

Firearms

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Proposed: Felon in Possession - §2K2.1

- Clarifies the operation of Relevant Conduct at §2K2.1 regarding possession of a firearm(s) in connection with another offense (SOC (b)(6)(B) and cross reference (c)(1))
 - The circuits have had a range of approaches
- The cross reference at §2K2.1(c)(1) will be limited to the firearm(s) listed in the *offense of conviction*

Cert. granted: ACCA Case

Johnson v. U.S. 526 F. App'x 708 (8th Cir. 2013),
cert granted, 134 S. Ct. 1871 (2014)

- Whether mere possession of a shotgun with a short barrel should be treated as a violent felony under the Armed Career Criminal Act

Most Common Firearms Offenses

- § 922(g) - “Felon-in-Possession”
 - Typically stat. max. 10 years with no minimum
 - If sentence enhancement for Armed Career Criminal Act (ACCA; § 924(e)): mandatory minimum 15 years with stat. max. of life
 - Requires use of the “Categorical Approach”

Most Common Firearms Offenses (cont.)

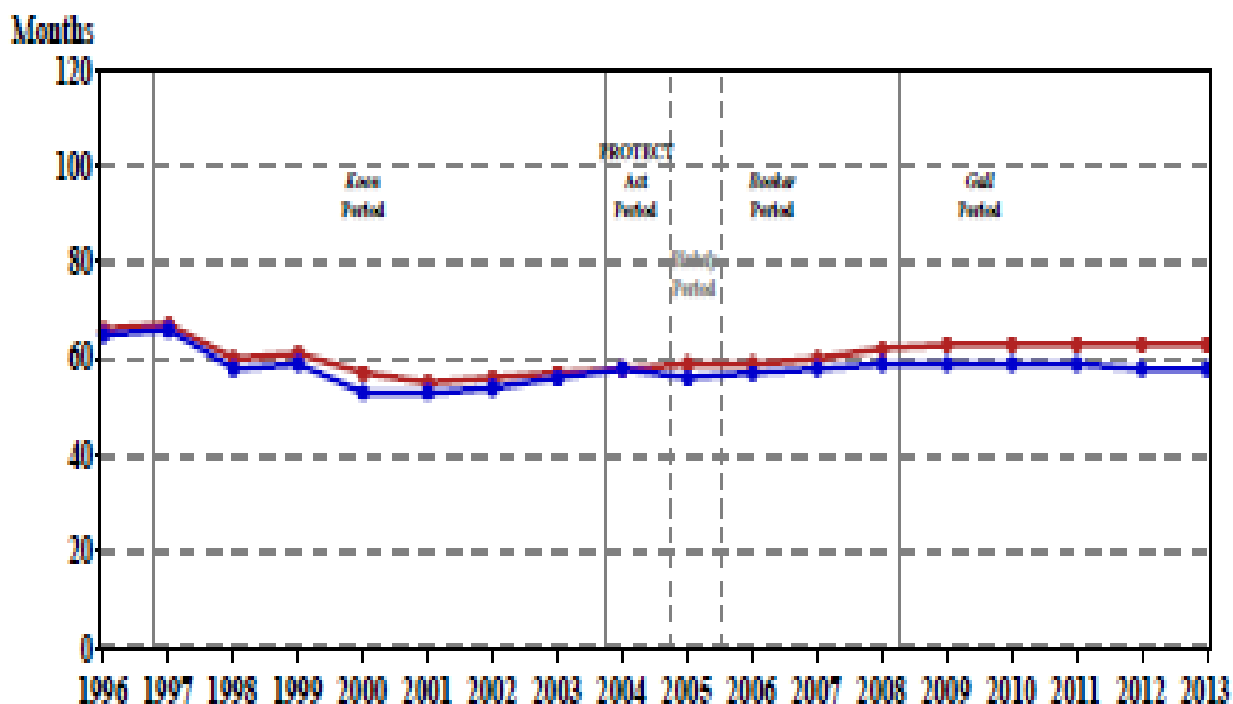
- § 924(c) - Use of firearm in relation to certain crimes
 - mandatory minimum typically 5, 7, or 10 years with stat. max. of life, consecutively

§2K2.1 – “Felon-in-Possession”

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

Average Guideline Minimum and Sentence Imposed Firearms Offenses Fiscal Years 1996-Preliminary 2013

- Average Guideline Minimum - Average Sentence Imposed



Only cases with complete guideline application information sentenced under USSC §2C1.1 were included in this analysis.

Cases with guideline minimums of 48 months or greater (including life) or probation were included in the guideline minimum average computation as 48 months and zero months, respectively. Guideline minimums account for applicable statutory mandatory penalties. Cases missing information on guideline minimums were excluded from the guideline minimum average computation. Cases with sentences of 48 months or greater (including life) or probation were included in the sentence average computation as 48 months and zero months, respectively. In addition, the information presented in this figure includes time of confinement as described in USSC §2C1.1. Cases missing information on sentence imposed were excluded from the sentence average computation.

SOURCE: U.S. Sentencing Commission, 2011 Resear Report Datafiles, 2013-Preliminary 4th Quarter 2013 Datafiles, USSCFY11-USSCFY13.

Relevant Conduct & Multiple Counts

§§2K2.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of §2K2.1, based on all relevant conduct

§2K2.1(a) – Base Offense Levels (BOLs)

Eight BOLs, from 6 to 26, determined by various factors, including:

- Status, including
 - “felon-in-possession” (“basic” case is BOL 14)
 - “straw purchaser” (“basic” case is BOL 14)
- More serious types of firearms
- Prior convictions for “crime of violence” or “controlled substance offense”

Note Regarding “Straw Purchasers”

- §2K2.1 was amended on November 1, 2011, to increase the BOLs for “straw purchasers” convicted under 18 USC § 922(a)(6) or 924(a)(1)(A) when done with knowledge, intent, reason to believe that it would result in the transfer to a prohibited person; this results in the same BOLs as for a conviction under § 922(d)
 - Increased from 12 to 14 generally
 - Increased from 12 to 20 if certain firearms involved
 - Departure provision at App. Note 15 for certain “less culpable” straw purchasers

Use of “Crime of Violence” and “Controlled Substance Offense” in BOLs

- Requires use of the “Categorical Approach”
- The terms are defined at the *Career Offender* guideline
 - Per §2K2.1, App. Note 1 referring to §4B1.2(a)&(b) and App. Note 1

Use of “Crime of Violence” and “Controlled Substance Offense” in BOLs (cont.)

- For the priors to be used in the BOLs, they must also be counted *separately* for Criminal History at §4A1.1(a), (b), or (c)
 - Per §2K2.1, App. Note 10
 - Note: This results in time limits on priors
 - Note: This also results in “single/separate” determinations

Issues in the Application of Selected Specific Offense Characteristics

§2K2.1(b)

Number of Firearms SOC

§2K2.1(b)(1), App. Note 5

	Number of Firearms	Increase in Level
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10

Stolen Gun/Obliterated Serial Number SOC

§2K2.1(b)(4), App. Note 8

- Strict liability standard
 - If any firearm
 - Was stolen, increase by 2 levels
- OR**
- (*i.e.*, cannot give both; use the greater)**
- Had an altered or obliterated serial number, increase by 4 levels

“Trafficking” SOC

§2K2.1(b)(5)

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

Trafficking Definition

§2K2.1(b)(5), App. Note 13(A)

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

Trafficking Definition (cont.)

§2K2.1(b)(5), App. Note 13(B)

Individual whose possession or receipt of the firearm would be unlawful means an individual who:

- Has a prior felony conviction for a crime of violence or a controlled substance offense, or a misdemeanor domestic violence offense

OR

- At the time of the offense was under a criminal justice sentence

Trafficking Definition (cont.)

§2K2.1(b)(1) & (b)(5), App. Note 13(D)

In a case in which three or more firearms were both possessed and trafficked, apply *both* subsections (b)(1) (number of firearms) and (b)(5) (trafficking)

Circuit Cases Applying the “Trafficking” SOC

- *U.S. v. Stebbins*, 523 F. App’x. 1 (1st Cir. 2013)
- *U.S. v. Marceau*, 554 F.3d 24 (1st Cir. 2009)
- *U.S. v. Melvin*, 463 F. App’x 141 (3d Cir. 2012)
- *U.S. v. Miller*, 529 F. App’x 331 (4th Cir. 2013)
- *U.S. v. Lattimore*, 455 F. App’x 141 (4th Cir. 2011)

Circuit Cases Applying the “Trafficking” SOC (cont.)

- *U.S. v. Mendoza*, 2014 WL 661055 (5th Cir. 2014)
- *U.S. v. Tovar*, 516 F. App’x 383 (5th Cir. 2013)
- *U.S. v. Juarez*, 626 F.3d 246 (5th Cir. 2010)
- *U.S. v. Jenkins*, 528 F. App’x 483 (6th Cir. 2013)
- *U.S. v. Freeman*, 640 F.3d 180 (6th Cir. 2011)

Circuit Cases Applying the “Trafficking” SOC (cont.)

- *U.S. v. Pepper*, 747 F.3d 520 (8th Cir. 2014)
- *U.S. v. Howard*, 539 F. App'x 904 (10th Cir. 2014)
- *U.S. v. Garcia*, 635 F.3d 472 (10th Cir. 2011)

Circuit Cases Applying the “Trafficking” SOC (cont.)

- *U.S. v. West*, 2014 WL 1613267 (11th Cir. 2014)
- *U.S. v. McMillar*, 518 F. App’x 867 (11th Cir. 2014)
- *U.S. v. Villa Carvajal*, 516 F. App’x 808 (11th Cir. 2013)
- *U.S. v. Grinnage*, 309 F. App’x 334 (11th Cir. 2009)

Circuit Cases Rejecting the “Trafficking” SOC

- *U.S. v. Green*, 405 F. App’x 860 (5th Cir. 2010)
- *U.S. v. Johns*, 732 F.3d 736 (7th Cir. 2013)
- *U.S. v. Richardson*, 427 F. App’x 522 (7th Cir. 2011)
- *U.S. v. Willett*, 623 F.3d 546 (8th Cir. 2010)
- *U.S. v. Arechiga-Mendoza*, 2014 WL 1876244 (10th Cir. 2014)

Issues in Application of the “Use/Possession” SOC and Cross Reference

§2K2.1(b)(6)(B) & §2K2.1(c)(1)

“Use/Possession” SOC

§2K2.1(b)(6)(B)

If the defendant:

- Used or possessed any firearm or ammunition in connection with another felony offense

OR

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

Increase by 4 levels, with floor of 18

“Use/Possession” *Cross Reference*

§2K2.1(c)(1)

If the defendant:

- Used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense

OR

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

Apply the Cross Reference

Distinctions Between §2K2.1(b)(6)(B) and §2K2.1(c)(1)

- Generally does not reflect substantive distinctions
- “Reason to believe” can be the basis for the SOC, but not the cross reference
- While the cross reference does not *require* a felony, offense level unlikely to be greater for misdemeanor offenses

Pointers for §2K2.1(b)(6)(B) and (c)(1)

§2K2.1, App. Note 14(C) & §1B1.5, App. Note 3

- No conviction necessary
- Can be based on any federal, state, or local offense, *except*
 - not another firearms or explosive offense
- If the firearm was involved in more than one offense, the cross reference is applied to the one resulting in the greatest offense level

Pointers for §2K2.1(b)(6)(B) and (c)(1) (cont.)

§2K2.1, App. Note 14(C) & §1B1.5, App. Note 3

- It will be rare when the (b)(6)(B) SOC applies that the (c)(1) cross reference will not also apply (although it will only be *used* if it results in a greater offense level)

General Standard for “In Connection With”

§2K2.1(b)(6)(B) & (c)(1), App. Note 14(A)

- If the firearm facilitated, or had the potential of facilitating, another felony offense or another offense
- Adopted language from *Smith v. United States*, 508 U.S. 223 (1993)

Standard for “In Connection With” in a **Drug Trafficking Offense**

§2K2.1(b)(6)(B) & (c)(1), App. Note 14(B)

SOC and cross reference apply
when a firearm is found in close proximity
to drugs, drug-manufacturing materials,
or drug paraphernalia

Standard for “In Connection With” in a **Burglary Offense**

§2K2.1(b)(6)(B) & (c)(1), App. Note 14(B)

SOC and cross reference apply
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

Grouping of a §2K2.1 Count Based on the “In Connection With” SOC or Cross Reference

§2K2.1(b)(6)(B) & §2K2.1(c)(1)

and

§3D1.2

“Grouping Rules” for Multiple Counts of Conviction

§3D1.2

- (a) Same Victim, Same Act
- (b) Same Victim, Two or More Acts
- (c) Conduct Treated by a Characteristic
- (d) Based on Aggregate

Drug Distribution & Felon in Possession of a Firearm

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

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)

18 USC § 924(e) – ACCA

Armed Career Criminal Act

Armed Career Criminal Act (ACCA)

§ 924(e)

- *Statutory* sentencing enhancement for a defendant convicted of § 922(g) (“felon-in-possession”)
 - Does not have to be charged or an information filed
 - Procedures not set by statute and can vary by jurisdiction

Armed Career Criminal Act (ACCA) (cont.)

§ 924(e)

- Requires three prior convictions for a “violent felony” or “serious drug offense” committed on occasions different from one another
 - *Statutory definitions* at § 924(e)(2)
 - Distinctions from “crime of violence” and “controlled substance offense” used in the *Guidelines* (including §§2K2.1 (Firearms), 4B1.1 (Career Offender), and 4B1.4 (the Armed Career Criminal *guideline*))
 - The “time frames” for Criminal History **do not** apply

Armed Career Criminal *Guideline*

§4B1.4

- Applicable for a defendant subject to the statutory penalty enhancement under the Armed Career Criminal Act (ACCA) - § 924(e)
- An “override”
 - Provides for a possible greater offense level and/or greater criminal history category than established in the application of Chapters Two & Three, Chapter Four, or other “overrides” prior to application of §4B1.4 (for example, Career Offender (§4B1.1))

Chapter Three and Chapter Four “Overrides”

§3A1.4

Terrorism

§§4B1.1 - 4B1.2

Career Offender

§4B1.3

Criminal Livelihood

§4B1.4

Armed Career Criminal

§4B1.5

Repeat and Dangerous
Sex Offender Against
Minors

§ 924(c)

18 U.S.C. § 924(c)

- Stat. max. is life
- Mandatory minimums of at least five years, depending upon:
 - Whether firearm possessed, used, carried, brandished, or discharged
 - Type of firearm
 - Prior § 924(c) convictions

18 U.S.C. § 924(c) (cont.)

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

Impact of § 924(c)

Impact of § 924(c) on Multiple Counts

§§3D1.1(b) & 5G1.2(a)

- § 924(c) count excluded from grouping with any other count
- Sentence for § 924(c) count imposed independently

Impact of § 924(c) on SOCs

§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

Example

- Defendant convicted of
 - Robbery, 18 USC § 1951; §2B3.1
 - Use of Firearm During a Crime of Violence, § 924(c); §2K2.4
- The § 924(c) offense occurred during this robbery
- The firearm SOC at §2B3.1(b)(2) not be applied

Robbery & Use of a Firearm During Crime of Violence

Count 1: §2B3.1

Robbery

$20 + 5 = 20$

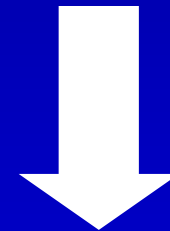
Offense Level = 20

Count 2: §2K2.4

Use of Firearm

18 USC § 924(c)

60 mos. consecutive



Count 2 Consecutively
to Count 1

Impact of § 924(c) on SOC (cont.)

- If there is also a conviction for which §2K2.1 applies (*e.g.*, felon in possession), do not apply SOC (b)(6)
 - § 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

Impact of § 924(c) on Multiple Counts

§§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)

Example

- Defendant convicted of
 - Robbery, 18 USC § 1951; §2B3.1
 - Use of Firearm During a Crime of Violence, § 924(c); §2K2.4
 - Felon in Possession, § 922(g); §2K2.1
- The § 924(c) offense occurred during the robbery
- “Firearm SOC” at §2B3.1(b)(2) will not be applied
- “In connection with” SOC at §2K2.1(b)(6)(B) will not be applied
- Robbery & Felon in Possession counts group

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

Count 1:
§2B3.1
 $20 + \cancel{5} = 20$

Count 2:
§2K2.1
 $24 + \cancel{4} = 24$
(CR = 20)

Count 3:
§2K2.4
60 mos.
consecutive

Offense Level = 24

Group counts 1 and 2
under §3D1.2(c)

§ 924(c) count
runs consecutively
to all counts

Impact of a Single Count of § 924(c) on Different Types of Offenses

Impact: Single Count of § 924(c) & Multiple Counts of Armed Drug Trafficking

Example:

Drugs-1

§2D1.1

Drugs-2

§2D1.1

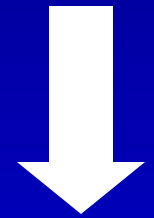
Drugs-3

§2D1.1

§ 924(c) for

Drugs-2

§2K2.4

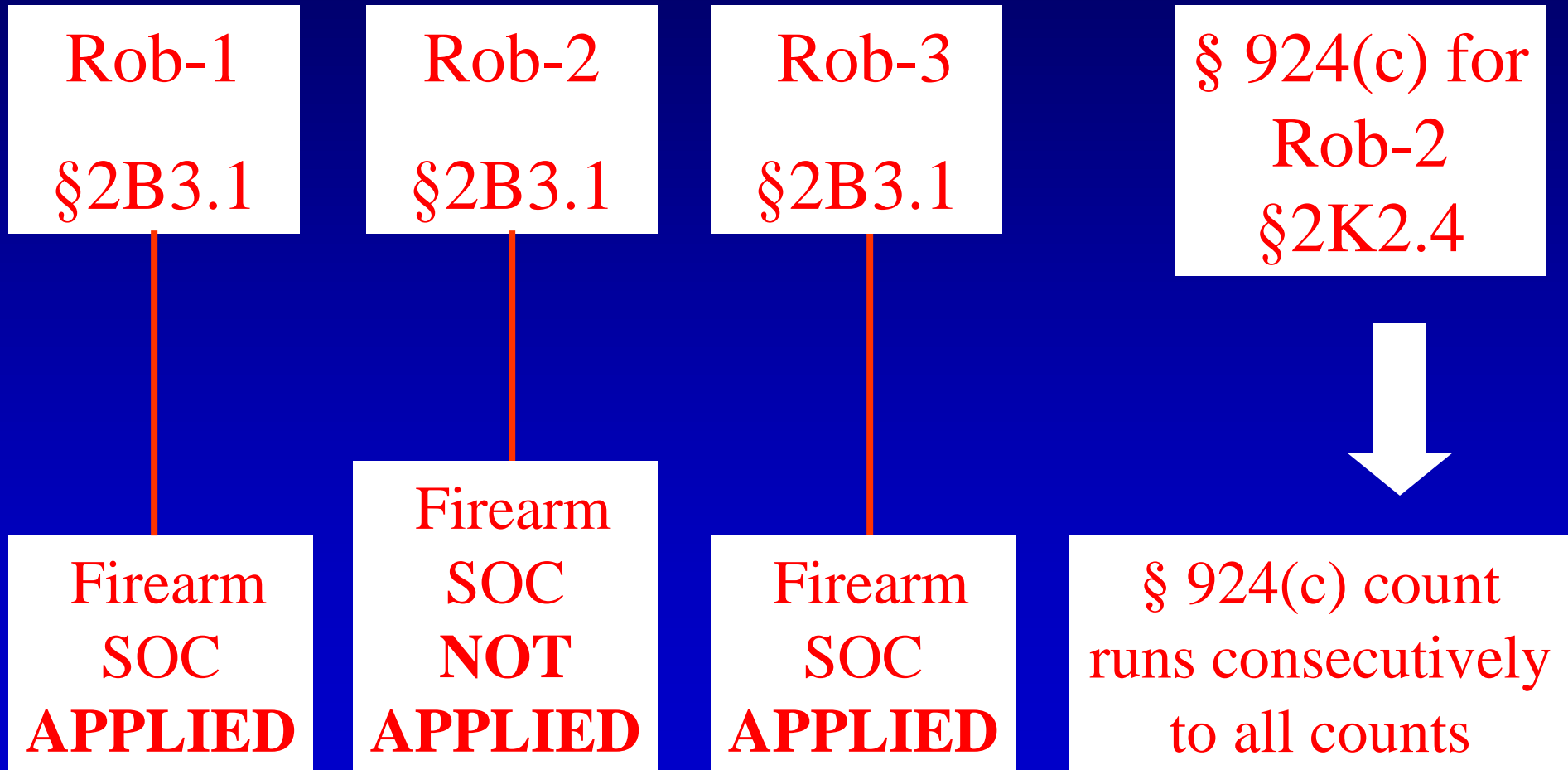


One application: Offense level for the group based on drug aggregate; **Firearm SOC NOT APPLIED**

§ 924(c) count runs consecutively to all counts

Impact: Single Count of § 924(c) & Multiple Counts of Armed Robbery

Example:



“Units” required to establish offense level

END