

1 C-71/91

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

P.O. BOX 2-AD

RICHMOND, VIRGINIA 23205

(804) 643-7171

CHAMBERS OF

HON. ROBERT R. MERHIGE, JR.

SENIOR UNITED STATES DISTRICT JUDGE

October 19, 1990

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

Dear Billy:

I apologize for my delay in responding to your letter of September 21 soliciting my thoughts on the Guidelines sections or policy statements that I believe need review, amendment or clarification.

I preface my suggestions by pointing out that many, if not most, of the firearms violations in this district are prosecuted under 18 U.S.C. § 922(a)(6) -- in short, dealing with the making of false and factitious statements to a dealer and the acquisition of firearms. We frequently have seen defendants who have either attempted to or successfully purchased firearms locally to be sold out of state (usually New York City). There is no doubt in my mind that many of these firearms that come into the hands of such people end up in the major urban areas of the country. Sections 2K.1 and 2K.2 are the specific guidelines for this type of misbehavior. My understanding is that if a defendant purchases as many as 49 firearms in violation of 18 U.S.C. § 922(a)(6), his offense level would be an 11. Depending on his criminal history category, his guideline range could be as low as 8-14 months. If a defendant purchases 50 or more firearms, his offense level is increased only by 1. If he or she accepts responsibility for his or her offense behavior, the likelihood is that there would be a reduction of 2 points, resulting in a range of 4-10 months. Needless to say, a great deal would depend on the criminal history category of the defendant. My own experience is that most of the defendants that I have seen in this regard either tend to be first-time offenders, or have minor prior records. I suspect they are simply sent down here by others with false identification.

If a defendant purchases as many as 49 firearms in violation of 18 U.S.C. § 922(a)(6), his base offense level would be 6, which, because of the number of firearms, would be increased by 5, for a total offense level of 11. Depending on his criminal history category, his guideline range could be as low as 8-14 months.

Frankly, I think sending this number of guns to an urban area is an offense which warrants a very substantial term of imprisonment. Indeed, if a defendant purchases 50 or more firearms, his offense level would be increased only by 1. Couple that with the fact that if a defendant accepts responsibility for his offense behavior, that same 8-14 range would be 4-10 months, by virtue of reducing the offense level by 2 points.

My suggestion then is that we do not need to do any more to increase the base offense level in §§ 2K2.1 and 2K2.2. In addition, I would suggest a change in § 2K2.2(b)(1) to reflect a substantial increase concerning the number of firearms. More succinctly, I think anyone who purchases 50 or more guns are preparing to start their own war and warrants a very severe term of incarceration.

The Supreme Court's decision in Hughey v. United States, as I understand it, precludes the ordering of restitution for any offense of which the defendant has not been convicted. You may be assured that plea bargains in the future will result in the dismissal of counts which ordinarily would carry a burden of a high financial restitution. This case leads me to some concern reference Guideline § 1B1.3 dealing with relevant conduct. I suppose, in light of the fact that I have no solution to my concern, and perhaps it would have been better to have mentioned it, but the relevant conduct guidelines, which establishes the parameters for what has to be considered, is a source of much time-consuming argument between the prosecutor and defense counsel. Regardless of the correctness of the arguments, you may be assured that a great deal of time will be spent listening to arguments to the effect that in light of Huey, potential punishment should be limited premised on relevant conduct in the counts of conviction only.

Finally, I am running into difficulties with § 4A1.2 dealing with the computation of criminal history. The newest tactic in this area, when the defendant has been convicted by a state court as well as a federal court, is to delay the state sentence as long as possible in order to have the federal sentence first to avoid it being counted in the computation of criminal history. This could all be avoided if § 4A1.1 dealt not with sentencing, but with convictions, in which event § 4A1.2(a)(b)(c) could all deal solely with convictions as distinguished from sentences.

I am afraid none of this will be of much help, Billy, and it may be that much of my concerns could be alleviated by sentencing above the guideline range which, frankly, I have never done, nor indeed have I sentenced below the guideline range.

I know my comments are going to destroy my reputation for being a bleeding heart (undeserved, in my opinion), but I do think we should seriously consider that further study needs to be

conducted to the end that we consider guidelines more in line with the statutory maximums.

With warm personal regards, I am

Respectfully,

A handwritten signature in black ink, appearing to read "B. Merhige, Jr.", with a stylized flourish at the end.

Robert R. Merhige, Jr.
United States District Judge