



Sentencing Issues in Firearms Cases

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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; multiple counts must run consecutively (with 25 years for second or subsequent convictions)



Primer on “Firearms” (as Defined by Federal Law)

- Why you need to know this: for determining “relevant conduct” under the firearms guideline
 - The firearm(s) charged in the indictment are not the only ones that can affect the guideline range
 - Partial exception to this rule for cross-reference under USSG §2K2.1(c)(1) (discussed below)



“Firearms” Primer Cont’d

- Regular “Firearms”
 - Regular pistols, rifles, and shotguns (including .22 caliber pistols or rifles and .410 shotguns) – whether loaded or unloaded
 - Exception for most pre-1899 firearms and post-1898 replicas (“antiques”)
 - Includes inoperable firearms if they could be “readily” restored or converted
 - Note that, under 18 U.S.C. § 922(g) and related statutes, possession or transfer of **ammunition** (including a single bullet) is just as illegal as possessing or transferring a firearm



Statutory Definition of “Firearm”

- Statutory definition (18 U.S.C. § 921(a)(3)):
 - “The term ‘firearm’ means
 - (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
 - (B) the frame or receiver of any such weapon;
 - (C) any firearm muffler or firearm silencer; or
 - (D) any destructive device.”



Definitions of “Firearms” Cont’d

- Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine
 - Commonly referred to as an “assault weapon”
 - Generally, if magazine can accept more than 15 rounds (other than .22 caliber rounds)
 - Formerly illegal but no longer illegal (yet still treated as an aggravating factor in the firearms guideline and in 18 U.S.C. § 924(c))
- National Firearms Act (NFA) Firearms
 - Particularly dangerous firearms, including automatic weapons (machine guns), sawed-off shotguns and rifles, and silencers
- “Destructive Devices”
 - Includes rockets/missiles, bombs, grenades, and certain very large caliber firearms





§2K2.1 – “Felon-in-Possession”

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



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Section 2K2.1 Data Overview

- Around 6K-7K cases per year consistently during past decade (vast majority are offenders prosecuted under 18 U.S.C. § 922(g)).
- Within-range rate for section 2K2.1 has been between 55-65% in post-*Booker* era
- The average guideline minimum has closely hewed to the average sentence imposed both before and after *Booker*
- *See* 2015 “Quick Facts” on Felon-in-Possession cases, [http://www.usssc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick Facts Felon in Possession FY14.pdf](http://www.usssc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick%20Facts%20Felon%20in%20Possession%20FY14.pdf)



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
 - BOL raised to 18, 20, 22, or 26 depending on the type
- Prior convictions of “crime of violence” or “controlled substance offense”
 - BOL raised to 20, 22, 24, or 26 depending on the nature and number of priors



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

- 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





Application of Selected Specific Offense Characteristics

§2K2.1(b)



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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
 - Application Note 8(B)
- If any firearm
 - Was stolen, increase by 2 levels; *or*
 - Had an altered or obliterated serial number, increase by 4 levels (if *both* stolen and obliterated, only apply latter enhancement)
 - Do not apply enhancement if a defendant was convicted only of possessing a stolen firearm (*e.g.*, 18 U.S.C. § 922(i)) or possessing a firearm with an obliterated serial number (18 U.S.C. § 922(k)), *see* Application Note 8(A)



“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* (*i.e.*, drug-trafficking), or a misdemeanor domestic violence offense (*i.e.*, not just any “felon”)

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)



Examples of Circuit Cases Interpreting the “Trafficking” SOC

- *U.S. v. Asante*, 782 F.3d 639 (11th Cir. 2015) (applying the enhancement)
- *U.S. v. Pepper*, 747 F.3d 520 (8th Cir. 2014) (applying the enhancement)
- *U.S. v. Arechiga-Mendoza*, 566 F. App’x 713 (10th Cir. 2014) (refusing to apply the enhancement)
- *U.S. v. Freeman*, 640 F.3d 180 (6th Cir. 2011) (applying the enhancement)
- *U.S. v. Garcia*, 635 F.3d 472 (10th Cir. 2011) (applying the enhancement)
- *U.S. v. Richardson*, 427 F. App’x 522 (7th Cir. 2011) (refusing to apply the enhancement)
- *U.S. v. Juarez*, 626 F.3d 246 (5th Cir. 2010) (applying the enhancement)
- *U.S. v. Green*, 405 F. App’x 860 (5th Cir. 2010) (refusing to apply the enhancement)
- *U.S. v. Marceau*, 554 F.3d 24 (1st Cir. 2009) (applying the enhancement)





Issues in Application of the “Use/Possession” SOC and Cross Reference §2K2.1(b)(6)(B) & §2K2.1(c)(1)



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Amendment (Effective 11/1/14)

- 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 previously had different approaches
- *Limits the cross reference at §2K2.1(c)(1) to the firearm(s) listed in the offense of conviction*
 - Commission policy decision



“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 cited in the offense of conviction in connection with commission or attempted commission of another offense

OR

- Possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another felony offense

Apply the cross reference



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

- SOC (b)(6)(B) applies to firearms specifically cited in the count(s) of conviction **AND** firearms that are not part of the count(s) of conviction but are in “the same course of conduct/common scheme or plan” (as found by the sentencing court)
- Cross reference (c)(1) applies only in cases in which the firearm cited in the count(s) of conviction was used or possessed in connection with another offense



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

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

- 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



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 usually 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



Examples of Cases Interpreting §2K2.1(b)(6)(B) & (c)(1)

- U.S. v. Chadwell, ___ F.3d ___, 2015 WL 4925636 (9th Cir. 2015) (applying the §2K2.1(b)(6)(B) enhancement)
- U.S. v. Patrie, ___ F.3d ___, 2015 WL 4508825 (8th Cir. 2015) (applying the §2K2.1(c)(1) enhancement)
- U.S. v. Pimpton, 589 Fed. App'x 692 (5th Cir. 2014) (refusing to apply the §2K2.1(b)(6)(B) enhancement)
- U.S. v. Seymour, 739 F.3d 923 (6th Cir. 2014) (refusing to apply the §2K2.1(b)(6)(B) enhancement)
- U.S. v. Blankenship, 552 F.3d 703 (8th Cir. 2009) (refusing to apply the §2K2.1(b)(6)(B) enhancement)
- U.S. v. Outley, 348 F.3d 476 (5th Cir. 2003) (applying the §2K2.1(b)(6)(B) enhancement)



Separate SOC for Exporting Weapons Abroad

§2K2.1(b)(6)(A)

- 4-level increase (with a floor of 18) if the defendant “possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States”
- 4-level increase for §2K2.1(b)(6)(A) *or* §2K2.1(b)(6)(B), but not an 8-level increase if both (A) and (B) apply. *See* USSG §1B1.1, comment. (n.5).



Mitigating Adjustment for “Lawful Sporting Purposes or Collection” §2K2.1(b)(2) & Application Note

- “If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.”



§2K2.1(b)(2) Cont'd

- *Application Note 6*: “Under subsection (b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.”



§2K2.1(b)(2) Cont'd – Case Law Examples

- U.S. v. Collins, 313 F.3d 1251 (10th Cir. 2002) (remanding for district court to make findings about whether §2K2.1(b)(2) should apply)
- U.S. v. Solomon, 274 F.3d 825 (4th Cir. 2001) (refusing to apply §2K2.1(b)(2))
- U.S. v. Shell, 972 F.2d 548 (5th Cir. 1992) (refusing to apply §2K2.1(b)(2))
- U.S. v. Visser, 611 F. Supp.2d 907 (N.D. Iowa 2009) (applying §2K2.1(b)(2))



Armed Career Offender Act: 18 U.S.C. § 924(e) & USSG §4B1.4

- “In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .”
 - Requires use of categorical approach and modified categorical approach
 - “Serious drug offense” has a different definition than “controlled substance offense” in guidelines
 - “Violent felony” is similar to “crime of violence” in the guidelines (except the latter’s enumerated offense clause only covers “burglary of a dwelling”)
 - *Johnson v. United States*, 135 S. Ct. 2551 (2015) (voiding § 924(e)’s “residual clause”)





§ 924(c)



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18 U.S.C. § 924(c)

- Stat. max. is life imprisonment
- Mandatory minimums of at least five years and as much as LWOP, depending upon:
 - Whether firearm was “possessed,” “used,” “carried,” “brandished,” or “discharged” determines the length of the man. min. It is thus an “element” and not a “sentencing factor.” *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).
 - *Type* of firearm also determines the length of the man. min.
 - Type of firearm also is an “element,” not a sentencing factor. *See O’Brien v. United States*, 560 U.S. 218 (2010).
 - Thus, how the prosecution charges the alleged type and alleged manner of use of a firearm matters in terms of the length of the man. min. under § 924(c).



- A “second or subsequent conviction” under section 924(c) also has a significant effect on length of the man min
 - May occur at same sentencing
 - *Deal v. U.S.*, 508 US 223 (1993)
 - Man. min. typically 25 years, which is consecutive to sentence for first section 924(c) conviction
- A section 924(c) sentence must be consecutive to any and all other sentences
 - *U.S. v. Gonzales*, 520 US 1 (1997) (state as well as federal sentences)





Impact of § 924(c) on Guidelines Sentence



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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 SOC

§2K2.4, App. Note 4 & Amendment #599 (Nov. 1, 2000)

- **Do not apply** the firearm (weapon) SOC in guideline for the *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 was in this robbery
- The firearm SOC at §2B3.1(b)(2) will not be applied



Robbery & § 924(c)

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

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 SOCs (cont.)

- If there is also a conviction for which §2K2.1 applies (*e.g.*, felon in possession), **do not apply** SOC (b)(6) (use or possession of a firearm in connection with another felony offense)
 - § 924(c) accounts for the conduct of this enhancement
 - § 924(c) accounts for any weapon within the relevant conduct
 - This limitation does not affect any other SOC, BOL, or cross reference at §2K2.1



Impact of § 924(c) on SOCs (cont.)

- The non-924(c) counts for which specified SOCs **do not apply** based on the directive at §2K2.4, App. Note 4, may still group under Rule (c)
 - Rule (c): “When one of the counts embodies conduct that **is treated as** a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.”



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 was in this robbery



Example (cont.)

- “Firearm SOC” at §2B3.1(b)(2) will not be applied
- “Firearm used or possessed in connection with another felony offense” SOC at §2K2.1(b)(6)(B) will not be applied
- *However*, the Robbery count and the Felon in Possession count *still group* under Rule (c)



Robbery & Felon in Possession & § 924(c)

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

Count 2:
§2K2.1
Felon-in-Poss
 $24 + \del{4} = 24$
(Cross Ref = 20)

Count 3:
§2K2.4
§ 924(c)
60 mos. consec.

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



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

Count 1:
§2D1.1
Drugs

Count 2:
§2D1.1
Drugs

Count 3:
§2D1.1
Drugs

Count 4: §2K2.4
§ 924(c)
Re: Ct. 2 Drugs
60 mos. consec.

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

Count 4
Runs consecutively
to ALL Counts



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

See 2K2.4, App. Note 4

Count 1:
§2B3.1
Robbery

Count 2
§2B3.1
Robbery

Count 3:
§2B3.1
Robbery

Count 4: §2K2.4
Use of Firearm
Re: Ct. 2 Robbery
18 USC § 924(c)
60 mos. consecutive

Firearm
SOC
APPLIED

Firearm
SOC **NOT**
APPLIED

Firearm
SOC
APPLIED

Count 4
Runs consecutively
to ALL Counts

“Units” required to establish offense level



Section 924(c)/929(a) Career Offender

USSG §4B1.1(c)

- Separate Career Offender provision for offenders convicted under section 924(c)
 - Separate Career Offender Table
- Some cases will have two counts of conviction that are each subject to different provisions in USSG §4B1.1 (subsections (b) & (c))
 - Use the Career Offender provision that produces the greatest range
- In many cases with multiple section 924(c) convictions, the regular Chapter Two guideline range with the multiple 924(c) convictions “stacked” on top of the guideline sentence and each other will be greater than the Career Offender sentence. Use the Chapter Two sentencing range in such a case (USSG §4B1.1(c)(2)(A)).



Other Common Guidelines With Firearms Enhancements

- §2B3.1(b)(2) (robbery)
 - “(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 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 or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.”
 - Can include a co-participant’s possession/use/etc. if “relevant conduct”



Other Common Firearms Enhancements in Guidelines

- §2D1.1(b)(1) (drug trafficking)
 - “If a dangerous weapon (including a firearm) was possessed, increase by 2 levels”
 - Can include a co-participant’s possession if “relevant conduct”
- Also, note the “safety valve” (§2D1.1(b)(17) & §5C1.2): defendant not eligible if he “possess[ed] a firearm or other dangerous weapon (or induce[ed] another participant to do so) in connection with the offense”
 - Doesn’t include a co-participant’s possession if only “relevant conduct” (where defendant did not aid/abet or induce)





END

Questions?



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