

# Firearms

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February 20, 2007

# Areas for Discussion

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- Review of relevant conduct (§1B1.3)
- (§2K2.1 (general firearms guideline)
- 18 USC § 924(c) (use/carry/possession relation to crime of violence/drugs)
- Review of multiple counts grouping (§3D1.2)

# Review of Relevant Conduct

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# (a)(1) & (a)(2): Analysis

## WHO:

(a)(1)(A): Acts of the defendant

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

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan

# §2K2.1 & Relevant Conduct

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## §§2K2.1 & 3D1.2(d) & 1B1.3(a)(2)

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

# §2K2.1

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Unlawful Receipt, Possession, or  
Transportation of Firearms; or  
Prohibited Transactions Involving  
Firearms

# Issues in Application of Use/Possession SOC and Cross Reference

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§2K2.1(b)(6) & (c)(1)

# §2K2.1

## (b)(6) **vs.** (c)(1)

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used or possessed any firearm  
in connection with **another felony  
offense**

**vs.**

used or possessed any firearm  
in connection with **the commission  
or attempted commission of  
another offense**



## (b)(6) **vs.** (c)(1) (cont.)

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

**vs.**

possessed or transferred a firearm with knowledge or intent that it would be used or possessed in connection with another offense

# Significance of Language Distinctions in (b)(6) and (c)(1)

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## §2K2.1

- Generally does not reflect substantive distinctions
- While the cross reference does not *require* felony, application unlikely to be greater
- SOC for possess/transfer applicable based on “reason to believe”; cross-reference is not

# Application Issues for (b)(6) and (c)(1)

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## §2K2.1

- “In connection with”
- Active employment or “clearly improbable” standard

# Application Issues for (b)(6) and (c)(1) (cont.)

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- Application based on all relevant conduct, not solely the firearm in the offense of conviction.
- If cross reference is for use/possession/transfer in multiple offenses, cross reference only to the most serious
  - §1B1.5, App. Note 3

# Fact Pattern(s)

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- Insert fact pattern information here from selected helpline calls

# 2006 Amendment: Resolution of Circuit Conflict

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## §2K2.1(b)(6) & (c)(1) Standard

- Split on whether a firearm was possessed/used “in connection with” another offense in the application of the SOC and cross reference

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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- Majority of circuits (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, & 10<sup>th</sup>): the firearm must serve some purpose or facilitate the felonious conduct, rather than being merely coincidental
- Minority of circuits (5<sup>th</sup> & 8<sup>th</sup>): the enhancement applies if the firearm reflects an increased danger of violence unless it was “clearly improbable” that the weapon was connected with the offense

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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- Adopted language from *Smith v. United States*, 508 U.S. 223 (1993)
- §2K2.1, App. Note 14
  - if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense



# Fact Pattern(s)

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- Insert fact pattern information here from selected helpline calls

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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

- Split on whether a firearm obtained in the commission of a burglary was possessed/used “in connection with” that offense in application of §2K2.1

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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- Majority of circuits (3<sup>rd</sup>, 6<sup>th</sup>, & 7<sup>th</sup>): if the firearm is taken during the burglary, the enhancement should **not** apply
- Minority of circuits (5<sup>th</sup> & 8<sup>th</sup>): the taking of a firearm in a burglary **can be used** to apply the enhancement

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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- Resolution consistent with minority view
  - SOC applies in the case of a defendant who takes a firearm during the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary

## 2006 Amendment: Resolution of Circuit Conflict (cont.)

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- In the case of a drug trafficking offense:
  - SOC applies when a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia

# Fact Pattern(s)

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- Insert fact pattern information here from selected helpline calls

# Question Regarding “Lawful Sporting Purpose”

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

# 18 U.S.C. § 924(c) & §2K2.4

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Use, Carry, or Possession of a  
Firearm in Relation to a Crime of  
Violence or Drug Trafficking  
Crime



# 18 U.S.C. § 924(c)

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

# 18 U.S.C. § 924(c) (cont.)

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- “Second or subsequent conviction”
  - May occur at same sentencing
  - *Deal v. U.S.*, 508 U.S. 223 (1993)
  - Mand. min. typically 25 years
- Must be consecutive to any and all other sentences
  - *U.S. v. Gonzales*, 520 U.S. 1 (1997)

# §2K2.4

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- Apply the mand. min. for § 924(c) counts
- Do not apply Chapters Three or Four to a § 924(c) count
- Exceptions when § 924(c) count is Career Offender (§4B1.1)

# Impact of § 924(c) on SOC's

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§2K2.4 App. Note 4 & Amdmt. #599

- Do not apply firearm SOC in guideline for underlying offense
  - § 924(c) accounts for any weapon SOC for the underlying offense
  - § 924(c) accounts for any weapon within the relevant conduct

# Impact of § 924(c) on SOC's (cont.)

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

# Grouping of Multiple Counts Involving Firearms

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# §2K2.1 & Multiple Counts & Relevant Conduct

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## §§2K2.1 & 3D1.2(d) & 1B1.3(a)(2)

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

# Grouping under “Rule” (d)

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# “Grouping Rules”

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## §3D1.2

(a) Same Victim, Same Act

(b) Same Victim, Two or More Acts

(c) Conduct Treated by Characteristic

(d) Based on Aggregate

# Fact Pattern(s)

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- Insert fact pattern information here from selected helpline calls

# Drug Distribution & Felon in Possession of a Firearm

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Count 1: §2D1.1

$$18 + 2 = 20$$

Count 2: §2K2.1

$$24 + 4 = 28$$

(Cross Ref.=20)

Offense Level = 28

Group counts 1 and 2 under §3D1.2(c)

# Drug Distribution & Felon in Possession of a Firearm

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Count 1: §2D1.1

$$28 + 2 = 30$$

Count 2: §2K2.1

$$24 + 4 = 28$$

(Cross Ref.=30)

Offense Level = 30

Group counts 1 and 2 under §3D1.2(a)

# Drug Distribution & Use of a Firearm During Drug Trafficking Offense

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Count 1: §2D1.1

Drug Distribution

18 + 2 = 18

Offense Level

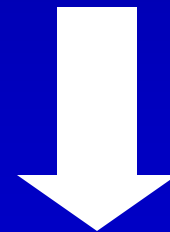
=18

Count 2: §2K2.4

Use of Firearm

18 USC § 924(c)

60 mos. consecutive



Count 2 Consecutively to Count 1

# Felon in Possession & Use of a Firearm During Crime of Violence

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Count 1: §2K2.1

Felon in Possession

20 +4 = 20

Offense Level

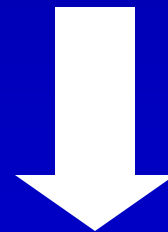
=20

Count 2: §2K2.4

Use of Firearm

18 USC § 924(c)

60 mos. consecutive



Count 2 Runs Consecutively to Count 1

# Drug Distribution & Felon in Possession of a Firearm & Use of Firearm During Drug Trafficking Offense

Count 1:  
§2D1.1  
 $18 + 2 = 18$

Count 2:  
§2K2.1  
 $20 + 4 = 20$   
(CR = 18)

Count 3:  
§2K2.4  
60 mos.  
consecutive

Offense Level = 20

Group counts 1 and 2  
under §3D1.2(c)

Count 3 runs consecutively

# Drug Distribution & Felon in Possession of a Firearm & Use of Firearm During Drug Trafficking Offense

Count 1:  
§2D1.1  
 $26 + 2 = 26$

Count 2:  
§2K2.1  
 $20 + 4 = 20$   
(CR = 26)

Count 3:  
§2K2.4  
60 mos.  
consecutive

Offense Level = 26

Group counts 1 and 2  
under §3D1.2(a)

Count 3 runs consecutively



# Impact of § 924(c) on Multiple Counts

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## §§3D1.1(b) & 5G1.2(a)

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

# EXTRA SLIDES

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# Base Offense Level Issues

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## §2K2.1(a)

- Defendant's prior convictions
  - Must receive points under criminal history
  - Counted both in the BOL and criminal history
  - Definitions for “crime of violence” and “controlled substance offense” at Career Offender (§4B1.2)

# Base Offense Level Issues (cont.)

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## §2K2.1(a)

- Timing of defendant's prior convictions and status
  - Must occur prior to the end of relevant conduct

# 2006 Amendment:

## Semi-automatic Assault Weapons

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

- Deletes the references to 18 U.S.C. § 921(a)(30) at the base offense levels in §2K2.1
- Replaces the reference with the term “a semiautomatic firearm capable of accepting a large capacity magazine”<sup>45</sup>

# 2006 Amendment: Semi-automatic Assault Weapons (cont.)

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

# 2006 Amendment:

## Semi-automatic Assault Weapons (cont.)

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- §2K2.1 Application Note 2
  - “semiautomatic firearm capable of accepting a large capacity magazine” does NOT include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition
- Conforming language in §5K2.17  
(Semiautomatic Firearms Capable of Accepting Large Capacity Magazine)

# Specific Offense Characteristics Issues

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## §2K2.1(b)(1)

- Number of firearms
  - Determined by relevant conduct
  - Must be unlawful activity



# 2006 Amendment: Trafficking

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- New SOC at §2K2.1(b)(5)

“If the defendant engaged in the trafficking of firearms, increase by 4 levels.”

# 2006 Amendment:

## Trafficking - §2K2.1, App. Note 13

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- If the defendant:
  - transported, transferred, or otherwise disposed of two or more firearms to another individual or received such firearms with the intent to do so **AND**
  - knew or had reason to believe such conduct would result in the transport, transfer or disposal of a firearm to an individual
    - whose possession or receipt would be unlawful; or
    - who intended to use or dispose of the firearm unlawfully

## 2006 Amendment:

### Trafficking - §2K2.1, App. Note 13 (cont.)

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- Individual whose possession or receipt of the firearm would be unlawful means an individual who:
  - has a prior conviction for crime of violence, controlled substance offense, or misdemeanor domestic violence offense; **OR**
  - at the time of the offense was under a criminal justice sentence

# Specific Offense Characteristics Issues (cont.)

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## §2K2.1(b)(4)

- Stolen gun/obliterated serial number
  - Strict liability standard

# 2006 Amendment: “Stolen/Obliterated” SOC

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## §2K2.1(b)(4)

- Current SOC
  - 2-level increase for offense involving a stolen firearm or a firearm with an altered/obliterated serial number
- New SOC
  - 2-level increase for stolen firearm and a 4-level increase if the offense involved a firearm with an altered or obliterated serial number

# Specific Offense Characteristics Issues (cont.)

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## §2K2.1(b)(3)

- Destructive device
  - Counts both in BOL and in the SOC
  - May include sawed-off shotguns of certain gauges

# Specific Offense Characteristics Issues (cont.)

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## §2K2.1(b)(2)

- Reduction for “lawful sporting purposes”