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

MEMORANDUM

TO: Phyllis Newton

FROM: Working Group on Criminal History

SUBJECT: Proposed Amendments to Criminal History Chapter

DATE: December 20, 1989

Attached you will find the proposed amendment changes to Chapter Four that resulted from the work of Pam Barron, Charles Betsey, Peter Hoffman, and Jay Meyer.

Our group has focused on several primary areas:

- Whether or not to add a category VII to the sentencing table, and the issues surrounding such an addition; and

- The sources and extent of the confusion in the field over assigning criminal history points to uncounseled misdemeanor convictions.

The recommendations to address the above items are in the following attachments.

We recognize that there are other areas that the Commission might want to consider that drafting staff is currently preparing, and that we will review upon completion. They are:

- In application note 3 to §4A1.2, providing a clearer definition of "consolidated for sentencing."

- Clarifying whether prior convictions for careless driving and reckless driving are offenses that are included in the list of offenses under §4A1.2(c)(1).

- Determining whether a prior conviction on appeal may be counted.

- Providing a clearer definition of local ordinance violations under §4A1.2 (c)(1).

December 14, 1989

Memorandum

TO: Phyllis Newton

FROM: Criminal History Working Group

§5A1.1. Sentencing Table

A. The Department of Justice has recommended that the Commission add one additional criminal history category (Memorandum by Roger Pauley dated 10/17/88, accompanied by cover letter from Commissioner Saltzburg dated 10/18/88). The pertinent section of that memorandum follows:

"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 score 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."

Should the Commission wish to accept this recommendation, drafting staff have prepared a proposed amendment with a discussion of the technical issues involved.

The working group has attempted to examine current practice information that might assist the Commission in addressing this issue.

We have attempted to ascertain (1) the frequency of cases having criminal history points in excess of 13, and (2) the frequency of upward departures from criminal history Category VI based on adequacy of criminal history.

Distribution of Criminal History Points

We first checked with the Monitoring Section to obtain the distribution of guideline cases by criminal history points. This information, however, is not available from the monitoring system which currently can only provide data by criminal history category. Therefore, we asked Jim Beck to review the random sample of 200 cases provided to him by the monitoring section and provide us with the distribution of cases having 13 or more criminal history points.

This table is shown below (Total N= 198; 2 cases were not guideline cases):

Criminal History Points	Number of Cases	Percent of All Cases
unknown	1	0.5%
13 points	5	2 1/2%
15 points	3	1 1/2%
16 points	2	1%
17 points	1	0.5%
18 points	2	1%
21 points	1	0.5%
22 points	1	0.5%
24 points	1	0.5%
34 points	1	0.5%

Based on the limited data available until the monitoring system is operational, it appears that the creation of an additional criminal history category for cases having substantially in excess of 13 points would include a very small proportion of cases. If, for example, Category VI was revised to include 13-19 points, and Category VII was established for 20 points or more, Category VII would include roughly 2% of all cases. Or, if Category VI were 13-16 criminal history points and Category VII were 17 points or more, Category VII would include roughly 3.5 percent of all cases.

Departures Due to Adequacy of Criminal History

At the request of the working group, Jay Meyer examined the criminal history departures from the Spring 1989 Departure Study by the Monitoring Section. His report (attached) indicates that only 2/10 of 1 percent of the cases (6 cases) involved an upward departure from criminal history category VI. Two additional cases involved departures from below level VI to above level VI for inadequacy of criminal history category; including these cases increases the rate of departure above level VI to 1/3 of 1 percent.

Depending upon the assumptions made about the definition of the new Category VII, up to 16 percent of the cases with criminal history scores substantially in excess of 13 would be upward departures above Category VI. For example, assuming 3.5 percent of all cases had criminal history scores of 17 or more, there would be 88 such cases in the random sample of 2500 cases. If all 6 cases that involved an upward departure from Category VI had criminal history scores of 17 or more, the upward departure rate would be 7 percent. If all 8 cases that involved departures above Category VI were included, the departure rate would be 9 percent. If Category VII applied to cases with 20 or more criminal history points, there would be roughly 50 such cases in the random sample of 2500 cases. If all 6 cases that involved upward departures from Category VI had criminal history scores of 20 or above, the upward departure rate would be 12%. If all 8 cases that involved departures above Category VI were included, the departure rate would be 16 percent.

From the above limited information, it does not appear that courts are using their authority to depart particularly frequently for such cases. Whether this indicates that the courts see the criminal history category VI penalties as adequate for such cases or whether they are simply reluctant to depart from the guidelines is not known.

Conclusion. Creation of an additional criminal history category creates certain additional complexities (see attached memorandum). At the current time, the available data do not demonstrate a pressing need for an additional criminal history category. This does not mean that creation of an additional category is inappropriate. Whether the advantages of an additional criminal history category outweigh whatever additional complexity such a category would create is a policy matter for the Commission.

B. At a recent Commission meeting, Commissioner Nagel expressed interest in staff exploring the possibility of the creation of an additional criminal history category for "true" first offenders.

"True" first offender can be defined in a number of ways. One way would be to define it as a defendant with no prior criminal history points. Under this definition, a "true" first offender criminal history category would have only defendants with 0 points, rather than 0 or 1 points as in the current guidelines. If the Commission wishes to have such a criminal history category, it could simply redistribute the points in each of the current six categories.

It is to be noted that in the January 1987 Draft Guidelines, Criminal History Category I contained defendants with only 0 points. (See the comparison below). However, after public

comment, the Commission rejected this formulation in favor of that contained in the current guidelines.

Comparison of January 1987 Draft Guidelines and Current Guidelines

	Criminal History Category					
	I	II	III	IV	V	VI
Criminal History Points						
1987 Draft Guidelines	0	1-2	3-4	5-6	7-8	9 or more
Current Guidelines	0-1	2-3	4-6	7-9	10-12	13 or more

Another way of defining a "true" first offender is a defendant who has not been in any criminal "trouble" previously. "Trouble" is usually defined as an arrest, whether or not leading to conviction. Under this definition, a defendant who has one or more previous arrests is not a true first offender (unless possibly the defendant can show that the previous arrest(s) were erroneous). When field staff talk about "true" first offenders, it frequently is this, or some similar, definition to which they are referring. Unfortunately, information on the circumstances underlying past arrests not leading to conviction is frequently not available, and even where it is available it might not be sufficient to withstand legal challenge. At the same time, the Commission has expressly stated that the presence of a prior arrest by itself is not sufficient for consideration under §4A1.3." (§4A1.3). Consequently, while the definition of a "true" first offender as one who has had no previous legal difficulty is quite understandable, it is not clear at this time how it could be incorporated into a guideline system. If the Commission is interested in pursuing this approach, we recommend further study.

December 14, 1989

Memorandum

TO: Criminal History Working Group

FROM: Peter Hoffman

SUBJECT: Addition of Criminal History Category

The following illustrates the addition of a criminal history category for defendants with criminal history scores of 20 or more.

(1) Proposed Amendment: Chapter Five, Part A, is amended in the Sentencing Table by deleting "(13 or more)" and inserting in lieu thereof (13-19), and by inserting the following additional column:

Offense Level	"VII (20 or more)
1	2-8
2	4-10
3	6-12
4	9-15
5	12-18
6	15-21
7	18-24
8	21-27
9	24-30
10	27-33
11	30-37
12	33-41
13	37-46
14	41-51
15	46-57
16	51-63
17	57-71
18	63-78

19	70-87
20	77-96
21	84-105
22	92-115
23	100-125
24	110-137
25	120-150
26	130-162
27	140-175
28	151-188
29	168-210
30	188-235
31	210-262
32	235-293
33	262-327
34	292-365
35	324-405
36	360-life
37	360-life
38	360-life
39	360-life
40	360-life
41	360-life
42	360-life
43	life".

(2) Conforming Amendment: Section 4A1.3 is amended in the fourth paragraph by deleting "Category VI" and inserting in lieu thereof "Category VII".

In addition, in the Sentencing Table in Chapter Five Part A, the "or"s and commas in the criminal history point captions for criminal history categories I-VI should be deleted, and dashes inserted in lieu thereof for consistency.

(3) Career Offenders. Several choices are available. One option would be to amend §4B1.1 by deleting "Category VI" and inserting in lieu thereof "the category corresponding to the defendant's criminal history points, or Category VI, whichever is greater". This would ensure that a defendant with 20 or more criminal history points would not receive a benefit from this revision. That is, this option would increase the guideline range for all career offenders with 20 or more criminal history points, but would otherwise not affect the guideline ranges for such cases. Under this option, the guideline range for a non-career offender with 20 or more criminal history points could be higher than that for a career offender with a criminal history score of fewer than 20 criminal history points (but this would happen only where the Chapter Two offense level for a career offender was greater than the offense level from the chart in §4B1.1).

Another option would be to amend §4B1.1 by substituting "Category VII" for Category VI" and by conforming the offense

levels in §4B1.1 (which are geared to the statutory maxima) by reducing each offense level by 1 level (e.g., level 37 would become level 36 producing the same guideline range). This option would automatically increase the guideline ranges for all career offenders where the offense level was determined by the offense level for the underlying offense rather than the chart in §4B1.1 whether or not the defendant's criminal history points were 20 or more, but would retain the current guideline range where the offense level is determined from the chart in §4B1.1.

§4A1.2. Definitions and Instructions for Computing Criminal History

The working group on criminal history has found that there is significant conflict between what we perceive to be the Commission's intent and the Administrative Office's instructions to probation officers relative to the counting of prior sentences resulting from constitutionally valid, although uncounseled, misdemeanor convictions in the criminal history score. In brief, the guidelines calls for counting such prior sentences unless the court expressly finds that the use of such convictions would be unconstitutional; the Administrative Office's instructions seem to indicate that such convictions are not to be counted. See memorandum from Jay Meyer dated 11/17/89 (attached). This conflict results in disparity in guideline application and may be why there has been a perception that the criminal history score increases sentences more slowly than pre-guideline practice. Under the Parole Commission's salient factor score, prior constitutionally valid misdemeanor convictions, whether counseled or uncounseled, were counted.

Part of the confusion seems to have been created by the Commission's failure to take a position on whether it believed the counting of constitutionally valid, uncounseled misdemeanor convictions was compatible with Baldazar v. Illinois, 44 U.S. 222 (1980). The Commission's choice of language in Application Note 6 of the Commentary to §4A1.2 (which amounts to a statement that the court should not count what it finds unconstitutional to count) did not resolve the issue, but rather provided the conditions for the Administrative Office to issue its instruction.

A proposed amendment to address this issue directly is shown below. The Commission's General Counsel has been requested to provide an opinion on the legal issues set forth in the proposed amendment.

A. Proposed Amendment:

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the fourth sentence as follows:

> "Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by inserting the following immediately before the period at the end of the second sentence:

", including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction".

The Commentary to §4A1.2 is amended by inserting at the end:

"Background

As noted in Application Note 6, sentences resulting from constitutionally valid convictions (including misdemeanor convictions where imprisonment was not imposed and, thus, provision of counsel was not constitutionally required) are counted. To make distinctions on whether a prior constitutionally valid sentence resulted from a counseled or uncounseled conviction would create wide disparity unrelated to the purposes of sentencing (e.g., some jurisdictions routinely appoint counsel in such cases while others do not). To prohibit use of all misdemeanor convictions not resulting in imprisonment would deprive the court of significant information relevant to the purposes of sentencing. Therefore, the Commission's criterion for inclusion of a prior sentence in the criminal history score is whether the prior sentence resulted from a constitutionally valid conviction, not whether the conviction was counseled or uncounseled.

The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled convictions, in the criminal history score violates the holding in Baldazar v. Illinois, 446 U.S. 222 (1980).".

B. The amendment shown below corrects a clerical error.

The Commentary to §4A1.2(d) captioned "Application Notes" is amended in the second sentence of Note 6 by deleting "in a" and inserting in lieu thereof "from a".

November 20, 1989

MEMORANDUM

TO: Criminal History Working Group

FROM: Jay Meyer

SUBJECT: Departures due to §4A1.3, Adequacy of Criminal History

As agreed upon in the criminal history working group, I have pulled those cases from the spring, 1989 departure study where §4A1.3, Adequacy of Criminal History, was listed by the court for the basis of its departure from the established sentencing guidelines. Of the 2,500 cases that were randomly selected by the monitoring department for review, 24 cases listed §4A1.3 as a reason for departure.

I examined the 24 files and documented the criminal history category determined by the court. I subsequently documented the sentence that was imposed by the court and assigned the criminal history category in which that sentence was located.

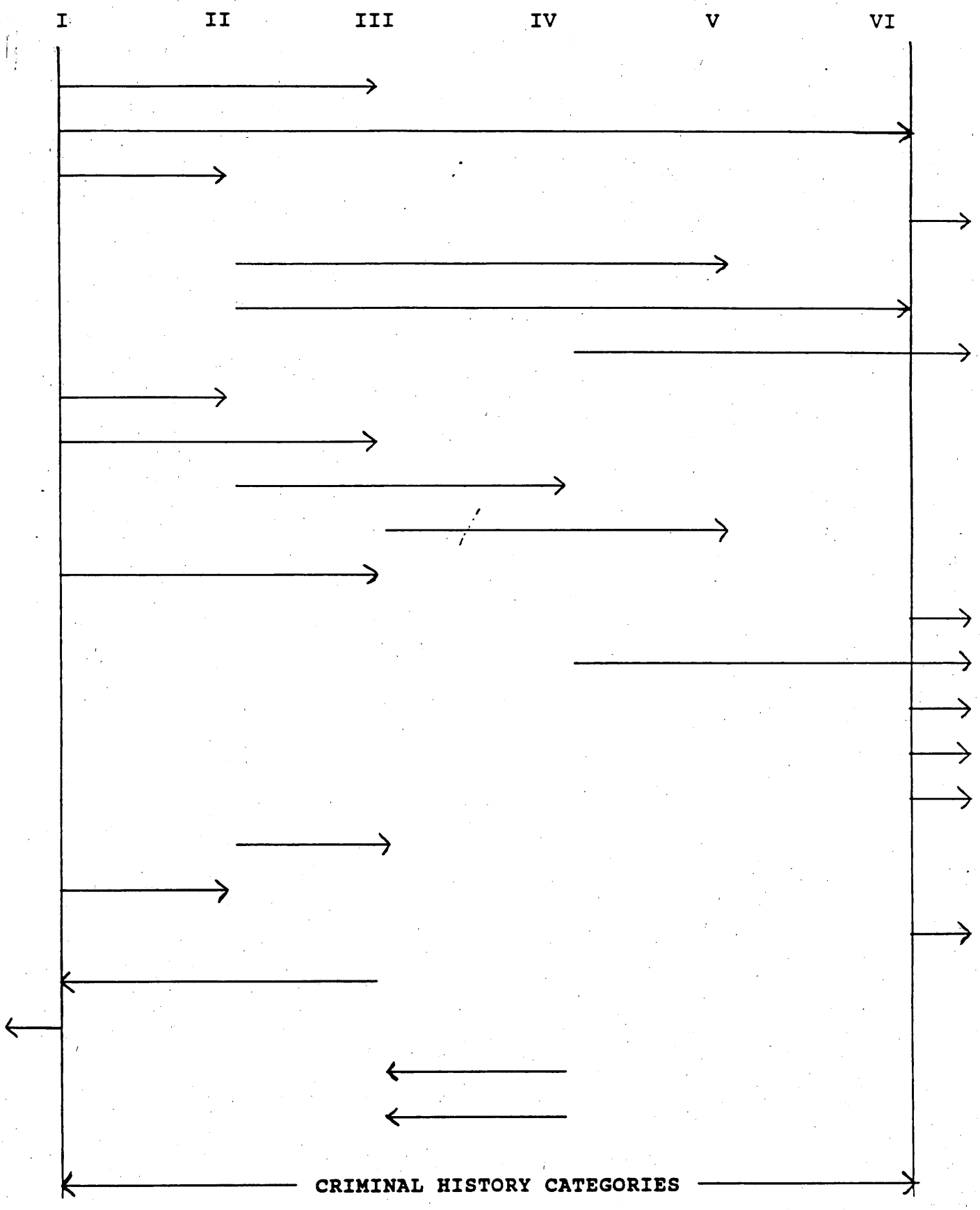
As you can see from the attached table, there was an upward departure in 20 (83%) of the cases. Conversely, four (17%) cases involved a downward departure.

Of the 24 cases where an upward departure occurred, six cases or 30% departed upward from category VI. There were two cases where the court departed from category IV to above category VI.

In summary, approximately 1% of the 2,500 cases studied involved departures based on §4A1.3. Of that 1%, only 25% of the cases involved departures from category VI to a higher range.

Perhaps this information will be useful to our group as we determine whether or not to recommend the addition of a category VII to the criminal history table. If the group deems it desirable, I could conduct a similar study of the data revealed from the current departure study.

DEPARTURES DUE TO §4A1.3



November 20, 1989

MEMORANDUM

To: Criminal Justice Working Group

From: Jay Meyer

Subject: Uncounseled Misdemeanor Convictions

As agreed upon in our criminal history working group, I have collected written material that might be helpful to us as we examine the apparent confusion in the field over whether uncounseled misdemeanor convictions should be counted under §4A1.1.

Attached is an excerpt from the Federal Judicial Center's training manual that was distributed to the U. S. probation offices in late 1987. Under Part B. THE DEFENDANT'S CRIMINAL HISTORY on page 29, it reads:

> A conviction should not be reported here if it cannot be established that the defendant was represented by counsel or waived the right to counsel. The Supreme Court has held that such a conviction may not be considered as proof that the defendant engaged in the conduct for which he was convicted. United States v. Tucker, 404 U.S. 443 (1972).

Shortly after this training manual was received by the field, the Administrative Office's General Counsel's office sent a memorandum to the field that was entitled "Use in Presentence Reports of Convictions Obtained Without Assistance of Counsel." The four-page letter outlines the pertinent case law that has been established surrounding this issue. In the closing paragraph on page four the memo reads:

> ...Thus, the instruction in the presentence report monograph directing probation officer to avoid mention of all uncounseled convictions is overly broad...Until the issue is determined by the courts, I believe probation officers should be instructed not to use these convictions to determine the criminal history category but simply refer to them in the "other criminal conduct" section of the presentence report and, perhaps, note the effect of the conviction if counted...

The hotline unit of the Technical Assistance Service has received numerous calls from the field inquiring into the apparent conflict between the AO's memorandum and application note 6 under §4A1.2. Probation officers believe the application note instructs them to include convictions unless the defendant shows that the convictions were invalid due to issues of constitutionality.

It is not surprising that there is confusion over this issue. It is likely that uncounseled misdemeanors are simply not being counted whenever there is a question of counsel being present. If this were the case, those uncounseled misdemeanor convictions under the old system that were routinely counted in salient factor scoring by the Parole Commission, are no longer figuring in to a defendant's guideline calculation under the new system.

The practice of automatically excluding uncounseled misdemeanors could explain why certain defendants are receiving lighter sentences under the guidelines than in the past. Under the provisions of the U. S. Parole Commission's salient factor scoring, it was presumed that a conviction/adjudication was valid. [See page 63 of Parole Guideline Manual]

At a maximum, the result would be undercounting four criminal history points, plus two points if the defendant was on probation for the one of the prior convictions at the time of the instant offense.

memorandum

DATE: January 13, 1988

REPLY TO ATTN OF: David N. Adair, Jr., Assistant General Counsel

SUBJECT: Use in Presentence Reports of Convictions Obtained Without Assistance of Counsel

TO: Donald L. Chamlee, Chief, Probation Division

For the last several years, there has been criticism of the policy outlined in Appendix C of the Presentence Investigation Report, Publication 105, that probation officers verify that the defendant was represented by, or waived, counsel before including a conviction in the prior record section of the PSI. This policy has been carried over into the new Presentence Investigation Reports under the Sentencing Reform Act of 1984, page 29. Probation officers have complained that this duty is burdensome and unjustified since counsel has been required to be provided under the principles of Gideon v. Wainwright, 372 U.S. 335 (1963), for the past 25 years. Indeed, many states provide for counsel by statute or otherwise; it is argued, therefore, that a presumption of counsel is justified where prior criminal proceedings occurred after the effective date of those statutes or other formalized policies.

With the promulgation of the guidelines of the United States Sentencing Commission, the criticism of the verification requirement has taken on additional significance. As you know, the guidelines rely heavily on prior convictions to determine the criminal history category which, in turn, affects the sentencing range applicable to the individual defendant. The Commission indicates in its commentary to section 4A1.2 at note 6, page 4.7, that the burden is on the defendant to show that a conviction is constitutionally invalid. Representatives of the Sentencing Commission have stated that probation officers should include all prior convictions, regardless of whether representation or waiver can be verified, and that such convictions should be used to calculate the criminal history category or for other purposes unless the defendant successfully challenges the constitutionality of the prior conviction. Apart from questions of the authority of the Sentencing Commission to dictate practice among probation officers in preparing the presentence report, this assertion has caused confusion among probation officers and renewed criticism of the policy contained in the presentence report monograph. Accordingly, we have reviewed the case law and the reasons behind the policy of verification and have concluded that, while it retains substantial validity, some minor adjustments are in order.

As you know, the basis for the policy is United States v. Tucker, 404 U.S. 443 (1972), in which the Supreme Court held that a felony conviction obtained in violation of the right to counsel guaranteed by the Sixth Amendment of the Constitution could not be considered in imposing sentence in a later criminal proceeding. Although the court recognized that sentencing judges could take into account an extremely broad range of factors in sentencing, convictions obtained without benefit of counsel constitutes reliance upon "misinformation of constitutional magnitude." 404 U.S. at 447. This

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

GPO : 1987 O - 173-680

unambiguous holding justified the policy contained in the presentence monograph and current case law supports the continuation of that policy with only minor adjustments.*

In fact, recent cases suggest that all that is necessary to challenge a sentence as violative of the principles announced in Tucker is that it is "not improbable that the trial judge was influenced by improper factors in imposing sentence." Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987), citing United States v. Harris, 448 F.2d 366, 374-75 (7th Cir. 1977). But see United States v. Williams, 782 F.2d 1462 (9th Cir. 1985) in which the court held that to challenge a sentence under Tucker, defendant must show that the sentencing judge mistakenly believed the prior conviction was constitutional and that it was used to enhance the sentence.

If the court has relied upon a potentially unconstitutional conviction in imposing sentence, an affirmative showing that defendant had representation or validly waived representation is required. I am aware of no cases in the sentencing context that have endorsed a presumption of regularity in prior convictions. Once the issue is raised, the Government bears the burden of showing representation or waiver. See United States v. Debevoise, 799 F.2d 1401 (9th Cir. 1986), and Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978) (en banc).

A challenge to the constitutional validity of a sentence may be raised at any time. Therefore, while a court may not have an affirmative duty to determine the constitutional validity of each prior conviction considered in imposing sentence, considerations of judicial economy support such an inquiry at some level prior to the imposition of sentence. Since it is clear that the Government must show representation or a waiver of representation once the issue is raised by the defendant, and since prior convictions are factors that affect the determination of the applicable sentencing range, it seems reasonable to suppose that defendants will regularly put the Government to its proof on the chance that some convictions that might otherwise have been relied upon will not be used because of the lack of such proof. Without some inquiry into representation prior to sentencing, it is possible that, upon a challenge by the defendant, neither the Government nor the probation officer would be able to provide sufficient proof of representation or waiver without delaying the sentencing hearing. And, of course, if the issue is not resolved prior to sentencing, the defendant could raise the issue in connection with a motion under 28 U.S.C. § 2255. All of this leads to the conclusion that there should be some indicia of validity before a conviction is listed in the presentence report. But that indicia need not always be specific to the conviction at issue.

Where the probation officer is certain that the defendant was entitled to receive representation under the laws or practice of the jurisdiction in which the conviction was obtained, it seems reasonable to rely on that fact and avoid unnecessary sifting through

---

*Of course, the entire issue could be mooted if it is determined that it is simply absurd to permit the use of unadjudicated conduct to determine offense behavior and, at the same time, to prohibit the use of actual convictions obtained without benefit of counsel to determine the criminal history category.

old court records. If a defendant challenges the use of such a conviction under Tucker, the probation officer should be able to produce the necessary documentation without unreasonable delay. This assumption is supported by the fact that the guidelines limit the use of prior convictions as follows:

> (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month that resulted in the defendant's incarceration during any part of such fifteen-year period.
>
> (2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

Section 4A1.2(e). Documentation should, of course, be easier for these more recent convictions. Of course, this procedure will work only in districts that have provided for challenges to the presentence report prior to the sentencing hearing. Under the Model Local Rule promulgated by the Probation Committee, the probation officer would have 10 days to obtain the necessary documentation. Otherwise, if the challenge is allowed to be raised for the first time at the sentencing hearing, delay will be inevitable. Privolous challenges might be reduced if, when the officer relies on a state law or policy to presume representation, the officer sets out the authority for the presumption in the presentence report. The authority should include a citation of the state law or policy that provides representation.

This change in policy might not be helpful in all cases and could be awkward in cases in which the conviction at issue was obtained in another district. I presume that the probation office in the other district could obtain the necessary documentation, but some delay is possible. Nonetheless, the change could reduce some of the burden on probation officers. It should be added that a number of districts are already following such a policy without any reported problems. On the other hand, it is rumored that public defenders are being instructed to challenge all prior convictions under Tucker. If this rumor is correct, a delay in the implementation of this policy change is warranted. I suspect that routine challenges to information in presentence reports will abate after several months of experience with guideline sentencing.

The Sentencing Commission has further objected to any policy that would result in the failure to list in the presentence report uncounseled misdemeanor convictions that did not result in imprisonment. Sections 4A1.1 and 4A1.2 provide for the use of misdemeanor convictions in determining the criminal history category. The commentary to section 4A1.2 at note 6, page 4.7, provides that "if to count an uncounseled misdemeanor could result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score." This cryptic statement in the commentary acknowledges the confusing state of the case law but leaves to the sentencing courts the question of the permissible use of uncounseled misdemeanor convictions in imposing sentence.

In Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court held that an uncounseled misdemeanor conviction is constitutional if the defender was not incarcerated as a result of the conviction. In Baldasar v. Illinois, 446 U.S. 222 (1980), however, the Supreme Court, in a per curiam opinion, held that, even if the uncounseled misdemeanor conviction is valid, it may not be used to increase a misdemeanor to a felony under a state recidivist statute. Unfortunately, the plurality opinion did not result in a single rationale for the decision. Four justices urged that, under the state recidivist statute, the only reason the defendant could be incarcerated was because of the earlier uncounseled misdemeanor conviction. The result of consideration of the uncounseled conviction is no different than had the offender been imprisoned on the earlier conviction. In his concurring opinion, Justice Blackmun, however, reiterated the position articulated in his dissent in Scott and, while voting to prohibit use of the uncounseled conviction, indicated that he would hold invalid any uncounseled misdemeanor conviction in which the offense carried a term of imprisonment over six months or where defendant was actually sentenced to imprisonment. Because of the plurality opinion, some courts have found broad exceptions to the general principles suggested in Baldasar. In Schindler v. Clerk of the Circuit Court, 715 F.2d 341 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984), for example, the court permitted the use of the results of a civil forfeiture proceeding in imposing a prison sentence for a subsequent violation of the same driving-under-the-influence statute. The court reasoned that the first civil proceeding was simply a form of notice to individuals that subsequent proceedings would result in imprisonment. The court thus declined to extend Baldasar to that situation. See also United States v. Roblas-Sandoval, 637 F.2d 692 (9th Cir. 1981), and Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981). A number of state courts have also found broad exceptions to the Baldasar result. See Justice White's dissent in the denial of certiorari in Moore v. Georgia, 108 S. Ct. 247 (1987).

Given the state of the case law, it is unclear what effect Baldasar will have on the use of uncounseled misdemeanor convictions that did not result in imprisonment under the sentencing guidelines. It seems to me that if the use of such a conviction resulted in a guideline range that did not permit probation or actually resulted in the defendants receiving a sentence of imprisonment, the majority holding in Baldasar would prohibit that use. Even that result, however, is not certain. It is fairly certain, however, that an otherwise constitutional misdemeanor conviction could be used in certain guideline decisions that did not result in imprisonment. Thus, the instruction in the presentence report monograph directing probation officers to avoid mention of all uncounseled convictions is overly broad. I suggest that the instructions be amended to provide that probation officers report uncounseled misdemeanor convictions that do not result in imprisonment but to identify them as raising legal issues. Until the issue is determined by the courts, I believe probation officers should be instructed not to use these convictions to determine the criminal history category but simply refer to them in the "other criminal conduct" section of the presentence report and, perhaps, note the effect of the conviction if counted. This recommendation is consistent with Tony Partridge's suggestions to Judge Tjoflat in his letter of October 27, 1987 (which I attach for your convenience), except that Tony suggests an additional, separate section for that information.

Attachment

cc: Honorable Edward R. Becker
Mr. Anthony Partridge

within the meaning of Section 4B1.1 of the Guidelines. The statutory maximum for the instant offense is 20 years, and the offense level determined under Section 4B1.1 is 34 rather than the lower level calculated above.

If the calculated offense level is less than 13 and there is information showing that the instant offense was part of a pattern of criminal conduct from which the defendant derived a substantial portion of his income, the officer should set forth the basis for the finding in this section. See Section 4B1.3 of the Guidelines.

In some cases, the officer will find that the Guidelines are unclear about matters that affect the computation of the offense level. In such cases the officer should rely on the interpretation that he or she thinks is correct but should note that there is an alternative interpretation. If possible, the impact of the alternative interpretation on the offense level calculation should be given. As has been noted earlier, an apparent conflict between the language of Guidelines and the language of Commentary or other explanatory material provided by the Sentencing Commission should be resolved in favor of the guideline language. The inconsistency should be noted for the benefit of the court.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

In the first two sections of this part, report the defendant's juvenile adjudications of guilt and criminal convictions. Within

each group, list the entries in chronological order of arrest. Include, in addition to convictions, any diversionary disposition that was based on a finding or admission of guilt.

Contrary to past practice, these sections are to include only matters in which the prior disposition of the charges can be accepted by the court as proof that the defendant was guilty of those charges. They will not include arrests that did not result in prosecution, cases prosecuted that were disposed of by dismissal, or cases resolved by acquittal. The exception is that a diversionary disposition should be included if it was based on a finding or admission of guilt.

A conviction should not be reported here if it cannot be established that the defendant was represented by counsel or waived the right to counsel. The Supreme Court has held that such a conviction may not be considered as proof that the defendant engaged in the conduct for which he was convicted. United States v. Tucker, 404 U.S. 443 (1972).

For each offense, report the date of referral or arrest, the charge, the court, the date of sentencing, and the disposition. Show the number of points that each conviction contributes to the criminal history score and the section of the Guidelines on which that number is based. Indicate whether the defendant was represented by counsel or waived his or her right to counsel. In

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

MEMORANDUM

TO: Phyllis Newton

FROM: Working Group on Criminal History

SUBJECT: Proposed Amendments to Criminal History Chapter

DATE: December 20, 1989

Attached you will find the proposed amendment changes to Chapter Four that resulted from the work of Pam Barron, Charles Betsey, Peter Hoffman, and Jay Meyer.

Our group has focused on several primary areas:

- Whether or not to add a category VII to the sentencing table, and the issues surrounding such an addition; and

- The sources and extent of the confusion in the field over assigning criminal history points to uncounseled misdemeanor convictions.

The recommendations to address the above items are in the following attachments.

We recognize that there are other areas that the Commission might want to consider that drafting staff is currently preparing, and that we will review upon completion. They are:

- In application note 3 to §4A1.2, providing a clearer definition of "consolidated for sentencing."

- Clarifying whether prior convictions for careless driving and reckless driving are offenses that are included in the list of offenses under §4A1.2(c)(1).

- Determining whether a prior conviction on appeal may be counted.

- Providing a clearer definition of local ordinance violations under §4A1.2 (c)(1).

December 14, 1989

Memorandum

TO: Phyllis Newton

FROM: Criminal History Working Group

§5A1.1. Sentencing Table

A. The Department of Justice has recommended that the Commission add one additional criminal history category (Memorandum by Roger Pauley dated 10/17/88, accompanied by cover letter from Commissioner Saltzburg dated 10/18/88). The pertinent section of that memorandum follows:

"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 score 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."

Should the Commission wish to accept this recommendation, drafting staff have prepared a proposed amendment with a discussion of the technical issues involved.

The working group has attempted to examine current practice information that might assist the Commission in addressing this issue.

We have attempted to ascertain (1) the frequency of cases having criminal history points in excess of 13, and (2) the frequency of upward departures from criminal history Category VI based on adequacy of criminal history.

Distribution of Criminal History Points

We first checked with the Monitoring Section to obtain the distribution of guideline cases by criminal history points. This information, however, is not available from the monitoring system which currently can only provide data by criminal history category. Therefore, we asked Jim Beck to review the random sample of 200 cases provided to him by the monitoring section and provide us with the distribution of cases having 13 or more criminal history points.

This table is shown below (Total N= 198; 2 cases were not guideline cases):

Criminal History Points	Number of Cases	Percent of All Cases
unknown	1	0.5%
13 points	5	2 1/2%
15 points	3	1 1/2%
16 points	2	1%
17 points	1	0.5%
18 points	2	1%
21 points	1	0.5%
22 points	1	0.5%
24 points	1	0.5%
34 points	1	0.5%

Based on the limited data available until the monitoring system is operational, it appears that the creation of an additional criminal history category for cases having substantially in excess of 13 points would include a very small proportion of cases. If, for example, Category VI was revised to include 13-19 points, and Category VII was established for 20 points or more, Category VII would include roughly 2% of all cases. Or, if Category VI were 13-16 criminal history points and Category VII were 17 points or more, Category VII would include roughly 3.5 percent of all cases.

Departures Due to Adequacy of Criminal History

At the request of the working group, Jay Meyer examined the criminal history departures from the Spring 1989 Departure Study by the Monitoring Section. His report (attached) indicates that only 2/10 of 1 percent of the cases (6 cases) involved an upward departure from criminal history category VI. Two additional cases involved departures from below level VI to above level VI for inadequacy of criminal history category; including these cases increases the rate of departure above level VI to 1/3 of 1 percent.

Depending upon the assumptions made about the definition of the new Category VII, up to 16 percent of the cases with criminal history scores substantially in excess of 13 would be upward departures above Category VI. For example, assuming 3.5 percent of all cases had criminal history scores of 17 or more, there would be 88 such cases in the random sample of 2500 cases. If all 6 cases that involved an upward departure from Category VI had criminal history scores of 17 or more, the upward departure rate would be 7 percent. If all 8 cases that involved departures above Category VI were included, the departure rate would be 9 percent. If Category VII applied to cases with 20 or more criminal history points, there would be roughly 50 such cases in the random sample of 2500 cases. If all 6 cases that involved upward departures from Category VI had criminal history scores of 20 or above, the upward departure rate would be 12%. If all 8 cases that involved departures above Category VI were included, the departure rate would be 16 percent.

From the above limited information, it does not appear that courts are using their authority to depart particularly frequently for such cases. Whether this indicates that the courts see the criminal history category VI penalties as adequate for such cases or whether they are simply reluctant to depart from the guidelines is not known.

Conclusion. Creation of an additional criminal history category creates certain additional complexities (see attached memorandum). At the current time, the available data do not demonstrate a pressing need for an additional criminal history category. This does not mean that creation of an additional category is inappropriate. Whether the advantages of an additional criminal history category outweigh whatever additional complexity such a category would create is a policy matter for the Commission.

B. At a recent Commission meeting, Commissioner Nagel expressed interest in staff exploring the possibility of the creation of an additional criminal history category for "true" first offenders.

"True" first offender can be defined in a number of ways. One way would be to define it as a defendant with no prior criminal history points. Under this definition, a "true" first offender criminal history category would have only defendants with 0 points, rather than 0 or 1 points as in the current guidelines. If the Commission wishes to have such a criminal history category, it could simply redistribute the points in each of the current six categories.

It is to be noted that in the January 1987 Draft Guidelines, Criminal History Category I contained defendants with only 0 points. (See the comparison below). However, after public

comment, the Commission rejected this formulation in favor of that contained in the current guidelines.

Comparison of January 1987 Draft Guidelines and Current Guidelines

	Criminal History Category					
	I	II	III	IV	V	VI
Criminal History Points						
1987 Draft Guidelines	0	1-2	3-4	5-6	7-8	9 or more
Current Guidelines	0-1	2-3	4-6	7-9	10-12	13 or more

Another way of defining a "true" first offender is a defendant who has not been in any criminal "trouble" previously. "Trouble" is usually defined as an arrest, whether or not leading to conviction. Under this definition, a defendant who has one or more previous arrests is not a true first offender (unless possibly the defendant can show that the previous arrest(s) were erroneous). When field staff talk about "true" first offenders, it frequently is this, or some similar, definition to which they are referring. Unfortunately, information on the circumstances underlying past arrests not leading to conviction is frequently not available, and even where it is available it might not be sufficient to withstand legal challenge. At the same time, the Commission has expressly stated that the presence of a prior arrest by itself is not sufficient for consideration under §4A1.3." (§4A1.3). Consequently, while the definition of a "true" first offender as one who has had no previous legal difficulty is quite understandable, it is not clear at this time how it could be incorporated into a guideline system. If the Commission is interested in pursuing this approach, we recommend further study.

December 14, 1989

Memorandum

TO: Criminal History Working Group

FROM: Peter Hoffman

SUBJECT: Addition of Criminal History Category

The following illustrates the addition of a criminal history category for defendants with criminal history scores of 20 or more.

(1) Proposed Amendment: Chapter Five, Part A, is amended in the Sentencing Table by deleting "(13 or more)" and inserting in lieu thereof (13-19), and by inserting the following additional column:

	"VII
Offense Level	(20 or more)
1	2-8
2	4-10
3	6-12
4	9-15
5	12-18
6	15-21
7	18-24
8	21-27
9	24-30
10	27-33
11	30-37
12	33-41
13	37-46
14	41-51
15	46-57
16	51-63
17	57-71
18	63-78

19	70-87
20	77-96
21	84-105
22	92-115
23	100-125
24	110-137
25	120-150
26	130-162
27	140-175
28	151-188
29	168-210
30	188-235
31	210-262
32	235-293
33	262-327
34	292-365
35	324-405
36	360-life
37	360-life
38	360-life
39	360-life
40	360-life
41	360-life
42	360-life
43	life".

(2) Conforming Amendment: Section 4A1.3 is amended in the fourth paragraph by deleting "Category VI" and inserting in lieu thereof "Category VII".

In addition, in the Sentencing Table in Chapter Five Part A, the "or"s and commas in the criminal history point captions for criminal history categories I-VI should be deleted, and dashes inserted in lieu thereof for consistency.

(3) Career Offenders. Several choices are available. One option would be to amend §4B1.1 by deleting "Category VI" and inserting in lieu thereof "the category corresponding to the defendant's criminal history points, or Category VI, whichever is greater". This would ensure that a defendant with 20 or more criminal history points would not receive a benefit from this revision. That is, this option would increase the guideline range for all career offenders with 20 or more criminal history points, but would otherwise not affect the guideline ranges for such cases. Under this option, the guideline range for a non-career offender with 20 or more criminal history points could be higher than that for a career offender with a criminal history score of fewer than 20 criminal history points (but this would happen only where the Chapter Two offense level for a career offender was greater than the offense level from the chart in §4B1.1).

Another option would be to amend §4B1.1 by substituting "Category VII" for Category VI" and by conforming the offense

levels in §4B1.1 (which are geared to the statutory maxima) by reducing each offense level by 1 level (e.g., level 37 would become level 36 producing the same guideline range). This option would automatically increase the guideline ranges for all career offenders where the offense level was determined by the offense level for the underlying offense rather than the chart in §4B1.1 whether or not the defendant's criminal history points were 20 or more, but would retain the current guideline range where the offense level is determined from the chart in §4B1.1.

§4A1.2. Definitions and Instructions for Computing Criminal History

The working group on criminal history has found that there is significant conflict between what we perceive to be the Commission's intent and the Administrative Office's instructions to probation officers relative to the counting of prior sentences resulting from constitutionally valid, although uncounseled, misdemeanor convictions in the criminal history score. In brief, the guidelines calls for counting such prior sentences unless the court expressly finds that the use of such convictions would be unconstitutional; the Administrative Office's instructions seem to indicate that such convictions are not to be counted. See memorandum from Jay Meyer dated 11/17/89 (attached). This conflict results in disparity in guideline application and may be why there has been a perception that the criminal history score increases sentences more slowly than pre-guideline practice. Under the Parole Commission's salient factor score, prior constitutionally valid misdemeanor convictions, whether counseled or uncounseled, were counted.

Part of the confusion seems to have been created by the Commission's failure to take a position on whether it believed the counting of constitutionally valid, uncounseled misdemeanor convictions was compatible with Baldazar v. Illinois, 44 U.S. 222 (1980). The Commission's choice of language in Application Note 6 of the Commentary to §4A1.2 (which amounts to a statement that the court should not count what it finds unconstitutional to count) did not resolve the issue, but rather provided the conditions for the Administrative Office to issue its instruction.

A proposed amendment to address this issue directly is shown below. The Commission's General Counsel has been requested to provide an opinion on the legal issues set forth in the proposed amendment.

A. Proposed Amendment:

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the fourth sentence as follows:

> "Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score.".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by inserting the following immediately before the period at the end of the second sentence:

", including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction".

The Commentary to §4A1.2 is amended by inserting at the end:

"Background

As noted in Application Note 6, sentences resulting from constitutionally valid convictions (including misdemeanor convictions where imprisonment was not imposed and, thus, provision of counsel was not constitutionally required) are counted. To make distinctions on whether a prior constitutionally valid sentence resulted from a counseled or uncounseled conviction would create wide disparity unrelated to the purposes of sentencing (e.g., some jurisdictions routinely appoint counsel in such cases while others do not). To prohibit use of all misdemeanor convictions not resulting in imprisonment would deprive the court of significant information relevant to the purposes of sentencing. Therefore, the Commission's criterion for inclusion of a prior sentence in the criminal history score is whether the prior sentence resulted from a constitutionally valid conviction, not whether the conviction was counseled or uncounseled.

The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled convictions, in the criminal history score violates the holding in Baldazar v. Illinois, 446 U.S. 222 (1980).".

B. The amendment shown below corrects a clerical error.

The Commentary to §4A1.2(d) captioned "Application Notes" is amended in the second sentence of Note 6 by deleting "in a" and inserting in lieu thereof "from a".

November 20, 1989

MEMORANDUM

TO: Criminal History Working Group

FROM: Jay Meyer

SUBJECT: Departures due to §4A1.3, Adequacy of Criminal History

As agreed upon in the criminal history working group, I have pulled those cases from the spring, 1989 departure study where §4A1.3, Adequacy of Criminal History, was listed by the court for the basis of its departure from the established sentencing guidelines. Of the 2,500 cases that were randomly selected by the monitoring department for review, 24 cases listed §4A1.3 as a reason for departure.

I examined the 24 files and documented the criminal history category determined by the court. I subsequently documented the sentence that was imposed by the court and assigned the criminal history category in which that sentence was located.

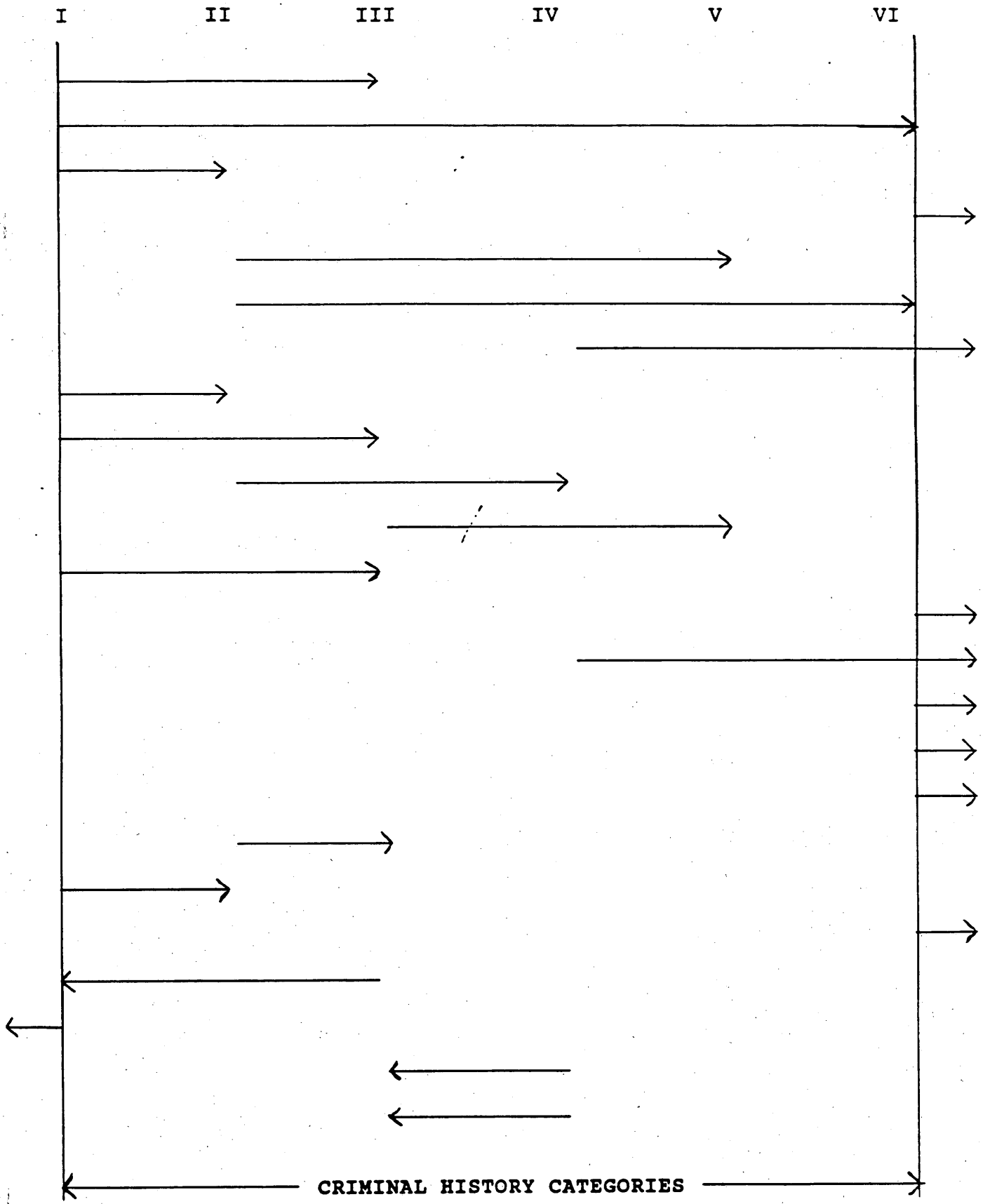
As you can see from the attached table, there was an upward departure in 20 (83%) of the cases. Conversely, four (17%) cases involved a downward departure.

Of the 24 cases where an upward departure occurred, six cases or 30% departed upward from category VI. There were two cases where the court departed from category IV to above category VI.

In summary, approximately 1% of the 2,500 cases studied involved departures based on §4A1.3. Of that 1%, only 25% of the cases involved departures from category VI to a higher range.

Perhaps this information will be useful to our group as we determine whether or not to recommend the addition of a category VII to the criminal history table. If the group deems it desirable, I could conduct a similar study of the data revealed from the current departure study.

DEPARTURES DUE TO §4A1.3



November 20, 1989

MEMORANDUM

To: Criminal Justice Working Group

From: Jay Meyer

Subject: Uncounseled Misdemeanor Convictions

As agreed upon in our criminal history working group, I have collected written material that might be helpful to us as we examine the apparent confusion in the field over whether uncounseled misdemeanor convictions should be counted under §4A1.1.

Attached is an excerpt from the Federal Judicial Center's training manual that was distributed to the U. S. probation offices in late 1987. Under Part B. THE DEFENDANT'S CRIMINAL HISTORY on page 29, it reads:

> A conviction should not be reported here if it cannot be established that the defendant was represented by counsel or waived the right to counsel. The Supreme Court has held that such a conviction may not be considered as proof that the defendant engaged in the conduct for which he was convicted. United States v. Tucker, 404 U.S. 443 (1972).

Shortly after this training manual was received by the field, the Administrative Office's General Counsel's office sent a memorandum to the field that was entitled "Use in Presentence Reports of Convictions Obtained Without Assistance of Counsel." The four-page letter outlines the pertinent case law that has been established surrounding this issue. In the closing paragraph on page four the memo reads:

> ...Thus, the instruction in the presentence report monograph directing probation officer to avoid mention of all uncounseled convictions is overly broad...Until the issue is determined by the courts, I believe probation officers should be instructed not to use these convictions to determine the criminal history category but simply refer to them in the "other criminal conduct" section of the presentence report and, perhaps, note the effect of the conviction if counted...

The hotline unit of the Technical Assistance Service has received numerous calls from the field inquiring into the apparent conflict between the AO's memorandum and application note 6 under §4A1.2. Probation officers believe the application note instructs them to include convictions unless the defendant shows that the convictions were invalid due to issues of constitutionality.

It is not surprising that there is confusion over this issue. It is likely that uncounseled misdemeanors are simply not being counted whenever there is a question of counsel being present. If this were the case, those uncounseled misdemeanor convictions under the old system that were routinely counted in salient factor scoring by the Parole Commission, are no longer figuring in to a defendant's guideline calculation under the new system.

The practice of automatically excluding uncounseled misdemeanors could explain why certain defendants are receiving lighter sentences under the guidelines than in the past. Under the provisions of the U. S. Parole Commission's salient factor scoring, it was presumed that a conviction/adjudication was valid. [See page 63 of Parole Guideline Manual]

At a maximum, the result would be undercounting four criminal history points, plus two points if the defendant was on probation for the one of the prior convictions at the time of the instant offense.

memorandum

DATE: January 13, 1988

REPLY TO ATTN OF: David N. Adair, Jr., Assistant General Counsel

SUBJECT: Use in Presentence Reports of Convictions Obtained Without Assistance of Counsel

TO: Donald L. Chamlee, Chief, Probation Division

For the last several years, there has been criticism of the policy outlined in Appendix C of the Presentence Investigation Report, Publication 105, that probation officers verify that the defendant was represented by, or waived, counsel before including a conviction in the prior record section of the PSL. This policy has been carried over into the new Presentence Investigation Reports under the Sentencing Reform Act of 1984, page 29. Probation officers have complained that this duty is burdensome and unjustified since counsel has been required to be provided under the principles of Gideon v. Wainwright, 372 U.S. 335 (1963), for the past 25 years. Indeed, many states provide for counsel by statute or otherwise; it is argued, therefore, that a presumption of counsel is justified where prior criminal proceedings occurred after the effective date of those statutes or other formalized policies.

With the promulgation of the guidelines of the United States Sentencing Commission, the criticism of the verification requirement has taken on additional significance. As you know, the guidelines rely heavily on prior convictions to determine the criminal history category which, in turn, affects the sentencing range applicable to the individual defendant. The Commission indicates in its commentary to section 4A1.2 at note 6, page 4.7, that the burden is on the defendant to show that a conviction is constitutionally invalid. Representatives of the Sentencing Commission have stated that probation officers should include all prior convictions, regardless of whether representation or waiver can be verified, and that such convictions should be used to calculate the criminal history category or for other purposes unless the defendant successfully challenges the constitutionality of the prior conviction. Apart from questions of the authority of the Sentencing Commission to dictate practice among probation officers in preparing the presentence report, this assertion has caused confusion among probation officers and renewed criticism of the policy contained in the presentence report monograph. Accordingly, we have reviewed the case law and the reasons behind the policy of verification and have concluded that, while it retains substantial validity, some minor adjustments are in order.

As you know, the basis for the policy is United States v. Tucker, 404 U.S. 443 (1972), in which the Supreme Court held that a felony conviction obtained in violation of the right to counsel guaranteed by the Sixth Amendment of the Constitution could not be considered in imposing sentence in a later criminal proceeding. Although the court recognized that sentencing judges could take into account an extremely broad range of factors in sentencing, convictions obtained without benefit of counsel constitutes reliance upon "misinformation of constitutional magnitude." 404 U.S. at 447. This

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

GPO : 1987 O - 173-680

unambiguous holding justified the policy contained in the presentence monograph and current case law supports the continuation of that policy with only minor adjustments.*

In fact, recent cases suggest that all that is necessary to challenge a sentence as violative of the principles announced in Tucker is that it is "not improbable that the trial judge was influenced by improper factors in imposing sentence." Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987), citing United States v. Harris, 448 F.2d 366, 374-75 (7th Cir. 1977). But see United States v. Williams, 782 F.2d 1462 (9th Cir. 1985) in which the court held that to challenge a sentence under Tucker, defendant must show that the sentencing judge mistakenly believed the prior conviction was constitutional and that it was used to enhance the sentence.

If the court has relied upon a potentially unconstitutional conviction in imposing sentence, an affirmative showing that defendant had representation or validly waived representation is required. I am aware of no cases in the sentencing context that have endorsed a presumption of regularity in prior convictions. Once the issue is raised, the Government bears the burden of showing representation or waiver. See United States v. Debevoise, 799 F.2d 1401 (9th Cir. 1986), and Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978) (en banc).

A challenge to the constitutional validity of a sentence may be raised at any time. Therefore, while a court may not have an affirmative duty to determine the constitutional validity of each prior conviction considered in imposing sentence, considerations of judicial economy support such an inquiry at some level prior to the imposition of sentence. Since it is clear that the Government must show representation or a waiver of representation once the issue is raised by the defendant, and since prior convictions are factors that affect the determination of the applicable sentencing range, it seems reasonable to suppose that defendants will regularly put the Government to its proof on the chance that some convictions that might otherwise have been relied upon will not be used because of the lack of such proof. Without some inquiry into representation prior to sentencing, it is possible that, upon a challenge by the defendant, neither the Government nor the probation officer would be able to provide sufficient proof of representation or waiver without delaying the sentencing hearing. And, of course, if the issue is not resolved prior to sentencing, the defendant could raise the issue in connection with a motion under 28 U.S.C. § 2255. All of this leads to the conclusion that there should be some indicia of validity before a conviction is listed in the presentence report. But that indicia need not always be specific to the conviction at issue.

Where the probation officer is certain that the defendant was entitled to receive representation under the laws or practice of the jurisdiction in which the conviction was obtained, it seems reasonable to rely on that fact and avoid unnecessary sifting through

---

*Of course, the entire issue could be mooted if it is determined that it is simply absurd to permit the use of unadjudicated conduct to determine offense behavior and, at the same time, to prohibit the use of actual convictions obtained without benefit of counsel to determine the criminal history category.

old court records. If a defendant challenges the use of such a conviction under Tucker, the probation officer should be able to produce the necessary documentation without unreasonable delay. This assumption is supported by the fact that the guidelines limit the use of prior convictions as follows:

> (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month that resulted in the defendant's incarceration during any part of such fifteen-year period.
>
> (2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

Section 4A1.2(e). Documentation should, of course, be easier for these more recent convictions. Of course, this procedure will work only in districts that have provided for challenges to the presentence report prior to the sentencing hearing. Under the Model Local Rule promulgated by the Probation Committee, the probation officer would have 10 days to obtain the necessary documentation. Otherwise, if the challenge is allowed to be raised for the first time at the sentencing hearing, delay will be inevitable. Frivolous challenges might be reduced if, when the officer relies on a state law or policy to presume representation, the officer sets out the authority for the presumption in the presentence report. The authority should include a citation of the state law or policy that provides representation.

This change in policy might not be helpful in all cases and could be awkward in cases in which the conviction at issue was obtained in another district. I presume that the probation office in the other district could obtain the necessary documentation, but some delay is possible. Nonetheless, the change could reduce some of the burden on probation officers. It should be added that a number of districts are already following such a policy without any reported problems. On the other hand, it is rumored that public defenders are being instructed to challenge all prior convictions under Tucker. If this rumor is correct, a delay in the implementation of this policy change is warranted. I suspect that routine challenges to information in presentence reports will abate after several months of experience with guideline sentencing.

The Sentencing Commission has further objected to any policy that would result in the failure to list in the presentence report uncounseled misdemeanor convictions that did not result in imprisonment. Sections 4A1.1 and 4A1.2 provide for the use of misdemeanor convictions in determining the criminal history category. The commentary to section 4A1.2 at note 6, page 4.7, provides that "if to count an uncounseled misdemeanor could result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score." This cryptic statement in the commentary acknowledges the confusing state of the case law but leaves to the sentencing courts the question of the permissible use of uncounseled misdemeanor convictions in imposing sentence.

In Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court held that an uncounseled misdemeanor conviction is constitutional if the defender was not incarcerated as a result of the conviction. In Baldasar v. Illinois, 446 U.S. 222 (1980), however, the Supreme Court, in a per curiam opinion, held that, even if the uncounseled misdemeanor conviction is valid, it may not be used to increase a misdemeanor to a felony under a state recidivist statute. Unfortunately, the plurality opinion did not result in a single rationale for the decision. Four justices urged that, under the state recidivist statute, the only reason the defendant could be incarcerated was because of the earlier uncounseled misdemeanor conviction. The result of consideration of the uncounseled conviction is no different than had the offender been imprisoned on the earlier conviction. In his concurring opinion, Justice Blackmun, however, reiterated the position articulated in his dissent in Scott and, while voting to prohibit use of the uncounseled conviction, indicated that he would hold invalid any uncounseled misdemeanor conviction in which the offense carried a term of imprisonment over six months or where defendant was actually sentenced to imprisonment. Because of the plurality opinion, some courts have found broad exceptions to the general principles suggested in Baldasar. In Schindler v. Clerk of the Circuit Court, 715 F.2d 341 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984), for example, the court permitted the use of the results of a civil forfeiture proceeding in imposing a prison sentence for a subsequent violation of the same driving-under-the-influence statute. The court reasoned that the first civil proceeding was simply a form of notice to individuals that subsequent proceedings would result in imprisonment. The court thus declined to extend Baldasar to that situation. See also United States v. Roblas-Sandoval, 637 F.2d 692 (9th Cir. 1981), and Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981). A number of state courts have also found broad exceptions to the Baldasar result. See Justice White's dissent in the denial of certiorari in Moore v. Georgia, 108 S. Ct. 247 (1987).

Given the state of the case law, it is unclear what effect Baldasar will have on the use of uncounseled misdemeanor convictions that did not result in imprisonment under the sentencing guidelines. It seems to me that if the use of such a conviction resulted in a guideline range that did not permit probation or actually resulted in the defendants receiving a sentence of imprisonment, the majority holding in Baldasar would prohibit that use. Even that result, however, is not certain. It is fairly certain, however, that an otherwise constitutional misdemeanor conviction could be used in certain guideline decisions that did not result in imprisonment. Thus, the instruction in the presentence report monograph directing probation officers to avoid mention of all uncounseled convictions is overly broad. I suggest that the instructions be amended to provide that probation officers report uncounseled misdemeanor convictions that do not result in imprisonment but to identify them as raising legal issues. Until the issue is determined by the courts, I believe probation officers should be instructed not to use these convictions to determine the criminal history category but simply refer to them in the "other criminal conduct" section of the presentence report and, perhaps, note the effect of the conviction if counted. This recommendation is consistent with Tony Partridge's suggestions to Judge Tjoflat in his letter of October 27, 1987 (which I attach for your convenience), except that Tony suggests an additional, separate section for that information.

Attachment

cc: Honorable Edward R. Becker
Mr. Anthony Partridge

within the meaning of Section 4B1.1 of the Guidelines. The statutory maximum for the instant offense is 20 years, and the offense level determined under Section 4B1.1 is 34 rather than the lower level calculated above.

If the calculated offense level is less than 13 and there is information showing that the instant offense was part of a pattern of criminal conduct from which the defendant derived a substantial portion of his income, the officer should set forth the basis for the finding in this section. See Section 4B1.3 of the Guidelines.

In some cases, the officer will find that the Guidelines are unclear about matters that affect the computation of the offense level. In such cases the officer should rely on the interpretation that he or she thinks is correct but should note that there is an alternative interpretation. If possible, the impact of the alternative interpretation on the offense level calculation should be given. As has been noted earlier, an apparent conflict between the language of Guidelines and the language of Commentary or other explanatory material provided by the Sentencing Commission should be resolved in favor of the guideline language. The inconsistency should be noted for the benefit of the court.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

In the first two sections of this part, report the defendant's juvenile adjudications of guilt and criminal convictions. Within

each group, list the entries in chronological order of arrest. Include, in addition to convictions, any diversionary disposition that was based on a finding or admission of guilt.

Contrary to past practice, these sections are to include only matters in which the prior disposition of the charges can be accepted by the court as proof that the defendant was guilty of those charges. They will not include arrests that did not result in prosecution, cases prosecuted that were disposed of by dismissal, or cases resolved by acquittal. The exception is that a diversionary disposition should be included if it was based on a finding or admission of guilt.

A conviction should not be reported here if it cannot be established that the defendant was represented by counsel or waived the right to counsel. The Supreme Court has held that such a conviction may not be considered as proof that the defendant engaged in the conduct for which he was convicted. United States v. Tucker, 404 U.S. 443 (1972).

For each offense, report the date of referral or arrest, the charge, the court, the date of sentencing, and the disposition. Show the number of points that each conviction contributes to the criminal history score and the section of the Guidelines on which that number is based. Indicate whether the defendant was represented by counsel or waived his or her right to counsel. In