AMENDMENT 7 - OFFENSES RELATING TO FIREARMS: STAFF ANALYSIS

Introduction

On February 11, the Commission published for comment in the Federal Register Amendment 7, which contains five parts with specific amendment language and three general Issues for Comment. On March 10, the Commission received Briefing Materials containing refinements to the proposed amendments and a variety of new options for addressing the Issues for Comment. Commission staff met with outside parties and conducted in-house review of these proposals. Final review of options regarding Issues for Comment (2) and (3) led to the conclusion that no workable draft was possible. In the proposed amendments included with these materials (the "Revised Amendment"), further refinements to the language for proposed amendments (A) - (D) have been made and the unworkable options have been deleted. This Staff Analysis discusses each of the proposed amendments and briefly describes difficulties encountered with earlier drafts and with the options developed for Issues for Comment (2) and (3). Clarifying and conforming amendments of a technical nature are not discussed.

Amendments Directly Responsive to Public Law 105–386

(A), Part I: Definition of "Brandish"

Proposed Amendment Part (A), Part I (Fed. Reg.,[1] p. 7-20; Revised Amendment, p. 7-10) amends §1B1.1 (Application Instructions) to provide the definition of "brandish" used in 18 U.S.C. § 924(c), as amended by Public Law 105–386. There are two major differences between the statutory and the current guideline definition. First, while the guideline definition requires that all or part of the weapon be visible, the statutory definition does not require that the firearm be displayed or visible, so long as the presence of the weapon is made known to another person "in order to intimidate that person." Second, the statutory definition requires that a firearm actually be present. The guideline definition applies to all "dangerous weapons," which the guidelines define to include any object that "appears to be a dangerous weapon," including toys and fakes.

No prison impact analysis is possible for this amendment, because data are not available on how firearms were used in cases currently convicted under section 924(c). The amendment broadens the scope of brandish, and is expected to increase sentences for some offenders. As described in the team's initial report, however (p. 31, n. 53), the number of offenders affected is likely to be small, because most guidelines provide the same adjustment if a weapon was brandished or was merely possessed.

(A), Part II: Eliminate the Term "Display" from Weapon Enhancements

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[1]References to the Federal Register are to the published version included in these materials.

Issue for Comment (1) (Fed. Reg., p. 7-24) asked whether the Commission should delete "displayed" from the weapon SOCs throughout the Guidelines Manual. These SOCs currently apply "if the firearm was brandished, displayed, or possessed." *Proposed Amendment A, Part II* (Revised Amendment, pp. (7-10)-(7-13) eliminates "displayed" from this list in these guidelines.

The inclusion of "display" appears redundant, given that the definition of brandish already includes display. Note, however, that the new definition of brandish follows the statute and contains the additional requirement "in order to intimidate that person." No significant prison impact is expected from this amendment.

(B) Clarify that the Court Should Impose the Minimum Term of Imprisonment

Proposed Amendment Part (B) (Fed. Reg. p. 7-20; Revised Amendment, p. 7-13 amends §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to clarify that the guideline sentence for convictions under sections 924(c) and 929(a) is the minimum of the statutory range. Any sentence above this minimum would be a departure. Staff believe this result is the correct interpretation of the present guideline, but that the proposed amendment would help avoid any confusion. Reports from the field indicate that some probation officers believe that a life sentence is a guideline sentence under the present guideline.

The language for §2K2.4 section (a) that is provided in the Revised Amendment is revised from the Federal Register publication, and Application Note 1 is also expanded. These revisions reflect a distinction between the three statutes indexed to the guideline. Sections 924(c) and 929(a) provide for mandatory minimums of "not less than" a term of years, and leave unspecified the maximum (which effectively makes the maximum life in prison). Section 844(h) provides only for fixed terms of imprisonment. Separating these two types of statutes in section (a) of the guideline reflects this distinction.

Because this amendment is designed to preserve the status quo ante, no prison impact is expected. Public Law 105–386 itself, however, will of course have prison impact from 1) the expansion of the scope of section 924(c) to include possession in furtherance of the crime, 2) the tiered sanctions provided when a firearm is brandished or discharged, and 3) other increases provided for repeat offenders.

Sentences above the minimum term

Proposed Amendment (B), as published in the Federal Register (p. 7-20), would have expanded Application Note 1 to alert judges to the new statutory maximum of life and to provide guidance as to when a departure above the minimum term may be warranted. A non-exhaustive list of aggravating factors gleaned from other guidelines was provided. Subsequent staff review of the draft language revealed significant problems, however. Peculiarities result if aggravating factors that may be included in guidelines for underlying offenses are listed. For example, simply listing victim injury as a departure factor in §2K2.4 encourages departure in such cases, without excluding those cases in which victim injury was already taken into account by the guideline for the

underlying offense. Attempts to draft language to account for these permutations resulted in considerable complexity.

The March 10 materials (p. 8) contained an abbreviated note that simply states that upward departure may be warranted if the minimum term of imprisonment required by statute does not reflect "the seriousness of the offense or the seriousness of the defendant's criminal history." The types of criminal record for which the note intends to encourage upward departure is unclear, however. Does the note intend to encourage departure for offenders with *any* criminal record that would place them above Criminal History Category I, or only for those with exceptionally serious records? How does the standard established by this note compare with the standard for departure at §4A1.3, Adequacy of Criminal History Category, which is applicable to all other offenders?

As a result of these concerns, the Revised Amendment (p. 7-14) contains a greatly abbreviated note. The first paragraph restates the distinction among the statutes noted in the section above. The second paragraph simply states that in cases involving sections 924(c) or 929(a), "a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 9292(a) is an upward departure, which the court may impose if such departure is warranted." This is intended to clarify that the minimum term required by statute is the guideline sentence, and that sentences above the statutory minimum may be imposed under the ordinary standards governing departure.

Given that upward departures are generally infrequent, the staff expect departures to be rare. There is, however, no way to determine precisely how often judges would use this departure power, so prison impact assessment is impossible.

Issue for Comment (2) (Fed. Reg., p. 7-24) asks whether a cross reference to the guideline for the underlying offense might be appropriate if the defendant was not convicted of that offense. Several drafts of a cross reference were attempted, but each created new problems. A cross reference would require probation officers to apply the full guideline manual to offenders convicted only of section 924(c), in order to determine if the resulting guideline range is greater than the sentence provided under §2K2.4. Ordinarily no such application is necessary. In addition, it appeared that for many serious offenders (e.g., violent offenders who discharge their weapon) the guideline sentence for the underlying offense would not exceed the statutory sentence, while for relatively less serious offenders (e.g. drug traffickers who merely possess a weapon) the guideline sentence would often exceed the penalty required for the statute of conviction.

Consequently, no draft of a cross reference is included in the Final Package. Staff believe that if a cross reference is desirable, it should be attempted as part of a comprehensive revision of guideline §2K2.4.

Amendments responsive to circuit conflicts

(C) Instruction Not to Apply Weapon Enhancement to Underlying Offense

Proposed Amendment Part (C) (Fed. Reg., p. 7-21; Revised Amendment, p. 7-14) resolves a circuit conflict (described in the initial team report, p. 34) regarding whether a defendant convicted under section 924(c) can also receive a weapon SOC for the underlying offense. Specifically, the proposal amends §2K2.4, Application Note 2, to clarify that the "underlying offense" includes both the offense of conviction and any relevant conduct for which the defendant is accountable under §1B1.3. The proposed amendment also provides examples of when this rule would and would not apply.

Prison impact analysis of this amendment revealed that 19 cases in 1998, all involving drug trafficking, received both the statutory penalty under section 924(c) and a guideline SOC adjustment for conduct that appears likely to have been within the scope of relevant conduct for the underlying offense. By prohibiting this double counting, the proposed amendment will reduce sentences in these cases by an average of about 28 months.[2]

The new second paragraph in Application Note 2, Amendment (C), in the Revised Amendment (p. 7-15) addresses a related issue involving defendants convicted of both section 924(c) and statutes such as 18 U.S.C. § 922(g). Consistent with longstanding Commission training, this paragraph clarifies that the sentence imposed for the section 924(c) violation accounts for the conduct also covered by enhancements in §2K2.1(b)(5) and §2K1.3(b)(3). This prevents double counting of the conduct under different guideline provisions.

Section 924(c) and Career Offender Guideline 4B1.1

The Firearms Team report (pp. 7-8) described potential confusion regarding the current guidelines' treatment of section 924(c) counts, given a 1997 amendment to Application Note 1 to §4B1.2 and the recent increase in the statutory maximum for section 924(c) violations. It also described the duplicative punishment that would result if section 924(c) were considered an instant offense for career criminal purposes. These problems arise because of the unusual nature of section 924(c)—which calls for mandatory minimum *and* consecutive penalties—and because of the current guideline procedures that accommodate the statute, including exclusion of §2K2.4 from normal grouping procedures, and independent imposition of the required statutory term of imprisonment consecutive to the guideline sentence.

Several options for addressing these concerns were presented in the team report, including creation of a new guideline, which could contain a base offense level, SOCs, and be treated more routinely under the grouping and multiple count rules. The Commission decided that any comprehensive revision of §2K2.4 and associated procedures was beyond the scope of action appropriate for this amendment cycle, however. Instead, to address immediate concerns about how these counts should be handled, the Commission published *Proposed Amendment (D)* (Fed. Reg., p.

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[2]Based on the average SOC increase in drug trafficking cases. *See* Appendix B to initial team report.

7-22; Revised Amendment p. 7-15), which excludes section 924(c) counts as instant offenses under the career offender guideline. This proposal is discussed in the next section. In the final section after that, we discuss why attempts to develop special rules failed to yield workable results.

(D) Exclude section 924(c) Offenses as Instant Offenses under §4B1.1

Proposed Amendment (D) (Fed. Reg. p 7-22; Revised Amendment, pp. (7-15)-(7-17) amends application notes to both §§2K2.4 and 4B1.2 to clarify that a section 924(c) count is *not* considered an instant offense for purposes of the career offender guideline. The sentence for the section 924(c) conviction is to be determined under §2K2.4 without consideration of any Chapter Three or Four adjustments, and imposed consecutive to any other sentence. However, section 924(c) convictions may count as prior felony offenses for career offender purposes, if "the prior offense of conviction established that the underlying offense was a 'crime of violence' or 'controlled substance offense.'"[3]

This amendment clarifies what staff believe to be correct application of the current guidelines. It is relatively simple, and avoids the arguably duplicative punishment that arises if section 924(c) convictions were counted as instant offenses. It preserves the effect of the 1997 amendment, which was to count the section 924(c) convictions as prior offenses.[4] The proposal has been criticized, however, for treating prior and instant convictions differently. Because the amendment essentially preserves the status quo ante, no prison impact is expected.

Options Not Included in the Firearms Package

Issue for Comment (3) (Fed. Reg. p. 7-24) asked whether the Commission should consider including section 924(c) counts as instant offenses for purposes of the career offender guideline, and if so, how this might be accomplished. At the January meeting, the Commission directed staff

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[3]Note that if the underlying offense is drug trafficking, the section 924(c) conviction alone establishes that it meets the definition, since an underlying "controlled substance offense" is an element of the section 924(c) offense. If a crime of violence in the underlying offense, however, the section 924(c) conviction alone does not establish that it meets the definition of "crime of violence" found in §4B1.2, which is narrower than the definition of "crime of violence" found in section 924(c). (The use of violence against property is not considered a "crime of violence" under §4B1.2.)

[4]The rationale for the 1997 amendment is not clear from the available material, but its effect is only to ensure that prior offenses involving convictions under section 924(c) *alone* will be counted as prior offenses. Offenses involving convictions for both section 924(c) and an underlying offense already qualify as prior offenses based on the underlying offense. In recent years the number of offenders convicted of section 924(c) alone has ranged between 90 and 200 cases. It seems likely that very few cases in any given year involve career offenders with prior offenses involving section 924(c) convictions alone, although the precise number cannot be determined with available data.

to work with the Department of Justice and other interested parties to develop such proposals. Several "special rules" were drafted and presented to the Commission in the March 10 Materials (p. 6-11). Because they ultimately appeared unworkable, however, they have not been included in the Revised Amendment for this amendment cycle. If the Commission wishes to pursue these options, staff believe work should be undertaken over the next year as part of a comprehensive examination of guideline §2K2.4 and other firearm sentencing provisions. The remainder of this report analyzes the options presented in the March 10 Materials, explains their impact, and why they ultimately appeared unworkable.

Proposed Special Rule (March 10 Materials, p. 7) adds section (b)(2) to §2K2.4 directing courts to sentence qualifying offenders convicted of sections 924(c) or 929(a) under the career offender guideline. A new application note to §4B1.1 instructs courts how to proceed with these offenders. The effect is that the criminal history category for these offenders will be VI, and the offense level will be either 37, or 35 or 34 if an acceptance of responsibility adjustment is applied. The resulting guideline range is at least 262-327 and could be 360-life.

How many of the 91 offenders convicted in 1998 of section 924(c) alone would have qualified as career offenders under this rule is unknown, because no criminal history is determined for these offenders. One hundred thirty (130) offenders with section 924(c) convictions were sentenced under the career offender guideline based on convictions for another offense. Sixteen of these already received life sentences, so no impact from the proposed change would be expected. But 38 offenders had maximums of less than life. For offenders whose previous statutory maximum was 25 years or more, and who receive a 3-point acceptance of responsibility adjustment, including section 924(c) as an instant offense would increase the minimum of the guideline range by 74 months, from 188 (offense level 31) to 262 (offense level 34). Offenders with convictions carrying lower statutory maximums would receive greater increases.

Two options were provided in the March 10 materials (p. 9) for integrating the statutes' mandatory consecutive penalties to the prison terms determined by the career offender guideline. These were based on examples briefly described in Issue for Comment (3), and subsequently developed by Commission staff working in consultation with outside groups.

Option 1 directs courts to select a sentence from the guideline range provided by the career offender guideline, and then construct a sentence, using consecutive and concurrent terms as needed, to both 1) achieve the "total punishment" determined by the guidelines (*see* §5G1.2 , (Sentencing on Multiple Counts of Conviction)), and 2) meet the statute's requirement of a mandatory minimum and consecutive term. An example is provided, modeled on the procedure currently found in Application Note 3 to §2J1.6. In effect, courts would determine the total punishment they believe is appropriate under the career offender guideline, and then "carve out" the mandatory minimum term required by the statute and impose it to run consecutive to any remaining term imposed on other counts.

The estimated impact of Option 1 in 1998 would have been to raise sentences for 38

offenders an average of 31 months, and lower sentences for 32 offenders an average of 87 months.[5]

Every attempt to draft this option raised additional problems. The procedure from §2J1.6 cannot be used for these statutes without changes to §5G1.2 (Sentencing on Multiple Counts of Conviction). Complicating changes would also be needed to §2K2.4, Application Note 2, which directs courts not to apply any weapon SOC for the underlying offense if an offender is convicted under section 924(c).[6]

Option 2 (March 10 Material, p. 9) counts section 924(c) convictions as instant offenses and directs judges to choose a sentence from the resulting career offender guideline range. However, rather than integrating the statutory penalty into the guideline sentence, the minimum statutory penalty is simply imposed consecutive to the sentence required under the career offender guideline.

This procedure results in arguably duplicative punishment for offenders whose sentences are increased under the career offender guideline by the statutory maximum for section 924(c), and who then receive the consecutive statutory penalty. The estimated impact in 1998 would have been to raise sentences for 38 offenders by an average of 90 months. No offenders have their sentences reduced by this option.

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[5]Of the other 130 career offenders with convictions under section 924(c), 33 received departures and were excluded from the analysis and 9 had missing data. Sixteen already received life sentences and 2 others had no change in their sentence.

[6] Unless an exception to this rule were made for career offenders, conviction under section 924(c) could actually lower sentences for offenders whose offense level for the underlying offense *with a weapon adjustment* is greater than level 37, the level established by the career offender guideline for statutes with a life maximum.