

025-95



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

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CC-44,818 FE:BSO

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Sir:

This is in response to the Notice of Proposed Amendments to the Sentencing Guidelines published in the Federal Register on January 9, 1995. The Bureau of Alcohol, Tobacco and Firearms would offer the following comments on the Commission's proposals.

I. FIREARMS

A. Felons Possessing Firearms with Previous Violent Felony Convictions

The Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "the Act") provides that the United States Sentencing Commission (Commission) shall amend the guidelines to appropriately enhance sentencing in cases where a defendant, who is a felon in possession of a firearm in violation of section 922(g) of the Gun Control Act of 1968 (GCA), Title 18 U.S.C., has 1 or 2 prior convictions for a violent felony or a serious drug offense as defined by 18 U.S.C. § 924(e).

The current sentencing guideline in section 2K2.1 for a section 922(g) offense provides a base offense level of 14. The offense level for felons who have 1 prior conviction for a crime of violence or a controlled substance offense is 20, and the level for felons who have 2 prior convictions is 24.

The Commission requests comments on whether the current offense levels should be increased and, if so, by what amount. In our view, there is no discretion with respect to an increase because the Act requires the Commission to enhance the penalties in the above-described cases.

Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), whoever violates section 922(g) and has 3 previous convictions for violent felonies or serious drug offenses is

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subject to a mandatory sentence of not less than 15 years. Therefore, we believe it appropriate to enhance by 3 levels the sentence of felons having 1 predicate conviction and an additional 3 levels for felons having 2 such convictions. This would result in a sentence of approximately 5 years in the first instance and 10 years in the second instance.

Furthermore, we would point out several disparities between the 2K2.1 guidelines and the section 924(e) treatment of commercial burglary, foreign convictions, convictions which occurred more than 15 years ago, and related offenses. With respect to commercial burglaries, the guidelines include only burglaries of dwellings as crimes of violence. See section 2K2.1, Application Note 5 and section 4B1.2, Application Note 2. However, under section 924(e), burglaries of any building or structure are violent felonies. The Supreme Court has noted that all burglaries carry an inherent potential for harm to persons. See Taylor v. United States, 495 U.S. 575, 588 (1990). Therefore, we believe that the guidelines should be amended so that commercial burglaries are treated similarly to other violent felonies.

Likewise, under the current guidelines, foreign convictions for crimes of violence or controlled substances offenses are not treated as prior felony convictions and do not result in an increase in offense levels under section 2K2.1. Rather, section 4A1.2(h) provides that sentences resulting from foreign convictions may be considered in determining the defendant's criminal history category. On the other hand, foreign convictions for violent felonies and serious drug offenses are considered to be convictions for purposes of mandatory sentencing under section 924(e).¹ Therefore, we

¹ See United States v. Winson, 793 F.2d 754 (6th Cir. 1986), holding that a foreign felony conviction was a conviction for purposes of 18 U.S.C. 922(h), the predecessor to section 922(g). The court suggested that a foreign conviction should be treated as a disabling conviction if it was not the result of a violation of civil rights or contrary to other American constitutional principles.

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recommend that the guidelines be amended to provide that foreign convictions for crimes of violence or controlled substance offenses be treated consistently with domestic offenses.

In addition, section 2K2.1 provides that prior sentences for crimes of violence or controlled substance offenses must have been imposed within certain time limits. More specifically, a conviction which is more than 15 years old cannot be viewed as a predicate for enhancing the sentence of a felon in possession of a firearm. On the other hand, convictions more than 15 years old count as predicate convictions for purposes of sentencing under section 924(e). See, e.g., United States v. Daniels, 3F.2d 25, 28 (1st Cir. 1993). We recommend that section 2K2.1 be amended so that all prior felony convictions for crimes of violence or controlled substance offenses be considered as predicates to increase the defendant's offense levels regardless of when they occurred.

Section 2K2.1 also provides that sentences imposed for controlled substance offenses count as only 1 prior conviction. See section 4A1.2(a)(2) and Application Note 3. Application Note 3 states that prior sentences are not considered related if they were for offenses separated by an intervening arrest, i.e. the defendant was arrested for the first offense prior to committing the second offense. Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single scheme or plan, or (3) were consolidated for trial or sentencing. On the other hand, under section 924(e), a defendant who has committed violent felonies or serious drug offenses on 3 different occasions has committed the requisite 3 predicate offenses. See, e.g., United States v. Maxey, 989 F.2d 303 (9th Cir. 1992); United States v. Arnold, 981 F.2d 1121 (9th Cir. 1992). The fact that the offenses are consolidated for trial or sentencing is immaterial. We, therefore, recommend that section 2K2.1 be amended so that multiple crimes of violence and controlled substance convictions count as multiple convictions so long as the offenses were committed on different occasions.

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B. Manufacture, Transfer, or Possession of Semiautomatic Assault Weapons

The Act amended the GCA to make it unlawful to manufacture, transfer, or possess "semiautomatic assault weapons." 18 U.S.C. § 922(v). It also increased the penalty in 18 U.S.C. § 924(c) for using or carrying a semiautomatic assault weapon "during or in relation to any crime of violence or drug trafficking crime" to a mandatory term of 10 years or, in the case of a second or subsequent conviction, 20 years.

Section 2K2.1 covers firearms offenses involving semiautomatic assault weapons. For example, the base offense level for possession of an unlawfully imported semiautomatic assault weapon is level 12, with an upward departure recommended if the offense involved multiple military-style assault weapons. Section 2K2.1(a)(5) further provides for an offense level of 18 if the offense involved a National Firearms Act (NFA) firearm, as defined in 26 U.S.C. § 5845(a).

The Commission recommends that section 922(v) offenses be included in section 2K2.1. The Department of Justice (DOJ) proposes an enhanced offense level under section 2K2.1 for a conviction under section 922(v). We support the DOJ's position and recommend that section 922(v) offenses have a base offense level of 18. This is consistent with the level provided for unlawful possession of National Firearms Act (NFA) weapons, e.g., machineguns, as set forth in guideline section 2K2.1(a)(5). Since semiautomatic assault weapons and NFA weapons are highly restricted under Federal law, consistent sentencing guidelines for these offenses are warranted.

C. Juveniles

The Act added a new section 922(x) to the GCA making it unlawful to sell or transfer handguns to juveniles. It also prohibits the possession of handguns by juveniles. The maximum penalty for violating the subsection is 1 year. However, an adult who transfers a handgun to a juvenile knowing that the juvenile intends to carry, possess, or use the handgun in a crime of violence is subject to a maximum penalty of 10 years.

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Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a juvenile or to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant. A defendant who transfers a firearm knowing or having reason to believe that it may be used in connection with another felony offense is subject to the greater of a 4-level adjustment with a minimum offense level of 18, or a cross-reference to the guideline for the other offense.

The Commission offers 3 different options to deal with violations of new section 922(x). We favor option 3 which would amend section 2K2.1(a)(6) by inserting "or if the transferor knew or had reasonable cause to believe that the transferee was a prohibited person or was underage," resulting in a base offense level of 14 for such transfers. We believe that the 2-level increase is warranted since Congress has indicated its desire to impose greater punishment on persons providing firearms to juveniles.

D. Persons Under Restraining Orders in Possession of Firearms

The Act amended 18 U.S.C. § 922(d) and (g) to make it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to persons subject to specific types of court-issued restraining orders or for any person subject to such orders to possess or receive any firearm or ammunition.

Violations of section 922(d) and (g) are addressed in section 2K2.1 of the guidelines. Section 2K2.1 provides a base offense level of 12 for the transfer of a firearm by a licensed dealer to a person prohibited under section 922(g) from possessing a firearm. The section also provides a base offense level of 14 for possession of a firearm by a prohibited person and increases the base offense level depending on the prior criminal history of the defendant.

The proposed guideline adds persons under a disabling restraining order to the definition of a "prohibited person" in the commentary section under Application Note 6. This

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proposal would result in such persons being treated similarly to persons under other Federal firearms disabilities. We support this proposal.

E. Sentence Enhancements for Using Semiautomatic Firearms
During Crimes of Violence or Drug Trafficking Crimes

The Act directs the Commission to provide an appropriate enhancement for a conviction under section 924(c) (using or carrying a firearm during the commission of a crime of violence or drug trafficking crime) if a semiautomatic firearm is involved in the violation.

Currently, section 924(c) provides that persons who use or carry a firearm in the commission of a crime of violence or drug trafficking crime shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to a mandatory 5-year term of imprisonment, and if the firearm is a short barreled rifle or shotgun or a semiautomatic assault weapon, to imprisonment for 10 years, and if the firearm is a machinegun or a destructive device or is equipped with a silencer, to imprisonment for 30 years. In the case of a second or subsequent conviction under section 924(c), the person shall be sentenced to imprisonment for 20 years and if the firearm is a machinegun, or a destructive device or is equipped with a silencer, to life imprisonment.

The Commission requests comment on the appropriate offense level for an offense involving a semiautomatic firearm. We believe that use of a semiautomatic firearm in crimes of violence or drug trafficking crimes should result in a sentence enhancement of 2-4 levels. Such an enhancement is warranted since Congress specifically increased the penalty for using or carrying a "semiautomatic assault weapon," a specific type of semiautomatic firearm, during such crimes. Specifically, Congress provided a mandatory prison term of 10 years.

The Commission also requests comment on whether such an increase should apply to all semiautomatic firearms or whether the Commission should focus this enhancement on firearms that have characteristics that make them more dangerous than other firearms (e.g., semiautomatic firearms with large magazine capacity). We believe that any increase

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should apply to all semiautomatic firearms. Moreover, we also believe that an additional 2-level enhancement be applied with respect offenses involving semiautomatic firearms equipped with large capacity magazines.

F. Firearms Which Have Moved in Interstate Commerce

The Act added a new section 924(k) providing a term of imprisonment of not more than 10 years for stealing a firearm which has moved in interstate or foreign commerce. It also amended section 922(j) to clarify that it is unlawful to receive or possess any stolen firearm that has moved in interstate commerce, regardless of whether the movement occurred before or after the theft. Further, it added a new section 924(l) making it a Federal crime to steal any firearm from a licensed importer, manufacturer, dealer, or collector.

Section 2K2.1 covers offenses involving stolen firearms. These offenses are subject to a base offense level of 12. A 2-level enhancement applies if a firearm is stolen, unless the only count is a stolen firearm offense.

Section 2B1.1 governs general theft offenses, including offenses of goods traveling in interstate commerce. The general theft statute, 18 U.S.C. § 659, provides a maximum term of 10 years imprisonment for theft from an interstate shipment. Guideline 2B1.1(b)(2)(A) provides for a 1-level increase (to no less than 7) if a firearm or destructive device was taken, compared with a base offense level 12 under section 2K2.1.

The proposed guideline contains 2 options to address the disparity between guideline sections 2B1.1 and 2K2.1. We favor option 1, which would amend section 2B1.1 to include a cross reference to section 2K2.1 applying the greater offense level of the two provisions. This option accurately reflects Congress concern about theft of firearms.

G. Conspiracy to Commit Section 924(c) Violations

The Act adds a new section 924(n) making conspiracy to commit a section 924(c) violation a Federal crime. The penalty is imprisonment for not more than 20 years, and if the firearm is a machinegun or destructive device, or is

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equipped with a silencer or muffler, imprisonment for any term of years or life.

Despite the creation of this new conspiracy offense, the proposed guideline would not provide specific penalties for such violations. Rather, it merely provides a cross-reference to the guideline for conspiracy in general. Congress set the penalty for conspiracy to violate section 924(c) at a level 4 times greater than the penalty for other conspiracy violations. Accordingly, we believe the offense level for violations of section 924(n) should be 4 times greater than the offense level for the general conspiracy statute.

II. EXPLOSIVES AND ARSON

The Act directed the Commission to provide an appropriate enhancement for cases in which a defendant convicted under 18 U.S.C. 844(h) (use of fire or explosives during a felony) has previously been convicted under that section. In addition, it revised the mandatory 5-year penalty for a first offense to a range of 5 to 15 years and changed the mandatory penalty for a second offense from 10 years to a range of 10 to 25 years.

The Commission requests comment on how section 2K2.4 should be amended to address the directive. We believe that the mandatory 5-year minimum for first offenses and the mandatory 10-year minimum for second offenses should be enhanced by an analysis of the risk factors set forth in section 2K1.4 with respect to arson. These risk factors take into account the risk of death or bodily injury caused by the offending conduct.

In addition, the Act adds a new section 844(k) providing for a term of imprisonment of not more than 10 years for stealing explosives which have moved in interstate commerce and a new section 844(l) making it a Federal crime to steal explosives from licensed dealers. We incorporate our previous comment favoring option 1, which amends section 2B1.1 to include a cross reference to section 2K2.1, applying the greater offense level of the two provisions. We believe this option accurately reflects the seriousness

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of offenses involving stolen explosives.

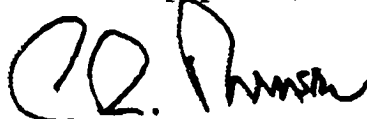
The Act adds a new section 844(m) increasing to 20 years the maximum penalty for a conspiracy to violate section 844(h). We incorporate our previous comment that, pursuant to the direction of Congress, the Commission should establish an offense level which is 4 times greater than that for general conspiracy.

III. PROVISIONS NOT ADDRESSED.

Several amendments in the Act are not addressed in the Commission's proposals, including an increase in the penalty for making a false statement to a firearms licensee in connection with the acquisition of a firearm (18 U.S.C. § 922(a)(6)) and adding a new section making it an offense punishable by not more than 10 years imprisonment to acquire firearms interstate to carry on an illegal firearms business (18 U.S.C. § 924(m)). Another significant amendment made it unlawful for felons to possess explosives (18 U.S.C. § 842(i)). We believe the Commission should address the guidelines relative to these provisions at the next opportunity.

We appreciate the opportunity to comment on the proposed guidelines. If we can be of further assistance to the Commission, please let us know.

Sincerely yours,



Charles Thomson
Associate Director
(Enforcement)