

Dear Commissioners:

Thank you for inviting me to testify today on behalf of the Zimroth Center/ NYU Law Working Group (the “Working Group”). The Working Group consists of researchers, policymakers, lawyers, former prosecutors, and advocates who focus on gun violence prevention, federal sentencing reform, and the prosecution of federal firearms offenses. Our members include former United States Attorneys, Brady United, Everytown for Gun Safety, Giffords, Community Justice Action Fund, the Johns Hopkins Center for Gun Violence Solutions, and Loyola University of Chicago’s Center for Criminal Justice Research. Collectively, we have extensive experience researching solutions to reduce and prevent gun violence in a fair and equitable way, and many of us were involved in public debate and internal discussions that led to the drafting and passage of the Bipartisan Safer Communities Act (the “BSCA” or “the Act”).

Gun Trafficking and Straw Purchasing: the Major Drivers of Gun Violence

The importance of the BSCA in the fight against gun violence cannot be understated. The BSCA has created several new tools and programs whose goals are to keep firearms out of the hands of those who would do harm to themselves or others. For instance, the BSCA contains a provision targeting unlicensed gun sellers and creates enhanced background checks for prospective firearms purchasers. While these provisions are not the subject of the Commission’s work, they are important because they suggest that Congress intended to focus on sellers and purchasers of firearms.

Likewise, by creating two new federal offenses that explicitly prohibit straw purchasing and gun trafficking, the BSCA has deliberately sought to shift federal enforcement further upstream in the illegal trafficking pipeline. The BSCA’s focus is on gun suppliers and inter-state trafficking networks. The Act’s focus on straw purchasing and gun trafficking reflects what data has long shown: the diversion of guns into illegal markets is what enables gun violence. Indeed, straw purchasing is the most common channel for guns entering the trafficking pipeline, and corrupt gun retailers account for a higher volume of guns diverted into the illegal market than any other single trafficking channel.¹

Illegal gun trafficking fueled by straw purchasing, rogue gun dealers and firearm sales made without a background check affects every state. The states with weaker gun laws often are the source of illegal guns recovered in states

¹ Giffords Law Center to Prevent Gun Violence, *Trafficking and Straw Purchasing*, available at <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/> (last visited Oct. 11, 2022).

with stronger gun laws.² For example, the Iron Pipeline—a “well documented” interstate trafficking pathway—transports guns purchased in southeastern states to states in the mid-Atlantic and Northeast, where gun dealers and guns are subject to greater regulation.³ This is not, however, a problem without a solution: research suggests that when gun dealers are held accountable, the flow of guns into the illegal market often decreases “significantly.”⁴

New ATF Data Reveals Trafficking Patterns

Gun trace data demonstrates the existence of clearly identifiable gun traffickers and straw purchasers who are responsible for the flood of guns into our communities. Historically, the Tiahrt Amendments⁵ have limited the public’s ability to obtain and understand data on crime guns and gun dealers. These Amendments, which were passed in 2000, have chilled ATF from sharing information about the guns it has traced. The last time ATF shared information about gun dealers was in 2000, when it issued a report showing that a small percent of licensed firearms dealers was responsible for most guns recovered by law enforcement.⁶

The current Administration has taken steps to fill this information gap by directing ATF to undertake its first study of criminal gun trafficking since 2000.⁷ In February 2023, ATF issued the second volume of this study. Volume two presents and analyzes data on crime guns recovered between 2017 and 2021. The data provide important information on the origins of crime guns and reported some alarming facts. First, many crime guns moved quickly from purchase to recovery in a crime (“time-to-crime”): 46 percent of guns were recovered less than 3 years after purchase, including 25 percent recovered

² Everytown Research and Policy, “Five Things to Know About Crime Guns,” Oct. 10, 2022, available at <https://everytownresearch.org/report/five-things-to-know-about-crime-guns/> (last visited Feb. 27, 2023).

³ Garen J. Wintemute, “Where Guns Come From: The Gun Industry and Gun Commerce,” available at <https://issuelab.org/resources/499/499.pdf> (last visited Feb. 19, 2023).

⁴ *Id.* (citing research). See also Johns Hopkins University Bloomberg School of Public Health, *Reforms to Sales Practices of Licensed Gun Dealers Reduced Supply of New Guns to Criminals*, Sept. 27, 2006, available at <https://publichealth.jhu.edu/2006/webster-gun-dealer> (last visited Oct. 15, 2022).

⁵ The Tiahrt Amendments, named after Representative Todd Tiahrt (R-KS), are provisions that have attached to DOJ appropriation bills since 2003. The Tiahrt Amendments prohibit ATF from releasing firearm trace data for use by cities, states, researchers, litigants, and members of the public (subject to certain limited exceptions), and they require the FBI to destroy gun purchaser records within 24 hours of approval, making it difficult for ATF to retrieve firearms from prohibited persons. See Giffords Law Center, “Tiahrt Amendments,” available online at https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/tiahrt-amendments/#footnote_0_5675 (last visited Feb. 19, 2023).

⁶ *Combating Crime Guns*, *supra* note 1. See also *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy*, *supra* note 9 (citing this statistic).

⁷ Dep’t of Justice, Office of Public Affairs, “Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment,” Feb. 1, 2023, available at <https://www.justice.gov/opa/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and> (last visited Feb. 17, 2023).

within a year⁸ and 9 percent recovered in under 3 months.⁹ Moreover, the percentage of crime guns recovered within 3 years of purchase increased by 12 percentage points from 2019 to 2021—a 28 percent increase in the share of traced guns with a time-to-crime of less than 3 years that was driven almost entirely by an increase in traced guns with a time-to-crime of less than one year.¹⁰ These findings are important because ATF considers a “time-to-crime” of 3 years or less as a potential indicator of gun trafficking.¹¹

Data also revealed geographical patterns in firearms trafficking. 72 percent of traced crime guns were recovered within the state they were sourced from, and 28 percent were recovered from a different state.¹² Notably, the data suggest that the strength of state gun laws may influence trafficking patterns. Nearly 75 percent of likely-trafficked crime guns that crossed state lines came from states without background check laws.¹³ For instance, New Jersey had the highest percentage of recovered crime guns originally acquired at federal firearms licensees (“FFLs”) in other states (82 percent), followed by New York (80 percent), Massachusetts (67 percent), Hawaii (54 percent) and Maryland (53 percent).¹⁴ All these states regulate firearms dealers, suggesting that gun trafficking flows from states with weak regulations into states with strong gun laws.

Finally, data also revealed demographic information about the purchasers of crime guns. While men purchased a larger share of traced crime guns than women during the study period, the percentage of traced crime guns purchased by women increased 5 percentage points from 2017 (17 percent) to 2021 (22 percent), representing a 31 percent increase in the share of traced crime guns purchased by women.¹⁵ Shorter time-to-crime periods for recovered guns were also associated with a number of factors, including the gun being purchased by a woman.¹⁶

Federal Enforcement Priorities Have Ignored Straw Purchasing and Gun Trafficking

⁸ *Id.*

⁹ Press Release, Everytown for Gun Safety, “New ATF Report on Gun Trafficking Highlights Need for Gun Industry Accountability,” Feb. 2, 2023, available at <https://www.everytown.org/press/new-atf-report-on-gun-trafficking-highlights-need-for-gun-industry-accountability/> (last visited Feb. 17, 2023).

¹⁰ National Firearms Commerce and Trafficking Assessment: Crime Guns – Volume Two (“NFCTA”), “Crime Guns Recovered and Traced Within the United States and its Territories,” at 25, available at <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download> (last visited Feb. 17, 2023).

¹¹ Brady United, Frequently Asked Questions, “What is ‘Time to Crime?’”, available at <https://www.bradyunited.org/program/combating-crime-guns/faqs> (last visited Feb. 17, 2023).

¹² NFCTA at 38, *supra* note 8.

¹³ <https://everytownresearch.org/report/five-things-to-know-about-crime-guns/>

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 35-36.

Despite what the data have shown, federal enforcement priorities have not historically focused on straw purchasing or gun trafficking and have instead focused nearly exclusively on prosecuting “prohibited persons,” *i.e.*, people whose status prohibits them from possessing a firearm. For fiscal year 2021, only 11 percent of people who were convicted and sentenced under § 2K2.1 were convicted of non-“prohibited persons” offenses.¹⁷ Of this 11 percent, most persons were convicted for straw purchases/making a false statement in the purchase of a firearm, followed by offenses involving stolen firearms, firearms trafficking and/or exporting, and offenses involving prohibited weapons.¹⁸ In other words, less than 11 percent of sentences pursuant to § 2K2.1 involved the two main drivers of gun violence: straw purchasing and gun trafficking. Moreover, sentencing outcomes in this 11 percent of cases were shorter than for those sentenced for being a “prohibited person”—the average guideline minimum was 30 months, compared to 49 months for prohibited persons.¹⁹ Sentencing courts were also more willing to sentence people below the Guideline range at a higher rate for offenses involving firearms trafficking and straw purchases or false statements.²⁰

This mismatch between the drivers of gun violence and the people targeted for federal prosecution suggests the need to realign enforcement priorities. This has been a consistent focus of this Administration as it seeks to address the source of illegal firearms by targeting “rogue gun dealers” and establishing gun trafficking strike forces.²¹ The Administration has balanced this upstream enforcement approach with increasing funding and support for proven effective community violence intervention programs that focus on intervening prior to an act of violence that necessitates a criminal justice response.²² In fact, DOJ has indicated one of its performance goals is to increase the percentage of firearms cases that target traffickers and other large-scale enterprises.²³ The BSCA is a good starting point for advancing the Administration’s agenda because it provides federal prosecutors with new statutory offenses to target the source of illegal guns while also providing \$250 million for community violence intervention. However, as discussed herein, the Commission has an

¹⁷ Matthew J. Iaconetti, *et al.*, United States Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* at 28, (July 2022), available at <https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-really-look> (last visited Feb. 17, 2023).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 27.

²¹ The White House, Press Release, “Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety,” June 23, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/> (last visited Feb. 27, 2023).

²² *Id.*

²³ Anne Gannon, U.S. Dep’t of Justice, “Reduce Gun-Related Violence,” available at <https://www.performance.gov/agencies/DOJ/apg/goal-2/> (last visited Feb. 27 2023).

important role to play: the Guideline range arguably influences whether DOJ and ATF will expend resources on prosecuting these offenses.

Option One is Preferable

The Commission's proposed Amendments can help fulfill Congress' intent when it passed the BSCA. Congress sought to impose harsher penalties on straw purchasers and gun traffickers *without* exacerbating race disparities. Enhancing penalties for these two new federal offenses reflects the fact that these bad acts fuel and enable gun violence. Enhanced penalties will also incentivize DOJ and ATF²⁴ to shift their enforcement focus from "end users" to people further up the pipeline: gun dealers, straw purchasers, and the network of people and organizations who facilitate the flow of guns across state lines.

We believe that Option One can properly fulfill Congressional intent, subject to additional revisions to ensure that sentences more accurately reflect culpability. As a starting point, Option One's proposal to enhance straw purchasing and gun trafficking sentences via creation of new Specific Offense Characteristics ("SOC") is preferable, because it requires findings to be made by a sentencing judge regarding whether the SOC applies. We also respectfully submit that the Commission further amend Option One by creating tiered SOCs to reflect the different *mens rea* of the person being sentenced.

As a starting point, 18 U.S.C. §§ 932 and 933 criminalize conduct that is either "knowing" or based on "reasonable cause to believe." For instance, the straw purchasing statute makes it unlawful for any person to purchase or conspire to purchase any firearm for any other person, "*knowing or having reasonable cause to believe*" that such other person is (1) a prohibited person; (2) intends to use the firearm in a felony; a federal crime of terrorism or a drug trafficking crime; or (3) intends to sell or dispose of the gun to persons in categories (1) or (2).²⁵ The gun trafficking statute contains similar language: it is unlawful for any person to ship, transfer, otherwise dispose of, or receive, or conspire to ship, transfer, otherwise dispose of, or receive, any firearm for any other person, if such person "*knows or has reasonable cause to believe*" that the use, carrying, possession, or receipt of the firearm would constitute a felony.²⁶

²⁴ Prior to the BSCA's passage, there was no comprehensive gun-trafficking statute, and penalties were minimal. As a result, federal prosecutors were "less likely to accept and prosecute" these cases. See Alan Berlow, The Center for Public Integrity, "Current Gun Debate May Not Help Beleaguered ATF," Feb. 11, 2013, available at <https://publicintegrity.org/national-security/current-gun-debate-may-not-help-beleaguered-atf/> (last visited Feb. 16, 2023). See also Fox Butterfield, "Are Gun Laws, and Agency that Enforces Them, Equal to the Task?" The New York Times, July 22, 1999, available at <https://archive.nytimes.com/www.nytimes.com/library/national/072299guns-atf.html> (last visited Feb. 16, 2023).

²⁴ 18 U.S.C. § 932(b)(1)-(3) (2023) (emphasis added)

²⁵ 18 U.S.C. § 932(b)(1)-(3) (2023) (emphasis added).

²⁶ 18 U.S.C. 933 (2023) (emphasis added).

The Commission’s Option One amendment adopts this statutory language by creating SOC’s for people who engage in straw purchasing and/or gun trafficking, “knowing or having reason to believe” that their conduct would result in the receipt of a firearm by a person who was prohibited from having it or was going to use or dispose of it unlawfully. In sum, Option One’s SOC’s will increase the sentencing calculation equally for people who *knew* they were straw purchasing or gun trafficking and for people who may not have known but who had *reasonable cause to believe*. The Commission should consider revising Option One to create tiered SOC’s that increase the sentencing calculation based on the different *mens rea* levels in the statute. In other words, people who “knew” they were engaged in straw purchasing or gun trafficking would receive a greater enhancement than those persons who had “reasonable cause to believe” they were engaged in such misconduct. By tailoring SOC’s in this manner, the Commission can ensure that sentences more accurately reflect culpability.

The Commission should also make clear how FFLs fit in the SOC. FFLs occupy a position of public trust, as they are solely authorized to engage in the business of selling firearms to the public. The BSCA expressly contemplated that FFLs can be charged with gun trafficking, and the Commission should consider defining the appropriate SOC for FFLs that know or have reasonable cause to believe they are selling firearms to a gun trafficker, straw purchaser or other individual unlawfully “engaged in the business” of selling firearms that reflects the increased culpability of an FFL being the initial source or illegal firearms and the abuse of the federal license. The Commission should also consider how individuals unlawfully “engaged in the business” of selling firearms²⁷ are reflected in the SOC, as one provision of the BSCA addressed a lack of clarity in the law and showed Congress’s intent to focus on the unlicensed sellers making no background sales who are a source of illegally possessed guns.²⁸

Lastly, the Commission notes that Option One raises proportionality concerns, because the Guideline range for straw purchasing and gun trafficking are higher than the Guideline range for most “prohibited persons” offenses.²⁹ However, this does not mean that Option One is inherently problematic or disqualifying. The higher penalties for gun trafficking and straw purchasing are appropriate because they reflect the fact that these offenses are major drivers of gun violence that have historically been ignored in favor of other enforcement priorities. The comparative difference in sentences is also consistent with Congress’ intent to target these twin drivers of gun violence through the BSCA. Indeed, Option One might incentivize DOJ and ATF to investigate and charge these offenses, whereas they previously declined to do so due to prosecutors’

²⁷ 18 U.S.C. § 922(a)(1)(A); 18 U.S.C. § 921(a)(21)(C).

²⁸ Congressional Research Focus “Firearms Dealers ‘Engaged in the Business’”, Aug. 19, 2022, available at <https://sgp.fas.org/crs/misc/IF12197.pdf> (last visited Feb. 26, 2023).

²⁹ If the Commission accepts our suggestion to amend Option One to create tiered SOC’s that correspond to different *mens rea* levels, this can potentially address proportionality concerns.

views that the penalties were insufficient relative to the resources expended.³⁰

The Bipartisan Safer Communities Act and Race Disparities

As previously noted, the BSCA seeks to increase gun trafficking and straw purchasing prosecutions without exacerbating race disparities. This is an important goal because gun violence is a racial justice issue. Statistics show that the costs of gun violence are not borne equally across the United States. Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded,³¹ while Black children and teens are 14 times more likely to die from gun violence than their White counterparts.³² In 2020, Black Americans were the victims in 61 percent of gun homicides, despite making up only 12.5 percent of the United States population.³³ Gun violence is also not geographically constant: roughly half of all gun homicides occur in 127 cities totaling less than a quarter of the United States population.³⁴

Recent public comments from Senators Cory Booker (D-New Jersey) and Chris Murphy (D-Connecticut) expand on the BSCA's focus on racial disparities. In their letter, the Senators wrote that the BSCA seeks to "end the flow of illegal guns into communities and reduce gun violence," and that *both* enhanced penalties and mitigating factors reflect this focus, because the Act seeks to punish suppliers while avoiding unnecessarily long sentences for people "with less culpability or without significant criminal histories."³⁵ The Senators also note that excessive sentences for people who are relatively less culpable in the firearm trafficking chain "could disproportionately impact low-income people and people of color."³⁶ Finally, the Senators stated the Commission should interpret the BSCA's directive to consider "other mitigating factors" broadly, so as to ensure that past racial disparities do not "compound" or "persist" in future sentencing trends.³⁷

In ignoring straw purchasing and gun trafficking in favor of prosecuting "prohibited persons," federal enforcement also reflects race disparities. The

³⁰ See *supra* footnote 12.

³¹ Brady United, *Gun Violence is a Racial Justice Issue*, available at <https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue> (last visited Oct. 10, 2022).

³² *Id.*

³³ Marissa Edmund, Center for American Progress, *Gun Violence Disproportionately and Overwhelmingly Affects Communities of Color* (June 30, 2022), available at <https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color/> (last visited Oct. 10, 2022).

³⁴ Giffords Law Center to Prevent Gun Violence, *Statistics*, available at <https://giffords.org/lawcenter/gun-violence-statistics/> (last visited Oct. 10, 2022).

³⁵ Letter from Senator Cory S. Booker and Senator Chris S. Murphy to The Hon. Carlton W. Reeves, Chair, United States Sentencing Commission at 2, Dec. 5, 2022, available at https://www.booker.senate.gov/imo/media/doc/bipartisan_safer_communities_act_letter.pdf (last visited Feb. 17, 2023) (emphasis supplied).

³⁶ *Id.*

³⁷ *Id.*

Commission’s 2022 report showed stark contrasts in people sentenced under § 2K2.1 when compared to the general population of people sentenced under the other guidelines: 54.5 percent of those sentenced for firearms offenses were Black compared to 16.9 percent of “other offenders,” *i.e.*, those sentenced pursuant to 18 U.S.C. 924(c), the career offender guideline, and the Armed Career Criminal Act.³⁸ The Commission also noted existing race disparities in the arrests that led to these federal sentences. In its study, the Commission found that 27.5 percent of people charged with federal firearms offenses were initially arrested during a routine patrol or traffic stop.³⁹ For firearms offenses stemming from a routine street patrol, 73 percent of those sentenced were Black. For firearms offenses stemming from a traffic stop, 66.9 percent of those sentenced were Black.⁴⁰

The BSCA has potential to ameliorate these race disparities.⁴¹ By shifting enforcement further upstream to dealers and those who divert guns into the illegal market, this potentially changes the population of people who are eligible to be charged with federal offenses. Data shows that most licensed gun dealers are White. For instance, data obtained from ATF shows that the “vast majority of responsible persons transferring guns at licensed dealers in California, Illinois, Michigan, New Jersey, and Wisconsin” are White.⁴² A similar pattern is seen in Chicago. Despite having no gun stores within the city limits, guns flow into Chicago from elsewhere in suburban Cook County.⁴³ Of the 137 federal firearms licensees (“FFLs”) in Cook County, 97 percent of them are White—only one FFL is Black.⁴⁴ Racial disparities are similarly seen in the FFLs who operate in DuPage, Lake, and Will Counties, all of which also surround Chicago.⁴⁵ These surrounding counties play a role in Chicago’s gun violence, because roughly 40 percent of guns recovered in the city and traced during the study period came from these neighboring counties.⁴⁶ We cite these statistics on FFLs not to suggest that White firearms dealers intend to traffic guns into cities that are predominantly Black, but rather to show that *where* in the pipeline federal enforcement occurs matters for purposes of addressing racial disparities.

Straw Purchasing and Reduced Culpability

³⁸ *What Do Federal Firearms Offenses Really Look Like?* at 10, *supra* note 27.

³⁹ *Id.* at 32.

⁴⁰ *Id.*

⁴¹ As noted previously, the BSCA and the current Administration have emphasized and sought to invest in community violence intervention programs. Taken together, these actions show that Congress and the Executive’s goal is to invest in downstream prevention solutions while increasing upstream enforcement actions, including federal prosecutions.

⁴² Brady United, *Racial Inequities and Demographics*, available at <https://www.bradyunited.org/program/combating-crime-guns/gun-dealers-racial-demographics> (last visited Feb. 15, 2023).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The Commission's proposed Amendment offers a reduction to people convicted of straw purchasing who meet certain criteria, including (i) having 1 criminal history point or less, (ii) being motivated to commit the offense due to an intimate or familial relationship or by threat or fear, (iii) receiving little to no compensation, (iv) having minimal knowledge of the scope and structure of the organization or that the firearm would be used in future criminal activity.

As a starting point, I respectfully submit that the first factor is redundant for purposes of calculating mitigation for straw purchasers. The proposed Amendment requiring 0-1 Criminal History points is unnecessary, because the offense of straw purchasing is predicated on a person having no criminal history that would prohibit them from purchasing or possessing a firearm. Put differently, straw purchasers are sought out to buy guns for others precisely because they lack criminal history and can thus help others evade background checks. For instance, both DOJ and ATF define straw purchasers as people without a criminal record who purchase firearms for others who are otherwise prohibited from making the purchase.⁴⁷ Because having a minor criminal record is a feature of the offense of straw purchasing, the Commission does not need to include to include the criminal history factor.

The Commission's mitigation amendment contemplates whether a person must meet all the factors or *any* of the factors listed above to qualify for a reduction in sentence. For instance, the proposed amendment lists factors (ii)-(iv) and contains both "and" and "or" language. The Commission should not require "and" language and should make mitigation available to straw purchasers so long as they can show that they were motivated to commit the offense due to an intimate or familial or relationship or threat or fear. The BSCA states that straw purchasers' sentences should reflect consideration of their "role and culpability," as well as any "coercion, domestic violence survivor history, or other mitigating factors." Nothing in this directive suggests that a straw purchaser must meet all these factors before they can qualify for a reduction. In fact, bundling these exceptions together undermines Congress's clear directive.

Moreover, as noted in our previous comment letter and herein, the data on straw purchasers indicates that they are likely to be women and are often recruited to purchase guns for boyfriends or family members. This factor is important, because it suggests the role that women play in the larger gun trafficking pipeline and how they risk being exploited due to domestic violence or other fears. The Commission correctly recognizes this, but it should make this an independent factor that, if met, enables a person to get a reduction in their sentence.

⁴⁷ See DOJ White Paper, "Deliberative and Pre-Decisional," Chapter 9, Reduction of Crime, available at <https://www.justice.gov/file/1353601/download>; Jim Nelson, CNN.com, "Feds in Cleveland Suggest Legal Guns are Purchased For Convicted Felons Every Day," May 31, 2022, available at <https://www.cleveland19.com/2022/06/01/feds-cleveland-suggest-legal-guns-are-purchased-convicted-felons-every-day/> (last visited Feb. 17, 2023).

Finally, the Commission has asked for comment on how the proposed mitigation amendment should related to Application Note 15 of § 2K2.1, which advises that mitigation may be considered for certain convictions related to straw purchasing. I urge the Commission to revise the Guideline to include mitigation as part of the sentencing calculation for § 2K2.1. As a starting point, a public search of Westlaw case databases suggests that Application Note 15 has not been the subject of many contested sentencings. When publicly available court filings were searched, this did not provide more clarity on how sentencing courts were applying or Application Note 15. It did, however, shed some light on how federal prosecutors approached this advisory note: they tended to oppose downward departures, even when a person met certain criteria, and they argued that Note 15 was discretionary, such that a sentencing court could still decline to grant a downward departure.⁴⁸

Admittedly, the dearth of case law discussing Application Note 15 could be because the Note is only available for certain offenses of conviction. But this proves my point: Application Note 15's limited applicability means that most persons sentenced under § 2K2.1 are not entitled to argue for downward departures. Considering Senators Booker and Murphy's statement that the Commission "interprets the instruction to consider 'other mitigating factors' broadly," the Commission should delete Application Note 15 in favor of a broader downward departure provision available to all qualifying persons (discussed below). If it declines to make mitigating factors broadly available, the Commission should include mitigation for straw purchasers in the body of the Guidelines.

Offer a Downward Departure to All Qualifying Persons

The Commission has also sought comment on whether to offer a downward departure applicable to all persons who meet the criteria. I respectfully submit that the Commission should make mitigation broadly available, both to address past racial disparities in sentences and to ensure that these disparities do not persist going forward. As noted previously, persons convicted of offenses pursuant to § 2K2.1 are predominantly Black, and their sentences tend to be longer. Creating a downward departure to all qualifying persons would potentially ameliorate the race disparities seen in the Commission's report.

Our working group has cited data showing that straw purchasers tend to be women, and that they may have been pressured, coerced, or threatened into becoming straw purchasers due to a familial or intimate relationship. The logic underlying the proposed reduction for these straw purchasers applies equally to those who traffic firearms on behalf of someone else: in both cases, the person being sentenced may have been coerced or pressured into the illegal act. In both cases, the fear, coercion, or pressure from these relationships was

⁴⁸ See Gov't Ltr. re: Mot. for Upward/Downward Departure from Sentencing Guidelines, *United States v. Latoya Smith*, No. 17-cr-15 (D. Del. 2018).

a material factor in the wrongdoing. To draw an analogy to federal drug prosecutions, public discourse has recognized the problem of holding everyone equally liable for the full scale of wrongdoing in a drug trafficking organization when some people—often, women who dated men in the organization—had little to no personal involvement.⁴⁹ The Commission can avoid repeating this “girlfriend problem” in gun-trafficking prosecutions by amending the Guideline to include a downward departure for all persons who qualify.

Finally, creating a broader downward departure provision would also be consistent with Congress’ intent when it passed the BSCA. As Senators Booker and Murphy observed in their letter to the Commission, the BSCA’s mitigation directive should be read expansively, to ensure that racial disparities are not perpetuated, and to ensure that mitigation is properly considered in every sentence.⁵⁰

Collect Data About Race Disparities and Federal Sentences Under § 2K2.1

We are cognizant that prosecutorial discretion can lead to race disparities in sentencing.⁵¹ We are similarly aware that federal prosecutors retain discretion (i) in deciding what charges to bring, which in turn determines what the Guideline range for a defendant will likely be, and (ii) in negotiating plea agreements that contain stipulations as to Guideline calculations. This discretion can lead to unintended race disparities. Given that straw purchasing and gun trafficking prosecutions have comprised less than 10 percent of federal sentences under § 2K21, we urge the Commission to collect data on sentences imposed for these two new federal offenses to determine whether racial disparities arise. Studying this issue is consistent with the BSCA’s

⁴⁹ Press Release, ACLU, “‘Girlfriend Problem’ Harms Women and Children, Impacted Families Call Mandatory Sentences Unfair and Destructive,” June 14, 2005, available at <https://www.aclu.org/press-releases/girlfriend-problem-harms-women-and-children-impacted-families-call-mandatory> (last visited Feb. 17, 2023); Matt Alston, “Mandatory Minimum Sentencing Might Have a ‘Girlfriend Problem’”, Rolling Stone, Nov. 18, 2018, available at <https://www.rollingstone.com/culture/culture-features/mandatory-minimum-sentencing-girlfriend-problem-757690/> (last visited Feb. 17, 2023).

⁵⁰ Letter from Senator Cory S. Booker and Senator Chris S. Murphy to The Hon. Carlton W. Reeves, *supra* note 27.

⁵¹ See, e.g., Lynn D. Lu, “Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys,” 19 Fed. Sentencing Rept’r 3 (Feb. 2007), available at <https://www.brennancenter.org/sites/default/files/legacy/Justice/10%20Prosecutorial%20Discretion%20and%20Racial%20Disparities%20in%20Federal%20Sentencing.pdf> (last visited Feb. 19, 2023); ACLU Written Testimony, Hearing on Reports of Racism in the Justice System of the United States, Submitted to the Inter-American Commission on Human Rights, Oct. 27, 2014, available at https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf (last visited Feb. 17, 2023); Robert J. Smith and Justin D. Levinson, “The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion,” 795 Seattle U. L. Rev. 35 (2012) available at <https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/f201faa4-ad58-46be-b4d6-0a5434fe7210/content> (last visited Feb. 27, 2023).

mandate to avoid exacerbating racial disparities, and it will also complement the research that is forthcoming from ATF on crime guns and trace data.

Conclusion

On behalf of the Working Group, I appreciate the opportunity to share these views with you today, and we look forward to providing more input as the Commission considers amendments to § 2K2.1.

Sincerely,

s/ Rob Wilcox

Rob Wilcox

Federal Legal Director, Everytown for Gun Safety
on behalf of the Zimroth Center/NYU Law Working Group