Firearms
Areas for Discussion

• Review of relevant conduct (§1B1.3)

• (§2K2.1 (general firearms guideline)

• 18 USC § 924(c) (use/carry/possession relation to crime of violence/drugs)

• Review of multiple counts grouping (§3D1.2)
Review of Relevant Conduct
(a)(1) & (a)(2): Analysis

WHO:
- (a)(1)(B): Certain acts of others
  (3-part analysis)

WHEN:
- Offense of Conviction

(a)(1):
- In preparation
- During
- Avoiding detection

(a)(2):
- Same course of conduct/
  Common scheme or plan
§2K2.1 & Relevant Conduct

§§2K2.1 & 3D1.2(d) & 1B1.3(a)(2)

• Because §2K2.1 is listed at §3D1.2(d):
  – Relevant conduct at §1B1.3(a)(2) will “expand”
    • Acts in the same course of conduct, common scheme or plan will be included
§2K2.1

Unlawful Receipt, Possession, or Transportation of Firearms; or Prohibited Transactions Involving Firearms
Issues in Application of Use/Possession SOC and Cross Reference

§2K2.1(b)(6) & (c)(1)
§2K2.1
(b)(6) vs. (c)(1)

used or possessed any firearm in connection with another felony offense

vs.

used or possessed any firearm in connection with the commission or attempted commission of another offense
(b)(6) vs. (c)(1) (cont.)

possessed or transferred any firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense

vs.

possessed or transferred a firearm with knowledge or intent that it would be used or possessed in connection with another offense
Significance of Language Distinctions in (b)(6) and (c)(1)

§2K2.1

• Generally does not reflect substantive distinctions
• While the cross reference does not require felony, application unlikely to be greater
• SOC for possess/transfer applicable based on “reason to believe”; cross-reference is not
Application Issues for (b)(6) and (c)(1)

§2K2.1

• “In connection with”

• Active employment or “clearly improbable” standard
Application Issues for (b)(6) and (c)(1) (cont.)

• Application based on all relevant conduct, not solely the firearm in the offense of conviction.

• If cross reference is for use/possession/transfer in multiple offenses, cross reference only to the most serious
  – §1B1.5, App. Note 3
Fact Pattern(s)

• Insert fact pattern information here from selected helpline calls
2006 Amendment: Resolution of Circuit Conflict

§2K2.1(b)(6) & (c)(1) Standard

- Split on whether a firearm was possessed/used "in connection with" another offense in the application of the SOC and cross reference
2006 Amendment: Resolution of Circuit Conflict (cont.)

- Majority of circuits (1st, 2nd, 3rd, 4th, 6th, 7th, 9th, & 10th): the firearm must serve some purpose or facilitate the felonious conduct, rather than being merely coincidental

- Minority of circuits (5th & 8th): the enhancement applies if the firearm reflects an increased danger of violence unless it was “clearly improbable” that the weapon was connected with the offense
2006 Amendment: Resolution of Circuit Conflict (cont.)

- §2K2.1, App. Note 14
  - if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense
Fact Pattern(s)

- Insert fact pattern information here from selected helpline calls
2006 Amendment: Resolution of Circuit Conflict (cont.)

Firearm used/possessed “in connection with” a burglary or drug offense

• Split on whether a firearm obtained in the commission of a burglary was possessed/used “in connection with” that offense in application of §2K2.1
2006 Amendment: 
Resolution of Circuit Conflict (cont.)

- Majority of circuits (3rd, 6th, & 7th): if the firearm is taken during the burglary, the enhancement should not apply

- Minority of circuits (5th & 8th): the taking of a firearm in a burglary can be used to apply the enhancement
2006 Amendment:
Resolution of Circuit Conflict (cont.)

• Resolution consistent with minority view
  – SOC applies in the case of a defendant who takes a firearm during the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary
• In the case of a drug trafficking offense:
  – SOC applies when a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia
Fact Pattern(s)

- Insert fact pattern information here from selected helpline calls
Question Regarding “Lawful Sporting Purpose”

• How can a convicted felon, whose base offense level is determined under (a)(6)(A) (“prohibited person”) ever receive the downward adjustment at §2K2.1(b)(2)? Isn’t it a contradiction to say that a convicted felon could ever possess ammunition or firearms for a lawful sporting purpose or collection since a convicted felon is supposed to be prohibited from any possession or use of a firearm?
18 U.S.C. § 924(c) & §2K2.4

Use, Carry, or Possession of a Firearm in Relation to a Crime of Violence or Drug Trafficking Crime
18 U.S.C. § 924(c)

- Stat. max. is life
- Mand. mins. vary, but none less than five years, depending upon
  - Whether firearm possessed, used, carried, brandished, or discharged
  - Prior § 924(c) convictions
  - Type of firearm
18 U.S.C. § 924(c) (cont.)

- “Second or subsequent conviction”
  - May occur at same sentencing
  - Mand. min. typically 25 years
- Must be consecutive to any and all other sentences
§2K2.4

- Apply the mand. min. for § 924(c) counts

- Do not apply Chapters Three or Four to a § 924(c) count

- Exceptions when § 924(c) count is Career Offender (§4B1.1)
Impact of § 924(c) on SOC’s

§2K2.4 App. Note 4 & Amdmt. #599

• Do not apply firearm SOC in guideline for underlying offense
  – § 924(c) accounts for any weapon SOC for the underlying offense
  – § 924(c) accounts for any weapon within the relevant conduct
Impact of § 924(c) on SOC’s (cont.)

• If there is also a conviction for which §2K2.1 applies (e.g., felon in possession), do not apply SOC (b)(5)
  – § 924(c) accounts for the conduct of this enhancement
  – § 924(c) accounts for any weapon within the relevant conduct
  – Does not affect any other SOC, BOL, or cross-reference at §2K2.1
Grouping of Multiple Counts Involving Firearms
§2K2.1 & Multiple Counts & Relevant Conduct

§§2K2.1 & 3D1.2(d) & 1B1.3(a)(2)

• Because §2K2.1 is listed at §3D1.2(d):
  – Multiple counts involving this guideline will “group”
    • Only a single application of the multiple counts of §2K2.1 based on all relevant conduct
Grouping under “Rule” (d)

One application with the offense level for the group based on an aggregate
“Grouping Rules”

§3D1.2

(a) Same Victim, Same Act

(b) Same Victim, Two or More Acts

(c) Conduct Treated by Characteristic

(d) Based on Aggregate
Fact Pattern(s)

• Insert fact pattern information here from selected helpline calls
Drug Distribution & Felon in Possession of a Firearm

Count 1: §2D1.1
18 + 2 = 20

Count 2: §2K2.1
24 + 4 = 28
(Cross Ref.=20)

Offense Level = 28

Group counts 1 and 2 under §3D1.2(c)
Drug Distribution & Felon in Possession of a Firearm

Count 1: §2D1.1
28 + 2 = 30

Count 2: §2K2.1
24 + 4 = 28
(Cross Ref.=30)

Offense Level = 30

Group counts 1 and 2 under §3D1.2(a)
Drug Distribution & Use of a Firearm During Drug Trafficking Offense

Count 1: §2D1.1
Drug Distribution
18 +2 = 18

Offense Level
=18

Count 2: §2K2.4
Use of Firearm
18 USC § 924(c)
60 mos. consecutive

Count 2 Consecutively to Count 1
Felon in Possession & Use of a Firearm During Crime of Violence

Count 1: §2K2.1
Felon in Possession
20 + 4 = 20

Count 2: §2K2.4
Use of Firearm
18 USC § 924(c)
60 mos. consecutive

Offense Level
= 20

Count 2 Runs Consecutively to Count 1
Drug Distribution & Felon in Possession of a Firearm & Use of Firearm During Drug Trafficking Offense

Count 1: §2D1.1
18 + 2 = 18

Count 2: §2K2.1
20 + 4 = 20
(CR = 18)

Count 3: §2K2.4
60 mos. consecutive

Offense Level = 20

Group counts 1 and 2 under §3D1.2(c)

Count 3 runs consecutively
Drug Distribution & Felon in Possession of a Firearm & Use of Firearm During Drug Trafficking Offense

Count 1:
§2D1.1
26 + 2 = 26

Count 2:
§2K2.1
20 + 4 = 20
(CR = 26)

Count 3:
§2K2.4
60 mos.
consecutive

Offense Level = 26

Group counts 1 and 2 under §3D1.2(a)

Count 3 runs consecutively
Impact of § 924(c) on Multiple Counts

§§3D1.1(b) & 5G1.2(a)

• § 924(c) count excluded from grouping with any other count
• Sentence for § 924(c) count imposed independently
• Non-§ 924(c) counts where firearm SOC not applied may still group under Rule (c)
EXTRA SLIDES
Base Offense Level Issues

§2K2.1(a)

• Defendant’s prior convictions
  – Must receive points under criminal history
  – Counted both in the BOL and criminal history
  – Definitions for “crime of violence” and “controlled substance offense” at Career Offender (§4B1.2)
Base Offense Level Issues (cont.)

§2K2.1(a)

- Timing of defendant’s prior convictions and status
  - Must occur prior to the end of relevant conduct
2006 Amendment: Semi-automatic Assault Weapons

18 USC § 921(a)(30) Repealed September 13, 2004

• Deletes the references to 18 U.S.C. § 921(a)(30) at the base offense levels in §2K2.1
• Replaces the reference with the term “a semiautomatic firearm capable of accepting a large capacity magazine”
2006 Amendment: Semi-automatic Assault Weapons (cont.)

- §2K2.1 Application Note 2
  - Semiautomatic firearm that has the capability to fire many rounds without reloading because
    - the firearm had attached a magazine or similar device that could accept more than 15 rounds of ammunition OR
    - such a magazine or similar device was in close proximity to the firearm
2006 Amendment: Semi-automatic Assault Weapons (cont.)

• §2K2.1 Application Note 2
  – “semiautomatic firearm capable of accepting a large capacity magazine” does NOT include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition

• Conforming language in §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine)
Specific Offense Characteristics Issues

§2K2.1(b)(1)

• Number of firearms
  – Determined by relevant conduct
  – Must be unlawful activity
2006 Amendment: Trafficking

• New SOC at §2K2.1(b)(5)

“If the defendant engaged in the trafficking of firearms, increase by 4 levels.”
2006 Amendment: Trafficking - §2K2.1, App. Note 13

• If the defendant:
  – transported, transferred, or otherwise disposed of two or more firearms to another individual or received such firearms with the intent to do so \textit{AND}
  – knew or had reason to believe such conduct would result in the transport, transfer or disposal of a firearm to an individual
    • whose possession or receipt would be unlawful; or
    • who intended to use or dispose of the firearm unlawfully
• Individual whose possession or receipt of the firearm would be unlawful means an individual who:
  – has a prior conviction for crime of violence, controlled substance offense, or misdemeanor domestic violence offense; OR
  – at the time of the offense was under a criminal justice sentence
Specific Offense Characteristics Issues (cont.)

§2K2.1(b)(4)

• Stolen gun/obliterated serial number
  – Strict liability standard
2006 Amendment: “Stolen/Obliterated” SOC

§2K2.1(b)(4)

• Current SOC
  – 2-level increase for offense involving a stolen firearm or a firearm with an altered/obliterated serial number

• New SOC
  – 2-level increase for stolen firearm and a 4-level increase if the offense involved a firearm with an altered or obliterated serial number
Specific Offense Characteristics Issues (cont.)

§2K2.1(b)(3)

• Destructive device
  – Counts both in BOL and in the SOC
  – May include sawed-off shotguns of certain gauges
Specific Offense Characteristics Issues (cont.)

§2K2.1(b)(2)

• Reduction for “lawful sporting purposes”