - Aggravated Assault	145	105	72.4	7	4.8	31	21.4	2	1.4
2A2.3 - Minor Assault	16	16	100.0	0	0.0	0	0.0	0	0.0
2A2.4 - Obstructing or Impeding Officers	54	47	87.0	0	0.0	7	13.0	0	0.0
2A3.1 - Criminal Sexual Abuse	64	54	84.4	1	1.6	7	10.9	2	3.1
2A3.2 - Criminal Sexual Abuse of a Minor	21	19	90.5	2	9.5	0	0.0	0	0.0
2A3.4 - Abusive Sexual Contact	57	52	91.2	5	8.8	0	0.0	0	0.0
2A4.1 - Kidnapping	46	34	73.9	0	0.0	8	17.4	4	8.7
2A4.2 - Demanding or Receiving Ransom Money	4	4	100.0	0	0.0	0	0.0	0	0.0
2A5.1 - Aircraft Piracy	5	5	100.0	0	0.0	0	0.0	0	0.0
2A5.2 - Interference w/Flight Crew Member	79	71	89.9	4	5.1	4	5.1	0	0.0
2A6.1 - Threatening Communications	2	2	100.0	0	0.0	0	0.0	0	0.0
TOTAL	611	506	82.8	27	4.4	67	11.0	11	1.8

*Of 33,419 guideline cases, the Commission received departure information for 31,785. Of the 31,785 cases with such information, 307 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received departure information for 616. Of the 616 cases with such information, 5 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

the three downward departures in the Voluntary Manslaughter cases were the victim's conduct in two cases and that the defendant had already served time (one year under a sentence given in tribal court) for the offense of conviction in one case.

Of the 145 cases sentenced under the Aggravated Assault guideline, §2A2.2, the departure rate was 27.6 percent (n=40). Of the departures in Aggravated Assault cases, 82.5 percent represented a downward departure (n=31). The reason cited for more than one third of the downward departures in these cases was §5K2.10 (Victim's Conduct). While there was no one scenario that described all of those cases that received a downward departure due to the victim's conduct, a couple of elements seemed to emerge in several of these cases. First, most of these downward departures occurred on Indian Reservations, and alcohol (intoxication) contributed to the altercation. Additionally, the altercation typically involved either a barroom brawl or a domestic quarrel. Of the seven upward departures in the Aggravated Assault cases, the reason most often cited was death or serious bodily or psychological injury to the victim.

Finally, of the 46 cases sentenced under the Kidnapping, Abduction, and Unlawful Restraint guideline, §2A4.1, the departure rate was 26.1 percent (n=12). The reason most often cited for the downward departures was §5K1.1 (Substantial Assistance to Authorities). Other reasons for the downward departures included the mental and emotional condition of the defendant, and pursuant to a written plea agreement.

Table 11 describes the Part 2A cases by the position of their sentences relative to their respective final guideline sentence range. In general, courts tend to sentence at the bottom or lower half of the range, with some notable exceptions, such as §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts). The relative positioning of sentences within the range would require additional case review and analysis to assess the factors considered by judges when determining the sentence.

Tables 12 and 13 provide a look at cases with components of violent behavior but with no Part 2A guideline as the "highest guideline" applied. In cases with multiple guideline calculations, see Table 12, where a Part 2A guideline was applied, the most typical "highest guideline" used is §2D1.1 for Drug Trafficking. Cases with violent components but no Part 2A guideline applied seem to be most frequent in the category of Extortion by Force or Threat of Force, Extortion by Cover of Official Right, and Extortionate Extension of Credit. See Table 13.

To gain a more detailed understanding of these cases, the working group reviewed all the files identified as offenses against the person for which the "highest guideline" applied was not a Part 2A guideline. An analysis was completed of the 126 cases that met these criteria, with the purpose to identify what the violent count of conviction or component was in these cases. The following is a short summary of the major findings from the case reviews.

Table 11

OFFENSES AGAINST THE PERSON, BY THE RELATIVE POSITION OF THE SENTENCE IMPOSED TO THE GUIDELINE RANGE* (October 1, 1990 through September 30, 1991)

Guideline Applied With Highest Offense Level	Total (100%)	Relative Position of the Sentence Imposed to the Guideline Range											
		Downward Departure		Bottom of Range		Lower Middle		Upper Middle		Top of Range		Upward Departure	
		N	%	N	%	N	%	N	%	N	%	N	%
2A1.1 - 1st Degree Murder	10	1	10.0	8	80.0	0	0.0	0	0.0	1	10.0	0	0.0
2A1.2 - 2nd Degree Murder	13	2	15.4	5	38.5	1	7.7	0	0.0	2	15.4	3	23.1
2A1.3 - Voluntary Manslaughter	13	3	23.1	3	23.1	1	7.7	2	15.4	3	23.1	1	7.7
2A1.4 - Involuntary Manslaughter	42	3	7.1	16	38.1	6	14.3	2	4.8	14	33.3	1	2.4
2A2.1 - Assault w/Intent to Commit Murder	16	0	0.0	3	18.8	2	12.5	2	12.5	6	37.5	3	18.8
2A2.2 - Aggravated Assault	119	31	26.1	35	29.4	14	11.8	15	12.6	18	15.1	6	5.0
2A2.3 - Minor Assault	14	0	0.0	10	71.4	2	14.3	1	7.1	1	7.1	0	0.0
2A2.4 - Obstructing or Impeding Officers	43	6	14.0	11	25.6	9	20.9	7	16.3	10	23.3	0	0.0
2A3.1 - Criminal Sexual Abuse	54	8	14.8	20	37.0	6	11.1	6	11.1	14	25.9	0	0.0
2A3.2 - Criminal Sexual Abuse of a Minor	19	0	0.0	5	26.3	2	10.5	1	5.3	9	47.4	2	10.5
2A3.4 - Abusive Sexual Contact	53	0	0.0	17	32.1	8	15.1	6	11.3	17	32.1	5	9.4
2A4.1 - Kidnapping	34	10	29.4	12	35.3	3	8.8	3	8.8	6	17.7	0	0.0
2A4.2 - Demanding or Receiving Ransom Money	2	0	0.0	1	50.0	0	0.0	1	50.0	0	0.0	0	0.0
2A5.1 - Aircraft Piracy	2	0	0.0	0	0.0	1	50.0	0	0.0	1	50.0	0	0.0
2A5.2 - Interference w/Flight Crew Member	5	0	0.0	1	20.0	1	20.0	1	20.0	2	40.0	0	0.0
2A6.1 - Threatening Communications	67	4	6.0	21	31.3	13	19.4	6	9.0	20	29.9	3	4.5
TOTAL	506	68	13.4	168	33.2	69	13.6	53	10.5	124	24.5	24	4.7

*Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received guideline range position information for 506. In the calculation of relative position, sentences at the midpoint were included in the lower middle category.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 12

OFFENSES AGAINST THE PERSON, WITH A PART 2A GUIDELINE APPLIED, BUT NOT RESULTING IN THE HIGHEST OFFENSE LEVEL (October 1, 1990 through September 30, 1991)

Guideline Applied with Highest Offense Level	Part 2A Offense Within Guideline Calculations	
	N	Percent
2B1.3 - Property Damage or Destruction	1	3.0
2B2.1 - Burglary of a Residence	1	3.0
2B3.1 - Robbery	1	3.0
2B3.2 - Extortion by Force or Threat	1	3.0
2D1.1 - Drugs: Import/Export/Trafficking	13	39.4
2D2.1 - Drugs: Unlawful Possession	1	3.0
2E1.1 - Unlawful Conduct Relating to RICO	1	3.0
2F1.1 - Fraud and Deceit	1	3.0
2H1.2 - Conspiracy to Interfere w/Civil Rights	1	3.0
2J1.3 - Perjury or Subornation of Perjury	1	3.0
2K1.4 - Arson	1	3.0
2K2.1 - Firearms: Receipt/Possess./Transport.	2	6.1
2P1.2 - Provide/Possess Contraband in Prison	3	9.1
2T1.3 - Fraud/False Statements (Taxes)	2	6.1
2T1.9 - Conspiracy to Impair/Impede/Defeat Tax	3	9.1
TOTAL	33	100.0

*Of 33,419 guideline cases, the Commission received guideline application information for 32,029. Of the 32,029 cases with such information, 310 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 33 had a Part 2A offense within guideline calculations (but did not possess the highest offense level).

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 13

OFFENSES AGAINST THE PERSON, WITH NO PART 2A GUIDELINE APPLIED*
(October 1, 1990 through September 30, 1991)

Guideline Applied with Highest Offense Level	Violent Offense Code(s)	
	N	Percent
2B1.1 - Larceny/Embezzlement	1	1.0
2B1.3 - Property Damage or Destruction	3	3.1
2B2.1 - Burglary of a Residence	14	14.6
2B2.2 - Burglary of Other Structures	1	1.0
2B3.1 - Robbery	1	1.0
2B3.2 - Extortion by Force or Threat	15	15.6
2B3.3 - Blackmail and Similar Forms of Extortion	1	1.0
2C1.1 - Extortion Under Color of Official Right	18	18.8
2D1.1 - Drugs: Import/Export/Trafficking	5	5.2
2D1.2 - Drugs: Underage/Pregnant Individuals	1	1.0
2E1.4 - Murder-For-Hire	9	9.4
2E2.1 - Extortionate Extension of Credit	14	14.6
2J1.2 - Obstruction of Justice	1	1.0
2J1.3 - Perjury or Subornation of Perjury	1	1.0
2J1.6 - Failure to Appear by Defendant	1	1.0
2K2.1 - Firearms: Receipt/Possess./Transport.	1	1.0
2K2.2 - Firearms: Traffick./Prohib. Transactions	1	1.0
2P1.2 - Provide/Possess Contraband in Prison	1	1.0
2S1.1 - Laundering of Monetary Instruments	2	2.1
2T1.9 - Conspiracy to Impair/Impede/Defeat Tax	4	4.2
2X3.1 - Accessory After the Fact	1	1.0
TOTAL	96	100.0

*Of 33,419 guideline cases, the Commission received guideline application information for 32,029. Of the 32,029 cases with such information, 310 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 102 did not have a Part 2A offense within guideline calculations (but had "violent" elements, as defined through one or more offense codes). Of these 102 cases, 6 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Eighteen of these cases involved the application of §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe: Extortion Under Color of Official Right) where the primary offense of conviction was 18 U.S.C. § 1951, the Hobbs Act extortion, or attempted extortion, under color of official right statute. Sixteen cases involved the application of §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). Each of these cases, like those sentenced under the §2C1.1 guideline, involved conviction under 18 U.S.C. § 1951, the Hobbs Act extortion, or attempted extortion, under color of official right statute.

An additional 18 cases involved the application of §2D1.1 (Unlawful, Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)). While the §2D1.1 guideline provided the highest offense level in all but two of these 18 cases, they each involved an additional count of conviction that had an element of violence. The element of violence included aggravated assault, a felony with death resulting, use of a firearm during the commission of a drug trafficking offense, kidnapping or hostage-taking, or some combination of these offenses.

For the 15 cases in which the §2B2.1 guideline (Burglary of a Residence) was applied, the element of violence was the burglary of a domestic dwelling. In 14 of the cases, the guideline applied was §2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means). In each of these cases, the element of violence involved extortion.

As would be expected, in the nine cases that applied the §2E1.4 guideline (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire), the underlying violent offense involved conspiracy or attempt to commit murder. Of the seven cases that applied the §2T1.9 guideline (Conspiracy to Impair, Impede, or Defeat Tax), six involved obstructing or impeding officers. One case involved a minor assault.

Finally, 29 cases involved the application of some other guideline.[4] The violent

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[4] Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft (n=1)); §2B1.3 (Property Damage or Destruction (n=4)); §2B2.2 (Burglary of Other Structure (n=1)); §2B3.1 (Robbery (n=2)); §2B3.3 (Blackmail and Similar Forms of Extortion (n=1)); §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals (n=1)); §2D2.1 (Unlawful Possession (n=1)); §2F1.1 (Fraud and Deceit (n=1)); §2J1.2 (Obstruction of Justice (n=1)); §2J1.3 (Perjury or Subornation of Perjury (n=2)); §2J1.6 (Failure to Appear by Defendant (n=1)); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition (n=3)); §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms (n=1)); §2P1.2 (Providing or Possessing Contraband in Prison (n=4)); §2S1.1 (Laundering of Monetary Instruments

component of the offense conduct in these cases included aggravated assault, minor assault, obstructing or impeding officers, and some other violent felony or misdemeanor.

Table 14 describes the departure status for the three groups of offenses against the person, as compared to all cases. While defendants whose highest adjusted guideline applied was Part 2A, or whose sentence involved the calculation of a Part 2A guideline, were more often sentenced within the guidelines, this was not the case for defendants sentenced under some other violent offense (a violent offense that did not involve the application of a Part 2A guideline (e.g., §2E1.4 (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire)). In fact, defendants sentenced under these "other" violent offenses were only sentenced within the appropriate guideline range in 75.2 percent of the cases and were more likely to receive other downward and substantial assistance departures.

C. Case Law

The working group reviewed relevant case law to identify additional potential issues of interest to the Commission. Cases were reviewed to determine if they involved the following areas of concern: 1) departures from the revised firearms guidelines; and 2) difficulties in applying the revised firearms guidelines, including circuit court conflicts over guideline application. No reported decisions appeared to involve substantial departure issues, but a review of those decisions may be found in Appendix A, pages A-9 and A-10. The remainder of this Case Law section focuses on the primary application issues.

1. Sentence Provided under §2A1.1 (First Degree Murder) and 18 U.S.C. § 1111(b) (Murder)

The working group examined the issue of whether 18 U.S.C. § 1111 mandates a sentence of life in prison or whether a term of years may be imposed. Section 1111(b) reads as follows:

> Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", (sic) in which event he shall be sentenced to imprisonment for life ....

(n=2)); §2T1.3 (Fraud and False Statements Under Penalty of Perjury (n=2)); §2X3.1 (Accessory After the Fact (n=1)).

Table 14

DEPARTURE STATUS*
(October 1, 1990 through September 30, 1991)

Departure Status	Offenses Against the Person		Part 2A Offense Within Guideline Calculations		Violent Offense Code(s)		All Guideline Cases	
	N	%	N	%	N	%	N	%
No Departure	506	82.8	27	90.0	79	75.2	25,352	80.5
Upward Departure	27	4.4	0	0.0	1	1.0	545	1.7
Downward Departure	67	11.0	1	3.3	10	9.5	1,820	5.8
Substantial Assist	11	1.8	2	6.7	15	14.3	3,761	12.0
TOTAL	611	100.0	30	100.0	105	100.0	31,478	100.0

*Of 33,419 guideline cases, the Commission received departure information for 31,785. Of the 31,785 cases with such information, 307 mixed law cases (both guideline and pre-guideline counts) were excluded. Of the 33,419 guideline cases, 633 involved a Part 2A offense. Of these 633 cases, the Commission received departure information for 616. Of the 616 cases with such information, 5 mixed law cases were excluded. Of the 33,419 guideline cases, 33 involved a Part 2A offense within guideline calculations. Of these 33 cases, the Commission received departure information for 30. Of the 33,419 guideline cases, 125 involved violent offense code(s). Of these 125 cases, the Commission received departure information for 111. Of the 111 cases with such information, 6 mixed law cases were excluded.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

The guidelines indicate some ambiguity regarding whether a term of years may be imposed under section 1111(b), thus leaving the issue to the courts. The background commentary to §2A1.1 (1991) reads:

> Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion ... regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence of life imprisonment.

Every appellate court to address the issue (i.e., the Second, Third, Ninth and Tenth Circuits) has held that the statute requires a mandatory term of life in prison. United States v. Sands, 968 F.2d 1058, 1066 (10th Cir. 1992) (section 1111 provides a statutorily required minimum sentence of life in prison that would control over any other lesser sentence suggested under the guidelines); United States v. LaFleur, 952 F.2d 1537 (9th Cir. 1991) ("[t]he express wording of § 1111(b) leaves the sentencing court no discretion to impose a lesser sentence" than life in prison; finds the Commission's deference on this issue (see U.S.S.G. §2A1.1 (Background)) to be "appropriate"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (repeals by implication are disfavored; court finds such a repeal only when the legislature's intent is "clear and manifest"; "where preexisting sentencing statutes mandate minimum terms in excess of the maximum applicable Guidelines sentence, these statutes control"); United States v. Gonzalez, 922 F.2d 1044 (2d Cir. 1991) ("Congress did not inadvertently eliminate parole.... Congress could foresee its action would translate every life sentence into life imprisonment without possibility of parole, so that the term life sentence would be the reality"); United States v. Donley, 878 F.2d 735 (3d Cir. 1989) ("Congress did not mean to replace a fixed minimum sentence for first degree murder with an indeterminate sentence; the legislative history [of the SRA] makes it clear that Congress intended to go in the opposite direction of achieving more consistent, determinate sentences").

The decisions show that the commentary language found in §2A1.1 has apparently prompted some defendants to challenge their life sentences. For example, in Gonzalez the court noted:

> In urging this proposition [that life is not the mandatory minimum term] Gonzalez points to the Commentary to § 2A1.1 of the Guidelines ... as evidence that the Sentencing Reform Act's abolition of parole does not mean that the only sentence a judge may impose under § 1111 is life without parole.

Two primary theories of the defense emerge in these cases. The first is that, prior to the Sentencing Reform Act, any prisoner serving a life term was parolable after 30 years (18 U.S.C. § 4206(d) (repealed 1987)) or ten years (18 U.S.C. § 4205(a) (repealed 1987), and thus the life sentence under section 1111 was not, in fact, a determinate

sentence nor a mandatory minimum. The court in Lafleur, however, responds that Congress nevertheless restricted the availability of parole but did not change the plain meaning of the statute, and must have been cognizant of the inevitable consequences of such actions.

The second argument is that one reading of the SRA might hold that 18 U.S.C. § 3559 provides that offenses with maximums of life are Class A felonies, and 18 U.S.C. § 3581 provides that Class A felonies are subject to terms of life or any term of years in prison. Bolstering this argument is language found at 49 App. U.S.C.A. § 1472(i)(1)(B) (Aircraft Piracy) which implies that Congress, at the time of passage of the Sentencing Reform Act, considered section 3559(b) to authorize any term of years or life for Class A offenses.[5] The court in Lafleur finds, however, that section 3581 is not intended to alter the relevant terms of imprisonment for offenses where such term is explicitly provided in the statute.

See Appendix A, pages A-16 to A-18 for a more detailed discussion of these cases.

2. Murder; Conspiracy to Commit Murder; Attempted Murder

In certain relatively limited cases, an issue arises regarding whether to apply §2A1.5 (Conspiracy to Commit Murder) (or §2A2.1 (Attempted Murder)) or whether to apply §2A1.1 (First Degree Murder) in connection with §2X1.1(c) (Attempt, Solicitation, or Conspiracy). The issue arises particularly in connection with a conviction for a conspiracy to kidnap that is sentenced under §2A4.1 (Kidnapping, Abduction, Unlawful Restraint), which references the guideline for another offense committed in connection

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[5] Section 1472(i)(1)(B) reads:

> Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished ... notwithstanding the provisions of section 3559(b) of Title 18, if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

The argument might run that Congress would not have considered it necessary to preclude consideration of section 3559(b) (providing that an offense classified under that section carries the incidents of classification of an offense) if Congress believed that the penalty under section 1472 (and similar offenses) did not permit a term of years to be imposed. One of the incidents of classification might be found in section 3581(b)(1). However, it might be noted in response that section 3559(b), by its express terms, exempts the incident of maximum term of imprisonment, and no exemption in the offense might then be necessary. Additional arguments along these lines might be considered at a later time.

with the kidnapping. See Appendix A, pages A-4 and A-5, for relevant case law raising this issue.

The case law suggests two approaches to this issue. The first is to apply §2A4.1 (Kidnapping), then reference §2A1.1 (First Degree Murder) as provided by §2A4.1(b)(7) because the defendant further conspired to kill the kidnapping victim, then reduce the offense level by three levels pursuant to §2X1.1(b) for the uncompleted conspiracy. This is the approach upheld by the majority in United States v. Depew, 932 F.2d 324 (4th Cir.), cert. denied, 112 S. Ct. 210 (1991), and in United States v. Lambey, 1992 WL 210604, No. 90-5619 (4th Cir. 1992) (en banc) (holding that lower court's calculation of guideline range was not plain error, and was consistent with decision in DePew). The resulting offense level is level 40.

The second approach, advocated by the dissent in Lambey, is to apply the guidelines as above, but instead of stopping the analysis with the application of §2X1.1(b) (3-level reduction for incomplete conspiracy), §2X1.1(c) (use attempt or conspiracy guideline expressly covering the conduct) is applied. In this case, that guideline would be §2A1.5 (Conspiracy to Commit Murder). The resulting offense level is level 28.

An amendment to the commentary of §2A4.1 (Kidnapping), effective November 1, 1992, specifies that the first approach is to be followed for kidnapping offenses.

3. Enhancement for Injury to Victim

Throughout the guidelines, references are made to "any victim" or "the victim" for purposes of certain specific offense characteristics. The case law appears to hold that a reference to "a victim" requires an adjustment if the defendant's relevant conduct involved any victim. United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991) (robbery). The issue arises whether a guideline referring to "the victim" requires an adjustment in the same circumstances, or whether the adjustment is applied only for the victim of the offense of conviction. The Fifth Circuit and the Ninth Circuit appear to have held that "the victim" refers only to the object of the offense of conviction. United States v. Kleinebreil, 1992 WL 155419, No. 90-8375 (5th Cir. 1992) (aggravated assault); United States v. Graves, 908 F.2d 528 (9th Cir. 1990) (aggravated assault). The Fourth Circuit may have reached a different result in United States v. Bassil, 932 F.2d 342 (4th Cir. 1991) (inmate convicted of aggravated assault under Assimilative Crimes Act after throwing chair at prison officials during a riot that resulted in injury to six officials and 40 inmates is accountable under §1B1.3 for all harm resulting from riot).

4. Aggravated Assault, Dangerous Weapons, and Double-Counting

A split in the circuits appears to have developed over the issue of whether a defendant using a dangerous weapon that is not inherently dangerous (e.g., a chair or an automobile) is subject to impermissible double-counting when the defendant is sentenced under §2A2.2 (Aggravated Assault) and receives an enhancement for otherwise using the dangerous weapon. The Fourth Circuit in United States v. Williams, 954 F.2d 204 (4th Cir. 1992) (defendant struck another person with a chair) holds there is no impermissible double-counting in this instance as the Commission is not prohibited by the Constitution (and does not expressly prohibit in the guidelines) from further enhancing the sentence for the use of the dangerous weapon.

However, the Second Circuit in United States v. Hudson, No. 92-1057, 1992 WL 194524 (2d Cir. 1992) (driving automobile at federal agent) explicitly disagrees with Williams and holds that such an enhancement does constitute double-counting. The court held that the charge of aggravated assault contemplated the use of a dangerous weapon. Specifically, an automobile is not an inherently dangerous weapon and becomes one only when 'otherwise used' in an assault. Thus, unlike a gun, the mere possession of a car during an assault will not convert an ordinary assault into an aggravated one. The court considered the actions involving the vehicle in the charge.

Other issues appearing in the case law are summarized in Appendix A, pages A-4 to A-15.

D. Hotline Calls

Between November 1, 1987, and September 1, 1992, 108 hotline calls regarding Part 2A guidelines were received on the TAS and legal hotlines. Eighty-three of those calls were received after January 1, 1990. The majority of calls referred to the following guidelines: §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) (23 Calls); §2A2.2 (Aggravated Assault) (17 Calls); §2A6.1 (Threatening Communications) (17 Calls); and §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) (13 Calls).

Under §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) many of the questions involved the use of the specific offense characteristic at §2A4.1(b)(7) for offenses that were the subject of state charges or convictions. Section 2A4.1(b)(7) requires the use of an underlying offense, if higher, if the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense; or if another offense was committed during the kidnapping, abduction, or unlawful restraint. For example, callers questioned the use of a federal guideline such as criminal sexual abuse as an underlying offense for a state charge or conviction of rape. Other callers questioned the circumstances necessary to apply the 1-level decrease at §2A4.1(b)(4)(C) for releasing the victim before twenty-four hours had elapsed.

Regarding §2A6.1 (Threatening Communications), most callers wanted to know how to group multiple counts of threatening communications if they involved the same victim occurring on different occasions. Others wanted further definition of what constitutes "evidencing an intent to carry out such threat" under §2A6.1(b)(1). Finally, callers inquired as to whether a downward departure was appropriate due to the defendant's diminished capacity and another caller wanted to depart upward for repeated conduct and the defendant's apparent recidivist tendencies.

With respect to §2A2.2 (Aggravated Assault), most of the callers inquired as to what constitutes aggravated assault for purposes of deciding which guideline to apply, §2A2.2 or §2A2.3 (Minor Assault). For example, what does "not merely to frighten" mean or what is considered "serious bodily injury."

A variety of questions were asked in reference to §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder). Most of the questions involved the use of the 1989 and 1990 guidelines manuals. Most of the callers questioned the use of the cross references and wanted to know which underlying offense applies. Another caller inquired as to why the conspiracy to commit murder was listed under §2A2.1 and did not provide a cross reference to murder. Finally, a caller questioned the Commission's rationale for deleting the weapon enhancement under §2A2.1 in the 1990 manual and whether an upward departure was warranted.

Finally, there were no calls on the following guidelines: §2A1.2 (Second Degree Murder); §2A3.3 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2A4.2 (Demanding or Receiving Ransom Money); §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); and §2A5.3 (Committing Certain Crimes Aboard Aircraft).

E. Expert Assistance[6]

The working group met with the Commissioner Ex-officio and Department of Justice staff to solicit the Department's comments and suggestions regarding Part 2A guidelines. The Commissioner requested that the working group particularly examine the suggestion in the background commentary to §2A1.1 that a sentence imposed under 18 U.S.C. § 1111(b) may be other than a life sentence. It was also agreed that the Department would identify additional Part 2A application issues. The Department has not completed these efforts at the time of this writing.

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[6] A review of recent public comment files yielded no relevant commentary.

F. Legislative History

In reviewing the penalties for the statutes that are the subject of the Part 2A guidelines, the group found maximum penalties ranging from life imprisonment or death for First Degree Murder to three years for assault upon certain federal officers "while engaged in or on account of...official duties." A review of the U.S. Code also revealed that there are several federal provisions addressing the varying degrees of assault and battery. The penalties vary considerably, even when the statutes refer to substantially similar conduct. As the guidelines note in background commentary to §2A2.2, if the assault is upon certain federal officers "while engaged in or on account of...official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on the federal officer, the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

The federal provisions for murder, conspiracy to commit murder, solicitation to commit murder, and attempted murder also show a range of maximum penalties from life or death for First Degree Murder to twenty years for attempted murder. The federal murder provisions are unlike those in the Controlled Substances Act (21 U.S.C. § 841, et seq.) which authorize the same punishment for attempted and completed drug trafficking offenses. The murder statutes were not enacted as a comprehensive piece of legislation, but have been added over a period of time. The Commission, therefore, has promulgated different guidelines for the various murder statutes to reflect the substantially different statutory maximums.

G. Issues for Consideration

The following possible issues arise from the discussion above of monitoring data, case law, hotline calls, and public comment. The issues listed within each section below have been identified by the working group as involving some degree of difficulty in application or raising some similar concern. The working group has attempted to be inclusive, rather than exclusive, in identifying issues for possible further analysis, publication in the Federal Register, or resolution by the Commission.

1. §2A1.1 -- Life Mandatory Minimum Under 18 U.S.C. § 1111(b)

Section 2A1.1 indicates that there may be some ambiguity regarding whether a term of years may be imposed under section 1111(b) or whether section 1111(b)

mandates a sentence of life in prison. Section 2A1.1 leaves the issue for the courts to resolve. However, the appellate courts addressing the issue (i.e., the Second, Third, Ninth and Tenth Circuits) hold unanimously that the statute requires a mandatory term of life in prison. Should the commentary be amended to conform to the holding of these courts?

2. §2A2.2 (Aggravated Assault), §2A2.3 (Minor Assault), and §2A2.4 (Obstructing or Impeding Officers)

Application difficulties arise when determining which of these three guidelines is most applicable when cross referencing from another guideline. Would it be beneficial to consolidate these guidelines into one assault guideline? Also, when cross referencing, can conduct resulting in a state charge or conviction be considered?

3. §2A2.2(b)(3) -- Definition of "Victim"

When applying the specific offense characteristic of serious bodily injury under §2A2.2(b)(3) (Aggravated Assault), is the determination of "the victim" limited to the victim addressed in the count of conviction or may it apply to others included by relevant conduct?

4. §2A4.1 -- Kidnapping, Abduction, Unlawful Restraint

Does the specific offense characteristic at §2A4.1(b)(7) (cross reference to underlying offense) apply to conduct resulting in a state charge or conviction? Also, is the reduction of 1 level under §2A4.1(b)(4)(C) if the victim was released within 24 hours appropriate or necessary? There is concern that defendant can engage in many serious criminal acts within that time period and should not be allowed any such reduction. Finally, does §2A4.1(b)(4)(A) apply if the victim is killed (thereby "releasing" the victim)?

5. §2A4.2 -- Demanding or Receiving Ransom Money

Does the single base offense level 23 provided for this guideline adequately reflect the variety of conduct covered by the guideline? As the background commentary notes in part, this guideline covers not only extortionate demands and demanding ransom money as a participant in a kidnapping offense, but also accessory after the fact to a kidnapping, and a "copy-cat" demand for ransom money where others not associated with the defendant committed the kidnapping.

6. §2A6.1 -- Threatening Communications

It is unclear whether to group multiple instances of threatening communications to the same victim on different occasions. Are these considered separate harms? Also, does this guideline with a base offense level of 12 adequately reflect the "heartland" offense?

7. §2A6.1 -- Appendix A (Statutory Index)

Some confusion exists over which statutory provisions and which conduct is subject to §2A6.1 (Threatening Communications) and which is the subject of guidelines imposing more severe sentences (e.g., §2B3.2 (Extortion) because, in some cases, the conduct may be prosecuted under a variety of statutes, or a single statute applies to a variety of conduct (e.g., 18 U.S.C. § 876 which has multiple, unenumerated paragraphs, applying to extortion, demand for ransom in a kidnapping, and threatening communications).

8. Penalties for Violent Offenses

Are the offense levels adequate for Chapter Two, Part A guidelines?

III. Firearms

A. Background

The firearms guidelines have been the subject of considerable study and amendment since the promulgation of the sentencing guidelines in 1987. The Commission has enacted amendments to the firearms guidelines in 1989, 1990, and 1991.

The 1989 amendments increased the penalty for National Firearms Act firearms (including automatic and short-barreled firearms, silencers and destructive devices) from base offense level 12 to level 16, increased the penalty for prohibited persons from level 9 to level 12, and increased the adjustment for a stolen firearm from 1 level to 2 levels.

The 1990 amendments further increased the penalty for National Firearms Act firearms from level 16 to level 18.

In 1991, the Commission undertook a substantial revision of the firearms guidelines, consolidating a number of the guidelines, strengthening cross references, and implementing significant increases in the penalties for the most serious offenses. After an extensive review of monitoring data, case law, case files, literature, and after consultation with firearms experts, criminal justice practitioners, the Department of Justice, and the Bureau of Alcohol, Tobacco and Firearms, the Commission increased penalties for offenses involving:

Summary of Guideline Provision	Summary of Penalty Increase
Defendants with one or more prior convictions for a crime of violence or controlled substance offense	Penalty increased from level 12 to up to level 26
Other prohibited persons (e.g., felons, illegal aliens, fugitives)	Penalty increased from level 12 to level 14
Possession of a firearm in connection with another felony offense	Penalty enhanced by 4 levels to not less than level 18
Unlawful interstate trafficking, or possession of stolen firearms	Penalty increased from level 6 to level 12
Destructive devices	Penalty increased from level 18 to 20
Multiple firearms	Applied enhancement to possession offenses

Following publication of amendments for the 1992 cycle, the Attorney General identified several additional areas of concern relevant to violent crime, and recommended the following increased penalties:

- the base offense level for offenses involving National Firearms Act firearms (e.g., machineguns, short-barreled firearms, silencers) should be increased from the current level 18 to level 22 (level 24 for destructive devices);

- the base offense level for illegal possession or use of semiautomatic firearms should be increased from the current level 12 to level 22 (the level proposed for machineguns and most other National Firearms Act firearms);

- felony offenses committed by a member of a criminal street gang, or in association with a criminal street gang, should receive a 4-level enhancement;

- the base offense levels for firearms violations by prohibited persons (e.g., felons or fugitives) should be increased in all cases by 4 levels;

- the minimum offense level for possession or use of the firearm in connection with another felony offense should be increased from level 18 to level 22;

- the cumulative offense level restriction (cap) of level 29 should be eliminated;

- the base offense level for distribution of a firearm to a prohibited person (e.g., a felon or fugitive) should be increased from the current level 12 to level 16; and

- the adjustment for offenses involving multiple firearms should increase more rapidly.

In response, the Commission established this working group to study these areas and to identify any additional, related issues. After reviewing previous working group research, and soliciting individual Commissioner and senior staff input, the working group set out to study two general research questions relevant to the current, revised firearms guidelines at §2K2.1 (i.e., found in the "red" manual):

- Are the current penalties for the revised firearms guidelines adequate?

- Are there specific application problems associated with the revised firearms guidelines that need to be addressed?

The remainder of the firearms section of this report summarizes the working group's research and findings with respect to these two questions.

B. Monitoring Data

In order to determine the impact of the revised firearms guidelines, the working group analyzed post-November 1, 1991, monitoring data for cases in which defendants were sentenced under the 1991 version of §2K2.1.

Average Sentence Use of the 1991 version of §2K2.1 (the revised version of the firearms guidelines) has been limited to 66 cases for the period from November 1, 1991 (the effective date of the amendment) to September 25, 1992 (the time of the writing of this report). Only 50 of these cases have imprisonment information available in the statement of reasons. This compares with 837 cases sentenced under the 1990 version of the firearms guidelines during fiscal year 1991.[7] The average sentence imposed in a 1990 amendment firearms case was 34 months. The average sentence imposed using the revised 1991 amendment firearms guideline was 54 months, an increase of 20 months or 59 percent over the 1990 amendment cases. See Appendix B, page B-1.

Median Guideline Range The median guideline range for cases sentenced under the 1990 version of the firearms guidelines during fiscal year 1991 was 15-21 months. This compares with the median guideline range of 41-51 months for cases sentenced to date under the 1991 version of the firearms guidelines.

Departures Sixty-one of the sixty-six 1991 amendment firearms cases had statement of reasons information available. Of these 61 cases, two (3%) involved upward departures, four (7%) involved downward departures, and four (7%) involved substantial assistance departures. This compares with the 957 amendment year 1990 cases which included 46 (4.8%) upward departures, 41 (4.3%) downward departures, and 32 (3.3%) substantial assistance departures. See Appendix B, page B-1. The overall population showed 1.7 percent as upward departures, 5.8 percent of cases as downward departures, and 11.9 percent as substantial assistance departures.[8]

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[7] In multiple count cases, the case was counted if the firearms guideline (the 1991 version of §2K2.1 or the 1990 versions of §§2K2.1, 2K2.2, or 2K2.3) produced an offense level equal or higher to that produced by the other guidelines used. Cases in which §4B1.1 (Career Offender) or §4B1.4 (Armed Career Criminal) was ultimately applied were not considered to be firearms guideline cases. Section 2K2.1 (1991) was compared with §§2K2.1, 2K2.2, and 2K2.3 (1990) because the 1991 version combined conduct sentenced under the previous three guidelines into a single guideline.

[8] Annual Report, United States Sentencing Commission 133 (1991).

Reasons for Departure The most common reasons for departure in 1990 amendment cases include substantial assistance (34 cases, 20%), adequacy of criminal history (26 cases, 16%), and no reason given (36 cases, 22%). The reasons for departure in 1991 amendment cases include substantial assistance (4 cases, 22%), diminished capacity (1 case), adequacy of criminal history (1 case), overrepresentative criminal history category (1 case), prior record (1 case), plea agreement (1 case), general aggravating/mitigating circumstances (1 case), and no reason given (8 cases, 44%).

C. Case Law

The working group reviewed relevant case law to identify additional potential issues of interest to the Commission. Cases were reviewed to determine if they involved the following areas of concern:

- departures from the revised firearms guidelines;[9]
- difficulties in applying the revised firearms guidelines, including circuit court conflicts over guideline application;
- differential treatment of offenders or offenses involving semiautomatic firearms; and
- constitutional issues surrounding federal regulation of firearms and violent offenses.

1. Departures and Application Issues in the Firearms Guidelines

Difficulties in applying the revised guidelines were limited, but included the issue, raised in United States v. Morehead, 959 F.2d 1489 (10th Cir. 1992), regarding the relevant guideline to be applied where the defendant is convicted under 18 U.S.C. § 371 of conspiring to violate 18 U.S.C. § 924(c) (carrying or using a firearm during or in relation to a drug trafficking crime).[10] In that case, the lower court used §2X1.1 (Attempt, Solicitation, or Conspiracy) to apply §2D1.1, because the underlying conduct

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[9] Because the revised firearms guidelines have been in effect for less than a year, few reported decisions reflect use of the revised version. While Commission data indicate ten departures under the revised guidelines, no reported decisions appeared to involve departures from the revised guidelines, or circuit conflicts over application of the revised firearms guidelines.

[10] See the hotline call infra on a related issue.

involved a drug transaction. The appellate court overturned the lower court's decision, holding that the most analogous guideline was §2K2.1(a)(7) and not §2D1.1, particularly in light of the nature of the firearms offense and the jury acquittal on drug trafficking charges. The court had difficulty applying §2K2.4 in light of guideline direction to apply the term required by statute, a term not specified in this case.[11]

A district court in Maryland has called into question the legality of mandatory cross references such as §2K2.1(c) which provides that a sentence may be enhanced based on the defendant's use of a firearm in the commission of a state offense. The court found such a provision, "blatantly adopted by the Commission as a clever device for punishing conduct for which the offender cannot be federally prosecuted," to be "blatantly intolerable and illegal."[12] This holding conflicts with the holdings of a number of appellate courts, including the Fourth Circuit.[13]

2. Semiautomatic Firearms

The circuits appear to be split on the issue of whether a departure is permitted based on the type of firearm involved in the offense, particularly in light of §2K2.1 and its commentary (both the 1990 and 1991 versions).

The 1990 version of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) distinguished among certain types of firearms, giving National Firearms Act firearms (machineguns, destructive devices, short-barreled firearms, and silencers) an offense level 18, and other firearms a level 6 or level 12, depending on the

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[11] Two other cases raised relatively esoteric questions concerning the "sporting purposes" reduction under §2K2.1(b)(2). United States v. Skinner, 1992 WL 178770, No. 91-7775 (11th Cir. Aug. 14, 1992); United States v. Stewart, 780 F.Supp. 1366 (N.D.Fla. 1991). See Appendix B, pages B-4 and B-5.

[12] United States v. Carroll, No. 90-0471 (D.Md. Sept. 4, 1992) (Smalkin, J.).

[13] See e.g., United States v. Humphries, 961 F.2d 1421 (9th Cir. 1992); United States v. Perez, 897 F.2d 751 (5th Cir.), cert. denied, 111 S.Ct. 177 (1991); United States v. Smith, 910 F.2d 326 (6th Cir. 1990). In United States v. Dickerson, 956 F.2d 46 (4th Cir. 1992), the court directed the use of the cross reference at §2K2.1(c) to the Attempted Murder guideline, as opposed to the First-Degree Murder guideline, where the defendant was convicted for failure to register a National Firearms Act firearm.

status of the defendant. At the same time, background commentary to the guideline indicated that "the guideline is not based upon the type of firearm."[14]

The circuits do not appear to read the guideline consistently. At least one circuit reads them to preclude further adjustment on the basis of type of firearm, arguing that the commentary, in particular, indicates that the Commission has "adequately considered" the factor. United States v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990) (type of firearm -- a semiautomatic AK47 -- may not be considered as a departure factor to increase sentence, because all types may equally be intended for unlawful purposes).

Other circuits have determined that the type of firearm, including semiautomatic firearms, was not adequately considered by the Commission, and may justify an upward departure under §5K2.0 (Grounds for Departure). United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991) (dangerousness of two AR-15 semiautomatic rifles justifies upward departure from range of 10-16 months to 48-month sentence); United States v. Thomas, 914 F.2d 139 (8th Cir. 1990) (upholding upward departure from range of 8-14 months to a sentence of 60 months based on dangerous nature of AK47 assault rifle, and a 9 mm pistol, along with cocaine, at girlfriend's apartment); United States v. Robinson, 898 F.2d 1111 (6th Cir. 1990) (upholding departure from "woefully inadequate" range of 4-10 months to 60-month sentence based on nature of Tec 9 semiautomatic firearms and threat to the community of two fully loaded magazines containing 32 rounds each); see also, United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989) (nature of firearms, machine guns, could be considered in determining whether to depart upward); United States v. Scott, 914 F.2d 959 (7th Cir. 1990) (remanding for consideration of whether possession of short-barreled shotgun may justify upward departure).[15]

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[14] U.S.S.G. §2K2.1 comment. (backg'd) (1990) reads in relevant part:

> Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence. Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

[15] For a more detailed discussion of this and related issues, see Appendix B, page B-6 to B-9.

No court has interpreted the revised §2K2.1 in this context. Three aspects of that revised guideline address "type of firearm." First, the 1991 version of §2K2.1 provides enhanced penalties for National Firearms Act firearms (at least level 18) and destructive devices (at least level 20). Second, note 16 has been added to the commentary, providing for an upward departure involving multiple National Firearms Act firearms, military-style assault rifles, or non-detectable firearms. Both of these provisions may suggest that the Commission adequately has considered type of firearm, and intends to preclude upward departures on this basis. However, the third aspect of §2K2.1 is that the background commentary discussion of the irrelevance of type of firearm has been eliminated, possibly suggesting that the Commission does find the type of firearm to be relevant.

3. Federalization of Firearms and Violent Offenses

Concerns have been expressed regarding the increased federalization of certain firearms and violent offenses. Historically, many of these offenses have been left to regulation by state and local governments. Over the last three decades, however, the federal government has increasingly enacted criminal penalties for various firearms offenses, including recent statutes banning possession of certain machineguns (18 U.S.C. § 922(o)) and punishing the carrying or use of a firearm in connection with a crime of violence or controlled substance offense (18 U.S.C. § 924(c)). Pending crime legislation would further expand the scope of federal regulation.[16]

This federalization raises two issues: (1) whether such federal regulation (and by extension the relevant federal sentencing guidelines) is constitutional; and (2) whether such federal regulation is wise public policy. The working group examined case law relevant to the first question. The second question is obviously beyond the scope of the working group.

Regarding the first question, it appears that the federal courts examining this issue have upheld federal regulation of various firearms and violent activity whether that activity involves interstate commerce or takes place exclusively intrastate. Perez v. United States, 402 U.S. 146, 150 (1970). The standard for evaluating the validity of an Act promulgated pursuant to the Commerce Clause[17] is whether a reasonable Congress could find that the "class of activity" regulated affects interstate commerce, even if some of that activity take place exclusively intrastate. Perez, 402 U.S. at 150. If the class of activity affects interstate commerce, then the Congress may regulate it pursuant to the

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[16] See the summaries of pending legislation prepared by the Legal Staff.

[17] U.S. Const. Art. I, § 8, cl. 3.

Commerce Clause. Congress need not make specific findings of fact to support its conclusion that a class of activity affects commerce. Perez, 402 U.S. at 156 (1970).

Under this standard, it appears courts have consistently upheld federal regulation of firearms, firearm possession, and firearm use in connection with violent or drug-related crime. See United States v. Evans, 928 F.2d 858 (9th Cir. 1991) (upholding 26 U.S.C. § 5861(d) (prohibiting receipt or possession of unregistered firearm, including machinegun) and 18 U.S.C. § 922(o) (prohibiting possession or transfer of machinegun) since there is at least an implicit, if "tenuous," nexus between the possession of any firearm and the national economy); and United States v. Dumas, 934 F.2d 1387 (6th Cir. 1990) (upholding 18 U.S.C. § 924(c) punishing use of firearm in connection with drug or violent offense as a valid measure designed to deter the violence associated with drug trafficking, an activity validly regulated by Congress under the Commerce Clause).

But see the recent opinion in the District of Maryland objecting to the use of state offenses to enhance the sentence for a federal offense of felon in possession of a firearm because --

> it is fundamentally offensive to any proper notion of federalism to "federalize," for punishment purposes, countless thousands of state crimes merely because the offender happens to be a convicted felon with a gun. Although chimerical, the supposed nexus between convicted felons in possession of handguns and interstate commerce has been deemed sufficient by the federal appellate courts to sustain the constitutionality of 18 U.S.C. § 922(g), usually in opinions lacking in any real analysis. See, e.g., United States v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990). Notwithstanding the power of Congress in connection with firearms regulation, it is common knowledge that recent congressional attempts to federalize such crimes as murder when committed with a handgun that has traveled in interstate commerce have failed of enactment. To allow the Sentencing Commission, as "a sort of junior-varsity Congress," to exercise palpable sentencing power over non-federal offenses by the simple and innocuous-looking expedient of a "cross-reference" is blatantly intolerable and illegal ... .[18]

(Internal citation omitted.)

D. Hotline Calls

A total of 82 calls regarding Part K were received on the Technical Assistance Service and legal hotlines between November 1, 1991, and September 1, 1992. The

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[18] United States v. Carroll, No. 90-0471 (D. Md. Sept. 4, 1992) (Smalkin, J.).

majority of calls referred to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) (52 calls), and §2K2.4 (Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes) (22 calls).

Under §2K2.1 many of the questions involved whether or not the cross reference at §2K2.1(c)(1) could be applied to conduct resulting in a state charge or conviction, where the state charged the robbery or aggravated assault and the United States Attorney prosecuted the firearms charge. The other most prevalent question involved whether the defendant must have knowledge that the firearm had been stolen, in order to apply the specific offense characteristic at §2K2.1(b)(4). Others questioned which manual applies and whether or not the court could use the 1991 amended increased base offense levels as a reason for upward departure. Finally, a few callers were concerned that the use of prior convictions to determine the base offense levels may be double counting. Questions involving grouping of firearm counts appear to have decreased since the 1991 amendment.

With respect to §2K2.4, most callers inquired whether the enhancement for firearm possession under §2D1.1 or §2B3.1 could be applied if guns other than the gun charged in the 18 U.S.C. § 924(c) count were involved. Some callers wanted direction on how to apply the new proviso at §2K2.4 application note 2, while others questioned if multiple counts of 18 U.S.C. § 924(c) run concurrently or consecutively.

A question relevant to both §2K2.1 and §2K2.4 was raised regarding the sentence to be imposed on a defendant convicted in count one under section 371 of conspiring to violate section 924(c), and in count two under the substantive section 924(c) offense.[19]

There were no calls regarding the other Part K guidelines at §2K1.2, §2K1.3, §2K1.5, §2K1.6, §2K1.7, §2K3.1, or §2K3.2.

E. Public Comment and Expert Assistance

1. Public Comment

The working group reviewed public comment submitted following promulgation of the revised firearms guidelines in order to determine the primary issues the public considered to remain in this area.

A federal District Court judge wrote the single comment relevant to the subject matter of the working group. The judge urged the Commission to eliminate the "most

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[19] See case law summary supra of the related Morehead case.

cumbersome language found outside the Internal Revenue Code" which is located in Application Note 2 to §2K2.4, the guideline that applies to convictions under 18 U.S.C. § 924(c). The judge noted this provision was almost "incomprehensible, very difficult to apply, and creates far more problems than it attempts to solve," and suggested a more concise alternative provision.

2. Department of Justice

The working group met with the Commissioner Ex-officio and Department of Justice staff in order to further explore the Attorney General's correspondence with the Commission. As a result of this productive meeting, it was agreed that the Commission and the Department would exchange various information including summaries of cases, and statistical and departure data on gangs and semiautomatic firearms.

The Department informs us that, at this writing, much of the information requested is not yet available. The Executive Office in June of 1992 began to collect systematically statistical data on semiautomatic firearms and gangs, including relevant departure data. Triggerlock data do not identify either type of firearm or gang-related information. In addition, the Department has not completed efforts to identify compelling cases that may justify the need for enhanced firearms sentences.

3. Bureau of Alcohol, Tobacco and Firearms

During the 1991 amendment cycle, the firearms working group met with representatives of the Bureau of Alcohol, Tobacco and Firearms on multiple occasions to discuss technical aspects of firearms, firearms prosecutions, and the firearms guidelines. The results of these discussions are summarized below in the section on technical aspects of firearms, and in the firearms working group's fall report.

Additional correspondence has been sent to the Bureau seeking additional statistical and technical information regarding classification of firearms, including semiautomatic firearms, and the Bureau is currently preparing a response. The working group will advise the Commission of relevant information provided by the Bureau.

F. Legislative History and Pending Legislation

1. Legislative History of Firearms Statutes

Until the 1920s and early 1930s, firearms restrictions were largely the province of state and local authorities. However, criminals, particularly those in organized crime, increasingly used more dangerous firearms such as machineguns, automatic firearms,

guns equipped with silencers, short-barreled firearms, and disguised firearms (e.g., pen guns).[20] Local governments were perceived as unable to stem the national use of these dangerous firearms, and pressure soon developed to enact federal firearms restrictions.

In 1934, the National Firearms Act (N.F.A.), 26 U.S.C. § 5801, et seq., was enacted. The Act restricts the use of various serious firearms (N.F.A. firearms) by requiring manufacturers, importers, and dealers to register annually with the federal government, to pay occupational, manufacture, and transfer taxes, to identify firearms with serial numbers or other methods of identification, and to maintain such records and returns as prescribed by the Secretary.[21] All "makings"[22] and transfers are required to be approved by the Secretary. Every firearm is to be registered by its transferor, and the information compiled in a central registry maintained by the Secretary. The importing of N.F.A. firearms, except for certain lawful purposes (e.g., research, government use), is prohibited. The receipt or possession of any unlawfully transferred, manufactured, transported, or imported firearm, or the possession of any unregistered or unidentified firearm, is punishable by a term of imprisonment not to exceed ten years.[23]

Additional federal firearms legislation was enacted by the Gun Control Act of 1968, 18 U.S.C. § 921, et seq.[24] This Act extends additional restrictions over N.F.A. firearms, and introduces some of the first federal firearms restrictions to non-N.F.A. firearms, such as shotguns, rifles, handguns, and other semiautomatic and manual firearms, and to ammunition. These provisions include licensing of those engaging in the business of importing, manufacturing, dealing, shipping, transporting, receiving firearms or ammunition,[25] and restrictions on the transfer and possession of firearms.

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[20] These firearms are known as National Firearms Act (N.F.A.) firearms. Destructive devices, such as pipe bombs and grenades were later added to the list of N.F.A. firearms. They do not include firearms such as handguns, unaltered, regulation-length long-arms (rifles and shotguns), and various semiautomatic weapons.

[21] See 26 U.S.C. §§ 5801, 5802, 5811, 5821, 5842, 5843, respectively.

[22] Under the Act, "making" a firearm involved the manufacture of a weapon by one not qualified to engage in the business of manufacturing firearms; "manufacturing" involved the manufacture by one engaged in the business. See 26 U.S.C. § 5845(i).

[23] 26 U.S.C. §§ 5812, 5822, 5841, 5844, 5871, respectively.

[24] The Act underwent a subsequent, substantial revision in 1986 as part of the Firearms Owners' Protection Act (FOPA).

[25] 18 U.S.C. § 922(a)(1).

Restrictions based on the type of firearm involved include restrictions on dealers selling N.F.A. firearms or armor-piercing ammunition.[26] The manufacture and domestic sale of certain types of ammunition, particularly armor-piercing ammunition, is prohibited.[27] In addition, no person may possess or transfer a machinegun not lawfully possessed prior to May 19, 1986.[28] Most offenses under the Act are subject to five-year statutory maximums,[29] but certain relatively serious offenses are subject to ten-year terms of imprisonment.[30]

Two predominant threads underlie the approach and penalty structure of the firearms statutes. First, law-abiding citizens generally have the right to own firearms, and this ownership should be subject to minimal federal regulation. Amendments to the Gun Control Act, made under the Firearms Owner Protection Act, underscore this theme.[31] A second consideration is the intent of Congress that the statutes and their penalty provisions provide for harsh punishment if the offender is not a law-abiding

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[26] 18 U.S.C. § 922(b).

[27] 18 U.S.C. § 922(a)(7), (a)(8).

[28] 18 U.S.C. § 922(o).

[29] But cf., 18 U.S.C. § 922(m) (one year statutory maximum where dealer makes false entries or records, or fails to make required records).

[30] See e.g., 18 U.S.C. § 922(g) (prohibiting felons, and others, from possessing firearms); 18 U.S.C. § 922(h) (prohibiting employees of felons, and others, from purchasing firearms in the course of their employment); 18 U.S.C. § 922(i) (prohibiting shipping of stolen firearms); 18 U.S.C. § 922(j) (prohibiting receipt or sale of stolen firearms); 18 U.S.C. § 922(o) (prohibiting transfer or possession of unlawfully possessed machinegun).

[31] See Hardy, The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 Cumberland L. Rev. 585-682 (1987) for a detailed summary of the Act and the negotiations on which the Act was predicated. See also discussion in Research Project, Federal Firearms Legislation, 6 Hamline Law Review 409, 412-415. The author cites as the predominant provisions furthering this philosophy the restrictive definition of "engaged in the business of selling firearms," the tightened scienter requirements, and liberalized record keeping requirements for dealers.

citizen,[32] or if particularly serious firearms are involved, such as those regulated by the National Firearms Act.[33]

2. Pending Legislation

Numerous additional proposals for restricting certain handguns and military-style, semiautomatic assault rifles have been proposed since the early 1970s, but none have become law.[34] Legislation pending at the adjournment of the 102d Congress contained numerous firearms and violent crime provisions, including new mandatory minimum penalties, increased statutory maximums, directives to the Commission, and new offenses. This legislation did not pass before the Congress concluded.

G. Literature and Report Review

1. Previous Commission Reports

The firearms and explosives working group prepared two extensive reports (Fall of 1990 and Spring of 1991) summarizing monitoring data, case file review data, and appellate law for the 1987-1990 versions of the firearms guidelines. Those reports are available for review by individual Commissioners, and will not be summarized further here.

The drug role working group prepared two extensive reports (Fall of 1991 and Spring of 1992) summarizing various data and case law relevant to §2D1.1 drug offenses. Relevant data include findings that firearms were used or discharged by the defendant in 1.3 percent of the cases, were possessed on the person of the defendant or within arm's reach in 9.1 percent of the cases, were readily available to the defendant (located near

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[32] See 18 U.S.C. § 924(a)(2), providing for ten-year statutory maximums for offenses involving prohibited persons under 18 U.S.C. § 922(d), (g) and (h), and providing for a lower standard of scienter ("knowing") in contrast with the higher "willing" standard provided for violations of other provisions under the statute.

[33] See 18 U.S.C. § 924(a)(2) which provides a ten-year statutory maximum for "knowing" as opposed to "willing" violations of 18 U.S.C. § 922(o); see also 26 U.S.C. § 5871 (penalties for violations of the National Firearms Act).

[34] See summary of legislation pending in the 101st Congress, printed in Hogan, Gun Control, Congressional Research Service Issue Brief (September 4, 1990).

drugs or near the defendant but not within arm's reach) in 9.7 percent of the cases, and were possessed by a co-conspirator in an additional 8.7% of the cases.[35]

2. Technical Journals, Law Review Articles, and other Periodicals

This section reviews various journals, articles, and other periodicals for technical information and data on firearms. The information may help determine if there are certain classes of firearms that may be considered technically more dangerous than others. If such classes exist, the Commission may wish to consider enhancing the sentence based on such possession or use of such firearms, or identifying such possession or use as a basis for departure.

a. Traditional Classification of Firearms

Traditionally, firearms are classified into three broad categories: fully automatic, semiautomatic, and manual firearms. The categories are based on the method by which the firearm fires a round and chambers the next round.

Automatic firearms are generally firearms that fire multiple rounds with a single pull of the trigger. An automatic firearm is defined in 26 U.S.C. § 5845(b) as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[36] These firearms are often called machineguns and have generally been banned for civilian sale and ownership since 1986.[37] Automatic firearms may be either long-arms (rifles) or short-arms (handguns).[38]

Semiautomatic firearms fire one round with each pull of the trigger but chamber the next round, and can fire multiple rounds from a magazine without reloading. A

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[35] See Appendix B, pages B-13 to B-15. The working group reviewed 815 randomly selected MONFY90 §2D1.1 cases.

[36] Section 5845(b) also provides that "The term [machinegun] shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. §5845(b).

[37] 18 U.S.C. § 922(o) prohibits the transfer of any machinegun not lawfully possessed prior to May 19, 1986.

[38] See e.g., ATF Ruling 82-3 (KG-9 pistol); 82-8 (SM10 and SM11A1 pistols).

firearm is defined in 18 U.S.C. § 921(a)(28) as semiautomatic if it "utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge."[39] Their sale and civilian use is subject to certain restrictions of state and local codes, but, for the most part, semiautomatic firearms are not subject to federal prohibitions on possession.[40] Kits to convert semiautomatics to automatics are available, and some semiautomatic firearms have selector switches allowing either automatic or semiautomatic operation.[41]

Manual firearms include single-shot pistols, revolvers, and pump-action or bolt-action firearms. These firearms fire one round with each pull of the trigger but do not reload automatically. They generally have a capacity of no more than eight rounds.

The Department of Justice, as noted above, has asked that one of these traditional classes of firearms -- semiautomatic firearms -- serve as the basis for an enhanced sentence. The primary limitation on the use of traditional classifications when considering whether to apply sentence enhancements to that class of firearm, is the lack of consensus among experts as to whether each of the specific firearms within the semiautomatic classification is in fact technically more dangerous than manual firearms. While some of these semiautomatic firearms may have particular appeal to criminals, and may be particularly suited for injuring large numbers of persons, other semiautomatic firearms (e.g., .22 caliber rifles) appear to be widely used for legitimate sporting purposes.[42]

b. Some Alternative Classifications

Given this difficulty, the Commission may wish to consider alternatives to the traditional classification. A few possibilities are identified below. In order for a classification of firearms to be considered as a sentencing factor, the specific firearms within the classification should correlate relatively well with some notion of increased

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[39] 18 U.S.C. § 921(a)(28) defines "semiautomatic rifle" but the definition of "semiautomatic" is generic and can apply to any short-arm or long-arm.

[40] In 1989, the Administration established a permanent ban on the importation of 43 models of military-style semiautomatic rifles. CRS 92-434 GOV (May 13,1992). Subsequently, Congress prohibited the domestic assembly of the banned military-style assault rifles from imported parts. 18 U.S.C. § 922(r).

[41] Such firearms are considered automatic firearms. See 26 U.S.C. § 5845(b).

[42] See, for example, Semi-Auto Firearms, National Rifle Association, (Nov. 1991).

dangerousness to an individual victim or to society in general, or at the least should have some particular, demonstrable use in the commission of crime.

Military-Style Assault Rifles. One alternative classification of firearms that the Commission might consider for sentencing factor purposes is the military-style assault rifle. These firearms are typically semiautomatic firearms. Media reports and anecdotal information suggest the prevalence of these firearms in the commission of drug trafficking offenses, as well as gang-related and other violent offenses.[43] In response to these reports and in the face of impending congressional action,[44] the Administration acted pursuant to 18 U.S.C. § 925(d)(3) to establish a permanent ban on the importation of 43 models of military-style semiautomatic rifles considered not to be "particularly suitable for or readily adaptable to sporting purposes."[45] Most military-style assault rifles, being manufactured domestically, are not banned,[46] although Congress continues to introduce legislation addressing these types of firearms.[47] The working group is seeking specific data on the frequency of use of military-style assault rifles in connection with crimes, but data appear to be limited.

As with other classifications of firearms, there may be limitations in the use of this classification to enhance sentences. First is the difficulty in identifying the distinguishing technical characteristics that raise concerns about these firearms. As part of its effort to restrict military-style assault rifle importation, the Bureau of Alcohol, Tobacco and Firearms established a working group[48] that identified the following criteria for identifying semiautomatic military-style assault firearms that lacked a sporting purpose:

1. Military configurations (e.g., ability to accept large detachable magazines; folding or telescoping stocks; pistol grips);

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[43] See e.g., Jane Gross, Epidemic in Urban Hospitals: Wounds from Assault Rifles, N. Y. Times, Feb. 21, 1989, at A1, A15.

[44] CRS 92-434 GOV (May 13, 1992) 51.

[45] See discussion at CRS 92-434 GOV 51-52 (May 13, 1992).

[46] From 1985-1989, the domestic production of semiautomatic pistols went from 706,542 to 1,376,073 (Congressional Research Service, 92-434 GOV, (May 13, 1992) page 26.

[47] See listing in CRS 92-434 GOV (May 13, 1992) 56-57.

[48] U.S. Department of Treasury. Bureau of Alcohol, Tobacco, and Firearms. Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles. Washington, [July] 1989.

2. Firearms with selective fire (selecting either semiautomatic or automatic mode of operation), resulting in firearms that are merely semiautomatic versions of machineguns; and

3. Acceptance of centerfire rather than rimfire cartridges of 2.25 inches size or less.

Others have identified bayonet mounts; flash suppressors; bipods; the ability to launch grenades; and night sights as potentially distinguishing characteristics of military-style assault rifles.[49]

A second limitation associated with using the classification of military-style assault rifles is the inability of experts to agree whether military-style assault rifles are inherently more dangerous than other semiautomatic firearms. In meetings with the previous firearms working group, representatives of the Bureau of Alcohol, Tobacco and Firearms noted that these firearms are distinguishable from other semiautomatic firearms on the basis of their appearance, not their ability to inflict more harm.[50] On the other hand, some argue that statistics, including Bureau data, show these firearms are disproportionately used by drug traffickers and violent offenders.[51]

Disguised or Gadget Firearms The Bureau has suggested informally that another class of firearms that might be considered to merit an enhanced sentence are disguised or gadget firearms, generally restricted under section 5845(e) of the National Firearms Act.[52] These firearms include "pen guns" and "cane guns," and may commonly be used for assassination or terrorist activities.

Identify Dangerous Characteristics of a Firearm Instead of identifying a class of firearms based on technical aspects of round chambering (e.g., semiautomatic firearm) or appearance (e.g., military-style assault rifle), the Commission might consider enhancing a sentence based on the more dangerous nature of the firearm. The potentially subjective nature of this correlation, and the policy-laden character of the inquiry, are beyond the scope of this working group. However, the working group can briefly suggest possible

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[49] See CRS 92-434 GOV (May 13, 1992).

[50] See also Semi-Auto Firearms, National Rifle Association, (Nov. 1991).

[51] See CRS 92-434 GOV (May 13, 1992) 65-73.

[52] 26 U.S.C. § 5845(e) defines "any other weapon" subject to the Act as:

> any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell ... .

characteristics of a firearm that may alone, or in combination, indicate a particular firearm is more dangerous than others. Those characteristics include the concealability of the firearm, the speed with which rounds may be fired, the range at which the firearm is accurate, the capacity of the firearm or attachable clips or magazines,[53] the ability of the firearm to inflict wounds or death on an individual victim,[54] and the type of ammunition used.

List Specific Firearms that are Considered More Dangerous (Sentence Increased) or Less Dangerous (Sentence Reduced) The Commission might consider adopting the list of firearms developed by some other body or agency and increasing or reducing sentences based on that list. This approach is similar to that taken by the Bureau of Alcohol, Tobacco and Firearms with respect to that for military-style assault rifles, discussed above. In addition, California regulates 54 listed firearms as particularly dangerous,[55] while Maryland's new handgun law creates a Handgun Roster Board which appraises the legitimate purpose of firearms and develops a list of approved firearms.[56] There are, of course, limitations to any approach relying on a list of firearms: the list tends to be somewhat inflexible and requires updating as firearms are modified, developed, or removed from the market. The Senate Report on the Gun Control Act of 1968 notes "the difficulty of defining weapons' characteristics" and gives this as "a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition."[57]

Issue a Broad Statement of Purpose The Commission might consider merely providing a broad statement of purpose or policy regarding the types of firearms that might be considered to merit a sentencing enhancement, thereby leaving individual courts to depart in appropriate cases. This approach is similar to that used by Congress under 18 U.S.C. § 925(d)(3), pursuant to which the Administration based its military-style assault rifle ban.

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[53] For example, pending legislation in Congress defines an assault weapon as "any semiautomatic center fire rifle that accepts a detachable magazine with a capacity of 20 or more rounds of ammunition." CRS 89-415 GOV (July 11, 1989). See also, Virginia Code Annotated. Section 18.2-308.2:2(1989).

[54] See discussion in Handgun Wounding Factors and Effectiveness, Federal Bureau of Investigation (July 14, 1989).

[55] Cal. Penal Code § 12275.5 (West 1990).

[56] Md. Code Ann. Crim. Law § 36F (West Supp. 1989).

[57] S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968). See also 18 U.S.C. § 925(d).

H. Issues for Consideration

The following possible issues arise from the discussion above of monitoring data, case law, hotline calls, and public comment. The issues listed within each section below have been identified by the working group as involving some degree of difficulty in application or raising some similar concern. The working group has attempted to be inclusive, rather than exclusive, in identifying issues for possible further analysis, publication in the Federal Register, or resolution by the Commission.

1. §2K2.1(a)(1)-(6), (b)(1), (b)(5) -- Increase in Offense Levels

Are the offense levels inadequate for offenses involving National Firearms Act firearms; firearms violations by prohibited persons (e.g., felons or fugitives); possession or use of the firearm in connection with another felony; distribution of a firearm to a prohibited person; or multiple firearms?

2. §2K2.1(a)(1),(3),(4)(B),(5) -- Increase Base Offense Level for Semiautomatic Firearms or Other Dangerous Class of Firearms

Are there certain firearms, such as semiautomatic firearms, assault weapons, or disguised firearms, that should be subject to increased sentences because of their inherently dangerous nature?

3. §2K2.1(a) and Commentary (n. 14) -- Departure Based on Type of Firearm

Does the commentary to §2K2.1 preclude or permit departure on the basis of type or nature of the firearm? The circuits are apparently split on this issue.

4. §2K2.1(a)(1),(3),(4)(B) -- "Instant Offense" vs. "Offense"

Subsections (a)(1) and (a)(3) apply if the "instant offense" involved a particular firearm, but subsections (a)(4)(B) and (a)(5) apply if the "offense" involved a particular firearm. There is some confusion about the distinction between these terms, surmising that one term referred to the offense of conviction only, and the other to all relevant conduct.

5. §2K2.1(a)(1)-(4)(A) and Commentary (n.5) -- Use of Criminal History or Career Offender Rules to Determine Number of Prior Convictions

Note 5 to the commentary to §2K2.1 indicates "For purposes of determining the number of [prior] convictions ... count any such prior conviction that receives any points under §4A1.1 (Criminal History Category). This provision generally applies the criminal history rules for counting prior convictions to the firearms guideline. Among those rules is §4A1.2(a)(1) which notes that a prior sentence to be counted includes "any sentence previously imposed upon adjudication of guilt ... for conduct not part of the instant offense." Thus, if the defendant commits a state offense after the federal offense but is convicted on the state offense prior to the federal offense, then the state offense is considered a prior conviction.

This may be considered, however, to conflict with the language of subsections (a)(1) through (4)(A), as well as the general "junior career criminal" approach of those subsections. Those subsections specify a base offense level "if the defendant had" a certain number of prior convictions. The past tense of the guideline implies those convictions must have been sustained prior to the instant offense. Further, the general approach of these subsections is to sentence the defendant as a career criminal with sufficient prior convictions to merit an enhanced sentence, but fewer prior convictions than the three required by the Armed Career Criminal statute. Case law interpreting that statute, as well as the career offender provision at §4B1.2(3) itself, require that the prior convictions be sustained prior to the instant offense.

This rule, then, conflicts with the apparent rule in note 5, and clarification may be in order.

6. §2K2.1(b)(4) -- Stolen Firearms -- Mens Rea Required

Subsection (b)(4) enhances the offense level if the firearm was stolen. Some confusion continues over whether the defendant had to know the firearm was stolen. All courts have held that there is no requirement that the defendant had to have known the firearm was stolen, but litigation on the issue continues.

7. §2K2.1(c)(1) and §2K1.3(c)(1) -- Cross Reference to State Offense

Do the cross references at §§2K2.1(c)(1) and 2K1.3(c)(1) apply to conduct resulting in a state charge or conviction?

8. §2K2.1 Commentary (Statutory Provisions) -- Reference to 18 U.S.C. § 924(h)

There is no guideline listed in Appendix A (Statutory Index) for 18 U.S.C. § 924(h). Should a reference be added?

9. §§2K2.1 and 2K2.4 -- Conspiracy to Violate 18 U.S.C. § 924(c)

What is the relevant guideline, if the defendant is convicted under 18 U.S.C. § 371 of conspiring to violate 18 U.S.C. § 924(c) (carrying or using a firearm during or in relation to a drug trafficking crime)?[58] The lower court used §2X1.1 (Attempt, Solicitation, or Conspiracy) to apply §2D1.1 because the underlying conduct involved a drug transaction. The appellate court overturned the lower court's decision, holding that the most analogous guideline was §2K2.1(a)(7) and not §2D1.1, particularly in light of the nature of the firearms offense and the jury acquittal on drug trafficking charges. The court had difficulty applying §2K2.4 in light of guideline direction to apply the term required by statute because the term was not specified in this case.

10. §2K2.4 -- Application Note 2

Note 2 of the commentary to section 2K2.4 requires use of the greater of the sentence prescribed by 18 U.S.C. § 924(c) or the increment in punishment resulting from the relevant firearm enhancement. Application of this provision has resulted in some concern that the note is more complicated and confusing than necessary.

11. §2K2.4 -- Double-Counting

Section 2K2.1(b)(5) enhances the offense level for that guideline by 4 levels if the firearm is used in connection with another felony offense. In most cases, this enhancement should not apply if the defendant is also convicted under 18 U.S.C. § 924(c). However, note 2 to §2K2.4 is not explicit that double-counting should be barred in such a case.

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[58] See the hotline call infra on a related issue.

12. §2K2.5 -- Calculation of Consecutive Sentence

Section 922(q) of Title 18, and 18 U.S.C. § 924(a)(4) establish a misdemeanor offense punishable by up to five years in prison. Any term imposed under these sections must run consecutive to any other term imposed under any other provision of law. Section 2K2.5 provides that the relevant guideline range shall be calculated and the range parsed between the term for the underlying offense and the term for the section 922(q) offense. This provides an incremental punishment in a one-count case, but not in many multiple count cases (e.g., 18 U.S.C. §§ 922(g) and 922(q)) (no incremental punishment since grouping rules add no levels when the §2K2.1 offense level is greater than level 16); a §2D1.1 offense and section 922(q) (no incremental punishment for the protected location -- school yard -- portion of the offense, because the gun portion of the offense is a specific offense characteristic under §2D1.1, and the section 922(q) offense will be grouped pursuant to §3D1.2(c)).

13. §7B1.1 -- Definition of 26:5845(a) Firearm

Section 7B1.1 refers to "a firearm or destructive device of a type described in 26 U.S.C. § 5845(a)." Note 4 to §7B1.1 provides the relevant definition of this term. The term used differs from that used in §2K2.1 (Firearms) ("a firearm listed in 26 U.S.C. § 5845(a)") which is separately defined in note 3 to §2K2.1.

14. §4B1.4 -- Double Counting -- Armed Career Criminal and 18 U.S.C. § 924(c)

Section 4B1.4(b)(3)(A) adjusts the offense level by one level if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or a controlled substance offense. This adjustment might be considered double counting if the defendant also is convicted under 18 U.S.C. § 924(c).

15. §2D1.1 -- Cross References to Part 2A Offenses and Enhancements for Threat or Use of Firearm In Connection with Drug Offense

The current version of §2D1.1 provides limited adjustments for violent or firearms conduct occurring in connection with a §2D1.1 offense. There is no cross reference to the Part 2A guidelines in the event of an homicide, assault, or kidnapping, and no adjustment for threatened use or use of a firearm. The violent crimes working group will coordinate research efforts and analysis with the drugs/role/harmonization working group to ensure that any provision proposed by the current drug/role/harmonization working group is consistent with the findings and data presented in this violent crimes report.

IV. Gangs

A. Background

In order to lay the groundwork for understanding future research questions about gangs and gang-related crime, the working group: 1) conducted a literature review of 40 academic and applied journal studies of gangs; 2) surveyed by telephone approximately 20 state sentencing commissions or their counterparts; 3) reviewed pertinent case law; and 4) sought the expert assistance of Department of Justice personnel.[59]

An important first step in this process was to ascertain whether there existed a generally agreed-upon definition of gangs. The working group also investigated whether relevant studies of gangs and gang behavior have been conducted, what policies or practices exist regarding the sentencing of gang members, and what, if any, valid and reliable data exist for research purposes. Particular attention was given to the extensive definitional, constitutional, and practical issues concerning this topic, including the threshold issue of whether a gang member is to be sentenced based on criminal conduct specifically undertaken as a gang member. In addition, concern was taken to note whether or not elements associated with gang-related conduct are presently taken into consideration in the fashioning of appropriate sentences.

B. Literature Review

1. Purpose

The goals of the literature review were to: 1) obtain an overview of the information available through academic studies and practitioner-oriented writings on the topic of gangs; 2) examine the various definitions of "gang" employed by academicians and practitioners; and 3) summarize and assess in a general way the findings and nature of research in this field.

2. Methodology

From an extensive bibliography on gang-related issues prepared by the National Criminal Justice Reference Service, the staff working group selected for review 40 written works including books, monographs, reports, and articles from academic and law enforcement journals. In choosing the literature for review, the working group considered the recency, the type, and the authors of the publications. The group's aim

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[59] A review of recent public comment files yielded no commentary regarding gang-related issues.

was to compile a collection of articles that would contain some of the more current writings on gangs, but that would also include earlier works authored by some of the more prominent researchers on gang-related topics. The group also wished to examine a mix of both scholarly and practitioner-oriented articles.

After a review of the articles, the group completed abstracts of them with the aid of a sample organized into six sections: the purpose of the study, the methodology employed, the population (the group under study), hypotheses, study findings, and definitions of gangs used by the authors. See Appendix C, page C-1. The 40 article abstracts are available should Commissioners or staff wish to review them. The following summary of gang-related research and writings stems from this abstract project.

3. Definitions of "Gang"

The definitions of "gang" employed by the studies under review are many and varied. Similarly, the definitions of "gang crime" frequently differ. In his review of the literature on gangs, Professor Jeffrey Fagan of Rutgers (1989:638) notes a "lack of consensus on the basic definitions and characteristics of gangs." Fagan recounts many of the different interpretations of what constitutes a gang and gang crime. He attributes the varied definitions of gang crime to the "interests of the definer." Gang researcher Arnold Goldstein (1991:5) observes the lack of an acceptable "gang" definition and states that definitions tend to vary according to time, place, political and economic conditions, community tolerance, the level and nature of public concern, cultural conditions, and media treatment. Spergel et al. (1989:2) note that gang definitions employed by law enforcement agencies are frequently narrower than those used by community agencies.

In a study prepared at the request of the National Institute for Juvenile Justice, Walter Miller (1975, as cited in Lyman, 1989:96) lists five criteria for the gang definition to apply. According to Miller, a gang must have: 1) violent or criminal behavior as a major activity; 2) a functional role division and a chain-of-command within the organization; 3) an identifiable leadership; 4) continued interaction among its members; and 5) a sense of territoriality.

Noted criminologist Malcolm Klein (1969, as cited in Lyman, 1989:96) defines a gang as "any denotable adolescent group of youngsters who 1) are generally perceived as a distinct aggregation by others in their neighborhood and who, 2) recognize themselves as a denotable group (almost invariably with a group name), and 3) have been involved in a sufficient number of delinquent incidents to call forth a consistent negative response from neighborhood residents and/or enforcement agencies."

Kane and Spergel (1992) define a gang as a "group or collective of persons with a common identity whose members interact on a fairly regular basis in cliques or

sometimes as a whole group. The activities of the gang may be regarded as legitimate, illegitimate or criminal in varying combinations."

James Silbey (1989:403) states that gangs "vary from loose-knit affiliations without distinct structure or leadership, to quasi-militaristic units with distinct ranks and responsibilities." Gangs, he says, wear identifying colors and maintain certain unifying customs and policies.

Curry and Spergel (1988:401) define a gang as a residual social subsystem often characterized by competition for status and for income opportunity through drug sales. Gangs are organizations concerned with territoriality, status, and controlling human behavior.

Sarnecki (1985, as cited in Goldstein, 1991:4) defines a gang as "a group of juveniles linked together because the police suspected them of committing crimes together."

According to the California Office of Criminal Justice Planning, a gang is "a group of associating individuals which (a) has an identifiable leadership and organizational structure; (b) either claims control over particular territory in the community, or exercises control over an illegal enterprise; and (c) engages collectively or as individuals in acts of violence or serious criminal behavior" (Goldstein, 1991:4).

The New York State Division for Youth defines a gang as "an ongoing, identifiable group of people (highly organized or loosely structured) which, either individually or collectively, has engaged in or is considered likely to engage in unlawful or antisocial activity that may be verified by police records or other reliable sources and who create an atmosphere of fear and intimidation within the community (Goldstein, 1991:5).

The Los Angeles Sheriff's Department, in its effort to operationalize the concept of gang membership, identifies gang members using the following criteria: 1) individual admissions; 2) informant identifications; 3) place of residence, socialization, style of dress, use of hand signals, symbols, tattoos, and associations with known gang members; and 4) prior arrests with known gang members (Maxson & Klein, 1990:75).

4. Observations on "Gang" Definitions

These gang definitions vary according to the criteria they contain and according to the level of specificity of the criteria. It is noteworthy that while many of the definitions contain criminal behavior as a required element, not all do. Likewise, definitional features such as sense of territoriality and chain-of-command found in some definitions are lacking in others. Some individual criteria involve lower level abstractions (e.g.,

wearing colors, having a group name), while others involve concepts that border on the esoteric (e.g., residual social subsystems characterized by competition for status). Many of the definitional elements are conceptual in nature and would seem to require subjective judgment when determining whether a particular group qualifies as a gang. For example, someone, somewhere, would have to decide whether a group 1) had an identifiable leadership; 2) claimed control over a particular territory; 3) recognized itself as a "denotable group"; 4) was a distinct aggregation; or 5) had been involved in a sufficient number of unlawful activities to create a consistent negative response from the community.[60] Even if a definition of gang could be agreed upon, some system of accurately operationalizing the criteria (e.g., determining that wearing colors is an accurate indicator of collective identity) would have to be developed.

It is also noteworthy that some gang definitions are painted so broadly that they encompass both organized crime and group delinquency, the latter defined as delinquent acts committed by small, ephemeral, loosely organized youth groups (Curry and Spergel, 1988:382; Donal, 1984:11).

5. Defining "Gang Crime"

Defining gang crime can also be problematic. The National Youth Gang Suppression and Intervention Program operating out of the University Chicago presents two definitions of gang crime. The *gang-motivated* definition centers on the criminal act, defined as an incident arising from "gang motivation, interest or specific circumstances which enhance the status or function of the gang" (e.g., inter-gang violence, gang retaliation, turf protection, robbery, recruitment). The *gang-related* definition involves the identification of a defendant as a gang member. Using this definition, the incident is classified as gang-related "when the suspect, offender or victim is a gang member, regardless of gang motivation or circumstances." Because of the difficulty in determining motivation and purpose, a burglary or car theft committed by a gang member is much more likely to be classified as a gang crime if the definition employed is *gang-related* than if it is *gang-motivated* (Kane and Spergel, 1992).

Employment of differing definitions of gang crime can result in wide variation among statistics maintained by law enforcement agencies. Maxson and Klein (1990:91) found that the "prevalence of gang violence can vary widely among cities using different definitions of gang violence." Maxson and Klein (1990:90) found, for example, that using a motive-based definition of gang-related homicides yields about half as many gang homicides as does a member-based definition.

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[60] Criteria in this example are drawn from several different definitions.

Much like the "gang" definitions, translating definitions of "gang crime" into identifiable behavior may also prove to be problematic. Identifying a crime as a "gang crime" may require subjective judgments regarding crucial issues such as motivation of the perpetrator. Furthermore, a police or probation officer filling out a report about an offense simply may not know enough of the facts pertinent to a particular definition to make an accurate determination that gang crime occurred.

The Los Angeles Police Department establishes "gang-relatedness" if any of the following criteria are met: 1) suspects yell a gang name during the crime; 2) suspects yell, "Where are you from?" before the crime; c) witnesses state that the suspects were gang members; and 4) "victims are gang members" (Maxson and Klein, 1990:76). Clearly, the LAPD has made some subjective determinations as to which behavior constitutes gang crime. The police department's set of indicators is also heavily dependent upon the availability of certain evidence (e.g., the utterance, "Where are you from?").

6. General Overview of Gangs

Gang membership in the United States is a widespread phenomenon. While gangs were once thought to be confined to large cities, this notion is clearly no longer valid. In addition to organized youth gangs, prison gangs and outlaw motorcycle gangs proliferate, many originating in the Southern California area. While it is impossible to accurately count the number of gangs present in the United States (Asian gangs particularly remain secret societies), a 1989 survey of 35 cities reported 1,439 gangs with 120,636 gang members (Goldstein, 1991:23). The Los Angeles area alone claims 409 gangs with about 57,000 members. This vast number of gang members adds to their ability to spread into all areas of the United States.

Gang membership is often associated with poverty and unstable social environments, with gang members most commonly holding territory, status and money as primary interests (Spergel et al., 1989:8). Frequently an ethnic phenomenon, Irish, Italians, Chinese, Japanese, Samoans, African-Americans, Chicanos, Central Americans, Puerto Ricans, Jamaicans, and Dominicans have formed large and powerful gangs. Ninety to ninety-five percent of gang members are male (Goldstein, 1991:23, Dolan, 1984:49). Various studies indicate a median gang age of 19 to 20, but numerous recent reports state "that gangs now include a larger proportion of members in their twenties and even beyond in selected cases" (Klein and Maxson, 1989:213). Spergel (1984, as cited in Klein and Maxson, 1989:213) stated, "[G]ang violence is primarily a young adult rather than a juvenile problem." While evidence shows that all gangs profit from drug sales, to some extent crime specialization tends to be present in gangs: Columbian and Jamaican gangs in "crack" cocaine; Nigerian gangs in credit card fraud; motorcycle gangs in prostitution and pornography; and Israeli gangs in heroin (U.S. News & World Report, 1988).

7. Gangs, Violence, and Drugs

Most gangs are considered violent and this condition appears to be escalating (Goldstein, 1991:ix; Lyman, 1989:95). According to Yablonsky (1962, as cited in Silbey, 1989:403), "Brutality is basic to [the gang's] system. Talk of assault is a constant theme. 'Getting even' is characteristic -- even when there is nothing to 'get even' about....Illegal behavior is viewed as a badge of merit." Gang membership appears to prolong the extent and seriousness of criminal careers (Spergel et al., 1989:4). In addition, Spergel et al. (1989:5) found that the rate of violent offenses for gang members is three times as high as for non-gang members. Much of the documented gang violence has been attributed both to competition for the drug market and to traditional turf conflicts (Lyman, 1989:91; Spergel et al., 1989:5).

In contrast to some of the general findings about the association of violence and gangs, some researchers have found spurious relationships between the two. In one study, members of violent gangs reported the existence of features of social organization and cohesion as more influential than the gang's involvement in drug use and dealing (Fagan, 1989:633). Another study found that the purported gang connections for both "rock" cocaine sales and violence during 1984-85 were considerably overstated (Klein et al., 1988). Miller (1976:363) found that only a small minority of gang members were active in violent crimes and that violence was neither a dominant activity of the gangs, nor a central reason for their existence.

Evidence does suggest that drug use by individual gang members is on the rise (Goldstein, 1991:ix), and many studies have noted a connection between drug dealing and gang membership (Fagan, 1989:635). What emerges from much of the study of gang violence is that it is strongly related to the drug trade. Jamaican posses, perhaps with a strong business relationship with the Colombian cartels, are thought to control much of the gang cocaine smuggling, having turned a one-time "cottage industry" into a well-organized retail market (Lyman, 1989:85). Crips violence is more specifically related to "sales territories" of their drug markets (Lyman, 1989:101). Jamaican posses, consequently, are at war with CRIPs and Bloods over the crack cocaine trade. Gang members are expected to use extreme violence to protect their sales territories or to discourage competition. While violence is directed mostly toward other gangs, occasionally innocent bystanders are hurt (Moore, 1990:171; Lyman, 1989:111). However, Klein and Maxson (1989:231) found that only two to five percent of gang homicides involved nongang victims. Fagan (1989:633) found that violence was not an inevitable consequence of involvement in drug use or drug dealing.

A dissenting opinion on the pervasiveness of drug dealing and gangs is offered by some researchers who infer that crack cocaine distribution, while it involves many individual gang members, is not a street-gang phenomenon nor have gang members brought much extra violence or organizational characteristics to crack distribution (Klein et al., 1991:623, 647). Maxson and Cunningham (1991:647) conclude that "the world of

crack in Los Angeles belonged principally to the regular drug dealers, not to street gangs." Moore (1990:171) states that it is not safe to assume that drug-related violence is inherent in gangs, and that the connection between violence and drug marketing is "faint."

8. Assessment of Research on Gangs

Several studies assess the quality of the research on gangs. Klein and Maxson (1989:199) examine the gang research of the last twenty years and ask the question, "What do we know from the [gang] research undertaken since the early 1970s?" "Not much," they conclude. They note a decline in scholarly attention to gang developments during a period of significant changes in the age, structure, ethnicity, and geographic locations of gangs. This "research impoverishment" has been attributed by various scholars to such factors as civil rights developments, drugs, an alleged decline in gang activity, and changes in the political climate (Maxson and Klein, 1989:199).

In the Maxson and Klein view (Weiner and Wolfgang intro, 1989:13), the emphasis on deterrence-based models and a growing interest in controlling street-gang violence has made city police departments the major repositories of gang information and research opportunities. They note that "[p]olice sources of information have lead to difficulties in conducting cross jurisdictional research because of varying data collection procedures and classification schemes." The result is an informational resource with theoretical and methodological limitations. As a consequence, "[r]ecent information on street gangs has not yet been integrated into either existing or new theoretical approaches explaining this social phenomenon [of gangs], resulting in a conceptualization that has been unable to explain diverse street gang activity over the last 20 years" (Weiner and Wolfgang, 1989:13).

Moore (1990:160) also explored the issues and problems associated with social scientific inquiry into gangs, and found that research in these areas is highly problematic. For example, she notes the problems inherent in the gang studies that are based on interviews of gang members. One pitfall is that studies based on interviews in correctional settings have a sampling problem because gang members who go to jail are not necessarily representative of the gang (Moore, 1990:172). Studies that rely on subjects from gang intervention programs also suffer from sampling biases; the subjects may overemphasize the evils of gang membership or may supply the researcher with self-aggrandizing myths (Moore, 1990:173).

The potential coercive nature of institutional settings may also distort study findings. The environmental settings for the interviews, along with the sampling problems, frequently lead to a stereotyping of gangs (Moore, 1990:172). One "major stereotype is the tendency to focus on criminal behavior to the exclusion of group and

community dynamics, and blame the 'gang' for criminal acts of individual gang members" (Moore, 1990:160).

C. State Initiatives

1. Introduction

As part of its research on gangs, the staff working group conducted telephone interviews with 21 state sentencing commissions or their counterparts.[61] These particular states were selected because they either had sentencing guidelines currently in effect or were awaiting legislative passage of proposed guidelines. Of the 21 states interviewed, 15 had sentencing guidelines, one had voluntary guidelines, and five had guidelines that were pending. Most often, the working group interviewed either an agency director or administrator; in two cases, a parole commissioner or staff attorney was interviewed. Each agency spokesperson was asked the same basic set of questions regarding the way in which the state's sentencing guidelines took gang-related activity into account. If the state guidelines did not provide for gang activity, the working group interviewer inquired whether the state had ever made any effort to incorporate this factor into the guidelines. The working group also asked for referrals to other state agencies that might have other, gang-related information.

2. Findings

None of the states contacted reported gang affiliation or related activity as a specific factor in their current guidelines. One state had initially incorporated gang-related crime into its guidelines as a departure factor, but this factor was dropped after a statute was enacted that specifically addressed gang crime. Other states reported that gang-related crime was not a stated departure in their guidelines, but that a judge might depart using gang-relatedness in conjunction with another factor. One state spokesperson reported his state's use of "organized criminal operation" as an aggravating factor, but did not believe that the concept encompassed gangs. Another state listed "organized criminal activity" as an aggravating factor in its guidelines. The interviewee from this state said that this term "includes more than the mob, but hasn't really been defined." A number of other states reported that their courts take account of gang behavior through various departures that do not specifically address gangs and by

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[61] The states called were: Alaska, California, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, and Wisconsin. "Counterparts" included criminal justice planning agencies and court and corrections agencies.

sentencing at the high range of the guidelines. Several states reported that they have not felt the pressure of gangs and therefore have not taken any guideline action regarding gang affiliation and related activity.

The telephone interviews uncovered several concerns at the state level. One frequently voiced concern revolved around the definition of gangs. According to the state spokespersons, arriving at a suitable "gang" definition is a major obstacle to creating sentencing guidelines for gangs. Only Minnesota had developed its own definition. The Minnesota Sentencing Guidelines Commission defined "organized gang" as an "association of five or more persons, with an established hierarchy, formed to encourage gang members to perpetrate crimes or to provide support to gang members who do commit crimes." This definition was used until recently by the Minnesota courts as a reason for departure. In August of 1991, however, the state enacted a statute that established gang-related criminal activity as a separate crime, and the departure factor was dropped from the guidelines. The current definition as defined in the statute describes "criminal gang" as "any ongoing organization[,] association, or group of three or more persons, whether formal or informal, that: (1) has, as one of its primary activities, the commission of one or more of the offenses listed in [state statute and section]; (2) has a common name or common identifying sign or symbol; and (3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity." Statute also provides that "a person who commits a crime for the benefit of, at the direction of, or in association with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members is guilty of a crime and may be sentenced as provided in [the penalty section of the code]." The director of another state agency with sentencing guidelines, however, notes the difficulty "differentiat[ing] between home boys, machos, and those with more sinister purposes."

A second concern was that incorporating the factor of gang-related affiliation into the guidelines might provoke constitutionality problems. At the heart of the issue is an individual's freedom of association. One director of a guidelines commission questioned the authority to penalize a person who is acting within his constitutional right. He asks the question, "Can you penalize one beyond the act?" and believes "the issue is whether the membership itself represents additional intent and culpability." Another director noted that specific, gang-related guidelines could be viewed as racist and discriminatory because most gang members belong to ethnic minorities.

D. Case Law

In his January 31, 1992, letter to the Commission, Attorney General Barr requested that the Commission amend Chapter Three to provide for a 4-level enhancement for "any felony committed in association with a criminal street gang or by a member of a criminal street gang." A review of case law reveals that punishment based partially or totally on gang-related conduct generally falls into three areas. The first is as

a condition of probation, parole, or supervised release. Malone v. United States, 502 F.2d 554 (9th Cir.), cert. denied, 419 U.S. 1124 (1974) (probation); United States v. Terrigno, 838 F.2d 371 (9th Cir. 1988) (probation); United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991) (supervised release); Liberatore v. Story, 854 F.2d 830 (6th Cir. 1988) (parole). The second is as a ground for sentencing within the applicable guideline range, or in fashioning a pre-guideline sentence. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990). The third is as a ground for upward departure (United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991). A summary of these cases appears in Appendix C, pages C-2 to C-10.

Three constitutional issues associated with sentencing on the basis of the defendant's gang-related conduct are apparent.

The first involves fashioning a definition of "gang" or the relevant gang-related conduct that survives scrutiny under the "void for vagueness" doctrine that requires that the proscribed acts be defined in terms that permit a person of common intelligence to determine the line between innocent and condemned conduct. Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489 (1982); Kolender v. Lawson, 461 U.S. 352 (1982); Lanzetta v. New Jersey, 306 U.S. 451 (1939). The void for vagueness doctrine also requires that terms are not so vague as to lead to arbitrary and discriminatory law enforcement, Kolender 461 U.S. at 357, because "a vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). It should be noted that there appears to be a split in the circuits on the primary issue of whether void for vagueness challenges to the sentencing guidelines are permissible. See United States v. Jackson, 968 F.2d 158 (2nd Cir. 1992) (implying they are permissible); United States v. Wivell, 893 F.2d 156, 159-160 (8th Cir. 1990) (impermissible).

The second constitutional issue involves fashioning such a definition that survives scrutiny under the "overbreadth" doctrine which prohibits laws that sanction constitutionally-protected activity as well as the prohibited activity. Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).

Finally, any definition of "gang" or gang-related conduct should not unconstitutionally restrict the right of freedom of association, a "preferred right" which may be impinged only upon a showing that the restriction is reasonably necessary to accomplish the essential needs of the public interest and has a sufficient nexus with that goal. See Malone, Terrigno, and Bolinger, supra.

A number of cases have considered this last constitutional issue. In cases when the nature of the gang relationship was specifically described and used to enhance the sentence, the sentence appears to be upheld. When not so described, or not proven by a preponderance of the evidence, the enhancement is reversed. In a preguidelines case,

the Seventh Circuit affirmed a sentence which took into consideration the gang-related nature of the crime committed, finding the crime to have been committed by an El Rukn gang member, carried out at the direction of gang members, and committed in furtherance of gang activity. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990).

However, the same circuit reversed an enhanced sentence based on gang-related conduct in United States v. Thomas, 906 F.2d 323 (7th Cir. 1990). In Thomas, the district court enhanced the defendant's sentence based upon his membership in a gang that distributed drugs and possessed prohibited firearms. The sentencing court specifically found that "these gang activities might indicate a recidivist tendency ... or potential for violence not normally associated with the crimes charged" (i.e., felon in possession of a firearm and possession of unregistered short-barreled shotgun). In reversing the enhanced sentence, the circuit court held that, while "[i]nvolvement in gang activities might provide more fruitful grounds for departure," the sentencing court's factual findings were insufficient. On resentencing, no enhancement for gang-related activity was sought or given.

The Eleventh Circuit recently upheld an upward departure based upon the gang-related conduct surrounding the offense of conviction. The defendant was the leader of a gang which engaged in drive-by shootings using guns which the defendant was convicted of possessing. The government introduced evidence of the dangerousness of the weapons by virtue of their use in drive-by shootings and connected the guns found at the defendant's home to the shootings by the casings recovered at the scene of some of the shootings. United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991).

A similar enhancement was rejected in United States v. Scott, 914 F.2d 959 (7th Cir. 1990). The district court departed upward based upon defendant's membership in a violent street gang:

> Mr. Scott had a prior conviction. It's a drug case. He is found in possession of a gun. His gun's a sawed-off shotgun. He's a member of the Brothers of Struggle. Violent street gang ... I think a sentence (within the applicable guidelines) would be totally, absolutely inadequate. It would send the wrong message to the community and to gang members and to people who get involved in the dangerous mix of drug houses, cocaine, sawed-off shotguns and violence.

Reversing, the circuit court held the departure was neither adequately articulated nor justified within the framework of the guidelines.

In United States v. Cammissano, 917 F.2d 1057 (8th Cir. 1990), the sentencing court enhanced defendant's sentence based on his membership in La Cosa Nostra. On appeal, the court reversed and remanded based upon the lack of credible, reliable evidence to support the allegation of defendant's membership in organized crime. The court cited with approval two Northern District of Illinois opinions: United States v.

Schweihs, 733 F. Supp. 1174 (N.D. Ill. 1990) (association with organized crime could be considered aggravating factor supporting upward departure if that association was used by defendant in carrying out his crimes), reversed on other grounds, No. 90-1463 (7th Cir. Aug. 6, 1992) (affirming enhancement for organized crime); and United States v. Cortina, 733 F. Supp. 1195 (N.D. Ill. 1990) (government must show connection between defendant's association to organized crime and the offense of conviction when seeking an upward departure).

E. Expert Assistance

The working group met with staff of the Department of Justice's Organized Crime Section (which oversees federal racketeering prosecutions) in order to identify the statutes currently used to prosecute criminal street gangs and to understand more fully the advantages and limitations of using these statutes, and the potential advantages and limitations of the relevant sentencing guidelines. Section staff identified the RICO statute as the primary statute used against organized criminals, particularly the better organized, more established organizations which have regular meetings and a defined hierarchical structure (i.e., traditional "Mafia" organizations). Staff stated that these statutes were traditionally used in cases in which additional violence, extortion, thefts, fraud, or obstructions of justice occur, over and above the statutory predicate crimes (e.g., extortion or kidnapping).

Between 1985-1990, there were approximately 100-110 RICO prosecutions per year. Today, there are approximately 80-85 per year. This decrease is primarily attributable to the availability of alternative, more severe statutes, such as the narcotics and Continuing Criminal Enterprise statutes. The availability of severe penalties under these statutes, as well as the additional elements of proof required for RICO prosecutions, makes use of RICO statutes against criminal street gangs less practical. In addition, criminal street gangs prove harder to infiltrate as they lack any kind of cohesive infrastructure, are not yet well known to law enforcement, and often function as social clubs as well as criminal organizations.

Section staff also identified "murder for hire" statutes (18 U.S.C. §§1958 and 1959) as possible tools for criminal street gang prosecutions. However, the underlying gang conduct would need to fit within the relatively narrow scope of the statute.

Section staff did not identify any particular limitations of the sentencing guidelines.

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APPENDIX A

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 662-8800
FAX (202) 662-7631

MEMORANDUM

To: Susan Winarsky
Violent Crimes Working Group

From: Vince Ventimiglia

Re: Summary of Penalty Review Project Recommendations Relevant to Violent Crimes Working Group

Date: September 29, 1992

The Commission is directed by statute to inform Congress of inconsistencies in the statutory penalties. A report of the Commission's Penalty Review Project identified inconsistent penalties in three areas relevant to the Violent Crimes Working Group: assault, the Travel Act, and manslaughter. A summary of the report's recommendations follows:

Assault:

Current Statute: Depending on the statute involved, current statutory maximums range from 1-3 years for simple assault, 1-10 years for assault with a dangerous weapon, and 3-10 years for assault resulting in injury.

The Report: Recommends that the five assault statutes (18 U.S.C. §§ 111, 112(a), 113(c), 351(e), and 1751(e)) be amended so that all simple assaults have a statutory maximum of 1 year, and all assaults with a dangerous weapon, and assaults resulting in injury, have a statutory maximum of 10 years.

The Guidelines: Simple assaults receive a base offense level 3 (no physical contact) or level 6 (physical contact). Aggravated assaults receive a base offense level 15 (18-24 months for a first offender); level 18 (27-33 months) if use of a weapon was threatened; level 22 (41-51 months) if discharge of the weapon resulted in bodily injury.

Pending Legislation: The Conference Crime Bill (H.R. 3371) and S. 2305 generally would implement the recommendation of the Commission report.

Travel Act:

Current Statute: Travel Act offenses (18 U.S.C. § 1952) provide a statutory maximum of five years for offenses such as extortion, money laundering, drug distribution, prostitution, and gambling involving interstate travel or the use of interstate facilities.

The Report: Recommends that the statutory maximums be amended so that Travel Act offenses resulting in death are subject to a term of life imprisonment, offenses involving a crime of violence or felony drug offense are subject to 20 years, and all other offenses are subject to 5 years.

The Guidelines: Section 2E1.2 provides a base offense level 6 or the offense level from the underlying offense, including offenses under Chapter Two, Part A.

Pending Legislation: The Conference Crime Bill (H.R. 3371) does not address this recommendation of the Commission report. S. 2305 would implement the recommendation of the Commission report.

Manslaughter:

Current Statute: Involuntary manslaughter offenses are subject to a three-year statutory maximum under 18 U.S.C. § 1112.

The Report: Recommends that the offense be subject to a six-year statutory maximum.

The Guidelines: Section 2A1.4 provides a base offense level 14 (15-21 months for a first offender) in most cases.

Pending Legislation: The Conference Crime Bill (H.R. 3371) and S. 2305 would implement the recommendation of the Commission report.

VIOLENT OFFENSE CODES:

First Degree Murder
Felony With Death Resulting
Second Degree murder
Voluntary Manslaughter
Involuntary Murder Conspiracy to Murder (with death)
Conspiracy to Attempt to Murder
Conspiracy to Murder (no death, assault, or attempt)
Attempt to Commit Murder
Assault with Intent to Murder
Aggravated Assault
Minor Assault
Obstructing or Impeding Officers
Criminal Sexual Abuse
Sexual Abuse of a Minor
Sexual Abuse of a Ward
Abusive Sexual Contact
Hostage/Kidnapping
Ransom taking
Aircraft Piracy
Interference With Flight Crew
Other-- Aboard Aircraft
Threatening Communication
Burglary of a Residence
First Degree Murder
Attempt to Commit Murder
Conspiracy to Commit Murder
Hobbs Act Extortion
Extortionate Extension of Credit
Other Violent Felony
Other Violent Misdemeanor

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 626-8500
FAX (202) 662-7631

September 15, 1992

MEMORANDUM

TO: Violent Crimes Working Group

FROM: Vince Ventimiglia

RE: Case Law on Part 2A Guidelines

This memorandum summarizes some of the issues considered to date by courts with respect to offenses subject to Part 2A of the Sentencing Guidelines.

§2A1. Murder; Conspiracy to Commit Murder
§2A2. Assault; Attempted Murder
§2X1. Attempt, Solicitation, Conspiracy

1. Murder; Conspiracy to Commit Murder; Attempted Murder

United States v. Depew, 932 F.2d 324 (4th Cir.), cert. denied, 112 S. Ct. 210 (1991).

Issue: Where the defendant intended to kidnap a young child in order to film the sexual abuse and murder of the child, what is the relevant guideline?

Decision: The circuit court held that the relevant application of the guidelines is as follows: §2X1.1(a) applies to the conspiracy to kidnap the child and directs the court to the underlying substantive offense. Since the substantive offense was a kidnapping, §2A4.1 and its adjustments apply. Section 2A4.1(b)(5) ((b)(7) under the current guidelines) requires that if the victim was kidnapped in connection with another offense, use the offense level for the relevant guideline. Since the defendant intended to murder the child, §2A1.1 would apply. Finally, §2X1.1(b) was

applied, reducing the offense level by 3 levels, since the conspirators did not complete all the acts necessary to complete the murder.

The court gave limited or no discussion to the defendant's claim that the relevant guidelines were either §2A1.5 (Conspiracy to Commit Murder) or §2A2.1 (Attempted Murder).

United States v. Lambey, 1992 WL 210604, No. 90-5619 (4th Cir. 1992) (en banc) (holding that lower court's calculation of guideline range was not plain error, and was consistent with decision in DePew).

but see, Lambey, (Murnaghan, C.J., dissenting) (noting ambiguity in application of §2X1.1(c); apply guideline section that expressly covers conspiracy to commit offense): the provision either applies only at the start of the analysis (in which case, once §2A4.1 is referenced, §2X1.1(c) would not be applied), or it applies to the entire analysis conducted under §2X1.1).

c.f., United States v. Dickerson, 956 F.2d 46 (4th Cir. 1992)

Issue: Which guideline should apply where the defendant is convicted of federal firearms offenses after she detonated a pipe bomb under her estranged husband's pickup truck when he started it one morning? After using the §2K2.1 cross reference to §2X1.1, is the guideline for the underlying offense murder (§2A1.1) with a three-level reduction for the attempt, or attempted murder (§2A2.1)?

Decision: Attempted murder (§2A2.1). The court relied on the language in §2X1.1(c) which provides that attempts expressly covered by other offense guidelines (including §2A2.1) are subject to that specific guideline section.

2. Minimal Planning (§2A2.2(b)(1))

Issue: What is more than minimal planning under §2A2.2(b)(1)?

United States v. Foster, 898 F.2d 25 (4th Cir. 1990)

Decision: More than minimal planning is present in offenses "not committed on the spur of the moment." Here, more than minimal planning was involved where defendant saw his girlfriend in bed with another man, grabbed a gasoline can on the porch, purchased gas and wire, assembled a crude bomb, placed it on the seat of the victim's car, and concealed the bomb with the victim's clothes.

United States v. Smith, 953 F.2d 1060 (7th Cir. 1992)

Decision: More than minimal planning applies where the defendant's planning "exceeded the norm for aggravated assault." Here, defendant returned to a bar to wreak revenge on the victim, after defendant armed himself with numerous weapons, modified the M-16 by changing barrels (to make the weapon appear more frightening), and switching cars to avoid detection on his return.

3. Enhancement for Use of a Dangerous Weapon (§2A2.2(b)(2))

United States v. Johnson, 931 F.2d 238 (3rd Cir.), cert. denied, 112 S. Ct. 242 (1991).

Issue: Is the enhancement under §2A2.2(b)(2)(C) (brandishing dangerous weapon) or (b)(2)(B) (other use of a dangerous weapon) appropriately given where the defendant pointed the firearm at a victim's head and threatened to discharge the firearm?

Decision: The circuit court noted that the guideline definition "is not helpful in drawing the line between the three categories of action." The court goes on to find "brandish" includes pointing the weapon in a "generalized" threat, as opposed to a "specific" threat. The specific threat in this case involved leveling the firearm and enunciating a threat to discharge the weapon. The court notes similar findings in United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990) (kidnapper waved pistol at victims and threatened that anyone calling the police would have to deal with the defendant); United States v. Hamilton, 929 F.2d 1126 (6th Cir. 1991) (waving knife and threatening girlfriend, and inadvertently injuring her); United States v. Roberts, 898 F.2d 1465, 1470 (10th Cir. 1990) (waving knife).

United States v. Foster, 898 F.2d 25 (4th Cir. 1990)

Issue: Under §2A2.2, does the placing of a bomb under clothes in the back seat of a car, and wiring the detonator to the engine, constitute threatened use of a dangerous weapon, or otherwise used, when the bomb fails to detonate due to improper grounding?

Decision: The court upheld the district court's increase of 3 levels for threatened use, and then noted the defendant "did not merely brandish or threaten to use a dangerous weapon, he used one."

4. Enhancement for Injury to Victim (§2A2.2(b)(3))

United States v. Moore, 958 F.2d 646 (5th Cir. 1992)
United States v. Kleinebreil, 1992 WL 155419, No. 90-8375 (5th Cir. 1992)

Issue: Where a defendant convicted under 18 U.S.C. § 111(a)(1) and (b) for assaulting federal officers, assaulted the federal officer, but only injured a non-federal officer, does the four-level enhancement for injury to the victim apply?

Decision: No. The plain meaning of "the victim" is the object of the aggravated assault, i.e. the federal officer.

United States v. Graves, 908 F.2d 528 (9th Cir. 1990)

Decision: No. The plain meaning of "the victim" prevails over §1B1.3 reading that might permit enhancement for injury to another person not the object of an offense of conviction where the injury to that other person occurred during the commission of the offense of conviction or in the course of attempting to avoid detection or responsibility for that offense.

but see, United States v. Bassil, 932 F.2d 342 (4th Cir. 1991)

Issue: Is the defendant subject to an enhancement under §2A2.2(b)(3)(A) (bodily injury) where a defendant convicted under the Assimilative Crimes Act threw a chair at prison officials during a prison riot, another inmate in the riot punched an official in the face, and 6 officers in all were injured by 40 rioting inmates?

Decision: Yes. "While it may be uncertain whether the chair thrown by Brown [the defendant] caused a specific injury, it is undisputed that Brown participated in and aided a riot in which assaults occurred that caused bodily injuries. [H]e is accountable for this harm under ... §1B1.3."

but c.f., United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991)

Decision: Held that the language "any victim" in §2B3.1(b)(3) (Robbery) includes any employee, bystander, customer or police officer who gets assaulted during the bank robbery or during an attempted getaway, and distinguishing Graves on the basis of the nature of the crime committed.

5. Departure for Multiple Victims or Grave Risk to Others

United States v. Johnson, 931 F.2d 238 (3rd Cir. 1991)

Issue: Can the court depart upwards three levels on the grounds that there were three victims assaulted?

Decision: Yes. Here, the defendant was convicted of one count of 18 U.S.C. § 111 when he assaulted three Assistant United States Attorneys with a firearm. The guidelines do not provide for circumstances involving multiple victims (assuming there is not a count of conviction for each victim), and §2A2.2(b)(3) refers to "victim" only in the singular. Further, §5K2.0 suggests multiple victims may be grounds for a departure. A three-level adjustment is consistent with the grouping rule treatment of three counts of conviction for assault.

United States v. Streit, 962 F.2d 894 (9th Cir. 1992)

Issue: When is a four-level upward departure pursuant to §5K2.2 (Physical Injury) justified when applying §2A2.4 (Obstructing or Impeding Officers)?

Decision: In this case, a four-level departure was not appropriate, and should have been limited to a two-level departure, analogizing to the enhancement in §2A2.2 (Aggravated Assault). Even though there are two victims in this case, grouping rules would limit the enhancement to two levels. Separate convictions with respect to each victim limit the availability of a departure under §5K2.0. In this case, the defendant bit the thumbs of two officers, crushing the bones in that finger, and pointed a gun at them. Defendant was convicted of 18 U.S.C. §§ 111, 1114, and 924(c). The court applied the three-level enhancement under §2A2.4(b)(1) for personal contact, and departed by four levels, analogizing to the two-level enhancement for bodily injury available under §2A2.2 (Aggravated Assault), and presumably multiplying it by two.

United States v. Carpenter, 914 F.2d 1131 (9th Cir. 1990)

Issue: Can a court depart upward from a guideline range under §2A2.1, on grounds that multiple victims were threatened, or that a grave risk to other persons was presented?

Decision: Yes. The guideline does not reflect risk to multiple persons, in this case the children of the ex-wife who was the target of the murder attempt. (The defendant intended to run his ex-wife's car off the road with a lumber truck, possibly killing all in the car; or to blow up the butane tank attached to the woman's home, possibly blowing up all the occupants in the home.)

6. Double-Counting

United States v. Williams, 954 F.2d 204 (4th Cir. 1992)

Issue: Does the enhancement for use of a dangerous weapon at §2A2.2(b)(2) constitute impermissible double-counting or a violation of the double jeopardy clause where the offense of conviction (18 U.S.C. § 113(c)) is defined to include felonious assault with a dangerous weapon with intent to do bodily harm, and the offense maximum presumably incorporates this element?

Decision: No. The Commission is not prohibited by the Constitution, and does not expressly prohibit in the guidelines, from enhancing the sentence for the use of the dangerous weapon.

but see United States v. Hudson, 1992 WL 194524 (2d Cir. 1992)

Decision: Yes. The 4-level enhancement to defendant's base offense level for use of a dangerous weapon in an aggravated assault constituted impermissible double counting. The defendant attempted to run over U.S. marshals with his car. The court held that the charge of aggravated assault contemplated the use of a dangerous weapon. Specifically, an automobile is not an inherently dangerous weapon and becomes one only when 'otherwise used' in an assault. Thus, unlike a gun, the mere possession of a car during an assault will not convert an ordinary assault into an aggravated one. The court considered the actions involving the vehicle in the charge.

United States v. Padilla, 961 F.2d 322 (2nd Cir. 1992), petition for cert. filed, (June 8, 1992) (No. 91-8528).

Issue: Does the enhancement for official victim at §3A1.2 constitute impermissible double-counting where the offense of conviction (18 U.S.C. § 111) must have an official victim as the object of the offense?

Decision: No. The Commission is not prohibited, and does not expressly prohibit in the guidelines, from enhancing the sentence on the basis of official victim, since the guideline, unlike the statute, requires the defendant to have known the victim was an official, and because note 1 to §2A2.4 evidences the clear intention to apply the adjustment.

see also United States v. McNeill, 887 F.2d 448 (3rd Cir. 1989), cert. denied, 493 U.S. 1089 (1990).

§2A4 Kidnapping, Abduction, or Unlawful Restraint

U.S. v. Galloway, 963 F.2d. 1388 (10th Cir. 1992), petition for cert. filed, (Aug. 4, 1992) (No. 92-5391).

Defendant convicted of kidnapping for purposes of sexual abuse. District court went first to §2A4.1(b)(5) (now §2A4.1(b)(7)) which directed the application of the guideline for the offense for which kidnapping effected or the kidnapping guideline plus a four-level enhancement, whichever is greater. The district court applied §2A3.1 (Criminal Sexual Abuse) as it was the higher of the two. Defendant argued that §2A4.1(b) was ambiguous as there were two offenses for which he committed the kidnap--sexual abuse and extortion. The extortion guideline (§2B3.2) was lower than the enhanced kidnapping guideline and this created an ambiguity. Thus lenity demanded that the lesser guideline apply. The circuit court interpreted the direction of §2A4.1(b) to mean what it said--the highest guideline should be applied.

Defendant further argued that the enhancement under §2A3.1(b)(5) was double-counting in that abduction of a sexual abuse victim is inherent in the offense of kidnapping. The court rejected this argument, referring to §1B1.5 in finding that when cross-referencing, the entire guideline (including SOCs) were meant to be applied. (A copy of this case is attached.)

§2A6.1 (Threatening Communications)

1. Timing of Evidencing Intent

United States v. Hornick, 942 F.2d 105 (2d Cir. 1991), cert. denied, 112 S. Ct. 942 (1992), petition for cert. filed on other grounds, (Aug. 3, 1992) (No. 92-5726).

Issue: Does the conduct showing intent to carry out the threat (six-level enhancement under §2A6.1) have to occur contemporaneous with or subsequent to the threat, or may it occur prior to the threat?

Decision: "A person cannot take action that will constitute proof of his intent to carry out a threat until after the threat has been made." The court relied on the "future conditional" language of §2A6.1 ("if the defendant engaged"). Defendant in an oil investment scam double-sold property of an investor more than a year prior to threatening the investor.

United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990)

Issue: Is a six-level upward adjustment based on evidence of intent to carry out the threat warranted for a defendant who threatened to kill his intended police and federal judge victims, when the defendant 15 years earlier had killed a police officer, but was acquitted of murder on grounds of self-defense?

Decision: Yes. The previous killing can be used to justify a departure on the basis that the killing indicated an intent to carry out the present threats, particularly where the earlier victim was associated with the present victim (both were police officers).

United States v. Philibert, 947 F.2d 1467 (11th Cir. 1991)

Issue: Does the six-level adjustment (for engaging in conduct evidencing an intent to carry out the threat) under §2A6.1 apply where defendant transported a quantity of weapons to his mother's house, purchased an automatic firearm, shot a horse, lopped off its head, and placed it on the steps of the federal court house (coincidentally as a local television crew was filming for an unrelated story), and where such conduct occurred two months prior to the defendant's threatening his employer?

Decision: The enhancement does not apply since there was no evidence connecting the acquisition of firearms or the Godfather-like conduct

2. Most Analogous Guideline

United States v. Nilsen, 1992 WL 165818, No. 90-5950 (11th Cir. 1992)
United States v. Johnson, 965 F.2d 460 (7th Cir. 1992)

Issue: Is §2A6.1 the most analogous guideline for an offense convicted under 18 U.S.C. § 876 where the defendant sent threatening communications to prevent a potential witness from testifying against him in criminal proceedings (Nilsen) or threatened to harm the victim or her property if she did not provide $25,000 (Johnson)?

Decision: No. The most analogous guideline is §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). Lack of actual intent to carry out the threat is not sufficient to remove the case from §2B3.2.

United States v. Pacione, 950 F.2d 1348 (7th Cir. 1991), cert. denied, 112 S. Ct. 3054 (1992).

Issue: Is §2A6.1 the most analogous guideline for an offense under 18 U.S.C. §115(a) where the defendant phoned an I.R.S. agent and threatened harm to her, particularly in light of the cross reference in Appendix A to §2A2.3 (minor assault)?

Decision: §2A6.1 is the most analogous guideline, despite the lack of a cross reference in the statutory index to this guideline, since §115(b)(4), the penalty provision for §115(a), is referenced only to §2A6.1, and since §2A6.1 is "clearly more applicable to Pacione's offense."

United States v. Norman, 951 F.2d 1182 (10th Cir. 1991),

Issue: Is §2A6.1 the most analogous guideline for offenses under 49 U.S.C. 1472(m) (making false reports to an airline) where the defendant intended to harm a passenger on the plane?

Decision: No. Threatening communications offenses are most commonly threats against federal officials, or using the mail to make threats. This offense is more comparable to carrying weapons aboard an aircraft (see 49 U.S.C. § 1472(l)) which is covered under §2K1.5.

United States v. Bigelow, 914 F.2d 966 (7th Cir. 1990), cert. denied sub. nom., Vaughan v. United States, 111 S. Ct. 1077 (1991).

Issue: Is §2A6.1 the most analogous guideline for offenses under 18 U.S.C. § 894 (extortionate extension of credit) or is §2B3.2 (Extortion) where the defendant paid two codefendants to collect past debts from clients.

Decision: §2B3.2 is the most analogous guideline since the defendant used threats and conspired with others to use threats and violence to collect an extension of credit. The court focused on the language in §2B3.2 that even ambiguous statements such as "pay up or else" bring the conduct within the scope of the guideline.

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 662-8800
FAX (202) 662-7631

October 5, 1992

MEMORANDUM

To: Violent Crimes Working Group

From: Vince Ventimiglia

Re: Case Law on Mandatory Minimum of Life Under 18 U.S.C. § 1111

This memorandum examines the issue of whether 18 U.S.C. § 1111 mandates a sentence of life in prison, or whether a term of years may be imposed.

Section 1111(b) reads as follows:

> Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", (sic) in which event he shall be sentenced to imprisonment for life ... .

The guidelines indicate that there is some ambiguity regarding whether a term of years may be imposed under section 1111(b), and leave the issue to the courts. The background commentary to §2A1.1 (1991) reads:

> Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion ... regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence of life imprisonment.

Every appellate court to address the issue (i.e., the Second, Third, Ninth and Tenth Circuits) has held that the statute requires a mandatory term of life in prison. United States v. Sands, 968 F.2d 1058, 1066 (10th Cir. 1992) (section 1111 provides a statutorily required minimum sentence of life in prison that would control over any other lesser sentence suggested under the guidelines); United States v. LaFleur, 952 F.2d 1537 (9th Cir. 1991) ("[t]he express wording of § 1111(b) leaves the sentencing court no discretion to impose a

lesser sentence" than life in prison; finds the Commission's deference on this issue (see U.S.S.G. §2A1.1 (Background)) to be "appropriate"); United States v. Williams, 939 F.2d 721 (9th Cir. 1991) (repeals by implication are disfavored; court finds such a repeal only when the legislature's intent is "clear and manifest"; "where preexisting sentencing statutes mandate minimum terms in excess of the maximum applicable Guidelines sentence, these statutes control"); United States v. Gonzalez, 922 F.2d 1044 (2d Cir. 1991) ("Congress did not inadvertently eliminate parole. ... Congress could foresee its action would translate every life sentence into life imprisonment without possibility of parole, so that the term life sentence would be the reality"); United States v. Donley, 878 F.2d 735 (3d Cir. 1989) ("Congress did not mean to replace a fixed minimum sentence for first degree murder with an indeterminate sentence; the legislative history [of the SRA] makes it clear that Congress intended to go in the opposite direction of achieving more consistent, determinate sentences").

The decisions show that the commentary language found in §2A1.1 has apparently prompted some defendants to challenge their life sentences. For example, in Gonzalez the court noted:

> In urging this proposition [that life is not the mandatory minimum term] Gonzalez points to the Commentary to § 2A1.1 of the Guidelines ... as evidence that the Sentencing Reform Act's abolition of parole does not mean that the only sentence a judge may impose under § 1111 is life without parole.

Two primary theories of the defense emerge in these cases. The first is that, prior to the SRA, any prisoner serving a life term was parolable after 30 years (18 U.S.C. § 4206(d) (repealed 1987)) or ten years (18 U.S.C. § 4205(a) (repealed 1987), and thus the life sentence under section 1111 was not in fact a determinate sentence nor a mandatory minimum. The court in Lafleur, however, responds that Congress nevertheless restricted the availability of parole but did not change the plain meaning of the statute, and must have been cognizant of the inevitable consequences of such actions.

The second argument is that one reading of the SRA holds that 18 U.S.C. § 3559 provides that offenses with maximums of life are Class A felonies, and 18 U.S.C. § 3581 provides that Class A felonies are subject to terms of life or any term of years in prison. The Lafleur court notes, however, that section 3581 is not intended to alter the relevant terms of imprisonment for offenses where such term is explicitly provided in the statute.

More detailed arguments against a mandatory minimum sentence of life may also be found in Norris, C.J. (concurring) who makes these additional points:

- The sentence under 18 U.S.C. § 1111 should be considered a presumptively applicable sentence to be imposed according to the usual Guidelines procedures since Congress replaced one sentence mitigation schema based on parole with another based on departures and adjustments.

- All cases previously holding that statutory minimums are Guidelines minimums have involved post-guidelines statutes or pre-Guidelines statutes that did not provide for parole in the first place.

- The ambiguity in the statute calls for application of the rule of lenity in favor of the reading most favorable to the defendant.

Additional, detailed analysis of statutory construction and legislative history, aimed at discerning legislative intent, particularly with respect to the apparently conflicting provisions of section 3559 and section 3581, may go far toward ultimately resolving this issue. For purposes of this memorandum the analysis is summarized very briefly here; further detailed analysis will be reviewed at such time as the Commission desires. The points that might be made are as follows:

- Penalty provisions for first degree murder frequently provide for a term of years or life in prison, and in specific cases (e.g., murder of a law enforcement officer in connection with a controlled substance offense) mandate statutory minimum penalties (e.g., 20 years in the case just noted). Congress could be considered to increase disparity, rather than decrease it, if it intended to punish the murder of a person on a military base with a minimum of life in prison, and permit a term of years or a mandatory minimum of less than life in more specific cases of murder with aggravating characteristics.

- Language found at 49 App. U.S.C.A. § 1472(i)(1)(B) (Aircraft Piracy) which implies that Congress at the time of passage of the Sentencing Reform Act considered section 3559(b) to authorize any term of years or life for Class A offenses.[1] The argument might run that Congress would not have considered it necessary to preclude consideration of section 3559(b) (providing that the incidents of classification of an offense) if Congress believed that the penalty under section 1472 (and similar offenses) did not permit a term of years to be imposed. One of the incidents of classification might be found in section 3581(b)(1).

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[1] Section 1472(i)(1)(B) reads:

> Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished ... notwithstanding the provisions of section 3559(b) of Title 18, if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

APPENDIX B

Table 15

AVERAGE IMPRISONMENT - 2K2.1 CASES*
(October 1, 1990 through September 25, 1992)

Amendment Year	Total Months Imprisonment	
	N	Average
1990	837	34.2
1991	50	54.3
TOTAL	887	44.3

*For the 1990 amendment year, 843 cases (2K2.1, 2K2.2, 2K2.3) were identified. Of these 843 cases, 6 mixed law cases (both guideline and pre-guideline counts) were excluded. SOR imprisonment information was available for 50 of 66 1991 amendment year cases (2K2.1). Sentences with zero months prison ordered were included in the calculation of average prison term.

SOURCES: U.S. Sentencing Commission, 1991 Data File MONFY91.
U.S. Sentencing Commission, Ongoing Data File.

Table 16

DEPARTURE STATUS - 2K2.1 CASES*
(October 1, 1990 through September 25, 1992)

Departure Status	Amendment Year 1990		Amendment Year 1991	
	N	Percent	N	Percent
No Departure	838	87.6	51	83.6
Upward	46	4.8	2	3.3
Downward	41	4.3	4	6.6
Substantial Assist	32	3.3	4	6.6
TOTAL	957	100.0	61	100.0

*For the 1990 amendment year, 965 cases (2K2.1, 2K2.2, 2K2.3) were identified. Of these 965 cases, 8 mixed law cases (both guideline and pre-guideline counts) were excluded. SOR imprisonment information was available for 61 of 66 1991 amendment year cases (2K2.1).

SOURCES: U.S. Sentencing Commission, 1991 Data File MONFY91.
U.S. Sentencing Commission, Ongoing Data File.

Table 17

GUIDELINE SENTENCING RANGES - 2K2.1 CASES*
(October 1, 1990 through September 25, 1992)

Guideline Range	Amendment Year 1990		Amendment Year 1991	
	N	Percent	N	Percent
0-6	104	11.6	2	3.3
1-7	15	1.7	0	0.0
2-8	34	3.8	1	1.7
3-9	0	0.0	0	0.0
4-10	21	2.4	0	0.0
6-12	54	6.0	1	1.7
8-14	57	6.4	0	0.0
9-15	1	0.1	0	0.0
10-16	109	12.2	2	3.3
12-18	34	3.8	2	3.3
15-21	108	12.1	1	1.7
18-24	9	1.0	4	6.7
21-27	106	11.8	2	3.3
24-30	56	6.3	2	3.3
27-33	60	6.7	2	3.3
30-37	24	2.7	2	3.3
33-41	18	2.0	8	13.3
37-46	20	2.2	0	0.0
41-51	10	1.1	6	10.0
46-57	10	1.1	3	5.0
51-63	6	0.7	3	5.0
57-71	0	0.0	1	1.7
63-78	1	0.1	6	10.0
70-87	1	0.1	1	1.7
77-96	0	0.0	2	3.3
78-97	0	0.0	0	0.0
84-105	2	0.2	5	8.3
87-108	0	0.0	0	0.0
92-115	0	0.0	0	0.0
97-121	0	0.0	0	0.0
100-125	3	0.3	0	0.0
108-135	0	0.0	1	1.7
110-137	0	0.0	0	0.0
120-150	0	0.0	1	1.7
121-151	1	0.1	0	0.0
130-162	1	0.1	1	1.7
135-168	0	0.0	0	0.0
140-175	0	0.0	1	1.7
151-188	1	0.1	0	0.0
168-210	3	0.3	0	0.0
188-235	10	1.1	0	0.0
210-262	6	0.7	0	0.0
235-293	4	0.5	0	0.0
262-327	1	0.1	0	0.0
292-365	2	0.2	0	0.0
324-405	0	0.0	0	0.0
360-life	3	0.3	0	0.0
life	0	0.0	0	0.0
TOTAL	895	100.0	60	100.0

*For the 1990 amendment year, 902 cases (2K2.1, 2K2.2, 2K2.3) were identified. Of these 902 cases, 7 mixed law cases (both guideline and pre-guideline counts) were excluded. SOR guideline range information was available for 60 of 66 1991 amendment year cases (2K2.1).

SOURCES: U.S. Sentencing Commission, 1991 Data File MONFY91.
U.S. Sentencing Commission, Ongoing Data File.

Table 18

REASONS FOR DEPARTURE - 2K2.1 CASES*
(October 1, 1990 through September 25, 1992)

Reasons for Departure	Amendment Year 1990		Amendment Year 1991	
	N	Percent	N	Percent
No Reason Given	36	21.6	8	44.4
Age	1	0.6	0	0.0
Mental and Emotional Conditions	2	1.2	0	0.0
Physical Condition	3	1.8	0	0.0
Substantial Assistance at Motion	34	20.4	4	22.2
Substantial Assistance Motion Likely	3	1.8	0	0.0
Several Persons Injured	1	0.6	0	0.0
Death	1	0.6	0	0.0
Physical Injury	1	0.6	0	0.0
Abduction or Unlawful Restraint	1	0.6	0	0.0
Weapons and Dangerous	6	3.6	0	0.0
Criminal Purpose	1	0.6	0	0.0
Coercion and Duress	2	1.2	0	0.0
Diminished Capacity	2	1.2	1	5.6
Public Welfare	3	1.8	0	0.0
Weapon Use	1	0.6	0	0.0
Pattern of Conduct	2	1.2	0	0.0
Related Cases	2	1.2	0	0.0
Old Cases	1	0.6	0	0.0
Does Not Reflect Adequacy of Criminal History	26	15.6	0	0.0
Significance or Similarity of Past Conduct	1	0.6	0	0.0
Other Adequacy of Criminal History	3	1.8	1	5.6
Criminal History Category Overrepresents Involvement	7	4.2	1	5.6
Prior Record - Risk of Future Criminal Conduct	2	1.2	1	5.6
Career Offender	1	0.6	0	0.0
Pursuant to Plea Agreement	8	4.8	1	5.6
Due to Stipulations	1	0.6	0	0.0
Adequate Punishment to meet the Purposes of Sentencing	2	1.2	0	0.0
Deterrence	1	0.6	0	0.0
Charge/Plea Does Not Reflect Seriousness of Offense	1	0.6	0	0.0
Defendant's Propensity for Violence	1	0.6	0	0.0
Rehabilitation	1	0.6	0	0.0
Reduce Disparity Between Similar Cases and Co-Defendants	2	1.2	0	0.0
General Aggravating or Mitigating Circumstance	6	3.6	1	5.6
Departure Known, No Specific Reason Given	1	0.6	0	0.0
TOTAL	167	100.0	18	100.0

*For the 1990 amendment year, 170 reasons for departure cases (2K2.1, 2K2.2, 2K2.3) were identified. Of these 170 cases, 3 mixed law cases (both guideline and pre-guideline counts) were excluded.

SOURCES: U.S. Sentencing Commission, 1991 Data File MONFY91.
U.S. Sentencing Commission, Ongoing Data File.

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

September 30, 1992

MEMORANDUM

TO: Violent Crimes Working Group

FROM: Vince Ventimiglia

RE: Case Law on Revised Firearms Guideline (§2K2.1 (1991))

This memorandum reviews cases that have considered issues relevant to application of the revised firearms guidelines at §2K2.1.

United States v. Morehead, 959 F.2d 1489 (10th Cir. 1992).

Most analogous guideline for defendant convicted in jury trial of conspiring to carry firearms in connection with drug trafficking offense in violation of 18 U.S.C. § 371, is §2K2.1(a)(7) and not §2D1.1. Court looked at nature of the firearms offense and the acquittal on drug trafficking charges. Court had difficulty applying §2K2.4 in light of guideline direction to apply the term required by statute -- which term was not specified in this case. Court accordingly looked to most analogous offense guideline. Court left open for lower court the issue of whether the defendant's offense level under §2K2.1 should be reduced by three levels pursuant to §2X1.1(b)(2).

United States v. Stewart, 780 F.Supp. 1366 (N.D.Fla. 1991)

In a case decided less than six weeks into the use of the revised guidelines, the court held that the new guidelines "raise double jeopardy concerns" where the defendants were originally convicted of federal hunting violations and the current conviction relates to possession of the firearm by a felon (same conduct as implicated in the prior conviction). The guidelines six-level "sporting purposes" reduction under §2K2.1(b)(2), the court held, would be denied the defendants in this case, thus

> the entire conduct constituting the offenses for which the defendants have already been convicted is brought directly to bear on their sentences for possession of a firearm by a convicted felon. The guideline incorporates a "use" adjustment for sentencing that is not a part of the offense. In order to deny the defendants the benefit of the six-level reduction, I would have to consider "the entirety of the conduct for which [the defendants were] convicted." I conclude, therefore, that these defendants may not be deprived of the six-level reduction in the base offense level . . . .[1]

United States v. Skinner, 1992 WL 178770, No. 91-7775 (11th Cir. Aug. 14, 1992)

The circuit court clarified that the sporting reduction under §2K2.1(b)(2) applies where the defendant did not actually use the firearm for unlawful purposes, or did not intend its use for such purposes. Similarly, the actual or intended use for sporting purposes warrants the reduction. The lower court apparently denied the reduction on the basis that the defense failed to show actual sporting use.

[1]Internal cites omitted. The court without explanation applies a base offense level 12 under §2K2.1(a)(7). Typically, a conviction under 18 U.S.C. § 922(g)(1), of which the defendants were convicted, receives a level 14 under §2K2.1(a)(6).

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 662-8800
FAX (202) 662-7631

September 15, 1992

MEMORANDUM

TO: Violent Crimes Working Group

FROM: Vince Ventimiglia

RE: Case Law on Semiautomatic Firearms

The following cases have considered semiautomatic firearms in some fashion. A number of cases have permitted upward departures based on the more dangerous nature of semiautomatic firearms. However, the courts are split on whether type of weapon in any case, may justify a departure, in light of background commentary to §2K2.1.[1] Additional issues arise in a limited number of cases in connection with semiautomatic firearms.

Permissible Grounds for Departure

United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991)

The dangerousness of the defendants' two AR-15 semiautomatic rifles and other firearms used in the narcotics offense and in drive-by shootings is a factor not considered by the

[1] U.S.S.G. §2K2.1 comment. (backg'd) (1990) stated:

> Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence. Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Commission and could justify an upward departure from a range of 10-16 months to a sentence of 48 months.

United States v. Thomas, 914 F.2d 139 (8th Cir. 1990)

The court permitted an upward departure from a range of 8-14 months to a sentence of 60 months based on the nature of the firearms involved, and other factors. Defendant possessed a fully loaded AK47 assault rifle, and a 9 mm pistol, along with cocaine, at his girlfriend's apartment. "The factors forcefully illustrate the danger Thomas-Bey [the defendant] has repeatedly posed for others, which indeed warrants a severe penalty.

United States v. Robinson, 898 F.2d 1111 (6th Cir. 1990)

Defendant purchased two Tec 9 semiautomatic firearms for eventual resale in New York City, and possessed 1.22 grams of crack cocaine in his vehicle. The guideline §2K2.1 (base offense level 9) range of 4-10 months was considered "woefully inadequate for this offense" by the district court, which departed upward to a sentence of 60 months based on number of weapons, nature of the weapons (semiautomatic -- the "weapons of choice for those involved in the drug trade"), unlawful purpose of illegal resale to those in the drug trade, and threat to the community of two fully loaded magazines containing 32 rounds each.

The appellate decision is less than clear, apparently confusing the categories of "automatic" and "semiautomatic" firearms. The court states:

> Section 2K2.1 of the guidelines (background notes) indicates that "the guideline is not based upon the type of firearm." An upward departure, however, may be based on the manner of use or intended use of the firearm. We believe that the district court may take into account the nature of the firearm, whether it is automatic and intended to be used in the drug trade.

The concurring opinion may clarify somewhat the intent of the majority. The concurrence notes:

> I concur in the panel's opinion except with respect to the discussion regarding automatic weapons. In departing, the District Court relied on the nature of the firearms, noting that semi-automatics are the "weapon of choice" in the drug trade. But the applicable guideline explicitly rejects the type of firearm as a sentencing criterion: it differentiates according to intended use, "not . . . upon the type of firearm." . . . The government's brief notes that Guidelines § 5K2.6 allows the court to enhance the sentence in accordance with "the dangerousness of the weapon" used or possessed in the commission of the offense. But it would be illogical to construe this general provision to override the Commission's specific statement that the type of firearm is irrelevant to the appropriate sentence for the crime charged in this case.

Neither of the opinions address the lower court's consideration of the larger capacity of the semiautomatic firearms and the concomitant threat to the community.

United States v. Scott, 914 F.2d 959 (7th Cir. 1990)

Notes, without deciding, the split in circuits over whether type of weapon may be considered for an upward departure. Remands to lower court to clarify reasons for departure, including possible ground that possession of sawed-off weapon may justify departure. See e.g., United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989) (nature of weapons, machine guns, could be considered in determining whether to depart upward).

Impermissible Grounds for Departure

United States v. Enriquez-Munoz, 906 F.2d 1356 (9th Cir. 1990)

Type of weapon, as provided by earlier versions of §2K2.1, may only be considered as a departure factor to the extent a reduction in the offense level is warranted, and not for an increase in sentence, since all types may equally be intended for unlawful purposes. The lower court had departed on a number of grounds, including the presence of at least 40 AK47 assault rifles.

United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989)

The mere presence of a semiautomatic weapon at a drop house for illegal immigrants did not by itself constitute a ground for upward departure. There appears to be no connection between the firearm and the offense, as required by §5K2.6. The lower court held that the presence of the 9mm Uzi semiautomatic firearm at the time of the defendant's arrest indicate a substantial role in the offense. The firearm was found at the drop house along with a small bag of marijuana and large sums of money. Not clear if the nature of the firearm influenced the lower court's decision to depart. Not clear why the firearm was considered unconnected to the offense, in light of its location and the sums of money nearby.

Other Issues

United States v. Dinges, 917 F.2d 1133 (8th Cir. 1990)

Number and type of weapons (in this case, a Remington 12-gauge semiautomatic shotgun, an AKS-762 semiautomatic 39 mm rifle, a .41 magnum pistol, and two .22 caliber semiautomatic pistols) justified denial of a reduction in sentence based on sporting purposes

of the guns, particularly in light of ATF ban on assault rifles, and inference that the guns can not be used solely for sporting or collection purposes.

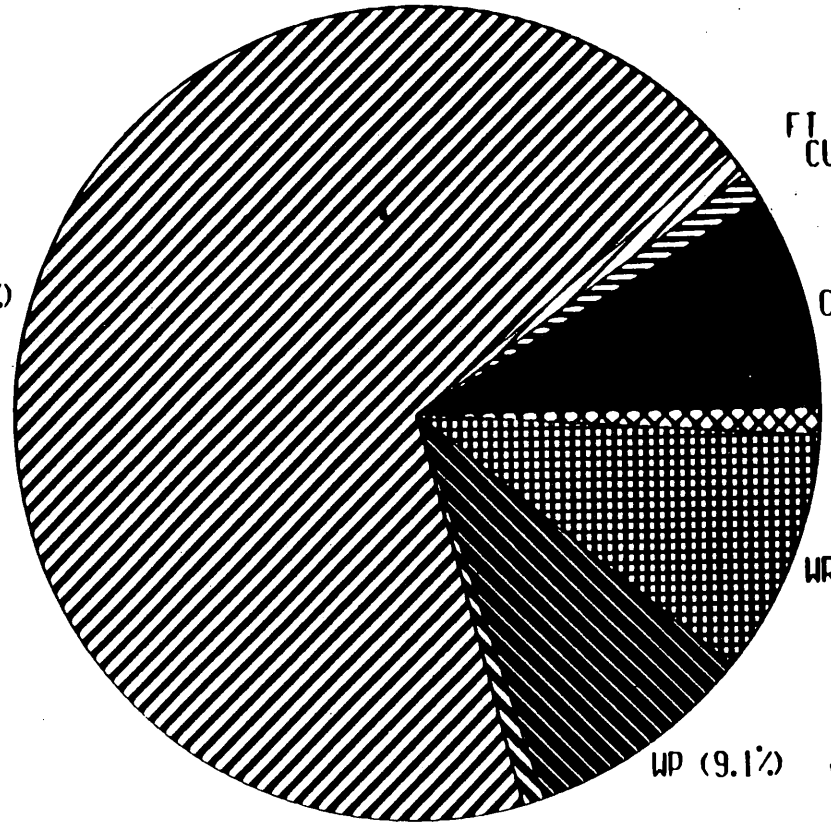
United States v. Willard, 919 F.2d 606 (9th Cir. 1990), cert. denied, 112 S. Ct. 208 (1991).

Affirms that mere presence of semiautomatic handguns clearly reflect an increased danger of violence, and consequently a two-level enhancement under §2D1.1(b)(1) may be sustained. Accord, United States v. Streeter, 907 F.2d 781 (8th Cir. 1991) (noting that defendant's Colt AR-15, a semi-automatic assault rifle that is not typically used in hunting, "is quite a formidable weapon") (citing United States v. Green, 889 F.2d 187 (8th Cir.1989); and holding that the connection of defendant's guns to the offense was consequently not "clearly improbable").

United States v. Hernandez, 921 F.2d 1569 (11th Cir.), cert. denied sub. nom., Tape v. United States, 111 S. Ct. 2271 (1991).

The defendant argued that admission of an Israeli Military Industries semiautomatic firearm was prejudicial to the defendant. The court held that, since the firearm was a tool of the drug trade, the firearm could be properly admitted in connection with an instruction to the jury that the weapon is not evidence of guilt, but can show intent and knowledge.

Use of Weapon/Show of Force
All Drug Defendants Studied



NF = No Force Used NF (68.4%)

FT (1.0%) FT = Force Threatened, No Gun
CU (1.0%) CU = Co-Conspirator Used Weapon

CP (8.7%) CP = Co-Conspirator Poss. Weapon

WU (1.3%) WU = Defendant Used Weapon

WR (9.7%) WR = Weapon Readily Available to Defendant

WP (9.1%) WP = Defendant Possessed Weapon

WO (0.8%) WO = Weapon Out of Defendant's Reach

USE OF A WEAPON
Comparing FORCE Used by Mitigating and No Role Defendants
CURRENT Guideline vs. PROPOSED Guidelines

CURRENT Guideline

	FORCE								
MITROLE	CP	CU	FT	NF	WO	WP	WR	WU	Total
(No Adj) 0	46	5	4	399	5	56	54	7	576
(Minor) -2	10	1	2	54	1	2	6	1	77
-3	4	1	0	7	0	0	0	0	12
(Minml) -4	3	0	1	25	0	0	0	0	29
Total	63	7	7	485	6	58	60	8	694

VARIABLE **SUMMARY OF VARIABLE AND CODES**

Force: Force/Weapon/Firearm Used in the Offense

NF -- No Force and No Weapon
FT -- Force Threatened/Used (No Weapon)
CP -- Coconspirator Possessed/Carried Weapon
CU -- Coconspirator Showed/Used Weapon
WO -- Weapon Out of Defendant's Reach
WR -- Weapon Readily Available to Defend.
WP -- Weapon Possessed/Carried By Defendant
WU -- Weapon Showed/Used By Defendant

USE OF A WEAPON

Type of Force
All Defendants Studied, Grouped by Tasks Performed

	FORCE								
FUNCTION	CP	CU	FT	NF	WO	WP	WR	WU	Total
Bodyguard	1	0	0	0	0	1	1	0	3
Broker	6	0	0	31	1	0	1	0	39
Courier	8	2	0	99	0	5	2	1	117
CrewMember	0	0	0	2	0	0	0	0	2
Enabler	0	0	0	7	0	0	1	0	8
Financier	1	0	0	4	0	0	1	0	6
Gofer	6	0	1	10	0	0	2	0	19
Grower/Man	3	0	0	13	1	6	9	0	32
High-Level	4	1	0	18	0	7	8	0	38
Lookout	3	0	0	6	0	0	0	0	9
Mid-Level	12	2	4	129	2	21	28	5	203
Money-Runn	2	0	0	4	0	0	0	0	6
Mule	0	0	0	59	0	2	1	0	62
Offloader	2	0	0	2	0	0	1	0	5
Pilot/Capt	0	0	0	3	0	0	0	0	3
Renter	4	0	0	12	0	0	2	0	18
Street-Lev	12	2	2	125	2	25	17	4	189
Unknown	5	1	1	16	0	5	3	0	31
Total	69	8	8	540	6	72	77	10	790

APPENDIX C

SAMPLE ABSTRACT
(hypothetical)

Simpson, L., Randolph, E., and Anderson, R. J. New directions in gang research. Journal of Applied Sociological Research, 1972, 22, 73-79.

Purpose
The primary objective of this study was to examine drug use by gangs and its relationship to subsequent gang violence.

Method
This study employed a participant-observer who posed as a gang member and who recorded descriptive narrative data on the types and amounts of drug usage and drug trafficking behavior, and the gang-related violence that was associated with these activities.

Population
The target population for this study was the Invincibles, a ninety-member Caucasian street gang operating out of downtown Miami.

Hypotheses
The study hypothesized that trafficking in the more potent and addictive illicit drugs (e.g., crack cocaine) would be associated with more frequent and more serious violence on the part of the gangs. The study also hypothesized that the usage of higher potency drugs (e.g., PCP) would result in greater gang violence than would the use of drugs of lesser potency (e.g., marijuana).

Findings
The study found that trafficking activities that involved crack cocaine were significantly more likely to be associated with knifings, shootings, and turf-related gang warfare than were trafficking activities that involved marijuana. The authors speculate that the higher profit associated with crack cocaine was the reason gang members were more likely to resort to violence as they defended their turf.

The study also found a slightly higher incidence of violence to be associated with PCP and crack cocaine usage than with marijuana. However, this violence was generally less premeditated than was the violence associated with trafficking in these same drugs.

Definition
This study defined a "gang" as a group of youths from one neighborhood banded together for social reasons, a group possessing a strong group identity.

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, DC 20004
(202) 662-8800
FAX (202) 662-7631

October 8, 1992

MEMORANDUM

TO: Violent Crime/Firearms Working Group
Susan Winarsky, Chair
Bonney Adams, Bob Bentsen, Mike Courlander, Susan Katzenelson, Pam Montgomery, Barbara Nienstedt, Katherine Rosich, Rebecca Schwartz, Melissa Selick, Vince Ventimiglia

FROM: Deborah J. Dealy-Browning

RE: Case Law Review of Selected Gang-Related Sentences

In response to group discussion, I began a case law study to determine if sentencing enhancements are being sought for gang affiliation. It appears that gang-related behavior comes into play in three areas: 1) as it interacts with conditions of supervised release and parole or probation; 2) as a ground for sentencing within the range of the applicable guidelines; and 3) as a ground for upward departure. It is very clear from the case law reviewed that so long as the condition regarding prohibition of gang-related activity is reasonably related to the specific goals for supervised release as set forth by the judge, and the condition itself is reasonable, this interference with the "preferred" right to freedom of association is permissible. It is also apparent that gang-related conduct may be relied upon to determine a sentence within the range. A more interesting question is whether gang-related conduct may be grounds for a departure -- and the answer appears to be yes, if sufficiently proven and connected to the offense.

Definition of "Gang" or "Gang-Related Conduct"

In one case, I found that a prosecution had been conducted against the Patriaca family of La Cosa Nostra (Mafia) under the auspices of the RICO statutes. The "gang" was defined as a highly secret enterprise whose illegal activities have included specified murders, drug trafficking, extortion, obstruction of justice and gambling. The issues in the case revolve around the use of a wiretap; I include it here to provide one definition

of gang and to demonstrate the existence of a RICO prosecution of gang activity. Another possible definition for "gang" comes from United States v. Bigelow, 914 F.2d 966, 976 (7th Cir. 1990); cert. denied, sub. nom., Vaughan v. United States, 111 S. Ct. 1077 (1991), appealed after remand, United States v. Bigelow, 952 F.2d 1398 (7th Cir. 1992) ("the use of violence to support an ongoing, criminal business practice").

Gang Enhancement Upheld

Finally, in the cases in which the gang-related nature of the offense was considered for sentencing purposes, the enhancement was upheld when the nature of the relationship was specifically and meticulously described.

1. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990), cert. denied, 112 S. Ct. 242 (1991)

In a preguidelines case, the mother of a member of the El Rukns gang who had turned government informant was shot in the legs by gang members. In finding that consideration of gang association was appropriate for determining the sentence, the circuit court specifically held:

> To the extent that the district court might have considered the defendants' gang membership, such consideration was not improper. Gang membership, insofar as it bears on the issues of rehabilitation and general deterrence, may be a relevant factor in fashioning an appropriate sentence. Moreover, the record shows that the defendants, who were El Rukns, carried out the attack on Tetter at the direction of the El Rukn organization. Given the relevance of gang membership to the possibility of rehabilitation and the need for general deterrence as well as to the facts of this case, we cannot conclude that the district court's consideration of the defendants' El Rukn membership was improper.

Each defendant's 20-year sentence was upheld.

2. United States v. Thomas, 906 F.2d 323 (7th Cir. 1990)

Defendant and another were convicted of weapons and narcotics offenses. The guidelines range for defendant was 21 to 27 months; the range for the co-defendant, Cooper, was 24 to 30 months. The court found that the firearms guideline "absolutely gives away this offense" and further determined that these types of gang activities indicated a recidivist tendency that is not reflected in their criminal history categories. The court also noted these gang activities indicated a potential for violence not normally associated with the crimes charged (felon in possession, possession of unregistered Title II weapons, possession with intent to distribute cocaine, and 924(c)), the court departed

upward to 25 years for defendant and to 15 years for Cooper. In reversing and remanding, the circuit court held:

> Involvement in gang activities might provide more fruitful grounds for departure, but the district court insufficiently articulated reasons for departure based on gang affiliation . . . .
>
> At sentencing, the government offered evidence that the defendants were members of a violent street gang whose business was trafficking in illegal narcotics. The evidence strongly indicated the BOS gang, of which both defendants were members, has contributed greatly to the urban drug and crime problems in the communities in which it operates . . . .
>
> The district court did not, however, say whether it accepted or rejected the government's reasoning . . . . Moreover, a factual finding that gang activities are terrible is insufficient to support a holding that the Guidelines failed to adequately consider the effects of such activities . . . . Leaders of gangs can receive enhancements for playing an aggravating role in the offense under 3B1.1. The simple statement that gang activity is terrible does not point to where the Guidelines insufficiently take the problems into account.

3. United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991)

Defendant and his brother were each convicted of felon in possession of a firearm. The district court departed upwards to four years for the brother, from a guideline range of 10 to 16 months, and sentenced defendant to 15 years as an Armed Career Criminal. The government offered evidence at sentencing that both defendant and his brother were members of the Untouchables, a violent street gang responsible for drive-by shootings connected with their drug trafficking activities. In departing upwards, the district court found that the "offense was part of a criminal livelihood which survived through terrorizing and intimidating witnesses so that the extent of the criminal behavior never translates into a prosecution." The circuit court affirmed the departure, holding that the facts relied upon by the district court provided a proper basis for an upward departure: 1) the brother was the leader of a gang which engaged in drive-by shootings using the same guns that the brother possessed in his place of residence; 2) the dangerousness of the weapons possessed; and 3) the evidence presented linked the type of weapon recovered with casings recovered from the scene of the drive-by shootings.

Thomas, was cited with approval in two more recent cases:

4. United States v. Scott, 914 F.2d 959 (7th Cir. 1990).

Defendant pled guilty to felon in possession of a firearm and possession of an unregistered firearm. He initially admitted in open court that he was a member of the Brothers of Struggle (BOS) street gang. After plea, defendant was allowed out on bail; during his pretrial release, he had two dirty urinalysis specimens and was seen at a tavern with another BOS gang member during a shoot-out, and a warrant was issued for his arrest after he failed to appear for sentencing. Sentencing range was 10-16 months. The court departed upwards and gave him 60 months. The court undeniably relied heavily upon defendant's membership in BOS and upon what he called guidelines "fraught with inadequacies":

> Mr. Scott had a prior conviction. It's a drug case. He is found in possession of a gun. His gun's a sawed off shotgun. He's a member of the Brothers of Struggle. Violent street gang . . . .
>
> I think that a sentence in the range of 10-16 months here would be totally, absolutely inadequate. It would send the wrong message to the community and to gang members and to people who get involved in the dangerous mix of drug houses, cocaine, sawed-off shotguns and violence.

The circuit court remanded the case holding that the departure was not adequately articulated nor justified within the framework of the guidelines. In a footnote on page 964, the court did specifically hold that gang involvement might provide the basis for a departure if analyzed in the terms of Thomas.

5. United States v. Cammissano, 917 F.2d 1057 (8th Cir. 1990)

Defendant convicted of obstruction of justice, acquitted of one count of witness tampering, and split verdict (mistrial) on another count of witness tampering, as well as perjury counts. The PSR recommended an upward departure might be appropriate based on the defendant's links with and membership in La Cosa Nostra (Mafia). The court found there was a preponderance of evidence demonstrating that the defendant was a member of organized crime and that it was a proper basis for departure.

On appeal, the defendant argued the departure was based on hearsay. The court rejected that argument but remanded for lack of reliable, credible evidence (hearsay or not) to support the allegation. Of interest to this group is the court's reliance upon district court case, United States v. Schweihs, 733 F. Supp. 1174 (N.D. Ill. 1990) -- which held that association with organized crime could be considered an aggravating factor and support an upward departure if that association was used by the defendant in carrying out the crimes of which he has been convicted. The court also cited with approval United States v. Cortina, 733 F. Supp. 1195 (N.D. Ill. 1990) in which that court required a connection between the defendant's association to organized crime and the offense of conviction. The circuit court remanded the case to the district court to take what additional evidence the government could produce and to make fully articulated and

sufficiently particular findings with regards to the basis and the extent of any departure based upon ties to organized crime.

6. United States v. Schweihs, 733 F. Supp. 1174 (N.D. ILL. 1990), vacated on other grounds 1992 WL 186564 (7th Cir. 1992)

Defendant convicted on various counts of conspiracy to commit extortion, attempted extortion, and solicitation to commit a crime of violence. At sentencing, government moved to enhance defendant's sentence based upon his connections to "the Mob" and organized crime. Specifically, the government argued that Schweihs committed his crimes on behalf of, and through use of, an organized crime organization. In agreeing with the government, the court noted in passing:

> While it remains a mystery as to why the Guidelines do not consider the presence of organized crime as a factor to be considered at sentencing, there is ample and widespread comment in the case law on the dangers such enterprises pose for society . . . (citations omitted). Organized crime is extraordinarily difficult to detect and prosecute, and, since organized crime structures are in essence business ventures, they are able to manufacture a high volume of their product -- crime. Furthermore, because of its business, such an organization is more likely to be deterred by the prospect of prison than, say, a person who commits a crime of passion.

In granting the government's motion for an upward departure, the court analogized to extortion guidelines and the provision for enhancement for discharge of a firearm, 2B3.2(b)(2)(A). Finding that use of mob ties was even worse than the discharge of a firearm in that it had "wide-spread implications" to society, the court gave the defendant a 7-level enhancement.

7. United States v. Cortina, 733 F. Supp. 1195 (N.D. Ill. 1990)

The defendant was convicted by plea of running an illegal gambling operation. Nine others pled guilty also. At sentencing the government requested an upward departure for Cortina and two others. One ground asserted was the defendants' association with organized crime. In denying this ground, the court held:

> Defendants' connections to organized crime are allegedly related to their illegal gambling operation. The government concedes that there is no evidence at all in this case of any violence, extortion, or other criminality normally associated with mob activities. Since defendants have already been charged with and have pled guilty to conducting illegal gambling activities, their gambling connection to organized crime has already been taken into consideration by the

Guidelines. Therefore, any upward departure based on defendants' alleged mob connections would amount to punishing defendants merely for their alleged associations with certain individuals. The court finds no basis for such a departure under the Guidelines.

The court went on to comment that the government had simply failed to present sufficiently reliable or credible evidence to even connect the defendants with organized crime.

Restrictions on Gang-Related Conduct as Condition of Probation or Supervised Release

1. Malone v. United States, 502 F.2d 554 (9th Cir.), cert. denied, 419 U.S. 1124, 95 S. Ct. 809 (1974)

Defendant was convicted in 1973 of unlawful exportation of firearms. Conditions of probation included: belong to no Irish organizations; belong to no Irish Catholic organizations; not visit any Irish pubs; and accept no employment, directly or indirectly from any Irish organization. The district court based these conditions on defendants' "tremendous emotional involvement" in the Irish Republican movement.

In affirming the conditions on appeal, the court held:

> The courts strive to protect freedom of speech, religion and racial equality, but freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order . . . . There is a reasonable nexus between the probation conditions and the goals of probation. A convicted criminal may be reasonably restricted as part of his sentence with respect to his associations in order to prevent his future criminality.

2. United States v. Terrigno, 838 F.2d 371 (9th Cir. 1988)

Following defendant's conviction for embezzlement of public funds, the Court sentenced her to probation, one condition of which was that she could not receive any remuneration for speaking engagements, written publications, movies or other media coverage of her crime. The circuit court affirmed on appeal:

> The test for validity of probation conditions, even where 'preferred' rights are affected, is whether the conditions are primarily designed to meet the ends of rehabilitation and protection of the public.

The court went on to specify that the defendant's right to speak was not restricted, just her ability to make money from her crime while on probation.

3. United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991)

Defendant was convicted of felon in possession of a firearm with other charges dismissed. As a condition of his supervised release, the court prohibited him from being involved in any motorcycle gang or club. On appeal, the circuit court affirmed, finding the restriction valid to meet the ends of rehabilitation and to protect the public.

4. Liberatore v. Story, 854 F.2d 830 (6th Cir. 1988)

On appeal, the defendant argued the Parole Commission was not permitted to rely upon the predicate RICO offenses of which defendant was acquitted. The court held that the Commission could properly take into account the fact that the defendant was a member of a criminal enterprise which was involved in murder; his sentence could logically be greater than someone's whose criminal enterprise did not involve such serious crimes.

5. United States v. Torres, 901 F.2d 205 (2nd Cir. 1990)

Defendants were each sentenced to long terms in prison following their convictions for distributing heroin. In determining the sentence, the district court relied upon the "massive quantities of heroin" distributed in "blatant disregard of the law" and discussed the enormous psychological and physical damage wrought to the recipients of this scheme. In affirming the sentence, the circuit court stated:

> [G]iven the policies underlying the pertinent federal legislation, the court's concern with, and focus upon, the massive damage inflicted by this intensive, lengthy and highly remunerative narcotics operation was thoroughly justified.

No Enhancement for Gang-Related Conduct Sought or Imposed

1. United Statesv. Carter, No. 91-5032 (July 20, 1992, 10th Cir.)

Defendant appealed following jury conviction for conspiracy to distribute cocaine. During trial, defendant alleged to be member of gang, Crips, for whom he sold the drugs for which he was convicted. No enhancement sought and defendant given 15-year pre-guideline sentence. Appeal on substantive issues which arose in trial.

2. United States v. Nettles, No. 91-50082 (9th Cir. June 24, 1992) (unpublished)

After a joint task force was created specifically targeting gangs, defendant was arrested and convicted of felon in possession of a firearm. He was sentenced as a career offender to 96 months imprisonment. On appeal, the case was remanded following Sahakian decision. No enhancement sought or given despite the specific gang-related nature of the arrest and conviction.

3. United States v. Seale, Nos. 89-4098, et al. (6th Cir. Oct. 31, 1991)

Defendant and others prosecuted and convicted of distribution of crack cocaine and cocaine. Defendant and group all members of Crips and the distribution of drugs was run as a gang project. No gang enhancement requested; however, the court did upwardly depart based upon inadequacy of criminal history in representing Seale's "proclivity to violence." Actual sentence not given but appears base offense level was 32.

4. United States v. Barger, 931 F.2d 359 (6th Cir. 1991) (reconsideration denied Mar. 4, 1991)

Defendant was the leader of the Los Angeles chapter of the Hell's Angels and the recognized leader of the nationwide Hell's Angels outlaw motorcycle gang. When a member of the Alaska chapter of the Hell's Angels was murdered by the rival Outlaws motorcycle gang, defendant and the Hell's Angels plotted to kill one of the Outlaws. Defendant was ultimately convicted of several crimes. At sentencing, no gang enhancement was sought notwithstanding the very clear gang-relatedness of this offense.

5. United States v. Roehl, No. 89-2889 (7th Cir. Nov. 5, 1990)

Defendant was a member of the Outlaws motorcycle gang and was arrested while sleeping inside the clubhouse, protecting it, in possession of a firearm. Sentenced as an Armed Career Criminal to 15 years; again, no gang enhancement sought or given.

6. United States v. Keys, 899 F.2d 983 (10th Cir.), cert. denied, 111 S. Ct. 160 (1990)

Defendant convicted of offense committed while in prison. Admitted member of Crips actively using fellow Crips members while in prison. Court upwardly departed based upon prison disciplinary record but not for gang-related conduct.

7. United States v. Barnes, 910 F.2d 1342 (6th Cir. 1990)

Notwithstanding defendant's membership in the Iron Horsemen outlaw motorcycle gang and conviction for weapons possession, no gang enhancement sought and upward departure based on other grounds.

8. United States v. Summers, 893 F.2d 63 (4th Cir. 1990)

Defendant was a recognized member of the Crips. He plead guilty to felon in possession of a firearm, a 924(c) count, and providing false information to acquire a firearm. The district court departed downward from a range of 292-365 to 180 months plus the required consecutive 60 months. No gang enhancement; case remanded to determine specific grounds for departure and less spread in departure.

9. United States v. Thompson, 876 F.2d 1381 (8th Cir. 1989), cert. denied, 493 U.S. 868, 110 S. Ct. 192 (1989)

Defendant was a member of Crips and was arrested in Kansas City Airport, in Crips colors, for possession of drugs with intent to distribute. No gang enhancement sought and defendant sentenced to 33 months.

10. United States v. White, 888 F.2d 1252 (8th Cir. 1989)

Defendant admitted member of Bloods gang and convicted of possession with intent to distribute cocaine base and 924(c). No gang enhancement sought and sentenced to 70 months with required consecutive 60.