



Families Against Mandatory Minimums

F O U N D A T I O N

Testimony Before the Committee on the Judiciary
RE: House Bill 2165
Lancaster, Pennsylvania
August 29, 2000

Submitted by Julie Stewart
President, Families Against Mandatory Minimums

Good morning. My name is Julie Stewart. I am the president of Families Against Mandatory Minimums (FAMM) a national organization working to restore and retain judicial discretion at sentencing. We are based in Washington, D.C. with volunteer chapters in over 21 states. We have a national membership of 20,000, and I am here today representing the nearly 2,000 members of FAMM who live in Pennsylvania. On their behalf, I urge you to oppose House Bill 2165, the firearm possession bill.

My overarching reasons for opposing this bill are that it is unnecessary and, like all mandatory minimum sentencing laws, it ties judges' hands. The bill is unnecessary because under Pennsylvania's existing guideline sentences, defendants are already given enhanced punishment if they use a gun or threaten violence in the act of committing another offense. The bill will also tie judges' hands, forcing them to deliver five year sentences in cases where that sentence is wildly disproportionate to the defendant's role in the offense. This will be particularly true in conspiracy cases where a co-conspirator's gun can add five years to a defendant's prison sentence.

Specifically, this bill is repeating the mistakes that have already been made--and somewhat ameliorated--in Congress. As you may know, federal legislation called for a five-year mandatory minimum sentence for any violations of 924(c) of Title 18, "using or carrying a firearm while committing a crime of violence or a drug trafficking crime." The language was clear and unambiguous. The Congressional intent was to punish the active employment of firearms in violent or drug trafficking crimes. Unfortunately, prosecutors began seeking the five-year sentence extension in cases where a defendant merely possessed the gun, and did not use or

carry it--much as H.B. 2165 is written.

The results were disastrous. Many defendants who had hunting rifles, unloaded firearms, gun collections, and the like, were convicted under the gun statute and given five year mandatory minimums consecutive to their sentences for the underlying drug offenses.

Let me give you some examples:

Herman McGee was convicted of a cocaine conspiracy on the word of a single informant. When agents arrested Herman at his home, they found and seized five legally owned guns from his collection. Prosecutors charged Herman with the drug offense (even though no drugs were found) and they charged each gun separately. The result was a 20 year sentence for the drug offense and 25 years added on for the gun collection. A total sentence of 45 years, without parole.

Amy Marie Kacsor was 21 when she was arrested for growing marijuana for personal use in her garden in Michigan. Amy shared a house with her mother who owned two registered handguns, and her boyfriend who owned some hunting rifles. Amy agreed to plead guilty to conspiracy to manufacture marijuana and use of firearm during a drug trafficking offense, in exchange for charges against her mother being dropped. She received five years for the marijuana and five years for the firearms that were not even hers. A ten year sentence, without parole.

In 1995, the U.S. Supreme Court put a stop to the defiance of the plain statutory language. In *U.S. v. Bailey*, the Court held that simple possession is not the same thing as "use." The *Bailey* decision allowed Herman and Amy and hundreds of prisoners like them, to get back into court and have the 924(c) firearm convictions dropped.

Three years later, Congress amended the 924(c) statute to include possession of a firearm, but they went beyond mere possession and added the language, possession “in furtherance of the crime of violence or drug trafficking crime.” This small, but meaningful, distinction makes prosecutors prove that the firearm played some role in furthering the drug offense. A hunting rifle in the closet would no longer automatically trigger a five-year prison sentence.

During debate about the gun amendment a number of unusual voices weighed in against adding mere “possession” of a firearm to the statute. Second Amendment expert, David Kopel, said the amendment “chills the exercise of Second Amendment rights... [by providing] a severe mandatory sentence for persons who possess firearms without misusing them in any way.” Gun Owners of America argued that the amendment “removed the disincentive of the criminal to leave his gun at home, and sends the message that he may as well actually carry and use it, because the punishment is the same for mere possession.”

Federal district judge Paul Magnuson of Wisconsin pointed out in *U.S. v Angell* that a mandatory sentence for simple gun possession is heavily discriminatory against regions of the country where recreational gun ownership is common. If H.B. 2165 were to become law, consider how differently two similiar defendants would be sentenced:

Defendant A lives in a Philadelphia suburb where gun ownership is rare. He grows 51 marijuana plants in his garage and receives a five-year mandatory minimum sentence. Defendant A has no gun in his house.

Defendant B lives in central Pennsylvania where gun ownership is common. He engages in precisely the same conduct as Defendant A but he has an unloaded .22 rifle in his upstairs bedroom. He receives five years for the marijuana offense and five years for “possessing” a gun while violating the Controlled Substance, Drug, Device and Cosmetic

Act.

As a substantive matter, defendants A and B have committed precisely the same crime, and should receive precisely the same punishment. But H.B. 2165 would punish Defendant B with an extra five years in prison, simply because he exercised his right to keep and bear arms.

I understand and agree with the sentiment behind H.B. 2165--I want to stop violent crime and punish those who endanger others. But it is clear from my experience with federal sentencing law that the language of H.B. 2165 is overly broad and will result in injustice if it is not narrowed. Prosecutors will tell you that they will not charge the defendant who has a hunting rifle in his closet that was not used in the drug offense, but the federal example proves otherwise--even when the bill's language specifically said "use" or "carry" a firearm. I guarantee you it will happen in Pennsylvania if this bill is not amended.

My first choice would be for this committee to throw out the mandatory minimum language of this bill and allow the sentencing guidelines to work. Let judges judge. Short of that, I would urge the committee to amend H.B. 2165 to replace the words "while in possession" with the words "while using" a firearm, or "while in possession of a firearm in furtherance of a violation of the Controlled Substances Act." These changes more accurately reflect the defendant that this bill is targeted at.

Thank you for your time and attention. I would be happy to answer any questions.



Families Against Mandatory Minimums

F O U N D A T I O N

Herman McGee

Federal sentence: 45 years

Conviction: Conspiracy to distribute cocaine; use of firearms during a drug transaction

Priors: None

Date of sentencing: July 19, 1991

Date of birth: 1950

NATURE OF OFFENSE: Herman was convicted on the word of a single informant, Mike Barnes, who had been arrested 6 months earlier. At the time of Barnes's arrest, he gave them the name of his supplier, and it was not Herman McGee. But six months later Barnes was told that he was running out of time and that he must give them someone else so he gave them Herman's name. The evidence presented against Herman at trial was a tape recording between one of his codefendants and Barnes talking about Herman. When Herman was arrested, they seized five legally owned guns from his collection at home. No drugs, or drug paraphernalia, were found at his home or in his possession.

GUIDELINE SENTENCE: No amount of cocaine was specified in Herman's indictment, but Barnes estimated the amount to be 93 kilos, which determined Herman's 20 year sentence (level 38). Herman received 25 years for the 5 guns found in his home, although no one testified that any drug transactions occurred in his home. In addition to the prison sentence, the government seized Herman's wife's jewelry, two vehicles, and some rental property that he owned. The informant, Mike Barnes, was paid and received immunity.

CASE STATUS: Herman filed a 2255 motion for resentencing after the Supreme Court Bailey decision and it was granted. He had 25 years dropped from his sentence for the gun convictions, and he is serving the remainder of his 20 year drug conviction.

DISTRICT JUDGE: William Hungate of Missouri.

PERSONAL BACKGROUND: Herman has been married for over 20 years and has a 16 year old daughter. He was employed at Chrysler for 18 years until his arrest, and his wife has worked there for over 20 years. Herman had supported himself since his mother died when he was 16 years old.

LAWYER: Richard Sindel (314) 721-6040



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F O U N D A T I O N

Amy Marie Kacsor

Federal sentence: 10 years

Convictions: conspiracy to manufacture marijuana; use of a firearm during a drug transaction

Priors: None

Date of sentencing: 1994

Date of birth: 1976

NATURE OF OFFENSE: At 21 years old, Amy was growing marijuana for personal use in a garden at her home in Owosso, Michigan. She shared the house with her mother who owned two registered handguns, and her boyfriend who owned some hunting rifles.

GUIDELINE SENTENCE: Amy, her mother and her boyfriend were all charged with the same crime. Amy plead guilty to conspiracy to manufacture marijuana and use of a firearm during a drug trafficking offense in exchange for charges against her mother being dropped. Without the mandatory minimum for the gun conviction, Amy's guideline sentence for the drugs and gun would have been 78 months (5 years for the drugs and 2 points for the gun = level 28). In addition to the prison sentence, the government seized the house that was purchased by Amy and her mother with funds from her father's life insurance, and they seized the family car which was purchased by her grandmother.

DISTRICT JUDGE: Stuart Newblatt, who called this a "vicious sentence."

PERSONAL BACKGROUND: Amy was 6 months pregnant at the time of the arrest. After her incarceration she gave birth to a daughter who her mother is raising.

ATTORNEY: Scott Keillor (313) 487-5537



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F O U N D A T I O N

David Canterbury

Federal sentence: 5 years, 9 months

Conviction: Possession of a firearm in relation to a drug trafficking offense; conspiracy to possess and distribute cocaine and possession of illegal drugs.

Priors: Adjudicated charge of possession of 1.5 grams cocaine 1989

Date of sentencing: May 9, 1994

Date of birth: February 23, 1960

NATURE OF OFFENSE: David was a small-time drug user who sold 3.5 grams of cocaine to undercover agents who befriended his girlfriend. After the sale, agents raided the farm house where he lived in rural Iowa, and found 4.84 grams of cocaine and 72 grams of marijuana. They also found a 9 mm rifle under his desk and a 9 mm handgun in the head board of the master bed. David used the rifle for hunting on his farm and the handgun for general protection.

GUIDELINE SENTENCE: In a plea agreement, prosecutors dropped one of the gun charges and convicted David on the rifle charge and the drug possession and distribution. He received 60 months for the gun and 9 months for conspiracy to distribute cocaine. Were it not for the mandatory minimum sentence required for the gun conviction, David would have served between 24 and 30 months (base offense level 18 for the cocaine, plus 2 for the weapon, minus 3 for the acceptance of responsibility = total offense level of 17).

CASE STATUS: David filed a 2255 motion under the Bailey Supreme Court decision and was granted a new sentence of 28 months. After completion of the sentence (with good time) he was released on May 15, 1996.

DISTRICT JUDGE: Donald E. O'BRIEN, Chief Judge, 8th Circuit, N.D. of Iowa

PERSONAL BACKGROUND: David was farming his family farm with his father at the time of his arrest and conviction. He has now returned to farming.

ATTORNEY: Mark Meyer (319) 365-7524



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F O U N D A T I O N

Tracy and Dennis Wilcox

Federal sentence: 6 years, 4 months

Conviction: conspiracy to distribute marijuana; use of firearms during a drug transaction

Priors: None

Date of sentence: August 5, 1994

Date of births: Tracy July 28, 1968; Dennis, 1958

NATURE OF OFFENSE: Tracy and Dennis were using marijuana and had 38 kilograms of it at their house when they were arrested. A government informant turned them in. A search of their house found 13 hunting guns, all legally owned, and unloaded. None of the guns was near the marijuana and there was no evidence that they had used or carried the guns in drug transactions.

SENTENCES: Tracy and Dennis pleaded guilty to the marijuana charge and went to trial on the gun charges. They lost at trial and lost their appeals. Their guideline sentence was level 14 (15-21 months) plus 5 years for the gun conviction bringing them to a level 26 (63-78 months). The judge sentenced them each to 76 months. In addition to the prison sentences, Tracy's house was seized.

CASE STATUS: Tracy and Dennis filed successful 2255 motions under the Supreme Court Bailey decision and have served their sentences for the drug conviction.

DISTRICT JUDGE: Michael Melloy, 8th Circuit Court in Iowa. He was appointed by President Bush.

PERSONAL BACKGROUND: Tracy and Dennis were raised in the country, hunting and fishing, and they liked to target shoot. Dennis has a 16 year old daughter who was living with them when they were arrested. She returned to her mother's house after the arrest.

ATTORNEYS: Dennis attorney is Wallace Taylor (319) 366-2428. Tracy's attorney is Frank Nidey (319) 363-0000.