

REVISED AMENDMENT 7: Offenses Relating to Firearms

Synopsis of Revised Amendment: *The principal parts of the proposed amendment are as follows:*

- *Part (A)(1) proposes to amend §1B1.1 (Application Instructions) to provide the statutory definition of “brandish” found in 18 U.S.C. § 924(c). The proposed definition tracks the statutory definition except that the proposed definition includes any dangerous weapon, not just a firearm.*

Part (A)(2) responds to a published issue for comment regarding whether the Commission should make a conforming amendment to delete the term “display” from the weapon enhancement that applies “if the firearm was brandished, displayed, or possessed,” which is contained in §§2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and 2E2.1 (Making or Financing an Extortionate Extension of Credit). The amendment proposes to make this conforming amendment. In addition, the amendment has been revised to include proposals to delete the term “display” from the definition of “dangerous weapon” in §1B1.1, and from an enhancement provision of §2A3.1 (Criminal Sexual Abuse). (The amendment also proposes to delete an unnecessary phrase from the enhancement provision in §2A3.1.)

- *Part (B) responds to the legislation that changed the penalty provision in 18 U.S.C. § 924(c) from a fixed term of years to a mandatory minimum term. The proposal amends §2K2.4 to clarify that the guideline sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is the minimum term required by statute. However, because 18 U.S.C. § 844(h) still provides a fixed term of imprisonment, the amendment proposes to clarify that the guideline sentence for a conviction for this offense still is the term of imprisonment required by the statute. Additionally, the amendment has been revised to propose a general departure provision that would enable a court to depart above the minimum term of imprisonment for convictions under 18 U.S.C. § 924(c) or § 929(a) if such a departure is warranted. See Staff Analysis for further discussion.*
- *Part (C) resolves a circuit conflict regarding whether, if a defendant is convicted of violating both 18 U.S.C. § 924(c) and the underlying offense, the court can apply a weapon enhancement when applying the guideline for the underlying offense. Specifically, the proposal amends Application Note 2 of §2K2.4 to clarify that the term “underlying offense” includes both the offense of conviction and any relevant conduct for which the defendant is accountable under §1B1.3. The amended Note instructs the court not to apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for the underlying offense. The proposed amendment also provides examples of when this rule would (and would not) apply.*

The proposed amendment has been revised to include an additional instruction that directs the court not to apply an enhancement under §2K1.3(b)(3) (pertaining to

possession of explosive material in connection with another felony offense) or §2K2.1(b)(5) (pertaining to possession of any firearm or ammunition in connection with another felony offense) if the weapon that was used in the course of the underlying offense would otherwise result in application of either enhancement. This is in response to a concern raised by ESP staff that double counting could result in the case of a defendant who, in addition to a conviction under section 924(c), is also convicted of being a felon in possession, in violation of 18 U.S.C. § 922(g). This additional instruction would prevent double counting of the firearm in these, and similar, cases. See Staff Analysis for further discussion.

The legislation also specifically added brandishing to the conduct covered by 18 U.S.C. § 924(c). This proposed amendment provides a conforming amendment to Application Notes 2 and 4 and the Background Commentary of §2K2.4 to add brandishing to the list of specific offense characteristics that are not applied with respect to the sentencing for the underlying offense.

- *Part (D) clarifies that under current guideline application: (A) Chapters Three and Four do not apply to any sentence imposed under §2K2.4 because the sentence is determined by the relevant statute (18 U.S.C. § 844(h), § 924(c), or § 929(a)); and (B) because Chapter Four does not apply, the career offender guideline, §4B1.1, does not apply if the instant offense of conviction is for a violation of 18 U.S.C. § 924(c) or § 929(a). See Staff Analysis for further discussion.*
- *Part (E) proposes technical and conforming amendments to §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction) that result from the change to the penalty provision of 18 U.S.C. § 929(a).*

REVISED AMENDMENT: Offenses Relating to Firearms

(A) Definition of Brandish and Eliminate the Term “Display” from Weapon Enhancement

Part I: Definition of Brandish

Proposed Amendment:

§1B1.1. Application Instructions

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Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*

* * *

- (c) "Brandished" with reference to a dangerous weapon (including a firearm) means ~~that the weapon was pointed or waved about, or displayed in a threatening manner.~~ that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. [Accordingly although the dangerous weapon does not have to be directly visible, the weapon must be present.]*

* * *

Part II: Eliminate the Term “Display” from Weapon Enhancement (and from Two Other Guideline Provisions)

Published Issue for Comment: *Several guidelines provide an enhancement that applies “if the firearm was brandished, displayed or possessed.” See, e.g., §2B3.1 (Robbery); §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage). Given that the proposed amendment defines “brandished” to mean, in part, that “all or part of the weapon was displayed,” the Commission invites comment regarding whether, if the Commission adopts this amendment, it should make a conforming amendment to delete “displayed” from this enhancement as unnecessary.*

Proposed Amendment:

§1B1.1. Application Instructions

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Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

- (d) “Dangerous weapon” means an instrument capable of inflicting death or serious bodily injury. ~~Where~~*If an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon.*

* * *

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

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- (b) Specific Offense Characteristics

- (1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) ~~(including, but not limited to, the use or display of any dangerous weapon)~~, increase by 4 levels.

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Commentary

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Application Notes:

1. For purposes of this guideline—

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“The means set forth in 18 U.S.C. § 2241(a) or (b)” are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, ~~where~~ if any dangerous weapon was used, ~~or brandished, or displayed to intimidate the victim.~~

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§2B3.1. Robbery

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- (b) Specific Offense Characteristics

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- (2) (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, ~~displayed~~, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, ~~displayed~~, or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

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Commentary

Application Notes:

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- 2. *When an object that appeared to be a dangerous weapon was brandished, ~~displayed~~, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(E).*

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§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

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(b) Specific Offense Characteristics

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- (3) (A)(i) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished, ~~displayed~~, or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels; or (v) if a dangerous weapon was brandished, ~~displayed~~, or possessed, increase by 3 levels; or

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§2E2.1. Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

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(b) Specific Offense Characteristics

- (1) (A) If a firearm was discharged increase by 5 levels; or
- (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; or
- (C) if a dangerous weapon (including a firearm) was brandished; ~~displayed~~ or possessed, increase by 3 levels.

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(B) Clarify that the Court Should Impose the Minimum Term of Imprisonment; Upward

Departure Provision

Proposed Amendment:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) ~~If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), § 924(c), or § 929(a), the term of imprisonment is that required by statute.~~

(a) If the defendant, whether or not convicted of another crime, was convicted of violating:

(1) Section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute.

(2) Section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute.

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Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Subsection (a) reflects this distinction. Accordingly, the guideline sentence for a defendant convicted under section 844(h) is the term required by the statute, whereas the guideline sentence for a defendant convicted under section 924(c) or section 929(a) is the minimum term required by the relevant statute. ~~In each case, the~~ Each statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

A sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure, which the court may impose if such departure is warranted.

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Background: ~~18 U.S.C. §§~~Section 844(h) of title 18, United States Code, ~~924(c), and 929(a)~~ provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment ~~penalties for the conduct proscribed.~~ A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment.

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(C) Clarify that “Underlying Offense” Refers to the Offense of Conviction and Any Relevant Conduct

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

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Commentary

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2. ~~Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm (e.g., §2B3.1(b)(2)(A)-(F) (Robbery)) is not to be applied in respect to the guideline for the underlying offense.~~

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm with respect to the guideline for that underlying offense. A sentence under §2K2.4 accounts for any explosive or weapon enhancement both for the underlying offense of conviction and for any other conduct for which the defendant may be accountable under §1B1.3 (Relevant Conduct). For example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a different firearm from the one for which the defendant was convicted under 18 U.S.C. § 924(c), do not apply any weapon enhancement in the guideline for the underlying offense; or (B) in an ongoing drug trafficking offense, the defendant possessed firearms other than the one for which the defendant was convicted under 18 U.S.C. § 924(c), do not apply any weapon enhancement in the guideline for the underlying offense. However, if a defendant is convicted of two armed bank robberies, but is convicted of a 18 U.S.C. § 924(c) offense in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(5) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply the enhancement. A sentence under §2K2.4 accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct which forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(5) would not apply.

* * *

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under

18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: * * * To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

(D) Section 924(c) and Career Offender

Exclude 18 U.S.C. § 924(c) Offenses as Instant Offense of Conviction under Career Offender Guideline

Proposed Amendment:

(The Commentary to §2K2.4 captioned “Application Notes” is amended by redesignating Notes 3 and 4 as Notes 5 and 6, respectively, and inserting a new Note 4.)

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

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Commentary

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Application Notes:

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4. Do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of these chapters because the term of imprisonment for each offense is determined only by the relevant statute. See §§3D1.1, 5G1.2.

3.5. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).

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(The Commentary to §4B1.2 captioned “Application Notes” is amended by redesignating Notes 2 and 3 as Notes 3 and 4, respectively and inserting new Note 2.)

§4B1.2. Definitions of Terms Used in Section 4B1.1

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Commentary

Application Notes:

1. For purposes of this guideline—

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~~Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a "crime of violence" or "controlled substance offense" if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a "crime of violence" or "controlled substance offense." A prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of applying §4B1.1 (Career Offender) if the prior offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." (Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).~~

2. A sentence for a conviction under 18 U.S.C. § 924(c) or § 929(a) is determined only by the statute and is imposed independently of any other sentence. See §§2K2.4, 3D1.1, and 5G1.2(a). Accordingly, do not apply this guideline if the instant offense of conviction is a conviction for violating 18 U.S.C. § 924(c) or § 929(a).

- 2.3. * * *

- 3.4. * * *

Part E Technical and Conforming Amendments

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

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Commentary

Application Note:

1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring a mandatory minimum term of five years imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by

subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See §5G1.2(a).

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§5G1.2. Sentencing on Multiple Counts of Conviction

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Commentary

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Subsection (a) applies if a statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring a mandatory minimum term of five years imprisonment, based on the conduct involved, to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

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