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MEMORANDUM

TO: All Commissioners
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FROM: Gary J. Peters

SUBJECT: **Career Offender** Guidelines

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

I. INTRODUCTION

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

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

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

- are violent offenses counted if they occurred more than 15 years ago?

- are the time periods applicable to criminal history also applicable in career offender decisions?
- are felony convictions for possession of a controlled substance counted as "controlled substance offenses?"

- would a prior conviction for escape which involved violence be considered a "crime of violence?"

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

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

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

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

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

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

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

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

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

II. DESCRIPTION OF 18 U.S.C. § 924(e)

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

A. The Development of the Statute

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

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

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

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

B. Legislative History of the Statute

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

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

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

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

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

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

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

C. The Operation of the Statute

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

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

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

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

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

III. THE CAREER OFFENDER GUIDELINES

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

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

A. The Development of the Guideline

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

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

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

§B311. Special Offenders Defined

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

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

B. The Legislative History of the Guideline

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

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

C. The Operation of the Guideline

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

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

IV. SPECIFIC ISSUES AND PROPOSALS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A

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

MEMORANDUM

TO: Judge MacKinnon

FROM: Phyllis Newton

SUBJECT: Easterbrook Decision

DATE: 1 February 1988

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B

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

March 26, 1987

LEGAL MEMORANDUM:

TO: The Commission

FROM: John Steer

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

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

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

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

Background and Discussion

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

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

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

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

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

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

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

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

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

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

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

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

CAREER CRIMINAL

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

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

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

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

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

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

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

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

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

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

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

Reasonably construing the provision in its present context

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

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

APPENDIX C

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

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

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

Commentary

Application Note:

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

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

§4B1.2. Definitions

(1) The term "~~crime of violence~~ VIOLENT FELONY" as used in this provision ~~is defined under 18 U.S.C. § 16~~ SEE INSERT A

(2) The term "~~controlled substance offense~~ SERIOUS DRUG OFFENSE" as used in this provision means ~~an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959; and similar offenses.~~ SEE INSERT B

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

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

Commentary

Application Notes:

SEE INSERT C

1. *"Crime of violence" is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.*

2. *"Controlled substance offense" includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.*

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.*

§4A1.2(j) (PRIOR SENTENCE DEFINED),

4. *The provisions of §4A1.2(e) (Applicable Time Period), §4A1.2(h) (Foreign Sentences), and §4A1.2(j) (Expunged Convictions) are applicable to the counting of convictions under §4B1.1. Also applicable is the Commentary to §4A1.2 pertaining to invalid convictions.*

SEE INSERT D

§4B1.3. Criminal Livelihood.

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

INSERT A

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

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INSERT B

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

INSERT C

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

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

INSERT D

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

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

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

Offense Statutory Maximum	Offense Level
(A) Life	37
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Commentary

Application Note:

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

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

§4B1.2. Definitions

(1) The term "~~crime of violence~~" VIOLENT FELONY as used in this provision ~~is defined under 18 U.S.C. § 16.~~ SEE INSERT A

(2) The term "~~controlled substance offense~~" SERIOUS DRUG OFFENSE as used in this provision means ~~an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959, and similar offenses.~~ SEE INSERT B

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

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

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

Commentary

Application Notes:

SEE INSERT C

~~1. *"Crime of violence" is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.*~~

~~2. *"Controlled substance offense" includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.*~~

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.*

§4A1.2(j) (PRIOR SENTENCE DEFINED),

4. *The provisions of §4A1.2(e) (Applicable Time Period), §4A1.2(h) (Foreign Sentences), and §4A1.2(j) (Expunged Convictions) are applicable to the counting of convictions under §4B1.1. Also applicable is the Commentary to §4A1.2 pertaining to invalid convictions.*

SEE INSERT D

§4B1.3. Criminal Livelihood.

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

INSERT A

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

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INSERT B

an offense under federal or state law, involving the manufacturing, importing, distributing, or possession with intent to manufacture, import, or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law. (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)), } add *

INSERT C

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

2. "Violent felony" includes murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use, of physical force against the person of another, or (B) the offense of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another.". } * delete, or at least emphasize the the examples are illustrat & not comprehens

INSERT D

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

January 17, 1990

Memorandum

TO: Judge Wilkins

FROM: Peter Hoffman

SUBJECT: Career Offenders

As you requested, I have prepared a guideline amendment that would provide for use of relevant conduct rather than the offense of conviction in determining whether a defendant qualified as a career offender under §4B1.1 in respect to the instant offense (amendment is attached).

As I understand your request, the working of the provision would be demonstrated by the following example:

> Example: The defendant, who has two prior convictions for robbery, is arrested for robbery of a bank. He is allowed to plead guilty to bank larceny. The offense guideline would be §2B1.1 (Larceny) unless the defendant stipulated to robbery as part of the plea agreement, in which case the robbery guideline (§2B3.1) would apply (see §1B1.2(a)).
>
> In any case, however, the career offender provision would apply because relevant conduct would be used to determine whether the instant offense was a crime of violence or drug offense. The statutory maximum would be that of the offense of conviction.
>
> In this case, if the offense of conviction was 18 U.S.C. § 2113(b) (10 year maximum), the offense level would be level 24 from the table at 4B1.1 unless the defendant had stipulated to the commission of the robbery and the robbery guideline had produced the same or a higher result.

There seem to me to be several reasons for proceeding cautiously in this area, and I would recommend against this change at this time.

(1) The Commission has explained the increases in prison population due to the career offender provision as being required by the statutory direction to the Commission in 28 U.S.C. § 994(h). It is to be noted that this provision expressly refers to a defendant who is convicted of an offense that is a crime of violence or a drug trafficking offense. This amendment therefore, and the increase in prison population resulting therefrom, would clearly be no longer directly required by the statutory directive.

(2) As noted in the case example shown above, the offense of conviction controls the offense guideline section (thus, a plea to larceny will result in a lower offense level than a plea to robbery), unless there is a stipulation to the commission of robbery. Under this amendment, however, a plea to a lesser offense may produce a lower offense guideline from Chapter Two, but nonetheless result substantially higher guideline from Chapter Four, Part B.

This seems to me to be such a substantial departure from the modified charge offense system adopted by the Commission that it might be preferable simply to solicit public comment on whether the Commission should now abandon the modified charge offense system and adopt a real offense system. After all, the only way the current career offender provision can be subverted is by prosecutorial charge manipulation. If prosecutorial charge manipulation is a significant problem in the most heinous cases (i.e., career offenders) it is likely to be an even more serious problem in the run of the mill cases. Note: an amendment to move the guideline to real offense sentencing would require substantial revision to a number of sections. Therefore, if the Commission wishes to pursue this course, I would recommend that the proposal be set forth as a general proposal. This would allow more time to determine exactly which sections had to be amended and the appropriate wording for each. Personally, I have always favored a real offense system, although I do not know if this would be the most appropriate time for the Commission to make such a significant change. It might be preferable to wait until there is more analysis as to the extent of offense level manipulation as a result of plea negotiation.

Note that a change in the robbery guideline to take into account multiple instances does not raise the same concern because (1) multiple robberies are heartland conduct, (2) there will be no inconsistency between Chapter Two and Four, and (3) the commission has already taken a similar approach in other cases (e.g., an offense involving multiple bribes in §2C1.1).

Career Offender

Proposed Amendment: Section 4B1.1 is amended by deleting "instant offense of conviction is" and inserting in lieu thereof "instant offense involves".

The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting "that is" and "is of", and by inserting in lieu thereof in each instance "involves".

The Commentary to §4B1.1 captioned "Background" is amended by inserting at the end:

> "In addition, the Commission has expanded the definition of career offender as set forth in 28 U.S.C. § 994(h) in respect to the instant offense to include defendants whose conduct, as determined under §1B1.3 (Relevant Conduct), involves a 'crime of violence' or 'controlled substance offense'.".

Reason for Amendment: This amendment expands the applicability of §4B1.1 (Career Offenders) to cover cases in which the instant offense, as determined under §1B1.1 (Relevant Conduct), constitutes a 'crime of violence' or 'controlled substance offense'.

This amendment, for example, would call for the application of the career offender provision where the defendant had two prior robbery convictions, and the instant offense was determined under §1B1.3 (Relevant Conduct) to constitute a robbery even if offense of conviction was a lesser offense such as larceny.

(1) From Federal Register 3/3/89

§2B3.1. Robbery

Concern also has been expressed that the guideline sentence may be unduly limited by the number of counts of conviction. (See Chapter 3, Part D, for guidelines dealing with multiple counts of conviction.) Under the guidelines, the offense level is not increased by offenses that are uncharged or counts that are dismissed; the sentencing judge may consider them only within the guideline range or as a basis for departure. Under past practice, the sentencing judge was unconstrained in his consideration of other offenses. The parole guidelines took them into account regardless of whether there was a conviction.

This facet of the guidelines may result in lower sentences than under past practice if the prosecutor accepts a plea to one count of robbery when the defendant in fact has committed several robberies. It has been proposed that the Commission amend the robbery guideline to explicitly take into account other robberies of which the defendant has been not convicted. The following two amendments have been proposed as ways to accomplish this.

[Option 1: Insert as an additional specific offense characteristic at §2B3.1(b):

"(6) If, as part of the same course of conduct or common scheme or plan as the offense of conviction, the defendant committed one or more additional robberies, increase by 2 levels. Do not, however, apply this adjustment if the application defendant is convicted of multiple counts of robbery.".]

[Option 2: Insert as an additional specific offense characteristic at §2B3.1(b):

"(6) If, as part of the same course of conduct or common scheme or plan as the offense of conviction, the defendant committed (A) one additional robbery, increase by 2 levels; (B) two additional robberies, increase by 3 levels; (C) three or four additional robberies, increase by 4 levels; or (D) five or more additional robberies, increase by 5 levels.".

The following additional Application Note would be inserted as Note 9:

"9. Multiple robberies are not grouped under §3D1.2(d). Where specific offense characteristic (b)(6) applies, multiple counts will be grouped under §3D1.2(c).".]

The Commission solicits comment on whether either of these approaches should be followed.

(2) Additional Option (Rough Draft)

Proposed Amendment: Section 2B3.1 is amended by inserting the following additional subsection:

"(c) Special Instruction:

(1) If, as part of the same course of conduct or common scheme or plan as the offense of conviction, the defendant participated in one or more additional robberies, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such robbery.".

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

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

* * *

Commentary

Application Notes:

1. *"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.*

2. *"Offense Statutory Maximum" refers to the maximum term of imprisonment authorized for the offense of conviction ~~that is~~ involves a crime of violence or controlled substance offense. If more than one count of conviction ~~is of~~ involves a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.*

Background: 28 U.S.C. § 994(h) mandates that the Commission assure that certain "career" offenders, as defined in the statute, receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this mandate. The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy).

In addition, the Commission has expanded the definition of career offender as set forth in 28 U.S.C. § 994(h) in respect to the instant offense to include defendants whose conduct, as determined under §1B1.3 (Relevant Conduct), involves a 'crime of violence' or 'controlled substance offense'.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 47 and 48); November 1, 1989 (see Appendix C, amendments 266 and 267).

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

April 17, 1989

TO: All Commissioners

FROM: Dennis Murphy, Bank Robbery Working Group

SUBJECT: Career Offender Issues

This memorandum provides information on three issues relating to the proposed amendments to the Career Offender Provision of the Guidelines. The first issue concerns the unexpectedly small number of Career Offender Guideline bank robbery cases that have been received by the Monitoring Unit. The second and third issues relate respectively to the age and criminal history profiles of Career Offenders.

Number of Guidelines Career Offenders

As I discussed in my March 29 memorandum that analyzed data from Monitoring files for bank robbery offenders sentenced under the Guidelines, Career Offender status is indicated in approximately nine percent of the presentence reports for Guidelines bank robbery offenders. For a sample of about 160 bank robbers sentenced in 1985, a hand analysis of presentence reports identified 35 offenders, or about 22 percent of the sample, who would qualify as Career Offenders if sentenced under the Guidelines.[1] The Prison Impact Simulation Model (PRISM) classifies as Career Offenders about one-third of all bank robbery cases contained in the 1985 Augmented FPSSIS.

There are at least two possible explanations for the relatively small number of bank robber Career Offenders in our Guidelines monitoring files. It may be that many Career Offender cases are complex and have not yet been resolved. It is also possible that as a reaction to the high sentences that bank robbery and other Career Offenders would receive under the Guidelines, some of these cases are being pled down to lesser offenses that would not trigger the Career Offender provision. This memo explores the latter theory.

Following the suggestion of Phyllis Newton, I have examined Monitoring files for offenders with at least two prior adult

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[1] See page 1 of my March 29, 1989 memo titled "Bank Robbery Cases Sentenced Under the Guidelines".

convictions who were sentenced under the Guidelines for either bank larceny, simple possession of a controlled substance, or possession of a firearm by a convicted felon. If plea bargains are being struck routinely to avoid the Career Offender provision, we would expect to find a number of examples in these files of offenders who would be classified as Career Offenders absent the plea bargain. As I will detail below, such pleas do not in fact appear to be occurring very frequently. The results I report are merely suggestive, however, since my analysis of the files has not been checked by a more experienced member of the Commission staff.

Monitoring has received only two cases involving offenders convicted of bank larceny who had two prior adult convictions. For one of these cases the plea bargain was intended explicitly to avoid a Career Offender sentence under the bank robbery Guidelines. Interestingly, however, the offender still received a Career Offender sentence of 84 months (Level 22, Category VI) under the (mistaken) assumption that bank larceny is considered a violent crime under the Guidelines.

The search for bank larceny cases also turned up several additional bank robbery files that had been misclassified by the Administrative Office. This group included a Career Offender. The judge departed downward to ten years citing the offender's advanced age (68 years).

There were ten Monitoring files for offenders with two prior convictions who were sentenced for simple possession of a controlled substance. One of these individuals would have been considered a Career Offender had an indictment count for distribution of crack not been dropped. There is no indication in the file, however, as to why the distribution charge was dismissed.

The largest group of files was for the conviction offense possession of a firearm by a convicted felon. Of 60 such files, I found three cases where the offender would have been considered a Career Offender had one of the counts of indictment not been dismissed as part of a plea bargain.[2] Again, I could not determine whether the counts were dropped specifically to avoid a Career Offender classification.

Career Offender Age Profile

I have attached in Appendix I three tables that disclose the age distribution of various groups of Career Offenders. Table I shows the distribution for the 35 offenders convicted of bank robbery in 1985 who were classified by Commission staff as Career Offenders using actual presentence reports. Tables II and III are based on information obtained from the Prison Impact Simulation Model. Table II shows the average age by offense category of

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[2] The counts dismissed for the three cases were distribution of crack, kidnapping, and assault on a police officer.

Career Offenders as identified by PRISM using 1985 Augmented FPSSIS data. Table III provides a detailed age profile of bank robbery Career Offenders from Augmented FPSSIS broken down by Criminal History Category.

Career Offender Criminal History Profile

Appendix I also provides information on criminal history for Career Offenders. Table IV shows in chart form the distribution of raw criminal history points for the 35 bank robbery offenders classified by Commission staff as Career Offenders. Table V discloses the distribution of Career Offenders by Criminal History raw points for each of the six offenses that can trigger the Career Offender provision.

APPENDIX I
AGE AND CRIMINAL HISTORY PROFILES OF CAREER OFFENDERS

TABLE I

AGE DISTRIBUTION FOR 35 BANK ROBBERY CAREER OFFENDERS (1985 Augmented FPSSIS)

AGEGROUP	COUNT	PCT
17-24	1	2.94
25-29	8	23.53
30-34	8	23.53
35-39	4	11.76
40-44	5	14.71
45-49	4	11.76
50-54	3	8.82
55-59	0	0.00
60+	1	2.94

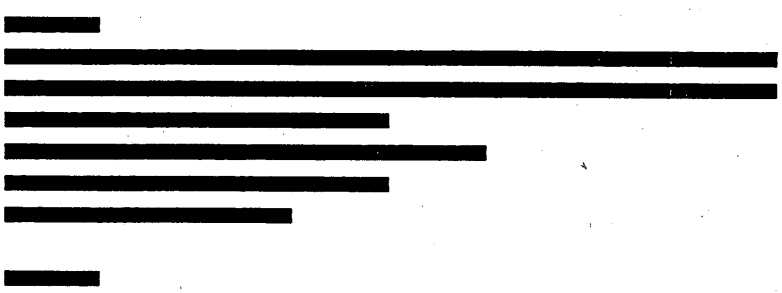

TABLE II

AVERAGE AGE OF CAREER OFFENDERS BY OFFENSE

Summaries of AGE
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			35.6102	9.3996	489
AOCODE	1100	Bank Robbery	35.2526	9.1253	293
AOCODE	1500	Agg Assault	28.5429	4.9725	35
AOCODE	6100	Rape	31.0000	7.9057	13
AOCODE	6511	Marij.Distib	39.9865	8.2447	25
AOCODE	6711	Heroin Distrib	37.5424	10.2053	59
AOCODE	6721	Cocaine Distrib	38.5343	9.9394	64

TABLE III

AGE PROFILE FOR ROBBERY CAREER OFFENDERS

Crosstabulation: TAGE
By CH

CH–> / TAGE	Count	2.00	3.00	4.00	5.00	6.00	Row Total
18 - 24	1.00	2	1	7	3	4	17 5.9
25 - 29	2.00	1	9	21	22	23	76 26.4
30 - 34	3.00		12	9	20	28	69 24.0
35 - 39	4.00	1	2	17	11	19	50 17.4
40 - 44	5.00		4	6	14	4	28 9.7
45 - 49	6.00	1	2	9	5	5	22 7.6
50 - 54	7.00	1	1	1	5	4	12 4.2
55 - 59	8.00	1	3	1	4	1	10 3.5
60+	9.00		1	1		2	4 1.4
	Column Total	7 2.4	35 12.2	72 25.0	84 29.2	90 31.3	288 100.0

TABLE IV

DISTRIBUTION OF CRIMINAL HISTORY POINTS, 35 BANK ROBBERY CAREER OFFENDERS (1985 Augmented FPSSIS)

POINTS	COUNT	PERCENT
5.	2	5.71
6.	2	5.71
7.	1	2.86
8.	1	2.86
9.	3	8.57
10.	2	5.71
11.	8	22.86
12.	4	11.43
13.	2	5.71
14.	1	2.86
15.	1	2.86
16.	1	2.86
17.	4	11.43
18.	1	2.86
23.	1	2.86
25.	1	2.86

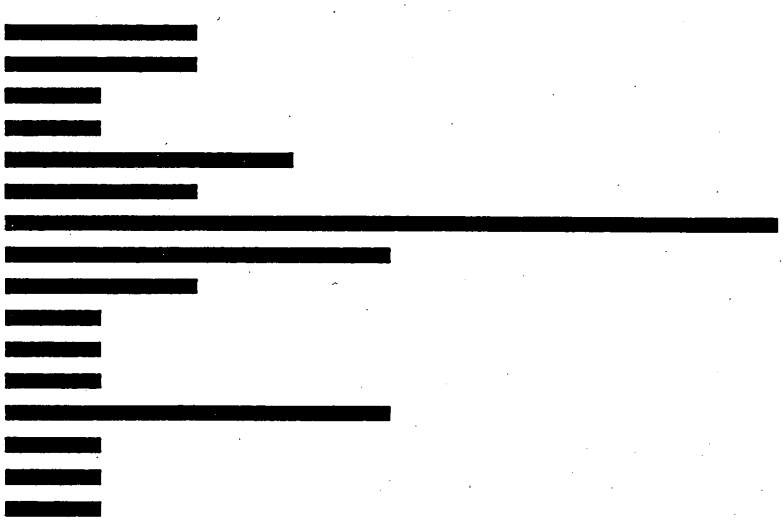

TABLE V

AVERAGE RAW CRIMINAL HISTORY SCORE BY OFFENSE

Summaries of RAWCH
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			10.6469	4.9661	492
AOCODE	1100	Bank Robbery	11.1993	4.7505	296
AOCODE	1500	Agg Assault	8.6000	4.3467	35
AOCODE	6100	Rape	8.0769	3.7741	13
AOCODE	6511	Marij.Distib	8.1859	4.9249	25
AOCODE	6711	Heroin Distrib	9.3898	5.0686	59
AOCODE	6721	Cocaine Distrib	11.8514	5.4960	64

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

February 13, 1989

MEMORANDUM

TO: All Commissioners

FROM: Dennis Murphy,
Robbery Working Group

SUBJECT: **Career Offender** Profiles

Attached are a series of tables that present summary data for various characteristics of individuals in the 1986 Augmented FPSSIS data set who would be considered career offenders under the guidelines. The first table discloses the breakdown of career offenders by type of conviction offense (e.g. robbery, aggravated assault, heroin distribution, etc). The leading sources of career criminals are Robbery (41 percent),[1] cocaine distribution (19 percent) and Heroin distribution (15 percent).

Table II presents the average age of career offenders by offense category. Drug offenders average about 38 years of age, with bank robbers averaging about 35 years. (A more complete age profile of bank robbers is available in Table VII.)

Table III.A reveals how the average raw criminal history score of career offenders varies across offense categories. Bank robbers have on average accumulated 11 points, which places them in the middle of criminal history category V. Career offenders in other offense categories have accumulated about 8 points (criminal history category IV). Table III.B is a matrix that discloses by offense the distribution of career offenders across criminal history categories. It can be seen that drug offenders tend to be spread more evenly over categories I-VI than are bank robbers, who

[1] It should be noted that virtually all of the career offenders convicted of bank burglary and bank larceny were originally indicted for bank robbery. Thus, bank robbery as a real offense accounted for roughly half of all career offenders in 1986.

tend to cluster in categories V and VI.[2]

Tables IV-VI use several measures to describe the severity of individual offenses within offense category. Table IV presents the average number of injuries reported by offense category. Table V presents similar data for the average number of deaths. Table VI lists the percentage of offenders who possessed a weapon by offense category. As might be expected, the injury rate is highest for aggravated assault and rape. Death is a rare occurrence across all categories.

Finally, Table VII presents detailed age and criminal history information for career offender bank robbers. About 75 percent of such offenders are under age 40. Only eight percent are over age 50.

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[2] Due to missing data problems concerning prior sentence length, the prison impact model used to classify career offenders and simulate guideline sentences arbitrarily assigned several individuals to Category I, even though this outcome is technically impossible under the guidelines. Such cases should be ignored, since the individuals may not be career offenders or may belong in a higher criminal history category.

TABLE I

CAREER OFFENDERS BY OFFENSE

AOCODE

Value Label	Value	Frequency	Percent	Valid Percent	Cum Percent
Bank Robbery	1100	335	41.4	41.4	41.4
Agg Assault	1500	38	4.7	4.7	46.1
Bank Burglary	2100	32	4.0	4.0	50.0
Bank Larceny	3100	35	4.3	4.3	54.3
Rape	6100	13	1.6	1.6	55.9
Marij.Distib	6511	80	9.9	9.9	65.8
Heroin Distrib	6711	124	15.3	15.3	81.1
Cocaine Distrib	6721	153	18.9	18.9	100.0
	TOTAL	810	100.0	100.0	

Valid Cases 810 Missing Cases 0

TABLE II

AVERAGE AGE OF CAREER OFFENDER BY OFFENSE

Summaries of AGE
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			35.7041	9.0706	806
AOCODE	1100	Bank Robbery	34.9970	8.8919	332
AOCODE	1500	Agg Assault	29.5263	6.2633	38
AOCODE	2100	Bank Burglary	34.2258	7.5970	31
AOCODE	3100	Bank Larceny	28.6390	10.4097	35
AOCODE	6100	Rape	31.0000	7.9057	13
AOCODE	6511	Marij.Distib	37.8203	7.1216	80
AOCODE	6711	Heroin Distrib	37.8790	9.7402	124
AOCODE	6721	Cocaine Distrib	38.2141	8.5638	153

Total Cases = 810
Missing Cases = 4 OR .5 PCT.

TABLE III.A

AVERAGE RAW CRIMINAL HISTORY SCORE BY OFFENSE

Summaries of RAWCH
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			9.7303	4.9214	810
AOCODE	1100	Bank Robbery	11.0119	4.7752	335
AOCODE	1500	Agg Assault	8.7895	4.2436	38
AOCODE	2100	Bank Burglary	11.0313	4.0758	32
AOCODE	3100	Bank Larceny	7.4183	5.5582	35
AOCODE	6100	Rape	8.0769	3.7741	13
AOCODE	6511	Marij.Distib	8.6210	3.9357	80
AOCODE	6711	Heroin Distrib	8.2097	4.5893	124
AOCODE	6721	Cocaine Distrib	9.3659	5.4389	153

Total Cases = 810

TABLE III.B

CRIMINAL HISTORY CATEGORY BY OFFENSE

Crosstabulation: AOCODE By CH

CH-> Count / AOCODE	1.00	2.00	3.00	4.00	5.00	6.00	Row Total
1100 Bank Robbery	7	9	41	83	95	100	335 41.4
1500 Agg Assault		4	5	17	6	6	38 4.7
2100 Bank Burglary			4	7	13	8	32 4.0
3100 Bank Larceny	4		25		1	4	35 4.3
6100 Rape		1	4	3	2	3	13 1.6
6511 Marij.Distib	1	7	15	29	14	13	80 9.9
6711 Heroin Distrib	3	17	31	31	18	24	124 15.3
6721 Cocaine Distrib	12		47	32	7	55	153 18.9
Column Total	27 3.4	38 4.7	172 21.3	202 25.0	156 19.2	214 26.4	810 100.0

TABLE IV

AVERAGE NUMBER OF INJURIES BY OFFENSE

Summaries of NO_INJUR
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			.1000	.5202	810
AOCODE	1100	Bank Robbery	.0985	.6829	335
AOCODE	1500	Agg Assault	.8158	.5626	38
AOCODE	2100	Bank Burglary	.1250	.7071	32
AOCODE	3100	Bank Larceny	0.0	0.0	35
AOCODE	6100	Rape	.8462	.3755	13
AOCODE	6511	Marij.Distib	0.0	0.0	80
AOCODE	6711	Heroin Distrib	.0161	.1796	124
AOCODE	6721	Cocaine Distrib	0.0	0.0	153

Total Cases = 810

TABLE V

AVERAGE NUMBER OF DEATHS BY OFFENSE

Summaries of NO_KILL
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			.0086	.1530	810
AOCODE	1100	Bank Robbery	0.0	0.0	335
AOCODE	1500	Agg Assault	.0526	.2263	38
AOCODE	2100	Bank Burglary	0.0	0.0	32
AOCODE	3100	Bank Larceny	0.0	0.0	35
AOCODE	6100	Rape	0.0	0.0	13
AOCODE	6511	Marij.Distib	0.0	0.0	80
AOCODE	6711	Heroin Distrib	.0403	.3696	124
AOCODE	6721	Cocaine Distrib	0.0	0.0	153

Total Cases = 810

TABLE VI

AVERAGE POSSESSION OF WEAPON BY OFFENSE

Summaries of WEAPON12
By levels of AOCODE

Variable	Value	Label	Mean	Std Dev	Cases
For Entire Population			.3532	.4783	810
AOCODE	1100	Bank Robbery	.5791	.4944	335
AOCODE	1500	Agg Assault	.7368	.4463	38
AOCODE	2100	Bank Burglary	.3750	.4919	32
AOCODE	3100	Bank Larceny	0.0	0.0	35
AOCODE	6100	Rape	.3846	.5064	13
AOCODE	6511	Marij.Distib	.0936	.2931	80
AOCODE	6711	Heroin Distrib	.1774	.3836	124
AOCODE	6721	Cocaine Distrib	.1148	.3198	153

Total Cases = 810

Table VII

1986 FPSSIS

AGE PROFILE FOR ROBBERY CAREER OFFENDERS

	CRIMINAL HISTORY CATEGORY												ROW TOTAL	
AGE	I		II		III		IV		V		VI			
	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)	N	(%)
17-24	1	(.002)	2	(.005)	3	(.008)	3	(.008)	6	(.016)	14	(.036)	29	(.074)
25-29	1	(.002)	1	(.002)	5	(.013)	9	(.023)	26	(.066)	60	(.153)	102	(.2)
30-34	2	(.004)	1	(.002)	9	(.023)	9	(.023)	15	(.038)	64	(.163)	100	(.255)
35-39	2	(.004)	2	(.005)	1	(.002)	8	(.02)	17	(.043)	37	(.094)	67	(.171)
40-44	0	(.0)	0	(.0)	1	(.002)	3	(.008)	7	(.018)	26	(.066)	37	(.094)
45-49	1	(.002)	1	(.002)	2	(.005)	0	(.0)	10	(.026)	13	(.033)	27	(.069)
50-54	0	(.0)	1	(.002)	2	(.005)	0	(.0)	1	(.002)	10	(.026)	14	(.036)
55-59	1	(.002)	1	(.002)	3	(.008)	1	(.002)	1	(.002)	5	(.013)	12	(.031)
60+	0	(.0)	0	(.0)	1	(.002)	0	(.0)	1	(.002)	2	(.005)	4	(.01)
Column	8	(.02)	9	(.023)	27	(.069)	33	(.084)	84	(.214)	231	(.589)	392	(1.0)

BURGLARY

DEFINITION

The Uniform Crime Reporting Program defines burglary as the unlawful entry of a structure to commit a felony or theft. The use of force to gain entry is not required to classify an offense as burglary. Burglary in this Program is categorized into three subclassifications: forcible entry, unlawful entry where no force is used, and attempted forcible entry.

TREND

Year	*Number of offenses*	*Rate per 100,000 inhabitants*
1988	*3,218,077*	*1,309.2*
1989	*3,168,170*	*1,276.3*
Percent change	*−1.6*	*−2.5*

Volume

An estimated 3,168,170 burglaries occurred in the United States during 1989. These offenses accounted for 22 percent of the total Crime Index and 25 percent of the property crimes.

Distribution figures for the regions showed that the highest burglary volume occurred in the most populous Southern States, accounting for 42 percent of the total. The Western States followed with 23 percent, the Midwestern States with 19 percent, and the Northeastern States with 16 percent.

Like the previous year, more burglaries occurred in August than any other month. The lowest number was reported in February.

Burglary by Month, 1985-1989

[Percent of annual total]

Months	1985	1986	1987	1988	1989
January	8.2	8.4	8.4	8.4	8.8
February	7.2	7.5	7.8	7.8	7.3
March	8.2	8.3	8.3	8.1	8.2
April	7.8	7.9	7.6	7.5	7.7
May	8.0	8.1	8.0	8.1	8.4
June	7.9	8.1	8.0	8.0	8.3
July	9.0	8.9	8.8	8.8	9.2
August	9.1	9.0	9.1	9.3	9.3
September	8.5	8.5	8.4	8.6	8.6
October	9.0	8.4	8.4	8.5	8.5
November	8.5	8.1	8.4	8.4	8.1
December	8.8	8.8	8.8	8.5	7.8

Trend

Nationwide, the burglary volume decreased 2 percent in 1989 from the 1988 total. By population groupings, the only increases were registered in cities under 10,000 in population, with a rise of less than one-half of 1 percent, and in the rural counties, 1 percent.

Geographically, all four regions of the United States reported decreases in burglaries during 1989 as compared to 1988. The declines were 2 percent in the Western and Midwestern States, and 1 percent in the Northeastern and Southern States.

Rate

A burglary rate of 1,276 per 100,000 inhabitants was registered nationwide in 1989. The rate fell 3 percent from 1988 and was 24 percent below the 1980 rate, the highest in history. In 1989, for every 100,000 in population, the rate was 1,412 in the metropolitan areas, 1,040 in the cities outside metropolitan areas, and 673 in the rural counties.

Regionally, the burglary rate was 1,554 in the Southern States, 1,388 in the Western States, 1,013 in the Midwestern States, and 1,007 in the Northeastern States. A comparison of 1988 and 1989 rates showed decreases of 5 percent in the West, 3 percent in the Midwest, 2 percent in the South, and 1 percent in the Northeast.

Nature

Two of every 3 burglaries in 1989 were residential in nature. Seventy percent of all burglaries involved forcible entry, 22 percent were unlawful entries (without force), and the remainder were forcible entry attempts. Offenses for which time of occurrence was reported showed that 49 percent happened during the daytime hours and 51 percent during the nighttime hours.

Burglary victims suffered losses estimated at $3.4 billion in 1989, and the average dollar loss per burglary was $1,060. The average loss for residential offenses was $1,080, while for nonresidential property, it was $1,023.

Residential burglary showed a 3-percent decline from 1988 to 1989; nonresidential offenses showed a 2-percent increase during the same period.

Clearances

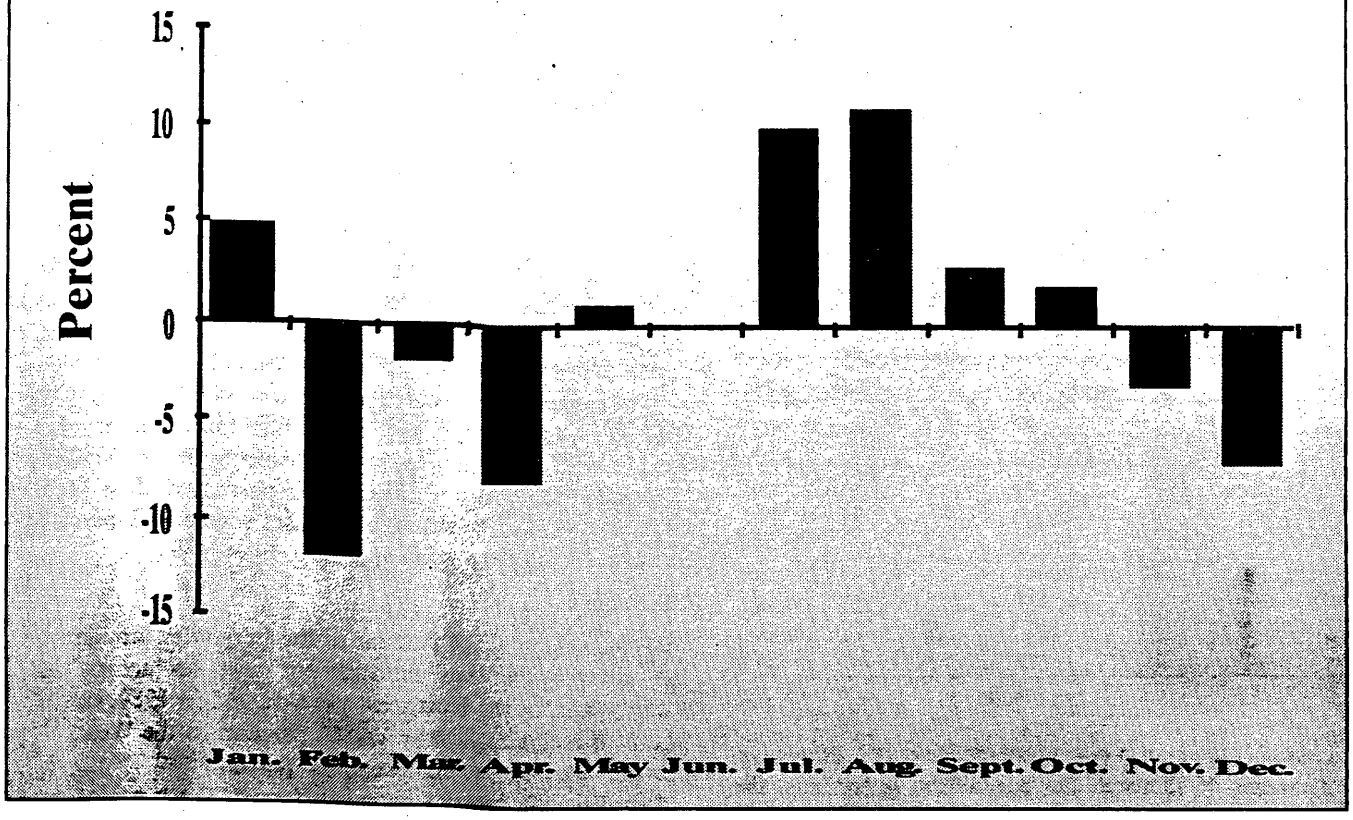
Geographically, 14 percent of the burglaries brought to the attention of law enforcement agencies across the country and in the Northeast were cleared in 1989. In the South, the clearance rate was 16 percent; in the West, 13 percent; and in the Midwest, 12 percent.

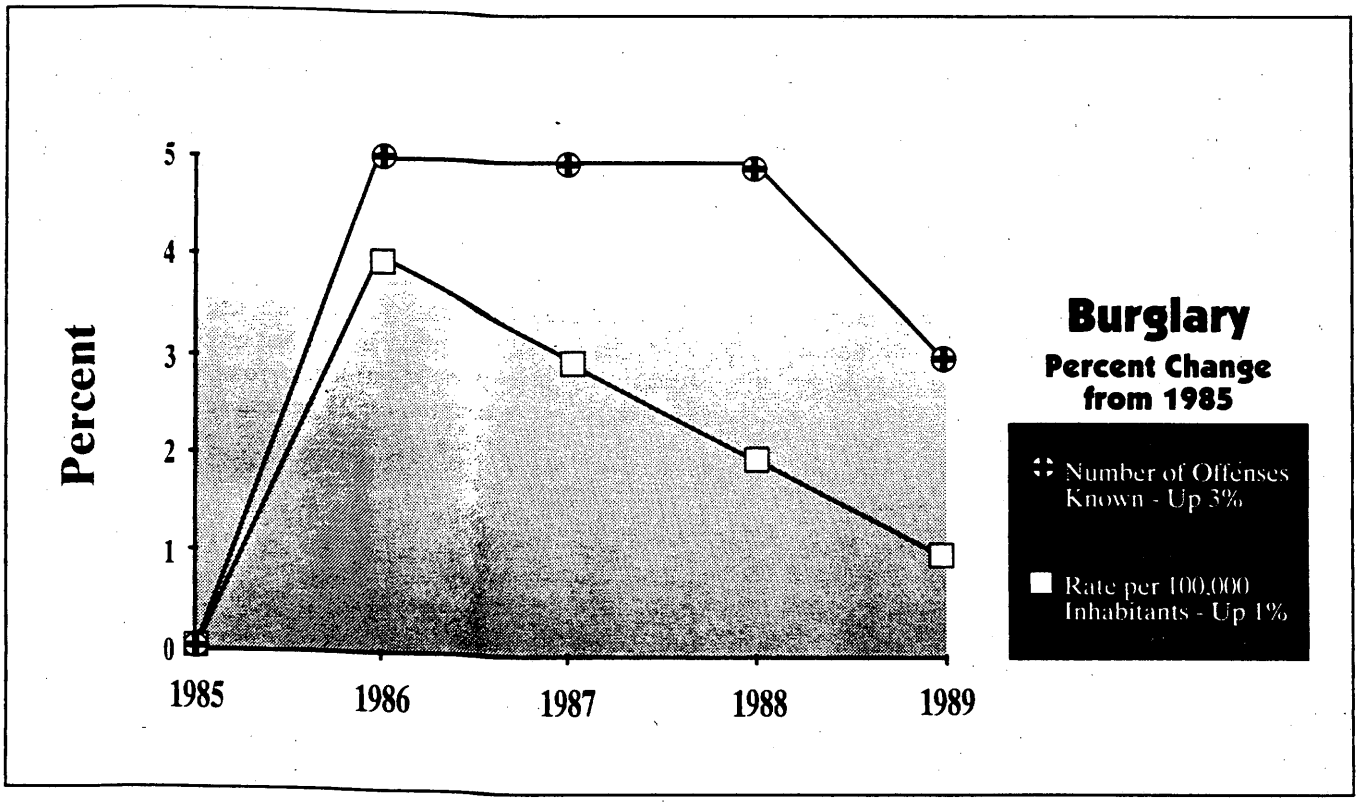
Rural county law enforcement cleared 16 percent of the burglaries in their jurisdictions. Equivalent to the national experience, 14-percent clearance rates were recorded by agencies in cities and suburban counties.

Adults were involved in 83 percent of all burglary offenses cleared, and only young people under 18 years of age were offenders in the remaining 17 percent. Similar to the national experience, persons under age 18 accounted for 17 percent of the burglary clearances in cities. Suburban and rural county law enforcement agencies reported 18 and 19 percent, respectively, of their burglary clearances involved only juveniles. The highest degree of juvenile involvement was recorded in the Nation's smallest cities (under 10,000 in population) where young persons under 18 years of age accounted for 23 percent of the clearances.

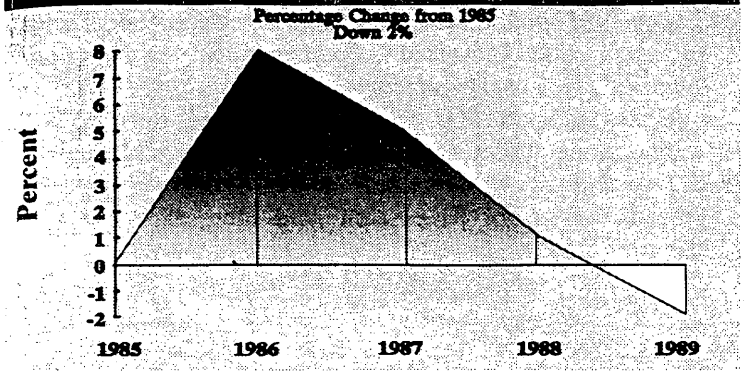
Burglary by Month 1989

Variation from Monthly Average

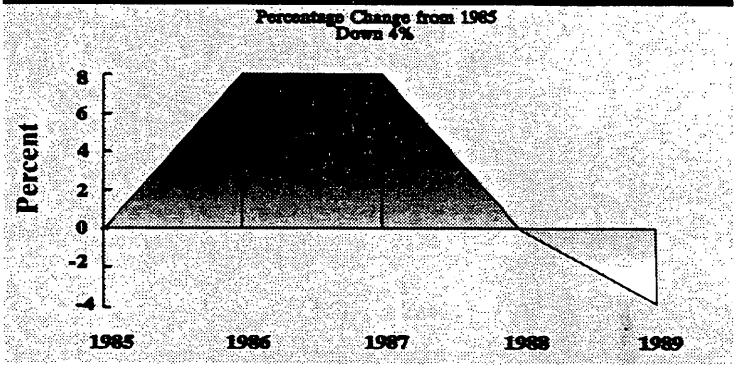




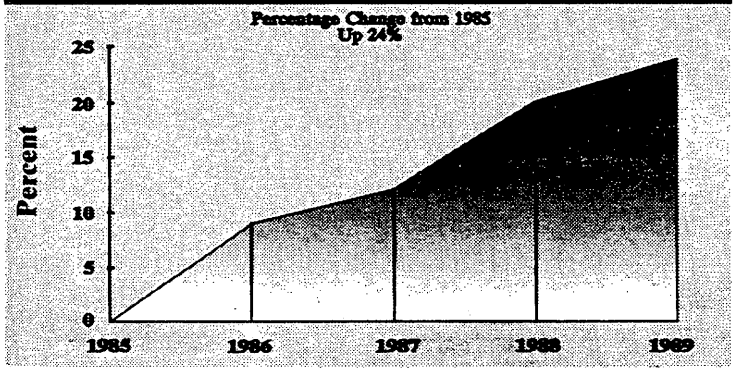
Residence Burglary-Nighttime



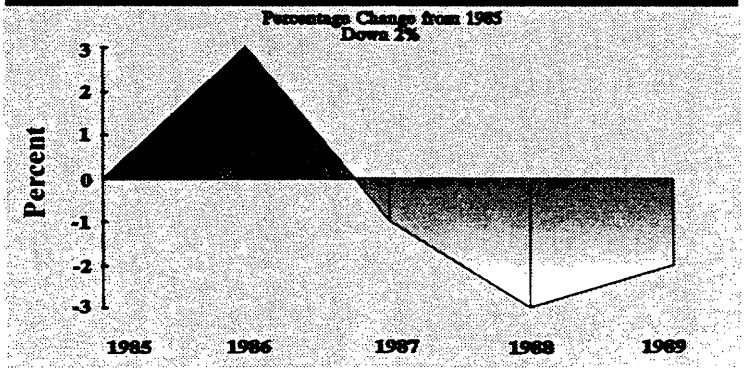
Residence Burglary-Daytime



Nonresidence Burglary-Daytime



Nonresidence Burglary-Nighttime



Persons Arrested

In the UCR Program, several persons may be arrested in connection with the clearance of one crime, or the arrest of one individual may clear numerous offenses. The latter is often true in cases of burglary for which an estimated 468,900 arrests were made in 1989. Arrest trends between 1988 and 1989 show a 3-percent increase in total burglary arrests. Arrests of persons under 18 years of age dropped 1 percent, while those for adults rose 6 percent. For the same 2-year time period, total burglary arrests in cities and suburban counties were up 3 percent, while in the rural counties, they rose 9 percent in number.

Ninety-one percent of the burglary arrestees during 1989 were males and 65 percent were under 25 years of age. Of the total burglary arrestees, whites accounted for 66 percent, blacks for 32 percent, and other races for the remainder.

Release Date
Sunday
August 5, 1990

Uniform Crime Reports

1989

Crime in the United States

APPENDIX II

OFFENSES IN UNIFORM CRIME REPORTING

Offenses in Uniform Crime Reporting are divided into two groupings, Part I and Part II. Information on the volume of Part I offenses known to law enforcement, those cleared by arrest or exceptional means, and the number of persons arrested is reported monthly. Only arrest data are reported for Part II offenses.

The Part I offenses are:

Criminal homicide.—a. Murder and nonnegligent manslaughter: the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, accidental deaths, and justifiable homicides are excluded. Justifiable homicides are limited to: (1) the killing of a felon by a law enforcement officer in the line of duty; and (2) the killing of a felon by a private citizen. b. Manslaughter by negligence: the killing of another person through gross negligence. Traffic fatalities are excluded. While manslaughter by negligence is a Part I crime, it is not included in the Crime Index.

Forcible rape.—The carnal knowledge of a female forcibly and against her will. Included are rapes by force ıd attempts or assaults to rape. Statutory offenses (no ɔrce used—victim under age of consent) are excluded.

Robbery.—The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Aggravated assault.—An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. Simple assaults are excluded.

Burglary–breaking or entering.—The unlawful entry of a structure to commit a felony or a theft. Attempted forcible entry is included.

Larceny–theft (except motor vehicle theft).—The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles or automobile accessories, shoplifting, pocket-picking, or the stealing of any property or article which is not taken by force and violence or by fraud. Attempted larcenies are included. Embezzlement, "con" games, forgery, worthless checks, etc., are excluded.

Motor vehicle theft.—The theft or attempted theft ɔf a motor vehicle. A motor vehicle is self-propelled and runs on the surface and not on rails. Specifically excluded from this category are motorboats, construction equipment, airplanes, and farming equipment.

Arson.—Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

The Part II offenses are:

Other assaults (simple).—Assaults and attempted assaults where no weapon is used and which do not result in serious or aggravated injury to the victim.

Forgery and counterfeiting.—Making, altering, uttering, or possessing, with intent to defraud, anything false in the semblance of that which is true. Attempts are included.

Fraud.—Fraudulent conversion and obtaining money or property by false pretenses. Included are confidence games and bad checks, except forgeries and counterfeiting.

Embezzlement.—Misappropriation or misapplication of money or property entrusted to one's care, custody, or control.

Stolen property; buying, receiving, possessing.—Buying, receiving, and possessing stolen property, including attempts.

Vandalism.—Willful or malicious destruction, injury, disfigurement, or defacement of any public or private property, real or personal, without consent of the owner or persons having custody or control.

Weapons; carrying, possessing, etc.—All violations of regulations or statutes controlling the carrying, using, possessing, furnishing, and manufacturing of deadly weapons or silencers. Included are attempts.

Prostitution and commercialized vice.—Sex offenses of a commercialized nature, such as prostitution, keeping a bawdy house, procuring, or transporting women for immoral purposes. Attempts are included.

Sex offenses (except forcible rape, prostitution, and commercialized vice).—Statutory rape and offenses against chastity, common decency, morals, and the like. Attempts are included.

Drug abuse violations.—State and local offenses relating to the unlawful possession, sale, use, growing, and manufacturing of narcotic drugs.

Gambling.—Promoting, permitting, or engaging in illegal gambling.

Offenses against the family and children.—Nonsupport, neglect, desertion, or abuse of family and children.

Driving under the influence.—Driving or operating ıy vehicle or common carrier while drunk or under the ıfluence of liquor or narcotics.

Liquor laws.—State or local liquor law violations, except "drunkenness" and "driving under the influence." Federal violations are excluded.

Drunkenness.—Offenses relating to drunkenness or intoxication. Excluded is "driving under the influence."

Disorderly conduct.—Breach of the peace.

Vagrancy.—Vagabondage, begging, loitering, etc.

All other offenses.—All violations of state or local laws, except those listed above and traffic offenses.

Suspicion.—No specific offense; suspect released without formal charges being placed.

Curfew and loitering laws (persons under age 18).—Offenses relating to violations of local curfew or loitering ordinances where such laws exist.

Runaways—(persons under age 18)—Limited to juveniles taken into protective custody under provisions of local statutes.

U.S. Department of Justice
Federal Bureau of Investigation

Uniform Crime Reporting Handbook

CHAPTER I
DEFINITIONS—PART I OFFENSES

The Part I offenses are as follows:

1. Criminal homicide:
   a. Murder and nonnegligent manslaughter
   b. Manslaughter by negligence
2. Forcible rape:
   a. Rape by force
   b. Attempts to commit forcible rape
3. Robbery:
   a. Firearm
   b. Knife or cutting instrument
   c. Other dangerous weapon
   d. Strong-arm—hands, fists, feet, etc.
4. Aggravated assault:
   a. Firearm
   b. Knife or cutting instrument
   c. Other dangerous weapon
   d. Hands, fists, feet, etc.—aggravated injury
5. Burglary:
   a. Forcible entry
   b. Unlawful entry—no force
   c. Attempted forcible entry
6. Larceny-theft (except motor vehicle theft)
7. Motor vehicle theft:
   a. Autos
   b. Trucks and buses
   c. Other vehicles
8. Arson:
   a.-g. Structural
   h.-i. Mobile
   j. Other

The Uniform Crime Reporting (UCR) Program collects and reports crime offense data for the Nation, and in many instances, for smaller subdivisions of the country. Essential to the maintaining of uniform and consistent data is the utilization of standard definitions of the offenses used in the Program. The standard UCR definitions for Part I offenses are recorded and explained in the sections that follow. The Crime Index is comprised of all of the Part I offenses with the exception of manslaughter by negligence (class 1.b.).

In the reporting of offense data to a state or the national UCR Program, it is first necessary to classify appropriate offenses known into the Part I or II standard offense categories as defined by the Program. This practice ensures that offenses with different titles under state and local law are considered and appropriately counted in UCR. All criminal offenses of law will be classified as either Part I or II in this Program. Part II offenses will be discussed in a later section.

When *classifying* an offense, it should first be determined if it is one of the Part I offenses and then into which category it would be included. The following pages of definitions and explanations will aid in the classifying of these offenses. Unusual situations will arise in this effort, and not all can be covered in this handbook. In classifying the unusual situations, the nature of the crime should be considered along with the guidelines provided. If assistance is needed, communicate with the UCR Program, Federal Bureau of Investigation, Washington, D.C. 20535.

Counting the number of offenses after they have been classified is referred to as *scoring*. A suggested method of handling information in preparation for submission of the Monthly Return of Offenses Known to the Police (Return A) is to classify and score the Part I offenses in a tally book. These books have the same format as the monthly Return A and are available without charge from the national UCR Program. Tallies can be made from an agency's offense reports on a regular basis during the month and then transferred in total to the monthly reporting form. Remember:

CLASSIFY AND SCORE FROM THE RECORDS OF CALLS FOR SERVICE, COMPLAINTS, AND/OR INVESTIGATIONS. *OFFENSE* COUNTS ARE TO BE RECORDED, NOT FINDINGS OF A COURT, CORONER, JURY, OR DECISION OF A PROSECUTOR SINCE THESE CRIME STATISTICS ARE INTENDED TO ASSIST IN IDENTIFYING THE LAW ENFORCEMENT PROBLEM.

General Note—To aid in the understanding of the examples in this section, a knowledge of the six columns of the Return A reporting form is necessary. The columns are as follows: (See pages 47-48 for additional comments.)

Column 1: *Classification of Offenses*—The criminal act offenses are printed on the form in this column.

Column 2: *Offenses Reported or Known to Police*—Enter a count of offenses reported or otherwise known to the department.

Column 3: *Unfounded*—Enter the total number of reported offenses that are false or baseless.

Column 4: *Number of Actual Offenses*—Subtract the entries in column 3 from the entries in column 2.

Column 5: *Total Offenses Cleared*—Enter the number of offenses cleared by arrest and by "exceptional" means.

Column 6: *Number of Clearances Involving Only Persons Under 18 Years of Age*—Enter the number of offenses cleared by arrest, "exceptional" means, or other handling of persons under 18 years of age.

Note: The counts recorded in columns 5 and 6 are the number of offenses cleared and not the number of persons arrested.

Greater detail is given regarding classifying, scoring, unfounding, and clearances in the section of the handbook on Classifying and Scoring, pages 33-42.

Crimes Against Persons Versus Crimes Against Property

Distinguishing between crimes against persons and those against property greatly facilitates the classifying and scoring process. In the UCR Program, the offenses of *criminal homicide, forcible rape, and aggravated assault* are crimes against persons. For these crimes, *one offense is counted for each victim.*

Robbery, burglary, larceny-theft, motor vehicle theft, and arson are crimes against property. For these crimes, *score one offense for each distinct operation,* except in the case of motor vehicle theft for which one offense is counted for each stolen vehicle.

1. Criminal Homicide

(*Crime against the person; score one offense per victim.*)

1.a. Criminal Homicide—Murder and Nonnegligent Manslaughter

Definition—the willful (nonnegligent) killing of one human being by another.

As a general rule, any death due to injuries received in a fight, argument, quarrel, assault, or commission of a crime is counted as a 1.a. Homicide. *Score one offense on the Return A for each person willfully killed by another.*

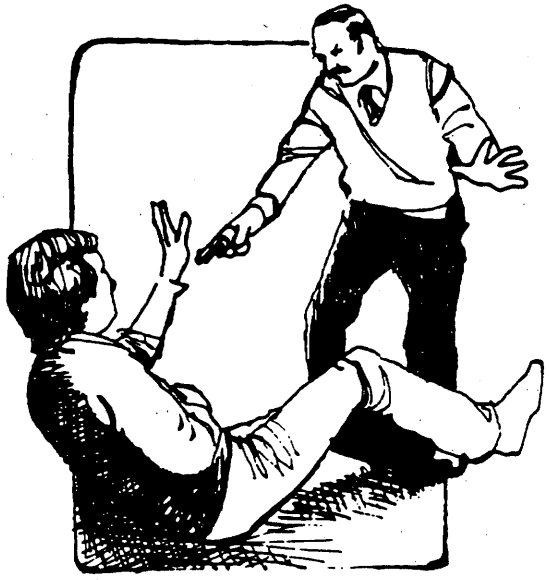
Suicides, accidental deaths, assaults to murder, traffic fatalities, and attempted murders are not classified as murder and nonnegligent manslaughter (1.a.). Situations where a victim dies of a heart attack as the result of a robbery or witnessing a crime do not meet the criteria for inclusion in the criminal homicide classification. A heart attack cannot, in fact, be caused at will by an offender. Even in instances where an individual is known to have a weak heart, there is no assurance whatever that an offender can cause sufficient emotional or physical stress to guarantee the victim will suffer a fatal heart attack. Suicides, traffic fatalities, and fetal deaths are totally excluded from the UCR Program, while some accidental deaths are counted as manslaughter by negligence (1.b.) and will be addressed later. Assaults to murder and attempted murders are classified as aggravated assaults and are discussed on pages 16-20 of this publication.

Certain willful killings are classified as justifiable or excusable. In UCR, *justifiable homicide* is defined as and limited to:

1. *the killing of a felon by a peace officer in the line of duty, or*
2. *the killing (during the commission of a felony) of a felon by a private citizen.*

Do not count a killing as justifiable or excusable solely on the basis of self-defense or the action of a coroner, prosecutor, grand jury, or court. The willful (nonnegligent) killing of one individual by another is being reported, not the criminal liability of the person or persons involved. For UCR purposes, crime counts are based on law enforcement investigation.

To report justifiable homicides on the Return A, score one offense for each victim in column 2 on line 1.a. Score that same number of offenses in column 3, Unfounded. No Actual Offenses (column 4) will be counted or recorded for justifiable homicides.



SCORE ONE OFFENSE FOR EACH VICTIM

Examples:

1.b.-1 While two juveniles are playing with a gun, one "playfully" points the gun at the other. One youth fires the gun and the other is killed. At the time of arrest, the juvenile claims no knowledge of the gun being loaded. (One offense, one offense cleared by arrest of a person under 18.)

1 CLASSIFICATION OF OFFENSES	Data Entry	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
1. CRIMINAL HOMICIDE* a. MURDER AND NONNEGLIGENT HOMICIDE (score attempts as aggravated assault) If homicide reported, submit Supplementary Homicide Report	11					
b. MANSLAUGHTER BY NEGLIGENCE	12					

1.b.-2 A target shooter was practicing in a wooded area near a housing project. One shot missed the target and killed a resident of the project. The police arrested the shooter. (One offense and one offense cleared.)

1 CLASSIFICATION OF OFFENSES	Data Entry	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
1. CRIMINAL HOMICIDE* a. MURDER AND NONNEGLIGENT HOMICIDE (score attempts as aggravated assault) If homicide reported, submit Supplementary Homicide Report	11					
b. MANSLAUGHTER BY NEGLIGENCE	12					

2. Forcible Rape

(Crime against the person; score one offense per victim.)

Definition—the carnal knowledge of a female forcibly and against her will.

2.a. Rape by Force

2.b. Attempts to Commit Forcible Rape

Score one offense for each female raped or upon whom an assault to rape or attempt to rape has been made. Rapes or attempts accomplished by force or threat of force are classified as forcible regardless of the age of the female victim. Actual offenses of forcible rape are scored opposite item 2.a., while assaults or attempts to forcibly rape are scored opposite item 2.b. In cases where several men attack one female, count one forcible rape. *Do not count the number of offenders.*

Do not count statutory rape (defined as the carnal knowledge or the attempted carnal knowledge of a female with no force used and the female victim is under the legal age of consent) or other sex offenses under this category. However, if the female victim is under the legal age and is forced against her will to engage in sexual intercourse, the incident should be classified as a rape by force. By definition, sex attacks on males are excluded and should be classified as assaults or "other sex offenses" depending on the nature of the crime and the extent of injury.

SCORE ONE OFFENSE FOR EACH VICTIM

2.b.-1 A woman is attacked on the street by a man who attempts to have sexual relations with her. The attacker is frightened away by a pedestrian before he can complete the attack. (One offense, not cleared.)

1 CLASSIFICATION OF OFFENSES	Data Entry	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
2. FORCIBLE RAPE TOTAL	20	1		1		
a. Rape by Force	21					
b. Attempts to commit Forcible Rape	22	1		1		

3. Robbery

(Crime against property; score one offense per distinct operation.)

Definition—the taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Robbery is a vicious type of theft in that it is committed in the presence of the victim. The victim, who usually is the owner or person having custody of the property, is directly confronted by the perpetrator and is threatened with force or is put in fear that force will be used. Robbery involves a theft or larceny but is aggravated by the element of force or threat of force.

In the absence of force or threat of force, as in pocket-picking or purse-snatching, the offense must be classified as larceny rather than robbery. However, if in a purse-snatching or other such crime force or threat of force is used to overcome the active resistance of the victim, the offense is to be classified as strong-arm robbery.

In analyzing robbery, the following subheadings are used:

3.a. Firearm
3.b. Knife or cutting instrument
3.c. Other dangerous weapon
3.d. Strong-arm—hands, fists, feet, etc.

Armed robberies, categories 3.a.-3.c., are incidents commonly referred to as "stickups," "hijackings," "holdups," and "heists." Robberies wherein no weapons are used may be referred to as "strong-arms" or "muggings."

In any instance of robbery, score one offense for *each distinct operation* including attempts. Do not count the number of victims robbed, those present at the robbery, or the number of offenders when scoring this crime.

SCORE ONE OFFENSE FOR EACH DISTINCT OPERATION

In cases involving pretended weapons or those in which the weapon is not seen by the victim but the robber claims to possess one, classify the incident as armed robbery and score it in the appropriate category. If an immediate "on view" arrest proves that there is no weapon, the offense may be classified as strong-arm robbery.

Law enforcement should guard against using the public's terminology such as "robbery of an apartment" or "safe robbery" inasmuch as the public is referring to a burglary situation.

3.a. Robbery—Firearm

Count one offense for each distinct operation in which any firearm is used as a weapon or employed as a means of force to threaten the victim or put the victim in fear.

3.b. Robbery—Knife or Cutting Instrument

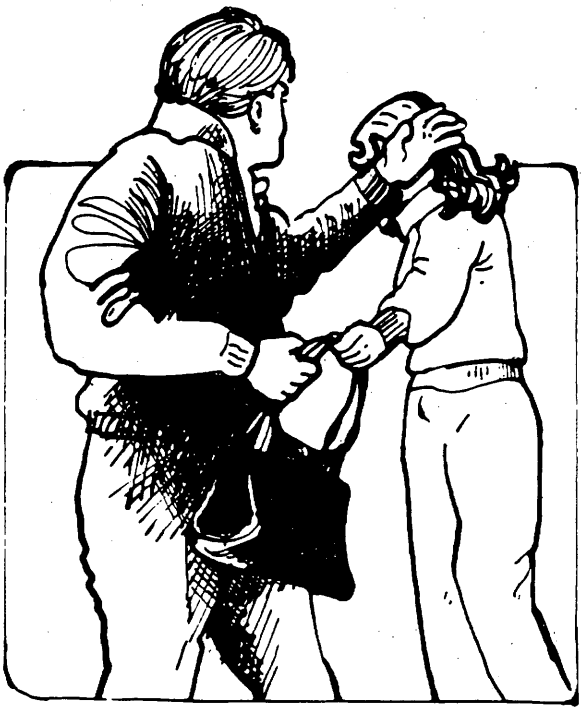
Score one offense for each distinct operation in which a knife, broken bottle, razor, ice pick, or other cutting or stabbing instrument is employed as a weapon or as a means of force to threaten the victim or put the victim in fear.

3.c. Robbery—Other Dangerous Weapon

In this category of robbery, enter one offense for each distinct operation in which a club, acid, explosive, brass knuckles, or other dangerous weapon is employed or its use is threatened.

3.d. Robbery—Strong-Arm—Hands, Fists, Feet, etc.

This category includes muggings and similar offenses where no weapon is used, but strong-arm tactics (limited to the use of personal weapons such as hands, arms, feet, fists, teeth, etc.) are employed or their use is threatened to deprive the victim of possessions.



SCORE ONE OFFENSE FOR EACH DISTINCT OPERATION

Examples:

3.a.-1 A man comes to a victim's door and asks to use the phone. After being admitted to the residence, he pulls a gun and demands money. He takes the victim's money and flees. (One offense, no clearance).

1 CLASSIFICATION OF OFFENSES	Date Survey	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
3. ROBBERY TOTAL		1		1		
a. Firearm		1		1		
b. Knife or Cutting Instrument						
c. Other Dangerous Weapon						
d. Strong-Arm (Hands, Fists, Feet, Etc.)						

3.d.-1 During a purse-snatching, the victim is shoved to the ground and her purse taken. The thief escapes. (One offense of strong-arm robbery, no clearance.)

1 CLASSIFICATION OF OFFENSES	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
3. ROBBERY TOTAL					
a. Firearm					
b. Knife or Cutting Instrument					
c. Other Dangerous Weapon					
d. Strong-Arm (Hands, Fists, Feet, Etc.)					

4. Assault

(Crime against the person; score one offense per victim.)

Definition—an unlawful attack by one person upon another.

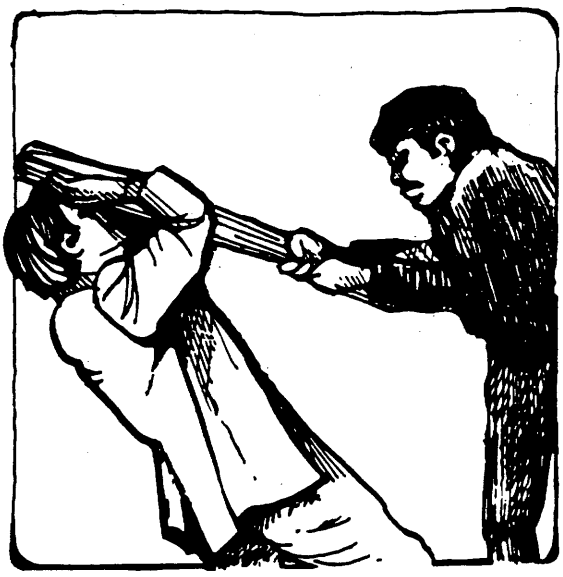
For the purpose of Uniform Crime Reporting, assault information is collected on the offenses that are aggravated in nature, as well as on those that are not. Aggravated assault offenses, including attempts, are scored opposite items 4.a. through 4.d. on the Return A.

4.a.-d. Aggravated Assault

Definition—an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm.

The categories of aggravated assault (4.a.-d.) include the following commonly entitled offenses: assaults or attempts to kill or murder; poisoning; assault with a dangerous or deadly weapon; maiming, mayhem, assault with explosives; and all attempts to commit the foregoing offenses. *In other words, all assaults by one person upon another with the intent to kill, maim, or inflict severe bodily injury with the use of any dangerous weapon are classified under one of the aggravated assault categories. It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.*

On occasion, it is the practice of local jurisdictions to charge assailants in assault cases with assault and battery or simple assault even though a knife, gun, or other weapon was used in the incident. For Uniform Crime Reporting purposes, this type of assault is to be classified as aggravated.



SCORE ONE OFFENSE FOR EACH VICTIM

4.a. Assault—Firearm

Count here *all* assaults wherein a firearm of any type is used or its use is threatened. Include assaults with revolvers, automatic pistols, shotguns, zip guns, rifles, etc.

4.b. Assault—Knife or Cutting Instrument

Include the number of assaults wherein weapons such as knives, razors, hatchets, axes, cleavers, scissors, glass, broken bottles, ice picks, etc., are used as cutting or stabbing objects or their use is threatened.

4.c. Assault—Other Dangerous Weapon

Score assaults resulting from the use or threatened use of any object as a weapon which does or could result in serious injury. The weapons in this category would include but not be limited to clubs, bricks, jack handles, tire irons, bottles, or other blunt instru-

ments used to club or beat victims. Also include in this category attacks by explosives, acid, lye, poison, scalding water, burning, etc.

4.d. Assault—Hands, Fists, Feet, etc.—Aggravated Injury

Classify in this category only the attacks by use of personal weapons such as hands, fists, feet, etc., which result in serious or aggravated injury. The seriousness of the injury is the primary factor to consider in establishing whether the assault is aggravated or simple. The assault will be aggravated if the personal injury is serious, e.g., broken bones, internal injuries, or where stitches are required. On the other hand, it is a simple assault if the injuries are not serious (abrasions, minor lacerations, or contusions) and require no more than usual first-aid treatment. These simple assaults are to be scored as 4.e., other assaults.

4.e. Other Assaults—Simple, Not Aggravated

Include in this category all assaults which do not involve the use of a firearm, knife, cutting instrument, or other dangerous weapon and in which there were no serious or aggravated injuries to the victims. Simple assault is not within the Crime Index—it is a Part II offense but is collected under 4.e. as a quality control matter and for the purpose of looking at total assault violence.

Score such offenses as simple assault, assault and battery, injury caused by culpable negligence, intimidation, coercion, and all attempts to commit these offenses. For other examples, refer to page 79.

An Aid to Classifying Assaults

Careful consideration of the following factors should assist in classifying assaults:

1. The type of weapon employed or the use of an object as a weapon;
2. The seriousness of the injury;
3. The intent of the assailant to cause serious injury.

Usually, the weapons used or the extent of the injury sustained will be the deciding factors in distinguishing aggravated from simple assault. In only a very limited number of instances should it be necessary to examine the intent of the assailant.

Prosecutive policy in a jurisdiction should not control classification or reporting of law enforcement offense data on the Return A. It is necessary that assaults in each jurisdiction be examined and classified according to the standard Uniform Crime Reporting definitions, regardless of whether they are termed felonies by local definitions. In an aggravated assault situation where the victim later dies, count one offense of murder on the Return A for the month in which the death occurred and delete the aggravated assault previously recorded. (See page 42 on adjustments.)

Examples:

4.a.-1 Joe and Sally had an argument. Sally later returned with a gun and shot Joe, attempting to kill him. Joe recovered and Sally was prosecuted for attempted murder. (One actual offense, cleared.)

1 CLASSIFICATION OF OFFENSES	Basis of Classification	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
4. ASSAULT TOTAL		1		1	1	
a. Firearm		1		1	1	
b. Knife or Cutting Instrument						
c. Other Dangerous Weapon						
d. Hands, Fists, Feet, Etc. - Aggravated Injury						
e. [1]Other Assaults-Simple, Not Aggravated						

4.b.-c.-1 Police, in answer to a disturbance call, find a juvenile gang fight in progress. The participants escape, except for seven who suffer injuries. None will cooperate, and it is not determined who started the fight. Three were cut severely with knives. The remaining four suffered broken bones from beating by clubs. All seven are arrested on felonious assault charges. (Seven offenses, all cleared by arrest of persons under 18.)

1 CLASSIFICATION OF OFFENSES	Data Entry	2 OFFENSES REPORTED OR KNOWN TO POLICE (INCLUDE "UNFOUNDED" AND ATTEMPTS)	3 UNFOUNDED, I.E., FALSE OR BASELESS COMPLAINTS	4 NUMBER OF ACTUAL OFFENSES (COLUMN 2 MINUS COLUMN 3) (INCLUDE ATTEMPTS)	5 TOTAL OFFENSES CLEARED BY ARREST OR EXCEPTIONAL MEANS (INCLUDES COL. 6)	6 NUMBER OF CLEARANCES INVOLVING ONLY PERSONS UNDER 18 YEARS OF AGE
4. ASSAULT TOTAL		7		7	7	7
a. Firearm						
b. Knife or Cutting Instrument		3		3	3	3
c. Other Dangerous Weapon		4		4	4	4
d. Hands, Fists, Feet, Etc. - Aggravated Injury						
e. Other Assaults-Simple, Not Aggravated						

5. Burglary—Breaking or Entering

(Crime against property; score one offense per distinct operation.)

Definition—the unlawful entry of a structure to commit a felony or a theft.

For UCR purposes, offenses locally known as burglary (any degree); unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts at these offenses should be counted as burglary.

In the UCR standard definition of burglary, a structure is considered to include but not be limited to the following:

Apartment	Mill
Barn	Office
Cabin	Other building
Church	Outbuilding
Condominium	Public building
Dwelling house	Railroad car
Factory	Room
Garage	School
Housetrailer or houseboat (used as permanent dwelling)	Stable
	Vessel
	Warehouse

Any housetrailer or other mobile unit that is permanently fixed as an office, residence, or storehouse should be considered a structure.

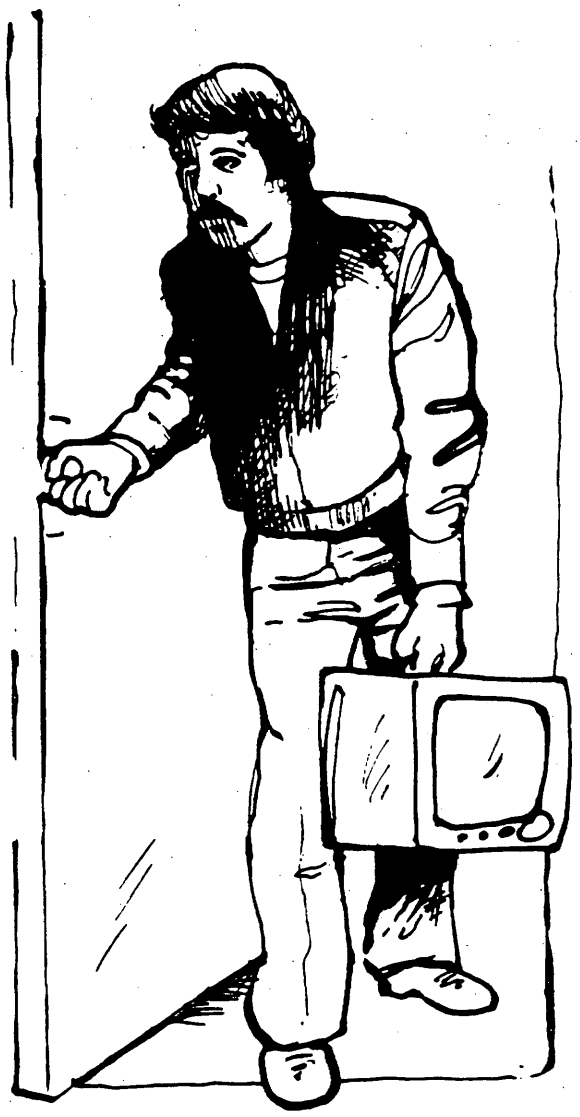
Whenever a question arises as to whether a type of structure comes within the purview of the burglary definition, the law enforcement officer should look to the nature of the crime and be guided by the examples set forth. If a question remains, contact the Uniform Crime Reporting Program.

The illegal entry of a tent, tent trailer, motor home, housetrailer, or other mobile unit that is being used for recreational purposes, followed by a theft, felony, or attempt to commit a felony or theft, should *not be counted as burglary.* These categories will be discussed in the section on larceny-theft.

Burglaries of hotels, motels, lodging houses, and other places where lodging of transients is the main purpose are scored under provisions of the "Hotel Rule." This principle of scoring dictates that if a number of dwelling units under a single manager are burglarized and the offenses are most likely to be reported to the police by the manager rather than the individual tenants, the burglary should be scored as one offense. Examples of situations for application of the Hotel Rule are burglaries of a number of rental hotel rooms, rooms in "flop" houses, rooms in a youth hostel, and units in a motel. If the individual living areas in a building are rented or leased to the occupants for a period of time, which would preclude the tenancy from being classified as transient, then the burglaries would most likely be reported separately by the occupants. These burglaries should be scored as separate offenses. Examples of this latter type of multiple burglary would be the burglaries of a number of apartments in an apartment house, of the offices of a number of commercial firms in a business building, or of the offices of separate professionals within one building.

Note: It is important to remember that offenses should be classified according to UCR definitions and not according to state or local codes.

Some states might, for instance, categorize a shoplifting or a theft from an automobile as burglary.



SCORE ONE OFFENSE FOR EACH DISTINCT OPERATION

These offenses are not classified as burglaries in UCR and must be considered larcenies for reporting purposes. Thefts from automobiles whether locked or not; shoplifting from commercial establishments; and thefts from telephone booths, coinboxes, or coin-operated machines are all counted as larceny-theft offenses. Of course, if these thefts are accompanied by unlawful entry of a structure, a multiple offense exists and the burglary would be scored. A telephone booth is not considered a structure under the UCR definition.

5.a. Burglary—Forcible Entry

Count all offenses where force of any kind is used to unlawfully enter a structure for the purpose of committing a theft or felony. This act includes entry by use of tools; breaking windows; forcing windows, doors, transoms, or ventilators; cutting screens, walls, or roofs; and where known, the use of master keys, picks, unauthorized keys, celluloid, or other devices which leave no outward mark but are used to force a lock. Burglary by concealment inside a building followed by an exiting of the structure is included in this category.

5.b. Burglary—Unlawful Entry—No Force

The entry in these burglary situations involves no force and is achieved by use of an unlocked door or window. The element of trespass to the structure is essential in this classification, which includes thefts from open garages, open warehouses, open or unlocked dwellings, and open or unlocked common basement areas in apartment houses where entry is committed other than by the tenant who has lawful access. If the area entered was one of open access, thefts from the area would not involve an unlawful trespass and would be scored as larceny.

5.c. Burglary—Attempted Forcible Entry

Count in this classification those situations where a forcible entry burglary is attempted. If an entry is actually made, the offense should be classified as 5.a. Include unlawful entry—no force when a perpetrator is frightened off while entering an unlocked door or climbing through an open window. If an actual trespass occurs, classify as 5.b. Law enforcement experience is the determining factor in deciding whether force or no force was used in gaining entry.

A forcible entry or unlawful entry where no theft or felony occurs but where acts of vandalism, malicious mischief, etc., are committed is not scored as a burglary provided investigation clearly establishes that the unlawful entry was for a purpose other than to commit a felony or theft. For the definition of vandalism, refer to page 79.

rented to outsiders. Residential property not meeting these criteria are classified "Other Residential." For arson reporting purposes, temporary living quarters such as hotels, motels, inns, etc., are included in the "Other Residential" category.

The remaining structural subclassifications address nonresidential property and are self-explanatory.

8.H.-I. Arson—Mobile

"Motor vehicles" by UCR definition must be self-propelled and run on land surface but not on rails. For example, automobiles, motorcycles, motor scooters, and snowmobiles are motor vehicles, while trains, boats, and airplanes are not and should be classified as "Other Mobile Property."

SCORE ONE OFFENSE FOR EACH DISTINCT OPERATION

8.J. Arson—Other

This classification encompasses arsons of all property not classified as structural or mobile. Willful or malicious burnings of property such as crops, timber, fences, signs, and merchandise stored outside structures should be included.

Classifying Arsons

The key to proper arson classification is the establishment of the point of origin of a fire. If an individual willfully burns a vehicle parked adjacent to a home and the subsequent fire spreads and destroys the home, the appropriate arson classification would be "Mobile—Motor Vehicle." In cases where a positive determination of the point of origin is undetermined or in instances of multiple points of origin, the structural, mobile, or other category of property which suffered the greatest damage due to the fire should be scored.

Note: Because of the unique nature of the crime of arson, a separate reporting form (Monthly Return of Arson Offenses Known to Law Enforcement) is utilized for the collection of data regarding this offense.

On the form, the various property classifications appear in column 1. Columnar headings 2 through 6 are identical to those on the Return A, but two additional columns are contained on the arson form. Column 7 is used to enter the number of arson offenses which involved structures (A.-G. only) that were uninhabited, abandoned, deserted, or not normally in use. In column 8, the estimated value of property damage for all arson offenses scored in column 4 is listed. These two additional columns are discussed further in the section of this handbook addressing the specific reporting forms (page 57).

Examples:

8.A. As the result of fire, several rowhouses are destroyed. Investigation reveals an actual arson offense occurred in one rowhouse; however, the fire spread to several adjacent homes, causing $200,000 total damage. (One offense, no clearance.)

1 PROPERTY CLASSIFICATION	2 Offenses Reported or Known to Police (Include Unfounded and Attempts)	3 Unfounded, i. e. False or Baseless Complaints	4 Number of Actual Offenses (Column 2 Minus Column 3 Include Attempts)	5 Total Offenses Cleared by Arrest or Exceptional Means (Include Column 4)	6 Number of Clearances Involving Only Persons Under 18 Years of Age	7 Offenses Where Structures Uninhabited Abandoned, or not Normally in Use	8 Estimated Value of Property Damage
A. Single Occupancy Residential: Houses, Townhouses, Duplexes, etc.	1		1				$200,000.

CHAPTER II
CLASSIFYING AND SCORING PROCEDURES

Classifying is determining the proper crime categories in which to report offenses in UCR. Classification is based on the facts of an agency's investigations of crimes.

Scoring is counting the number of offenses after they have been classified and entering the total count on the appropriate reporting form.

Classifying and scoring are the two most important and essential functions that must be performed by a participant in the Uniform Crime Reporting Program. The data provided are based on these two functions and are only as good as agencies' efforts to follow the guidelines of the Program.

Classifying

Generally, attempts to commit a crime are classified as though the crimes were actually completed. The only exception to this rule applies to attempts or assaults to murder wherein the victim does not die. These incidents should be classified as aggravated assaults rather than murders.

In a previous section of this handbook, the UCR Part I offenses have been precisely defined. The exceptions to the definitions also have been discussed and must be considered when classifying criminal acts to guarantee the accuracy and consistency of reports from all agencies in the Nation.

Hierarchy Rule

The experience of law enforcement agencies in handling UCR data shows that for the most part offenses of law occur singly as opposed to many being committed simultaneously. In these single-offense situations, it must be decided whether the crime is one of the Index offenses, and if so, it would be scored accordingly. However, if several offenses are committed at the same time by a person or a group of persons, a different approach must be used in classifying and scoring. The law enforcement matter in which many crimes are committed simultaneously is called a multiple-offense situation in this Program. As a general rule, a multiple-offense situation requires classifying each of the offenses occurring and determining which of them are Part I crimes. The Part I offenses involved must then be located in the listing which follows:

1. Criminal homicide:
   a. Murder and nonnegligent manslaughter
   b. Manslaughter by negligence
2. Forcible rape:
   a. Rape by force
   b. Attempts to commit forcible rape
3. Robbery:
   a. Firearm
   b. Knife or cutting instrument
   c. Other dangerous weapon
   d. Strong-arm—hands, fists, feet, etc.
4. Aggravated assault:
   a. Firearm
   b. Knife or cutting instrument
   c. Other dangerous weapon
   d. Hands, fists, feet, etc.—aggravated injury
5. Burglary:
   a. Forcible entry
   b. Unlawful entry—no force
   c. Attempted forcible entry
6. Larceny-theft (except motor vehicle theft)
7. Motor vehicle theft:
   a. Autos
   b. Trucks and buses
   c. Other vehicles
8. Arson:
   a.-g. Structural
   h.-i. Mobile
   j. Other

Locate the offense that is highest on the list, score that offense, and ignore the other offenses involved in the incident. The *Hierarchy Rule,* which requires counting only the highest offense on the list and ignoring all others, applies *only* to crime reporting and does not affect the number of charges for which the defendant may be prosecuted in the courts. An exception to the rule is arson, which is discussed later in this chapter.

Example:

Incident: During the commission of an armed bank robbery, the offender strikes a teller with a butt of a handgun. The robber runs from the bank and steals an automobile at curb side.

Classification of this incident: Robbery, aggravated assault, and motor vehicle theft are three Part I offenses apparent in this situation. Each of these offenses should be located on the listing, and by doing so, it is seen that robbery is the crime highest on the list. Therefore, this incident will be classified as robbery, one offense scored accordingly, and all of the other offenses ignored.

CHAPTER VI
DEFINITIONS—PART II OFFENSES

The Uniform Crime Reporting Program offenses are divided into two groupings—Part I and Part II crimes. Arrest data are collected on both Part I and Part II offenses, and it is as important and essential to maintain uniformity in the data collection of persons arrested as it is in the offense data collection conducted for Part I crimes only.

The Part II offenses encompass all other crime classifications outside those defined as Part I earlier in this publication. In November, 1932, the UCR Program adopted a Standard Classification of Offenses for the compilation of criminal statistics. This classification was devised and adopted in order that law enforcement, judicial, and penal statistics might be uniformly compiled in terms of a single classification of offenses. The definitions of the Part II offenses that follow include some of the offense titles described in local and state law. These titles have been included as descriptive data to aid in determining the offenses that should be included or excluded in each classification.

9. Other Assaults

Assaults and attempted assaults where no weapon was used or which did not result in serious or aggravated injury to the victim are included as other assaults.

Examples of local jurisdiction offense titles which would be included in "other assaults" are:

Simple assault;
Minor assault;
Assault and battery;
Injury by culpable negligence;
Resisting or obstructing an officer;
Intimidation;
Coercion;
Hazing; and
Attempts to commit the above.

10. Forgery and Counterfeiting

In the majority of states, forgery and counterfeiting are treated as allied offenses. Placed in this class are all offenses dealing with the making, altering, uttering, or possessing, with intent to defraud, anything false in the semblance of that which is true. Include:

Altering or forging public and other records;
Making, altering, forging, or counterfeiting bills, notes, drafts, tickets, checks, credit cards, etc.;
Forging wills, deeds, notes, bonds, seals, trademarks, etc.;
Counterfeiting coins, plates, banknotes, checks, etc.;
Possessing or uttering forged or counterfeited instruments;
Erasures;
Signing the name of another or fictitious person with intent to defraud;
Using forged labels;
Possession, manufacture, etc., of counterfeiting apparatus;
Selling goods with altered, forged, or counterfeited trademarks; and
All attempts to commit the above.

11. Fraud

Fraudulent conversion and obtaining money or property by false pretenses.

Include:

Bad checks, except forgeries and counterfeiting;
Confidence games;
Leaving full-service gas station without paying attendant;
Unauthorized withdrawal of money from an automatic teller machine; and
Attempts to commit the above.

12. Embezzlement

Misappropriation or misapplication of money or property entrusted to one's care, custody, or control. Include attempts.

13. Stolen Property; Buying, Receiving, Possessing

Include in this class all offenses of buying, receiving, and possessing stolen property, as well as all attempts to commit any of these offenses.

14. Vandalism

Vandalism consists of the willful or malicious destruction, injury, disfigurement, or defacement of any public or private property, real or personal, without consent of the owner or person having custody or control by cutting, tearing, breaking, marking, painting, drawing, covering with filth, or any other such means as may be specified by local law. This offense covers a wide range of malicious behavior directed at

property, such as: cutting auto tires, drawing obscene pictures on public restroom walls, smashing windows, destroying school records, tipping over gravestones, defacing library books, etc. Count all arrests for the above, including attempts.

15. Weapons; Carrying, Possessing, etc.

This class deals with weapon offenses, regulatory in nature, such as:

Manufacture, sale, or possession of deadly weapons;
Carrying deadly weapons, concealed or openly;
Using, manufacturing, etc., silencers;
Furnishing deadly weapons to minors;
Aliens possessing deadly weapons; and
All attempts to commit any of the above.

16. Prostitution and Commercialized Vice

Include in this class the sex offenses of a commercialized nature, such as:

Prostitution;
Keeping a bawdy house, disorderly house, or house of ill fame;
Pandering, procuring, transporting, or detaining women for immoral purposes, etc.; and
All attempts to commit any of the above.

17. Sex Offenses

(Except forcible rape, prostitution, and commercialized vice.) Include offenses against chastity, common decency, morals, and the like, such as:

Adultery and fornication;
Buggery;
Incest;
Indecent exposure;
Indecent liberties;
Seduction;
Sodomy or crime against nature;
Statutory rape (no force); and
All attempts to commit any of the above.

18. Drug Abuse Violations

Drug abuse violation arrests are requested on the basis of the narcotics used. Include all arrests for violations of state and local laws, specifically those relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs. Make the following subdivisions of drug abuse violation arrests, keeping in mind to differentiate between Sale/Manufacturing and Possession:

(1) Sale/Manufacturing
a. Opium or cocaine and their derivatives (morphine, heroin, codeine)
b. Marijuana
c. Synthetic narcotics—manufactured narcotics which can cause true drug addiction (demerol, methadones)
d. Dangerous nonnarcotic drugs (barbiturates, benzedrine)
(2) Possession
e. Opium or cocaine and their derivatives (morphine, heroin, codeine)
f. Marijuana
g. Synthetic narcotics—manufactured narcotics which can cause true drug addiction (demerol, methadones)
h. Dangerous nonnarcotic drugs (barbiturates, benzedrine)

Include all attempts to sell, manufacture, or possess any of the above.

19. Gambling

All charges which relate to promoting, permitting, or engaging in illegal gambling are included in this category. To provide a more refined collection of gambling arrests, the following breakdown should be furnished:

a. Bookmaking (horse and sport book)
b. Numbers and lottery
c. All other

20. Offenses Against the Family and Children

Include here all charges of nonsupport and neglect or abuse of family and children, such as:

Desertion, abandonment, or nonsupport of spouse or child;
Neglect or abuse of spouse or child (if injury is serious, score as aggravated assault);
Nonpayment of alimony; and
All attempts to commit any of the above.

Note: Do not count *victims* of these charges who are merely taken into custody for their own protection.

21. Driving Under the Influence

This class is limited to the driving or operating of any vehicle or common carrier while drunk or under the influence of liquor or narcotics.

Include:

Operating a motor vehicle while under the influence; and
Operating an engine, train, streetcar, boat, etc., while under the influence.

22. Liquor Laws

With the exception of "drunkenness" (offense 23) and "driving under the influence" (offense 21), liquor law violations, state or local, are placed in this class.

Include:

Manufacture, sale, transporting, furnishing, possessing, etc., intoxicating liquor;
Maintaining unlawful drinking places;
Bootlegging;
Operating still;
Furnishing liquor to a minor or intemperate person;
Using a vehicle for illegal transportation of liquor;
Drinking on train or public conveyance; and
All attempts to commit any of the above.

23. Drunkenness

Include in this class all offenses of drunkenness or intoxication, with the exception of "driving under the influence" (offense 21).

Drunkenness
Drunk and disorderly
Common or habitual drunkard
Intoxication

24. Disorderly Conduct

In this class are placed all charges of committing a breach of the peace.

Include:

Affray;
Unlawful assembly;
Disturbing the peace;
Disturbing meetings;
Disorderly conduct in state institutions, at court, at fairs, on trains or public conveyances, etc.;
Blasphemy, profanity, and obscene language;
Desecrating the flag;
Refusing to assist an officer; and
All attempts to commit any of the above.

25. Vagrancy

Persons prosecuted on the charge of being a "suspicious character or person, etc." are included in this class.

Include:

Vagrancy;
Begging;
Loitering (persons 18 and over); and
Vagabondage.

26. All Other Offenses

Include in this class every other state or local offense (except traffic violations) not included in offenses 1 through 25, such as:

Admitting minors to improper places;
Abduction and compelling to marry;
Bigamy and polygamy;
Blackmail and extortion;
Bribery;
Combination in restraint of trade; trusts, monopolies;
Contempt of court;
Criminal anarchism;
Criminal syndicalism;
Discrimination, unfair competition;
Kidnaping;
Marriage within prohibited degrees;
Offenses contributing to juvenile delinquency (except as provided for in offenses 1 to 25), such as employment of children in immoral vocations or practices, admitting minors to improper places, etc.;
Perjury and subornation of perjury;
Possession, repair, manufacture, etc., of burglar's tools;
Possession of drug paraphernalia;
Possession or sale of obscene literature, pictures, etc.;
Public nuisances;
Riot and rout;
Trespass;
Unlawfully bringing weapons into prisons or hospitals;
Unlawfully bringing drugs or liquor into state prisons, hospitals, etc.; furnishing to convicts;
Unlawful disinterment of the dead and violation of sepulture;
Unlawful use, possession, etc., of explosives;
Violations of state regulatory laws and municipal ordinances (this does not include those offenses or regulations which belong in the above classes);
Violation of quarantine;
All offenses not otherwise classified; and
All attempts to commit any of the above.

27. Suspicion

While "suspicion" is not an offense, it is the grounds for many arrests in those jurisdictions where the law permits. After examination by law enforcement officers, the prisoner is either formally charged or released. Those formally charged are entered in one of the Part I or II offense classes. This class is limited to "suspicion" arrests where persons arrested are released by the police.

28. Curfew and Loitering Laws—(Persons under 18)

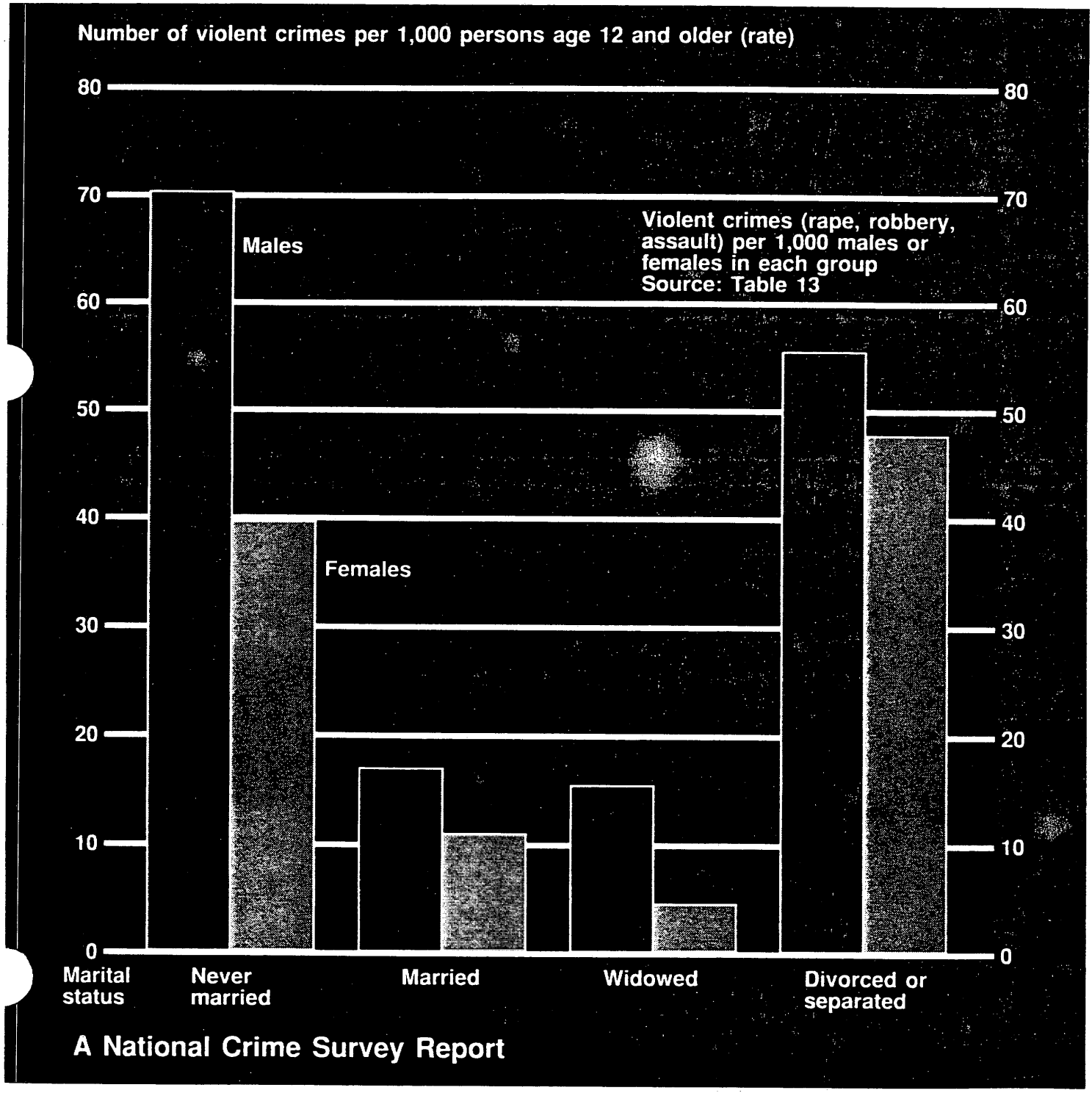
Count all arrests for violations of local curfew or loitering ordinances where such laws exist.

29. Runaways—(Persons under 18)

For purposes of the Uniform Crime Reporting Program, report in this category apprehensions for protective custody as defined by local statute. Arrests of runaways from one jurisdiction by another agency should be counted by the home jurisdiction. Do not include protective custody actions with respect to runaways taken for other jurisdictions.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Criminal Victimization in the United States, 1989



A National Crime Survey Report

Introduction

The National Crime Survey (NCS) provides information on crimes which interest the general public and the criminal justice community. Not all crimes are measured; many offenses are difficult to detect through a survey of the general population.

NCS-measured crimes

The success of a victimization survey like the NCS depends on the ability to identify specific crimes. This requires that the victims are not only willing to report the crime, but also understand what happened, and how it happened. The NCS measures the crimes most likely to be identified by a general survey, namely, rape, robbery, assault, burglary, personal and household larceny and motor vehicle theft.

Since crime victims are asked directly about crime, all crimes are measured, whether or not they were reported to the police. No attempt is made to validate reported crimes by checking them against other sources of criminal data, such as police records.

Crimes not measured by the NCS

The NCS does not measure murder and kidnaping. Formerly, the survey included commercial burglary and robbery, but these crimes were dropped in 1977, largely for economic reasons. Crimes such as public drunkenness, drug abuse, and prostitution, which are often referred to as victimless crimes, are not measured. The survey also excludes crimes where the victim shows a willingness to participate. Some examples of this type of crime include illegal gambling, con games, and blackmail.

Sometimes people are not aware they have been victims of a crime, making such crimes difficult to measure accurately. Buying stolen property, and certain types of fraud and embezzlement are examples of this type of crime. In addition, many attempted crimes of all types are probably under-reported because victims were not aware of the incident.

Classifying the crimes

In any criminal encounter, more than one criminal act may be committed against the same individual. For example, a victim may be both raped and robbed during the same incident.

To record crimes accurately, each criminal incident is counted only once and is classified according to the most serious event that occurred during the event. Crimes are ranked according to severity by using the system employed by the Federal Bureau of Investigation.

Personal crimes of contact are considered more serious than household crimes. In descending order of severity, the personal crimes are rape, robbery, assault, and personal larceny. The household crimes, in the same order, are burglary, motor vehicle theft, and household larceny. Thus, if a person is both robbed and assaulted, the event is classified as a robbery; if the victim suffers physical harm, the crime is categorized as a robbery with injury.

Victimizations vs. incidents

A single crime may victimize one or more individuals. For example, two people may be victimized during a single personal robbery. Thus, a single incident can result in more than one victimization. This distinction is applied to personal crimes, but all household crime incidents are assumed to have only one victim, the household as a unit.

A victimization, the basic measure of the occurrence of crime, is a specific criminal act because it affects a single victim. The number of victimizations is determined by the number of victims of such acts. Victimization counts serve as key elements in computing rates of victimization, as described in the victim characteristics sections of this report. Victimizations also are used in developing a variety of information on crime characteristics and the effects of crime on victims, including injuries and medical care, economic losses, time lost from work, self-protection, and reporting to police. For violent personal crimes, offender characteristics are also measured by victimizations.

An incident is a specific criminal act involving one or more victims. The number of incidents of personal crime is lower than that of victimizations because some crimes are simultaneously committed against more than one individual.

Incident figures are used in describing the settings and circumstances in which crimes occurred, including the time and place of occurrence, number of victims and offenders, and use of weapons.

Series victimizations

A series victimization is defined as three or more similar but separate crimes which the victim is unable to recall individually or describe to the interviewer in detail. Prior to 1979, series victimizations were recorded by the season of occurrence and tabulated according to the quarter of the year in which the data was collected. Because of this procedure, it was not possible to total nonseries and series crimes together.

In January of 1979 the NCS questionnaire was revised to enable series crimes and regular (nonseries) crimes to be combined. The effects of this change were included in the initial release of the 1980 data.

Summary data on series crimes is presented separately in the NCS annual report in Appendix III.

Locality of residence

Locality of residence, as used in the NCS, refers to where a person lived when he was interviewed, not to the place where a crime occurred. The country is divided into three locality types: central cities, metropolitan areas not located inside central cities, and nonmetropolitan places. The areas

Table 1. Personal and household crimes, 1989:

Number and percent distribution of victimizations, by sector and type of crime

Sector and type of crime	Number of victimizations	Percent of victimizations within sector	Percent of all victimizations
All crimes	**35,818,410**	...	**100.0 %**
Personal sector	**19,690,500**	**100.0 %**	**55.0 %**
Crimes of violence	5,861,050	29.8	16.4
Completed	2,196,000	11.2	6.1
Attempted	3,665,040	18.6	10.2
Rape	135,410	0.7	0.4
Completed	45,910	0.2	0.1
Attempted	89,490	0.5	0.2
Robbery	1,091,830	5.5	3.0
Completed	743,520	3.8	2.1
With injury	300,350	1.5	0.8
From serious assault	140,130	0.7	0.4
From minor assault	160,220	0.8	0.4
Without injury	443,160	2.3	1.2
Attempted	348,310	1.8	1.0
With injury	93,710	0.5	0.3
From serious assault	43,310	0.2	0.1
From minor assault	50,400	0.3	0.1
Without injury	254,590	1.3	0.7
Assault	4,633,800	23.5	12.9
Aggravated	1,664,710	8.5	4.6
Completed with injury	586,190	3.0	1.6
Attempted with weapon	1,078,520	5.5	3.0
Simple	2,969,080	15.1	8.3
Completed with injury	820,360	4.2	2.3
Attempted without weapon	2,148,710	10.9	6.0
Crimes of theft	13,829,450	70.2	38.6
Completed	12,995,870	66.0	36.3
Attempted	833,570	4.2	2.3
Personal larceny with contact	542,930	2.8	1.5
Purse snatching	161,520	0.8	0.5
Completed	123,420	0.6	0.3
Attempted	38,100	0.2	0.1
Pocket picking	381,400	1.9	1.1
Personal larceny without contact	13,286,510	67.5	37.1
Completed	12,491,040	63.4	34.9
Less than $50	5,126,330	26.0	14.3
$50 or more	6,837,690	34.7	19.1
Amount not available	527,010	2.7	1.5
Attempted	795,460	4.0	2.2
Population age 12 and over	201,375,630	...	...
Household sector	**16,127,910**	**100.0 %**	**45.0 %**
Completed	13,618,740	84.4	38.0
Attempted	2,509,170	15.6	7.0
Burglary	5,352,310	33.2	14.9
Completed	4,110,910	25.5	11.5
Forcible entry	1,812,700	11.2	5.1
Unlawful entry without force	2,298,210	14.2	6.4
Attempted forcible entry	1,241,400	7.7	3.5
Household larceny	8,955,470	55.5	25.0
Completed	8,327,430	51.6	23.2
Less than $50	3,413,000	21.2	9.5
$50 or more	4,482,130	27.8	12.5
Amount not available	432,290	2.7	1.2
Attempted	628,040	3.9	1.8
Motor vehicle theft	1,820,120	11.3	5.1
Completed	1,180,390	7.3	3.3
Attempted	639,720	4.0	1.8
Total number of households	94,899,080	...	...

Note: Detail may not add to total shown because of rounding.
Percent distribution is based on unrounded figures.
... Not applicable.

Glossary

Age-The appropriate age category is determined by the respondent's age on the last day of the month before the interview.

Aggravated assault-Attack or attempted attack with a weapon, regardless of whether or not an injury occurred, and attack without a weapon when serious injury results. Serious injury includes broken bones, lost teeth, internal injuries, loss of consciousness, and any injury requiring two or more days of hospitalization.

Annual family income-The total income of the household head and all relatives living in the same housing unit for the 12 months preceding the interview. Includes wages, salaries, net income from businesses or farms, pensions, interest, dividends, rent, and any other form of monetary income. The incomes of people who are not related to the head of the household are not included.

Assault-An unlawful physical attack or threat of attack. Assaults may be classified as aggravated or simple. Rape and attempted rape are excluded from this category, as well as robbery and attempted robbery. The severity of assaults ranges from minor threat to incidents which are nearly fatal.

Attempted forcible entry-A form of burglary in which force is used in an attempt to gain entry.

Burglary-Unlawful or forcible entry or attempted entry of a residence. This crime usually, but not always, involves theft. The illegal entry may be by force, such as breaking a window or slashing a screen, or may be without force by entering through an unlocked door or an open window. As long as the person entering has no legal right to be present in the structure a burglary has occurred. Furthermore, the structure need not be the house itself for a burglary to take place; illegal entry of a garage, shed, or any other structure on the premises also constitutes household burglary. If breaking and entering occurs in a hotel room or vacation residence, it is still classified as a burglary for the household whose member or members were staying there at the time the entry occurred.

Central city-The largest city (or grouping of cities) in a Metropolitan Statistical Area (see below).

Ethnicity-A classification based on Hispanic culture and origin, regardless of race.

Forcible entry-A form of burglary in which force is used to gain entry to a residence. Some examples include breaking a window or slashing a screen.

Head of household-A classification which defines one and only one person in each housing unit as the head. Head of household implies that the person rents or owns (or is in the process of buying), the housing unit. The head of household must be at least 18, unless all members of the household are under 18, or the head is married to someone 18 or older.

Hispanic-A person who describes himself as Mexican-American, Chicano, Mexican, Mexicano, Puerto Rican, Cuban, Central American, South American, or from some other Spanish culture or origin, regardless of race.

Household-A person or group of people meeting either of the following criteria. (1)people whose usual place of residence is the same housing unit, even if they are temporarily absent. (2)people staying in a housing unit whohave no usual place of residence elsewhere.

Household crimes-Attempted and completed crimes that do not involve personal confrontation. Examples of household crimes include burglary, motor vehicle theft, and household larceny.

Household larceny-Theft or attempted theft of property or cash from a residence or the immediate vicinity of the residence. In order to occur within a house, the thief must have a legal right to be in the house (such as a maid, delivery person or guest), as unlawful or forcible entry constitutes a burglary.

Incident-A specific criminal act involving one or more victims and offenders. For example, if two people are robbed at the same time and place, this is classified as two robbery victimizations but only one robbery incident.

Larceny-Theft or attempted theft of property or cash without involving force or illegal entry. This category is subdivided into personal larceny and household larceny.

Marital status-Every person is assigned to one of the following classifications: (1) married, which includes persons in common-law unions and those who are currently living apart for reasons other than marital discord (employment, military service, etc.); (2) separated or divorced, which includes married persons who are legally separated and those who are not living together because of marital discord; (3) widowed; and (4) never married, which includes persons whose marriages have been annulled and those who are living together and not in a common-law union.

Metropolitan area-See "Metropolitan Statistical Area".

Metropolitan Statistical Area (MSA)-The Office of Management and Budget (OMB) defines this as a population nucleus of 50,000 or more, generally consisting of a city and its immediate suburbs, along with adjacent communities having a high degree of economic and social integration with the nucleus. MSA's are designated by counties, the smallest geographic units for which a wide range of statistical data can be obtained. However, in New England, MSA's are designated by cities and towns since these subcounty units are of great local significance and considerable data is available for them. Currently, an area is defined as an MSA if it meets one of two standards: (1) a city has a population of at least 50,000; (2) the Census Bureau defines an urbanized area of at least 50,000 people with a

total metropolitan population of at least 100,000 (or 75,000 in New England). The Census Bureau's definition of urbanized areas, data on commuting to work, and the strength of the economic and social ties between the surrounding counties and the central city determine which counties not containing a main city are included in an MSA. For New England, MSA's are determined by a core area and related cities and towns, not counties. A metropolitan statistical area may contain more than one city of 50,000, and may cross State lines.

Motor vehicle- An automobile, truck, motorcycle or any other motorized vehicle legally allowed on public roads and highways.

Motor vehicle theft-Stealing or unauthorized taking of a motor vehicle, including attempted thefts.

Non-Hispanic-Persons who report their culture or origin as something other than "Hispanic" as defined above. This distinction is made regardless of race.

Nonmetropolitan area-A place not located inside an MSA. This category includes a variety of localities, ranging from sparsely populated rural areas to cities with populations less than 50,000.

Nonstranger-A classification of a crime victim's relationship to the offender. An offender who is either related to, well known to or casually acquainted with the victim is a nonstranger. For crimes with more than one offender, if any of the offenders are nonstrangers, then the group of offenders as a whole is classified as nonstranger. This category only applies to crimes which involve contact between the victim and the offender; the distinction is not made for personal larceny without contact since victims of this offense rarely see the offenders.

Offender-The perpetrator of a crime; this term usually applies to crimes involving contact between the victim and the offender.

Offense-A crime. When referring to personal crimes, the term can be used to refer to both victimizations and incidents.

Outside central cities-Refer to "suburban area".

Personal crimes-Rape, personal robbery, assault, personal larceny with contact or personal larceny without contact. This category includes both attempted and completed crimes.

Personal crimes of theft-Personal larceny. The theft or attempted theft of property or cash by stealth, either with contact (but without force or threat of force) or without direct contact between the victim and the offender.

Personal crimes of violence-Rape, personal robbery or assault. This category includes both attempted and completed crimes, and the crime always involves contact between the victim and the offender.

Personal larceny-Equivalent to the personal crimes of theft. Personal larceny is divided into two subgroups depending on whether or not the crime involved personal contact between the victim and the offender.

Personal larceny with contact-Theft or attempted theft of property or cash directly from the victim by stealth, not force or threat of force. Includes both purse snatching and pocket picking.

Personal larceny without contact-Theft or attempted theft of property or cash from anyplace other than the victim's home or its immediate vicinity, without direct contact between the victim and the offender. This crime differs from household larceny only in the location in which the theft occurs. Examples of personal larceny without contact include theft of an umbrella in a restaurant, a radio from the beach, or cash from an automobile parked in a parking lot. Occasionally, the victim may see the offender commit the crime.

Physical injury-Physical injury is measured for the three personal crimes of violence. Completed or attempted robberies that result in injury are classified as involving "serious" or "minor" assault. Examples of injuries from serious assault include broken bones, loss of teeth, internal injuries, loss of consciousness, and undetermined injuries requiring two or more days of hospitalization. Injuries from minor assault include bruises, black eyes, cuts, scratches, swelling, or undetermined injuries requiring less than two days of hospitalization. Assaults without a weapon are classified as aggravated if the victim's injuries fit the description given above of serious assault. All completed rapes are defined as having resulted in physical injury. Attempted rapes are classified as having resulted in injury if the victim reported having suffered some form of physical injury.

Race-Racial categories for this survey are white, black, and other. The "other" category is composed mainly of Asians and American Indians. The race of the head of household is used in determining the race of the household for computing household crime demographics.

Rape-Carnal knowledge through the use of force or the threat of force, including attempts. Statutory rape (without force) is excluded. Both heterosexual and homosexual rape are included.

Rate of victimization- See "Victimization rate".

Region-The States have been divided into four groups or census regions:

Midwest-Includes the 12 States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

Northeast-Includes the 9 States of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

South-Includes the District of Columbia and the 16 States of Alabama, Arkansas, Delaware, Florida, Georgia,

Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

West-Includes the 13 States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

Robbery-Completed or attempted theft, directly from a person, of property or cash by force or threat of force, with or without a weapon.

Robbery with injury-Completed or attempted theft from a person, accompanied by an attack, either with or without a weapon, resulting in injury. An injury is classified as resulting from a serious assault, irrespective of the extent of injury, if a weapon was used in committing the crime, or, if not, when the extent of the injury was either serious (broken bones, loss of teeth, internal injuries or loss of consciousness, for example) or undetermined but requiring two or more days of hospitalization. An injury is classified as resulting from a minor assault when the extent of the injury was minor (for example, bruises, black eyes, cuts, scratches or swelling) or undetermined but requiring less than two days of hospitalization.

Robbery without injury-Theft or attempted theft from a person, accompanied by force or the threat of force, either with or without a weapon, but not resulting in injury.

Series-Three or more similar but separate events, which the respondent is unable to describe separately in detail to an interviewer.

Simple assault-Attack without a weapon resulting either in minor injury (for example, bruises, black eyes, cuts, scratches or swelling) or in undetermined injury requiring less than two days of hospitalization. Also includes attempted assault without a weapon.

Stranger-A classification of the victim's relationship to the offender for crimes involving direct contact between the two. Incidents are classified as involving strangers if the victim identifies the offender as a stranger, did not see or recognize the offender, or knew the offender only by sight. Crimes involving multiple offenders are classified as involving nonstrangers if any of the offenders was a nonstranger. Since victims of personal larceny without contact rarely see the offender, no distinction is made between strangers and nonstrangers for this crime.

Suburban areas-A county or counties containing a central city, plus any contiguous counties that are linked socially and economically to the central city. On data tables, suburban areas are categorized as those portions of metropolitan areas situated "outside central cities."

Tenure-The NCS recognizes two forms of household tenancy: (1) owned, which includes dwellings that are mortgaged, and (2) rented, which includes rent-free quarters belonging to a party other than the occupants, and situations where rental payments are in kind or services.

Unlawful entry-A form of burglary committed by someone having no legal right to be on the premises, even though no force is used.

Victim-The recipient of a criminal act, usually used in relation to personal crimes, but also applicable to households.

Victimization-A crime as it affects one individual person or household. For personal crimes, the number of victimizations is equal to the number of victims involved. The number of victimizations may be greater than the number of incidents because more than one person may be victimized during an incident. Each crime against a household is assumed to involve a single victim, the affected household.

Victimization rate-A measure of the occurrence of victimizations among a specified population group. For personal crimes, this is based on the number of victimizations per 1,000 residents age 12 or older. For household crimes, the victimization rates are calculated using the number of incidents per 1,000 households.

Victimize-To commit a crime against a person or household.

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MEMORANDUM

TO: COMMISSIONER CARNES
CRIMINAL HISTORY WORKING GROUP

FROM: VINCE VENTIMIGLIA

RE: CAREER OFFENDER PROVISIONS

DATE: JANUARY 7, 1991

This memo will summarize the appellate decisions which have considered downward departures for offenders sentenced under the Guideline's career offender provisions at §4B1.1.

I. WHETHER DOWNWARD DEPARTURES FROM CAREER OFFENDER RANGE PERMITTED

A. No Departures Permitted

In United States v. Henry Clay Saunders, 743 F.Supp. 444 (E.D. Va. 1990) (Ellis, J.), the court held that no downward departure under §4A1.3 was available to a career offender. Defendant was convicted of raping a woman at Fort Belvoir, after smoking crack with her, and received a total offense level 31, increased to level 37 (360 months to life) under the career offender provisions. Defendant had prior convictions for armed robbery in 1977, felonious assault in 1984, and unlawful wounding in 1989. The court refused to depart on the basis that no departures under §4A1.3 from §4B1.1 were contemplated in light of the mandatory language used in the career offender guideline. The court also held that the guidelines explicitly incorporate §4A1.2, but not §4A1.3, into §4B1.1; held that the legislative history of the provision requires a sentence near the statutory maximum;

and noted that since criminal history plays a limited role in measuring the degree of career offender enhancement (contrasted with the seriousness of the offense), then it should not be used as a departure basis to lessen the degree of enhancement. Defendant was sentenced to 360 months imprisonment.

B. Departures Permitted

In United States v. Howard Eugene Hughes, 901 F.2d 830 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 163 (1990) (appeal from W.D. Okla., West, J.), the court notes that downward departures from all guideline sentences, including a career offender sentence, are permitted. However, no such departure was contemplated in this case, which involved a bank robbery while brandishing a machinegun.

In United States v. Ricky Allen Hays, 899 F.2d 515 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 385 (1990) (appeal from W.D. Ken., Ballantine, J.), the circuit court implied the permissibility, under certain circumstances, of downward departures from career offender range. The court invalidated a downward departure from the career offender guideline range, where the departure was based on characteristics of the current offense (defendant's lack of violent conduct in connection with the present drug offense, and the small amount of drugs involved). Defendant in this case was convicted of two counts of conspiracy to possess cocaine and marijuana with intent to distribute, under 21 U.S.C. §§ 841 and 846. Defendant was arrested with seven pounds of marijuana, various drug paraphernalia, and had been believed to sell up to $12,000 a day in drugs. The career offender range was 360 months to life, since the two prior convictions for drug trafficking qualified him as a career offender. Defendant was sentenced to twenty years.

In United States v. Robert Gant, 902 F.2d 570 (7th Cir. 1990) (appeal from E.D. Wisc., Warren, C.J.), a defendant received a 120 month sentence instead of a 210-262 month sentence under the career offender provisions. The downward departure for substantial assistance was held valid.

In addition, the circuits below accept departures from the career offender guideline range.

II. PRIOR OFFENSES WHICH MAY JUSTIFY DOWNWARD DEPARTURE

A. Underlying Facts of Crimes, As Opposed to Generic Crimes, Do Not Involve Violence

1. Burglaries and Robberies

In United States v. Ramon Gonzalez-Lopez, 911 F.2d 542 (11th Cir. 1990) (appeal from N.D. Ga., Tidwell, J.), defendant was convicted under 21 U.S.C. § 846, Conspiracy to Distribute Cocaine, 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Cocaine. Defendant was sentenced to 57 months, the top of the guideline range of 46-57 months (total offense level 16 and criminal history category VI), which represented a downward departure from the career offender range of 262-327 months. The defendant had prior State convictions including robbery by force and fear (robbery of a woman's purse containing $5.35), armed robbery of a supermarket, attempted burglary of an occupied residence, burglary of unoccupied residence ($450 in merchandise taken). All but the second prior conviction received separate sentences of three years probation, and that conviction received a 364-day sentence. Defendant had several additional arrests and prior convictions for non-violent felonies and misdemeanors.

The sentencing court held that the facts underlying the prior convictions demonstrated that the crimes were not crimes of violence. In the alternative, the court held that, if the career offender provisions applied, a downward departure was warranted since the guideline did not adequately consider a situation where the priors in fact did not involve violence, and because such a career offender sentence would be "grossly unfair and grossly excessive." The defendant argued that the Commission did not adequately distinguish between crimes that involve the actual use of force and result in injury, and those that involve nothing more than the threat of force and do not result in injury.

The appellate court rejected this argument, finding the Commission did adequately consider such a distinction. The court noted that it was also unlikely that the Commission would prohibit the review of the underlying facts of the prior convictions in order to determine whether defendant qualified for career offender status, but would permit such a review to determine whether to depart from the resulting guideline range. The court also prohibited departure where the departure was based on the grounds that the sentence appeared excessive, citing United States v. Aguilar-Pena, 887 F.2d 347 (1st Cir. 1989).

In United States v. Sherman Nichols, 740 F.Supp. 1332 (N.D.Ill. 1990) (Hart, J.), the defendant was convicted of being a felon in possession of a firearm, under 18 U.S.C. § 922(g), use of a firearm during a drug

trafficking offense, under 18 U.S.C. § 924(c), and 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute .83 grams of cocaine. Defendant had prior State convictions for residential burglary (juvenile), robbery, auto theft, and residential burglary (adult conviction). The career offender range is 360 months to life. The sentencing court departed downward from this range, in part on the basis of §4A1.3, overstatement of criminal history, particularly since the opportunity for recidivism in an older defendant (here in his early thirties) is lower. The court noted the absence of details regarding the prior convictions, but noted the absence of actual violence in any of those offenses. The court departed downward from the career offender range, finding defendant was a category V offender, with an offense level 24 (92-115 months) (based on level 12 for the offenses of conviction, enhanced by 12 levels for a modified career offender sentence that accounts for the low level of drugs and overstated criminal history), and imposed the statutory minimum of 240 months (180 months for armed career offender and 60 months for the 924(c) offense).

2. Threatening Communications

In United States v. Merle Left Hand Bull, 901 F.2d 647 (8th Cir. 1990) (appeal from D. S.D., Porter, C.J.), defendant was convicted of mailing a threatening communication in violation of 18 U.S.C. § 876 to his estranged wife while he was in prison. The defendant received a career offender range of 51-63 months, but received a downward departure sentence of 48 months pursuant to 5K2.10 (victim's wrongful conduct significantly provoked the offense).

The threat was held to be a crime of violence by the lower court and the appellate court, despite defendant's argument that he had no contemporaneous ability to carry out the threat. No indication as to nature of priors, or role those priors had in influencing court's departure.

3. Drug Distribution Offenses

In United States v. Carlton Bernard Brown, 903 F.2d 540 (8th Cir. 1990) (appeal from D. Minn., Magnuson, J.), the defendant was convicted under 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1), (b)(1)(C), aiding and abetting the distribution of ten ounces (283 grams) of cocaine; and 21 U.S.C. § 841(a)(1), (b)(1)(C), and

21 U.S.C. § 846, conspiracy to distribute ten ounces (283 grams) of cocaine. Defendant was sentenced to two concurrent 210 month terms under the career offender provisions. The predicate offenses were two prior convictions, one a 1986 conviction under California law for transportation of a controlled substance, and the other a 1987 State conviction for possession of a controlled substance. The district court reluctantly imposed a sentence at the lower end of the career offender range (210-262 months), in light of the "extremely harsh penalty required by the career offender guideline," which the court was "not comfortable with" since it was almost ten times longer than those received by defendant's codefendants. Proportionality, then, was a key concern, but the nature of the priors may also have influenced the lower court's decision. The appellate court remanded for resentencing, in order to permit the lower court to consider the need for a downward departure.

B. Brief Period of Time During Which Crimes Were Committed; "Small-Time" Offenses

In United States v. Bobby Dale Smith, 909 F.2d 1164 (8th Cir. 1990), *petition for cert. filed* (Oct. 29, 1990), (appeal from S.D. Iowa, Wolle, J.), defendant was convicted under 21 U.S.C. § 846, Conspiracy to Distribute Cocaine, and 18 U.S.C. § 1952(a)(2) and (a)(3), Traveling in Interstate Commerce with the Intent to Facility the Drug Conspiracy. Career offender guideline range was 292-365 months, but the court sentenced under a downward departure to twenty years, citing, among other factors, the brevity of defendant's prior criminal career, and his youth when the crimes were committed. Smith reads Brown to stand for the "eminently reasonable principle" that all careers are not the same. The length and scope of the career that lands the criminal under the career-offender guideline are appropriate grounds for departure, either upward or downward, in an unusual case.

Here, where the career was "neither extensive nor long" and where defendant had only two prior State convictions, and each incident "though serious" was a "somewhat small-time offense." Defendant's priors included burglary of personal property from a home (total loss around $1,000) and conspiracy to sell ten hits of LSD on two occasions for a total of $80. Defendant was sentenced to probation both times. The crimes took place over a two-month period of time.

In United States v. Mary Elizabeth Harrison, 918 F.2d 30 (5th Cir. 1990), the court upheld the

sentencing court's refusal to depart downward from a career offender sentence, rejecting her argument that the career offender provisions did not apply where the requisite offenses occurred within a short period of time (here five felony drug provisions over a period of two years. Defendant was sentenced to 168 months for violating 21 U.S.C. § 841(a)(1), possession with intent to distribute controlled substances.

D. Find Common Scheme or Plan

In United States v. Jason Houser, 916 F.2d 1432 (9th Cir. 1990), the defendant had sold drugs to the same agent on two separate occasions in two different counties over a short period of time, apparently as a result of the same investigation. The defendant was convicted and sentenced at different times in different counties, and the sentencing court accordingly counted the offenses separately for career offender purposes. As a result of these two prior convictions, and the current convictions for 21 U.S.C. § 846, Conspiracy to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1), defendant was sentenced to 262 months under the career offender provisions. The appellate court remanded for resentencing, finding these transactions were part of a single common scheme or plan, and should not have been counted separately.

A similar result occurred in United States v. Gregory Robert Rivers, 733 F.Supp. 1003 (D.Md. 1990) (Smalkin, J.), where the defendant was convicted of bank robbery, and had two prior State convictions for two gas station armed robberies occurring twelve days apart from each other, one occurring in Baltimore City, and the other in Baltimore County. Defendant was sentenced in the two jurisdictions, the first court sentencing defendant to twelve years imprisonment, the second to sixteen years concurrent.

The sentencing court refused to consider the defendant a career offender by counting the two prior convictions separately, and instead found as fact that the two offenses would, save for "an accident of geography," have been consolidated for sentencing due to their similarity and closeness in time. The court held alternatively that the offenses were committed pursuant to a single plan, i.e., to obtain money to buy narcotics. The reported case dealt only with determining whether career offender status applied, and no sentence was imposed.

E. Section 4A1.3 Overrepresentation of Criminal History

In United States v. Melvin Raymond Lawrence, 916 F.2d 553 (9th Cir. 1990) (appeal from E.D. Wash., McNichols, J.), a defendant was convicted of possession with intent to distribute over 100 marijuana plants found in his car. Defendant apparently had another 4,000 plants at his home. Defendant had two prior State convictions: one for possession of a controlled substance with intent to deliver and possession of a controlled substance; and one for two counts of possession of marijuana with intent to manufacture or deliver. Defendant was sentenced to 30 months imprisonment (the range that would have applied in the absence of the career offender provisions), a downward departure from the career offender range of 151-188 months (level 29, Category VI). The rationale for the departure was based on §4A1.3 (overrepresentation of criminal history), and the appellate court agreed that this provision could justify a downward departure from the career offender range. The court rejected the government's argument that the Commission had been directed by 28 U.S.C. § 994(h) to mandate a career offender sentence where the requisite conditions had been satisfied. (The sentence was, however, vacated and remanded for resentencing in light of the presence of the 4,000 plants not counted by the court in relevant conduct.)

III. COUNTING "STALE" CONVICTIONS

A. "Stale" Convictions are Valid Basis for Departure

In United States v. Richard Gardner, 905 F.2d 1432 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 202 (1990) (appeal from W.D. Okla., Russell, J.), defendant was convicted of bank robbery with a revolver, under 18 U.S.C. § 2113, and sentenced to the bottom end of the guideline range applicable for a career offender. Defendant had previously been convicted of four firearms and robbery offenses, all of which were included in the criminal history calculation. Grounds for departure (inadequacy of criminal history since two armed robbery convictions and conviction on two counts of bank robbery fell outside the fifteen year time period) were sustained. Extent of departure reasonable since Defendant resembled a career offender (particularly since firearms offenses show continued pattern of crime, and robberies were conducted using similar methods), and since no category beyond Category VI existed. Defendant had a criminal history VI (15 points), and a non-career offender guideline range

of 100-125 months (level 24). The departure sentence was 210 months.

In United States v. Joseph E. Lang, 898 F.2d 1378 (8th Cir. 1990), the court held that sentences excluded from the criminal history calculation under §4A1.2(e)(2) may be considered in determining whether an upward departure is justified. The court cites United States v. Lopez, 871 F.2d 513 (5th Cir. 1989) and United States v. Elmendorf, 895 F.2d 1415 (6th Cir. 1990) (Table) for the proposition.

In United States v. Alejo Cota-Guerrero, 907 F.2d 87 (9th Cir. 1990), the court held that fourteen convictions that had occurred more than ten years prior to the offense for which defendant was being sentenced could be considered in deciding whether to depart upward from the guideline sentence, where the convictions showed a propensity toward violent conduct, and where the convictions were similar to the present offense of possession of firearm by a felon. At least one of these prior convictions included an assault with a deadly weapon, and another for assault and battery. The sentencing court departed upward from a level 7, Category III (4-10 months) sentence to two years.

B. "Stale Convictions" Valid as "Reliable Information" (§4A1.3)

In United States v. Joseph N. Williams, 910 F.2d 1574 (7th Cir. 1990), *petition for cert. filed* (Nov. 11, 1990), the court upheld an upward departure based on §4A1.2(e)(2), where the defendant was convicted under 18 U.S.C. § 922(g)(1) and, as a Category V defendant, was sentenced to 27 months imprisonment. The court departed upward from a level 9 (18-24 months). Defendant's prior convictions for unlawful taking of a motor vehicle and forgery, both of which occurred more than fifteen years prior to the current offense of felon in possession of a firearm. The "stale" offenses were dissimilar and could not be considered under §4A1.2, but could be considered under §4A1.3 as "reliable information" for purposes of determining whether the criminal history category was underrepresented. The court notes that this information was considered with other aggravating factors in order to justify the departure.

The court cites United States v. Carey, 898 F.2d 642 (8th Cir. 1990) (when record did not reflect whether old burglary convictions were violent crimes or gun-related, district court properly considered them to be "reliable information" under §4A1.3 for sentencing of felon in possession) and United States v. Jackson, 903

F.2d 1313 (10th Cir. 1990), *rehearing granted*, 1990 WL 203177, (district court properly referred to a twenty-one year old forgery conviction in applying §4A1.3 to increase criminal history category of defendant convicted of being felon in possession of ammunition).

In United States v. James Ray Russell, 905 F.2d 1439 (10th Cir. 1990), (appeal from W.D. Okla., Russell, J.), the defendant had three prior convictions (two burglaries, one in 1965 and one in 1967, and one escape, in 1968) beyond the fifteen year period set forth under the career offender provisions. The court nevertheless added three criminal history points for each offense, noting that defendant had spent eleven of the fifteen years in jail, and had been released from each prior conviction for only a short period of time before committing the next offense. As a result of the increased point total, defendant's criminal history category increased from II to V, increasing his range from 51-63 months to 84-105 months. The sentencing court imposed a 105 month sentence on the defendant. The appellate court upheld the inclusion of the "stale" offenses for purposes of calculating criminal history score, finding that the offenses qualified under §4A1.3 as "reliable information."

C. Departure Invalid Where Prior Conviction is Dissimilar or Solely on Basis that Defendant "Got a Break"

In United States v. Avinell Leake, 908 F.2d 550 (9th Cir. 1990), the court invalidated an upward departure based on §4A1.2(e)(2) where the prior convictions were for fraud offenses, and the present convictions were for assaults, noting that the guidelines require similarity between the otherwise excluded offenses.

In United States v. Richard Rodney Robison, 904 F.2d 365 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 360 (1990), the court held that the sentencing court could not "arbitrarily change the requirements for career offender status" simply because the defendant "got a break" on an earlier conviction by not being sentenced in a manner that would breach the ten year barrier. Defendant in that case was convicted of aggravated drug trafficking in 1977, and was convicted currently for 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Cocaine, and 21 U.S.C. § 846, Conspiracy to Distribute Cocaine.

D. Community Treatment Center Confinement not Incarceration

The court in United States v. Harold Jordan, 734 F.Supp. 687 (E.D.Pa. 1990) (Katz, J.), held that residence in a community treatment center is not "incarceration" for purposes of guidelines requiring that a prior sentence of imprisonment be counted toward a criminal history score if the defendant was incarcerated during the fifteen years prior to the crime for which he is sentenced.

b. Related Cases

In United States v. Ivory Geiger, 891 F.2d 512 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1825 (1990), USSC No. 89-11991, (appeal from W.D. Tex., Smith, J.), Defendant was convicted under 21 U.S.C. §§ 841(a)(1) and 845, Possession with Intent to Distribute Crack Cocaine within a 1000 feet of a School. Defendant sold the crack in exchange for food stamps. Defendant had four prior convictions for drug offenses (possession of marijuana under 2 ounces, possession of .5 grams cocaine, possession of cocaine, possession of 32 grams of cocaine), and one for gambling. The consolidated offenses were separated by intervening arrests. The latter three drug convictions were consolidated for sentencing, and as a result Defendant avoided career offender status. Grounds for departure (including consolidated sentences leading to avoidance of career offender status) were upheld. Departure calculated by treating priors separately for purposes of career offender provisions. Extent of departure was reasonable particularly given the potential statutory maximum available. Criminal History was Category III (4 points) and the guideline offense level 14 (21-27 months). The departure sentence was 120 months.

In United States v. Thurman Jones, 898 F.2d 1461 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 1990 WL 87103 (1990), USSC No. 9538, (appeal from W.D. Okla., Russell, J.), Defendant pleaded guilty to conspiracy to distribute cocaine, under 21 U.S.C. § 846. Defendant had previously been convicted of a 1984 assault with a deadly weapon, and for a 1985 sale of a controlled substance, which offenses were separated by an intervening arrest. Defendant was sentenced to six months and one year for the crimes, respectively. When his probation was revoked, Defendant was sentenced under State law to two years and three years for the convictions, to run

concurrently. The appellate court held that the two prior convictions were not related cases by virtue of being resentenced at the same time to concurrent terms following revocation of probation for each crime. The sentence, therefore, was not to be considered one sentence under § 4A1.2(a)(2). As a result, the sentences for each crime might be counted separately under § 4B1.2(3), for purposes of determining career offender status. The appellate court feared a ruling to the contrary would require the government to undertake separate resentencing proceedings as the only means to preserving the separate original sentences, when calculating criminal history. Criminal History Category was V (11 points) and the guideline sentence was level 14 (33-41). Departure sentence was 156 months (including reduction for substantial assistance).

In United States v. Alan Dorsey, 888 F.2d 79 (11th Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 756, (1990), USSC No. 5623,

(appeal from N.D. Ga., Forrester, J.), defendant was convicted of four bank robberies committed separately in two States, and later was convicted of four additional robberies committed in three States beginning the day of his escape from prison. Appellate court held Defendant could be treated as career offender with each prior conviction counted separately for purposes of § 4B1.1, although prior sentences could not be counted separately for purposes of § 4A1.2. One rationale for this holding is the desire not to compel the government to refuse Rule 20(a) consolidation of cases. Extent of departure held reasonable. Guideline sentence was 51-63 months, and the departure sentence was 262 months.

In United States v. Eddie Roberson, 872 F.2d 597 (5th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 175 (1989), USSC No. 2375, (appeal from N.D. Tex., Cummings, J.), defendant was convicted of credit card fraud, after the drunk with whom he was living choked and died. Defendant burned the body and went on a drunken spending spree, until he was arrested for public intoxication. Defendant's criminal history included three previous burglaries, not separated by intervening arrests, that were consolidated for sentencing. The appellate court held that a sentencing court may account for concurrent sentences when it decides whether a departure based upon criminal history is appropriate. Grounds for departure (including inadequate criminal history based on consolidated sentences) were upheld. Extent of departure held reasonable. Criminal history was Category VI, guideline range was level 12 (30-37 months). Departure sentence was 120 months.

In United States v. Abraham Flores, 875 F.2d 1110 (5th Cir. 1989), USSC No. 1952, (appeal from N.D. Tex., Cummings, J.), defendant was convicted of distributing heroin. Defendant had previously been convicted of six previous house burglaries, separated by intervening arrests, of which two were consolidated for sentencing in one county, three in another, and one in yet another, over a period of eighteen months. While sentencing on the cases ran concurrently, this was through operation of State law, and not through the order of any judge. Mere concurrent sentences are not enough to defeat the guidelines. As a result, the career offender provisions apply to Defendant. Other priors included theft and drug distribution. Departure Sentence was 240 months.

In United States v. Bobby Dean, 908 F.2d 1491 (10th Cir. 1990)
(appeal from W.D. Okla., Russell, J.), defendant was convicted of possession of a semi-automatic shotgun. Defendant had prior convictions for unauthorized use of a motor vehicle, first degree rape (Defendant also brandished a knife), of violating 18 U.S.C. § 922(g) (felon in possession of a firearm), robbery with a firearm and burglary, and a second burglary, and these convictions were sentenced separately. Additional convictions for assault with intent to kill and robbery with a dangerous weapon, which offenses took place ten months apart, were considered related cases to the rape conviction, since they were sentenced on the same day. Grounds for departure (including the inadequacy of criminal history given the related cases exclusion, and the inadequacy of Category VI given Defendant's criminal record) were upheld. Extent of departure held unreasonable in light of the court's failure to adequately justify the extent of the departure, and the appellate court can find no extension of criminal history category, no analogy or reference to guideline principles, that would justify doubling the permitted guideline sentence. It is not apparent whether the court would have upheld sentencing under the career offender provision (which would have provided a level 24 - Category VI range of 100-125 months). Criminal history was Category VI (17 points). Guideline offense level was 8 (18-24 months), and the departure sentence was 48 months (consecutive to sentence already serving).

In United States v. Franklin Joan, 883 F.2d 491 (6th Cir. 1989) (appeal from S.D. Ohio, Smith, J.), defendant was convicted of 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Marijuana, 21 U.S.C. § 843(b), Telephone Count, and 18 U.S.C. § 922(g), Felon in Possession of a Firearm. Defendant had prior convictions for aggravated robbery with a firearm, during which he kidnapped a drug store employee; for

aggravated trafficking, during which he carried a .44 Magnum. Grounds for departure (including inadequate criminal history based on nature of prior convictions, and threat to the public health and safety) were upheld. Extent of departure was based on increase in offense level to 24 (100-125 months), (equivalent to a career offender sentence) and was held reasonable. Criminal history was Category VI. Guideline offense level was 18 (57-71 months), and departure sentence was 120 months.

S A L I E N T F A C T O R S C O R E (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) ..... ☐

None ..... = 3
One ..... = 2
Two or Three .... = 1
Four or More .... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS ..... ☐
(ADULT OR JUVENILE)

None ..... = 2
One or Two ..... = 1
Three or More ... = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS ..... ☐

Age at commencement of current offense
26 years or age or more ..... = 2
20-25 years of age ..... = 1
19 years of age or less ..... = 0

***Exception: If five or more prior commitments of more than thirty days (adult of juvenile), place an "X" here _____ and score this item ..... = 0

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS) ..... ☐

No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense ..... = 1

Otherwise ..... = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR ..... ☐
THIS TIME

Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time ..... = 1

Otherwise ..... = 0

Item F: HEROIN/OPIATE DEPENDENCE ..... ☐

No history of heroin/opiate dependence ... = 1
Otherwise ..... = 0

TOTAL SCORE ..... ☐

Note: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as a conviction, even if a conviction is not formally entered.

SALIENT FACTOR SCORING MANUAL. The following instructions serve as a guide in computing the salient factor score.

ITEM A. PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) [[None = 3; One = 2; Two or three = 1; Four or more.... = 0]]

A.1 *In General.* Count all convictions/adjudications (adult or juvenile) for criminal offenses (other than the current offense) that were committed prior to the present period of confinement, except as specifically noted. Convictions for prior offenses that are charged or adjudicated together (e.g., three burglaries) are counted as a single prior conviction, except when such offenses are separated by an intervening arrest (e.g., three convictions for larceny and a conviction for an additional larceny committed after the arrest for the first three larcenies would be counted as two prior convictions, even if all four offenses were adjudicated together). Do not count the current federal offense or state/local convictions resulting from the current federal offense (i.e., offenses that are considered in assessing the severity of the current offense). Exception: Where the first and last overt acts of the current offense behavior are separated by an intervening federal conviction (e.g., after conviction for the current federal offense, the offender commits another federal offense while on appeal bond), both offenses are counted in assessing offense severity; the earlier offense is also counted as a prior conviction in the salient factor score.

A.2 *Convictions*

(a) Felony convictions are counted. Non-felony convictions are counted, except as listed under (b) and (c). Convictions for driving while intoxicated/while under the influence/while impaired, or leaving the scene of an accident involving injury or an attended vehicle are counted. For the purpose of scoring Item A of the salient factor score, use the offense of conviction.

(b) Convictions for the following offenses are counted only if the sentence resulting was a commitment of more than thirty days (as defined in item B) or probation of one year or more (as defined in Item E), or if the record indicates that the offense was classified by the jurisdiction as a felony (regardless of sentence):

1. contempt of court;
2. disorderly conduct/disorderly person/breach of the peace/disturbing the peace/uttering loud and abusive language;
3. driving without a license/with a revoked or suspended license/with a false license;
4. false information to a police officer;
5. fish and game violations;
6. gambling (e.g., betting on dice, sports, cards) [Note: Operation or promotion of or employment in an unlawful gambling business is not included herein];
7. loitering;
8. non-support;
9. prostitution;
10. resisting arrest/evade and elude;
11. trespassing;
12. reckless driving;
13. hindering/failure to obey a police officer;
14. leaving the scene of an accident (except as listed under (a)).

(c) Convictions for certain minor offenses are not counted, regardless of sentence. These include:

1. hitchhiking;
2. local regulatory violations;
3. public intoxication/possession of alcohol by a minor/possession of alcohol in an open container;
4. traffic violations (except as specifically listed);
5. vagrancy/vagabond and rogue;
6. civil contempt.

A.3 *Juvenile Conduct.* Count juvenile convictions/adjudications except as follows:

(a) Do not count any status offense (e.g., runaway, truancy, habitual disobedience) unless the behavior included a criminal offense which would otherwise be counted;

(b) Do not count any criminal offense committed at age 15 or less, unless it resulted in a commitment of more than 30 days.

A.4 *Military Conduct.* Count military convictions by general or special court-martial (not summary court-martial or Article 15 disciplinary proceeding) for acts that are generally prohibited by civilian criminal law (e.g., assault, theft). Do not count convictions for strictly military offenses. Note: This does not preclude consideration of serious or repeated military misconduct as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score in relation to this item).

A.5 *Diversion.* Conduct resulting in diversion from the judicial process without a finding of guilt (e.g., deferred prosecution, probation without plea) is not to be counted in scoring this item. However, behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be counted as a conviction even if a conviction is not formally entered.

A.6 *Setting Aside of Convictions/Restoration of Civil Rights.* Setting aside or removal of juvenile convictions/adjudications is normally for civil purposes (to remove civil penalties and stigma). Such convictions/adjudications are to be counted for purposes of assessing parole prognosis. This also applies to adult convictions/adjudications which may be set aside by various methods (including pardon). However, convictions/adjudications that were set aside or pardoned on grounds of innocence are not to be counted.

A.7 *Convictions Reversed or Vacated on Grounds of Constitutional or Procedural Error.* Exclude any conviction reversed or vacated for constitutional or procedural grounds, unless the prisoner has been retried and reconvicted. It is the Commission's presumption that a conviction/adjudication is valid. If a prisoner challenges such conviction he/she should be advised to petition for a reversal of such conviction in the court in which he/she was originally tried, and then to provide the Commission with evidence of such reversal. Note: Occasionally the presentence report documents facts clearly indicating that a conviction was unconstitutional for deprivation of counsel [this occurs only when the conviction was for a felony, or for a lesser offense for which imprisonment was actually imposed; and the record is clear that the defendant (1) was indigent, and (2) was not provided counsel, and (3) did not waive counsel]. In such case, do not count the conviction. Similarly, if the offender has applied to have a conviction vacated and provides evidence (e.g., a letter from the court clerk) that the required records are unavailable, do not count the conviction. Note: If a conviction found to be invalid is nonetheless supported by persuasive information that the offender committed the criminal act, this information may be considered as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score).

A.8 *Ancient Prior Record.* If both of the following conditions are met: (1) the offender's only countable convictions under Item A occurred at least ten years prior to the commencement of the current offense behavior (the date of the last countable conviction under Item A refers to the date of the conviction, itself, not the date of the offense leading to conviction), and (2) there is at least a ten year commitment free period in the community (including time on probation or parole) between the last release from a countable commitment (under Item B) and the commencement of the current offense behavior; then convictions/commitments prior to

the above ten year period are not to be counted for purposes of Items A, B, or C. Note: This provision does not preclude consideration of earlier behavior (e.g., repetition of particularly serious or assaultive conduct) as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score). Similarly, a substantial crime free period in the community, not amounting to ten years, may, in light of other factors, indicate that the offender belongs in a better risk category than the salient factor score indicates.

A.9 *Foreign Convictions.* Foreign convictions (for behavior that would be criminal in the United States) are counted.

A.10 *Tribal Court Convictions.* Tribal court convictions are counted under the same terms and conditions as any other conviction.

A.11 *Forfeiture of Collateral.* If the only known disposition is forfeiture of collateral, count as a conviction (if a conviction for such offense would otherwise be counted).

A.12 *Conditional/Unconditional Discharge (New York State).* In N.Y. State, the term 'conditional discharge' refers to a conviction with a suspended sentence and unsupervised probation; the term 'unconditional discharge' refers to a conviction with a suspended sentence. Thus, such N.Y. state dispositions for countable offenses are counted as convictions.

A.13 *Adjudication Withheld (Florida).* In Florida, the term "adjudication withheld" refers to a disposition in which a formal conviction is not entered at the time of sentencing, the purpose of which is to allow the defendant to retain his civil rights and not to be classified as a convicted felon. Since the disposition of "adjudication withheld" is characterized by an admission of guilt and/or a finding of guilt before a judicial body, dispositions of "adjudication withheld" are to be counted as convictions for salient factor scoring purposes. However, it is not considered a conviction on which forfeiture of street time can be based.

ITEM B. PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE) [[None = 2; One or two = 1; Three or more = 0]]

B.1 *Count* all prior commitments of more than thirty days (adult or juvenile) resulting from a conviction/adjudication listed under Item A, except as noted below. Also count commitments of more than thirty days imposed upon revocation of probation or parole where the original probation or parole resulted from a conviction/adjudication counted under Item A.

B.2 *Count* only commitments that were imposed prior to the commission of the last overt act of the current offense behavior. Commitments imposed after the current offense are not counted for purposes of this item. Concurrent or consecutive sentences (whether imposed as the same time or at different times) that result in a continuous period of confinement count as a single commitment. However, a new court commitment of more than thirty days imposed for an escape/attempted escape or for criminal behavior committed while in confinement/escape status counts as a separate commitment.

D.3 *Definitions*

(a) This item only includes commitments that were actually imposed. Do not count a suspended sentence as a commitment. Do not count confinement pending trial or sentencing or for study and observation as a commitment unless the sentence is

specifically to 'time served'. If a sentence imposed is subsequently reconsidered and reduced, do not count as a commitment if it is determined that the total time served, including jail time, was 30 days or less. Count a sentence to intermittent confinement (e.g., weekends) totalling more than 30 days.

(b) This item includes confinement in adult or juvenile institutions, and residential treatment centers. It does not include foster home placement. Count confinement in a community treatment center when part of a committed sentence. Do not count confinement in a CTC when imposed as a condition of probation or parole. Do not count self commitment for drug or alcohol treatment.

(c) If a committed sentence of more than thirty days is imposed prior to the current offense but the offender avoids or delays service of the sentence (e.g., by absconding, escaping, bail pending appeal), count as a prior commitment. Note: Where the subject unlawfully avoids service of a prior commitment by escaping or failing to appear for service of sentence, this commitment is also to be considered in Items D and E. Example: An offender is sentenced to a term of three years confinement, released on appeal bond, and commits the current offense. Count as a previous commitment under Item B, but not under Items D and E. To be considered under Items D and E, the avoidance of sentence must have been unlawful (e.g., escape or failure to report for service of sentence).

ITEM C. AGE AT COMMENCEMENT OF THE CURRENT OFFENSE/PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)

C.1 *Score 2* if the subject was 26 years of age or more at the commencement of the current offense and has fewer than five prior commitments.

C.2 *Score 1* if the subject was 20-25 years of age at the commencement of the current offense and has fewer than five prior commitments.

C.3 *Score 0* if the subject was 19 years of age or less at the commencement of the current offense, or if the subject has five or more prior commitments.

C.4 *Definitions*

(a) Use the age at the commencement of the subject's current federal offense behavior, except as noted under special instructions for federal probation/ parole/confinement/escape status violators.

(b) Prior commitment is defined under Item B.

ITEM D. RECENT COMMITMENT FREE PERIOD (THREE YEARS)

D.1 *Score 1* if the subject has no prior commitments; or if the subject was released to the community from his/her last prior commitment at least three years prior to commencement of his/her current offense behavior.

D.2 *Score 0* if the subject's last release to the community from a prior commitment occurred less than three years prior to the current offense behavior; or if the subject was in confinement/escape status at the time of the current offense.

D.3 *Definitions*

(a) Prior commitment is defined under Item B.

(b) Confinement/escape status is defined under Item E.

(c) Release to the community means release from confinement status (e.g., a person paroled through a CTC is released to the community when released from the CTC, not when placed in the CTC).

ITEM E. PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME

E.1 *Score 1* if the subject was not on probation or parole, nor in confinement or escape status at the time of the current offense behavior; and was not committed as a probation, parole, confinement, or escape status violator this time.

E.2 *Score 0* if the subject was on probation or parole or in confinement or escape status at the time of the current offense behavior; or if the subject was committed as a probation, parole, confinement, or escape status violator this time.

E.3 *Definitions*

(a) The term probation/parole refers to a period of federal, state, or local probation or parole supervision. Occasionally, a court disposition such as 'summary probation' or 'unsupervised probation' will be encountered. If it is clear that this disposition involved no attempt at supervision, it will not be counted for purposes of this item. Note: Unsupervised probation/parole due to deportation is counted in scoring this item.

(b) The term 'parole' includes parole, mandatory parole, conditional release, or mandatory release supervision (i.e., any form of supervised release).

(c) The term 'confinement/escape status' includes institutional custody, work or study release, pass or furlough, community treatment center confinement, or escape from any of the above.

ITEM F. HISTORY OF HEROIN/OPIATE DEPENDENCE

F.1 *Score 1* if the subject has no history of heroin or opiate dependence.

F.2 *Score 0* if the subject has any record of heroin or opiate dependence.

F.3 *Ancient Heroin/Opiate Record.* If the subject has no record of heroin/opiate dependence within ten years (not counting any time spent in confinement), do not count a previous heroin/opiate record in scoring this item.

F.4 *Definition.* For calculation of the salient factor score, the term "heroin/opiate dependence" is restricted to dependence on heroin, morphine, or dilaudid. Dependence refers to physical or psychological dependence, or regular or habitual usage. Abuse of other opiate or non-opiate substances is not counted in scoring this item. However, this does not preclude consideration of serious abuse of a drug not listed above as as negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score in relation to this item).

SPECIAL INSTRUCTIONS - FEDERAL PROBATION VIOLATORS

Item A Count the original federal offense as a prior conviction. Do not count the conduct leading to probation revocation as a prior conviction.

CAREER OFFENDER

Application Note 4 to §4B1.2 is amended to read:

> The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History), other than §4A1.2(e)(1)-(3), are applicable to the counting of convictions under §4B1.1.

The purpose of this amendment is to remove the major time limitations that now apply to prior convictions for purposes of the career offender guideline. Under the current guideline, for example, a prior sentence of imprisonment exceeding one year and one month that was neither imposed nor served within fifteen years of the commencement of the instant offense would not count toward application of the career offender guideline. Retention of the current limitations is inconsistent with the need for enhanced sentencing for career offenders -- those who have committed violent or drug crimes during the course of their lives and who commit such offenses again. For such defendants a greater measure of deterrence is necessary. This amendment would eliminate the restrictions contained in §4A1.2(e)(1) through (3) so that old convictions would be subject to the career offender guideline. The only time limits that would continue to apply to prior convictions under the career offender guideline are those described in §4A1.2(d)(2), relating to sentences for less serious offenses committed prior to age eighteen.

The Commission also seeks comment on whether the definition of the term "crime of violence" in §4B1.2(1) should be narrowed. The current definition covers any offense under federal or state law punishable by imprisonment for more than a year that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(2)

CAREER OFFENDER

Application Note 4 to §4B1.2 is amended to read: applicable

> The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History), other than the time periods in §4A1.2(d)(2) and (e), are applicable to the counting of convictions under §4B1.1.

The purpose of this amendment is to remove the time limitations that now apply to prior convictions for purposes of the career offender guideline. Under the current guideline, for example, a prior sentence of imprisonment exceeding one year and one month that was neither imposed nor served within fifteen years of the commencement of the instant offense would not count toward application of the career offender guideline. Retention of the current limitations is inconsistent with the need for enhanced sentencing for career offenders -- those who have committed violent or drug crimes during the course of their lives and who commit such offenses again. For such defendants a greater measure of deterrence is necessary. This amendment would eliminate the restrictions contained in §4A1.2(d)(2) and (e) so that old convictions would be subject to the career offender guideline.

The Commission also seeks comment on whether the definition of the term "crime of violence" in §4B1.2(1) should be narrowed. The current definition covers any offense under federal or state law punishable by imprisonment for more than a year that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

OCT - 3 1991

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

Dear Judge Wilkins:

Under the Sentencing Reform Act, the Criminal Division is required at least annually to submit to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We believe that on the whole the guidelines are working well and that the Commission has met its statutory responsibilities in an exemplary fashion. There are areas, however, in which the guidelines can be improved. We urge the Commission to consider the following recommendations, which we believe will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act of 1984.

1. Criminal History

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

Our next criminal history concern is that the criminal history guidelines should be refined to distinguish more accurately serious past offenses from less serious ones. Under the current provisions

all prior sentences exceeding one year and a month are treated alike. *See* guideline §4A1.1(a). A defendant with a past first degree murder conviction resulting in a 20-year sentence would have the same criminal history score as a burglar who was sentenced to just over one year and a month of imprisonment. Not only the frequency but the seriousness of past criminal conduct is relevant to the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. § 3553(a)(2). For example, protection of the public from further crimes of the defendant should be reflected in a sentence that properly takes into account the seriousness of past conduct. We recommend either that additional criminal history points, based on a sliding scale, be provided for past sentences of five years or more.

Downward Departures

We recommend an amendment of policy statement §4A1.3 to specify that the adequacy of a defendant's criminal history category not be a basis for downward departure when a guideline mandates a particular criminal history category, such as career offenders and armed career criminals. In the case of a career offender, guideline §4B1.1 establishes an offense level related to the statutory maximum for the offense of conviction and places the defendant in Category VI, rather than the category that would apply to the defendant if his criminal history score were calculated under the guidelines.

However, several courts of appeals have undermined the career offender guideline by ruling that the sentencing court may depart downward from the guideline range where the court determines that Category VI overstates the defendant's criminal history. These courts have relied on policy statement §4A1.3 on the adequacy of the criminal history category. *See, e.g., United States v. Lawrence,* 916 F.2d 553, 554-555 (9th Cir. 1990); *United States v. Brown,* 903 F.2d 540, 544-545 (8th Cir. 1990); *United States v. Adkins,* 937 F.2d 947, 950-953 (4th Cir. 1991). In our view the Commission's placement of a career offender in the highest criminal history category is simply a guidelines mechanism to assure fulfillment of the statutory directive in 28 U.S.C. § 994(h) that career offenders be sentenced at or near the statutory maximum for the offense of conviction. It was not meant to reflect the defendant's actual criminal history category calculated under the guidelines. Under the courts' reasoning any career offender whose actual criminal history category was less than Category VI could be eligible for a downward departure on the basis of his inadequate criminal history, and the career offender guideline would become meaningless.

A similar problem could occur with respect to the armed career criminal guideline, §4B1.4, which may place a defendant in a higher criminal history category than the criminal history calculations would otherwise provide. The criminal history component of the

armed career criminal guideline operates more in the nature of a specific offense characteristic by recognizing that certain conduct (*e.g.*, possession of a machine gun) warrants an enhanced sentence and also operates to provide a guideline sentence commensurate with the mandatory minimum 15-year term provided by statute, 18 U.S.C. § 924(e). If the defendant's actual criminal history can be used as a basis to depart below the guidelines, the factors reflected in the criminal history component of the guideline would be lost.

To overcome these problems, policy statement §4A1.3 should provide that downward departure on the basis of the adequacy of a defendant's criminal history category is not warranted when the guidelines specify a particular criminal history category in lieu of the category that would otherwise result from application of the provisions in Chapter Four.

2. Career Offender Guidelines

The career offender guidelines include an objectionable application note to the definition section. Specifically, application note 4 to guideline §4B1.2 provides that the definitions from guideline §4A1.2 on criminal history apply in determining which past convictions are covered by the career offender guideline, §4B1.1. These include, for example, the guideline on the applicable time period, foreign sentences, and expunged convictions. As a result, a sentence of more than one year and a month that was neither imposed nor served during the 15 years prior to the commencement of the instant offense is not counted. Similarly, a sentence of one year and a month or less does not count unless it was imposed within 10 years of the commencement of the instant offense. These limitations are inconsistent with the statutory mandate that the Commission "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. § 994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for criminal history purposes to the career offender provision, which is designed to look at the defendant's entire lifespan.

The career offender guideline should also be revised to include a lesser category of career offender, who would receive a lesser sentence than defendants in the current category. For example, a single predicate offense could qualify for a sentence between what now would result and what a career offender would receive. This change would improve proportionality and reduce the "cliff" effect of the career offender guideline.

4A1.3 ↑ above VI

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
4201 FEDERAL BUILDING
125 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84138-1102

STEPHEN H. ANDERSON
JUDGE

FTS 588-6950
(801) 524-6950

August 2, 1991

Hon. William W. Wilkins, Jr., Chairman
Hon. Julie E. Carnes, Commissioner
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins and Commissioner Carnes:

As you know, neither the Sentencing Guidelines nor the commentary provides specific criteria for ascertaining the extent of an upward departure in cases where "the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history." U.S.S.G. § 4A1.3. This omission is causing some difficulty when courts of appeals must pass on challenges to departure sentences.

In the tenth circuit we require district courts to justify upward departures. United States v. White, 893 F.2d 276 (10th Cir. 1990); United States v. Jackson, 921 F.2d 985 (10th Cir. 1990) (en banc). However, we have not yet stated exactly what justification for the degree of departure will pass muster. In United States v. St. Julian, 922 F.2d 563, 568 (10th Cir. 1990), we state that "the process of assaying the 'reasonableness' of a particular degree of departure remains enigmatic."

An opinion now in circulation (I am on the panel, but not author) recognizes the reasonableness standard, but strongly suggests that only a sentence based upon either extrapolation or analogy from the guidelines (increments between ranges, etc.) will withstand review. This is generally consistent with our opinion in Jackson. In this regard, the opinion also emphasizes the goals of uniformity and proportionality.

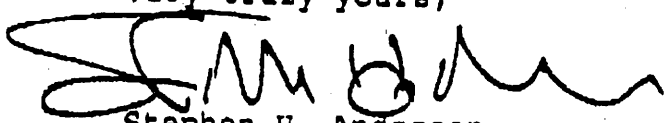
Frankly, it would be much easier for appellate courts and district courts alike if the Sentencing Commission would more definitely explain the manner by which sentencing judges, closely circumscribed within the guidelines, remain circumscribed in meting out departure sentences under the circumstances described above. As it is, there is more guesswork than guidance in practical application.

Of course, I speak only for myself in this matter, but the approach used by the Seventh Circuit in United States v. Schmude, 901 F.2d 555 (7th Cir. 1990), while perhaps overrigid, suggests a potential solution. You might want to consider an amendment to the commentary to § 4A1.3 to be included in the November, 1991 Guidelines Manual, along the following or similar lines:

> "Such a departure should be guided by the 10-15% proportional increase in guideline ranges found in Criminal History Categories I through VI. For example, if the grounds justifying a conclusion that Category VI is inadequate would normally have warranted a one category increase, the sentencing judge should consider sentencing the defendant within a range 10-15% higher than the range corresponding to Criminal History Category VI. See United States v. Schmude, 901 F.2d 555 (7th Cir. 1990)."

Conversely, if the Commission prefers a more discretionary approach, considering the many variables from case to case, it would clear the air to have a statement confirming that view.

Very truly yours,



Stephen H. Anderson

SHA:jjo
Enclosure

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

Insert here.

Commentary

Background: *This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.*

Historical Note: Effective November 1, 1987.

Departure Study
Correlate w/ letter from
J. Anderson need to amend
4A1.3 to guide upward
departure above III.
Also consider
5K2.0

Re: 5K2
↑ dept
4A1.3

: AS: 1991 WL 153144 (10TH CIR.(WYO.)))

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
JOSEPH MICHAEL KALADY, Defendant-Appellant.
No. 90-8087
United States Court of Appeals
Tenth Circuit
FILED August 15, 1991

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

Aleksander D. Radich, Assistant United States Attorney (Richard A. Stacy, United States Attorney; Gay Woodhouse, Assistant United States Attorney, with him on the brief), Cheyenne, Wyoming, for Plaintiff-Appellee.
Ronald G. Pretty, Cheyenne, Wyoming, for Defendant-Appellant.

Before ANDERSON, TACHA, and BRORBY, Circuit Judges

BRORBY, Circuit Judge.

*1 Joseph M. Kalady (Kalady, or Appellant) appeals his conviction and sentence for failure to appear in violation of 18 U.S.C. 3146. Kalady claims he was illegally denied a speedy trial, improperly refused access to a sentencing recommendation, and illegally sentenced. Familiarity with the flow of events which brought Kalady to this juncture is necessary to understand his appeal.

Background

s case begins on December 2, 1988, when Kalady was indicted by a federal _ ..nd jury in Cheyenne, Wyoming, for seven counts including mail fraud, wire fraud, and conspiracy. Kalady was at that time on parole from a previous federal fraud conviction in the Northern District of Illinois. Kalady was arraigned on the new charges in the United States District Court for the District of Wyoming (district court) in January 1989. Pursuant to a plea agreement, Kalady was then released on a personal recognizance bond after he agreed to appear for trial on May 3, 1989. Kalady did not appear on that date. A bench warrant was promptly issued for his arrest. Meanwhile, on May 17, 1989, United States Parole Commissioners in Illinois issued an arrest warrant based upon "reliable information" that Kalady had "violated one or more conditions of his release."

The second chapter in this saga opens with Kalady's arrest at a Wisconsin monastery by United States Marshals on November 8, 1989. Kalady was arrested on the parole violation warrant from Illinois. Kalady was then taken to a federal facility in Chicago, Illinois. As the pace of events temporarily quickened, a federal grand jury in Cheyenne indicted Kalady on December 1, 1989, for his previous failure to appear. The federal district court in Wyoming issued a warrant for Kalady's arrest on that charge five days later.

Ensnared in the maw of the federal parole authorities, however, Kalady was obliged to winter in Chicago. During that time period, the Government attempted to negotiate a plea agreement with Appellant's counsel in Cheyenne. Back in Chicago, although a preliminary hearing was held within a month of his arrest, Kalady's parole revocation hearing was delayed until late February

AMENDMENTS TO SENTENCING GUIDELINES

The Decay Factor

Option 1:

No change in Guidelines.

Reason for No Amendment: The addition of another 2.5% of offenders[1] as career offenders is statistically insufficient to offset the recognition that convictions obtained more than the required number of years prior to the instant offense may not be reliable enough to be used to justify an instant sentence at or near the statutory maximum.

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[1]If the decay factor were eliminated for career offenders, the Commission estmates that 2.5% of offenders would qualify for career status.

Vince

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

August 8, 1991

To: Susan Katzenelson and Criminal History Working Group

From: Visiting USPO Catherine J. Becker

Re: Career Offender Issue

As you may know, I have been coding the career offender cases for the past few weeks and I could not help coming up with a few observations which you may take with a grain of salt. To start out with a really outrageous observation, I think 4B1.1 should probably be eliminated. Seriously, this guideline is capturing far too many "would-be"serious criminals who are really drug addicts and/or alcoholics. As I have supervised these kinds of individuals for 14 years in the Baltimore Metro area, I have found that it is often the two-bit alcoholic and run-down drug addict that have a proclivity for getting into trouble. They often get caught in small drug deals and in bar related incidents. They probably will be sufficiently punished by the guideline range without the career offender enhancement. I have pictures of these guys waking up in a jail cell all nice and sober with 20 or so years to serve. One would have to look at the intent of this guideline and ask if it was really being served by putting this kind of individual away for such a long period of time. Perhaps another way of capturing the career offender could be by building the enhancements into the crimes of violence. I am not sure that the controlled substance offenses would require this enhancements at all, since Congress and the Commission have developed strong punishments for the drug dealers.

Since I don't think that 4B1.1 is going anywhere anytime soon, there has to be a way to improve this guideline. Some of the problems that I observed (other than your misapplication rules) were as follows: 1)the instant offense was either a small-time deal or a feeble attempt at a robbery; 2) the predicate offenses were either small-time deals, feeble attempts at robbery, or alcohol related assaults; 3) the predicate offenses were given

small sentences (of less than 6 months or probation for one year), yet they were able to meet the criteria under 4B1.2. In addition, probation officers seem far too eager to make the defendant a career offender, even if it could mean a misapplication of the rules.

Finally, I have found this task particularly troublesome because the impact on the offender is often so great. Although I am not expecting any great insights to come from my memorandum, I did feel compelled to share these thoughts with the group. Thank you for your attention in reading this memo and good-luck with your task.

PUBLIC COMMENT SUMMARY- CRIMINAL HISTORY AMENDMENTS[1]

The following is a summary of the public comments on Amendments 24-28, relating to criminal history.

AMENDMENT 24- PUBLIC COMMENT SUMMARY

Amendment 24 would revise §4A1.1 to narrow the related case doctrine. Opposition to this amendment was virtually unanimous.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- Judge Kazen (S.D. Tex.) opposes the amendment because,"The practical cost of requiring probation officers to check old records in order to determine how much time a defendant actually served in prison greatly outweighs the value of that addition."

Defense Attorneys- The **Federal Defenders** oppose the amendment because they feel that there is no data to support the amendment, and they have not seen any other showing of the need for change.

Probation- John Babi (W. D. N.Y.) opposes the amendment, because different states impose different periods of incarceration for the same basic offense. He fears that the amendment would lead to disparity in sentencing. Katherine Zimmerman (D. Or.) opposes the amendment since she feels that the current guideline range is adequate. Barbara Roembke (S. D. In.) recommends adding one additional point for sentences of imprisonment exceeding one year and one month in which the defendant actually served five or more years of imprisonment.

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[1] This memorandum was prepared by Noell Tin. Comments and suggestions are welcome.

AMENDMENT 25(A)- PUBLIC COMMENT SUMMARY

Amendment 25(A) sets forth two options for modifying subdivisions (f) and (j) of §4A1.2, the guideline that sets forth definitions and instructions for computing criminal history scores.

Option 1- Would revise subdivision (f) by deleting the reference to juvenile court and referring instead to offenses committed before the defendant's eighteenth birthday. It would also amend subdivision (j) to require the court to count a sentence that has been set aside for reasons other than legal defect or innocence, unless the sentence was a juvenile sentence.

Option 2- Would revise subdivision (f) to provide that a diversionary disposition is either: (1) counted if the instant offense was begun before the defendant had complied with all of the conditions of the diversionary disposition, or (2), as an alternative, not counted at all. Option 2 sets forth three alternatives for amending the guideline to deal with an adult sentence that has been set aside for reasons other than legal defect or innocence- (1) count the sentence if it contains a term of imprisonment of 60 days or more, (2) count the sentence if it contains a term of imprisonment of more than one year and one month, or (3) count the sentence if the defendant began the instant offense before the prior sentence was set aside. For juvenile sentences, Option 2 provides two alternatives- set aside sentences are not counted, or set aside sentences are not counted unless the instant offense was begun before the prior sentence was set aside.

Those commenting reached no consensus on this amendment.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- The **Eighth Circuit** opposes Option 1, because they feel that it will further limit the discretion of the district courts. They did not comment on the other options. Judge Kazen, on the other hand, strongly prefers Option 1 over Option 2, because it would consume less time for the probation officer to prepare the pre-sentence report.

Defense Attorneys- The **Federal Defenders** support Option 2 since they feel that it provides a bright line rule that brings greater fairness to the guideline. They also feel that it provides maximum deference to state-law policies in that it will enable the counting of serious offenses where the conviction has been set aside or pardoned for reasons other than innocence or legal defect.

Probation- John Babi strongly supports this amendment. Katherine Zimmerman, however, opposes all of Amendment 25 because she feels that the current guideline range is sufficient.

AMENDMENT 25(B)- PUBLIC COMMENT SUMMARY

Amendment 25(B) sets forth two options for amending §4A1.2(e), which sets forth rules for determining whether a prior conviction is stale, that is, falls outside the applicable time period.

Option 1- Would retain the present periods (15 years for adult sentences of 13 months or more and 10 years for other offenses.), but extend them by excluding any period of time when a defendant was continuously imprisoned (with options specifying what that period of time should be).

Option 2- Would call for the same extension and also revise the applicable time period to 12 years for all adult convictions.

Department of Justice- The **Justice Department** did not comment on either option specifically, but they support the elimination of the decay factor as applied to career offenders. See, Letter of October 3, 1991, from Deputy Assistant Attorney General Paul L. Maloney.

Judges- Judge Kazen opposes the amendment because he believes that it is "more problematic than useful."

Defense Attorneys- The **Federal Defenders** oppose both options, since they feel that there is no evidence that these proposals respond to a real problem.

AMENDMENT 26(A)- PUBLIC COMMENT SUMMARY

Amendment 26 proposes several revisions to the policy statement on criminal history departures (§4A1.3). That policy statement indicates that a departure may be appropriate if the defendant's criminal history category "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

Amendment 26(A) sets forth two options for amending §4A1.3 to address criminal history based departures for defendants in criminal history category VI.

Option 1- Would amend the policy statement to recommend that the sentencing court determine the extent of a criminal history departure from category VI by extrapolation.

Option 2- Would amend the policy statement to recommend that the sentencing court consider the nature of the prior offenses and, if a departure is warranted, that the court move down the sentencing table one level at a time to find the appropriate sentence.

Support for Option 2 was unanimous.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- The **Judicial Conference** and Judge Kazen favor the departure approach taken in Option 2. They also favor this approach over adding a new criminal History Category VII to the Guideline table, as described in Amendment 28, part (B). Eighth circuit judges Arnold, McMillian, Gibson, Lay, Bright, and Heaney support the amendment because it gives the sentencing court more authority to consider the nature rather than the number of prior offenses when considering whether to depart from the guidelines.

Defense Attorneys- Defense attorneys supported Option 2. The **American Bar Association** supports Option 2 as useful guidance because the disparity in sentencing at this level can be significant. The **Federal Defenders** do not strongly support either option, but they support Option 2 if the Commission adopts either proposal. They oppose Option One because they feel that, "The policy statement as amended by option 1 would call for extrapolation but would not explain how the court is to extrapolate. The policy statement would also direct the court, with regard to cases involving "unusually serious criminal history, or unusually high numbers of criminal history points," to extrapolate and then depart farther. Such a direction makes no sense if the extrapolation technique is the way in which to determine the appropriate extent of a departure." In short, the **Federal Defenders** find Option 1 to be a "vague and confusing policy statement." They believe that Option 2 is better drafted than Option 1, and although they question the need for a revision in the first place, they recommend Option 2 if the Commission wants to go forward.

Probation- Probation Officers unanimously supported Option 2. Barbara Roembke (S. D.

In.) supports Option 2, (particularly parts B and C) because she thinks they address areas which should be given consideration in determining the criminal history category. Nancy Reims (C. D. Ca.) supports Option 2 as more practical and avoiding the necessity of explaining the structure of the sentencing table to arrive at a Category VII. Dae Lynn Hollis also supports Option 2, because she believes that the court should be able to depart upward to the point to adequately reflect the seriousness of the offender's past criminal conduct.

AMENDMENT 26(B)- PUBLIC COMMENT SUMMARY

Amendment 26(B) revises §4A1.3 concerning the likelihood that the defendant will commit further crimes. The amendment clarifies that a departure under §4A1.3 may be warranted when the criminal history category does not adequately address either the likelihood of new offenses being committed by the defendant, or the type of risk posed by the defendant.

A majority of those responding supported the amendment.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- Judges unanimously supported the amendment. The **Judicial Conference** strongly supports the amendment because it reflects their concern that the Guidelines do not give enough flexibility to depart upwards based on offender dangerousness. The **Eighth Circuit** and Judge Kazen also support the amendment.

Defense Attorneys- The **Federal Defenders** oppose the amendment, because they feel that the policy statement needs the extensive changes that Amendment 26(B) would make, and they do not believe that those changes will improve the policy statement. The **American Bar Association** supports this amendment for the reasons stated in the 1990 recommendations of the **Judicial Conference**.

Probation- Nancy Reims supports the amendment and also recommends that, "**Judicial Conference** recommendation 6 would be a helpful clarification." Dae Lynn Hollis, however, disagrees with departures due to the inadequacy of the Criminal History Category based on the degree of risk or type of risk, because she feels that whether the degree of risk is physical or financial, both provide for their own degree of harm to the community.

AMENDMENT 26(C)- PUBLIC COMMENT SUMMARY

Amendment 26(C) adds language to the policy statement stating that a criminal history departure is "not warranted" for the career offender and armed career criminal guidelines.

The majority of comments disagreed with 26(C).

Department of Justice- The **Justice Department** strongly supports this amendment, because they feel that several courts of appeals have undermined the career offender guideline by ruling that a sentencing court may depart from the guideline range where the court determines that Category VI overstates the defendant's criminal history.

Judges- Judge Kazen opposes the amendment because he has, "experienced cases where the Career Criminal Category grossly overstated the person's real criminal history."

Defense Attorneys- The **Federal Defenders** oppose the amendment because they find the language "misleading and inaccurate." They also believe that the proposed guideline exceeds the Commission's statutory authority since they claim that the Commission cannot, as a matter of law, preclude a departure if there is a factor in the case that the commission did not adequately consider when formulating the Guidelines. They also believe that the amendment will overturn existing case law. See, United States v. Brown, 903 F.2d 540, 545 (8th Cir. 1990). The **American Bar Association** agrees that this amendment exceeds the Commission's statutory authority.

Probation- Nancy Reims (C. D. Ca.) opposes the amendment because she feels that "to preclude any means of legitimately departing would only lead to manipulation of the guidelines." Dae Lynn Hollis supports the amendment.

AMENDMENT 27(A)- PUBLIC COMMENT SUMMARY

Amendment 27(A) sets forth two options to amend the commentary to §4B1.1 to clarify the meaning of the term "offense statutory maximum."

Option 1- Would amend application Note 1 to indicate that the term refers to the maximum prison term before enhancement by a sentencing enhancement statute applied because the defendant has a prior conviction.

Option 2- Would amend that application note to indicate that the term refers to the maximum prison term after enhancement by such a statute.

Defense attorneys supported Option 1, while the **Justice Department** and probation officers generally supported Option 2.

Department of Justice- "To the extent there is a need for clarification," the **Justice Department** supports Option 2. They strongly oppose Option One, because they feel that the maximum term of imprisonment authorized must be the level authorized for the defendant being sentenced, not another defendant with a different criminal background.

Judges- The **Eighth Circuit** and Judge Kazen supported the amendment without comment.

Defense Attorneys- Defense lawyers supported Option 1. The **Federal Defenders** support Option 1 and oppose Option 2. They oppose Option 2 because they believe that it will encourage double counting by using the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category. The **National Association of Criminal Defense Lawyers** also supports Option 1 because it,"keeps from having the enhancement of the statutory maximum used in determining the offense level." They also recommend that the Commission incorporate into its commentaries, concerning career offender terms, definitions, and application notes, factors dealing with the court's downward departure power when the career offender enhancement penalties or the prior record overemphasizes the severity of the upgraded base offense level. See, United States v. Lawrence, 916 F.2d 553 (9th Cir. 1990).

Probation- Jerry Denzlinger (E. D. Va.), Carl Hays, and Barbara Roembke support Option 2. John Babi (W.D.N.Y.) supported amendment 27 in its entirety. Katherine Zimmerman (D. Or.) supported the purpose of the amendment, but did not understand Option 1. She opposed the rest of Amendment 27 as unworkable. Nancy Reims opposes the amendment because she feels that the current guideline is adequate.

AMENDMENT 27(B)- PUBLIC COMMENT SUMMARY

This amendment would revise the definition of the term "prior felony conviction" in Application Note 3 to §4B1.2. The amendment prevents the counting of relatively less serious crimes of violence by requiring that the statutory maximum for the offense be greater than two years.

Department of Justice- The **Justice Department** opposes the amendment, stating, "While we do not have strong policy objections to this proposal, we are concerned that it would violate the applicable statutory provision. A felony for purposes of Title 18, United States Code, is an offense punishable by more than one year of imprisonment. See, 18 U.S.C. §3559(a)(5).

Judges- The **Eighth Circuit** and Judge Kazen supported the amendment without comment.

Defense Attorneys- The **Federal Defenders** support the amendment because they feel that the current amendment includes nonserious offenses that should not be counted.

Probation- Nancy Reims and Jerry Denzlinger supported the amendment without comment. Michael Fisher (W. D. Tex.) also generally supports revising the definition of "career offender", but he is concerned that sentencing of street-level dealers under the career offender guideline is more severe than Congress intended. He acknowledges that street dealers are a menace to society, but he also believes that their careers in crime are a result of drug addiction and a poor socio-economic upbringing. He recommends that career offender guidelines would be more appropriate for the violent offender or the upper echelon drug distributor. Carl Hays (E.D. Ky) recommends that the definition of prior felony conviction remain unchanged.

AMENDMENT 27(C)- PUBLIC COMMENT SUMMARY

Amendment 27(C) would revise §4B1.2(3), which provides that the date when the judgment of conviction is entered is the date of conviction for purposes of the career offender guideline.

Department of Justice- The **Justice Department** did not comment on this amendment.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** oppose the amendment because they feel that it will unnecessarily contribute to prison overcrowding.

Probation- Nancy Reims and Jerry Denzlinger supported the amendment without elaboration. Carl Hays feels that the date should be the date of sentence.

AMENDMENT 27(D)- PUBLIC COMMENT SUMMARY

This amendment asks for comments on whether "lesser crimes of violence" should receive special treatment under the career offender guideline.

Department of Justice- The **Justice Department** opposes the amendment because they feel that such offenses should not be excluded as predicate offenses. They also feel that modifying the career offender provision to provide lower sentences for offenders convicted of such crimes is problematic because many of the sentences now provided are "near" the statutory maximum, rather than "at" it. In other words, lowering sentences would result in sentences less than "near" the statutory maximum, particularly after the reduction for acceptance of responsibility.

Judges- No judges commented on the amendment.

Defense Attorneys- The **Federal Defenders** support special treatment for "lesser" crimes of violence, recommending, "For example, the Commission could amend §4B1.2 to require that the defendant receive a term of imprisonment of more than a year and a month for the offense to qualify as a crime of violence." They would also recommend a similar requirement in the definition of "controlled substance offense."

Probation- Only Nancy Reims expressed support. Carl Hays does not think it is necessary to develop a category of "lesser" crimes. Barbara Roembke opposes the amendment because she believes that crimes of violence cannot be qualified. William Thorne (E. D. Ms.) and Jerry Denzlinger also oppose the amendment.

AMENDMENT 27(E)- PUBLIC COMMENT SUMMARY

This amendment seeks comments on whether the career offender guideline should be revised to provide that prior offenses that could have been consolidated for trial under Rule 8 of the Federal Rules of Criminal Procedure will be treated as one conviction.

Department of Justice- The **Justice Department** opposes this amendment as an artificial limitation on the career offender guideline.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** recommend adding the following new subdivision to §4B1.2:

(4) For purposes of this guideline, treat felony convictions not separated by an intervening arrest that result in concurrent, consecutive, or overlapping sentences as one prior felony conviction.

Probation- Carl Hays and William Thorne think the guideline should remain unchanged. Jerry Denzlinger and Nancy Reims recommend that separate indictments should be treated as separate convictions unless there was no intervening arrest and they were a string of the same type of criminal conduct.

AMENDMENT 27(F)- PUBLIC COMMENT SUMMARY

This amendment requests comment on whether the career offender guideline should be modified to require that all convictions occur sequentially, that is, that conduct resulting in conviction for the second prior offense occur after the conviction for the first prior offense.

Department of Justice- The **Justice Department** opposes this amendment because they believe that this amendment would provide a windfall to defendants who commit several criminal acts before they are sentenced and is inconsistent with the career offender statutory provision.

Judges- No judges commented on this amendment.

Defense Attorneys- The **Federal Defenders** believe that the career offender guideline should require sequential convictions in the same way that sentence enhancement statutes do.

Probation- Only Jerry Denzlinger supports the amendment. Carl Hays does not think the guideline should be changed, and he does not think there should be any requirement for a "strictly consecutive sequence." Nancy Reims is concerned that, "If guidelines require sentencing on the predicate priors for career offender classification, there could be three separate criminal acts with convictions, but one prior sentencing might purposefully be delayed to avoid career offender status. In the example given of rape and robbery in the same criminal activity, wouldn't they be treated as only one prior conviction anyway if they occurred on the same occasion?"

AMENDMENT 28(A)- PUBLIC COMMENT SUMMARY

This amendment requests comment on whether to establish a new Category 0 criminal history for offenders for whom Category I criminal history may be an inaccurate measure of the likelihood of recidivism.

Comments to 28(A) were mixed.

Department of Justice- The **Justice Department** strongly opposes the creation of a Criminal History Category 0. They believe that it would potentially revise the guidelines in a substantial way and alter the Commission's previous judgments about appropriate sentencing levels for all crimes. In particular, they feel that it would undermine sentencing of white collar defendants, who are unlikely to have a prior criminal history.

Judges- The **Eighth Circuit** opposes the amendment because they feel that a better approach is permit district courts to depart downward when the danger of recidivism is low and upward when the danger is high. Judge Kazen believes that the amendment would be "far more trouble than it's worth." Judge Maxwell (N. D. W.Va.) supports the amendment without comment.

Defense Attorneys- The **Washington Legal Foundation** supports the addition of a category 0, and the **Federal Defenders** support any amendment that will help to alleviate prison overcrowding. The **New York Council of Defense Lawyers** favors the creation of a Criminal History Category of 0, but opposes the amendment in its current form. They feel that the amendment as proposed would have a disparate impact on racial minorities and should be viewed with extreme caution. They write that empirical data demonstrate that inner-city youth are more susceptible to arrest or charges later found to be without substance than are white defendants. They recommend that to be denied the benefit of category 0, the defendant should have a prior arrest that, at a minimum, resulted in some accountability, even if less than a crime (e.g., a conviction of a violation, or an offense). The **American Bar Association** does not support the amendment because of their concern that a Category 0 would unfairly benefit white collar offenders. They also worry about the potential for abuse. For example, "is a prior arrest of a peaceful demonstrator a basis to deny zero category treatment?"

Probation- John Babi, Katherine Zimmerman and Barbara Roembke oppose the amendment because they feel the current guideline range is adequate. Christopher Buckman (W. D. Ms.) suggests that the amendment define Category 0 as an offender that does not have any convictions under the guidelines §4A1.1(a), (b), or (c) or §4A1.2(c)(1) regardless of the applicable time period (except in the case of juvenile adjudications). He believes that this will allow the current Sentencing Table to remain intact while giving defendants who have no criminal history a reduction in their offense level and sentencing range.

AMENDMENT 28(B)- PUBLIC COMMENT SUMMARY

This amendment seeks comment on the appropriate method of sentencing defendants with high numbers of criminal history points. It also provides three options for sentencing such defendants.

Option 1- Category VI with a 3-point spread. Category VI would include defendants with 13-15 points, and a new category VII would include cases with 16 or more points.

Option 2- Category VI with a 7-point spread. Category VI would include defendants with 13-19 points, and a new category VII would include defendants with 16-18 points.

Option 3- Category VI and Category VII each with 3 point spreads. Category VI would include defendants with 13-15 points, and a new Category VII would include defendants with 16-18 points.

Department of Justice- The **Justice Department**, "strongly believe(s) that this new criminal history category is needed to provide adequate sentences for the most serious recidivists." The Justice Department favors Option 3, because they feel that it is necessary for the Commission explicitly to eliminate the factor of "lack of youthful guidance" as a basis for departure in order to maintain the integrity of the guidelines system and ensure uniformity in sentencing. They also believe that "history of family violence" and other similar factors would have the same effect and should not be considered as a basis for downward departure.

Judges- The **Eighth Circuit** opposes the amendment because they feel that allowing judges to depart upward or downward depending on the danger of recidivism is a better approach. Judge Kazen opposes the amendment, because he feels that it should be handled as per Option 2 under Amendment 26(A). He is also concerned about the temptation to keep adding categories. Instead, he suggests leaving the categories where they are and handling the remaining cases by departure.

Defense Attorneys- The **American Bar Association** opposes the amendment because, "...this proposal is not supported by the data collected by the working group and should be shelved for that reason alone."

Probation- Barbara Roembke supports Option 3.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

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597-7959

September 25, 1990

Phyllis J. Newton, Staff Director
U. S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Ms. Newton:

I am writing in response to your August 9, 1990, memorandum soliciting comment on Guideline issues and amendments.

I. I have noticed on more than one occasion that there has been a great deal of confusion in Guideline Application resulting from the interplay of Sections 1B1.2 and 1B1.3. Generally, our officers have been able to resolve the problem of interpretation, and I believe that their ability to do so is a result of the formalized training which they have received from the Sentencing Commission. The problem arises from the fact that the two cited sections must be carefully read to begin Guideline application. On many instances, attorney's unfamiliar with the process do not see the sequential nature of these sections, occasionally bypass 1B1.2 and believe that Relevant Conduct allows for the use of any Guideline that appears to describe the overall offense behavior. I am of the opinion that these sections should be re-written in more specific language to guide new users through a step-by-step application process. Additional examples of commonly incorrect applications might prove an even greater clarification.

II. The concept of double counting is of such great importance that it should deserve a specifically numbered section rather than being hidden in the commentary. While this may be a minor point, erroneous application resulting from this process is not uncommon, and to merely highlight it might bring it to greater attention.

III. Probation Officers are almost routinely requested to amend Guideline Applications by Judges who have made decisions other than those reflected in the presentence report. While this matter is often later resolved by explaining to the Court the necessity of maintaining the integrity of the original report, such an explanation should be clearly set forth in Chapter Six to provide officers with a ready reference at the time of sentencing.

IV. The entire issue of Role in the Offense should be reviewed. There exists an unanticipated sentencing disparity arising from conflicts, both in the definition itself and between role and the ability to take advantage of a 5K1.1 departure. Role is based on managerial position primarily. We have had difficulty in several cases, primarily narcotics cases, where the managerial role could be estimated, however, the Indictment also included major drug suppliers of the organization who had no other function or relationship to the organization. Similarly, there have been several instances of very active, but low level defendants who were charged with the entire scope of the conspiracy under the reasonably foreseeable test. Nonetheless, these individuals received similar or greater sentences than more highly placed defendants. It would seem that a truer test of culpability must be considered or a disparate process will only be continued.

V. Acceptance of Responsibility: This section has evolved into pretty much of a given. Many officers tend to merely give credit for this section unless there is a definite commitment from the government that they will oppose the credit. I believe that it would be more honestly applied if it were specifically given for the plea alone with a possibly greater reduction for some concrete evidence of true acceptance such as those already delineated in the commentary.

VI. The concept of related cases should be further defined. Lengthy criminal conspiracies in this district often involve arrests on a local level for activities that are part of the conspiracy. Occasionally, the behavior is clearly part of the same pattern of behavior, but the local cases predate the scope of the conspiracy. Often in drug cases, these prior cases may well expose a defendant to career criminal provisions. These are such important issues that they should be clearly identified.

VII. The language concerning invalid (i.e. uncounseled) convictions for misdemeanors is totally confusing to probation staff. Specific language needs to be added to this section.

VIII. The fine table is exceptionally obtuse. Most officers tend to immediately rely on the fine table without consideration of the other required alternatives. Subsection (c)(4) is not clearly defined and is an ongoing problem. The reality of the situation is that most defendants can ill afford to pay the most minimal of fines and the statutory maximums are unrealistic math problems that offer no guidance to the sentencing court. I would suggest that a simple and direct fine table such as currently exists, be used in all cases with an exclusionary section for departures.

It is my opinion that the role of the presentence writer has become of even greater importance to the Court since the implementation of the Sentencing Reform Act. My officers are routinely called to chambers to explain Guideline Application as well as to provide a sounding board to individual jurists who are wrestling with sentencing decisions. Similarly, they appear frequently in open Court to explain and defend their reports. With the bifurcation of duties that exist in this office, there is now a core of officers who have come to be the hallmark by which the office is judged as a result of this greater daily exposure. It is my position that these officers should receive indepth training in Guideline Application, and I have seen that these officers do take advantage of all training opportunities. I would like to see a formalized training program established for all of my newly appointed officers to receive indepth training, of about a week's duration, solely on Guideline Application. Similarly, my experienced officers would benefit from regularly scheduled training in advanced Guideline techniques and recent decisions. I must say, however, that I am particularly impressed with the Commission's current commitment to training and the accessibility and responsiveness of your entire staff.

Sincerely,

Albert J. Christy
Chief U. S. Probation Officer

AJC/fr

U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 14 1990

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

Dear Judge Wilkins:

Under the Sentencing Reform Act, the Criminal Division is required at least annually to submit to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. 994(o). We believe that on the whole the guidelines are working well and that the Commission has met its statutory responsibilities in an exemplary fashion. There are areas, however, in which the guidelines can be improved. We urge the Commission to consider the following recommendations, which we believe will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act of 1984.

1. Criminal History

We have several recommendations regarding criminal history. First, guideline §4A1.2, which contains definitions and instructions for computing criminal history, should be amended so that sentences for separate offenses are not artificially treated as one. Guideline §4A1.2(a)(2) states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. Application note 3 provides that related cases are those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." This last factor artificially counts sentences for unrelated offenses as a single prior sentence and needlessly encourages separate trials and sentencing proceedings. The mere fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. We suggest that this third category of related cases be limited to those that were consolidated for trial or sentencing if the counts would have been

treated as a single group of closely related counts under guideline §3D1.2. This limitation would at least require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under guideline §4A1.3 on the adequacy of criminal history. See application note 3 to guideline §4A1.2. We believe that the problem needs to be corrected by a guideline, not a recommendation regarding the appropriateness of departure. The definition of prior sentence also applies with respect to career offenders, guideline §4B1.2(3), and produces results that are inconsistent with the career offender statute, 28 U.S.C. 994(h).

We also believe that the criminal history guidelines should be refined to distinguish more accurately serious past offenses from less serious ones. Under the current provisions all prior sentences exceeding one year and a month are treated alike. See guideline §4A1.1(a). A defendant with a past first degree murder conviction resulting in a 20-year sentence would have the same criminal history score as a burglar who was sentenced to just over one year and a month of imprisonment. Not only the frequency but the seriousness of past criminal conduct is relevant to the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. 3553(a)(2). For example, protection of the public from further crimes of the defendant should be reflected in a sentence that properly takes into account the seriousness of past conduct. We recommend either that additional criminal history points, based on a sliding scale, be provided for past sentences of five years or more or that some other mechanism be added to distinguish especially serious offenses, particularly crimes of violence, from less serious ones.

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

We have also noted that whether to count a sentence imposed in a case that is on direct appeal for criminal history purposes should be clarified. An application note should be added that such convictions are to be used in computing the criminal history score. Commentary language to the effect that prior sentences not otherwise excluded count in the criminal history score is not sufficient to clear up questions in this regard. See commentary to guideline §4A1.2, effective November 1, 1990; currently in application note 6 to guideline §4A1.2.

2. Career Offender Guidelines

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

3. Fraud Involving Financial Institutions

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

FIRREA, section 961(a) through (k), increased the maximum term of imprisonment from five or fewer years to 20 years and the maximum fine from $250,000 to $1,000,000 (and from $500,000 to $1,000,000 for an organization) for a violation of the following provisions of title 18, United States Code:

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

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

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

UNITED STATES GOVERNMENT

memorandum

DATE: August 31, 1990

REPLY TO ATTN OF: William P. Ross III, USPO

SUBJECT: Comments on Sentencing Guidelines

TO: G. Wray Ware, Chief USPO

For the majority of cases within the district, I would conclude that the application of the Sentencing Guidelines has become a smooth and functional process. The officers have an increased understanding of the guidelines and all of the reference material.

The areas creating some problems are in the application of Chapters Three and Four of the guidelines. One problem identified is the acceptance of responsibility. This part of the guidelines is most difficult and generates many objections to the report. This problem is compounded by the plea negotiations between the government and the defendant. Often the agreement stipulates whether or not the reduction is applied prior to the defendant's guilty plea and any interviews with the probation officer. Also, many historical cases include vague information about the extent of the defendant's involvement, and no individual can accurately assess the defendant's acceptance of responsibility. I understand the Sentencing Commission has approved a staff working group to address acceptance of responsibility, and this should be a priority.

Several matters within Chapter Four have generated comments. Many officers have voiced concern for the need to add another criminal history category to adequately reflect an offender's behavior with more than 13 criminal history points. I understand an amendment is being considered to implement such a change, and its approval would be suitable. Additionally, most officers have expressed the need for the Commission to provide a more definitive guide for related cases, particularly cases consolidated for court.

Otherwise, the memorandum dated August 9, 1990, from the U.S. Sentencing Commission mentioned that working groups will begin working on several matters that address most of the issues frequently discussed within this district.

Thank you for the opportunity to comment on this matter.

WPR/ajw

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
* USGPO 1986-491-248/40011

M E M O R A N D U M

DATE: August 15, 1990

FROM: Leslyn Amthor Spinelli, USPO

SUBJECT: **Comment on Sentencing Guidelines**

TO: Jack R. Verhagen, CUSPO

In response to Phyllis Newton's request for comments on the Sentencing Guidelines, I would offer the following:

The career offender guidelines appear to be needlessly harsh, I believe because the **career offender offense levels are tied to statutory maxima.** In the case of Dave Belanger, for example, although the underlying offense level was only 16, his career offender offense level was bumped all the way up to 34 because the statutory maximum was 30 years. He was also placed into the career offender status because of two prior drug felonies, each of which yielded only one criminal history point. I would suggest that the career offender provisions be modified and tied to the underlying offense level. The statutory maximum in a drug case is often sky-high but unrealistic. I would suggest, for example, someone with career offender status could be subject to a sentence 50% higher, or X number of levels higher, than that dictated by the underlying guideline offense level. This would accomplish the purpose of incapacitating career offenders for longer periods of time while keeping the individual case in mind.

9/14/90

Phyllis: This represents the consensus of our staff. Also, the career offender guideline is the reason for certain felonies previously committed qualifying for this status. You might talk with Melissa Allen re: case of David Belanger

Jack

FTS 678-264-5545

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

666 EUCLID AVENUE, ROOM 606
CLEVELAND 44114

September 20, 1990

Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D. C. 20004

RE: Request for Comment

In regard to your memorandum of August 9, 1990, I write to advise that the U. S. Probation Officers involved in the preparation of Guideline Presentence Reports for the Northern District of Ohio, have some definite concerns in the areas of guideline application, and the adequacy of current training programs.

Guideline Application:

1. The present guideline manual should include more detailed explanation in the application of departures, especially downward departures, giving the writer more flexibility in recommending departures for reasons other than those stated in the manual.

2. A clearer description is needed in the areas of Uncounseled Convictions, especially felony convictions (Section 4A1.2, Commentary #6), and in the area of career offender. For example, what constitutes a "crime of violence."

3. It would appear some consideration should be given to revising Commentary #3 to 4A1.2, Related Cases. Multiple concurrent sentences are not adequately being taken into consideration due to their consolidation, thus providing a criminal history category which does not truly reflect the defendant's pattern of criminality.

4. Mitigating Role: Section 3B1.2; the Commentary and Application Notes are vague and need clarification.

5. Section 3C1.1 and Application Note 1(c) need to be expanded, in terms of the types of behavior which constitute Obstruction of Justice.

6. The area of multiple count guideline application needs to be expanded to clarify and explain differences in guideline 3D1.2(a), (b) and (c).

TRAINING NEEDS:

1. The compendium of "Questions Most Frequently Asked" is considered valuable. A semi-annual update would be most useful.

2. The Selected Guidelines Application Decision is considered valuable to better understanding the U. S. Sentencing Guidelines. This information should continue to be provided to all who write guideline presentence reports

SUGGESTION:

Portions of the United States Sentencing Commission Guidelines Manual should be typed on to a floppy disc for transfer to a hard drive. Then make this program available to all presentence writers. Writers often use information which is directly quoted from the guideline manual in preparing presentence reports. This program would provide writers with the capability of easy access to guideline statements which could be transferred through WordPerfect and incorporated directly into the presentence report.

Very truly yours,

Keith A. Koenning

Keith A. Koenning
Chief Probation Officer

PRELIMINARY

SUMMARY OF CASE FILES
DECAY FACTOR REVIEW

Number of Case Files Involved:

Number of FY1990 Offenders:	29,011 cases
Number of Drug Offenders, Over Age 27, with some criminal history:	5,559 cases
Number of Violent Offenders, Over Age 27, with some criminal history:	1,148 cases

Number of Case Files Reviewed:

Number of Drug Offender Files Identified (Random Sample):	350 cases
Number of Violent Offender Files Identified (Random Sample):	250 cases
TOTAL FILES PULLED, SUMMARIZED, QC'ED:	**590 cases**

Case Files Screened Out:

Insufficient COV/CSO Priors:	**425 cases (71%)**
(Includes cases with 0 or 1 qualifying prior convictions for COV/CSO -- including prior convictions that definitely are or might possibly qualify (e.g., commercial burglary, involuntary manslaughter, assault, etc.)	
Defendant Sentenced as Career Offender:	**64 cases (11%)**
Instant Offense Is Not a COV/CSO:	**11 cases (2%)**
(Includes cases with any number of qualifying prior convictions for COV/CSO, but an instant offense that is not a COV/CSO)	
TOTAL SCREENED OUT:	**500 cases**

Potential Career Offender Without Changing Decay Factor:

Qualify as Career Offender, But Not Sentenced as Career Offender: 12 cases (2%)

* already has 2 or more qualifying, felony priors
* may have decayed priors, but none needed to make career offender
* no changes in COV/CSO definition required
* not actually sentenced as career offender

(includes 1 att. sexual battery, 1 DWI manslaughter)

Would Qualify as Career Offender If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: 19 cases (3%)

* no decayed prior needed to make 2 or more priors
* need to research the felony nature of an A/B or threatening communications prior (14 cases) or residential nature of a burglary prior (5 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If Commercial Burglary and Felony Drug Possession Rules Were Changed: 18 cases (3%)

* no decayed prior needed to make 2 or more priors
* need to change COV/CSO definition to include commercial burglary (7 cases) and felony drug possession (11 cases)
* could only be a career offender if this factor were changed

TOTAL CAREER OFFENDER REGARDLESS OF DECAY FACTOR CHANGE: 49 cases (8%)

Potential Career Offender If Decay Factor Modified:

Would Qualify as Career Offender If No Decay: 15 cases (2%)

* decayed prior needed to make 2 or more priors
* no changes in COV/CSO definition required

(includes 3 non-aggravated assaults, 1 manslaughter)

Would Qualify as Career Offender If No Decay and If We Knew the Assault/Battery Was a Felony or If We Knew the Burglary Was Residential: 19 cases (3%)

* decayed prior needed to make 2 or more priors
* need to research the felony nature of an A/B prior (8 cases) or residential nature of a burglary prior (11 cases) to determine if they qualify under existing rules

Would Qualify as Career Offender If No Decay and If Commercial Burglary and Felony Drug Possession Rules Were Changed: 7 cases (1%)

* decayed prior needed to make 2 or more priors
* need to change COV/CSO definition to include commercial burglary (4 cases) and felony drug possession (3 cases)

TOTAL QUALIFYING WITH DECAY MODIFICATIONS: 41 cases (7%)

PRELIMINARY

SUMMARY OF CASE FILES
NARROWING FACTORS REVIEW

Number of Case Files Involved:

Number of FY1990 Career Offenders:	653 cases
Files Identified (50% Sample):	327 cases
Files Pulled and Summarized:	322 cases

Case Files With "Aberrant" Applications:

Ratcheting Used:

21:841(b)(1)(B) Drug Enhancement From 40-year Maximum to Life Maximum:	10 cases (3%)
21:841(b)(1)(C) Drug Enhancement From 20-year Maximum to 30-year Maximum:	11 cases (3%)
21:844 Drug Enhancement From 1-year Maximum to 3-year Maximum:	2 cases (1%)
18:924(e)(1) Firearms Enhancement From 5- or 10-year Maximum to Life Maximum:	6 cases (2%)
Total Ratcheting:	**29 cases (9%)**

Related Cases Separated: **Total:** **7 cases (2%)***

Misapplication of Career Offender Rules:

Acceptance Not Given: (Includes applications before new guideline used, or other failure to apply the reduction)	21 cases (6%)
Improper Priors Used: (Includes use of misdemeanor priors, old priors, felony possession of drug priors, non-residential burglary priors)	15 cases (4%)
Total Misapplication:	**36 cases (11%)**

Used "Actual Offense" Analysis:

Felon in Possession:	6 cases (2%)
Miscellaneous Priors:	9 cases (3%)
Total Actual Offense:	**15 cases (4%)**

Career Offender Recommended But Not Applied:

Inadequate counsel/unconstitutional prior conviction:	2 cases (1%)
Improper Priors Used: (Includes felon in possession (4 cases), drug possession (5 cases), burglary (1 case))	10 cases (3%)
Improper instant offense (Felon in possession):	1 case (0%)
Unknown:	7 cases (2%)
Total Not Applied:	**20 cases (6%)**

TOTAL "ABERRANT" CASES: **107 cases (33%)**

Cases With "Minor" Instant Offenses:

(Does not include cases where career offender was not applied by court)

Felon in Possession of Firearm:		**14 cases (4%)**
Simple Possession of Drugs:		**2 cases (1%)**
Threatening the Life of the President:		**1 case (0%)**
Marijuana Distribution (Less than 50 Ks):		**2 cases (1%)**
	Total:	**19 cases (5%)**

Cases With One "Minor" Prior Offenses:

(Does not include cases where career offender was not applied by court; the "minor" prior had to be a necessary prior for the career offender provision to be triggered)

Assault/Battery (Non-Aggravated):		**8 cases (2%)**
Manslaughter:		**3 cases (1%)**
Felony Possession of CSO:		**10 cases (3%)**
Telephone Count:		**1 case (0%)**
Extortion/Threatening Communications:		**0 cases (0%)**
Criminal Recklessness:		**1 case (0%)**
	Total:	**23 cases (7%)**

Cases With Two "Minor" Prior Offenses:

(Does not include cases where career offender was not applied by court; the two "minor" priors had to be the only necessary priors for the career offender provision to be triggered)

Assault and Manslaughter:		**2 cases (1%)**
Two Prior Assaults:		**1 case (0%)**
Two Prior Felony CSO Possessions:		**1 case (0%)**
Assault and Grand Larceny:		**1 case (0%)**
	Total:	**5 cases (2%)**

TOTAL CASES WITH "MINOR" OFFENSES:	**47 cases (14%)**
Total "minor offenses" excluding felon in possession:	**33 cases (10%)**
Total "minor offenses" excluding felon in possession and felony drug possession:	**17 cases (5%)**

Note: * The related cases figure may be somewhat low in light of the difficulty of applying the related cases rule.

CAREER OFFENDER CASE FILE SUMMARY
NARROWING FACTORS

Coder _____
QC _____
Case No. _____

Current Offense

101 USSC Identification Number _____

102 Statute(s) of Conviction _____ _____ _____ _____
(Include Penalty Enhancement Statutes)

103 Statutory Maximum _____ _____ _____ _____

104 Do Mandatory Minimums Apply? Yes _____ years No _____

105 Brief Summary of Offense

_____

_____

_____

106 Age of Offender at Time of Offense _____ years

107 Role of the Drug Offender (Circle one)

P -- Peripheral Role C -- Courier D - Deals Above Street Level/Manufacturer U -- Unknown
M -- Minor Role S -- Sells to User L - Leader/Highest Level Dealer N -- Not Drugs

Range and Sentence

200 Guideline(s) Applied for Substantive Offense _____ _____ _____

201 Guideline Total Level and Range level _____ _____ months

202 Career Offender Total Level and Range level _____ _____ months

203 Sentence Imposed _____ months

204 Departure Entered

U -- Upward Departure
D -- Downward Departure
A -- Apparent Departure
N -- No Departure

Basis for Departure _____

Instant COV/CSO

	Offense	Juris-diction	Date Commenced	Date of Sentence	Force in Conduct?**	Force in Generic?**
300						

_____

Prior Offenses

400 Total Number of Priors _____

	COV/CSO (Describe)	Juris-diction	Date of Sentence	Date of Release	Date Out Of System	Force in Conduct?	Force in Generic?	Related Cases?
401								

_____

_____

_____

_____

_____

	Most Recent Felony Offense	Juris-diction	Date of Sentence	Date of Release	Date Out of System
402					

_____

403 Indicate using an " * " priors counted by the court for career offender purposes.

"Force in Conduct" -- (Indicate only one) --

W -- Offense Conduct Involved Dangerous Weapon
F -- Offense Conduct Involved Use of Force
T -- Offense Conduct Involved Threat of Use of Force
CSO- Offense Conduct Involved CSO With No Force
N -- Offense Conduct Did Not Involve Use or Threat
U -- Unknown

"Force in Generic" (Indicate only one) --

W -- Generic Offense Involved Use of Dangerous Weapon
F -- Generic Offense Involved Use of Force
T -- Generic Offense Involved Threatened Use of Force
CSO- Generic Offense Involved CSO With No Force
N -- Generic Offense Did Not Involve Use or Threat
U -- Unknown

"Related Cases"

SO -- Prior Occurred with Another on Single Occasion
SCS -- Prior Occurred with Another as Part of Single Common Scheme or Plan
C -- Prior Consolidated with Another for Sentencing
N -- Prior Not Related to Another
U -- Unknown

Criminal History

500 Criminal History Points _____
501 Criminal History Category _____

Application of Career Offender (Circle any that apply)

600 Ratcheting (list other offense or provision) _____
601 Related Cases Counted Separately (list offenses) _____
602 Apparent Misapplication of Career Offender Rules (explain) _____
603 Used "Actual Offense" Analysis to Determine Nature of Instant or Prior Conviction

Court Comments (Circle any that apply)

700 Career Offender Range Considered Excessive
701 Career Offender Range Considered Insufficient
702 Court Commented on Rules Used to Apply Career Offender
703 Court Recommended Alternative Rules
704 Court Comments Not Available
705 Court Comments Available, but None Made Regarding Career Offender
706 Quote Relevant Comments _____
_____

Miscellaneous

900 Career Offender Recommended but not Used in Sentencing
901 Comments _____

CAREER OFFENDER CASE FILE SUMMARY
MODIFYING DECAY FACTOR

Coder _____
QC ____
Case No. _____

100 USSC Identification Number _____

Prior Offenses

200 Controlled Substance Offenses and Crimes of Violence	Juris-diction	Date of Sentence	Date of Release	10-year Rule Excluded	15-year Rule Excluded	Not Excluded

201 Number of **KNOWN COV and CSO** Prior Convictions (Not Related) _____
(Drug Distribution/Sale, Homicide,
Forcible Sex Crimes, Robbery, Residential Burglary)

202 Number of **POSSIBLE COV and CSO** Prior Convictions (Not Related) _____
(Felony Drug Possession, Commercial Burglary, Non-"Simple Assault," Battery,
Threatening Communications, Extortion, Involuntary Manslaughter)

203 Total Number of **ALL** Prior Convictions (Exclude only minor Misdemeanors) _____

204 **SCREEN OUTS:** (Circle the one that applies)

(1) -- The SUM of lines 201 and 202 is zero or one -- SCREEN OUT

(2) -- The defendant was sentenced as a Career Offender -- SCREEN OUT

(3) -- The instant offense is not a COV/CSO -- SCREEN OUT

(4) -- Other reason: _____

205 Total Number of COV/CSO Prior Convictions Excluded by 10-Year Rule _____

206 Total Number of COV/CSO Prior Convictions Excluded by 15-Year Rule _____

207 Total Number of COV/CSO Prior Convictions Excluded by these Two Rules _____

Instant COV/CSO

300	Offense	Jurisdiction	Statute	Maximum/ Minimum	Date Commenced	Date of Sentence

301 Brief Summary of Offense

_____

_____

_____

302 Role In the Drug Offense (Circle One)

P -- Peripheral C -- Courier D -- Deals Above Street Level/Manufacturer
M -- Minor Role S -- Sells to User L -- Leader/Highest Level Dealer
U -- Unknown N -- Not Drugs O -- Other _____

303 Age of Offender at time of Offense _____ years

Range and Sentence

400 Guideline(s) Applied for Substantive Offense _____

401 Guideline Total Level and Range level _____ _____ months

402 Chapter 3 Reduction for Acceptance
A -- Applied N -- Not Applied

403 Sentence Imposed _____ months

404 Departure Entered
U -- Upward Departure
D -- Downward Departure
A -- Apparent Departure (Indicate Direction)
N -- No Departure

Basis for Departure _____

405 Potential Total Level and Range
If Career Offender Were to Apply level _____ _____ months

Criminal History

500 Criminal History Points _____
501 Criminal History Category _____

Miscellaneous Comments

600 Court Comments on Criminal History / Career Offender _____
601 Comments _____

CAREER OFFENDER WORKING GROUP
CASE SUMMARIES

Current Offense

100 Case Number
101 USSC Identification Number
102 Statutes of Conviction
103 Penalty Enhancement Statutes
104 Dropped Counts
105 Offense Statutory Maximum
106 Summary of Offense

Range and Sentence

200 Guideline Applied for Substantive Offense
201 Guideline Level and Range
202 Career Offender Total Level and Range
203 Sentence Imposed
204 Departures Entered and Basis for Departure

Instant Crime

300 Controlled Substance Offense
301 Crime of Violence
302 Year of Conviction
303 State of Conviction
304 Federal Conviction
305 Time Between Instant Conviction and Release from Last Term of Imprisonment
306 Underlying Facts of Prior Actually Involved Use of Force
307 Underlying Facts of Prior Actually Involved Threat of Use of Force
308 Underlying Facts of Prior Did Not Involve Use or Threat of Force
309 Generic Crime Involves Use of Force
310 Generic Crime Involves Threatened Use of Force
311 Generic Crime Does Not Involve Use or Threat of Force
312 Miscellaneous

Priors *(* Indicates prior that was counted by court)*

400 Total Number of Priors
401 Total Number of Qualifying Priors (Excluding Related Priors)
402 Number of Controlled Substance Offense Priors
403 Number of Crime of Violence Priors
404 List of Controlled Substance Offenses
405 List of Crimes of Violence
406 Year of Conviction
407 State of Conviction
408 Federal Conviction
409 Length of Sentence Imposed

410 Length of Sentence Served
411 Time Between Instant Conviction and Release from Prison
412 Underlying Facts of Prior Actually Involved Use of Force
413 Underlying Facts of Prior Actually Involved Threat of Use of Force
414 Underlying Facts of Prior Did Not Involve Use or Threat of Force
415 Generic Crime Involves Use of Force
416 Generic Crime Involves Threatened Use of Force
417 Generic Crime Does Not Involve Use or Threat of Force
418 Priors Single Occasion
419 Priors Single Common Scheme or Plan
420 Priors Consolidated for Sentencing
421 Period of Time During Which Qualifying Priors Committed
422 Miscellaneous

Criminal History

500 Points
501 Category

Application of Career Offender

600 Guideline Version Used
601 Applicable Statutory Maximum
602 Ratcheting (list other offense)
603 Related Cases Counted
604 Generic Offense Used
605 Actual Offense Used
606 Acceptance or Other Reductions/Enhancements Applied
607 Downward Departure Applied and Basis for Departure
608 Upward Departure Applied and Basis for Departure
609 Apparent Misapplication of Career Offender Rules
610 Miscellaneous

Roles in Determining Career Offender Status

700 PSI Reference
701 Plea Agreement Reference
702 Prosecutor Sought
703 Court Reference
704 Defense Challenge
705 Miscellaneous

Court Comments

800 Court Felt Career Offender Range Was Excessive
801 Court Felt Career Offender Range Was Insufficient
802 Court Commented on Rules Used to Apply Career Offender
803 Court Commented on Prosecutor Discretion
804 Court Recommended Alternative Rules
805 Miscellaneous

How Many Additional Career Criminals
if the decay factor were eliminated?

The purpose of this note is to estimate how many additional career criminals would be in found in the MONFY90 database if the entire database were examined for cases which would qualify if there were no decay.

The basis for the estimate is a population of 29,011 cases from which a subpopulation of 6707 cases was identified. These cases were all the drug and violent offenders over age 27 with some criminal history. They constitute the only group where additional career offenders could be found. In that group a random sample of 600 cases was selected. Within the sample a total of 15 cases (2.5%) were unambiguously identified as individuals who would qualify as career offenders if the decay factor were abolished.

The best point estimate (single value) for the additional number of career offenders is is 2.5% of affected population, thus 6707 * .025 = 168 additional cases. This represents 0.58% of the total database of 29,011 cases. Considering that there are currently 652 identified career offenders in the database, this would increase the total by a factor of 168/652 = .26 i.e. a 26 per cent increase over the current number of career offenders.

The estimate of 168 cases is subject to sampling error. This is usually addressed with an interval estimate for a range istead of a point estimate. Using the normal approximation for the confidence interval requires the equation below: In that equation

$$p \pm \left[t\sqrt{1-f}\sqrt{\frac{pq}{n-1}} + \frac{1}{2n} \right]$$

use p = .025 (the sample estimate), q = 1 - p, n = 600 (the size of the sample), f = 600/6707 (the sampling fraction) and t = 1.96 (the percentage point of the normal distribution to produce a 95 per cent confidence interval). See Cochran (1977, page 57). The bracketed term evaluates to .012 so that the interval estimate for p is .025 ± .012 = (1.3% to 3.7%). Multiplying both ends of the interval by 6707 (the pool of possible career offenders) produces a range of (88, 248). Thus we can state with 95 per cent confidence that there are between 88 and 248 additional individuals in the file who would be considered career offenders should the decay factors be modified.

Using the same approach as before, this would amount to an increase of between 88/652 = 13% to 248/652 = 38% with 95% confidence.

Reference

W. G. Cochran (1977), *Sampling Techniques.* John Wiley and Sons, NY.

Vinco

PERCENT OF DEFENDANTS IN CRIMINAL HISTORY CATEGORY I BY OFFENSE LEVEL

Offense Level	Defendants in Criminal History Category I With:		
	No Criminal History	0 Points	1 Point
1 - 6	22.3	17.2	20.2
7 - 10	20.2	17.9	17.7
11 - 12	7.3	7.7	6.6
13 - 18	14.6	14.9	15.5
19 - 24	14.2	15.3	16.0
25 - 30	12.0	13.6	12.1
31 - 36	7.5	10.5	8.8
37 - 43	1.8	2.9	3.1
	100.0 (9,769)	100.0 (4,352)	100.0 (2,561)

SOURCE: MONFY90, N=29,011

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

COMMISSION MEETING

12/14/90

AGENDA ITEM

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Career Offender Report and Miscellaneous Criminal History Amendments

DATE: 6 December 1990

Attached for your review are the Career Offender report from the Criminal History Working Group and miscellaneous amendments related to Chapter Four of the guidelines. These proposed amendments and report are submitted for your consideration at the December 14th Commission meeting.

Attachment

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

MEMORANDUM:

DATE: December 7, 1990

TO: Phyllis Newton

FROM: Jay Meyer
Work Group Coordinator

SUBJECT: Career Offender Report and Miscellaneous Amendments for Chapter Four

Attached are two documents from the criminal history work group. The first is the group's approach to studying the Career Offender guideline as explained by Commissioner Carnes in her memorandum. The second document contains the miscellaneous amendments pertaining to Chapter Four. Both topics will be presented at the Commission meeting on December 14, 1990.

The work group received the drafted miscellaneous amendment suggestions from Peter Hoffman and then made some changes on its own. The only amendment suggestion that has two options is the proposed language that handles sentences on appeal where the execution of the sentence is stayed pending appeal (§4A1.2(l).

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

MEMORANDUM:

DATE: December 6, 1990

TO: Commissioners

FROM: Julie E. Carnes, Commissioner

RE: Amendment of Career Offender Provision, §4B1.1

I. Introduction

The Commission has requested that the Criminal History Working Group study the advisability of two possible amendments to §4B1.1 (Career Offender) one of which would widen its scope, the other of which would narrow it. Specifically, some have questioned the appropriateness of a guideline that precludes, for purposes of determining career offender status, the counting of qualifying prior convictions occurring more than a specified number of years before the instant offense. That is, according to this argument, Congress did not impose a "decay factor" on prior qualifying convictions in its original direction to the Commission to draft a career offender provision. Further, these individuals argue, the existence of a time restriction on the counting of prior convictions is at odds with the common sense notion of a career offender as one who has likely been committing crimes most of his

or her life and who therefore might be expected to have older qualifying convictions.

Second, some individuals also question whether the guidelines' definition of a "crime of violence" sweeps too broadly, with the result that it includes as career offenders people whose prior crimes do not actually suggest that these individuals threaten the kind of danger to security that the career offender provision was intended to address. Specifically, a particular statute can meet the elements of threatened or actual use of force laid out by §4B1.1's definition of a crime of violence, but conduct sufficient to satisfy that statute can be non-serious in nature; e.g., a barroom brawl subject to conviction under a felony assault statute, a heated verbal dispute with acquaintances (sort of "fighting words plus") that in some states will constitute a violation of a terroristic threat statute.

Accordingly, these observers point out, the Commission should attempt to narrow its definition of a crime of violence.

II. Research Necessary to Determine Appropriateness of Particular Amendments

With regard to the time period limitations now present in the career offender provision, it would be easy enough to draft language that would delete that provision. With regard to an amendment that would prevent the counting of relatively non-serious crimes that nevertheless fit the definition of a "crime of violence," the narrowing of the present definition presents a more difficult drafting problem.

Of course, the initial questions are whether there is a need for either amendment and, if so, the ramifications of these changes. Extensive review of existing monitoring data is necessary before the Working Group can arrive at an intelligent analysis of these initial questions. The Group feels that this review should proceed generally along the following lines.[1]

A. Time Requirement For Counting Of Prior Offenses

In examining the impact of an amendment that would delete the time period restriction on the counting of prior crimes, the Group obviously needs to determine approximately the number of total offenders that would be affected by this change; that is, how many defendants with old convictions that were not counted would be considered to be career offenders with a rule that permitted the counting of these convictions? There is no quick or easy way to accomplish this goal.

Obviously, the starting pool consists of those offenders whose instant offense is a crime of violence or drug trafficking offense, as defined in §4B1.2. To determine which of these offenders would have been career offenders, but for the time period restriction, we would have to individually read each file, since "old" convictions that were not countable were obviously not coded by Monitoring. Yet, since this pool constitutes over 50% of the total pool of offenders, an effort to review each file would be beyond the resources of the Working Group.

---

[1] Attached to this memorandum is a proposed research strategy drafted by Susan Katzenelson.

Accordingly, the Group proposes that we take a sample of 570 cases, as described in the attached research proposal, to determine the impact of an amendment deleting the time period requirement.

B. An Amendment Narrowing the Definition of a Prior Qualifying Offense

To examine the need for an amendment narrowing the present definition for prior offenses that are countable for purposes of determining career offender status, the Commission will likely want to examine the cases already sentenced pursuant to §4B1.1 to identify instances in which it appears that the applicable definition brings in offenses that comply literally with the standard, but that appear not to represent the kind of serious conviction envisioned by Congress in the Sentencing Reform Act.

One suggestion as a possible limitation on prior qualifying offenses would be a requirement that the prior offenses, or at least prior crimes of violence, would have to have received a sentence of over a year and a month or over 60 days, as required by §4A1.1 (a) and (b), in order to count for career offender status. The Group will have to thoroughly examine the cases already sentenced under §4B1.1 to ensure that this definition would not exclude too many prior offenses involving serious crimes of violence.

Another approach would be to attempt to identify which prior offenses appear to represent non-serious crimes. If the latter is small in number, these offenses might be described in the guidelines as a ground for a downward departure or as offenses that would not be counted in determining career offender status.

The initial problem in adopting either approach is the Group's present inability to identify those defendants who have been sentenced as career offenders. Monitoring does not code this classification, so the Group must attempt to identify these individuals by other means, as described in the Research Proposal.

Summary

Given the level of interest from the field in the career offender category and the serious sentencing ramifications that result from a defendant's classification as such an offender, the Working Group believes that this provision is an appropriate area for further study. In addition, the Group has solicited an opinion from the Commission's General Counsel, John Steer, who indicates that, in his opinion, changes along the line tentatively suggested are within the Commission's statutory authority. See Attached Memorandum from John Steer.

Without the level of review previously described, however, the Working Group is unable to make an intelligent recommendation as to the wisdom or consequences of amendments in this area. Accordingly, if the Commission wishes further study, the Group would propose that it be given permission to conduct research as generally described in the Research Strategy Proposal.

Proposed Research Strategy to Study
"Career Offender" Issues

A. "Decay Factor" for past convictions.

In order to assess the impact of the possible abolition of any "decay factor", (i.e. counting predicate offenses any time they had occurred beyond a defendant's eighteenth birthday, independent of their recency), the following research strategy is proposed:

1. Sampling

a. Two-step cluster sampling, by
   - selecting all cases with defendants 28 years old and older*, and within that group,
   - selecting cases in the two qualifying instant felony offense categories of crimes of violence and controlled substance offenses.

b. Random sampling of five percent of the cases from the crimes of violence and the controlled substance offenses clusters.

c. Estimates from existing monitoring data from MON690 indicate that approximately 66 percent of the cases, (around 24,000), have defendants 28 or older, with approximately 42 percent of those cases involving drug possession and distribution, and another 6 percent involving crimes of violence.
A random 5 percent sample would yield approximately 70 cases of crimes of violence and 500 cases of controlled substance offenses, for a total sample of 570 cases.

2. Analysis

Review and analysis of all the sample cases for criminal history - specifically, for countable predicate offenses within the defendant's entire adult history.

*Note: A defendant population aged 28 and older was chosen in order to accomodate the "Applicable Time Period" specifi-

cations set out in 4A1.2(e) for counting prior sentences.

3. Findings

The estimated number of additional cases in which the defendant would qualify to become "Career Offender" with the abolition of any decay factor, (i.e. "widening the net").

B. "Threshold Level" of predicate offense severity.

In order to assess the impact of a possible increase in the threshold for offense severity as measured by the actual sentences for predicate offenses, (i.e. counting only predicate offenses with an actual sentence of one year and one month or more imprisonment), the following research strategy is proposed:

1. Sampling

a. Two-step process by

- Selecting all the cases in Criminal History Category VI, and within that category
- Selecting all the cases with a qualifying instant offense, (i.e. crimes of violence or controlled substance offenses).

b. Estimates from existing monitoring data from MON690 indicate 2155 cases in Criminal History Category VI, with approximately 50 percent of them involving instant convictions for violent and drug offenses. The estimate would involve a sample of about 1,100 cases.

2. Analysis

Review and analysis of all sampled cases, to:

- Identify defendants who were sentenced under 4B1.1 as "Career Offenders";
- Review their criminal histories for predicate offense convictions and sentences; and
- Assess whether their "Career Criminal" status under 4B1.1 would have been affected by an increased threshold level of severity.

3. Findings

The estimated number of cases in which the defendant would not qualify to be a "Career Offender" under a new and more strict definition of the severity of predicate offenses, (i.e. "narrowing the net").

C. Resources.

A satisfactory analysis of existing information would require the allocation of appropriate resources by the Staff Director. Requested resources would include:

- Programming, to generate the two samples/file lists by USSCID;
- Filing help, to pull/refile the sample cases identified, (for an estimated 1,670 cases in the two samples);
- Review and analysis of relevant cases for a variety of criminal history items;
- Coding, tabulation and statistical analysis of findings;
- Report preparation/presentation of the findings for consideration by the Commission.

CAREER OFFENDER WORKING GROUP

ISSUES FOR REVIEW DURING 1992 AMENDMENT CYCLE

1. Definitions of Crime of Violence and Controlled Substance Offense

   - Narrowing Definitions to Preclude Counting Non-Serious Offenses (Certain Assaults, Terroristic Threats)
   - Impact of State Variations in Definitions
   - Impact of P.O. Inability or Failure to Determine Nature of State Offense

2. Revisiting Decay Factor

   - Statutory Authority for Eliminating or Retaining Decay Factor
   - Policy Justifications Underlying Decay Factor

3. Counting Multiple Prior Offenses Occurring During Same Course of Conduct

   - Statutory Authority
   - Policy Justifications

4. Limiting "Ratcheting" of Sentences (Using Career Offender in Tandem with Mandatory Minimums, particularly Armed Career Criminal)

5. Impact of Plea Bargaining and Prosecutorial Discretion

   - Initiating the Decision to Impose Career Offender Sanctions
   - Charging Decisions that Impact Availability of Career Offender
   - Plea Bargains that Impact Availability of Career Offender

6. Sources for Miscellaneous Issues

   - Case Law
   - Field Comments (Box 11, Letters, Fed. Register Announcement)

Career Offenders

1. Population - hypothetically, there are two populations of interest:

- Defendants sentenced as Career Offenders;
- Defendants not sentenced as Career Offenders, who could qualify by eliminating the "decay" factor for criminal histories.

2. Data - as of June 11, 1991, there were 1,421 cases identified in Monitoring in which the defendant was sentenced as a Career Offender: 652 of them in FY1990. Of defendants not sentenced as Career Offenders, a potential population could be delineated by instant offense (approximately 50% of all Monitoring cases have a qualifying instant offense of conviction for drugs or violence), the existence of any criminal history, and defendant age.

3. Sampling - comparable samples of the two target populations:

- Career Offenders: a random sample of all cases, (i.e. a 25% or 50% sample of 1,421); or a sample year, (with FY1990 being the most complete);
- Non-career Offenders: a random sample of qualifying cases (as defined by instant offense, age, priors, etc.), with offense/offender characteristics matching Career Offenders as closely as possible.

In determining the samples and sample size, consideration should also be given to the number of cases the Working Group can realistically plan to review and analyze.

4. Issues - an initial list of issues would include:

- Widening the "net", (eliminating the decay factor);
- Narrowing the "net", (excluding some priors);
- Evenhandedness in application (cases that could, but do not, get sentenced under 4B1.1);
- Prison impact.

5. Variables - variables collected should correspond to the list of issues and questions raised by the application of 4B1.1:

- Instant offense: statute(s) of conviction, mandatory minimums, enhancements, role, weapons, injury, etc.;
- Conviction: plea/trial, plea agreement, 5K1.1;
- Priors: type, number, seriousness, recency, points;
- Guideline factors, range before/after, (prison impact).

Criminal History Working Group

Following are some base figures from the Monitoring data set to be considered in selecting samples for the Working Group's Career Offender project.

1. Decay factor: based on 4B1.1, 4B1.2, and 4A1.2(e), the population of interest would be defendants
   - with an instant offense involving drugs or violence; and
   - with any known criminal history, (independent of criminal history points); and
   - age 28 and over, [for the 10-year decay factor, as per 4A1.2(e)].

   The data base used for selection is the 29,011 cases in Monitoring FY1990, with a total of 5787 cases identified as relevant for studying the decay factor.

Distribution of Violent and Controlled Substance Offenses for Defendants aged 28 or Higher Having Any Known Criminal History

Offense Type	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Homicide	34	0.6	34	0.6
Kidnapping	20	0.3	54	0.9
Robbery	666	11.5	720	12.4
Assault	104	1.8	824	14.2
Burglary	36	0.6	860	14.9
Drug Distribution	4851	83.8	5711	98.7
Sex Offenses	76	1.3	5787	100.0

2. "Narrowing the net", by eliminating some priors: based on 4B1.1 and 4B1.2. The population of interest would be defendants presently qualifying as Career Offenders. Of the 28,661 cases coded for FY1990, 652 (or 2.3%) have been identified as Career Offender cases.

CRIMES OF VIOLENCE SURVEY

SAS 18:36 Tuesday, September 24, 1991

N Obs	Variable	N	Minimum	Maximum	Mean	Std Dev
1	USSCIDN	301	21975.00	58901.00	39356.26	9511.95
	CASENO	301	0	0	0	0
	ENTDATE	301	11584.00	11588.00	11585.55	1.6292590
	E_TIME	301	0	0	0	0
	STATMAX	301	0	996.00	273.9003322	424.8256545
	STATMIN	301	0	996.00	37.9169435	178.1231309
	GLTOT	301	0	47.0000000	23.1794020	8.0895637
	RANGEMIN	301	0	996.00	135.0398671	158.0038979
	COGLTOT	301	0	47.0000000	31.7475083	5.5954775
	COGLRMIN	301	24.0000000	996.00	244.9036545	170.8457024
	PRIORS	301	2.0000000	55.0000000	6.5681063	5.0245576
	PRIOR1	301	1.0000000	80.0000000	11.4152824	17.8623524
	PRIOR2	301	1.0000000	77.0000000	13.3820598	20.6353308
	PRIOR3	301	0	77.0000000	9.5614618	19.3690572
	PRIOR4	301	0	77.0000000	5.5548173	15.6171215
	PRIOR5	301	0	77.0000000	2.6378738	11.7554992
	RECENT	301	0	77.0000000	17.6544850	25.4760061
	RATCHET	301	0	1.0000000	0.1063123	0.3087502
	RELATED	301	0	1.0000000	0.0299003	0.1705960
	APPLY	301	0	1.0000000	0.1561462	0.3635984
	ACTUAL	301	0	1.0000000	0.0631229	0.2435889
	EXCESS	301	0	1.0000000	0.0531561	0.2247184
	INSUFF	301	0	1.0000000	0.0033223	0.0576390
	RULES	301	0	1.0000000	0.0664452	0.2494734
	ALTERNAT	301	0	0	0	0
	MISSING	301	0	1.0000000	0.1893688	0.3924537
	NONE	301	0	1.0000000	0.3654485	0.4823576
	COMMENT1	301	0	1.0000000	0.2159468	0.4121628
	NOTUSED	301	0	1.0000000	0.0664452	0.2494734
	COMMENT2	301	0	1.0000000	0.2358804	0.4252548
	AGE	301	21.0000000	89.0000000	37.3122924	9.2845112
	RACE	301	1.0000000	9.0000000	2.2159468	1.9226401
	SEX	301	0	9.0000000	0.5249169	2.0809158
	MANDMINM	301	0	9.0000000	4.9767442	1.0997533
	DISTRICT	301	0	91.0000000	45.4352159	24.7402497
	NOCOUNTS	301	1.0000000	99.0000000	2.5049834	6.1365687
	DISPOSIT	301	1.0000000	9.0000000	1.8272425	1.1790061
	TOTPRISN	301	0	9999.00	282.9036545	601.7680733
	NEWCODE	301	0	99.0000000	7.8870432	7.0328182
	DEPARTMN	301	0	9.0000000	6.8970100	3.6931501
	AGGROLE	301	0	99.0000000	0.6511628	5.7556848
	MITROLE	301	-2.0000000	99.0000000	0.2890365	5.7154334
	WEAP2D11	301	0	99.0000000	44.3488372	48.7978269
	WEAP2B31	301	0	99.0000000	65.7475083	45.8161111
	VICINJUR	301	0	9.0000000	1.2691030	3.0414923
	EDUC	301	1.0000000	99.0000000	16.6146179	31.8859058
	MARRIED	301	1.0000000	9.0000000	3.3754153	2.5590220
	ONGOING	301	1.0000000	9.0000000	2.7408638	2.5124937
	INVOLVE	301	1.0000000	9.0000000	2.9501661	2.5795688
	KIDCONV	301	0	99.0000000	13.0531561	32.7520559
	ADULTCON	301	0	99.0000000	17.2059801	31.2382900
	INCAR_HI	301	0	99.0000000	13.5116279	32.5819587
	INCAR_MD	301	0	99.0000000	14.0963455	32.3683079
	INCAR_LO	301	0	99.0000000	13.5215947	32.5801120
	PRIORSMN	301	0	99.0000000	14.0431894	32.3832487

TABLE OF YEARS BY CAT1

Age (in intervals)

YEARS	CAT1			
Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
Under 20	663	289	124	1076
	4.24	1.85	0.79	6.89
	61.62	26.86	11.52	
	7.33	6.94	5.14	
21 to 25	1753	776	439	2968
	11.22	4.97	2.81	19.00
	59.06	26.15	14.79	
	19.39	18.63	18.20	
26 to 30	1773	756	555	3084
	11.35	4.84	3.55	19.74
	57.49	24.51	18.00	
	19.61	18.15	23.01	
31 to 35	1537	684	435	2656
	9.84	4.38	2.78	17.00
	57.87	25.75	16.38	
	17.00	16.42	18.03	
Total	9043	4165	2412	15620
	57.89	26.66	15.44	100.00

(Continued)

TABLE OF YEARS BY CAT1

YEARS	CAT1			
Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
36 to 40	1138	599	321	2058
	7.29	3.83	2.06	13.18
	55.30	29.11	15.60	
	12.58	14.38	13.31	
41 to 45	834	441	254	1529
	5.34	2.82	1.63	9.79
	54.55	28.84	16.61	
	9.22	10.59	10.53	
46 to 50	550	261	133	944
	3.52	1.67	0.85	6.04
	58.26	27.65	14.09	
	6.08	6.27	5.51	
Over 50	795	359	151	1305
	5.09	2.30	0.97	8.35
	60.92	27.51	11.57	
	8.79	8.62	6.26	
Total	9043	4165	2412	15620
	57.89	26.66	15.44	100.00

Frequency Missing = 11038

TABLE OF RANGE BY CAT1

RANGE	CAT1			
Frequency Percent Row Pct Col Pct	TRUE	NOPTS	ONE	Total
57 to 71	22 0.20 52.38 0.34	12 0.11 28.57 0.39	8 0.07 19.05 0.45	42 0.37
63 to 78	328 2.91 56.07 5.09	165 1.47 28.21 5.42	92 0.82 15.73 5.21	585 5.20
70 to 87	13 0.12 43.33 0.20	10 0.09 33.33 0.33	7 0.06 23.33 0.40	30 0.27
77 to 96	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
78 to 97	209 1.86 56.79 3.24	110 0.98 29.89 3.61	49 0.44 13.32 2.77	368 3.27
84 to 105	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
87 to 108	19 0.17 59.38 0.29	8 0.07 25.00 0.26	5 0.04 15.63 0.28	32 0.28
Total	6445 57.27	3043 27.04	1766 15.69	11254 100.00

(Continued)

TABLE OF RANGE BY CAT1

RANGE	CAT1			
Frequency Percent Row Pct Col Pct	TRUE	NOPTS	ONE	Total
92 to 115	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
97 to 121	189 1.68 52.07 2.93	115 1.02 31.68 3.78	59 0.52 16.25 3.34	363 3.23
100 to 125	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
108 to 135	11 0.10 42.31 0.17	7 0.06 26.92 0.23	8 0.07 30.77 0.45	26 0.23
110 to 137	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
120 to 150	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
121 to 151	204 1.81 54.55 3.17	114 1.01 30.48 3.75	56 0.50 14.97 3.17	374 3.32
Total	6445 57.27	3043 27.04	1766 15.69	11254 100.00

(Continued)

TABLE OF RANGE BY CAT1

RANGE	CAT1			
Frequency Percent Row Pct Col Pct	TRUE	NOPTS	ONE	Total
130 to 162	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
135 to 168	10 0.09 47.62 0.16	6 0.05 28.57 0.20	5 0.04 23.81 0.28	21 0.19
151 to 188	152 1.35 51.35 2.36	97 0.86 32.77 3.19	47 0.42 15.88 2.66	296 2.63
168 to 210	6 0.05 26.09 0.09	11 0.10 47.83 0.36	6 0.05 26.09 0.34	23 0.20
188 to 235	75 0.67 49.67 1.16	51 0.45 33.77 1.68	25 0.22 16.56 1.42	151 1.34
210 to 262	5 0.04 22.73 0.08	13 0.12 59.09 0.43	4 0.04 18.18 0.23	22 0.20
235 to 293	42 0.37 43.75 0.65	35 0.31 36.46 1.15	19 0.17 19.79 1.08	96 0.85
Total	6445 57.27	3043 27.04	1766 15.69	11254 100.00

(Continued)

TABLE OF NWRACE BY CAT1

NWRACE CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
WHITE	3896	1859	1143	6898
	26.76	12.77	7.85	47.38
	56.48	26.95	16.57	
	46.24	47.99	50.55	
BLACK	1894	1031	614	3539
	13.01	7.08	4.22	24.31
	53.52	29.13	17.35	
	22.48	26.61	27.16	
HISPANIC	2331	845	439	3615
	16.01	5.80	3.02	24.83
	64.48	23.37	12.14	
	27.67	21.81	19.42	
OTHER	304	139	65	508
	2.09	0.95	0.45	3.49
	59.84	27.36	12.80	
	3.61	3.59	2.87	
Total	8425	3874	2261	14560
	57.86	26.61	15.53	100.00

Frequency Missing = 12098

Mode of Conviction

TABLE OF NWDISPOS BY CAT1

NWDISPOS CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
PLEA	7797	3524	2071	13392
	50.21	22.69	13.34	86.23
	58.22	26.31	15.46	
	86.74	85.12	86.26	
TRIAL	1192	616	330	2138
	7.68	3.97	2.12	13.77
	55.75	28.81	15.43	
	13.26	14.88	13.74	
Total	8989	4140	2401	15530
	57.88	26.66	15.46	100.00

Frequency Missing = 11128

Type of Sentence Imposed

BLE OF RCDESENT BY CAT1

RCDESENT CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
NO PRSN OR PROB	55 0.35 75.34 0.61	14 0.09 19.18 0.34	4 0.03 5.48 0.17	73 0.47
PROBATION	1981 12.79 65.44 22.08	608 3.92 20.09 14.74	438 2.83 14.47 18.26	3027 19.54
PROB + ALTERN	953 6.15 64.92 10.62	320 2.07 21.80 7.76	195 1.26 13.28 8.13	1468 9.47
PRISON	192 1.24 55.49 2.14	106 0.68 30.64 2.57	48 0.31 13.87 2.00	346 2.23
PRSN + SUP REL	5525 35.66 54.55 61.59	2949 19.03 29.11 71.49	1655 10.68 16.34 68.99	10129 65.37
PRSN+SREL+ALTERN	264 1.70 58.54 2.94	128 0.83 28.38 3.10	59 0.38 13.08 2.46	451 2.91
Total	8970 57.89	4125 26.62	2399 15.48	15494 100.00

Frequency Missing = 11164

...ive position of sentence to the guideline range.

Caution - This variable needs to be recoded on single offense cases only

TABLE OF SPOT BY CAT1

SPOT CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
BELOW	1207 10.75 57.37 18.78	575 5.12 27.33 18.93	322 2.87 15.30 18.25	2104 18.74
BOTTOM	2972 26.47 63.05 46.24	1087 9.68 23.06 35.79	655 5.83 13.89 37.13	4714 41.98
LESSMID	569 5.07 53.53 8.85	310 2.76 29.16 10.21	184 1.64 17.31 10.43	1063 9.47
MIDABOVE	955 8.51 54.57 14.86	530 4.72 30.29 17.45	265 2.36 15.14 15.02	1750 15.59
TOP	436 3.88 45.80 6.78	322 2.87 33.82 10.60	194 1.73 20.38 11.00	952 8.48
ABOVE	288 2.57 44.65 4.48	213 1.90 33.02 7.01	144 1.28 22.33 8.16	645 5.74
Total	6427 57.24	3037 27.05	1764 15.71	11228 100.00

Frequency Missing = 15430

TABLE OF MANDMINM BY CAT1

Presence Absence of a mandatory minimum in cases.

MANDMINM CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
NO MM	268 1.74 62.33 3.01	92 0.60 21.40 2.24	70 0.46 16.28 2.97	430 2.80
YES MM	125 0.81 62.19 1.40	44 0.29 21.89 1.07	32 0.21 15.92 1.36	201 1.31
Miscode (5)	8506 55.36 57.73 95.58	3970 25.84 26.94 96.69	2258 14.70 15.33 95.68	14734 95.89
Total	8899 57.92	4106 26.72	2360 15.36	15365 100.00

Frequency Missing = 11293

TABLE OF EDUC BY CAT1

EDUC CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
H.S.DIPLOMA	2017 14.74 58.72 25.55	884 6.46 25.74 24.02	534 3.90 15.55 25.30	3435 25.10
SOME COLLEG	1684 12.30 60.68 21.33	725 5.30 26.13 19.70	366 2.67 13.19 17.34	2775 20.28
COLLEG GRAD.	664 4.85 72.02 8.41	158 1.15 17.14 4.29	100 0.73 10.85 4.74	922 6.74
POST GRAD WK	170 1.24 70.25 2.15	46 0.34 19.01 1.25	26 0.19 10.74 1.23	242 1.77
Total	7894 57.68	3681 26.90	2111 15.42	13686 100.00

Frequency Missing = 12972

Indicates D's criminal justice status at the time of sentencing

SCJSTAT CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
A	0 0.00 0.00 0.00	4 0.03 66.67 0.11	2 0.01 33.33 0.09	6 0.04
B	89 0.65 22.70 1.13	223 1.63 56.89 6.06	80 0.58 20.41 3.79	392 2.86
C	7 0.05 11.67 0.09	38 0.28 63.33 1.03	15 0.11 25.00 0.71	60 0.44
D	31 0.23 30.69 0.39	50 0.36 49.50 1.36	20 0.15 19.80 0.95	101 0.74
E	0 0.00 0.00 0.00	4 0.03 100.00 0.11	0 0.00 0.00 0.00	4 0.03
J	35 0.26 18.42 0.44	109 0.80 57.37 2.96	46 0.34 24.21 2.18	190 1.39
Total	7904 57.70	3682 26.88	2113 15.42	13699 100.00

(Continued)

values for this variable are provided on p 11 of NCCRY90 Codebook, April 1992.

TABLE OF SCJSTAT BY CAT1

SCJSTAT CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
M	14 0.10 23.73 0.18	26 0.19 44.07 0.71	19 0.14 32.20 0.90	59 0.43
N	7683 56.08 61.13 97.20	3117 22.75 24.80 84.66	1768 12.91 14.07 83.67	12568 91.74
P	7 0.05 3.65 0.09	55 0.40 28.65 1.49	130 0.95 67.71 6.15	192 1.40
T	3 0.02 16.67 0.04	9 0.07 50.00 0.24	6 0.04 33.33 0.28	18 0.13
W	35 0.26 32.11 0.44	47 0.34 43.12 1.28	27 0.20 24.77 1.28	109 0.80
Total	7904 57.70	3682 26.88	2113 15.42	13699 100.00

Frequency Missing = 12959

TABLE OF PRIO_REV BY CAT1

# of prior convictions of supervision terms

PRIO_REV CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
NONE	7883 57.53 58.26 99.71	3614 26.37 26.71 98.13	2034 14.84 15.03 96.22	13531 98.74
ONE PROB	9 0.07 9.28 0.11	35 0.26 36.08 0.95	53 0.39 54.64 2.51	97 0.71
> ONE PROB	0 0.00 0.00 0.00	4 0.03 30.77 0.11	9 0.07 69.23 0.43	13 0.09
ONE PAROLE	1 0.01 9.09 0.01	8 0.06 72.73 0.22	2 0.01 18.18 0.09	11 0.08
> ONE PAROLE	0 0.00 0.00 0.00	3 0.02 60.00 0.08	2 0.01 40.00 0.09	5 0.04
Total	7906 57.70	3683 26.88	2114 15.43	13703 100.00

(Continued)

TABLE OF PRIO_REV BY CAT1

PRIO_REV CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
ONE BAIL	9 0.07 31.03 0.11	12 0.09 41.38 0.33	8 0.06 27.59 0.38	29 0.21
> ONE BAIL	1 0.01 20.00 0.01	0 0.00 0.00 0.00	4 0.03 80.00 0.19	5 0.04
ONE DIVERS	2 0.01 40.00 0.03	2 0.01 40.00 0.05	1 0.01 20.00 0.05	5 0.04
> ONE DIVERS	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00 . 0.00	0 0.00
MULT TYPES	1 0.01 14.29 0.01	5 0.04 71.43 0.14	1 0.01 14.29 0.05	7 0.05
Total	7906 57.70	3683 26.88	2114 15.43	13703 100.00

Frequency Missing = 12955

# of juvenile convictions

TABLE OF KIDCONV BY CAT1

KIDCONV CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
0	7903 57.61 58.82 99.80	3542 25.82 26.36 96.12	1992 14.52 14.82 94.23	13437 97.95
1	11 0.08 5.29 0.14	106 0.77 50.96 2.88	91 0.66 43.75 4.30	208 1.52
2	4 0.03 10.53 0.05	18 0.13 47.37 0.49	16 0.12 42.11 0.76	38 0.28
3	0 0.00 0.00 0.00	11 0.08 55.00 0.30	9 0.07 45.00 0.43	20 0.15
4	0 0.00 0.00 0.00	4 0.03 66.67 0.11	2 0.01 33.33 0.09	6 0.04
Total	7919 57.73	3685 26.86	2114 15.41	13718 100.00

(Continued)

TABLE OF KIDCONV BY CAT1

KIDCONV CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
5	0 0.00 0.00 0.00	2 0.01 66.67 0.05	1 0.01 33.33 0.05	3 0.02
6	0 0.00 0.00 0.00	1 0.01 50.00 0.03	1 0.01 50.00 0.05	2 0.01
7	0 0.00 0.00 0.00	0 0.00 0.00 0.00	1 0.01 100.00 0.05	1 0.01
8	0 0.00 0.00 0.00	0 0.00 0.00 0.00	1 0.01 100.00 0.05	1 0.01
9	1 0.01 50.00 0.01	1 0.01 50.00 0.03	0 0.00 0.00 0.00	2 0.01
Total	7919 57.73	3685 26.86	2114 15.41	13718 100.00

Frequency Missing = 12940

# of adult convictions

TABLE OF ADULTCON BY CAT1

Fossil variable

ADULTCON CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
0	7757 56.55 73.06 97.95	2551 18.60 24.03 69.23	310 2.26 2.92 14.66	10618 77.40
1	118 0.86 5.33 1.49	722 5.26 32.60 19.59	1375 10.02 62.08 65.04	2215 16.15
2	21 0.15 4.55 0.27	202 1.47 43.72 5.48	239 1.74 51.73 11.31	462 3.37
3	12 0.09 6.09 0.15	86 0.63 43.65 2.33	99 0.72 50.25 4.68	197 1.44
4	4 0.03 3.96 0.05	50 0.36 49.50 1.36	47 0.34 46.53 2.22	101 0.74
Total	7919 57.73	3685 26.86	2114 15.41	13718 100.00

(Continued)

TABLE OF ADULTCON BY CAT1

ADULTCON CAT1

Frequency / Percent / Row Pct / Col Pct	TRUE	NOPTS	ONE	Total
5	3 0.02 7.32 0.04	24 0.17 58.54 0.65	14 0.10 34.15 0.66	41 0.30
6	3 0.02 10.00 0.04	13 0.09 43.33 0.35	14 0.10 46.67 0.66	30 0.22
7	1 0.01 5.56 0.01	11 0.08 61.11 0.30	6 0.04 33.33 0.28	18 0.13
8	0 0.00 0.00 0.00	9 0.07 81.82 0.24	2 0.01 18.18 0.09	11 0.08
9	0 0.00 0.00 0.00	17 0.12 68.00 0.46	8 0.06 32.00 0.38	25 0.18
Total	7919 57.73	3685 26.86	2114 15.41	13718 100.00

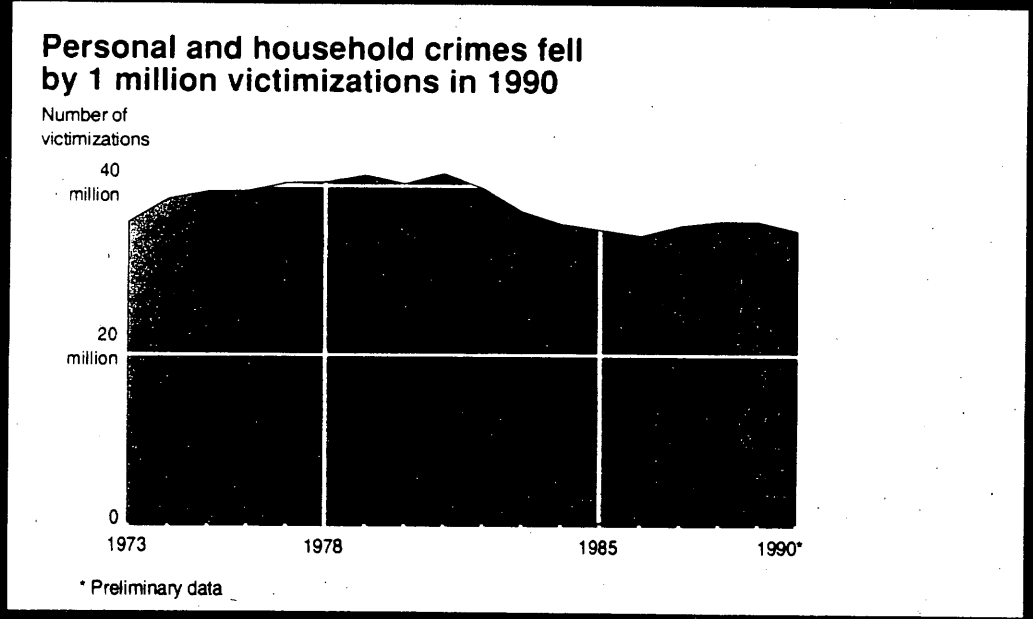
Frequency Missing = 12940

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Bureau of Justice Statistics

National Update

- BJS improves criminal justice records
- State Statistical Analysis Centers produce data on policy issues
- Crime dips; teenagers remain at risk



- Pretrial release varies by offense and offender
- Drug-related felony convictions rise
- Prison, jail, probation, and parole populations up

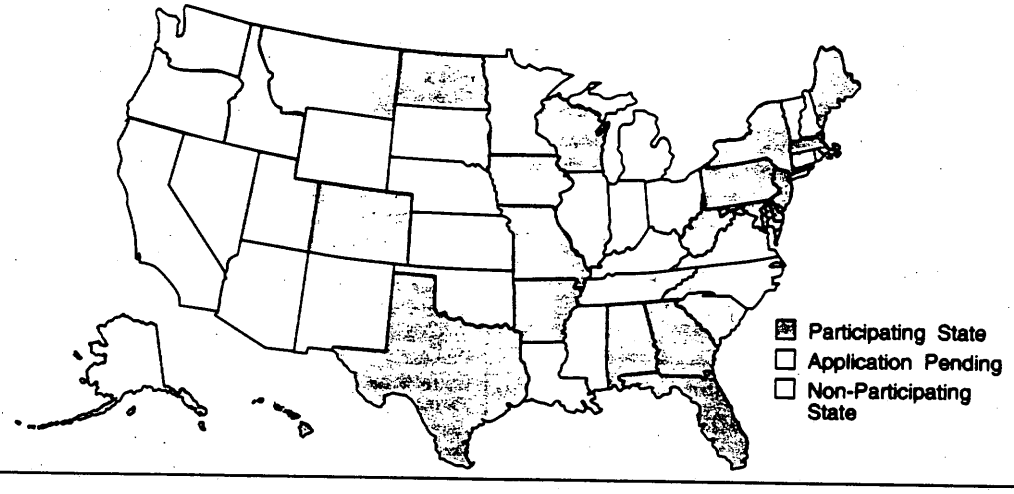
Vol. I, No. 1, July 1991

BJS implements the Attorney General's program to improve criminal history record information and stop the sale of firearms to convicted felons

27 States now participate in the Criminal History Record Improvement (CHRI) program

These 27 participating States represent:
- 69% of all offender records
- 62% of the U.S. population.

A total of $9,217,545 has been awarded to these States for CHRI as of June 1, 1991. An estimated total of 40 States will receive funds within 3 months.



Criminal History Record Improvement program established

The Attorney General established a 3-year $27 million Criminal History Record Improvement (CHRI) program administered by BJS and funded by the Bureau of Justice Assistance to enhance State computerized and manual records and identify convicted felons.

Criminal history records contain data collected by criminal justice agencies on persons arrested for a felony or serious misdemeanor. The record consists of arrest data, court information and dispositions, and, if applicable, sentencing details. Criminal history records are the most widely used records in the criminal justice process — for both criminal-justice and noncriminal-justice purposes.

BJS has been assigned responsibility for implementing the CHRI program and other related activities.

Voluntary reporting standards and overview of CHRI published

BJS and the FBI published voluntary reporting standards for the interstate exchange of criminal history information. BJS published an overview of the Attorney General's program for improving criminal history records.

BJS reviews criminal history record systems

In March 1991 BJS completed a comprehensive review of the Nation's criminal history record systems. This review was designed to serve as a baseline against which future advances can be measured.

FBI criminal history records enhanced

The Attorney General initiated a major new program to further automate FBI criminal history records and to reduce existing backlogs.

Sources: *BJS program application kit, fiscal year 1991*, April 1991, NCJ-128413 (CHRI Program). (See order form on last page.)

"BJS/FBI recommended voluntary standards for improving the quality of criminal history record information, "*Federal register*, vol. 56, no. 30, February 13, 1991.

Survey of criminal history information systems, March 1991, NCJ-125620.

Attorney General's program for improving the Nation's criminal history records and identifying felons who attempt to purchase firearms — Overview, March 1991, NCJ-128131.

Report to the Attorney General on systems for identifying felons who attempt to purchase firearms, Task Force on Felon Identification in Firearms Sales, October 1989.

BJS funds State Statistical Analysis Centers (SAC's)

SAC's collect, analyze, and publish data on crime and the operation of the criminal justice system at the State level.

• SAC's produced data on 38 issues of policy concern during 1990.

• Fifty States and three Territories have been funded under the SAC program since 1972. In 1991 Tennessee and West Virginia became the 49th and 50th State SAC's funded by BJS.

Crime statistics reporting, research, and policy analysis are the most common SAC functions

• 90% of SAC's report crime statistics, 86% conduct research, and 80% analyze policy.

SAC organizational locations

The SAC's are, and always have been, essentially executive branch agencies:
• 33% are in the office of the Attorney General
• 31% are in the office of the Governor.

The authority by which each State established its SAC dictates its mission and future. Establishing the SAC by legislation or Executive order shows commitment by the State.
• 57% of SAC's were established by legislation and 24% by Executive order.
• BJS guidelines require SAC's to operate under legislation by their fourth year.
• A majority of the SAC's are managing, or assisting with, the development of the National Incident-Based Reporting System (NIBRS) within their State.

Source: *Statistical Analysis Centers: The evolution of State criminal justice information resources*, Criminal Justice Statistics Association, April 1990.

See *BJS program application kit, fiscal year 1991*, NCJ-128413, April 1991. (See order form on last page.)

The top 20 issues of policy concern to Statistical Analysis Centers in 42 States in 1990

Issue	Number of States
Police	32
Sentencing	24
Controlled dangerous substances (drugs)	23
Courts	20
Juvenile delinquency	18
Personnel management issues	18
Overcrowding	17
Jail	16
Victims	16
Prosecution	16
Recidivism	15
Projections — population	15
Probation	12
Corrections	12
Parole	11
Alternatives to incarceration	11
Projections — crime	11
Homicide	10
Drunk driving	10
Pretrial release	9

Source: Criminal Justice Statistics Association Computerized Index to Data Sources (CIDS)

State/BJS relationship

• SAC's are also involved in investigating special problems in criminal justice that have national implications and in developing methods and techniques for analyzing such issues.

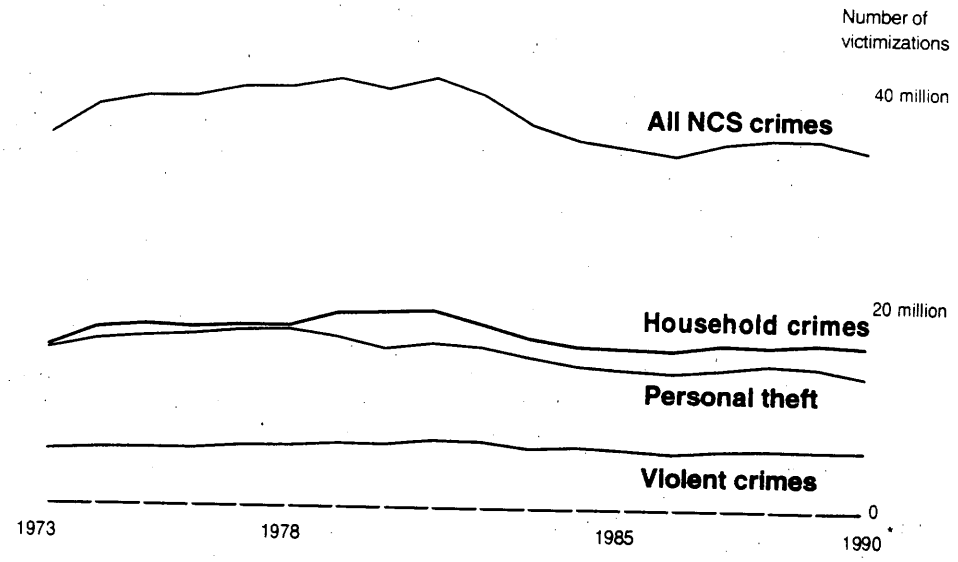
• The SAC's help meet the BJS mandate to support the development of information and statistical systems at the State and local levels, to utilize organizations within State governments, and to give emphasis to the problems of State and local criminal justice systems.

• The SAC's serve as the agent for the States to provide Offender-Based Transaction Statistics (OBTS) data annually.

Personal and household crimes fell by 1 million victimizations between 1989 and 1990

Personal and household victimizations declined from about 35.8 million in 1989 to about 34.8 million in 1990

The overall decline resulted largely from an 8% fall in the 1989 rate of personal thefts without direct contact between victim and offender.



*Preliminary data

Victimization rate for rapes, robberies, and personal thefts declined

The number of these crimes per 1,000 persons age 12 and older declined from 98 in 1989 to 93 in 1990.

About 95% of all personal thefts and about 66% of all crimes against persons involved such offenses as stealing personal belongings from public places or from an unattended automobile parked away from home.

Motor vehicle theft up

There was a 19% increase in motor vehicle theft — the only crime to rise significantly in 1990. In all there were 1.4 million completed thefts and 770,000 attempted thefts — the highest number since the National Crime Survey began in 1973.

Many crimes reported to the NCS were not reported to police

The National Crime Survey gathers data on rape, robbery, assault, personal larceny, household burglary and larceny, and motor vehicle theft, whether reported to the police or not. About 62% of all National Crime Survey offenses were not reported to the police. About 13.3 million personal and household crimes were reported to the police in 1990 — not a statistically significant change from 1989.

Final National Crime Survey estimates will be available later in 1991

In 1990, Bureau of the Census interviewers talked to about 97,000 persons in about 48,000 homes about crimes they had experienced during the previous 6 months.

Source: National Crime Survey preliminary 1990 press release, March 24, 1991. (See order form on last page.)

The National Crime Survey is improving the way it surveys victims of rape and sexual assault

How changes were developed

To evaluate the current NCS questionnaire, the Director of BJS requested the American Statistical Association to form a committee that includes statisticians, victim specialists, and government representatives. The Committee recommended more explicit questions about rape, attempted rape, sexual assault, and other coerced sexual acts. Immediate action was taken to make these changes. Additional methods for surveying rape and sex crimes are being studied.

How changes are being made

New questions will be on the NCS questionnaire beginning July 1, 1991. These questions will be phased into the sample, along with the remainder of the redesign program questions.

Questions will be asked of 10% of the sample beginning in July, of 50% of the sample in January 1992, and of 100% of the sample in 1993. These questions are expected to improve the reporting of rapes and sexual assaults recorded by interviewers through the NCS program.

Close to 1.2 million violent crimes against teenagers were not reported to the police

Violent crime rates

Each year from 1985 to 1988 youths age 12 to 19 were victims of 1.9 million rapes, robberies, and assaults. On average every 1,000 teenagers experienced 67 violent crimes each year, compared to 26 violent crimes for every 1,000 persons age 20 or older.

The risks of experiencing specific types of violent crime were higher for teenagers than for adults

Teenagers were twice as likely as adults to be a victim of robbery.

Age	Number of robberies per 1,000 persons in age group
12 to 15	9.2
16 to 19	10.0
20 or older	4.8

Source: *Teenage victims*, A BJS National Crime Survey report, April 1991, NCJ-128129. (See order form on last page.)

Much crime against teens occurs in and around schools and on the street

About half of all violent crimes against youths age 12 to 19 occurred in school buildings, on school property, or on the street. Of the violent crime on the street, 37% involved an offender with a weapon, while in 12% of crimes in school buildings, a weapon was present.

Most crimes against teens are not reported

Of the violent crimes against teenagers, about 37% of those that occurred on the street were reported to the police, compared with 22% of those on school grounds and 9% that took place in school buildings.

In about 37% of the violent crimes in school buildings and 32% of those on school property, law enforcement authorities were not notified because the crime was reported to someone else.

Two-thirds of the persons rearrested for a felony while on pretrial release were released again into the community

Felony defendants may be released in a number of different ways

Defendants may be released before trial on their promise to appear in court, on a citation issued by a law enforcement officer, on an unsecured bond which would be forfeited if they did not appear in court, or by posting a set amount of bail. Nearly two-thirds of the felony defendants in a sample drawn from the Nation's 75 most populous counties were released pending disposition of their 47,000 cases filed in February 1988.

Almost half of all pretrial releases took place on the day of arrest or the next day.

Among felony defendants released before trial, 66% were convicted. Of those convicted, 50% were sentenced to incarceration.

Most felony defendants who are not released have bail set

Among those felony defendants not released, 8 of 9 had a bail amount set, but they did not post the money required to secure release, and the remainder were held without bail.

Defendants accused of murder were less likely than other defendants to be released before trial:

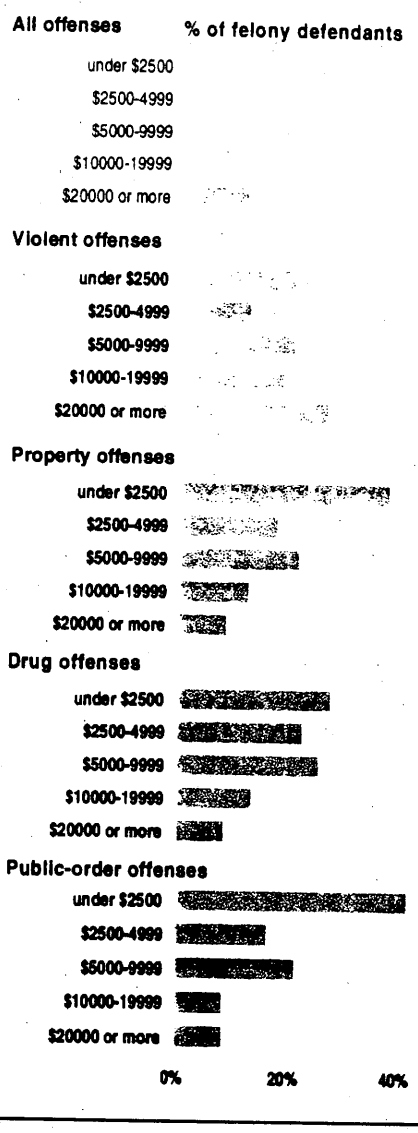
Offense charged	Percent of defendants released
Murder	39%
Rape	55
Drug sales	69
Driving-related felonies	86

Among felony defendants detained until trial, 79% were convicted. Of those convicted, 83% were sentenced to incarceration.

Fugitive warrants were issued for about 25% of the released felony defendants

Of the fugitive defendants, about—
- half returned within 3 months
- a third were still fugitives after 1 year.

Bail for most felony defendants was set at less than $5,000



About 18% of the released defendants were arrested for a felony while on release, and two-thirds of those rearrested were released again.

Among released defendants, those rearrested for another felony were younger and more likely to have five or more prior convictions than those not rearrested.

Source: *Pretrial release of felony defendants, 1988,* BJS Bulletin, February 1991, NCJ-127202. (See order form on last page.)

State courts convicted about 112,000 persons of felony drug trafficking in 1988— about 50% more than in 1986

About 667,000 persons were convicted of felonies by State courts in 1988

	Number convicted
Murder	9,340
Rape	15,562
Robbery	37,432
Aggravated assault	37,566
Larceny	95,258
Felony drug trafficking	111,950
Burglary	101,050
Other felonies	259,208

The proportion of convicted State felony drug offenders sentenced to State prison is increasing

Of the persons convicted for felony drug trafficking, 37% were sentenced to State prison in 1986, while 41% were sentenced to State prison in 1988. The number of adults arrested for serious drug trafficking offenses was about 185,000 in 1986 and 290,000 in 1988.

Most felony convictions result from guilty pleas

Among felons convicted by State courts in 1988, 91% pleaded guilty, 5% were found guilty by a jury, and 4% were found guilty by a judge.

Most convicted felons are sentenced to incarceration

Of the convicted felons, the State courts sentenced —
- 44% to prison
- 25% to local jails
- 30% to straight probation
- 1% to other sentences.

Over a third of all felony convictions in State court were for drug trafficking or possession in 1988

Offense	Percent of all 1988 State court felony convictions
Drug possession*	17%
Drug trafficking	17
Burglary	15
Larceny	14
Aggravated assault	6
Robbery	6
Forgery or fraud*	5
Other felonies*	5
Drunk driving and other traffic felonies*	4
Weapon possession*	3
Receiving stolen property*	3
Rape	2
Murder	1
Sex offenses other than rape*	1
Escape*	1

*Based on a subsample of cases.

Most criminal cases are handled in urban courts

In 1988, the Nation's 75 most populous counties had 37% of the U.S. population but accounted for —
- more than 50% of the crimes reported to the police
- about 50% of State felony convictions.

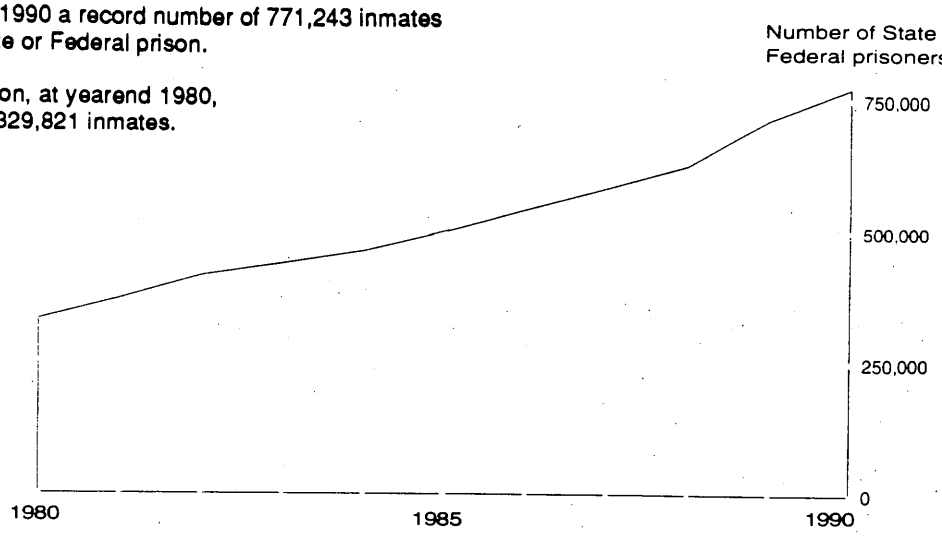
Source: *Felony sentences in State courts, 1988*, BJS Bulletin, December 1990, NCJ-126923. (See order form on last page.)

State and Federal prison populations grew 8% in 1990

Since 1980 the Nation's prison population has increased by almost 134%

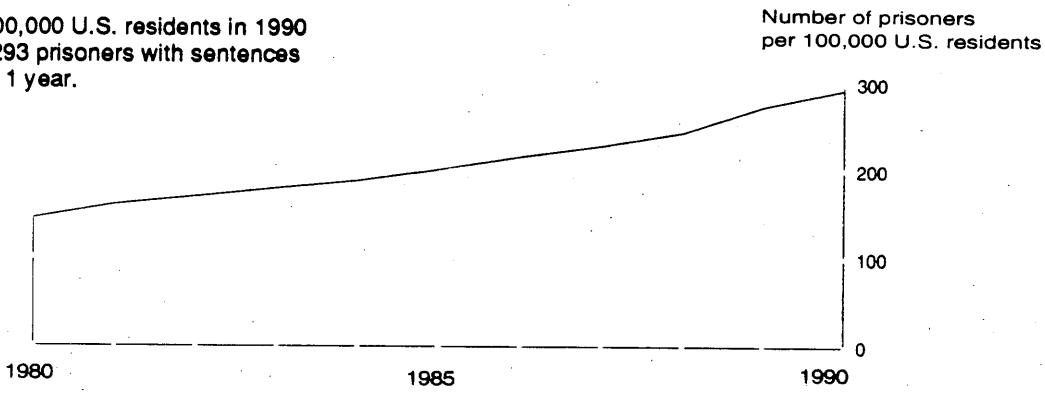
At yearend 1990 a record number of 771,243 inmates were in State or Federal prison.

In comparison, at yearend 1980, there were 329,821 inmates.



In 1990 the number of inmates per capita reached a new record

For every 100,000 U.S. residents in 1990 there were 293 prisoners with sentences greater than 1 year.



For the first time in a decade, during 1990 the number of men in prison increased faster than the number of women

The number of male prisoners rose 8.3% during the year; the number of female prisoners 7.9%.

Double-digit increases in 13 States

Thirteen States and the Federal system recorded increases of at least 10% in the number of prisoners in 1990. Three States had increases of more than 15%:
Vermont (15.9%)
Washington (15.4%)
New Hampshire (15.1%).

California's increase of more than 10,000 prisoners (11.5%) was the largest of any State.

Since 1985, two States — California and New Hampshire — have annually experienced double-digit growth in the number of prisoners with sentences greater than 1 year.

The imprisonment rate was highest in South Carolina with 451 per 100,000 residents, followed by Nevada with 444 and Louisiana with 427.

Source: *Prisoners in 1990*, BJS Bulletin, May 1991, NCJ-129198. (See order form on last page.)

More than 40% of the 1983-to-1989 rise in the jail population resulted from increases in the number of jail inmates accused or convicted of drug offenses

Drug offenses rose sharply

Such offenses accounted for 23% of the charges against nearly 400,000 men and women held in local jails during 1989 — up from 9% in 1983.

Many jail inmates used illicit drugs

Of all convicted jail inmates in 1989 —
- more than 4 in 10 said they had been using an illegal drug the month before committing the offense for which they were jailed
- about 1 in 4 said they had used a major drug, such as heroin, cocaine, crack, LSD, or PCP, in that month.

Women were more likely than men and Hispanics were more likely than non-Hispanics to be jailed on drug charges. About a third of female and Hispanic inmates were in jail for drugs.

Many jail inmates were recidivists

Of all jail inmates in 1989 —
- 46% were on probation, parole, bail or in some other criminal justice status at the time of their arrest
- more than 75% had a prior sentence to probation or incarceration
- at least a third were in jail for a violent offense or had previously been sentenced for a violent offense.

Female jail population rose sharply

This population rose from 7.1% in 1983 to 9.5% in 1989. Nearly 1 in 4 female inmates in 1989 were in jail for larceny or fraud.

Source: *Profile of jail inmates, 1989*, April 1991, NCJ-129097. (See order form on last page.)

The makeup of the jail population has changed between 1983 and 1989

From 1983 to 1989, there were increases in the proportion of inmates who were —
- female
- black
- Hispanic
- age 25-34 years
- unconvicted
- in jail for a drug offense

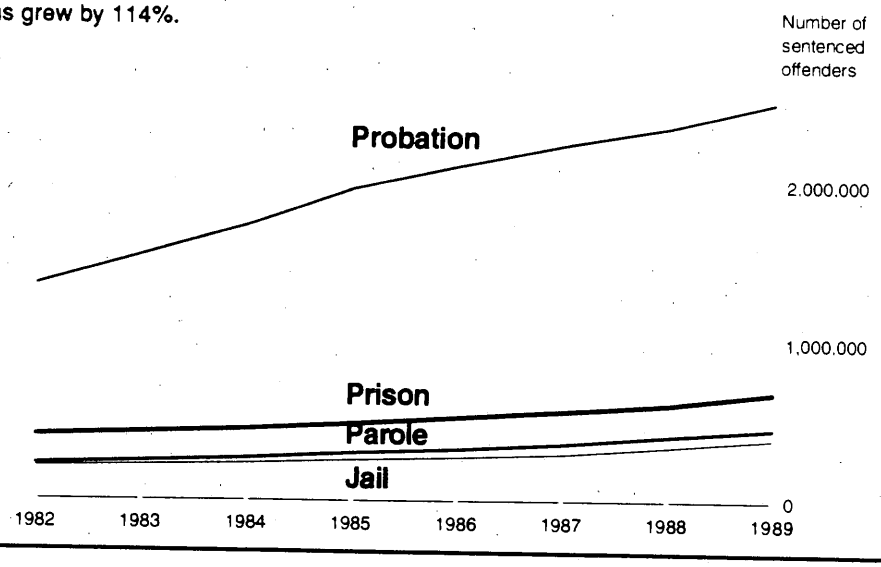
Characteristic	Percent of all jail inmates in 1983	1989
Sex		
Male	93%	90%
Female	7	10
Race/Hispanic origin		
Non-Hispanic		
White	46%	39%
Black	38	42
Hispanic	14	17
Other	2	2
Age		
17 or younger	1%	2%
18-24	40	33
25-34	39	43
35-44	12	17
45-54	5	5
55 or older	2	2
Detention status		
Convicted	60%	57%
Unconvicted	40	43
Offense		
Violent	31%	22%
Property	39	30
Drug	9	23
Public-order	21	23
Other	1	2

Note: Detail may not total 100% because of rounding.

At yearend 1989, an estimated 4.1 million adults — about 1 in every 46 — were under the care or custody of a corrections agency

All correctional populations are increasing

From yearend 1980 to yearend 1989, the number of adults in the U.S. —
- on probation grew by 126%
- on parole grew by 107%
- in jails and prisons grew by 114%.



Most offenders are supervised in the community

About 75% of all convicted offenders are being supervised in the community — not in prisons or jails.

The number of adults on probation and parole has reached a new high

At yearend 1989 —
- 2,520,479 adults in the United States were on probation
- 456,797 were on parole.

During 1989 —
- the number of adults on probation grew by nearly 6%
- the number on parole grew by 12%.

Source: *Probation and parole 1989*, BJS Bulletin, November 1990, NCJ-125833. (See order form on last page.)

Probation and parole populations grew in every region during 1989

The number of prison parolees supervised in the community rose —
17% in Southern States
14% in Western States
10% in Midwestern States
6% in Northeastern States
5% in the Federal system.

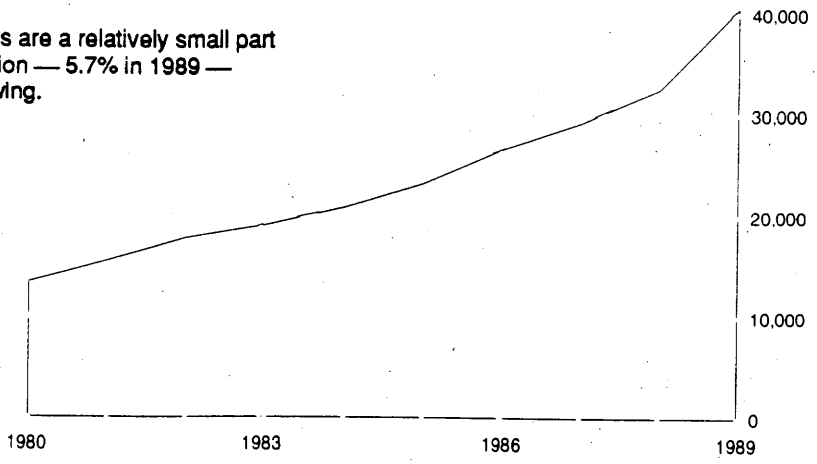
The probation population increased in every region. The highest increase was in the West (9.4%), the lowest in the Northeast (1.2%).

In 1989, the greatest numbers of adult probationers were in —
Texas with 291,156
California with 285,018
Florida with 192,495
New York with 128,707
Georgia with 125,441.

Nearly half of the women in State prisons for a violent crime in 1986 were under sentence for a homicide

The female inmate population grew by more than 200% from 1980 to 1989

- The number of women under the jurisdiction of State and Federal prison authorities at yearend 1989 was a record 40,556.
- Although female inmates are a relatively small part of the total prison population — 5.7% in 1989 — their share has been growing.



Many women inmates had been victims of abuse

Almost half the women in State prisons for a violent offense in 1986 said they had been sexually or physically abused at some time in their lives.

Of women incarcerated for a violent offense, 32% who had been physically or sexually abused were serving a sentence for killing a relative or intimate.

Most women inmates were convicted of a nonviolent offense

Of female prisoners, an estimated 41% were in prison for a violent offense in 1986 versus 49% in 1979.

Of the women in prison in 1986, 59% were sentenced for a nonviolent crime —
- 17% for fraud
- 15% for larceny or theft
- 12% for drug offenses
- 5% for public-order offenses.

An estimated 89% of the women in State prisons in 1986 had a current conviction for a violent crime or an earlier sentence to probation or incarceration for any crime.

Women inmates report drug use

Of all female inmates —
- 34% said they were under the influence of a drug at the time of their offense
- 39% said they were using drugs daily in the month before their offense
- 24% reported daily use of a major drug (cocaine, heroin, methadone, LSD, or PCP) in that month.

Source: *Women in prison*, BJS Special Report, April 1991, NCJ-127991. (See order form on last page.)

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___ State Statistical Analysis Centers
___ Decline in crime
___ Improved measure of rape and assault
___ Teenage victims
___ Pretrial release
___ Drug trafficking convictions
___ Prison inmates
___ Jail inmates
___ Probation/parole
___ Female prisoners

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☐ 04. ***Teenage victims***, 5/91, NCJ-128129 (see p. 4).
☐ 05. ***Pretrial release of felony defendants, 1988***, BJS Bulletin, 2/91, NCJ-127202 (see p. 5).
☐ 06. ***Felony sentences in State courts***, 1988, BJS Bulletin, 12/90, NCJ-126923 (see p. 6).
☐ 07. ***Prisoners in 1990***, BJS Bulletin, 5/91, NCJ-129198 (see p. 7).
☐ 08. ***Profile of jail inmates 1989***, BJS Bulletin, 4/91, NCJ-129097 (see p. 8).
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The Nation's two crime measures: Uniform Crime Reports and the National Crime Survey, NCJ-122705, 4/90
Criminal victimization in the U.S.:
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Victimization and fear of crime: World perspectives, NCJ-93872, 1/85, $9.15
The National Crime Survey: Working papers,
vol. I: Current and historical perspectives, NCJ-75374, 8/82
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Capital punishment 1989, NCJ-124545, 10/90
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State and Federal prisoners, 1925-85, NCJ-102494, 11/86
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Race of prisoners admitted to State and Federal institutions, 1926-86, NCJ-125618, 6/91
National corrections reporting program, 1985, NCJ-123522, 12/90
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See order form on last page

UNITED STATES SENTENCING COMMISSION
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MEMORANDUM

TO: Commissioners
Sid Moore

FROM: Charles Betsey CB
Associate Director of Research

Alain Sheer AS
Senior Research Economist

SUBJECT: Background Materials Related to Fraud

DATE: March 29, 1989

At its February 28 meeting the Commission asked for information on several issues related to the proposed fraud guidelines. The issues were whether the nature of fraud offenses had changed over time in terms of the amount of loss involved, the complexity of offenses (e.g., use of offshore accounts), or the incidence of or risk of bodily injury. The Research Staff was asked to review data from various sources that might bear on these issues, including the FPSSIS data on past practices, fraud cases sentenced under the guidelines, and information from various regulatory and enforcement agencies and United States Attorneys.

Several points emerge from this information. First, there is limited data bearing on the issue of increased complexity in fraud offenses, increases in the average amount of loss associated with fraud offenses, or the incidence or risk of bodily injury. The information indicating changes in the complexity of fraud offenses in general comes for the most part from personal assessments of United States Attorneys (see attached). There is evidence that bank fraud cases in particular have both increased in number in the past few years and become more complex. There are also indications that the average loss involved in such cases may have declined.

We could find no information indicating that the incidence or risk of bodily injury in fraud offenses had increased. Even in procurement fraud, where actual injury or risk of injury would appear to be most likely, there is no systematic effort to account for injury factors in fraud offenses.

Finally, our analysis of past practice data indicates that fraud offenses involving more than $5 million are relatively rare, accounting for about 3 percent of all fraud cases. Many of the larger volume cases in past practice are essentially money laundering cases. The fraud cases received to date as part of the Commission's monitoring effort involve no more than $1 million in loss; probably due in part to the length of time it takes to prosecute fraud offenses. Thus, the monitoring data shed no light on the issue of whether the average loss in fraud offenses has increased.

You will be receiving two volumes of materials that are the results of our contacts with investigative and regulatory agencies. Compiling these materials was largely the work of Alain Sheer, with assistance from Jeff Standen and Tim Daniels. We apologize in advance for the bulk of these materials, given the short time period remaining in which to review them. At the same time, many of the materials were received only in the last few days and it was not immediately obvious which materials might or might not be relevant for considering the questions at hand.

This first volume contains materials dealing with procurement fraud, including information describing the types of procurement fraud, significant recent cases, and disposition and sentence information on procurement cases from 1983 to early 1989. These data are drawn largely from the Department of Justice's Fraud and Corruption Tracking (FACT) system, and information about the system is also included.

The second volume contains materials on banking and savings and loan fraud as well as securities fraud. It includes information on the nature of bank fraud cases and descriptive statistics on pending cases. The data are presented separately for cases not involving money laundering since they involve large sums of money and may or may not be relevant for consideration of the fraud guideline. The materials from the Securities and Exchange Commission include a listing of recently prosecuted cases and their dispositions. It is not clear what if any conclusions can be drawn from these data about changes in the nature of securities fraud offenses.

Information on the projected prison impact of the proposed guideline changes related to fraud is forthcoming.

Attachments

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MEMORANDUM

TO: Charles Betsey
Alain Sheer

DATE: March 27, 1989

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases: Northern District of California

On Thursday, March 23, 1989, I spoke with Floy Dawson, head of the Criminal Division in the U.S. Attorney's office for the Northern District of California (San Francisco). Mr. Dawson has been a prosecutor specializing in fraud cases for twenty years. He reports that he believes fraud cases are "one hundred times more complex" currently than in earlier years. He thinks that this added complexity commenced around 1985. The current offenders are smarter, and take greater steps to conceal their crimes.

Mr. Dawson believes that the size of the frauds, in terms of losses caused, has also increased substantially over the same period of time. He reports that losses often exceed five million

dollars. The typical cases giving rise to these large amounts are savings and loan cases and defense procurement fraud.

Mr. Dawson does not believe that frauds are occurring with greater frequency in recent years than in past years. He has no knowledge as to whether recent frauds involve a greater risk of bodily injury. He has no recent cases involving offshore banking facilities. He has no opinion as to whether or not the frequency of adjudications by plea have increased or diminished.

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March 23, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - Northern District of Illinois

On Wednesday, March 22, 1989, I spoke with Joseph Duffey, First Assistant to the United States Attorney, Northern District of Illinois. Mr. Duffey stated that he has perceived in recent years a greater incidence, magnitude and complexity of frauds. Mr. Duffey stated that his office had under his supervision a "Defense Procurement Fraud Unit," which recently prosecuted a case to a settlement agreement at $200 million, at which amount Mr. Duffey approximated the loss caused. Moreover, Mr. Duffey stated that, if the recent reports of federal investigation of the commodities trading markets in Chicago are accurate, then the commodities trading fraud losses could be enormous. Mr. Duffey believes that the five million dollars guidelines limit is unrealistic.

Mr. Duffey believes that he has seen more sophisticated fraud offenders in recent years, with a corresponding increase in the use off-shore banking facilities and money wire transfers.

Mr. Duffey had no opinion on whether there was an increase in frauds involving to the risk of bodily injury.

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March 23, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - Central District of California

On Wednesday, March 22, 1989, I spoke with Terry Bowers, Chief of the Major Frauds Section of the United States Attorney's Office, Central District of California (Los Angeles). Mr. Bowers stated that he has perceived an increase in the frequency, severity, complexity and magnitude of frauds in recent years. He believes that the fraud guidelines are inadequate in stopping at five million dollars in loss.

Mr. Bowers perceives a tremendous increase in the complexity of the fraudulent schemes, as the typical defendant is a more sophisticated, more clever criminal, one able to utilize shell corporations, off-shore banking facilities and other sophisticated means to conceal crimes and thwart criminal detection and investigation. Mr. Bowers also perceived an increase in the risk of bodily injury arising from these frauds, stating that the typical white-collar fraud was "getting

rougher." Mr. Bowers cited typical examples in the telemarketing area, where apparently the owners of telemarketing schemes hire body guards whose function it is, in part, to injure those complaining to law enforcement authorities.

Mr. Bowers had no opinion on the incidence of pleas.

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March 23, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - Eastern District of Michigan

On Thursday, March 23, 1989, I spoke with Alan Gershel, Head of the Public Corruption Unit of the United States Attorney's Office, Eastern District of Michigan. Mr. Gershel's unit handles the office's defense procurement fraud cases. Mr. Gershel stated that he believes that the procurement frauds have, in recent years, generally become more frequent, of greater complexity and greater magnitude. He stated that the greater complexity was attributable in part to the practice of bribery, which both aids the commission of the crime and hinders detection.

Mr. Gershel stated that he has never seen a case exceed five million dollars in loss. He stated that, when such as case does arise, then it is typically referred to the Department of Justice, which apparently has a special unit assigned to deal with such cases. He stated that he had not seen such a case come through his office.

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March 22, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - District of New Jersey

On Wednesday, March 22, 1989, I spoke with Robert Warren, Chief of the Fraud Division of the Office of the U.S. Attorney, District of New Jersey. Mr. Warren stated that, in his opinion, the failure of the sentencing guidelines to exceed five million dollars in relation to fraud loss amounts is a serious problem. He stated that his office with far greater frequency than in past years has witnessed frauds greatly in excess of five million dollars, including a recent bank fraud, the loss from which was approximately $52 million. Mr. Warren believes that both the frequency and magnitude of frauds have increased within the last five years such that typical garden-variety frauds now routinely register as much as two to three million dollars in losses.

Mr. Warren opined that frauds were in general becoming more sophisticated and more complex, and that off-shore banking

facilities, particularly those available at the Cayman Islands, has caused his office considerable detection and enforcement difficulties.

Mr. Warren also opined that he had witnessed no change in the degree to which frauds had created risks of bodily or personal injury. He did state that he believed that the incidence of adjudications by plea had increased in recent years, due primarily to the applicability of the sentencing guidelines. Mr. Warren believes that the sentencing guidelines help to generate pleas. As an example, Mr. Warren stated, in the typical case, the defendant's sole avenue of diminished sentencing arises via his "acceptance of responsibility," to which the prosecutor may stipulate as a condition of the plea agreement.

In regard to the immediate future, Mr. Warren stated that he believes that the off-shore banking problem will continue to frustrate his enforcement problems. Mr. Warren also foresees that the size of the frauds in terms of losses caused will continue to increase. Finally, Mr. Warren also believes that the incidence of bank fraud will increase as real estate values within his district begin to decline, as it is Mr. Warren's theory that real estate prices form a major index of the profitability of banks, and as bank profits begin to decline, bank officers will turn to other avenues for profits.

On another matter, Mr. Warren expressed his strong opinion that the guidelines regarding penalties for securities fraud were far too low in terms of sentencing levels. The particular problem Mr. Warren sees is in the area of "penny" stocks, which typically are not subject to Exchange rules and are not sold by major investment houses. Mr. Warren believes these "penny" stocks are heavily manipulated, and are largely controlled by organized crime. He believes, if possible, that the Commission should do what it can to focus particular enhanced penalties upon the manipulation of "penny" stock prices.

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March 23, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - Eastern District of New York

On Wednesday, March 22, 1989, I spoke with Lawrence Urgenson, Chief Assistant U.S. Attorney, Eastern District of New York. Mr. Urgenson believes that fraud cases in his office in recent years have increased in size, complexity and magnitude. Regarding complexity, Mr. Urgenson explained that his office has prosecuted more multi-defendant cases involving activities in several federal districts. Mr. Urgenson also believes that the five million dollar cessation of the fraud sentencing guidelines is inadequate; his office's prosecution of bank, savings and loan and credit union frauds routinely exceed $5 million, and often approach $30 million.

Mr. Urgenson believes that recent years have seen an increase in the incidence of frauds committed within the corporate context, or by corporations. Mr. Urgenson states that this phenomenon has led to an increased difficulty in the

successful prosecution of fraud cases. Specifically, the corporate context gives rise to unusually difficult problems of determining which individuals and parties are responsible, had knowledge, and had the requisite "intent" to commit the fraud. Moreover, such cases typically involve thousands of documents.

Mr. Urgenson stated that he had no experience with any difficulties arising from off-shore banking facilities. Mr. Urgenson had not witnessed any increase in frauds that might lead to bodily injury. Furthermore, Mr. Urgenson did not believe there was any increase or decrease in the number of adjudications settled by plea. Because typical investigations of major frauds occur over several years, the sentencing guidelines have yet to have a significant effect upon the amount of plea bargaining.

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March 23, 1989

MEMORANDUM

TO: Charles Betsey
Alain Sheer

FROM: Jeffrey A. Standen JAS

RE: Fraud Cases - Eastern District of Michigan

On Wednesday, March 22, 1989, I spoke with Blondell Morey, Chief of the White-Collar Crime Unit, U.S. Attorney's Office, Eastern District of Michigan. Mr. Morey stated that, in his experience, the size of frauds in recent years had increased, but that typically the size of the frauds in his office were well within guideline ranges. The typical amount of loss caused by frauds ranged from $30,000 to $300,000. Mr. Morey believes there has been a recent increase in the frequency of bank frauds. These frauds are not done by insiders, buy typically involve bad check schemes or credit card frauds. In his district, there has been as yet few savings and loan or bank failures. Mr. Morey did not perceive any increase in the amount of frauds creating a risk of bodily injury. He perceived a slight increase in the sophistication of frauds.

Mr. Morey did believe that his office has recently prosecuted about two or three securities frauds which might have exceeded the guidelines in terms of the amount of loss caused. These cases were not guidelines cases, however. Regarding the future, Mr. Morey believes he will continue to see a great deal of credit card frauds, which are typically small in size.

On another matter, Mr. Morey believes that the guideline fraud table establishes guideline ranges that are too low respecting first-time white-collar offenders.

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MEMORANDUM

TO: Commissioners
Sid Moore

FROM: Charles Betsey CB

SUBJECT: Statistical Analysis Of Data On Fraud Cases

DATE: March 29, 1989

Guidelines Fraud Cases

The Commission asked that we undertake an investigation of the nature of fraud cases sentenced under the guidelines. The Monitoring Unit provided us with about 230 cases. Cases were further screened to assure that we had only those cases that had been sentenced under the guidelines. Cases were coded using a form developed by Alain Sheer and myself. Several staff members aided us in the coding exercise including Pam Barron, Paul Pierrot, Bruce Kobayashi, Jeff Carpenter, David Anderson, and Mary McDowell.

Preliminary results for 178 guideline fraud cases are reported in the following tables. Because of the time constraints with which we were dealing we decided to code by type of fraud to assure that we had accounted for those types involving large dollar losses. Thus, all cases of mail, wire, and credit card fraud are included in the initial analysis along with a sample of immigration, government program, and other fraud cases. Coding of the other cases is still underway and an analysis incorporating all of the cases will be provided at a later date. Since the omitted cases tend to entail little or no reported losses, any bias in the preliminary analysis may be to overstate the seriousness of fraud offenses sentenced under the guidelines to date.

The average duration of guidelines fraud cases was 8.7 months, but nearly one-half had durations of one month or less. The average loss involved in guidelines fraud cases was $61,900, with the loss ranging from $20 up to $1 million (about 51 percent of fraud cases either involved no reported loss or losses of $2,000

or less). Guidelines fraud cases were disposed of by guilty pleas 93 percent of the time. In less than one-fifth of the cases was it clear that a lower statutory maximum resulted from the plea, while in nearly two-thirds of the cases the plea had not reduced the statutory maximum.

Despite the sampling mentioned earlier, immigration fraud accounted for the largest group of cases in the guidelines sample (36 percent) with credit card fraud accounting for the next largest group (25 percent). Finally, three-fourths of defendants sentenced for fraud in our guidelines sample were in criminal history category I, and half of defendants had a total offense level of 8 or less. Departures with respect to the imprisonment range occurred in 14 percent of the guidelines fraud cases (25 cases); 60 percent were downward departures and 40 percent were upward departures.

Augmented FPSSIS and FPSSIS Guidelines Cases

Comparisons based on old law fraud cases and guidelines-eligible cases suggest that the two groups are substantially different. For example, the greatest loss amount for a guidelines fraud case is $1 million, while the old law sample includes several cases with losses in excess of $10 million (see attached memorandum). Similarly, nearly one-half of guidelines-eligible fraud cases involved single acts compared to less than one-fourth of old law cases. Finally, old law fraud cases were four times as likely to involve breach of trust as guidelines-eligible cases (26 percent compared with 6 percent). Rather than indicating that fraud offenses have become less serious since 1986, the differences are probably due to the relatively short time since the November 1987 effective date of the guidelines compared to the time to prosecute and sentence more serious fraud offenses.

Our evidence on this point is largely impressionistic and anecdotal. Assistant United States Attorneys in the offices handling the most fraud offenses indicate their perception that indeed fraud offenses have become more complex and involve larger amounts of loss than in the past. Data related to procurement fraud from the Inspector General's office at the Department of Defense appears to indicate that the time period for moving ahead with a case in 1988 was considerably greater than had been true in 1985 (Volume I). One possible explanation for this finding is an increase in the complexity of the cases.

Fraud Cases Involving Losses Over $5 Million

At the meeting of February 28 we were asked to investigate the nature of the fraud cases in the augmented FPSSIS data that involved losses in excess of $5 million. There are 27 such cases identified in the FPSSIS data, accounting for about 3 percent of all fraud cases. We were able to locate and review the Presentence

offenses. One of the cases we found was erroneously identified as involving a loss of $37 million, when in fact the loss was $3.7 million. Several of the cases involving the largest losses essentially involved money laundering offenses that could be sentenced under guideline 2F1.1 (18 U.S.C. § 2314), even though the most analogous guideline might appear to be 2S1.3.

Case Summaries

Case	Loss (Intended or Actual)	Offense
A	$5.8 million	Interstate Transportation of Money Obtained by Fraud; bogus corporate credit scheme.
B	$6 million	Mail and Wire Fraud; bogus coal leases.
C	$6 million	Mail Fraud; fraudulent automobile repair claims.
D	$6 million	False Statements on Application for Bank Loans
E	$6.3 million	Mail Fraud; evasion of customs duties on orange juice.
F	$7 million	False Statements;converting cash to cashier's checks (money laundering).
G	$8 million	Mail Fraud; mail order business.
H	$9 million	Interstate Transportation of Money Obtained by Fraud; factoring accounts payable for businesses.
I	$10 million+	False Statements and Conspiracy; money laundering.
J	$10.5 million	False Statement in Application for Bank Loan;
K	$45 million	Mail Fraud; mail order business.

L	$50 million	Conspiracy to use counterfeit credit cards; manufacture, sale, and distribution of counterfeit cards.
M	$56 million	Wire Fraud and Conspiracy; boileroom operation involving oil and gas leases.

Attachments

Loss Distribution for Guidelines Fraud Cases

Attempted/Intended Loss	Number	Percent
$2,000 or Less	90	50.5
$2,001-$5,000	17	9.6
$5,001-$10,000	8	4.5
$10,001-$20,000	11	6.2
$20,001-$50,000	16	9.0
$50,001-$100,000	25	14.0
$100,001-$200,000	4	2.2
$200,001-$500,000	5	2.8
$500,001-$1,000,000	2	1.1
$1,000,001 or more	-	-
Total	178	100.0

Average Loss = $61,880

Standard Deviation = $129,880

Range = $20-$1 million

Duration of Offense
for Guidelines Fraud Cases

Duration (In Months)	Number	Percent
One month or less	53	46.9
2-6	28	24.8
7-12	19	16.8
13-18	6	5.3
19-24	1	0.9
25-36	3	2.7
37-60	1	0.9
61-120	1	0.9
121-240	-	-
241 or more	1	0.9
TOTAL	113	100.0

DISPOSITION OF GUIDELINES CASES

Method of Disposition	Number	Percent
Plea	165	92.7
Trial	13	7.3
Total	178	100.0

PLEA REDUCED STATUTORY MAXIMUM

	Number	Percent
Yes	30	18.2
No	105	63.6
Don't Know/Missing	28	18.2
Total	165	100.0

DISTRIBUTION OF
GUIDELINE CASES
BY TYPE OF FRAUD

Type	Number	Percent
Lending and Credit	3	1.7
Bank	30	16.9
Procurement	-	-
Credit Card	45	25.3
Mail, Wire	20	11.2
Government Program	7	3.9
Immigration	64	36.0
Other	9	5.1
Total	178	100.0

Distribution of Offense Level
by Criminal History Category for
Guideline Fraud Cases

	Criminal History Category					
Offense Level	I	II	III	IV	V	VI
1	-	-	-	-	-	-
2	-	-	-	-	-	-
3	-	-	-	-	-	-
4	30	1	1	-	-	1
5	3	-	-	-	-	-
6	35	2	1	-	-	1
7	2	2	-	-	-	-
8	22	3	2	-	-	1
9	5	3	1	1	-	-
10	5	1	3	-	2	2
11	8	-	-	4	-	-
12	6	2	1	-	-	-
13	6	-	1	-	-	1
14	6	-	-	-	1	-
15	5	1	2	1	-	-
16	2	-	-	-	-	-
17	-	-	1	-	-	-
Total	135	15	13	6	3	6

Fraud Offenses by Nature of Behavior[1]
(Percent Distribution)

Nature of Behavior	Old Law	Guidelines-Eligible
On-Going Behavior	34.2	16.0
Multiple Acts	35.7	34.8
Single Act	24.1	49.2
Organized Crime	5.9	- -
Total	100.0	100.0

[1] Source: Augmented FPSSIS records for fiscal year 1985 and FPSSIS records for post-November 1, 1987 cases. Old law sample includes 526 cases; guidelines-eligible sample includes 474 cases.

Fraud Offenses by Type of Offense[1]
(Percent Distribution)

Type of Offense	Old Law	Guidelines-Eligible
Lending and Credit, Bank, Bankruptcy	8.8	15.0
Credit Card	1.6	16.0
Mail, Wire	32.8	7.6
Government Program	4.4	6.1
Immigration	36.0	47.2
Other (Including computer, conspiracy, other tax, etc.)	17.5	8.1
Total	100.0	100.0

[1] Source: Augmented FPSSIS records for fiscal year 1985 and FPSSIS records for post-November 1, 1987 cases. Old law sample includes 526 cases; guidelines-eligible sample includes 474 cases.

Fraud Offenses by Nature of Behavior
(Percent Distribution)

Nature of Behavior	Old Law	Guidelines-Eligible
On-Going Behavior	34.2	16.0
Multiple Acts	35.7	34.8
Single Act	24.1	49.2
Organized Crime	5.9	- -
Total	100	100

1

[1] Source: Augmented FPSSIS records for fiscal year 1985 and FPSSIS records for post-November 1, 1987 cases. Old law sample includes 526 cases; guidelines-eligible sample includes 474 cases.

Distribution of Loss for Fraud Offenses[1]
(Percent Distribution)

Loss Category	Old Law	Guidelines-Eligible
$2,000 or less	27.8	53.9
$2,001 - $5,000	7.4	9.0
$5,001 - $10,000	6.7	5.5
$10,001 - $20,000	7.0	5.7
$20,001 - $50,000	11.4	8.6
$50,001 - $100,000	7.4	8.8
$100,001 - $200,000	9.1	2.6
$200,001 - $500,000	10.5	4.5
$500,001 - $1,000,000	3.2	0.7
$1,000,001 - $2,000,000	3.8	0.5
$2,000,001 - $5,000,000	1.5	-
$5,000,001 - $6,000,000	1.3	-
$6,000,001 - $8,000,000	0.4	-
$8.000.001 - $10,000,000	0.6	-
$10,000,001 - $15,000,000	0.4	-
$15,000,001 - $20,000,000	-	-
More than $20 million	1.5	0.2
Total	100.0	100.0

[1] Source: Augmented FPSSIS records for fiscal year 1985 and FPSSIS records for post-November 1, 1987 cases. Old law sample includes 526 cases; guidelines-eligible sample includes 474 cases.

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

March 29, 1989

Memorandum

TO: Charles Betsey

FROM: Ronnie Scotkin

SUBJECT: Comparison of Fraud Guidelines

Per you request, attached is a copy of a comparison of U.S. Sentencing Commission Guidelines (October 1, 1988) to the U.S. Parole Commission Guidelines.

Fraud Offenses - Comparison of October 1, 1988 Sentencing Guidelines To The Equivalent Parole Guidelines Offense Levels

Dollar Amount	Guideline Level without Minimal Planning	Guideline Level with Minimal Planning	U.S. Parole Commission pre- 12/21/87	U.S. Parole Commission post- 12/21/87
$2,000 or less	*6*	*10*	*6*	*6*
$2,001-5,000	*7*	*10*	*6-9*	*6-9*
$5,001-10,000	*8*	*10*	*6-9*	*6-9*
$10,001-20,000	*9*	*11*	*6-9*	*6-9*
$20,001-50,000	*10*	*12*	*14*	*6-14*
$50,001-100,000	*11*	*13*	*14*	*14*
$100,001-200,000	*12*	*14*	*18-20*	*14*
$200,001-500,000	*13*	*15*	*18-20*	*18-20*
$500,001-1,000,000	*14*	*16*	*23*	*18-20*
$1,000,001-2,000,000	*15*	*17*	*23*	*23*
$2,000,001-5,000,000	*16*	*18*	*23*	*23*
over $5,000,000	*17*	*19*	*23*	*23*

**The above correspondences are based upon the parole guidelines adjusted to take into account the effect of good time under the new law.*