



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

February 27, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.¹ This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department’s written testimony for the Commission’s upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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¹ U.S. Sentencing Comm’n, *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023).

U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT APPROVED BY THE U.S. SENTENCING COMMISSION ON JANUARY 12, 2023, AND PUBLISHED IN THE FEDERAL REGISTER ON FEBRUARY 2, 2023.

1. Firearms Offenses

The Department appreciates and supports the Sentencing Commission’s efforts to implement the Bipartisan Safer Communities Act (“BSCA”). During the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Department has instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and the Department also continues to urge the Commission to consider broader reforms to Section 2K2.1.

The Commission has proposed two options to implement the BSCA. Both options include a general one- or two-level increase to the offense level for straw purchasers and traffickers. Option 1 increases offense levels by adding an enhancement for trafficking and straw purchasing, while Option 2 increases base offense levels. Option 1 increases offense levels for all straw-purchasing-related offenses, including those that predate the BSCA, but does not include any increase for prohibited persons. Option 2, by contrast, includes an increase for prohibited persons and for some of the straw-purchasing-related offenses that predate the BSCA, but does not include increases for all straw-purchasing-related offenses. Both Options 1 and 2 also include a mitigating-conduct reduction to implement the BSCA.

The Department recommends that the Commission adopt Option 2 with two significant changes: the Commission should (1) include all straw-purchasing-related offenses in the offense-level increase; and (2) increase the base offense levels by three or four levels, not one or two levels. The Department also supports the Commission’s mitigating-conduct proposal, but recommends that it be phrased in the conjunctive, requiring that a defendant meet all listed conditions (and not just any one listed condition).

A. Part A—The Bipartisan Safer Communities Act

- 1. The Commission Should Adopt Option 2 Because Prohibited Persons Should Receive the Same Increase as Straw Purchasers and Traffickers and Because it Provides More Clarity than Option 1*

The Department believes that Option 2 is preferable to Option 1 for two primary reasons. First, increasing the penalties for straw purchasers and traffickers, but not for the prohibited persons who benefit from such straw purchasing and trafficking, is inconsistent with the core principles of the Sentencing Reform Act. The BSCA made “it a serious crime to buy a gun for someone else when you know that person will use the gun to commit a felony or that they are not allowed to buy a gun themselves. . . . The consequences of this simple change will be real. It will keep deadly weapons out of the hands of people who would use them to hurt others, and it will level serious consequences for those who break the law.” 168 Cong. Rec. S3105–06 (statement of Senator Heinrich in support of the BSCA). In other words, when enacting the BSCA,

Congress was concerned about straw purchasing and trafficking precisely because these crimes are used to provide guns to prohibited persons. Thus, Congress did not stop at creating new straw-purchaser and trafficking offenses; Congress also increased the statutory maximum penalties for gun possession by prohibited persons from 10 to 15 years in prison.

Moreover, before the BSCA, the Sentencing Guidelines appropriately treated straw purchasers and prohibited persons as equally culpable; under current §2K2.1, both types of offenders are subject to a base offense level of 14. The current guideline thus recognizes that prohibited persons are at least as culpable as individuals who purchase weapons on their behalf. However, under Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun. Congress cannot have intended such anomalous results when it instructed the Sentencing Commission to increase the applicable Guidelines range for straw purchasing offenses while at the same time raising the maximum penalty for possession of weapons by prohibited persons.

Option 2 is also preferable to Option 1 because it provides more clarity to all parties including defendants and their counsel.² As the Department has previously noted, §2K2.1 is a complicated Guidelines provision; base offense levels are determined by not just the type of offense, but also the characteristics of the defendant and of the offense. Because this complicated structure often leads to mistakes in the Guidelines' application, the Department proposed specific language to simplify the guideline. Option 1—which proposes an enhancement rather than an increase to the base offense level—would exacerbate the challenges resulting from §2K2.1's structure. The Department continues to urge the Commission to simplify the guideline but, failing that, supports Option 2 to avoid making the guideline more complex.

If the Commission does adopt Option 1, the Department recommends amending the enhancement for straw purchasing and trafficking so that it applies not just to those who purchase guns for, or transfer to guns to, prohibited persons, but also to the prohibited persons who receive any weapons through such a straw-purchasing or trafficking arrangement. This would ensure that the individuals on both sides of the arrangement face the same offense level. The Department thus recommends the following edits to Option 1's enhancement:

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by [1][2] levels;

(B)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any

² Option 2, entitled “Increase Penalties for Offenses with Statutory Maximum of 15 years or more[.]” provides, at proposed §2K2.1(a)(7), for an offense level of 15 or 16 for all Section 922(g) offenses. Section 922(g), in turn, prohibits possession of weapons by certain persons, commonly referred to as “prohibited persons.” But Option 2 also provides, at proposed §2K2.1(a)(8), for an offense level of 14 “if the defendant . . . was a prohibited person at the time the defendant committed the instant offense.” The Department presumes that this reference to “prohibited persons” in §2K2.1(a)(8) is intended to apply only to individuals who cannot legally possess a weapon, but were not convicted under Section 922(g)—such as a prohibited person who is convicted under Section 922(a)(6) for lying on a gun application, but never possesses the weapon in question. We recommend making clear that proposed Section 2K2.1(a)(8) applies to “prohibited persons who are not convicted under Section 922(g).”

ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [1][2] levels; or (C)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [5][6] levels.

2. *Retaining the Existing Base Offense Level for Violations of Section 922(a)(6) and 924(a)(1)(A) is Inconsistent with Prior Commission Treatment of the Provisions and the BSCA*

Before the BSCA, several statutory provisions were used to prosecute straw purchasers, including Section 922(d), which prohibits transfers to prohibited persons, and Sections 922(a)(6) and 924(a)(1)(A), which prohibit making false statements in connection with a firearm purchase. In 2011, the Commission amended §2K2.1 to provide the same base offense level for Section 922(d) and offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed “with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.” See Amendment 753 (effective Nov. 1, 2011). As the Commission explained at the time, “[t]he amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under a third statute used to prosecute straw purchasers, 18 U.S.C. § 922(d), when the conduct is similar.” *Id.*

Section 922(d) and the new straw-purchasing and trafficking offenses carry a 15-year maximum term of imprisonment, while Sections 922(a)(6) and 924(a)(1)(A) carry only a 10-year and 5-year maximum term of imprisonment, respectively. But, under the current Guidelines, the increased base offense level does not apply to all offenses under Sections 922(a)(6) and 924(a)(1)(A), but only to those committed with the requisite heightened intent. Moreover, in the BSCA, Congress instructed the Commission to ensure increased penalties not only for the new straw-purchaser and trafficking offenses, but also “other offenses applicable to the straw purchases and trafficking of firearms”—a category that, as the Commission itself has repeatedly recognized, includes offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed “with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.” Although the BSCA created new straw-purchasing and trafficking offenses, prosecutors are still likely to use Sections 922(a)(6) and 924(a)(1)(A) to prosecute straw purchasing offenses. We thus recommend that the Commission adopt Option 2 but extend the base offense level increase to Section 922(a)(6) and 924(a)(1)(A) offenses

committed “with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.”

3. *The Department Does Not Believe that a 1 to 2 Level Increase is Sufficient to Comply with Congress’s Directive in the BSCA*

The Department believes that a greater increase of four levels is warranted for the amendment “to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities.” See Pub. L. 117–159, §12004(a)(5) (2022). Because straw purchasers, by definition, have not been convicted of a felony, they generally fall within Criminal History Category I, and, with a two-point reduction for acceptance of responsibility and no other enhancements, would face a Guidelines range of 10 to 16 months based on a base offense level of 14. Because that range is in Zone C, the sentencing court can substitute half of the recommended prison time for house arrest. USSG §5C1.1(d)(2). Thus, a straw purchaser can face as little as 5 months of imprisonment under the current Guidelines. The Commission’s proposal to raise the base offense levels by only one or two levels would lead to the same straw purchaser facing as little as six months in prison, after reductions for acceptance of responsibility.³ A single additional month of imprisonment is not consistent with the congressional directive to ensure “that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities.”

A four-level increase to the base offense level would be most consistent with Congress’s directive. Both a three- and four-level increase would put the same straw purchaser at a total offense level within Zone D, which would ensure that they serve a sufficient amount of time in prison rather than on house arrest.

4. *The Mitigating Reduction Should be Phrased in the Conjunctive*

The BSCA directed the Sentencing Commission to consider “an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that . . . reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” In both Options 1 and 2, the Commission has proposed a one- or two-level reduction where the offense involves a straw purchaser and “(i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].” The Department supports this provision but recommends that the Commission adopt the conjunctive (“and”) formulation.⁴

³ For many defendants, a two-level increase in the base offense level would produce the same Guidelines range as a one-level increase; at an offense level 16, the defendant would be eligible for a three-point acceptance-of-responsibility reduction, instead of the two-point reduction available at an offense level 15.

⁴ If the Commission agrees that the base offense level should be increased for all straw-purchasers, including those convicted under Section 922(a)(6) or 924(a)(1), where the offense was committed “with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person,” those offenses should be included in the reduction for certain straw-purchasers.

First, if the Commission adopts the disjunctive approach, it is likely that the mitigating-role reduction will apply to the vast majority of straw-purchaser cases. Many people receive little to no monetary compensation for serving as straw purchasers, and most straw purchasers have either limited knowledge of the crimes in which the gun will be used or the criminal enterprise that is using the gun. In addition, because the proposed reduction is equivalent to the Commission’s proposed increase for straw purchasers, the vast majority of straw purchasers would face the same offense level under the amended guideline that they face now, even though Congress expressly intended that straw purchasers be “subject to increased penalties in comparison to those currently provided by the guidelines.”

Moreover, the disjunctive formulation leads to absurd results. A defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in the organization, so long as he received only minimal financial compensation. Likewise, a defendant who was paid an exorbitant sum of money to provide a gun, knowing that it would be used in a felony, could argue that he is eligible for a reduction because the crime was “motivated by a . . . familial relationship,” as evidenced by the fact that he used the money to help a family member. And a firearms trafficker who sells 10 semi-automatic firearms to a prohibited person for a substantial profit would be eligible for a reduction, so long as he was not aware that the gun would be used in a crime or just did not have knowledge of the full scope to the criminal enterprise. The Commission should adopt the conjunctive formulation to ensure that the proposed reduction is limited to less culpable defendants, as Congress intended.

B. Part B—Firearms not Marked with Serial Numbers (“Ghost Guns”)

The Department supports the Commission’s proposal to apply the Guideline’s four-level enhancement for firearms with altered or obliterated serial numbers to “ghost guns”—guns that are missing a serial number—but recommends a rebuttable presumption for the *mens rea* requirement.

1. The Department Supports a Four-Level Enhancement for Ghost Guns

Section 2K2.1 currently provides a four-level enhancement where a firearm involved in the offense had an altered or obliterated serial number. As the Commission has previously explained, this enhancement “reflects both the increased likelihood that the firearm will be used in the commission of a crime and the difficulty in tracing firearms with altered or obliterated serial numbers.” U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* (2022) at 12. Ghost guns are even more difficult to trace than guns with altered or obliterated serial numbers, because ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis. The same is not true for ghost guns.

Ghost guns, moreover, present a significant and growing problem. As the White House recently indicated, “[l]ast year alone, there were approximately 20,000 suspected ghost guns

reported to ATF as having been recovered by law enforcement in criminal investigations—a ten-fold increase from 2016.” White House Fact Sheet (2022).⁵

ATF recently issued a regulation—the “frame and receiver” rule—that was partially aimed at reducing the proliferation of ghost guns. The Department supports the Commission’s efforts to deter the possession and use of these dangerous untraceable weapons by adding ghost guns to the four-level enhancement for guns with altered or obliterated serial numbers.

2. *The Department Supports Adding a Rebuttable Presumption Mens Rea Requirement to §2K2.1(b)(4)*

The Department understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement for untraceable guns, particularly for stolen guns. Although the fact that a gun has a missing, altered, or obliterated serial number is generally readily apparent from the gun itself, it may not be as readily apparent that a gun is stolen. And it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen, or that it had an accurate serial number. The defendant, however, is often in sole possession of evidence establishing his good faith belief that the gun in question was not stolen, or did not have an altered, obliterated, or missing serial number. The Department thus suggests that the Commission create a rebuttable presumption with regard to the *mens rea* element. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he or she lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. The Department would thus recommend the following language:

Subsection (b)(4) applies unless the defendant establishes by a preponderance of the evidence that he or she did not know, and had no reason to believe, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number.

C. **Part C—Further Revisions**

1. *Burglary from Federal Firearms Licensees*

The Department supports an enhancement for offenses involving the burglary or robbery of firearms from Federal Firearms Licensees (FFLs). Section 922(u), which prohibits the unlawful taking of any firearm from an FFL, covers offenses of varying severity, ranging from simple theft to burglary to robbery. But, unless the defendant is a prohibited person, §2K2.1(a)(7) provides the same base offense level of 12 for a Section 922(u) conviction, regardless of the severity of the offense. Moreover, although §2K2.1 provides for a two-level increase for offenses that involve a stolen gun, that enhancement does not apply to any offense subject to §2K2.1(a)(7). *See* USSG §2K2.1 cmt n.8(A).

Burglaries and robberies—especially of firearms from an FFL—are particularly dangerous crimes. FFL burglaries and robberies often involve the theft of multiple weapons that

⁵ Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/>.

are destined for the illegal market and for use in later crimes.⁶ They thus endanger not only the licensees who are robbed or burglarized, bystanders to the crimes, and law enforcement personnel who respond, but also victims of all subsequent crimes involving the stolen firearms. Burglaries and robberies of FFLs are also a chronic problem. In 2020, more than 6,000 firearms were stolen in more than 500 burglaries and robberies of FFLs.⁷ Given the prevalence and significance of the problem and the potential harm caused by these thefts, a six-level enhancement is warranted.

2. *Predicate Convictions for Misdemeanor Crimes of Domestic Violence*

The Department supports treating prior convictions for a misdemeanor crime of domestic violence as equivalent in seriousness to other prior violent crimes.

As the Commission has observed, “[a] majority (60.6%) of firearms offenders had at least one prior conviction for a violent offense, which is more than twice the rate of violent prior convictions for other offenders.” U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like* at 19. In determining how many firearms offenders had a violent prior conviction, the Commission identified offenses “that are generally accepted as having some level of violence,” including aggravated and simple assault. *Id.* at 37 n.40. Indeed, the most common violent predicate was assault—almost half (49.4%) of all §2K2.1 offenders had a prior assault conviction. But even though §2K2.1 increases the base offense level for defendants with prior violent felony convictions, the “crime of violence” enhancement does not apply to many assault convictions. Most notably, misdemeanor assault of a family member is not a “crime of violence,” even though Section 922(g)(9) prohibits gun possession by individuals with prior misdemeanor crimes of domestic violence.

Congress enacted Section 922(g)(9)—which treats misdemeanor crimes of domestic violence as equivalent in seriousness to felony offenses—precisely because “existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because ‘many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.’” *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Senator Lautenberg)). As Senator Lautenberg explained, “most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.” 142 Cong. Rec. S10377-78; *see also id.* at S10378 (“In all too many cases unfortunately, if you beat up or batter your neighbor’s wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor.”) (statement of Senator Wellstone).

Under the current Guidelines, a defendant faces a significantly lower sentence if he possesses a gun after “brutaliz[ing his] own wife or [his] own child” than he does after “beat[ing]

⁶ As but one example, on August 3, 2020, Shoot Point Blank FFL, in Memphis, TN, was burglarized and 32 firearms were stolen. *See* <https://www.justice.gov/usao-wdtn/pr/three-men-charged-burglarizing-gun-range-and-theft-firearms>.

⁷ *See* <https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseeffltheftlossreportjan2020-dec2020508pdf/download>.

up or batter[ing his] neighbor’s wife.” The latter crime is more likely to result in a felony crime-of-violence conviction; a defendant who possesses a gun after such a crime would thus have a base offense level of 20. With a 3-level acceptance-of-responsibility reduction, and a Criminal History Category of I, the defendant would face a Guidelines range of at least 24-30 months. But the former crime—a domestic assault—is much more likely to be prosecuted as a misdemeanor. In that case, a defendant who subsequently possess a gun would face a base offense level of 14, and with a 2-level reduction for acceptance of responsibility, would face a Guidelines range of only 10-16 months in prison. Because that range is in Zone C, the Guidelines provide that the sentencing court can substitute half of the recommended prison time for house arrest. A Guidelines sentence requiring that the defendant serve only five months in prison does not provide adequate punishment or deterrence to those who abuse their family members and later illegally possess a gun.

Indeed, even though domestic violence crimes are frequently charged as misdemeanors, they are among the most dangerous of violent crimes, and are even more dangerous when a gun is present. According to CDC statistics, one of the leading causes of death of women aged 44 or younger is homicide, with intimate partner violence accounting for about half of those murders.⁸ Moreover, research published in the American Journal of Public Health found that the presence of a gun in domestic violence situations significantly increases the risk of homicide.⁹ Abusers with access to a gun are five times more likely to murder a domestic relation.¹⁰ As Senator Lautenberg said nearly 30 years ago, “all too often, the only difference between a battered woman and a dead woman is the presence of a gun.” 142 Cong. Rec. S10377. Finally, the majority of intimate partner homicides involve prior physical abuse.¹¹ Indeed, more than three quarters of women who experience domestic violence were previously victimized by the same offender.¹² And there is evidence that a majority of individuals who commit mass shootings have a history of domestic violence. According to one peer-reviewed study, 59.1% of mass shootings between 2014 and 2019 were domestic violence-related, and in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of domestic violence. See Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019* (2021).¹³ Despite all this, defendants with multiple convictions for misdemeanor crimes of domestic violence currently face the same offense level, under the Guidelines, as a defendant with only a single non-violent felony offense.

In the BSCA, Congress closed the so-called “boyfriend loophole” in the misdemeanor crime of domestic violence definition.¹⁴ In doing so, and in reauthorizing the Violence Against Women Act in 2022, Congress demonstrated its ongoing commitment to protecting victims of domestic abuse from gun violence. The Commission should likewise seek to protect such victims from gun violence, by appropriately punishing those who possess weapons after domestic abuse

⁸ https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.

⁹ <https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections>.

¹⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.

¹¹ *Id.*

¹² https://nicic.gov/sites/default/files/031384_0.pdf.

¹³ Available at <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0>.

¹⁴ Sec. 12005, “Misdemeanor Crime of Domestic Violence,” Bipartisan Safer Communities Act, PI 117-159, June 25, 2022, 136 Stat 1313 (defining dating relationship).

convictions. Domestic abusers should face more serious consequences under the Guidelines than individuals with convictions only for non-violent or property offenses and should face consequences that are on par with other defendants with violent criminal histories. Section 922 treats misdemeanor crimes of domestic violence as seriously as it treats other violent crimes. The Guidelines should do the same, by providing that any offense that meets the statutory definition of “misdemeanor crime of domestic violence” results in the same enhancement, for the purposes of Section 2K2.1, as any other “crime of violence.”

3. Predicate Convictions for Firearm Offenses not Constituting Crimes of Violence

The Department supports a recidivism enhancement for prior firearm convictions that are not otherwise considered crimes of violence. As the Commission itself has observed, recidivism of firearm offenders is a significant problem: “Firearms offenders recidivated at a higher rate than non-firearms offenders. Over two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%).” U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders* (2019), at 4. And “nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%).” U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?*, at 20. Firearm offenders are not only more likely to reoffend than other offenders, but they are also more likely to commit a future violent crime. As the Commission has previously observed, as compared to non-firearms offenders, “a greater percentage of firearms offenders were rearrested for a violent crime as the most serious new offense.” U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders*, at 19.

In short, the Commission’s own findings demonstrate that firearm offenders—particularly those with prior firearm convictions—are more dangerous than other offenders. But because the Guidelines do not include felon-in-possession offenses (or other offenses involving a firearm) as “crimes of violence,” a defendant with multiple firearm convictions may face the same offense level as a defendant with a single non-violent felony, such as a fraud conviction. Instead, the firearms guidelines should reflect the Commission’s findings on the danger of repeat firearm offenders. While it may not be appropriate to treat prior firearm offenses as equivalent in seriousness to prior violent offenses, a 2-level enhancement for a prior firearm offense will help ensure that §2K2.1 more appropriately punishes and deters repeat firearm offenders.

4. Definition of Firearm in Application Note 1

The Department recommends amending the definition of “firearms” in Application Note 1 of §2K2.1 to include devices defined as “firearms” under both 26 U.S.C. § 5845(a) and 18 U.S.C. § 921.

As currently drafted, §2K2.1 contains inconsistent definitions of the term “firearm.” Currently, §2K2.1(a)(1), (3), and (5) all provide for certain offense levels when an offense involved “a firearm described in 26 U.S.C. § 5845(a).” Application Note 1, meanwhile, defines the term “firearm” to have “the meaning given that term in 18 U.S.C. § 921(a)(3).” Section 921(a)(3), however, does not include all firearms “described in 26 U.S.C. § 5845(a).” In particular, Section 5845(a), but not Section 921(a), includes within its definition Machinegun

Conversion Devices—commonly referred to as “switches” or “Glock switches”—which are designed to convert semiautomatic firearms into machineguns. These “Glock switches” present an extraordinary threat to public safety, as they can be readily made using a 3D printer and will quickly turn a gun into a fully automatic weapon. Moreover, the Department has seen a sharp increase in the distribution of Glock switches, including cases involving the manufacture and distribution of numerous switches.¹⁵

Even though Glock switches are considered “firearms” under Section 5845(a), and even though they are one of the most dangerous “firearms” used by criminals, they do not trigger §2K2.1’s enhancement for trafficking or number of firearms because of the incomplete definition of “firearm” in §2K2.1’s application notes. The Department urges the Commission to amend the definition of “firearm” to include Glock switches and eliminate the inconsistency, as proposed below.

In addition, ATF recently amended the regulatory definition of “firearm” to provide that “[t]he term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition ‘frame or receiver.’” *See* 27 C.F.R. 478.11. As discussed above, this “frame and receiver” rule was designed to address the proliferation of ghost guns, which are often made from kits that consumers can readily assemble at home. Although such kits are now considered firearms under federal law, and although the guns made from such kits are particularly dangerous because they are untraceable, they do not trigger §2K2.1’s enhancement for trafficking or number of firearms because of the incomplete definition of “firearm” in §2K2.1’s application notes.

We thus recommend replacing the definition of “firearm” in Application Note 1 with the following definition:

A “firearm” includes any device defined as a firearm in 18 U.S.C. § 921(a)(3), 26 U.S.C. § 5845(a), or 27 C.F.R. § 478.11.

5. *Transfers to Minors*

The Department supports a two-level increase for offenders who transfer firearms to minors. Although federal and state laws restrict the ability of minors to obtain and possess many types of firearms,¹⁶ gun violence among youths is nonetheless increasing significantly. As the White House has observed, “[y]oung people are disproportionately likely to be involved in gun

¹⁵ *See, e.g.,* <https://www.atf.gov/news/pr/houston-area-residents-charged-unlawfully-possessing-full-auto-switches>; <https://www.atf.gov/news/pr/fort-worth-manufacturer-charged-glock-switch-case>; <https://www.atf.gov/news/pr/indictment-so-called-%E2%80%98glock-switches%E2%80%99-would-have-turned-pistols-machineguns>.

¹⁶ *See, e.g.,* 18 U.S.C. § 922(x)(1) (prohibiting the sale or transfer of a handgun or handgun ammunition to a juvenile); 18 U.S.C. § 922(x)(2) (prohibiting a juvenile from knowingly possessing a handgun or handgun ammunition); *see generally* <https://www.kff.org/other/state-indicator/firearms-and-children-legislation/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>

violence, either as perpetrators or victims.” Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety.¹⁷ In particular, in 2020, firearms were, for the first time, the leading cause of death among children.¹⁸ And, according to the ATF, the agency recovered 9,677 firearms from juveniles in 2021 and 12,008 in 2022.

Moreover, illegal firearm possession by minors is particularly problematic because, as the Supreme Court has recognized, “a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults These qualities often result in impetuous and ill-considered actions and decisions.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation, alteration, and internal quotation marks omitted). Guns are simply more dangerous in the hands of minors.¹⁹

In the BSCA, Congress took action to curb youth violence, providing for an enhanced background check process for firearm purchases by individuals under the age of 21, and authorizing grants supporting mental health services for children. In so doing, Congress recognized the increased dangers associated with illegal gun possession by minors. The Commission should likewise act to curb the growing problem of youth gun violence by deterring offenders from transferring firearms connected to illegal activity to minors. The Department therefore supports a two-level increase for offenses that involve such transfers, taking care not to capture certain lawful activity by providing that the enhancement will not apply if the transfer is solely for a lawful sporting purpose or collection.

The Department thus suggests the following language:

If the offense involved the defendant transferring a firearm to an individual under the age of 18 years, increase by 2 levels, unless the transfer was solely for lawful sporting purposes or collection.

* * *

¹⁷ 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/>.

¹⁸ See <https://www.nejm.org/doi/full/10.1056/NEJMc2201761>.

¹⁹ See, e.g., <https://www.justice.gov/usao-edtn/pr/knoxville-man-sentenced-10-months-federal-firearms-violation> (firearm unlawfully transferred to juvenile and that firearm was later “recovered by law enforcement in connection with an officer-involved shooting of Thompson at Austin-East Magnet High School on April 12, 2021.”); *United States v. Siri-Reynoso*, 17 Cr. 418 (S.D.N.Y.) (gang member provides gun to juvenile to shoot rival gang member resulting in the murder of a Bronx mother watching her kids on the playground); <https://www.nytimes.com/2017/07/26/nyregion/after-yearlong-inquiry-2-are-charged-with-killing-bronx-mother.html> (article about the killing).

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel