



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

NOV 16 1990

CC-38,342 FE:SRR

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

This is in response to the request of your staff that we review the sentencing guidelines and make recommendations with respect to possible changes in the guidelines for certain firearm and explosive offenses. The changes recommended in this letter are based on our experience with the guidelines.

Initially, we would express our appreciation to the Commission for the careful consideration it gave to our earlier comments on the guidelines and the improvements in the guidelines which became effective on November 1, 1990. As a result, the proposed new sentencing guidelines on arson and "Armed Career Criminals" will be significantly improved. We also want to thank Commissioner Carnes and the members of your staff for meeting with us on October 12, 1990, to discuss these additional recommendations.

Felons in Possession of Firearms

Under 18 U.S.C. § 922(g), it is generally unlawful for a felon to receive or possess a firearm. In November 1988, Congress increased the maximum penalty for this offense from 5 years to 10 years imprisonment. The current sentencing guideline applicable to this offense in section 2K2.1 provides a base offense level of 12 and requires a decrease to level 6 if the defendant obtained or possessed the firearm solely for lawful sporting purposes or for collection. Effective November 1, 1990, this reduction does not apply to National Firearms Act (NFA) weapons, *i.e.*, machineguns, silencers, destructive devices, or short-barrelled rifles and/or shotguns. In our view, the offense level for felons

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who possess firearms and those who have prior convictions for crimes of violence or for controlled substance offenses is too low.

Initially, we would point out that the 1986 amendments to the Gun Control Act of 1968 (18 U.S.C. Chapter 44) significantly decreased the number of felons prohibited by section 922(g) from possessing firearms. Effective November 15, 1986, under 18 U.S.C. § 921(a)(20), a felon who has received an expunction, pardon, set aside, or restoration of civil rights, and is not prohibited by the law of the jurisdiction in which convicted from possessing firearms is no longer prohibited under Federal law from possessing firearms. In addition, under 18 U.S.C. § 925(c), persons prohibited from possessing firearms because of a disabling conviction may apply to ATF for relief from their firearms disabilities. Thus, a section 922(g) offense has become more serious because only individuals not having any of these indicia of rehabilitation are prohibited from possessing firearms.

Because of the insufficient sentences provided for by the guidelines, ATF has experienced difficulty in having individuals prosecuted who possess firearms and who have committed a prior crime of violence or a controlled substance offense. Some United States attorneys are reluctant to expend time and resources to prosecute these cases. Thus, the guidelines should provide an increase in the base offense level to 18. If the defendant has one prior conviction for controlled substance offenses or crimes of violence, the offense level should be increased to 20. If the defendant has two prior convictions for controlled substance offenses or crimes of violence, the offense level should be increased to 22. If the defendant used a firearm or explosive in a prior felony, the offense level should be increased by two levels. If the defendant used a firearm or explosives in two prior felonies, the offense level should be increased by four levels. Finally, there should be a 2-level enhancement if the weapon possessed is an unregistered NFA weapon.

These classes of individuals pose a serious threat to society, yet they do not qualify for sentencing as "career offenders" or as "armed career criminals." Therefore, a significant deterrent to such possession should be

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implemented. Enclosure one contains a discussion of cases where defendants with prior violent felonies or controlled substance offenses received minimal sentences.

Furthermore, the decrease in offense level, if the defendant obtained or possessed the firearm solely for lawful sporting purposes or collection, should be eliminated. The fact that the defendant originally acquired the firearm for sporting or collection purposes is immaterial. Rather, the circumstances surrounding the defendant's possession and use of the firearm should be more significant for purposes of sentencing. This would eliminate frivolous arguments such as that raised by the defendant in United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989), who, having fired a rifle throughout his home after a quarrel with his wife, and having been convicted of being a felon in possession of the rifle, argued that his sentence should be reduced because the firearm was obtained for sporting purposes. If the Commission believes that there should be a sentence reduction available in those cases involving "technical" violations of section 922(g), such instances should be limited to persons having firearms for sporting purposes who have no more than one prior felony conviction which was neither a violent felony nor a substance abuse offense.

Furthermore, except for NFA weapons, we do not believe that the "type" of firearm possessed, e.g., handgun, shotgun, or rifle, should be a factor in the guidelines. For your further information, enclosure two includes a breakdown of firearms taken into ATF custody since 1983. While the enclosure might indicate that more handguns are involved in crime than any other type of firearm, we would conclude from our experience that criminals will use any type of firearm that is available. In our view, any felon with a firearm is potentially dangerous. Therefore, the "type" of firearm possessed by a felon should not be a major concern in sentencing.

Engaging in a Firearms Business Without a License

Under 18 U.S.C. § 922(a)(1), it is unlawful to willfully engage in the business of dealing in firearms without a license. Under this section, ATF must prove that the defendant devoted time, attention, and labor to dealing in firearms with the principal objective of livelihood

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and profit through the repetitive purchase and resale of firearms. However, a person who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection, or for a hobby, or who sells all or part of his or her personal collection of firearms, would not be engaging in a firearms business. See 18 U.S.C. § 921(a)(20)(C).

The current sentencing guideline applicable to this offense in section 2K2.2 provides a base offense level of 6. If the offense involved distribution of firearms, or possession with intent to distribute, the guideline provides for an increase in the offense level depending on the number of firearms distributed or involved in the violation. In our view, the base level of 6 is too low. Any willful violation of section 922(a)(1) is serious, notwithstanding the number of firearms involved in the violation. As noted above, dealing in firearms without a license is not a "technical violation" since the legitimate gun collector or hobbyist is not subject to this provision. With respect to the enhanced penalties based on the number of firearms illegally distributed, we are unable to make a recommendation for change in the guideline. In our view, the number of firearms involved in the offense would not necessarily indicate the seriousness of the crime. Indeed, a small number of firearms sold to terrorists or members of organized crime may have a greater consequence from a law enforcement standpoint than a larger number of firearms illegally sold to otherwise law-abiding citizens. However, we would recommend an increase in the base level for the offense from 6 to 12. In addition, we would recommend that "Commentary 2" accompanying this guideline allow for an upward departure if the number of weapons involved exceeds 25 rather than 50. The distribution of 25 or more firearms clearly indicates a trafficker in firearms warranting an increase in the sentencing level.

Receipt of Explosives by Felons

Under 18 U.S.C. § 842(i)(1), it is generally unlawful for any person who has been convicted of a felony to receive explosives. Under section 2K1.3 of the guidelines, the base offense level for unlawfully receiving explosives is 6 and if the defendant is prohibited under section 842(i) from receiving explosives, the offense level is increased 10

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levels to 16. We recommend an increase in the offense level to 18 for individuals who receive explosives and who have been convicted of a crime of violence or a controlled substance offense. If the defendant has two prior convictions for controlled substance offenses or crimes of violence, the offense level should be increased to 20. If the defendant used a firearm or explosive in the prior felony, the offense level should be increased by two levels. If the defendant used a firearm or explosive in two prior offenses the offense level should be increased by four levels. Similar to firearms violators, these individuals pose a serious threat but do not qualify for sentencing as "career offenders" or as "armed career criminals."

Unlawfully Trafficking in Explosives

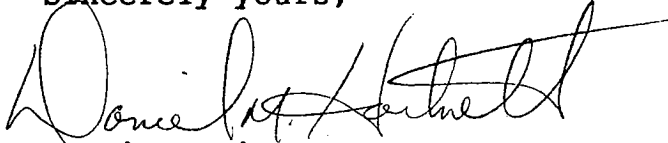
Under 18 U.S.C. § 842(a)(1), it is unlawful to engage in the business of manufacturing, importing or dealing in explosives without a license. The current sentencing guideline for this offense in section 2K1.3 provides a base level of 6. While increases in offense levels are provided in certain circumstances, e.g., dealing in stolen explosives or sales to felons, the base level of 6 is too low for the serious offense of illegally engaging in the business of an explosives manufacturer, importer, or dealer. In one case, for example, an individual pled guilty to dealing in explosives without a license (M-80's and M-200's) and was sentenced to probation for 3 years and fined \$1,420.

The clandestine manufacture of explosives, including illegal fireworks, poses a serious threat to public safety, particularly to children. Increasing the base level to 12 would comport with the seriousness of the offense. In addition, consideration might be given to an enhancement of the level based upon the quantity of explosives involved. For example, the sentence could be increased by two levels for every 50 pounds of explosives involved in the violation. Thus, an illegal fireworks manufacturer in possession of 200 pounds of explosives could be subject to sentencing at a base level of 12 and an additional enhancement of 8 levels based on the amount of explosives.

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We appreciate this opportunity to comment on the sentencing guidelines. If additional information is desired, please let us know.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Donald H. Hirsch". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Associate Director
(Law Enforcement)

Enclosures

On April 13, 1990, Anthony Watkins, a three-time convicted felon and member of the Bloods Street Gang, was found in possession of two handguns and a small quantity of marijuana. Watkins was subsequently indicted and pled guilty to one count of 18 U.S.C. 922(g)(1), the title 21 charges for the marijuana were dismissed. Watkins was sentenced in Tucson, Arizona, to 12 months of incarceration. The sentencing guidelines for Watkins were in the vicinity of 18 to 24 months.

In April 1989, Delbert Lee Thorne, who had two prior burglary convictions, was found in possession of three long guns. Subsequently, Thorne pled guilty to one count of 18 U.S.C. section 922(g)(1) in the Western Judicial District of Virginia. Originally, Thorne was sentenced to 6 months of incarceration and 3 years of probation. The U.S. attorney's office appealed the sentence and Thorne was resentenced to 21 months of incarceration and 2 years of supervised probation.

Recently, Raoul Tanguma, a twice-convicted felon on narcotics charges, pled guilty to one count of 18 U.S.C. section 922(g)(1). Tanguma was found in possession of two firearms while out on parole. Tanguma was sentenced to 14 months of incarceration. The presiding district court judge stated that he wished he could have given Tanguma additional jail time.

In 1987, Eluid Guerra was indicted by a Federal grand jury for violation of 18 U.S.C. section 922(g)(1). A short time later, Guerra became a fugitive. In August 1989, Guerra was rearrested in Texas. Guerra has two prior Federal convictions for narcotics violations. Guerra pled guilty and received 12 months of incarceration.

On February 17, 1989, Roberto Valles Narvaiz, a four-time convicted felon, pled guilty to one count of 18 U.S.C. section 922(g)(1) and was sentenced to 12 months of incarceration and 3 years of supervised probation. Narvaiz' convictions included three narcotics convictions and a theft conviction.

FIREARMS ENFORCEMENT PROGRAM

<u>FY</u>	<u>DEF.</u>	<u>FELONY</u>	<u>NARC.</u>	<u>T/GUNS</u>	<u>HG</u>	<u>LG</u>	<u>OTHER</u>
83	2,533	1,534	896	9,616	3,544	3,217	2,855
84	2,293	1,316	1,185	9,436	4,701	3,161	1,574
85	3,137	1,696	1,192	11,242	3,857	3,913	3,472
86	3,699	2,117	1,524	11,891	4,637	3,540	3,714
87	3,917	2,061	1,958	8,583	3,735	3,203	1,645
88	4,648	2,282	2,639	12,863	7,026	2,775	3,062
89	6,669	3,044	4,066	15,019	8,351	3,957	2,711
90	7,955	3,702	4,431	12,469	5,811	4,510	2,151
	34,851	17,752	17,891	91,119	41,662	28,276	21,184

FELONY--DEFENDANTS THAT HAVE PRIOR FELONY CONVICTIONS

NARC--DEFENDANTS WITH PRIOR NARCOTICS BACKGROUND

T/GUNS--TOTAL FIREARMS TAKEN IN BY ATF.

H/G--TOTAL HANDGUNS TAKEN IN BY ATF.

L/G--TOTAL LONG GUNS (RIFLES AND SHOTGUNS) TAKEN IN BY ATF.

45% OF ALL FIREARMS TAKEN IN BY THE BUREAU ARE HANDGUNS.

51% OF ALL DEFENDANTS HAVE PRIOR FELONY CONVICTIONS.

51% OF ALL DEFENDANTS HAVE SOME NARCOTICS TRAFFICKING
BACKGROUND.

BETWEEN FY83 AND FY87 37% OF ALL DEFENDANTS HAD PRIOR
NARCOTICS INVOLVEMENT; HOWEVER, BETWEEN FY88 AND FY90 63% OF
ALL DEFENDANTS WERE INVOLVED IN NARCOTICS.

OTHER CATEGORY--(SAWED-OFF SHOTGUNS, MACHINEGUNS, MACHINEGUN
CONVERSIONS, SILENCERS, AND OTHER NFA
WEAPONS).