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March 25, 1988

MEMORANDUM

TO: All Commissioners
Sid Moore
Guideline Drafting Staff
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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 Specter, the bill's sponsor). As originally proposed by Senator Specter, 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 or 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 consideration 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 not 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 twice 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 minimum 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, not 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.

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MEMORANDUM

TO: Judge MacKinnon
FROM: Phyllis Newton, J^r
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.

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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).

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 than 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

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

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.

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.

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(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. ^{VIOLENT FELONY} "Crime of violence," ^{SERIOUS DRUG OFFENSE} "controlled substance 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 ^{VIOLENT FELONY} "crime of violence" as used in this provision is ~~defined under 18 U.S.C. § 16.~~ SEE INSERT A
- (2) The term ^{SERIOUS DRUG OFFENSE} "controlled substance 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' ^{4.11} REFERS TO THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED FOR THE OFFENSE OF CONVICTION THAT IS A CRIME OF VIOLENCE OR SERIOUS DRUG OFFENSE. January 15, 1988

- (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(k) (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

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Commentary

Application Note:

1. ^{VIOLENT FELONY} "Crime of violence," ^{SERIOUS DRUG OFFENSE} "controlled substance 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 ^{VIOLENT FELONY} "crime of violence" as used in this provision ~~is defined under 18 U.S.C. § 16.~~ **SEE INSERT A**
- (2) The term ^{SERIOUS DRUG OFFENSE} "controlled substance 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**

4.11

January 15, 1988

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 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(k) (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 th the example are illustrated & not comprehen*

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."