WACO Sentencing

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2),	§	
KEVIN WHITECLIFF (3),	§	
CLIVE DOYLE (4),	§	
JAMIE CASTILLO (5),	§	
LIVINGSTON FAGAN (6),	§	
PAUL GORDON FATTA (7),	§	
GRAEME LEONARD CRADDOCK (10),	§	
RENOS AVRAAM (11), and	§	
RUTH OTTMAN RIDDLE (12),	§	
Defendants.	§	

SENTENCING FINDINGS AND OPINION

On February 28, 1993, an American tragedy of epic proportions took place near the community of Elk in Central Texas. The following sets forth the Court's findings, made by a preponderance of the evidence.

On, before, and after February 28, serious mistakes were made. Defense arguments at trial were that serious mistakes in judgment, particularly whether to proceed with execution of the search warrant after the element of surprise had been lost, were made by some in leadership roles of the Bureau of Alcohol, Tobacco and Firearms. Those allegations are not before this Court in this case, and are not deemed relevant in determining issues now before the Court.

The mistakes made by the Defendants now before the Court, and their co-conspirators, however, were serious violations of federal criminal law, and resulted in the homicide of four young agents, the injury of numerous other agents, and the deaths of

numerous residents of the building referred to during the trial as the "Compound."

These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents. It was a part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them, and by dying in the ensuing battle to be "translated" immediately to Heaven.

To this end, immense preparations were made. Huge sums were fraudulently charged to many credit cards in order to acquire an armory that would rival that of a National Guard unit's; ammunition in an unbelievable quantity was acquired; para-military uniforms and gear were purchased and created by Davidian seamstresses; firearm training and fortification of the Compound took place; the leader preached sermons to motivate his "army"; and finally preparations for the ambush of February 28 were completed.

At about 9:00 a.m. on that fateful morning, as agents attempted to execute a lawful search warrant, the first shots were fired from inside the front door of the Compound, wounding Agent Ballesteros in his hand. Immediately thereafter, countless shots were fired from many locations in different areas of the Compound, and a gun battle lasting approximately two and one-half hours ensued.

Thereafter, for 51 days these Defendants and their co-conspirators defied federal authority and refused to surrender. Finally, by a combination of suicide and murder inflicted by Davidian upon Davidian, all but a handful of the Davidians were killed.

Defendants Branch, Whitecliff, Castillo, Fagan, and Avraam stand convicted of aiding and abetting in the voluntary manslaughter of four federal agents, and in using or carrying a firearm during the commission of an act of violence. Defendant Craddock stands

convicted of possession of an unregistered grenade and in using or carrying a firearm during the commission of an act of violence. Defendant Riddle stands convicted of using or carrying a firearm during the commission of an act of violence. Defendant Fatta stands convicted of two counts of possessing illegal firearms.

The primary issue to be determined is whether the mandatory consecutive sentence to be applied to the "using or carrying" count is five years or 30 years. No previous decision deciding this issue can be located by the Court or by counsel. Both the Defendants and the Government have offered able briefs to aid the Court in this determination. The task faced is to determine what answer the Fifth Circuit Court of Appeals would give, in the first instance and the Supreme Court, if it elects to answer, in the second instance. This Court must decide this legal issue without being influenced by the result that will be mandated, and then apply the Sentencing Guidelines.

The first question to be answered is whether the Defendants can be charged with using or carrying an enhanced weapon. Obviously, Graeme Craddock was convicted of possessing an explosive device. The others, however, were not, but there was credible evidence that Riddle and Castillo actually possessed an enhanced weapon. (There is no evidence that any short-barrelled firearms were possessed).

By its verdict convicting the Defendants of violating Section 924(c)(1), the jury found that they were members of a conspiracy to murder federal agents and that they used or carried a firearm during and in relation to this crime of violence. To determine the appropriate sentence to impose, it is incumbent upon the Court to determine the facts as to the type of firearm or destructive device used or carried by the Defendants by a preponderance of the evidence. McMillan v. Pennsylvania, 477 U.S. at 91; United States v.

Casto, 889 F.2d 562, 570 (5th Cir.); cert. denied, _____ U.S. _____, 110 S.Ct. 1164 (1989). Under the statute, the term "used" is not confined to situations where a court must find actual or constructive possession. United States v. Long, 905 F.2d 1572, 1576 & n. 6 (D.C. Cir.) ("use" is properly susceptible of a broader interpretation than "carry"), cert. denied, _____ U.S. _____, 111 S.Ct. 365 (1990); United States v. Edun, 890 F.2d 983, 987 (7th Cir. 1989).

In its most widely understood application, the terms "used" or "uses" embrace the discharge of, assault with, or brandishing of a firearm during the commission of a felony or to avoid subsequent arrest. See, e.g., Busic v. United States, 446 U.S. 398 (1980) (attempted robbery at gunpoint and discharging pistol in battle with DEA agents); United States v. Molina-Uribe, 853 F.2d 1193 (5th Cir. 1988) (killing undercover DEA agent with his own weapon during drug buy), cert. denied, 489 U.S. 1022 (1989); United States v. Alvarez, 755 F.2d 830 (11th Cir.) (killing one undercover ATF agent and wounding another during drug transaction), cert. denied, 474 U.S. 905 (1985); United States v. Chilcote, 724 F.2d 1498, 1505 (11th Cir.) (pointing pistol at DEA agent attempting to effect arrest), cert. denied, 467 U.S. 1218 (1984). The courts have, however, repeatedly held that "a defendant can use a firearm within the meaning of § 924(c)(1) without firing, brandishing or displaying it." United States v. Ross, 920 F.2d at 1536, quoting United States v. McKinnell, 888 F.2d 660, 674-75 (10th Cir. 1989); United States v. Thomas, 12 F.3d 1350, 1361-62 (5th Cir. 1993) (firearm found in a zippered bag in second floor closet) see e.g., United States v. Brown, 915 F.2d 219, 225 (6th Cir. 1990); United States v. Lyman, 892 F.2d 751, 753 (8th Cir. 1989) (quoting legislative history), cert. denied, _____ U.S. _____, 111 S.Ct. 45 (1990); United States v. Rosado, 866 F.2d 967, 969 (7th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 117

(1989).

In fact, where firearms are not found on the person of the defendant, but are found on the premises "readily available in strategic locations," the courts have applied the "fortress theory" in sustaining convictions and sentences for violations of Section 924(c)(1). United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989) (where predicate offense was a drug violation); United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988) (same); see United States v. Matra, 841 F.2d 837, 843 (8th Cir. 1988) (same). In the above cases, the evidence established that the firearms were intended to protect drugs or otherwise facilitate drug transactions, and accordingly, the firearms were considered to have been used by the defendant(s) "during and in relation to" the underlying drug trafficking crime.

In Matra, the defendant argued that the language of § 924(c)(1) precluded conviction unless the United States established that the defendant actually possessed weapons during the drug transaction. In rejecting such a narrow interpretation of § 924(c)(1) the Court of Appeals for the Eighth Circuit used a military analogy to support its holding. As the Court noted, military installations keep weapons readily available to defend against potential enemy attack; so, too, may weapons be kept ready to protect a drug house, thereby safeguarding and facilitating illegal drug transactions. Matra's house was described as a veritable fortress, having only one usable entrance, which easily could be guarded from a second-story window. The court found that although Matra did not have actual possession of the machinegun or the other firearms, he did have ready access to them. Even though Matra did not brandish or discharge a weapon, the court concluded that the weapons were an integral part of his criminal undertaking and their availability increased the likelihood that the criminal undertaking would succeed. In the court's view, it would defy logic and common sense to

conclude Matra did not "use" the machinegun within the meaning of § 924(c)(1) during and in relation to his underlying offense.

Such reasoning would clearly be applicable to the facts in this case. The evidence established the existence of not only a figurative but a literal fortress, manned by each of the Defendants convicted on this count. Each either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege.

The Court heard the evidence at trial and recalls that from the ashes throughout the Compound and the vehicles immediately around it, 48 machineguns were found--46 complete firearms and 2 modified lower receivers. An examination of these and other weapons found at the Compound and admitted into evidence establishes that many of these weapons were equipped with silencers. Additionally, four live hand grenades -- destructive devices under Section 924(c) -- and numerous exploded fragments were discovered in the search of the Compound after the fire. The testimony established that all of these Defendants stood guard, with orders to fire should the FBI agents attempt entry, and that guns were available at each guard position. Numerous witnesses testified to the use of automatic weapons during the February 28th firefight with ATF agents and that was corroborated by the identification by Special Agent James Cadigan, a firearms expert, of fully automatic weapon fire on the video recordings made on that date.

The fortress theory demonstrates by analogy that when evaluating whether a firearm was carried in relation to an offense, a defendant's intentions as he engaged in the precise conduct that comprised the predicate offense should not be the sole focus. United States v. Brown, 915 F.2d 219, 224-25 (6th Cir. 1990). Rather, the totality of circumstances

surrounding the commission of the crime must be examined: "the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime." Brown, 915 F.2d at 226. In fortress type cases, the sheer volume of weapons makes reasonable the inference that the weapons involved were carried in relation to the predicate offense since they increase the likelihood that the offense will succeed. Wilson, 884 F.2d at 177.

Additionally, a defendant may be convicted of a violation of § 924(c)(1) under the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946), where a co-conspirator carried a firearm in furtherance of the criminal scheme and that action was reasonably foreseeable. United States v. Elwood, 993 F.2d 1146, 1151 (5th Cir. 1993) (defendant convicted of Section 924(c) violation where his codefendant carried the weapon). United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991) (defendant found to have possessed machinegun even though not present in area where it was found). See United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989), cert. denied, 494 U.S. 1989 (1990); United States v. Golter, 880 F.2d 91, 93-94 (8th Cir. 1989); United States v. Gironda, 758 F.2d 1201, 1214 (7th Cir.), cert. denied, 474 U.S. 1004 (1985); see also United States v. Cummings, 937 F.2d 941, 944 (4th Cir.) (collecting cases), cert. denied, _____ U.S. _____, 112 S.Ct. 395 (1991).

The evidence at trial established and the Court finds that Defendants Ruth Riddle and Renos Avraam had actual possession of a machinegun between February 28th and April 19th and that Graeme Craddock had actual possession of a destructive device on April 19th. It was further established that the weapons were displayed openly at the "chapel" and actually issued to members with all the "congregation" present. Weapons and violent confrontation were an integral part of the Message, and they were actually used to confront

and repel law enforcement agents on February 28th and April 19th. Consequently, all of the Defendants convicted on Count Three should be held accountable under Pinkerton for using and carrying machineguns, destructive devices and silencers during their conspiracy to murder federal officers.

Next, the jury, by convicting on Counts Three, Seven, Nine and Ten, found that some of the Defendants used or carried 30-year enhanced weapons during the period of the conspiracy, and the Court concurs.

As already mentioned, there were numerous machine guns, hand grenades and silencers found in the ashes of the Compound; an expert witness clearly identified automatic weapon fire from the video tape admitted in evidence; and the agents on the scene corroborated these facts.

Finally, it is clear that the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all of the Defendants, who were taught, who planned, and who practiced for just such an outcome.

Accordingly, the Court finds that those Defendants did, for sentencing purposes, use and carry such enhanced weapons.

The second question is whether the portion of § 924(c)(1) that refers to enhanced weapons is an enhancement provision or a separate offense. The statute is as follows (for a first-time offender of this section):

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug

> trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short barreled shotgun to imprisonment for ten years and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years . . .

The Defendants primarily rely on United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993) and in particular footnote 35, which states:

> We do note (without deciding) that a different situation may be presented when the evidence tends to prove the use of more than one weapon, and the firearms proven fall within different classes of Section 924(c)'s proscribed weapons. For example, if a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms. United States v. Sims, 975 F.2d 1225, 1235-36 (6th Cir. 1992), cert. denied, _____ U.S. _____, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993).

It is argued that it is simply contrary to fair play for there to be no requirement that a jury determine whether the weapon used or carried was an enhanced one, especially when the punishment increases from 5 years to 30 years. Title 21, section 841 however, contains enhancing provisions based on the quantity of controlled substances involved, and the quantity can increase the sentence to a mandatory minimum of 20 years or a mandatory life sentence if a death or serious bodily injury occurs or if the defendant has two previous convictions under that section. These provisions are clearly sentence enhancing provisions, and are as profound in their impact as is 924(c)(1). United States v. Royal, 972 F.2d 643

(5th Cir. 1992).

It should be pointed out that § 924(c)(1) (the entire statute) does define a separate crime and is not merely an enhancement provision. United States v. Correa-Ventura, 6 F.3d 1070, 1083 n.22 (5th Cir. 1993). That premise was the basis of this Court's Order validating Count Three despite the absence of a guilty finding on Count One. Section 924(c)'s dependence upon an underlying crime (in most cases), however, "contributes to the appearance that it is akin to a penalty enhancement provision." Correa-Ventura at 1083.

The Supreme Court recently set forth the elements of an offense under 18 U.S.C. § 924(c)(1):

> Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.' By its terms, the statute requires the prosecution to make two showings. First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.' Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of violence of drug trafficking crime.'

Smith v. United States, 113 S.Ct. 2050, 2053 (1993).

Under the plain language of the statute, and the Supreme Court's determination of the elements, the type of weapon is not an element of the offense.[1] Because Smith involved a machinegun, the Supreme Court could have incorporated the type of firearm as an element of the offense, but did not do so. The Supreme Court just stated that the sentence for this offense is five years, "[a]nd where, as here, the firearm is a 'machinegun' or is fitted with a silencer, the sentence is 30 years." Smith at 2053.

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[1] It should be noted, however, that because the defendant in Smith was actually indicted for and convicted of using or carrying a machinegun during a drug trafficking crime, the particular issue facing this Court was not presented. The indictment alleged that the defendant "knowingly used the MAC-10 and its silencer during and in relation to a drug trafficking crime." Smith at 2053.

As recently as March 10, 1994, the Fifth Circuit accepted this two part test enunciated by the Supreme Court, and noted that only those two elements are required. United States v. Singleton, 16 F.3d 1419, 1423 (5th Cir. 1994) (citing Smith).

It is axiomatic that a legislature may establish various factors which, should the sentencing court find to exist, subject a defendant convicted under the statute to a minimum mandatory sentence, and there is no constitutional requirement that these sentencing enhancing factors be submitted to a jury.

For example, in United States v. Royal, 972 F.2d 643 (5th Cir. 1992), the defendant was charged and convicted by a jury in this Court of violating 21 U.S.C. §§ 841(a)(1) & 846. The indictment did not charge a specific drug amount, and the jury was not instructed or questioned as to amount. The proof at sentencing established that the defendant had trafficked more than five kilograms of cocaine, thus implicating a mandatory minimum sentence of ten years. The defendant was sentenced to 30 years incarceration.

On appeal, the defendant argued that this Court erred in enhancing his sentence because the government failed to indict him for the quantity of drugs implicating the enhancement (i.e., over five kilograms). The government had filed a Penalty Enhancement Information several days after the jury's verdict and several months before sentencing. The Fifth Circuit affirmed the conviction:

> This circuit is part of an overwhelming majority of courts which have concluded that quantity is not an element of the offense. [citations omitted] Rather, quantity is relevant only at sentencing under § 841(b). Royal does not allege that the indictment did not adequately notify him of the charges against him. Because quantity is not an element of the offense of which he was convicted, he was not entitled to be notified through the indictment that quantity would be relevant to his sentencing. The notice he received [by the government's Penalty Enhancement Information and the Presentence Report] that the court would take quantity into account when sentencing him was

sufficient to allow him to present evidence, if any, disputing the government's evidence concerning quantity.

Royal at 650.

This Court's holding is further supported by McMillan v. Pennsylvania, 477 U.S. 79 (1986). In McMillan the Supreme Court upheld a Pennsylvania statute which provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum sentence of five years if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. McMillan at 81. The Supreme Court rejected the defendant's argument that the state must prove visible possession beyond a reasonable doubt, and held the Pennsylvania scheme to be consistent with due process. The Supreme Court noted, however, that it was unable to lay down a bright line test, and differences of degree might mandate different results in other cases.

To determine whether a particular statute (or part of a statute) creates an independent federal offense or is merely a sentencing-enhancement provision is a matter of legislative intent. United States v. Jackson, 891 F.2d 1151, 1152 (5th Cir. 1989). The factors deemed helpful, but not controlling, in making such a determination are whether: (1) punishment is predicated upon conviction under another section; (2) the statute multiplies the penalty received under another section; (3) the statute provides guidelines for sentencing hearings; and (4) the statute is titled as a sentencing provision. United States v. Affleck, 861 F.2d 97, 98 (5th Cir. 1988), cert. denied, 109 S.Ct. 1325 (1989).

The application of these factors to the sentencing portion of § 924(c)(1) clearly demonstrates Congressional intent to make the punishment provisions enhancement factors rather than essential elements. While punishment is not predicated upon a conviction for

another offense, United States v. Munoz-Fabela, 896 F.2d 908, 909 (5th Cir.), cert. denied, 498 U.S. 824 (1990), it is clear that the statute does require a finding by the jury of the commission of another offense. United States v. Ruiz, 986 F.2d 905, 911 (5th Cir.), cert. denied, 114 S.Ct. 145 (1993). The very language of the statute makes it clear that it does multiply the punishment and that punishment is mandatory and to be imposed consecutive to any sentence. Last, the unchanged title of § 924, "Penalties," is an indication that Congress intended the enhancement factors to be just that, and not essential elements.

Finally, in United States v. Harris, 959 F.2d 246 (D.C. Cir. 1992), the District of Columbia Circuit held that the jury need not find that a defendant knew he possessed a machinegun for purposes of a conviction under § 924(c).[2] The D.C. Circuit "easily reject[ed]" the defendant's argument that a particularized scienter is required under § 924(c) "because there is no requirement that every element of an offense dealing with highly dangerous devices or substances have scienter." Harris at 258. The Court held:

> [W]e assume that section 924(c) is violated only if the government proves that the defendant . . . intentionally used firearms in the commission of a drug trafficking crime. The defendant's knowledge that the objects used to facilitate the crime are 'firearms' must be proven and charged to the jury, as it was in this case. Deliberate culpable conduct is therefore required as to the essential elements of the crime--the commission of the predicate offense and the use of a firearm in its execution--before the sentence enhancement for use of a machinegun arises.
>
> Harris and Smith argue, however, that in light of the enhanced penalties involved, if a machinegun was used the government must show that the defendant knew the precise nature of the weapon and not merely that he knowingly used a weapon in relation to a drug distribution offense. The difficulty we see in appellants' position is that, assuming that the essential elements of the crime (drug trafficking and use of a firearm) already require

[2] The court did find that scienter was required for a violation of 26 U.S.C. § 5845(a)(6) -- just as the Supreme Court has recently found for § 5861. Staples v. United States, 1994 U.S. Lexis 3773 (May 24, 1994).

> a showing of *mens rea*, there does not seem to be a significant difference in *mens rea* between a defendant who commits a drug crime using a pistol and one who commits the same crime using a machinegun; the act is different, but the mental state is equally blameworthy. We are in neither case confronted with an altar boy making an innocent mistake. This case is similar to those involving arguments that criminal penalties cannot be enhanced based on possession of different kinds of illegal substances (drugs) without the government showing that the defendant knew the exact nature of a given illegal substance. That argument, correctly in our view, has been rejected by other circuits. . . . The jury found (pursuant to the district court's instructions) that both Harris and Smith knowingly or intentionally possessed a firearm, and that they did so intentionally to facilitate a drug trafficking crime. . . . We, therefore, conclude that appellants had the requisite *mens rea* under section 924(c).

Harris at 258-59.

In an earlier era, before the surge of crime in this country caused Congress to attempt to micro-manage sentences handed down by federal courts, judges could actually weigh relative culpability and exercise discretion in formulating appropriate sentences. Such is not now the case. Based on this Court's review and analysis of all available authorities, it is determined that 30 year sentences as to all Defendants convicted of Court Three is mandatory.

Obstruction of Justice. U.S.S.G. § 3C1.1.

Many of the Defendants object to the recommendation that two points be added to the offense level for obstruction of justice.

U.S.S.G. § 3C1.1, Application Note 3.i. provides that conduct prohibited by 18 U.S.C. §§ 1510-1516 is an example of conduct to which this enhancement applies.

Title 18 § 1509 provides:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with or willfully attempts to prevent, obstruct, impede or interfere with, the due exercise of rights or

> the performance of duties under any order . . . of a court of the United States shall be fined not more than $1,000.00 or imprisoned not more than one year or both.
>
> * * *

It is clear that each of the Defendants, for 51 days, conspired to prevent lawful authorities from executing a lawful search warrant and did so by threat of force, specifically keeping lawful authorities at bay by use of firearms. This enhancement does apply, and the objections are overruled.

Official Victim Adjustment U.S.S.G. 3A1.2

Several defendants object to a three level increase in the offense level under the Official Victim provision of U.S.S.G 3A1.2. That section provides:

> If ---
>
> a) * * *
>
> b) during the course of the offense . . . the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury, increase by 3 levels.

Each Defendant save Fatta was convicted of Court Three, which required a finding of conspiracy to murder federal agents. Such conspiracy and the ambush which resulted certainly constitutes an assault of the type described. There is no question that the Defendants knew the victims were law enforcement officers. Indeed the conspiracy demanded that they be. This objection is overruled.

Count Three Concurrent or Consecutive

Many Defendants suggest that punishment for Count Three should not be consecutive

because the jury did not convict on the predicate Count One. This suggestion ignores the requirement that the jury find as to Count Three that the predicate offense occurred, even though "through mistake, compromise or lenity" it chose not to do so as to Count One. United States v. Powell, 469 U.S. 57 (1984).

Additionally, the second sentence of Title 18 U.S.C. § 924(c)(1) provides:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried. (emphasis supplied).

This objection is likewise overruled.

Acceptance of Responsibility U.S.S.G. 3E1.1

All Defendants seek a three point reduction in the offense level for acceptance of responsibility. No defendant now before the Court admitted guilt, expressed remorse or in even any small way attempted to meet the requirements of this section. These objections are ludicrous and are overruled.

Fatta's Objections

Defendant Fatta suggests that adding 6 points for involvement of fifty or more firearms is inappropriate since there were only 48 illegal machineguns accounted for. Under Application Note 1, however, "firearm" includes any destructive device or silencer. There were several of each, and added to the 48 machineguns, the total exceeds 50. This objection is overruled.

Fatta also objects to a 2 point addition for the involvement of a destructive device. Since there were enough silencers to make the total above 50 without counting the live

grenades, then adding this two points does not double-count the grenades, and this objection is also overruled.

Fatta's primary objection is the cross-reference to conspiracy to murder.

U.S.S.G. § 2K2.1(c) provides:

> Cross-Reference
>
> 1) If the Defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm . . . with knowledge or intent that it would be used or possessed in connection with another offense, apply--
>
> > (A) § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; . . .

§ 2X1.1 provides:

> (a) Base Offense Level: The base offense level from the guidelines for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be esablished with reasonable certainty.

The offense to which cross-reference would be applied is conspiracy to murder federal agents, an offense for which Fatta was acquitted. Fatta's argument is that by allowing cross-reference to that offense, the sentencing guidelines stands the law on its head. The first answer is that the guidelines, and the cross-referencing provision, merely directs the Court to the correct sentence within the statutory range. In this case, that command would direct the Court to the upper limits of the statutory range. The second answer is simply that that is the law.

The Second Circuit addressed this exact issue in United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), cert. denied in Frias v. United States, ___ U.S. ___, 114 S.Ct. 163

(1993). In that case, the defendant was acquitted of an underlying narcotics conspiracy, but convicted of possession of a firearm by a felon and possession of an unregistered firearm. The district court cross-referenced to conspiracy, the acquitted offense. In pertinent part, the Second Circuit held:

> Given the Commission's evident intent that the term 'another offense' include uncharged offenses, we are left with the question of whether it also meant that term to include an offense with which the defendant was charged but of which he was acquitted. We conclude that it did. . . . Since an '[a]quittal d[id] not have the effect of conclusively establishing the untruth of all the evidence introduced against [a] defendant,' [citation omitted], and since disputed facts for purposes of sentencing needed only be established by a preponderance of the evidence, the sentencing court was entitled to consider information that the defendant had engaged in conduct that was the subject of an acquittal. [citations omitted]

Concepcion at 387-88.

In United States v. Masters, 978 F.2d 281 (7th Cir. 1992), cert. denied, _____ U.S. _____, ____ S.Ct. ____, 124 L.Ed2d 245 (1993), the Seventh Circuit similarly held, noting that judges may take other crimes into account when sentencing even when the defendant has been acquitted of those crimes: "An acquittal means that the charge was not proven beyond a reasonable doubt; it does not mean that the defendant didn't do it." Masters at 286.

Therefore, the acquittal of Fatta on Count One does not preclude the cross-reference recommended by the probation office in this case. Moreover, even if the increase in this case could be considered "astronomical," as in the Concepcion case, this Court does not believe a downward departure pursuant to § 5K2.0 is appropriate. Fatta was convicted by the jury of Conspiracy to Possess Machineguns (Count 9) in violation of 18 U.S.C. § 922(o), and Aiding and Abetting in the Unlawful Possession of Machineguns (Count 10) in violation of 18 U.S.C. § 922(o) and 18 U.S.C. § 2. Because of the large number of automatic

weapons and destructive devices in this case, the cross-reference is particularly appropriate and a downward departure is not warranted.

It is also important that U.S.S.G. 1B1.3, dealing with relevant conduct, provides:

> (a) Chapters Two (offense conduct) and Three (adjustments). Unless otherwise specified, . . . (iii) cross-reference in Chapter Two . . . shall be determined on the basis of the following:
>
> (1) . . .
>
> (B) in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. . . .

Lastly, Fatta was convicted of conspiracy to manufacture illegal arms, and under the circumstances, it was foreseeable and foreseen by him that those weapons would be used in the manner they were. Therefore, the cross-reference in this case is clearly appropriate, and Fatta's objection is overruled.

SIGNED this 17th day of June, 1994.

Walter S. Smith, Jr.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Saturday

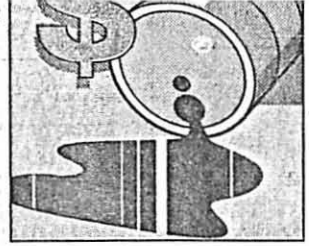
Partly cloudy
High 93, low 71
Details on Page 42A

Kevin Costner

FILM

Hollywood just won't let Westerns die

Film/Video, Page 5C



Oil prices top $20 for 16-month high

Business, Section F

Kidd prac
Montgome
Knicks beat P

The Dallas Morning Ne

exas' Leading Newspaper

Dallas, Texas, Saturday, June 18, 1994 6 Sections HF

The Dallas Morning News: Louis DeLuca

Lim Jin Gwan of Seoul, South Korea, leads cheers before Dallas' World Cup opener Friday at the Cotton Bowl.

TIME FOR

Simpson surrenders at his faces murder charges after

■ Hotels have vacancies. 1F

"Now my mind is so peaceful," said Young Gook Jung, the leader of a tour group from Seoul that numbered 150. "I feel so proud! Korean prosperity!"

City officials also seem pleased. The police had few problems, traffic planners reported smooth sailing, and World Cup organizers said the game gave Dallas a great introduction to international soccer.

"We took everything we've been talking about

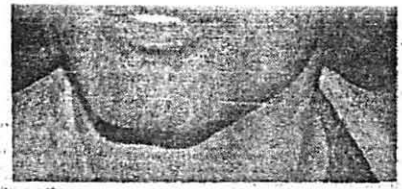
Please see FEW on Page 6A.

O.J. Simpson case took the nation to the California freeways Friday night for a stomach-knotting finish to the police pursuit of the football star turned fugitive.

"No scriptwriter, no dramatist could possibly conceive" of such events, NBC anchor Tom Brokaw said after TV cameras and police converged in front of Mr. Simpson's Brentwood home shortly before 10 p.m. Dallas time.

ABC, CBS, NBC, CNN, ESPN and Chicago "superstation" WGN provided live coverage throughout the chase. A squadron of television helicopters tracked

Please see TV on Page 30A.



O.J. Simpson . . . former football great has denied killing his former wife and a friend.

police on a 60-mile freeway before being captured at his sion.

Mr. Simpson, who faces a ble death sentence, was take custody by officers at his twood estate after a riveting p through rush-hour Orange a Angeles counties, a nearly s istic drama that was broadca on national television.

At several points durin chase and an ensuing stand

Loathsome limbs

'Trash trees' are weak, ugly, disease-prone and not protected by new city ordinance

By Anne Belli Gesalman
Staff Writer of The Dallas Morning News

Their names sound so likable, almost stately. Silver maple. Chinaberry. Mimosa.

But if trees were people, there would be nothing dignified about these. They'd be the outlaws, the social misfits, the Beavises and Butt-heads.

They're called "trash trees." Even tree lovers don't like them.

That's why when Dallas city officials approved their first tree preservation ordinance last month, they excluded these and seven other tree species from protection.

The new law generally prohibits its developers and some homeowners from removing most trees, unless they're in the way of an approved construction project or meet other special criteria.

But while city officials will fine you for chopping down live oaks, hack away at a hackberry and

Please see 'TRASH' on Page 11A.

The Dallas Morning News: John F. Rhodes

A car drives by a flower-laden mimosa, or "trash tree," near the Quadrangle in Dallas on Wednesday.

Officers w in law wi

Some drug users,

By Scott Parks
Staff Writer of The Dallas Morning News

State laws that take effect will no longer allow Texas jur judges to send many low-leve dealers and users to prison.

State Sen. John Whitmire, ton, co-author of the new law Texas can no longer afford "nonviolent" drug offenders in cells needed for violent crimi

But street-level undercov cers and some prosecutors sai terviews that the laws could their fight against drug crime

5 cult members sentenced to 40 years

Branch Davidians get maximum punishment

By Lee Hancock
Staff Writer of The Dallas Morning News

SAN ANTONIO — Five Branch Davidians were sentenced Friday to 40 years in federal prison for their roles in a deadly 1993 shootout and siege at their sect's compound near Waco.

Calling the incident "an American tragedy of epic proportions," U.S. District Judge Walter Smith showed leniency to only two defendants who

■ Defendants' sentences. 30A

he said "came closest" to expressing remorse for the tragedy, sentencing Ruth Riddle to five years in prison and Graeme Craddock to 20 years.

The judge gave the eighth defendant, Paul Fatta, a 15-year sentence for supplying apocalyptic sect leader David Koresh with the arsenal used in the deadly confrontation with federal authorities.

Attorneys for most of the defendants said they will probably appeal.

Rejecting sect members' attempts to blame federal authorities for the debacle, Judge Smith said the defendants' acts "were serious violations

Please see BRANCH on Page 30A.

INSIDE

Korean summit

In another breakthrough in their 15-month standoff, North Korea and South Korea agree to hold a summit aimed at resolving nuclear tensions on the peninsula.

Page 15A

Boyfriend charged

The boyfriend of a Lancaster woman who disappeared in March with her baby grandson is charge forging a document giving ownership of her home. Pag

BRANCH DAVIDIANS SENTENCED ON CONSPIRACY CHARGES

A federal judge Friday sentenced eight Branch Davidians convicted in the shooting deaths of four federal agents last year. All sentences are to be served consecutively.

THE DEFENDANTS AND THEIR SENTENCES:

Renos Avraam

(Total of 40 years, $10,000 fine)
- Voluntary manslaughter: 10 years, $5,000 fine.
- Using or carrying a weapon during crime of violence: 30 years, $5,000 fine.

Mr. Avraam, 29, is a London native and a son of Cypriot immigrants. He ran a computer business and began reading Branch Davidian literature in 1988. He moved to the compound about one year before the raid. He was taken into custody before the fire.

Brad Branch

(Total of 40 years and $2,000 fine)
- Voluntary manslaughter: 10 years, $1,000 fine.
- Using or carrying a weapon during crime of violence: 30 years, $1,000 fine.

Mr. Branch, 34, was born in Bryan, Texas, and raised around San Antonio. A high school dropout who joined the Navy, he worked as a mechanic in Waco-area aerospace companies. He was an occasional compound resident who returned just before the raid. He left the compound March 19.

Jaime Castillo

(Total of 40 years, $2,000 fine).
- Voluntary manslaughter: 10 years, $1,000 fine.
- Using or carrying a weapon during crime of violence: 30 years, $1,000 fine.

Mr. Castillo, 25, was born in Victoria, Texas, reared in California and joined the sect after David Koresh answered his newspaper ad seeking a band to play in. He moved to the compound in 1992 and was taken into custody after surviving the April 19 fire.

Graeme Craddock

(Total of 20 years, $2,000 fine)
- Possession of hand grenade: 10 years, $1,000 fine.
- Using or carrying a weapon during a crime of violence: 10 years, $1,000 fine.

Mr. Craddock, 32, is a former physics teacher from Australia with a degree in mechanical engineering. A lifelong Seventh-day Adventist who served as a deacon in the church, he moved to Waco one year before the raid.

Livingstone Fagan

(Total of 40 years, $5,000 fine)
- Voluntary manslaughter: 10 years, $2,500 fine.
- Using or carrying a weapon during crime of violence: 30 years, $2,500 fine.

Mr. Fagan, 34, is a Jamaica native and British citizen. A Seventh-day Adventist minister, he was defrocked for preaching Branch Davidian beliefs. He worked as a social worker in England before moving to Waco two years before the raid. His children left the compound during the siege, and his mother and wife died in the fire. On March 23, he was the last Branch Davidian to leave the compound before the fire.

Paul Fatta

(Total of 15 years, $50,000 fine)
- Aiding and abetting sect leader David Koresh in the manufacture or possession of a machine gun: 10 years, $25,000 fine.
- Conspiracy to manufacture or possess a machine gun: 5 years, $25,000 fine.

Mr. Fatta, 35, is a California native and former Hawaii businessman. Authorities accused him of being the sect's chief arms procurer. Recruited to join the sect in 1987, he donated at least $100,000 to the group and was away from the compound with his son Kalani during the Feb. 28 raid. He fled and surrendered to authorities April 26.

Ruth Riddle

- Using or carrying a weapon during a crime of violence: Five years, $2,500 fine.

Ms. Riddle, 30, a Canadian, was a lifelong Seventh-day Adventist who joined the Branch Davidians after she and her mother read some of the sect's literature nine years ago. She survived the April 19 fire but fought with an FBI agent who dragged her from the burning building.

Kevin Whitecliff

(Total of 40 years and $2,000 fine)
- Voluntary manslaughter: 10 years, $1,000 fine.
- Using or carrying a weapon during crime of violence: 30 years, $1,000 fine.

Mr. Whitecliff, 32, a native of Honolulu, was raised a Seventh-day Adventist. He received a dishonorable discharge from the Air Force and worked as a prison guard before joining the sect. He later left, returned just before the Feb. 28 raid and left the compound again on March 19.

NOTE: Defendants are ordered to pay restitution totaling $1,131,687.49.
SOURCE: *Dallas Morning News* research

The Dallas Morning News

Branch Davidians get maximum penalty

TV tal after fi

Continued from F

the 60-mile odyss Angeles area.

On TVs across sports bars, rest homes and stor watched the Simp from the police ar he was a fugitive public plea to friend's readin ter to the protr stand-off in his d

"Truth is stran said Andy Allan, w at the television in cago bar.

NBC, faced wi Game 5 of the NB the Houston Rocke Knicks, cut away home and later offe coverage of basketb ma in Brentwood.

In Dallas, local s tomers watched th chase almost as inten ketball game that ha there in the first plac

"Everybody's just set, just trying to fig going on," said Paul L ager at Humperdink's Avenue.

It was much the s courtside in New Yor

During timeouts fans at Madison Sq rushed into the arena watch the O.J. Simpso fold on TV sets.

Reporters coverin tuned their courtside Simpson coverage in

The Dallas Morning News

Branch Davidians get maximum penalty

Continued from Page 1A.

of federal law and resulted in the homicide of four young agents, the injury of numerous other agents and the deaths of numerous residents of (the compound)."

Despite the jury's refusal to convict the defendants of conspiring to kill federal agents, the judge decreed that a preponderance of evidence showed that they and others did just that. He also stated that evidence in the case proved that the Branch Davidians made "immense preparations" for war with the government, fired the first shots when federal agents approached the compound on Feb. 28, 1993, and then killed themselves rather than surrender.

"There's no question that the defendants knew that the victims were law enforcement. Indeed, the conspiracy demanded it," he said as he meted out the maximum possible sentences to most of the stone-faced defendants.

"I see Livingstone Fagan dressed in combat gear coldly shooting down Agent Eric Evers," he said of the defendants. "I remember Kevin Whitecliff shooting at unarmed helicopters. . . . I hear the voices on the (FBI surveillance) tapes: 'Spread the fuel. The fires are lit.' I remember evidence that the jury didn't see and that I ruled too gruesome."

Four federal Bureau of Alcohol, Tobacco and Firearms agents died and 20 were injured as they tried to search the compound and arrest Mr. Koresh for suspected weapons violations. An ensuing 51-day siege ended with a fire that destroyed the compound and left Mr. Koresh and more than 80 followers dead.

Lawyers for both sides had made final statements reminiscent of the emotionally charged arguments made throughout the six-week trial.

> "I see Livingstone Fagan dressed in combat gear coldly shooting down Agent Eric Evers. I remember Kevin Whitecliff shooting at unarmed helicopters. . . . I hear the voices on the (FBI surveillance) tapes: 'Spread the fuel. The fires are lit.' I remember evidence that the jury didn't see and that I ruled too gruesome."
>
> — U.S. District Judge Walter Smith

estimating the seriousness of these people, and so did the FBI," he said, prompting his wife, LeRoy, another member of the prosecution team, to add: "So did we all."

But sympathizers of the defendants and surviving sect members condemned the judge's decision to mete out the stiffest sentences possible to most of the defendants. One woman, Christin Hines of San Antonio, shouted: "Give me liberty or give me death. We have no freedom in this country," after the judge ended the two-day hearing.

Branch Davidians also repeated their continuing faith in Mr. Koresh's teachings that he was a divine messenger of the apocalypse.

"I feel sorry for them. I don't hate them. It's a waste of time," Branch Davidian Catherine Matteson, who left the compound during the first week of the siege, said of Judge Smith and federal prosecutors. "When that judge stands before the true judge of the world, he's going to learn what's truth."

Clive Doyle, one of three sect members acquitted of all charges in the federal trial, said: "We knew the way it was going to go even before the trial. . . . Now we're going to do everything we can to get them out."

Castillo. Under federal sentencing rules, all will serve their sentences with no chance for early parole.

All eight defendants were ordered to pay fines ranging from $2,000 to $50,000 and to pay restitution to the government totaling $1,131,687.49. The judge did not explain the restitution imposed, but federal officials have said the cost of the Branch Davidian prosecution will exceed $1 million.

Sentencing has not been set for Branch Davidian Kathryn Schroeder, who testified for the government in exchange for a reduced sentence for using a firearm to forcibly resist federal officers. She faces up to 10 years in prison.

Attorneys for most of the defendants said they were disappointed but not surprised at the sentencings.

"The government was successful in convincing the court to ignore the jury's findings," said Mike DeGeurin of Houston, the attorney for Mr. Fatta.

Joe Turner of Austin, the attorney for Ms. Riddle, said he probably would not appeal his client's sentence because the appellate process would likely take longer than her prison term.

Judge Smith told the packed courtroom that he had decided to depart from federal sentencing guidelines and give Ms. Riddle a shorter prison term because she was an "easily manipulated" fanatic and not as culpable for what happened as some others.

"It's hard for me to be happy about Ruth's sentence," Mr. Turner said. But when you see how brutal he was with the others, five years is a kiss."

Just prior to being sentenced, Ms. Riddle briefly pleaded for mercy and said she sympathized with the families of the dead ATF agents. "It was not my intent personally that anyone be harmed in any way," she said.

Judge Smith said he reduced Mr. Craddock's prison term from the maximum of 40 years recommended in federal sentencing guidelines because he offered some cooperating statements to prosecutors.

After the hearing, John Willis of Katy, father of one of the slain agents, stood quietly with his son Steve's former colleagues. His eyes tearing, he said: "I'm satisfied. There's nothing else to say."

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Lawyers for both sides had made final statements reminiscent of the emotionally charged arguments made throughout the six-week trial.

Defense attorneys again cast the government's actions as an effort to persecute the Branch Davidians for their religious beliefs; the chief prosecutor denounced those on trial as religious terrorists.

"They are as much religious terrorists as the people who blew up the barracks in Lebanon, the people who blew up the World Trade Center and Pan Am 103," said assistant U.S. Attorney Ray Jahn.

When one defense attorney referred to a deluge of telephone calls and letters to the judge's chambers demanding probation for the defendants, Judge Smith sternly responded, "It's a concerted effort by people who are so anti-government that they would take that position anywhere, anytime."

After the two-hour hearing, members of the prosecution team and ATF agents expressed relief and satisfaction with the judge's actions.

"This has been a long ordeal for me and for all of us in ATF, " said ATF Agent David Aguilera, who investigated the case before the raid and served as chief ATF case agent during the subsequent federal investigation. "I'm very happy with the decision."

Mr. Jahn also said he was "frightened" by the defendants lack of remorse in their courtroom statements during the first day of the two-day sentencing hearing. "The biggest

their continuing faith in Mr. Koresh's teachings that he was a divine messenger of the apocalypse.

"I feel sorry for them. I don't hate them. It's a waste of time," Branch Davidian Catherine Matteson, who left the compound during the first week of the siege, said of Judge Smith and federal prosecutors. "When that judge stands before the true judge of the world, he's going to learn what's truth."

Clive Doyle, one of three sect members acquitted of all charges in the federal trial, said: "We knew the way it was going to go even before the trial. . . . Now we're going to do everything we can to get them out."

Sarah Bain, the juror foreman in the trial, wept angrily after the sentencing and said that the judge did not respect the jury's sentiments in its Feb. 26 verdict. The jury voted not to convict the defendants of conspiring to kill federal agents, the government's most serious charges, and immediately after the verdict, several jurors described the decision as a compromise reflecting their belief that both sides were culpable in the Waco tragedy.

"The severity of the penalties, I don't really understand," said Ms. Bain, a New Braunfels school teacher who wrote the judge a letter last month asking him to be lenient. "I really regret that (the severity)."

As they were sentenced, several of the defendants tried to argue with the judge, some complaining that their attorneys had not fully explained the voluntary manslaughter charges for which five sect members were convicted.

"I believe we haven't had a fair trial, and I believe you haven't been a fair judge," said defendant Renos Avraam just before he was sentenced to 40 years in prison.

Judge Smith told the defendants, however, that it was the skill of their defense attorneys alone that saved them from convictions on the most severe charges and mandatory life sentences. Others receiving 40-year sentences included Mr. Fagan, Mr.

tence for using a firearm to forcibly resist federal officers. She faces up to 10 years in prison.

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