



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

MAR 23 1990

CC-38,342 FE:JBP

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

Dear Judge Wilkins:

This is in response to the Sentencing Commission's request for comments on proposed amendments to the sentencing guidelines published in the Federal Register on February 16, 1990.

Initially, we would express our appreciation for the careful consideration the Commission gave our earlier comments on the guidelines in our letter of December 14, 1989. As a result, the proposed new sentencing guideline on arson is a significant improvement.

With respect to firearms, we strongly support Option 2 for the proposed armed career criminal guideline in section 2K2.6. Under Option 1, the only increase above the base offense level of 34 occurs when in connection with the use of the weapon or ammunition in the instant offense a victim sustained death, permanent or life threatening injury, serious bodily injury or bodily injury. Regardless of the seriousness of the defendant's prior convictions, the base offense level cannot be increased above 34.

In our December 14 letter, we discussed pre-guidelines cases where defendants received sentences of more than 15 years under 18 U.S.C. § 924(e), including the case of Warren Bland who had a long history of vicious and sadistic sexual assaults. He received a sentence of life imprisonment under section 924(e). Attachment B to our December 14 letter shows that a firearm was found in Bland's car, but no injury resulted from his use of the firearm in the instant offense. Under Option 1, Bland's offense level could not be increased

Honorable William W. Wilkins, Jr.

above 34. Under option 2, Bland's brutal attacks upon and torture of his victims would result in a sentence at the offense level of 38.

In Attachment A to our December 14 letter, we discussed a pre-guidelines case, United States v. Gourley, 835 F.2d 249 (10th Cir. 1987). Gourley received a life sentence as an armed career criminal. He pressed a loaded sawed-off shotgun against the throat of an undercover police officer and pulled the trigger but the shotgun malfunctioned. Fortunately, the police officer was not injured. Under Option 1, Gourley's offense level could not be increased above 34. Under option 2, Gourley's use and brandishing of a firearm would result in sentencing at the offense level of 38 which we believe would be appropriate in such a case.

Our letter also discussed United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989), where the defendant used a firearm to fire at an off-duty police officer outside the store where the officer was employed as a security officer. Apparently, the officer was not injured. Jordan was sentenced to 20 years in prison. Under Option 1, Jordan's offense level would only be 34. Under Option 2, the offense level would be 38 because he used and brandished a firearm during the instant offense.

We strongly urge the adoption of Option 2 because it takes into account the circumstances surrounding the defendant's prior convictions and the circumstances involving the defendant's instant offense of possessing a firearm. A review of the cases discussed in Attachment A to our December 14 letter demonstrates that judges based their decisions in pre-guidelines cases on these circumstances when sentencing armed career criminals to more than 15 years imprisonment. Option 1 too narrowly restricts the factors used in sentencing under section 924(e).

Section 2K2.1 of the guidelines provides for the sentencing of persons convicted of violations of 18 U.S.C. § 922(g) (felons and other prohibited persons in possession of firearms) and 26 U.S.C. § 5861(d) (possession of unregistered National Firearms Act weapons). A proposed amendment to this section would provide an increase of 2 offense levels if the defendant possesses a loaded firearm or both an

Honorable William W. Wilkins, Jr.

unloaded firearm and ammunition that could be used in the firearm. We support this amendment. A defendant possessing a loaded firearm or the firearm and ammunition for the firearm obviously poses more of a threat to society. For example, the offense level should be increased to 18 if the defendant possessed a loaded machinegun. Moreover, we recommend an increase of 2 levels where the defendant possessed a loaded firearm to which a silencer is attached or possessed a loaded firearm and a silencer which is capable of being attached to the firearm.

The Commission also requested comment on whether an offender who is convicted of possessing a firearm or ammunition, and has one or two prior convictions for serious drug offenses or violent felonies but is not subject to sentencing under 18 U.S.C. § 924(e), should receive a 2-level increase in the offense level for each such prior conviction. We support the 2-level increase for each such prior conviction. As discussed in Attachment C to our December 14 letter, courts under repealed 18 U.S.C. § 3575 repeatedly enhanced sentences for felons in possession of firearms based on their prior convictions for serious crimes. A defendant who possesses a firearm and who has a prior conviction for manslaughter presents more of a threat of violence to society and should receive a more severe sentence than a defendant whose prior conviction is for larceny. Since a firearm is so easily used to commit crimes of violence and is a tool of the trade for drug dealers, defendants who have prior convictions for such crimes should be deterred from possessing firearms.

In 1988, Congress increased the maximum penalty for a violation of 18 U.S.C. § 922(g) (a felon in possession of a firearm) from 5 years to 10 years. ATF concentrates its prosecutions for this offense on defendants who have prior convictions for violent crimes or drug trafficking offenses. The doubling of the maximum sentence by Congress for the offense suggests that Congress believed the defendants actually prosecuted under section 922(g) were serious offenders. The offense levels in the current guidelines are simply too low to adequately deter serious criminals from possessing firearms.

We suggest that the 2-level increase for a defendant with a prior drug offense apply to defendants previously convicted of a "controlled substance offense" (as defined in section

Honorable William W. Wilkins, Jr.

4B1.2 of the guidelines) rather than a "serious drug offense." A serious drug offense requires that a State offense have a maximum penalty of 10 years imprisonment or more. Under section 11379.5(a) of the California Health and Safety Code, the sale or manufacture of PCP is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(b), a person convicted of selling PCP is subject to an additional term of 5 years imprisonment if the substance containing PCP exceeds 10 pounds by weight or 33 1/3 gallons by liquid volume. Under section 11352(a) of the California Health and Safety Code, the sale of heroin is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(a), a person convicted of selling heroin is subject to an additional term of 5 years imprisonment if the substance containing heroin exceed 10 pounds by weight. The term serious drug offense excludes the great majority of drug trafficking offenses committed in California. The term controlled substance offense includes the sale of PCP and heroin. We believe the offense of selling PCP and heroin and similar offenses in California are serious offenses and should result in a 2-level increase in the offense level.

We recommend that any amendment make it clear that the 2-level increase for having prior convictions for drug or violent crimes applies to those convicted of possessing unregistered National Firearms Act weapons as well as to felons and other proscribed persons unlawfully possessing firearms in violation of 18 U.S.C. § 922(g). Defendants who possess contraband (unregistered) National Firearms Act weapons and have such prior convictions impose a significant threat. These defendants should receive stiffer sentences than defendants who have no such prior convictions.

We support the proposed elimination of the reduction in offense level for unlawful possession of National Firearms Act weapons if the defendant "obtained or possessed the firearms solely for lawful sporting purposes or collection." However, we also believe that this reduction in offense level should be eliminated for all other firearms offenses. At a minimum, the provision should be amended to delete reference to the purpose for which firearms were obtained. The fact that the defendant originally acquired the firearm for sporting or collection purposes is immaterial. Rather,

Honorable William W. Wilkins, Jr.

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.

On page 5733 of the Federal Register, the Commission seeks comments on several issues relating to the firearms guidelines. Item 5 asks whether existing guidelines that incorporate violent activities or gun possession should provide additional adjustments due to prior violent or serious drug convictions or sentences. We would favor the amendments, however, the guidelines should apply to controlled substance offenses rather than serious drug offenses. Item 3 proposes an amendment to the criminal history guidelines to provide higher adjustments for each prior conviction involving violent or serious drug offenses. We would favor Item 3 if the adjustments would equal or exceed the 2-level increase for defendants having such prior convictions who are convicted of possessing firearms and if the guidelines covered controlled substance offenses rather than serious drug offenses.

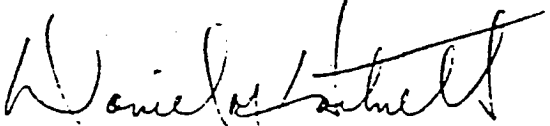
Item 2 asks whether the career offender guideline should be amended to apply to all instant offenses involving possession of a firearm. We recommend that the offense of possession of a firearm by a felon be considered a crime of violence if the circumstances of the offense show that the defendant fired the gun, pointed it at an individual, or otherwise used the gun to threaten an individual. The base offense level as a career offender would be 24 and the criminal history category would be VI, resulting in a sentence of 100-125 months. A felon who in the instant offense used a firearm in a violent or threatening manner and has 2 prior violent felony or controlled substance offenses should receive a substantially longer sentence than a felon who merely possesses a firearm. In United States v. Williams, 892 F.2d 296 (3rd Cir. 1989), the defendant fired a pistol at one person and threatened to shoot another. He was

Honorable William W. Wilkins, Jr.

convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and was sentenced as an armed career criminal under 18 U.S.C § 924(e) because he had three prior convictions for crimes of violence. The court also ruled defendant's current offense of possessing a firearm a crime of violence because he fired it at a person. The court sentenced defendant as a career offender to 360 months imprisonment.

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

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Daniel M. Hartnett", with a stylized flourish at the end.

Daniel M. Hartnett
Associate Director
(Law Enforcement)

Chairman, United States Sentencing Commission
1331 Penn. Ave., NW Suite 1400
Wash. DC 20004

Dear Chairman,

The purpose of this letter is to express my concerns regarding inequity in sentencing first time drug offenders to mandatory minimum terms. I write this as a citizen and not as a federal drug specialist. My comments reflect my own feelings and not that of any of my colleagues, supervisors, or chief. Having worked as a federal probation officer for 16 years and a drug specialist during ~~most~~ many of my 16 years, I have ~~seen~~ witnessed many changes in sentencing but none as drastic and punitive as the sentencing guidelines for first time drug offenders.

Most of the "mules" or "couriers" receive substantial sentences while their suppliers with the assistance of paid counsel manipulate the system. "Mules or Couriers" cannot afford expensive ~~attorney~~ counsel which reduces their bargaining power. In most cases, they do not have any information ^{of} the supplier. Unfortunately, this limits their ability to cooperate with the government for a reduction in sentencing.

As a result, the smaller fish receive substantially longer sentences when compared to the supplier. Don't mislead my concern. I am not suggesting mollycoddling drop kickers, but fairness in sentencing.

I suggest the following: No matter the amount of drugs a Five years imprisonment for defendants classified as Couriers or mules are first time offenders, no prior drug related arrest or conviction.

I believe first year incarcerated in federal prison is sufficient sentence for a person never locked up. Also, I believe the five years ~~should be~~ ~~at least~~ imprisonment should have three years supervised release to follow. This will ensure ~~captives~~ ~~corrections~~ ~~officer~~ ~~prison~~ ~~release~~ ~~and~~ ~~community~~ ~~service~~ ~~work~~.

Many of the first offenders aren't aware of the present mandatory minimum sentence & based on the amount of drug seized. I suggest a very strong public information push on sentence imposed in the federal courts. Many court appointed attorneys are simply not aware of the consequences of guilty pleas in any case until the presentence report is completed. Quite frankly, the way attorneys simply don't care. However, the supplier has paid counsel. This type of attorney challenges every statute in the presentence report.

Finally, the sentencing commission must adopt new sentencing alternatives other than incarceration, probation, supervised release, or home arrest. I strongly suggest half-way house, work release, and community service as a sentencing alternative to be used much more frequently than in the past. Sentencing first time offenders who would normally go to prison to the Peace Corps or Community Service programs/prison seems reasonable if the offender is non-violent.

In addition, changes need to be made in sentencing first time drug offenders who are carriers. However, I must commend the commission on its attempt at trying to balance the system. Although the system may have its flaws but compared to others, it is a start in the right direction.

Sincerely

Sam J. Green II
12809 Peace Dr.
Ft. WASH, MD 20744

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-8642 (PTS)
213-897-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

- § 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor
- § 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon
- § 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#31, Page 36 -- §2K2.6 (Armed Career Criminals)

We object to the Commission's response to the Armed Career Criminal Statute.

We propose that the Commission urge Congress to amend the 15 year mandatory minimum statute to restrict the coverage because it is unjustly applied in many instances.

Specifically, we believe that:

(1) the statute should redefine crime of violence to exclude consideration of prior breaking and entering convictions.

(2) the statute should require that the catchment of three prior crimes must have been committed within the past 15 years unless the defendant has been incarcerated for at least 10 of those 15 years.

(3) the statute should limit the prosecution offense to where the defendant uses the gun, or is involved in committing a violent act while in possession of it.

An example of the inequity of the statute: a retired, 60 year old, Chrysler worker living in a high crime area, keeps a rifle at home. As a youth, he was convicted 42 years ago for breaking and entering, 40 years ago for a second B&E, and 25 years ago for possession of marijuana. He was never sentenced to jail, has since raised a family and worked regularly for 25 years. This man must be sentenced to 15 years in jail. This is unjust.

We object to the Commission's proposal to use the 15 year mandatory minimum as a foundation upon which to build even more severe sentences. We believe that any sentence of more than 15 years should require a departure from the Guidelines.

We believe that the Commission should clearly state its objection to mandatory minimum sentence statutes. The essence of Guideline sentencing conflicts with that type of legislation.

We object to both Options 1 and 2. Option 2 offers the scenario of a 46 level BOL--more than life--for an Armed Career Criminal who used a dangerous weapon in his prior convictions or his present conviction.

No "Reasons for Amendment" are provided other than the 15 year statute. We agree; there are no reasons for these proposals.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 31. In this amendment, the Commission seeks to incorporate a mandatory minimum penalty into the guidelines and to establish the mandatory sentence as the floor within the guideline. Mandatory minimum sentences are coming under criticism throughout the federal judiciary on grounds of fairness and because they are understood to be inconsistent with a sentencing guidelines system. The Commission's decision to incorporate such a penalty into the guidelines represents an unwarranted endorsement of the statutory scheme, and will result in unduly harsh sentences above the minimum.

After putting forward two options, both of which are objectionable for the reasons stated above, the Commission asks a series of questions about the sentencing of violent career offenders. It seems more appropriate for the Commission to gather information in response to these important questions before proposing amendments that result in such severe guideline sentences.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Firearms

The guidelines relating to firearms offenses need strengthening. There is currently no guideline applicable to the "armed career criminal" provision of federal law, 18 U.S.C. §924(e), and the Commission has published two proposed alternative guidelines to cover the provision. Amendment No. 31. We strongly urge the Commission to adopt the second option.

The armed career criminal provision of the federal firearms laws is an enhanced sentencing provision for a violation of the prohibition against possession of a firearm by a convicted felon, 18 U.S.C. §922(g)(1), in the case of a defendant with three previous convictions for a violent felony or a serious drug offense. The provision requires a 15-year minimum prison term and leaves the maximum to the discretion of the court. We believe there should be a guideline applicable to sentences subject to the armed career criminal provision that includes a range of factors and is consistent with the fact that Congress established 15 years as only the minimum sentence available under this provision. In light of the current absence of guidelines



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STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

addressing the armed career criminal provision, the 15-year statutory minimum would normally become the guideline sentence. Higher sentences would be authorized only if a basis for departing from the guidelines existed in accordance with the departure standard set forth in the Sentencing Reform Act, 18 U.S.C. §3553(b).



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STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

The offense to which the armed career criminal statute applies is receipt, possession, or transportation of a firearm by a convicted felon. The enhanced sentencing under the armed career criminal statute is based solely on the number and nature of the past convictions creating the prohibition against possession of a firearm and does not require a current act of violence. It reflects the view that felons with convictions for violent felonies or serious drug offenses should be sentenced to significantly longer terms of imprisonment than other convicted felons in possession of firearms. The former present a special danger to society when in possession of guns and must be deterred from engaging in this form of illegal conduct or incapacitated when not deterred.



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STATEMENT

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DEPUTY ASSISTANT ATTORNEY GENERAL
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Option two addresses the concerns raised by the statutory provision more fully than does option one. In keeping with the statutory scheme, the second option increases the sentence depending upon the nature and seriousness of the past violent or drug offenses giving rise to the application of the statutory minimum. By contrast, option one increases the sentence primarily on the basis of any current underlying offense that occurs in connection with the unlawful possession of the firearm by a convicted felon and on the basis of the existing criminal history provisions. However, the criminal history provisions in the guidelines are only an approximate measure of past criminal behavior. They do not distinguish between violent and non-violent offenses in the defendant's background, nor do they



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STATEMENT

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distinguish between particularly heinous and less serious violent offenses. Simply to employ the existing criminal history scoring techniques, which may be acceptable for the average offender, to armed career criminals does not work.

An offender who has committed a heinous murder or a series of particularly violent offenses, one who has used firearms in connection with past violent offenses, or one who has engaged in very large drug transactions should receive a harsher penalty when in possession of a firearm than an offender whose past offenses were brawls resulting in little or no injury. The armed career criminal statute would be given little effect if offenders with particularly violent backgrounds only received higher than the mandatory minimum sentence when caught committing a new violent offense. The statute has a preventive purpose and does not require a new violent offense or use of a firearm in connection with any new offense. Defendants sentenced under the armed career criminal provision are potentially among the most



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STATEMENT

OF

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dangerous defendants in the federal system. It is important for the Commission to take special care in setting the correct sentences for this group even if extra investigation into the background of these offenders is required.

We would be pleased to offer our assistance to the Commission and expect to provide views on other issues raised by the Commission in its proposed guideline amendments as it addresses these amendments in future deliberations. United States Attorney Joe Brown, Chairman of the Sentencing Guidelines

Subcommittee of the Attorney General's Advisory Committee of United States Attorneys, will address other important areas of concern. Again, I commend the Commission for its important efforts and look forward to working with you in the future.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

31. NACDL does not favor either of the options proposed by the Commission. This is an example of how Congressionally prescribed mandatory minimum sentences are inconsistent with guideline sentencing. While NACDL acknowledges the seriousness of problems posed by "armed career criminals," we have not seen sufficient empirical data to justify such wholesale revisions of the guidelines. Finally, the Commission seeks to take into account the nature of the Defendant's prior convictions by assigning a minimum category III criminal history category. If the Commission

is actually going to consider the nature of the prior convictions, instead of just the number, it must also consider how remote in time such prior convictions are in determining whether and under what circumstances to apply the ancient prior record doctrine.