



October 17, 2022

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002
ATTN: Public Affairs – Priorities Comment

Re: Comments on Consideration of Possible Amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117-159); and (B) make any other changes that may be warranted to appropriately address firearms offenses.

Dear Judge Reeves,

We write to offer comments regarding possible amendments to §2K2.1 as it relates to penalties for gun trafficking offenses. The Brady Center to Prevent Gun Violence (“Brady”) urges this Commission, in exercising its sentencing guidelines promulgation authority, to take a holistic view of firearms trafficking by focusing on the “supply side” of crime guns. Specifically, Brady believes that the intent of Congress in passing the Bipartisan Safer Communities Act (“BSCA”), Pub L. 117-159—preventing gun violence—is best achieved through a sentencing scheme that accounts for the culpability for those responsible for gun trafficking. In our view, equitable sentencing requires accounting for the ways in which individuals and businesses who purposely engage in or facilitate in prolific firearms trafficking differ from lower level straw purchasers, some of whom may have been coerced into purchasing guns.

I. Introduction

Brady was founded in 1974 and is one of the nation’s most longstanding nonpartisan, nonprofit organizations dedicated to reducing gun violence. Brady works across Congress, the courts, and

communities, uniting gun owners and non-gun owners alike to take action, not sides, and end America's gun violence epidemic. Since 2000, our organization has carried the name of former White House press secretary Jim Brady, who was shot and severely injured in the assassination attempt on President Ronald Reagan, and his wife, Sarah, who led the fight to pass federal legislation requiring background checks for gun sales. Through a combination of education, research, policy advocacy, and litigation, Brady has created a comprehensive approach to preventing firearm violence, including strengthening the background check system, empowering high risk communities, promoting safe storage of firearms, and advocating for transparency and accountability in the firearm industry.

II. The Universe of Gun Trafficking is Directed Largely by “Upstream” Supply Side Actors

The BSCA provides federal prosecutors with the resources to prosecute not only perpetrators of gun violence but also those on the “supply side” who sell to gun traffickers and straw purchasers.¹ Specifically, the BSCA amends the Gun Control Act of 1968, 18 U.S.C. §§ 921 et seq., to prohibit any person from transferring a firearm to another person if such person knows or has reason to believe that use or possession of a firearm by the recipient would constitute a felony.² Looking “upstream” and tracking crime guns (i.e. guns that are used in a crime or guns whose possession is, itself, a crime) back to those who supply them is critical; it is the only way to cut-off the entire gun trafficking supply chain and thereby reduce gun violence more broadly.

A supply side approach to combating gun violence focuses on how firearms flow from the legal market to the illegal market where individuals use them to commit violence. When a gun is found at a crime scene or associated with a suspect, law enforcement agencies are able to track that firearm and follow the path from the manufacturer, to the distributor, to a federally licensed firearms dealer (“FFL”), to the first retail purchaser. These traces show that traffickers often turn to states with weaker gun laws in order to circumvent states with stricter ones.³ For example, most crime guns recovered in New York and New Jersey, two states with relatively stricter gun laws, were trafficked from other states with relatively weaker gun laws, mostly in the South.⁴

An effective way to interrupt this trafficking supply chain is to focus on the upstream sellers most responsible for enabling or even facilitating straw purchases. According to the most recent available national data, the dealers to whom the vast majority of crime guns are traced are a minute fraction of the total gun industry: 5% of licensed dealers sell about 90% of guns involved

¹ *Combating Crime Guns: A Supply-Side Approach*, BRADY CTR. TO PREVENT GUN VIOLENCE, <https://brady-static.s3.amazonaws.com/SUPPLYSIDEv5.pdf> (last visited Oct. 17, 2022).

² 18 U.S.C. § 933.

³ Gregor Aisch & Josh Keller, *How Gun Traffickers Get Around State Laws*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/interactive/2015/11/12/us/gun-traffickers-smuggling-state-gun-laws.html>.

⁴ *Id.* See also Nicholas Bogel-Burroughs, *House Passes Gun Control Legislation*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/live/2022/06/08/us/gun-violence-hearing-uvalde-buffalo> (“Representative Jody Hice, Republican of Georgia, asked Mayor Eric Adams of New York City if it was true that, despite being illegal for many people to carry a gun in the city, police are finding and seizing them in ‘record numbers.’ Mr. Adams replied that it was true, and then quipped: ‘And many come from Georgia.’”).

in crimes.⁵ Concerningly, research has found widespread willingness among FFLs to make firearm sales of questionable legality, including straw sales. Among surveyed FFLs, 70.8% indicated that they were willing to sell a handgun to a caller regardless of the gun’s stated end-use, and more than half were willing to sell a handgun to a caller when told it was for a girlfriend or boyfriend “who needs it.”⁶ As director of the Violence Prevention Research Program at the University of California, Davis recently said, “There are retailers who will clearly understand that they are involved in a straw purchase and will sell the guns anyway.”⁷ While trace data from the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) can be used to identify the dealers most responsible for gun crimes, due to insufficient resources, the ATF has been unable to meet its goals of regular dealer inspections and enforcement. Consequently, Congress provided the enforcement tools in the BSCA to help fill this enforcement gap. With the increased capacity of the ATF to engage in comprehensive oversight of FFLs, it is imperative to align sentencing priorities to focus on those most responsible for fueling the supply side of the gun violence epidemic.

Those individuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not. Sentencing guidance recognizing this disparity is crucial to achieve Congress’s goal of reducing gun violence. A recent indictment in the Northern District of Texas is illustrative. In *United States v. Hackworth*, 3:22-cr-00228-L, Dkt. 1 (N.D. Tex. June 7, 2022), the defendant is alleged to have purchased at least 92 guns from FFLs, including 75 from Triggernometry Arms, LLC over a six-month timeframe, 70 of which being of similar makes and models.⁸ Of the 92 guns purchased by the defendant, law enforcement has recovered 16 in incidents not involving the defendant, including aggravated assault, homicide, and drug trafficking.⁹ Announcing the charges, Attorney General Merrick Garland said, “We are cracking down on the criminal gun-trafficking pipelines that flood our communities with illegal guns.”¹⁰ However, despite selling the defendant 75 guns in 6 months, 70 of which were similar—clear signs of gun trafficking—Triggernometry Arms, LLC faces no charges. With the passage of the BSCA, appropriate sentencing directives from this Commission will let FFLs like

⁵ Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the United States*, DEP’T OF THE TREASURY (Feb. 2, 2000), <https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB2000102002.xhtml>.

⁶ S.B. Sorenson & K.A. Vittes, *Buying a Handgun for Someone Else: Firearm Dealer Willingness To Sell*, 9 INJ. PREVENTION 147 (2003), <https://injuryprevention.bmj.com/content/injuryprev/9/2/147.full.pdf>.

⁷ Andy Mannix, *She Bought 47 Guns Last Month. Police Are Already Finding Them in Shooting Investigations*, STAR TRIBUNE (June 12, 2021), <https://www.startribune.com/she-bought-47-guns-last-month-police-are-already-finding-them-in-shooting-investigations/600067591/?refresh=true>.

⁸ Indictment ¶ 6, *United States v. Hackworth*, No. 3:22-cr-00228-L (N.D. Tex. June 7, 2022), Dkt. 1.

⁹ *Id.* ¶ 7.

¹⁰ Off. of Pub. Affairs, *Justice Department Announces Charges Against Alleged Gun Trafficker*, DEP’T OF JUST. (June 13, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-charges-against-alleged-gun-trafficker>.

Triggernometry Arms, LLC know that they can no longer hide their heads in the sand when selling guns.

Other recent cases demonstrate how unscrupulous dealers are the origin point for gun trafficking. In December 2021, Darryl Ivery, Jr. was sentenced to 18 months imprisonment after pleading guilty to making false statements in connection with the acquisition of firearms.¹¹ According to documents in the case, Ivery purchased 25 firearms between February and August 2020, including 19 from Westforth Sports, Inc. in Gary, Indiana.¹² This past May, Terrence McCray was sentenced to 24 months in prison after pleading guilty to conspiracy to make false statements to a federally licensed firearms dealer.¹³ On the other hand, despite allegedly selling McCray many of the guns listed in his indictment, Westforth Sports, Inc. is still in business.¹⁴

Conversely, harsher penalties are less likely to disincentivize lower level traffickers and straw purchasers, given the desperate circumstances that often draw people into such conduct. According to another recent indictment, for example, Sarah Elwood and her boyfriend Jeffrey Jackson are alleged to have purchased approximately 95 firearms from 9 different FFLs between May 2020 and May 2021.¹⁵ Elwood and Jackson allegedly sold the guns for a \$100 profit per gun. In an interview with ATF, Elwood said “[s]he and Jackson needed the money since she lost her job in March 2020, lost her apartment and her mother was diagnosed with cancer.”¹⁶ By contrast, more stringent enforcement for those higher in the supply chain will put dealers and FFLs on notice that they have the responsibility of acting as responsible gatekeepers that protect public safety.

III. This Commission Should Consider Context and Avoid Relying on Gang Affiliation as an Indicator of Culpability

This Commission should ensure that any amendment to §2K2.1 does not disproportionately punish individuals who are forced to make straw purchases as a result of coercion or manipulative relationships. Further, the BSCA’s recommendation to increase penalties for individuals “affiliated with a gang” fails to account for the reality that law enforcement’s identification of gang affiliation is often significantly overinclusive. Focusing on increasing penalties for low-level straw purchasers and those affiliated with gangs—rather than for upstream supply side actors—risks undue increases in punishment for many who are forced to purchase the guns while under duress.

¹¹ U.S. Att’y N.D. Ind., *Hammond Man Sentenced to 18 Months in Prison*, DEP’T OF JUST. (Dec. 21, 2021), <https://www.justice.gov/usao-ndin/pr/hammond-man-sentenced-18-months-prison>.

¹² Aff. in Supp. of Crim. Compl., *United States v. Ivery*, No. 2:20-cr-00138 (N.D. Ind. Aug. 26, 2020), Dkt. 1-1.

¹³ U.S. Att’y N.D. Ind., *East Chicago Man Sentenced to 24 Months in Prison*, DEP’T OF JUST. (May 5, 2022), <https://www.justice.gov/usao-ndin/pr/east-chicago-man-sentenced-24-months-prison-0>.

¹⁴ Indictment, *United States v. McCray*, No. 2:21-cr-00097 (N.D. Ind. July 22, 2021), Dkt. 1.

¹⁵ Indictment ¶¶ 8-9, *United States v. Elwood*, No. 21-cr-00147 (D. Minn. June 24, 2021), Dkt. 33.

¹⁶ Mannix, n.7 *supra*.

Trafficking facilitators often seek out vulnerable individuals to carry out straw purchases using coercion or false pretenses. Coercion can refer to the threat of physical harm but also includes the manipulation of power dynamics with vulnerable individuals through the threat of isolation, domestic abuse, economic loss, or peer pressure. Even though most gun violence is committed by men, women are disproportionately recruited to purchase guns for illegal activity.¹⁷ A U.S. Department of Justice study observed that handguns purchased by women are 50% more likely to be used in a crime than a gun purchased by a man.¹⁸ Women with clean criminal records are often enlisted as straw purchasers by family and friends, frequently under the pressure of domestic violence, economic coercion, or drug addiction.¹⁹ Young adults may also be particularly vulnerable to unwittingly engaging in a straw purchase for a friend or family member due to a lack of education and the existence of unhealthy and abusive relationships. While the BSCA recommends accounting for these factors, Brady urges this Commission to recognize that coercion and manipulation play a much larger role for many straw purchasers.

This Commission should also account for the fact that affiliation with a gang tends to be construed as overly broad, and is not a reliable identifier of culpability. Gang databases maintained by law enforcement do a poor job of differentiating between active gang members and individuals who simply live in communities where gangs are prevalent. Adolescents who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis.²⁰ Law enforcement has broad discretion to add individuals to a gang database without providing evidence of criminality or even a suspicion of wrongdoing.²¹ Also, gang databases are notoriously discriminatory and error-ridden.²² An audit of a state-wide California gang database revealed 42 alleged gang members were actually infants under the age of one, 28 of whom had

¹⁷ G.J. Wintemute, P.J. Cook & M.A. Wright, *Risk Factors Among Handgun Retailers for Frequent and Disproportionate Sales of Guns Used in Violent and Firearm Related Crimes*, 11 INJ. PREVENTION 357 (2005).

¹⁸ Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use*, DEP'T OF JUST. (2007).

¹⁹ *Women and Crime Guns: Stories Lifted From the Headlines, Operation Lipstick Crime Report*, OPERATION LIPSTICK, available at <https://drive.google.com/file/d/0Bw0cnKHMSOckUkZXeTFhNWZRLTA/view?resourcekey=0-BZZIPDMbPOO5wfAinIRjsw> (last visited Oct. 17, 2022).

²⁰ *Gangs and Children*, AM. ACAD. OF CHILD & ADOLESCENT PSYCH. (Sept. 2017), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-and-Gangs-098.aspx.

²¹ Tracy Siska, *Gang Affiliation Data Project*, CHI. JUST. PROJECT (July 12, 2022), <https://chicagojustice.org/2022/07/12/gang-affiliation-data-project/>.

²² Ctr. for Popular Democracy & United We Dream, *Eliminating the Use of Gang Databases*, LOCAL PROGRESS, available at <https://localprogress.org/wp-content/uploads/2021/04/2020-LP-Policy-Brief-Gang-Databases.pdf> (last visited Oct. 17, 2022).

been added for supposedly admitting to their gang membership.²³ Introducing higher penalties for those affiliated with gangs will have a disproportionately negative impact on those who live in areas where gangs are prevalent. Simply stated, gang affiliation is an overinclusive category that should not be used to subject convicted straw purchasers to higher penalties.

Any amendment to §2K2.1 should properly account for the coercion that underlies straw purchases and should also avoid relying on overinclusive gang databases for increased punishments.

IV. Directing Harsher Sentences at Straw Purchasers and Gang Affiliates Will Result in Racial Disparities in Enforcement

The overinclusive nature of what constitutes gang affiliation compounds racial disparities in enforcement. Black and Brown people are more likely to live near segregated and impoverished communities where gangs operate²⁴ and thus are more likely to be added to a gang database even without evidence of wrongdoing. Racial disparities in enforcement have been in effect since the War on Drugs,²⁵ but the rate of gun violence has been largely unaffected.²⁶ Meanwhile, the stated purpose of the BSCA is to stop illegal trafficking in firearms as a means to address gun violence,²⁷ rather than impose harsher penalties on communities that are already heavily policed.

Instead, harsher penalties for straw purchasers based on “gang affiliation” will compound the impact on minority communities, where Black men are six times more likely and Hispanic men are three times more likely to be imprisoned than white men, and Black women ages 18-19 are five times more likely to be imprisoned than white women.²⁸ The rate of incarceration of Black men is nearly 21 times that of white men, and yet despite this trend, gun violence has only increased in inner cities.²⁹ When viewed against this backdrop, a harsher penalty linked to such a broad interpretation of “gang affiliation” risks causing significant harm to minority defendants,

²³ Chris Sommerfedt, *Audit Discovers Toddlers in California Gang Database*, N.Y. DAILY NEWS (Aug. 15, 2016), <http://www.nydailynews.com/news/national/audit-discovers-toddlers-california-gang-database-article-1.2751798>.

²⁴ Heather Ann Thompson, *Inner City Violence in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 30, 2014), <https://www.theatlantic.com/national/archive/2014/10/inner-city-violence-in-the-age-of-mass-incarceration/382154/>.

²⁵ *Id.*

²⁶ *U.S. Gun Suicide and Gun Murder Rates Have Increased in Recent Years, but Remain Below Past Highs*, PEW RESEARCH CTR. (Feb. 3, 2022); https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/ft_22-01-26_gundeaths_2/.

²⁷ Bipartisan Safer Communities Act, Pub. L No.117-159, Sec. 12004, 136 Stat. 1313, 1326 (June 25, 2022).

²⁸ Thompson, n.24 *supra*; Robert Weiss, *Rethinking Prison for Non-Violent Gun Possession*, 112 J. OF CRIM. L. & CRIMINOLOGY 667 (2022).

²⁹ Thompson, n.24 *supra*.

with a corresponding low likelihood of making any statistical significance in the rate of gun violence.

In major cities like Chicago, guns flow from white neighborhoods and suburbs to Black and Brown communities facing disproportionate disadvantages. Increasing penalties for trafficking based on gang affiliation would unduly punish those living in the communities most impacted by gun violence and gun trafficking without accounting for those responsible for selling the firearms.³⁰ This inequitable administration of gun trafficking penalties does not get to the source of the widespread distribution of guns in cities like Chicago, and will only heighten racial disparities in enforcement.

An amendment to §2K2.1 should properly account for the racial disparities in enforcement that underlie straw purchases to more accurately target the source of gun violence in the United States.

V. Conclusion

Brady urges you to adopt amendments to and guidance regarding §2K2.1 such that sentences are commensurate with the role played by the various actors involved in fueling the supply side of America's gun epidemic.

Sincerely,



T. Christian Heyne
Brady
Vice President, Policy

³⁰ *Examining the Practices and Profits of Gun Manufacturers: Hearing Before the House Comm. on Oversight and Reform*, 117th Cong. (July 27, 2022) (written testimony of Kelly Sampson, Senior Counsel and Director of Racial Justice, Brady Center to Prevent Gun Violence).