

PRIMER



FIREARMS

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I. INTRODUCTION

The purpose of this primer is to provide a general overview of the major statutes, sentencing guidelines issues, and case law relating to sentencing of firearms offenses. Although this primer identifies some of the issues and cases related to the sentencing of these offenses, it is not intended to be comprehensive or a substitute for independent research.

II. RELEVANT STATUTES

A. SUBSTANTIVE OFFENSES

1. *Firearms Transfer Offenses: 18 U.S.C. §§ 922(a)(6) (“straw purchase”), 922(d) (“prohibited person”), 924(a)(1)(A) (“false statement in a record”), 1715 (“firearms as nonmailable”)*

Section 922(a)(6) makes it unlawful for any person in connection with the acquisition, or attempt to acquire, any firearm or ammunition from a licensed importer, manufacturer, dealer, or collector to knowingly make any false oral or written statement or to furnish or exhibit any false or fictitious identification intended or likely to deceive such person with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under any provision of 18 U.S.C. §§ 921 *et seq.* A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years.¹ Any firearm or ammunition involved is subject to seizure and forfeiture.²

Section 922(d) makes it unlawful for any person to sell or dispose of any firearm or ammunition to any person knowing or having reason to believe that such person:

- (1) is under indictment or has been convicted of a felony;
- (2) is a fugitive from justice;
- (3) is an unlawful user of or addicted to any controlled substance;
- (4) has been adjudicated as suffering from mental health issues;
- (5) is an (A) illegal alien or (B) an alien admitted under a non-immigrant visa;³

¹ See 18 U.S.C. § 924(a)(2).

² See 18 U.S.C. § 924(d)(1).

³ The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is charged with promulgating regulations pertaining to § 922. Where the statute is silent as to the meaning of a term, a court will defer to the ATF's regulations at 27 C.F.R §§ 478 *et seq.* See, e.g., *United States v. Anaya-Acosta*, 629 F.3d 1091, 1094 (9th Cir.

- (6) has been dishonorably discharged from the Armed Forces;
- (7) has renounced his or her United States citizenship;
- (8) is subject to a restraining court order prohibiting harassing, stalking, or threatening an intimate partner or child;⁴ or
- (9) has been previously convicted of a misdemeanor crime of domestic violence.

A violation of section 922(d) is punishable by a statutory maximum term of imprisonment of ten years.⁵

Section 924(a)(1)(A) provides whoever knowingly makes any false statement or representation with respect to the information required by the provisions of 18 U.S.C. §§ 921 *et seq.* to be kept in the records of a person licensed under the same said provisions or in applying for any license or exemption or relief from disability under those same provisions is subject to a statutory maximum term of imprisonment of five years.

Section 1715 makes it unlawful to knowingly deposit for mailing or delivery any pistols, revolvers, and other firearms capable of being concealed on the person. A violation of section 1715 is punishable by a statutory maximum term of imprisonment of two years.

The guideline applicable to sections 922(a)(6), 922(d), 924(a)(1)(A), and 1715 offenses is §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).⁶

Some overlap appears to exist with the conduct covered under the three offenses. The following discussion includes examples of case law where a specific statute is charged. False statements on ATF Form 4473 - Firearms Transaction Record, the form required to lawfully transfer a firearm from a federally licensed dealer, will trigger prosecution.⁷ A common offense charged under section 922(a)(6) is the “straw purchase,” which entails a

2011), *abrogation recognized by* United States v. Venegas-Vasquez, 376 F. Supp.3d 1094 (D. Or. 2019) (using the meaning of “illegally or unlawfully in the United States” at 27 C.F.R. § 478.11 to interpret § 922(g)(5)(A)).

⁴ Subsection (d)(8) only applies to court orders issued after certain hearings that include a finding that the person subject to the court order represents a credible threat to the physical safety of the partner or child, or where the court order explicitly prohibits the use, attempted use or threatened use of physical force against the partner or child that would reasonably be expected to cause bodily injury.

⁵ See 18 U.S.C. § 924(a)(2).

⁶ See U.S. SENTENCING COMM’N, *Guidelines Manual*, App. A (Statutory Index) (Nov. 2018) [hereinafter USSG].

⁷ See United States v. Banks, 514 F.3d 769, 778 (8th Cir. 2008) (“Unlike other businesses, a firearms dealer is required to record all of its sales on Form 4473.”) (citing 27 C.F.R. § 478.124(a)).

material misrepresentation as to the identity of the actual firearm purchaser.⁸ In *Abramski v. United States*, the Supreme Court held that the true identity of the purchaser of a firearm is a material fact under 18 U.S.C. § 922(a)(6) even when the true purchaser is legally eligible to acquire a firearm.⁹ The Court’s decision resolved a circuit split concerning section 922(a)(6)’s materiality requirement in favor of the Fourth, Sixth, and Eleventh Circuits, and contrary to the Fifth Circuit’s position.¹⁰ Although frequently charged in such cases, section 922(a)(6) on its face does not prohibit straw purchases,¹¹ and section 924(a)(1)(A) may be charged instead.¹²

The firearm purchaser’s place of residence is a material fact; an incorrect street address on Form 4473 is a section 922(a)(6) violation.¹³

Note that the defendant’s intent may also be a factor considered when charging section 922(a)(6) because it is a general intent crime. Therefore, the government is relieved from proving that the defendant specifically intended to violate a federal law.¹⁴

Violations of section 922(d) occur when a prohibited person acquires a firearm or when a person transfers a firearm knowing or having a reasonable cause to believe the

⁸ See, e.g., *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010) (“[W]e find the act of falsifying the identity of the ‘actual buyer’ on Form 4473 to be a violation of § 922(a)(6).”); *United States v. Blake*, 394 F.3d 1089, 1090 (8th Cir. 2005) (purchasing firearms on behalf of another for “some quick money” is a “straw purchase”); *United States v. Ortiz*, 318 F.3d 1030, 1037 (11th Cir. 2003) (“‘straw purchases’ equally misrepresent the identity of the purchaser in a firearm sale and violate 18 U.S.C. § 922(a)(6)” and occur when an unlawful purchaser uses a lawful “straw man” purchaser to obtain a firearm); see also ATF Form 4473, Question 11.a. (“Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you.”).

⁹ 134 S. Ct. 2259 (2014).

¹⁰ Compare *United States v. Abramski*, 706 F.3d 307 (4th Cir. 2013); *United States v. Morales*, 687 F.3d 697, 700–01 (6th Cir. 2012) (a misrepresentation about the true purchaser’s identity is material even when he can legally own a gun); *United States v. Frazier*, 605 F.3d 1271, 1279–80 (11th Cir. 2010) (same) with *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997), *abrogated by Abramski*, 134 S. Ct. at 2259.

¹¹ See *Abramski*, 134 S. Ct. at 2270.

¹² See *United States v. Wilson*, 175 F. App’x 294 (11th Cir. 2006) (unpublished) (per curiam) (finding that falsely claiming on Form 4473 to be the actual purchaser of the firearm is a violation of § 924(a)(1)(A)).

¹³ See, e.g., *United States v. Bowling*, 770 F.3d 1168, 1177–78 (7th Cir. 2014) (stating a false address can be material misrepresentation and a violation of § 922(a)(6)); *United States v. Behenna*, 552 F.2d 573, 575–76 (4th Cir. 1977) (same); *United States v. Buck*, 548 F.2d 871, 876 (9th Cir. 1977) (same); *United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (same); *United States v. Gudger*, 472 F.2d 566 (5th Cir. 1972) (same).

¹⁴ See, e.g., *United States v. Edgerton*, 510 F.3d 54, 57 (1st Cir. 2007) (“Section 922(a)(6) . . . does not presuppose deceptive intent or even knowledge that one’s conduct is unlawful.”); *United States v. Elias*, 937 F.2d 1514, 1518 (10th Cir. 1991) (“[T]he phrase ‘likely to deceive’ in section 922(a)(6) does not establish a specific intent element but only requires proof the defendant imparted false information with the general intention of deceiving or being likely to deceive the dealer.”).

person is prohibited from acquiring it. Typically, the offense involves the transfer of a firearm to a convicted felon.¹⁵ Section 922(d) may also be charged in cases where a firearm purchaser makes a false misrepresentation on Form 4473. Each of the nine circumstances enumerated in section 922(d) are listed on Form 4473 at Questions 11 and 12, and the transferee must affirmatively state whether any are applicable. A false answer to a question may result in prosecution under section 922(d).

Section 924(a)(1)(A) may also be charged when a person provides false responses to questions on Form 4473. Examples of district court cases include the purchase of a firearm after conviction for a misdemeanor crime of domestic violence,¹⁶ and counseling another person to falsely state that she was the transferee/buyer of a firearm.¹⁷ However, as previously noted, section 924(a)(1)(A) also is sometimes charged in “straw purchase” cases.¹⁸ As noted above, the penalty for a violation of section 922(a)(6) is up to ten years’ imprisonment, while a violation of section 924(a)(1)(A) is up to five years. Charging section 922(a)(6) in lieu of section 924(a)(1)(A) may be based upon the surrounding circumstances or seriousness of conduct in the case.

Recognizing that these two statutes sometimes cover similar conduct, in 2011 the Commission amended subsections (a)(4)(B) and (a)(6) of §2K2.1 to increase penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) and who committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.¹⁹ The 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 18 U.S.C. § 922(d) when the conduct is similar. In addition, the amendment provided a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of §2K2.1 apply; (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; and (C) the defendant received no monetary compensation from the offense. A defendant meeting these criteria is generally less culpable than the typical straw purchaser.

¹⁵ See, e.g., *United States v. Dotson*, 570 F.3d 1067 (8th Cir. 2009) (attempting to transfer a firearm to a convicted felon is a violation of § 922(d)(1)); *United States v. Rose*, 522 F.3d 710 (6th Cir. 2008) (selling a firearm to a convicted felon is a violation of §§ 922(d)(1) and 924(a)(2)); *United States v. Peters*, 403 F.3d 1263 (11th Cir. 2005) (same). See also the discussion of 18 U.S.C. § 922(g), prohibiting possession of a firearm by a felon, *infra* at II(A)(2).

¹⁶ See *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D. W. Va. 2010).

¹⁷ See *United States v. Sanelli*, No. 5:10cr00010, 2010 WL 1608416 (W.D. Va. Apr. 20, 2010).

¹⁸ See *United States v. Torres*, No. CR 09–01733–TUC–JMR(JCG), 2010 WL 3190659 (D. Ariz. June 21, 2010), *aff’d* 472 F. App’x 819 (9th Cir. 2012) (unpublished).

¹⁹ See USSG App. C, amend. 753 (effective Nov. 1, 2011).

2. 18 U.S.C. § 922(g) - Prohibited Persons (“Felon-in-Possession”)

Section 922(g) bans specified classes of people from transporting or possessing in interstate or foreign commerce any firearm or ammunition or from receiving any firearm or ammunition that has been transported in interstate or foreign commerce. A firearm for purposes of section 922(g) is defined at section 921(a)(3) and does not include an antique firearm, one manufactured in or before 1898.²⁰ The antique firearm exception is an affirmative defense to prosecution, not an element of the offense.²¹ The banned classes include: convicted felons; fugitives; unlawful users or those addicted to controlled substances; adjudicated “mental defectives” or who have been committed to a mental institution; illegal aliens; dishonorably discharged service personnel; those who have renounced their U.S. citizenship; and misdemeanor domestic violence offenders or those subject to certain restraining orders in domestic violence matters. The Supreme Court recently held, in *Rehaif v. United States*, that to sustain a conviction under section 922(g)(1) for being a felon in possession, the government must prove four elements: (1) the defendant was a felon; (2) the defendant knew he was a felon; (3) he knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce.²² The statutory maximum penalty for the offense is ten years of imprisonment. Any firearm or ammunition involved is subject to seizure and forfeiture.²³

The guideline applicable to section 922(g) offenses is §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).²⁴

Issue—Multiplicity in the Charging Instrument

All circuits have now agreed that the “allowable unit of prosecution” is an incident of possession even if a defendant is a “prohibited person” under more than one category under section 922(g).²⁵ In *United States v. Richardson*, the Eighth Circuit reversed its past

²⁰ 18 U.S.C. § 921(a)(3) (Firearm means “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; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device.”).

²¹ See *United States v. Benamor*, 937 F.3d 1182, 1187 (9th Cir. 2019), *cert. denied*, 2020 WL 129957 (Jan. 13, 2020); *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) (collecting cases); *Gil v. Holder*, 651 F.3d 1000, 1005 n.3 (9th Cir. 2011) (*overruled in part on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013)).

²² 139 S. Ct. 2191 (2019).

²³ See 18 U.S.C. § 924(d)(1).

²⁴ See USSG App. A (Statutory Index).

²⁵ The “unit of prosecution” test is from *Bell v. United States*, 349 U.S. 81 (1955) (describing test to look at congressional intent and ask what Congress made allowable under the statute).

precedent and joined every other circuit to address the issue, concluding that Congress, by rooting all the firearm possession offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon.²⁶

A related set of issues, to which a similar analysis applies, arises in situations in which a defendant possesses multiple firearms or firearms and ammunition. Courts have held that possession of more than one firearm and ammunition by a prohibited person generally supports only one conviction under 18 U.S.C. § 922(g). Courts have noted that the prohibited conduct, possession of any firearm or ammunition, could arguably occur every time a disqualified person picks up a firearm even though it is the same firearm or every time a disqualified person picks up a different firearm. “The [statute] does not delineate whether possession of two firearms—say two six-shooters in a holster—constitutes one or two violations, whether the possession of a firearm loaded with one bullet constitutes one or two violations, or whether the possession of a six-shooter loaded with six bullets constitutes one or two or seven violations.”²⁷

However, this general rule is subject to exceptions: where the evidence demonstrates that the defendant stored the weapons in different places or acquired the weapons at different times, he can be convicted of multiple counts of illegal possession.²⁸ The Eighth Circuit, for example, has clarified that its holding in *Richardson* does not mean that “any period of overlap” in the possession of two firearms means that only one possession conviction may be obtained; rather, the question is “whether the two items

²⁶ 439 F.3d 421, 422 (8th Cir. 2006) (en banc); see also *United States v. Dunford*, 148 F.3d 385, 389 (4th Cir. 1998) (felon and drug user); *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (same); *United States v. Munoz-Romo*, 989 F.2d 757 (5th Cir. 1993), *United States v. Winchester*, 916 F.2d 601 (11th Cir. 1990); accord *United States v. Shea*, 211 F.3d 658, 673 (1st Cir. 2000).

²⁷ *Dunford*, 148 F.3d at 389 (reversing all but one conviction where defendant possessed six firearms and ammunition); see also *United States v. Tann*, 577 F.3d 533, 537 & n.5 (3rd Cir. 2009) (collecting circuit cases); *United States v. Parker*, 508 F.3d 434, 440 (7th Cir. 2007); *Richardson*, 439 F.3d at 422 (“allowable unit of prosecution” is one incident of possession regardless of whether defendant satisfies more than one classification or possessed more than one firearm or firearm and ammunition); *United States v. Verrecchia*, 196 F.3d 294, 297–98 (1st Cir. 1999); *United States v. Cunningham*, 145 F.3d 1385, 1398–99 (D.C. Cir. 1998); *United States v. Keen*, 104 F.3d 1111, 1119–20 (9th Cir. 1996); *United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990); *United States v. Pelusio*, 725 F.2d 161, 168–69 (2d Cir. 1983); *United States v. Valentine*, 706 F.2d 282, 292–94 (10th Cir. 1983).

²⁸ *United States v. Hutching*, 75 F.3d 1453, 1460 (10th Cir. 1996) (sustaining three counts of conviction where one firearm was stored in the defendant’s bedroom, one in a car parked in the garage, and one in another vehicle); see also *United States v. Olmeda*, 461 F.3d 271, 280 (2d Cir. 2006) (multiple rounds of ammunition in two different jurisdictions warranted two prosecutions despite some temporal overlap); *United States v. Goodine*, 400 F.3d 202, 209 (4th Cir. 2005); *United States v. Buchmeier*, 255 F.3d 415, 423 (7th Cir. 2001); *United States v. Adams*, 214 F.3d 724, 728 (6th Cir. 2000).

were separately acquired or stored.”²⁹ The Eighth Circuit has also found that where the prosecution seeks to bring more than one charge under section 922(g), separate acquisition and storage of the weapons is an element of the crime.³⁰

From a procedural standpoint, this general rule does not preclude the *charging* of multiple counts, only convictions. As the Supreme Court in *Ball v. United States* explained: “To say that a convicted felon may be prosecuted simultaneously for violation of [two firearms offenses], however, is not to say that he may be convicted and punished for two offenses.”³¹ The district court at sentencing may merge the counts of conviction that are duplicative.³²

3. 18 U.S.C. § 922(q) - Possession or Discharge of a Firearm in a School Zone

Section 922(q)(2)(A) prohibits the possession of a firearm that has moved in interstate or foreign commerce in a place that a person knows, or has reasonable cause to believe, is a school zone. Section 922(q)(3)(A) prohibits the discharge or attempted discharge of a firearm that has moved in interstate or foreign commerce in a place that a person knows is a school zone. A violation of either section 922(q)(2)(A) or section 922(q)(3)(A) is punishable by a statutory maximum term of imprisonment of five years.³³ However, the term of imprisonment for either offense must be imposed consecutively to any other term of imprisonment imposed under any other provision of law.³⁴ For example, when a defendant is convicted of section 922(q)(2)(A) as well as another similar conviction arising out of the same act or transaction, the court should first calculate the overall guideline range, apportion the sentence between the count for section 922(q) and the other conviction, and then run the section 922(q) term of imprisonment consecutively.³⁵

²⁹ *United States v. Woolsey*, 759 F.3d 905, 908 (8th Cir. 2014); *see also United States v. Washington*, 666 F. App’x 544, 546 (7th Cir. 2016) (unpublished) (affirming for two § 992(g)(1) convictions where defendant maintained ammunition and weapons separately in home and in car, and citing cases for same).

³⁰ *United States v. Gilliam*, 934 F.3d 854, 859 (8th Cir. 2019) (quoting *Woolsey*, 759 F.3d at 908).

³¹ 470 U.S. 856, 861 (1985).

³² *See, e.g., United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990) (affirming district court’s decision to permit the jury to consider multiple counts, anticipating that if multiplicitous convictions were obtained, it could dismiss counts as necessary).

³³ 18 U.S.C. § 924(a)(4).

³⁴ *Id.*

³⁵ *United States v. Figueroa-Ocasio*, 805 F.3d 360, 373 (1st Cir. 2015).

The guideline applicable to section 922(q)(2)(A) or 922(q)(3)(A) offenses is §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).³⁶ Section 2K2.5 provides for Base Offense Level 6.

4. 18 U.S.C. § 924(c) - Using or Carrying a Firearm During a Crime of Violence or Drug Trafficking Offense

18 U.S.C. § 924(c) provides for a fixed mandatory prison term for anyone convicted of using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such an offense (in addition to the punishment provided for the crime of violence or drug trafficking crime itself, if charged).³⁷ To convict a defendant of more than one section 924(c) charge, the defendant must have used, carried, or possessed a firearm more than once, and that depends on whether the defendant made more than one choice to use, carry, or possess the firearm.³⁸ Possession of a firearm can be joint with another person and may be constructive if the defendant does not have physical possession but does have the power and the intent to exercise control over the firearm.³⁹

For purposes of section 924(c), a “crime of violence” is defined at section 924(c)(3) and means an offense that is a felony and (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁴⁰ In 2015, the Supreme Court struck down the residual clause in section (924)(c)(3)(B) as unconstitutionally vague, in *Johnson v. United States*, discussed in more detail at section II.B.⁴¹ A “drug trafficking crime” means any felony punishable under the Controlled Substances Act.⁴² Although an exhaustive treatment of the definitions is beyond the scope of this primer, this section will discuss a few relevant issues.

For violations of section 924(c), the mandatory minimum penalty for the basic offense is five years; if the firearm is brandished, seven years; if the firearm is discharged, ten years; if the firearm is a short-barreled rifle or shotgun or semiautomatic assault

³⁶ See USSG App. A (Statutory Index).

³⁷ See 18 U.S.C. § 924(c)(1)(A).

³⁸ *United States v. Jackson*, 918 F.3d 467 (6th Cir. 2019).

³⁹ *United States v. Hernandez*, 919 F.3d 1102 (8th Cir. 2019).

⁴⁰ 18 U.S.C. § 924(c)(3).

⁴¹ 135 S. Ct. 2551 (2015).

⁴² 18 U.S.C. § 924(c)(2).

weapon, ten years; if a machine gun, destructive device, or firearm equipped with a silencer, 30 years.⁴³

In 2018, Congress enacted the First Step Act which amended the penalties for second or subsequent convictions under section 924(c).⁴⁴ Prior to the Act, the penalty for second or subsequent convictions for using a firearm during a crime of violence was 25 years, and if the firearm was a machine gun, etc., the penalty was life imprisonment without release. As a result of the prior version of section 924(c)(1)(C), a defendant could be sentenced to multiple consecutive section 924(c) penalties at one sentencing, commonly referred to as “stacking.” Section 924(c)(1)(C) now provides that the 25-year enhanced penalty applies only to offenders whose instant violation of section 924(c) occurs after a prior section 924(c) conviction has become final. As a result, a defendant can no longer be subject to “stacking” of multiple consecutive section 924(c) penalties at one sentencing. However, if a defendant has two or more counts of conviction for section 924(c) offenses in the same indictment, the court will still impose the mandatory minimum penalty for each count. Although this amendment to section 924(c)(1)(C) does not apply retroactively, it does apply to any sentencing that occurs after enactment of the Act, regardless of when the offense occurred.⁴⁵ These penalties are consecutive to any other sentence, including the sentence for the underlying offense.⁴⁶ The firearms involved are subject to seizure.⁴⁷ There is no defined maximum penalty, although most circuit courts conclude that the implied maximum penalty is life.⁴⁸

The guideline applicable to this statutory provision is §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).⁴⁹ Section 2K2.4 provides that if a defendant, whether convicted of another crime or not, was convicted of a violation of section 924(c), the guideline sentence is the minimum term of imprisonment required by statute. Additionally, Chapters Three and Four are not to apply to that count of conviction.⁵⁰

⁴³ See 18 U.S.C. § 924(c)(1)(B).

⁴⁴ First Step Act of 2018, Pub. L. No. 115–391, § 403, 132 Stat. 5194.

⁴⁵ *Id.*

⁴⁶ See 18 U.S.C. § 924(c).

⁴⁷ See 18 U.S.C. § 924(d)(1).

⁴⁸ See, e.g., *United States v. Farmer*, 583 F.3d 131, 151 (2d Cir. 2009); *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Cristobal*, 293 F.3d 134, 147 (4th Cir. 2002); *United States v. Avery*, 295 F.3d 1158, 1170 (10th Cir. 2002); *United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000).

⁴⁹ See USSG App. A (Statutory Index).

⁵⁰ See USSG §2K2.4(b).

Issue—Type of gun and manner in which it is used is an issue for the jury

In *United States v. O'Brien*, the Supreme Court held that the nature of the firearm (specifically, if the firearm is a “machine gun” triggering a 30-year mandatory minimum) is an element of the offense to be found by the jury, not a sentencing factor to be found by the judge.⁵¹ The decision resolved a circuit split. Before *O'Brien*, six circuits construed section 924(c) as creating a sentencing issue for the judge.⁵² Two construed the statute as creating an element for the jury.⁵³ In *United States v. Suarez*, the Fifth Circuit vacated a sentence imposed under section 924(c) because the issue of whether the firearm involved in the offense was a sawed-off shotgun, which would trigger the ten-year mandatory minimum, or a handgun, which would carry a five-year mandatory minimum sentence, was not submitted to the jury.⁵⁴

Issue—“During and in relation to” and “in furtherance of” standards

The statute sets out two different relationships between the firearm in question and the underlying crime of violence or drug trafficking offense, depending on whether the defendant (i) used or carried the firearm or (ii) possessed the firearm. If the defendant *used or carried* the firearm, these acts must only have been done “during and in relation to” the underlying offense for a violation of the statute to have occurred; if the defendant merely *possessed* the firearm, the possession must have been “in furtherance of” the underlying offense.

A significant body of case law has developed interpreting these two phrases, with the general consensus that a closer relationship between the firearm and the underlying offense is required to meet the “in furtherance of” standard than the “during and in relation to” standard. For example, where the defendant only possessed the firearm and the underlying offense is a drug trafficking offense, the Sixth Circuit held that “[i]n order for the possession to be in furtherance of a drug crime, the firearm must be strategically located so that it is quickly and easily available for use” and that other relevant factors “include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was

⁵¹ 560 U.S. 218 (2010).

⁵² See *United States v. Cassell*, 530 F.3d 1009, 1016–17 (D.C. Cir. 2008); *United States v. Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007); *United States v. Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States v. Avery*, 295 F.3d 1158, 1169–71 (10th Cir. 2002); *United States v. Harrison*, 272 F.3d 220, 225–26 (4th Cir. 2001); *United States v. Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001).

⁵³ *United States v. O'Brien*, 542 F.3d 921, 926 (1st Cir. 2008); *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005).

⁵⁴ 879 F.3d 626 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 279 (Oct. 7, 2019) (citing *O'Brien*, 560 U.S. at 235, and *Alleyne v. United States*, 570 U.S. 99 (2013)).

found.”⁵⁵ However, the Ninth Circuit has rejected the use of this list of factors “in closer, and more common, cases” and generally the “checklist” approach.⁵⁶ Rather, the Ninth Circuit held “that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense.”⁵⁷ In contrast, the Ninth Circuit rejected the claim that possession was in furtherance of a drug trafficking offense where there was no evidence to indicate that the defendant conducted drug trafficking activities in the home where the weapon was found.⁵⁸

Every circuit to address the question has held or assumed without deciding that a defendant who receives firearms in exchange for drugs possesses those firearms “in furtherance of” a drug trafficking offense.⁵⁹

With respect to the “during and in relation to” requirement for the use or carrying of a firearm, courts have interpreted this phrase to include a temporal element (“during”) as well as a nexus between the firearm and the underlying offense (“in relation to”). The nexus will depend on the particular facts and circumstances of the offenses, but generally the evidence must support a finding that the weapon’s presence was not coincidental; that is, simply carrying the firearm during the course of the offense is not sufficient.⁶⁰ Rather, “the evidence must support a finding that the firearm furthered the purpose or effect of the crime”⁶¹

⁵⁵ *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001) (citing *United States v. Ceballos-Torres*, 218 F.3d 409, 414–15 (5th Cir. 2000)) (affirming conviction where “there was an illegally possessed, loaded, short-barreled shotgun in the living room of the crack house, easily accessible to the defendant and located near the scales and razor blades” and the defendant was found near the weapon in possession of cocaine and a large amount of cash); *cf.* *United States v. King*, 632 F.3d 646, 657–58 (10th Cir. 2011) (noting that the Tenth Circuit has not adopted *Mackey’s* “accessibility requirements,” and instead applies “a more flexible approach” in which accessibility is but one factor). *See also* *United States v. Swafford*, 385 F.3d 1026 (6th Cir. 2004) (possession of a firearm in the same premises as drug trafficking activities alone is not sufficient to support conviction but the jury can infer firearms strategically located to provide defense are used “in furtherance of” trafficking); *United States v. Hernandez*, 919 F.3d 1102, 1108 (8th Cir. 2019) (“jury may infer that the firearm was used in furtherance of a drug crime when it is kept in close proximity to the drugs, is quickly accessible . . .”) (quoting *United States v. Close*, 518 F.3d 617, 619 (8th Cir. 2008)).

⁵⁶ *United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004).

⁵⁷ *Id.* at 968–69 (affirming conviction where “[n]o less than five high caliber firearms, plus ammunition, were strategically located within easy reach in a room containing a substantial quantity of drugs and drug trafficking paraphernalia” and “other [uncharged] firearms, which Krouse apparently kept for purposes unrelated to his drug business, . . . were stored elsewhere throughout his home.”).

⁵⁸ *United States v. Rios*, 449 F.3d 1009, 1015–16 (9th Cir. 2006).

⁵⁹ *See* *United States v. Miranda*, 666 F.3d 1280, 1283 (11th Cir. 2012) (collecting cases).

⁶⁰ *United States v. Lampley*, 127 F.3d 1231, 1241 (10th Cir. 1997).

⁶¹ *United States v. McRae*, 156 F.3d 708, 712 (6th Cir. 1998).

Issue—Whether a sentence imposed for a separate offense can supplant a section 924(c) sentence under the statute’s prefatory clause

In *Abbott v. United States*, the Supreme Court resolved a circuit split concerning whether the “except” clause prefacing section 924(c) exempts an offender from prison time for a section 924(c) conviction when sentenced to a greater mandatory minimum term for a conviction under another statute.⁶² Section 924(c) begins: “Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law,” and proceeds to outline minimum sentences. Prior to *Abbott*, several circuits interpreted this language to refer to other minimum sentences that may be imposed for violations of section 924(c), not separate offenses.⁶³ Two circuits held that a defendant is not subject to a section 924(c) minimum sentence if he is subject to a higher minimum sentence, for example as an armed career criminal.⁶⁴ The Supreme Court granted certiorari in *Abbott* to resolve the issue. In *Abbott*, the Court held that the clause “by any other provision of law” refers to the conduct section 924(c) proscribes, *i.e.*, possessing a firearm in connection with a predicate crime. The Court rejected the petitioners’ alternative reading that the clause relieved a section 924(c) offender from additional punishment if another, higher mandatory minimum sentence was imposed. The Court concluded that such a reading nullifies the statute’s ascending series of minimums at section 924(c)(1)(A)–(C), a result contrary to congressional intent.⁶⁵

Although the sentence for a section 924(c) conviction must be imposed consecutive to any other term of imprisonment, the Supreme Court held, in *Dean v. United States*,⁶⁶ that section 924(c) does not prevent a sentencing court from considering a mandatory minimum sentence that will be imposed pursuant to it when calculating a guidelines sentence for the underlying predicate offense. The Court explained that a sentencing court generally is permitted to consider the sentence imposed for one count of conviction when determining the sentence for other counts of conviction and that nothing in the text of section 924(c) prohibits such consideration. The Court further noted that, in other sections of the criminal code, Congress has explicitly prohibited consideration of a mandatory

⁶² 562 U.S. 8 (2010).

⁶³ See *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *aff’d*, *Abbott v. United States*, 562 U.S. 8 (2010); *United States v. London*, 568 F.3d 553 (5th Cir. 2009) (adopting the reasoning of *United States v. Collins*, 205 F. App’x 196 (5th Cir. 2006) (unpublished)); *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Jolivet*, 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000).

⁶⁴ See *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), *abrogation recognized by United States v. Lee*, 660 F. App’x 8 (2d Cir. 2016) (unpublished); *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010), *vacated by*, 131 S. Ct. 637 (2010).

⁶⁵ *Abbott*, 562 U.S. at 18–20.

⁶⁶ 137 S. Ct. 1170 (2017).

minimum penalty in determining the sentence for other counts of conviction. For example, 18 U.S.C. § 1028A, which relates to identity theft, provides that a court cannot reduce the term imposed for a predicate offense to compensate for the mandatory term of imprisonment required by section 1028A. Prior to the *Dean* decision, many sentencing courts interpreted section 924(c) to bar consideration of the mandatory minimum penalty when calculating a sentence for an underlying predicate offense.⁶⁷

Issue—Whether section 924(c) authorizes multiple consecutive firearm possession counts arising out of the same offense

Most courts hold that section 924(c) authorizes a conviction if, during the course of an underlying predicate offense, a defendant uses or carries a firearm at any time; in other words, the “unit of prosecution” for section 924(c) is the underlying crime, rather than each individual “use” to which firearms are put throughout the duration of the underlying crime.⁶⁸ However, even in these circuits, a defendant may be subject to multiple section 924(c) charges for the use of the same firearm during one criminal episode where the episode contains more than one independent and unique use of a firearm.⁶⁹ Other circuits have held that separate section 924(c) convictions may arise from one predicate offense.⁷⁰

⁶⁷ See, e.g., *United States v. Dean*, 810 F.3d 521 (8th Cir. 2015) (affirming district court’s determination that it could not vary from the guidelines range in calculating defendant’s sentence for offenses based on the mandatory minimum he would receive under § 924(c)), *overruled by Dean v. United States* 130 S. Ct. 1170 (2017); *United States v. Powell*, 444 F. App’x 517, 522 (3d Cir. 2011) (unpublished); *United States v. McCullers*, 395 F. App’x 975, 978 (4th Cir. 2010) (unpublished); *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008), *abrogation recognized by United States v. Rosario*, 792 F. App’x, 76 (2d Cir. 2019); *United States v. Franklin*, 499 F.3d 578, 583 (6th Cir. 2007), *abrogation recognized by United States v. Williams*, 499 F.3d 578 (6th Cir. 2018); *United States v. Roberson*, 474 F.3d 432, 436 (7th Cir. 2007), *abrogation recognized by United States v. Brazier*, 933 F.3d 796 (7th Cir. 2019). *But see United States v. Smith*, 756 F.3d 1179, 1193 (10th Cir. 2014) (“[N]othing in current law prohibits a district court’s considering a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence.”); *United States v. Webster*, 54 F.3d 1, 4 (1st Cir. 1995) (“[I]n departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence.”).

⁶⁸ See *United States v. Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc); *United States v. Diaz*, 592 F.3d 467 (3d Cir. 2010); *United States v. Rodriguez*, 525 F.3d 85, 111–12 (1st Cir. 2008); *United States v. Baptiste*, 309 F.3d 274, 278–79 (5th Cir. 2002); *United States v. Anderson*, 59 F.3d 1323 (D.C. Cir. 1995); *United States v. Cappas*, 29 F.3d 1187, 1189–90 (7th Cir. 1994); *United States v. Taylor*, 13 F.3d 986, 992–93 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 676 (2d Cir. 1993); *United States v. Hamilton*, 953 F.2d 1344 (11th Cir. 1992); *United States v. Smith*, 924 F.2d 889, 894–95 (9th Cir. 1991).

⁶⁹ *United States v. Hodge*, 870 F.3d 184, 197, n.10 (3rd Cir. 2017) (collecting cases); *United States v. Vichitvongsa*, 819 F.3d 260, 269–70 (6th Cir. 2016).

⁷⁰ See *United States v. Phipps*, 319 F.3d 177, 186 (5th Cir. 2003); *United States v. Camps*, 32 F.3d 102, 108–09 (4th Cir. 1994); *United States v. Lucas*, 932 F.2d 1210, 1222–23 (8th Cir. 1991).

5. 22 U.S.C. § 2778 - Exporting Firearms without a Valid License

Section 2778 prohibits the exportation (and importation) of designated national defense-related articles (or services) without a valid license to do so.⁷¹ Section 2778, a provision of the Arms Export Control Act, authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and promulgate regulations therefor. Items designated by the President as defense articles are added to the United States Munitions List (USML).⁷² Firearms, including their component parts, and ammunition, along with a wide range of other defense-related equipment such as military electronics, aircraft and aircraft parts, and night vision equipment, are on the USML. A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.

Firearms cases prosecuted under section 2778 involve the exportation, or attempted exportation, of firearms or ammunition across the U.S. border. Frequently the destination in such cases is Mexico, but the firearms may also be destined for other countries.⁷³ Violations of section 2778 that involve defense articles and services other than firearms are outside the scope of this primer.⁷⁴

The guideline applicable to a section 2778 offense is §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License).⁷⁵ Subsection (a)(2) at §2M5.2 provides for Base Offense Level 14 if the offense involved only (A) two or less non-fully automatic small arms (rifles, handguns, or shotguns), (B) 500 or less rounds of ammunition for non-fully automatic small arms, or (C) both.⁷⁶ Subsection (a)(1) provides for Base Offense Level 26 if subsection (a)(2) does not apply.

⁷¹ 22 U.S.C. § 2778; Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729.

⁷² See 22 C.F.R. § 121.1.

⁷³ See, e.g., *United States v. Sero*, 520 F.3d 187 (2d Cir. 2008) (affirming defendant's sentence for shipping firearms parts and ammunition to the Philippines); *United States v. Castro-Trevino*, 464 F.3d 536 (5th Cir. 2006) (affirming conviction under § 2778 and sentence under §2M5.2 for attempting to export firearm ammunition to Mexico); *United States v. Muthana*, 60 F.3d 1217 (7th Cir. 1995) (exporting ammunition to Yemen); *United States v. Galvan-Revuelta*, 958 F.2d 66 (5th Cir. 1992) (same).

⁷⁴ See, e.g., *United States v. Boltutskiy*, 634 F. App'x. 887 (3rd Cir. 2015) (unpublished) (exporting night vision devices to Belarus); *United States v. Reyes*, 270 F.3d 1158 (7th Cir. 2001) (exporting aircraft components to Iran).

⁷⁵ See USSG App. A (Statutory Index).

⁷⁶ In 2011, the Commission reduced the number of small arms at USSG §2M5.2(a)(2) from ten to two and added the "ammunition only" provision. See USSG App. C, amend. 753 (effective Nov. 1, 2011).

B. STATUTORY SENTENCING ENHANCEMENT - ARMED CAREER CRIMINAL ACT

The enhancement under 18 U.S.C. § 924(e), the Armed Career Criminal Act of 1984 (ACCA), imposes a mandatory minimum 15-year sentence of imprisonment (and a life maximum) for section 922(g) violators who have three previous convictions for a serious drug offense or a violent felony, committed on occasions different from one another.

“Serious drug offense” is defined as either certain federal drug offenses with a statutory maximum of ten years or more imprisonment, or state offenses involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance, with a statutory maximum of ten years or more imprisonment.⁷⁷

“Violent felony” is defined at 18 U.S.C. § 924(e)(2)(B) and means any crime punishable by imprisonment for more than one year, that

- (i) has as an element the use, attempted use, or threatened use of physical force against another;
- (ii) or is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.⁷⁸

The guideline implementing this statutory provision is §4B1.4 (Armed Career Criminal).⁷⁹ The offense level at §4B1.4(b) is 34 and the criminal history category is Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence as defined at §4B1.2(a), or a controlled substance offense as defined at §4B1.2(b).⁸⁰

Issue—What is a “violent felony”?

The definition of the term “violent felony” for purposes of the ACCA has been the subject of an ongoing series of Supreme Court cases, in addition to numerous cases in the lower federal courts. The volume of case law on this issue results primarily from the very general language of the statute and the variety of different state laws to which it must be applied. Although an exhaustive treatment of this issue is beyond the scope of this primer,

⁷⁷ 18 U.S.C. § 924(e)(2)(A).

⁷⁸ As explained in greater detail below, the Supreme Court invalidated the underlined text—known as the “residual clause”—in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Accordingly, a prior conviction may no longer be counted as an ACCA predicate solely because it meets the residual clause’s definition.

⁷⁹ See USSG App. A (Statutory Index).

⁸⁰ See USSG §§4B1.4(b)(3)(A); (c)(2).

this section will describe the major Supreme Court cases on the issue and sketch the general contours of the question.

The first major Supreme Court case instructing courts how to determine whether a particular prior offense is a “violent felony” was *Taylor v. United States*.⁸¹ The Court in that case addressed the question of how to determine whether a particular state conviction for an offense called burglary qualifies as a “burglary” for purposes of the ACCA. The Court concluded that, rather than relying on what each individual state law determined was a “burglary,” Congress intended a “generic, contemporary meaning of burglary” so that, regardless of what the particular offense was *labeled*, if it had as elements of the offense the same elements of generic, contemporary burglary, it would be considered a “burglary” for ACCA purposes.⁸² The Court determined that the generic statutory term “burglary” is the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.”⁸³

In making the comparison between a particular state offense and the generic meaning, the Court explained that courts should apply a “formal categorical approach” by which courts would look not to the facts of the particular defendant’s offense, but instead look to the elements of the statute under which the defendant was convicted.⁸⁴ However, the Court described an exception to this general rule: if the state statute is broader than the generic offense, courts could look to other records of the case to see if the jury determined that the defendant had actually committed the generic offense.⁸⁵ The Court addressed this modification of the categorical approach in *Shepard v. United States*.⁸⁶ In that case, the Court held that sentencing courts must look only to “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.”⁸⁷ In *Descamps v. United States*,⁸⁸ the Court held that this modified categorical approach may not be applied where the statute of conviction is indivisible—that is, one not containing alternative elements. In *Mathis v. United States*,⁸⁹

⁸¹ 495 U.S. 575 (1990).

⁸² *Id.* at 598–99.

⁸³ *Id.*

⁸⁴ *Id.* at 600–01.

⁸⁵ *Id.* at 602.

⁸⁶ 544 U.S. 13 (2005).

⁸⁷ *Id.* at 26.

⁸⁸ 570 U.S. 254 (2013).

⁸⁹ 136 S. Ct. 2243 (2016).

the Court further clarified that this means that even a statute which is indivisible but lists “alternative means” of commission is not subject to the modified categorical approach.

Recently in *Quarles v. United States*, the Court looked to the scope of generic “remaining in” burglary under *Taylor* with respect to the timing of the intent requirement.⁹⁰ It held that the definition of burglary under section 924(e) includes situations where the defendant forms the intent to commit a crime after the initial unlawful entry or remaining in the building or structure, and need not be present at the exact time of the unlawful entry or the time when the remaining in becomes unlawful.

The Court interpreted the phrase “physical force” as used in the ACCA’s “violent felony” definition in *Johnson v. United States*.⁹¹ The Court held that in the context of “violent felony,” “physical force” means violent force, “capable of causing physical pain or injury to another [].”⁹² Therefore, the Florida felony offense of battery by “[a]ctually and intentionally touch[ing] another person” does not have as an element the use of physical force and does not constitute a “violent felony” under the ACCA.

In 2015, in a later unrelated case, *Johnson v. United States*, the Supreme Court focused on the application of these principles to the ACCA’s “residual clause.”⁹³ The “residual clause” appeared at 18 U.S.C. § 924(e)(2)(B)(ii) following the listed offenses such as burglary; it provided that, in addition to the listed offenses, an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another” is a “violent felony.” In *Johnson*, the Supreme Court held that the ACCA’s “residual clause” is unconstitutionally vague and, therefore, imposing an increased sentence under that provision violates the Due Process Clause. Thus, under the ACCA, the residual clause may no longer be used to classify offenses as violent felonies. Nearly a year later, in *Welch v. United States*, the Supreme Court held that *Johnson’s* holding invalidating ACCA’s residual clause applies retroactively when a defendant seeks review of a previously imposed sentence.⁹⁴ Thus, any offender previously sentenced as an armed career criminal on the basis of a conviction qualifying under the ACCA’s residual clause can challenge their status as an armed career criminal and the resulting enhanced penalty.

The language of the “residual clause” also appeared in the sentencing guidelines in the definition of “crime of violence” in the career offender guideline at §4B1.2 (Definitions of Terms Used in Section 4B1.1). In response to the *Johnson* decision, the Commission

⁹⁰ 139 S. Ct. 1872 (2019).

⁹¹ 559 U.S. 133 (2010).

⁹² *Id.* at 140.

⁹³ 135 S. Ct. 2551 (2015).

⁹⁴ 136 S. Ct. 1257 (2016).

amended that guideline to remove the residual clause.⁹⁵ Under the previous version of the guideline, however, much of the case law on how to determine what constitutes a “violent felony” under the ACCA also applied to determining what constitutes a “crime of violence” under §4B1.2 of the guidelines. In *Beckles v. United States*, the Supreme Court resolved a circuit split, holding that the sentencing guidelines, including the residual clause at §4B1.2, are not subject to vagueness challenges.⁹⁶ Prior to *Beckles*, only the Eleventh Circuit had explicitly held that the holding in *Johnson* did not affect the residual clause in §4B1.2.⁹⁷ In cases abrogated by *Beckles*, the Third, Sixth, and Tenth Circuits had explicitly held that the holding in *Johnson* rendered the residual clause in §4B1.2 void for vagueness.⁹⁸ The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits either accepted the government’s concessions, or assumed without deciding, that *Johnson* applies and remanded cases for resentencing.⁹⁹ Thus, following the holding in *Beckles*, defendants sentenced as career offenders under the residual clause of §4B1.2 prior to its amendment cannot challenge their career offender status on this basis.

The Supreme Court held that generic burglary in the ACCA includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight habitation, including a mobile home, recreational vehicle, trailer, or camping tent.¹⁰⁰ In *United States v. Stitt*, the Court based its conclusion on the principle articulated in *Taylor* that the

⁹⁵ See USSG App. C, amend. 798 (effective Aug. 1, 2016).

⁹⁶ 137 S. Ct. 886 (2017).

⁹⁷ *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) (holding that *Johnson* did not make the residual clause of §4B1.2(a) also unconstitutionally vague).

⁹⁸ See *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016) (“Our reading of the current state of the law as established by the Supreme Court compels our holding that the rationale of *Johnson* applies equally to the residual clause of the Guidelines.”); *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015) (“In light of the Supreme Court’s decision in [*Johnson*], we hold that the residual clause [in §4B1.2] is unconstitutionally vague”); *United States v. Townsend*, 638 F. App’x 172 (3d Cir. 2015) (unpublished) (holding that *Johnson* applies to identical language in the guidelines’ career offender enhancement).

⁹⁹ See *United States v. Hudson*, 823 F.3d 11,18 (1st Cir. 2016) (accepting the government’s concession that *Johnson*’s holding “invalidates the district court’s application of United States Sentencing Guidelines §4B1.4(b)”); *United States v. Maldonado*, 636 Fed. App’x 807, 810 (2d Cir. 2016) (unpublished) (“We therefore proceed on the assumption that the Supreme Court’s reasoning with respect to the ACCA’s residual clause applies to the identically worded Guideline §4B1.2(a)(2)’s residual clause.”); *United States v. Frazier*, 621 F. App’x 166, 168 (4th Cir. 2015) (unpublished) (assuming without deciding that *Johnson* applies to the guidelines); *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015) (“[W]e proceed on the assumption that the Supreme Court’s reasoning applies to section 4B1.2 as well.”); *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015) (remanding for resentencing without deciding whether the guideline is unconstitutionally vague); *United States v. Willis*, 795 F.3d 986, 996 (9th Cir. 2015) (“It is an open question, however, whether this residual clause [in §4B1.2(a)] remains valid in light of *Johnson*...”).

¹⁰⁰ *United States v. Stitt*, 139 S. Ct. 399 (2018).

definition of a generic offense under the ACCA should reflect the sense in which the offense was understood in the criminal law of most states at the time of the enactment of the Act. The Court also noted that the risk of violent confrontation between intruder and occupant, which is the danger inherent in burglary, is present in the entry of an inhabited vehicle just as it is present in the entry of a residential home.

The Supreme Court also recently focused on the level of force necessary for a robbery offense to qualify as a violent felony under the elements clause of the ACCA. In *Stokeling v. United States*, the Court held the level of force required to qualify as a violent felony under the ACCA is force sufficient to overcome the victim's resistance, finding this conclusion consistent with the common law understanding of robbery at the time the ACCA was enacted and the majority of state law definitions of robbery.¹⁰¹

III. FIREARMS GUIDELINE: §2K2.1

A. GENERALLY

The offense level at §2K2.1 is determined principally by the type of firearm in question, the defendant's prior convictions for violent felonies or drug-related felonies, and the defendant's status as a person prohibited by law from possessing firearms (for example, a convicted felon or an illegal alien), in addition to other offense and offender characteristics, as discussed below. The base offense level ranges from **6** to **26**, depending on which of these characteristics are present.

B. DEFINITIONS

The guideline defines "firearm" as it is defined in 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", *but* does not include an "antique firearm."¹⁰² Generally, the circuit courts are in agreement that section 921(a)(3) requires the government only to prove that the firearm in question was designed to fire a projectile, not that the firearm was operable at the time the offense occurred.¹⁰³

¹⁰¹ 139 S. Ct. 544 (2019).

¹⁰² An "antique firearm" is defined at 18 U.S.C. § 921(a)(16) to mean, generally, (A) any firearm manufactured before 1898, (B) a replica of a firearm manufactured before 1898, or (C) a muzzle loading firearm designed to use black powder.

¹⁰³ *See, e.g.,* *United States v. Davis*, 668 F.3d 576 (8th Cir. 2012); *United States v. Gwyn*, 481 F.3d 849 (D.C. Cir. 2007) (faulty firing pin); *United States v. Rivera*, 415 F.3d 284 (2d Cir. 2005) (firing pin broken; firing pin

The alternative offense levels at §2K2.1(a)(1)(A)(i), (a)(3)(A)(i), and (a)(4)(B)(i)(I) apply if the offense involved a “semiautomatic firearm that is capable of accepting a large capacity magazine.” As defined in Application Note 2,

a “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm”, but does *not* mean “a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

The Eleventh Circuit has held that “close proximity” for purposes of the application note accounts for both physical distance and accessibility, thus the enhancement is applicable when a firearm is locked in a case in a room ten feet away from a high-capacity magazine.¹⁰⁴ One circuit has found that application of the alternative offense level at §2K2.1(a)(3) is applicable to the possession of an inoperable semiautomatic assault weapon unless the weapon has been rendered permanently inoperable.¹⁰⁵

A provision of the National Firearms Act,¹⁰⁶ 26 U.S.C. § 5845(a), separately defines “firearm” in a more limited fashion than 18 U.S.C. § 921(a)(3). Its definition includes certain shotguns, rifles, machineguns, silencers, destructive devices, and

any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire.¹⁰⁷

channel blocked); *United States v. Brown*, 117 F.3d 353 (7th Cir. 1997) (firing pin removed by undercover law enforcement agent); *United States v. Hunter*, 101 F.3d 82 (9th Cir. 1996) (firing pin bent); *United States v. Yannott*, 42 F.3d 999 (6th Cir. 1994) (firing pin broken); *United States v. Ruiz*, 986 F.2d 905 (5th Cir. 1993) (damaged hammer); *United States v. Martinez*, 912 F.2d 419 (10th Cir. 1990) (unloaded firearm); *United States v. York*, 830 F.2d 885 (8th Cir. 1987) (missing firing pin).

¹⁰⁴ *United States v. Gordillo*, 920 F.3d 1292 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 294 (Oct. 7, 2019).

¹⁰⁵ *See United States v. Davis*, 668 F.3d 576 (8th Cir. 2012).

¹⁰⁶ *See National Firearms Act*, Pub. L. No. 73-757, 48 Stat. 1236 (1934), as amended by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1230.

¹⁰⁷ *See* 26 U.S.C. § 5845(e).

Section 5845(a)'s definition excludes antique firearms¹⁰⁸ and those found to be "primarily . . . collector's item[s]."¹⁰⁹

The alternative offense levels at §§2K2.1(a)(1)(B), (a)(2), (a)(3)(B), and (a)(4)(A) apply if the defendant committed any part of the instant offense subsequent to sustaining one or more crimes of violence or a controlled substance offense. For an offense to qualify as a crime of violence under §4B1.2(a), it must have been "punishable by imprisonment for a term exceeding one year." The term "punishable" signifies that the defendant himself need not have received a sentence in excess of one year; rather, the particular statute of conviction must have carried a possible penalty of greater than one year. The conviction may be under state or federal law. To qualify as a controlled substance offense under §4B1.2, like a crime of violence, the offense must be punishable by a term of imprisonment of more than one year and may be a violation of state or federal law.

As defined in Application Note 1, a "crime of violence" has the meaning given that term in §4B1.2(a). Circuit courts have held that prior convictions for aggravated assault are not crimes of violence if they do not satisfy the force clause or the enumerated offense clause of the crime of violence definition.¹¹⁰

In 2016, the Commission promulgated an amendment to clarify the definition of the term "crime of violence" in §4B1.2.¹¹¹ This amendment did not change the "elements clause" of the definition, but modified the "enumerated clause" and removed the "residual clause" completely. Under the new definition, a crime of violence is a federal or state offense punishable by a term of imprisonment exceeding one year that has as an element the use, attempted use, or threatened use of physical force against another person. The guideline now specifies several offenses that fit in this category, including murder,

¹⁰⁸ Like 18 U.S.C. § 921, 26 U.S.C. § 5845(g) defines "antique firearm" to mean, generally, any firearm manufactured before 1898 or a replica of such a firearm. Unlike § 921, a muzzle loading firearm designed to use black powder is not included under § 5845.

¹⁰⁹ See 26 U.S.C. § 5845(a).

¹¹⁰ See *United States v. Harris*, 907 F.3d 1095 (8th Cir. 2018) (per curiam) (holding prior state conviction for second-degree domestic assault not crime a violence under §4B1.2 because offense could be committed recklessly); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018) (holding generic form of aggravated assault requires extreme indifference *mens rea*, citing *United States v. Barcenas-Yanez*, 826 F.3d 752, 758 (4th Cir. 2016)); *United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010), *abrogated on other grounds by* *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1025 (9th Cir. 2009) (per curiam) *with* *United States v. Mungia-Portillo*, 484 F.3d 813, 817 (5th Cir. 2007). See also *United States v. Benitez-Beltran*, 892 F.3d 462 (1st Cir. 2018) (holding under categorical approach a prior conviction of attempted murder is crime of violence under enumerated offense clause).

¹¹¹ See USSG App. C, amend. 798 (effective Aug. 1, 2016).

voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

The commentary to the guideline similarly defines the term “controlled substance offense” punishable by more than one year, by reference to §4B1.2, which in turn defines the term as any felony violation of a law “that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense” the substance. As with “crime of violence,” some of the issues surrounding the definition of this term are discussed separately below; *see* Section VII.B, *infra*.

At 18 U.S.C. §§ 922(g) and (n), referenced in Application Note 3 to §2K2.1, a defendant is a prohibited person, for purposes of this section, if he: has been convicted of a crime punishable by more than one year of imprisonment; “is a fugitive from justice;” “is an unlawful user of or addicted to any controlled substance;” “has been adjudicated as a mental defective or []has been committed to a mental institution;” is an illegal alien or a non-citizen in the country pursuant to certain types of visas; has been dishonorably discharged from the Armed Forces; has renounced his citizenship; is subject to certain court orders relating to domestic violence; has been convicted of a misdemeanor crime of domestic violence; or is under indictment for a crime punishable by imprisonment for a term exceeding one year.¹¹²

C. SPECIFIC OFFENSE CHARACTERISTICS

The specific offense characteristics represent various increases or decreases to the base offense level described above. A number of common application issues arise when determining whether a particular specific offense characteristic applies.

1. Multiple Firearms – §2K2.1(b)(1)

If a defendant possesses three or more firearms, §2K2.1(b)(1) specifies an increase in the base offense level of two, four, six, eight or ten levels, depending on the number of firearms. Possession can be actual or constructive.¹¹³

¹¹² *See* 18 U.S.C. §§ 922(g) and 922(n).

¹¹³ *See, e.g.,* United States v. Goldsberry, 888 F.3d 941, 943–44 (8th Cir. 2018) (finding although his fingerprint was only found on one firearm, enhancement was appropriate where other firearms were located at address defendant used when booked into custody).

In determining the number of firearms possessed for purposes of this specific offense characteristic, it is important to note that §2K2.1 is listed at §3D1.2(d) (Groups of Closely Related Counts) and therefore is subject to the provisions of §1B1.3(a)(2) (Relevant Conduct). As a result, if a court finds by a preponderance of the evidence that the defendant illegally possessed firearms other than those charged in the indictment as a part of the same course of conduct, or as part of a common scheme or plan with the charged firearm(s), the additional firearms will also be counted.¹¹⁴ However, the Sixth Circuit found the possession of one firearm four months before a conviction for possession of two other firearms while being an unlawful user of a controlled substance was not relevant conduct because the circumstances of the earlier possession were not related to the offense of conviction, based on a lack of regularity, similarity, and temporal proximity.¹¹⁵

Application Note 5 to §2K2.1 also emphasizes that any firearms *lawfully* sought, possessed or distributed by the defendant are *not* counted. Courts have reached different conclusions about whether a firearm illegally possessed under state law but legal under federal law is counted for purposes of the enhancement.¹¹⁶ Traditional doctrines of constructive possession may apply.¹¹⁷

The First Circuit held, in *United States v. Matos-de-Jesus*,¹¹⁸ that the district court did not err in varying upwards based in part on the defendant's possession of two firearms. The defendant argued that because §2K2.1(b)(1) increases penalties for possession of three or more firearms, the guidelines treat possession of one or two firearms the same and that considering the second firearm operated as impermissible double counting. The court rejected this argument, finding that the guidelines did not address possession of two

¹¹⁴ See *United States v. Goodson*, 920 F.3d 1209 (8th Cir. 2019) (defendant's statement that he handled a firearm a month prior to instant offense amounts to unlawful possession, because defendant was a convicted felon at the time of the handling and "handling" implies control or intent); *United States v. Maturino*, 887 F.3d 716 (3d Cir.), *cert. denied*, 139 S. Ct. 240 (Oct. 1, 2018) (enhancement at §2K2.1(b)(1) applies based on number of firearms sought even if number obtained is less).

¹¹⁵ *United States v. Bowens*, 938 F.3d 790 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 814 (Jan. 13, 2020).

¹¹⁶ Compare *United States v. Gill*, 864 F.3d 1279, 1280–81 (11th Cir. 2017) (firearm can be counted under §2K2.1(b)(1) if illegal under state law even if legal under federal law), with *United States v. Ahmad*, 202 F.3d 588 (2d Cir. 2000) (only firearms illegal under federal law count for purposes of enhancement).

¹¹⁷ See, e.g., *United States v. Foster*, 891 F.3d 93, 111 (3d Cir. 2018) ("Constructive possession exists if an individual knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons," quoting *United States v. Iafelice*, 978 F.2d 92, 96 (3d Cir. 1992)); *United States v. Eastham*, 618 F. App'x. 421, 423 (10th Cir. 2015) (unpublished) ("To establish possession, the government can show either actual or constructive possession of the firearms.").

¹¹⁸ 856 F.3d 174 (1st Cir. 2017).

firearms and nothing in the guidelines or any federal criminal statute prohibited consideration of this factor.¹¹⁹

2. Sporting Purposes or Collection – §2K2.1(b)(2)

For certain defendants, a reduction in the offense level is specified at §2K2.1(b)(2) where the court finds that the defendant “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.”¹²⁰ If the court finds that this provision applies, the offense level is reduced to six. The reduction applies to base offense levels determined under subsections (a)(6)–(a)(8) (offense levels **14–16**) but does not apply to base offense levels determined under subsections (a)(1)–(a)(5) (offense levels **26–18**) of §2K2.1. The defendant bears the burden of proving the applicability of this reduction.¹²¹ However, the guidelines do not state a requirement that a defendant produce evidence of actual *use* of the firearms in question, only that the firearms were *possessed* for sporting or collection purposes.¹²² A district court’s finding is reviewed for clear error on appeal.¹²³ Applicability of the reduction is determined by examining the “surrounding circumstances” including “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.”¹²⁴ Selling weapons will not disqualify a defendant from this reduction, “unless the sales are so extensive that the defendant becomes a dealer (a person who trades for profit) rather than a collector (a person who trades for betterment of his holdings).”¹²⁵ “Plinking,” a form of target shooting for amusement and recreation, can be a sporting purpose under the guidelines.¹²⁶

¹¹⁹ *Id.* at 178–79.

¹²⁰ USSG §2K2.1(b)(2).

¹²¹ *United States v. Keller*, 947 F.2d 739 (5th Cir. 1991).

¹²² *United States v. Mason*, 692 F.3d 178 (2d Cir. 2012).

¹²³ *See United States v. Massey*, 462 F.3d 843 (8th Cir. 2006).

¹²⁴ USSG §2K2.1(b)(2), comment (n.6).

¹²⁵ *United States v. Miller*, 547 F.3d 718, 721 (7th Cir. 2008) (citing *United States v. Clingan*, 254 F.3d 624 (6th Cir. 2001)).

¹²⁶ *See, e.g., United States v. Hanson*, 534 F.3d 1315, 1317 (10th Cir. 2008) (citing *United States v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999)); *United States v. Bossinger*, 12 F.3d 28 (3d Cir. 1993).

If the defendant admits, or the evidence indicates, that he possessed the gun for personal protection, the reduction does not apply, as the provision specifies that the firearm must be possessed *solely* for lawful sporting purposes or collection.¹²⁷

3. Stolen Firearms/Altered or Obliterated Serial Numbers – §2K2.1(b)(4)

Section 2K2.1(b)(4)(A) provides for an enhancement where a firearm is stolen and (b)(4)(B) provides an enhancement where a firearm has an altered serial number. Prior to November 1, 2006, possession of either stolen firearms or firearms with altered or obliterated serial numbers subjected a defendant to a 2-level enhancement. After the Commission amended §2K2.1(b)(4) in 2006, stolen firearms still lead to a 2-level enhancement, but firearms with altered or obliterated serial numbers lead to a 4-level enhancement.¹²⁸ Note that a defendant need not have *known* that a firearm he illegally possessed was stolen¹²⁹ or had an altered or obliterated serial number.¹³⁰

¹²⁷ United States v. Moore, 860 F.3d 1076, 1078 (8th Cir. 2017) (evidence of the defendant’s interest in hunting, fishing, and gun competitions was insufficient where defendant acknowledged gun was also for protection); United States v. Wyckoff, 918 F.2d 925 (11th Cir. 1990).

¹²⁸ See USSG App. C, amend 691 (effective Nov. 1, 2006).

¹²⁹ See United States v. Prien-Pinto, 917 F.3d 1155 (9th Cir.), *cert. denied*, 140 S. Ct. 172 (Oct. 7, 2019) (strict liability of §2K2.1(b)(4) is constitutional); United States v. Gonzalez, 857 F.3d 46 (1st Cir. 2017) (lack of *mens rea* requirement does not violate due process and is not contrary to congressional intent); United States v. Taylor, 659 F.3d 339, 343–44 (4th Cir. 2011) (holding that the lack of a scienter requirement in the stolen firearm enhancement is permissible); United States v. Bates, 584 F.3d 1105 (8th Cir. 2009); United States v. Murphy, 96 F.3d 846, 848–49 (6th Cir. 1996) (holding the enhancement does not violate due process despite the absence of a scienter requirement); United States v. Griffiths, 41 F.3d 844 (2d Cir. 1994) (same); United States v. Richardson, 8 F.3d 769 (11th Cir. 1993) (same); United States v. Mobley, 956 F.2d 450 (3d Cir. 1992) (same); United States v. Schnell, 982 F.2d 216, 219–22 (7th Cir. 1992) (recounting that the Sentencing Commission intends the enhancement to apply regardless of defendant’s knowledge that the firearm is stolen); United States v. Taylor, 937 F.2d 676, 682 (D.C. Cir. 1991) (same); United States v. Singleton, 946 F.2d 23, 26–27 (5th Cir. 1991) (lack of scienter permissible).

¹³⁰ See United States v. Starr, 361 F. App’x 60 (11th Cir. 2010) (unpublished); United States v. Perez, 585 F.3d 880, 883 (5th Cir. 2009) (holding that the enhancement does not require defendant to know the serial number is altered or obliterated); United States v. Shabazz, 221 F. App’x 529, 530 (9th Cir. 2007) (unpublished) (“[T]he enhancement applies without regard to a defendant’s mental state.”); United States v. Webb, 403 F.3d 373 (6th Cir. 2005) (same); United States v. Abernathy, 83 F.3d 17, 19 (1st Cir. 1996) (“[T]his enhancement explicitly applies ‘whether or not the defendant knew or had reason to believe that the firearm . . . had an altered or obliterated serial number.’”); United States v. Williams, 49 F.3d 92, 93 (2d Cir. 1995) (“Nor is due process offended by a strict liability construction of [the enhancement]....”); United States v. Schnell, 982 F.2d 216, 219–22 (7th Cir. 1992) (stating absence of the enhancement’s scienter requirement does not violate substantive due process); United States v. McMahon, 153 F.3d 729 (10th Cir. 1998) (unpublished) (same); see also United States v. Leake, 396 F. App’x 898, 905 (3d Cir. 2010) (unpublished) (stating that *Kimbrough* does not force a district court to analyze the empirical grounding of the enhancement’s lack of a *mens rea* requirement).

If the defendant steals the firearm in a burglary, the enhancement applies.¹³¹ Courts have held that for purposes of the enhancement, the term “stolen” should be interpreted broadly and that a gun can be classified as stolen once taken from the owner without permission even if the defendant did not personally steal it from the owner.¹³²

The Ninth Circuit has held that “the phrase ‘altered or obliterated’ cannot support the contention that a firearm’s serial number must be rendered scientifically untraceable for” the provision to apply.¹³³ Rather, the court said, the provision applies when the serial number “is materially changed in a way that makes accurate information less accessible.”¹³⁴ The enhancement applies even where partially obliterated serial numbers can be discerned through use of microscopy or other techniques.¹³⁵ The First, Fifth, Eighth, and Eleventh Circuits have held that if a firearm has more than one serial number on it, only one of the serial numbers needs to be altered to trigger the enhancement.¹³⁶

To avoid double counting, Application Note 8 states that the enhancement should not apply if the only offense to which §2K2.1 applies is one of several specified offenses themselves involving stolen firearms or firearms with altered or obliterated serial numbers and the base offense level is determined under subsection (a)(7).¹³⁷ It is not double counting, therefore, to impose the enhancement even if the fact the firearm was stolen is an element of the offense for which the defendant was convicted if the defendant is also convicted of another firearm offense.¹³⁸

¹³¹ United States v. Goff, 314 F.3d 1248, 1249 (10th Cir. 2003) (collecting cases); United States v. Hurst, 228 F.3d 751 (6th Cir. 2000).

¹³² United States v. Colby, 882 F.3d 267 (1st Cir.), *cert. denied*, 138 S. Ct. 2664 (June 18, 2018) (gun was “stolen” where a friend had taken the gun from her mother’s closet without permission and another friend took the gun from her friend’s closet).

¹³³ United States v. Carter, 421 F.3d 909, 916 (9th Cir. 2005).

¹³⁴ *Id.*; *see also* United States v. Fuller-Ragland, 931 F.3d 456 (6th Cir. 2019); United States v. Perez, 585 F.3d 880 (5th Cir. 2009) (holding that the district court did not err in finding that the serial number of a firearm was materially changed even though damage to the number did not render it unreadable).

¹³⁵ *See, e.g.*, United States v. Jones, 643 F.3d 257 (8th Cir. 2011).

¹³⁶ United States v. Jones, 927 F.3d 895 (5th Cir. 2019); United States v. Thigpen, 848 F.3d 841, 845–46 (8th Cir. 2017); United States v. Warren, 820 F.3d 406, 408 (11th Cir. 2016) (*per curiam*); United States v. Serrano-Mercado, 784 F.3d 838, 850 (1st Cir. 2015).

¹³⁷ *See, e.g.*, United States v. Dudley, 509 F. App’x 739 (10th Cir. 2013) (unpublished).

¹³⁸ *See, e.g.*, United States v. Shelton, 905 F.3d 1026 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 2624 (May 20, 2019).

4. Trafficking – §2K2.1(b)(5)

The guideline at §2K2.1 provides a 4-level enhancement if the defendant trafficked in firearms at §2K2.1(b)(5). Application Note 13(A)(i) defines “trafficking” for purposes of this enhancement, requiring two elements: the defendant must have “transported, transferred, or otherwise disposed of two or more firearms to another individual, or received [such] firearms with the intent to [do so]” *and* the defendant must have known or had reason to believe these acts would cause the firearms to be transferred to an individual who either (i) could not legally possess them or (ii) who intended to use or dispose of them unlawfully.¹³⁹ The Sixth Circuit interpreted the requirement at §2K2.1(b)(5) that two or more firearms be transferred to “*another individual*” to mean that that at least two firearms must be transferred to the same individual, and not to multiple individuals in the aggregate.¹⁴⁰ In that case, which involved an undercover agent posing as a prohibited person, the Sixth Circuit also held that the transferee did not need to have actually been a felon for the enhancement to apply, as long as the defendant had reason to believe the possession or receipt of the firearm would be unlawful.¹⁴¹ The Tenth Circuit disagreed, holding that the government must show the transferee was actually an unlawful possessor for the enhancement to apply.¹⁴²

Application Note 13(C) states that where “the defendant trafficked substantially more than 25 firearms. . . an upward departure may be warranted.”¹⁴³

¹³⁹ See, e.g., *United States v. Juarez*, 626 F.3d 246, 252–53 (5th Cir. 2010) (finding the clandestine nature of the firearms transactions and \$200 premium per firearm sufficient to cause reason to believe the weapons were intended for unlawful use (export to Mexican drug cartels) and justified the enhancement); *United States v. Garcia*, 635 F.3d 472 (10th Cir. 2011); cf. *United States v. Moody*, 915 F.3d 425, 428 (7th Cir. 2019) (finding district court erred in presuming defendant could not have believed several buyers of stolen firearms did not want those firearms to support other unlawful activity because “that’s who buys guns that have been stolen off a train.”).

¹⁴⁰ *United States v. Henry*, 819 F.3d 856, 871 (6th Cir. 2016) (improper to apply enhancement where defendant sold one firearm to confidential informant and one firearm to undercover agent; “‘[A]nother’ indicates that the noun that follows it is singular.”).

¹⁴¹ *Id.* at 870 (“[T]he agent need not have *actually* been a felon for §2K2.1(b)(5) to apply.”) (emphasis in original). See also *United States v. Fields*, 608 F. App’x 806, 813 (11th Cir. 2015) (unpublished) (“Because nothing in the Guidelines commentary suggests that defendant’s belief must be true, [the defendant’s] focus on the fact he transferred firearms solely to an undercover officer is unpersuasive.”); *United States v. Sacus*, 784 F.3d 1214, 1218 (8th Cir. 2015) (affirming enhancement where defendant sold firearms to undercover agent who claimed to have felony convictions).

¹⁴² *United States v. Francis*, 891 F.3d 888, 896 (10th Cir. 2018) (disallowing application of enhancement when transferee is undercover agent and not a prohibited person).

¹⁴³ See, e.g., *United States v. Hernandez*, 633 F.3d 370, 378–79 (5th Cir. 2011) (affirming an upward departure pursuant to §5K2.0 for trafficking 103 firearms to Mexican drug cartels).

Application Note 13(D) explains that if the defendant both possessed and trafficked three or more firearms, *both* the specific offense characteristics for number of firearms and trafficking would apply. The Second, Fifth, and Seventh Circuits have held that it is impermissible double counting to apply a §2K2.1(b)(5) “trafficking enhancement” in combination with a §2K2.1(b)(6) “another felony offense” enhancement when they are based on the same trafficking offense.¹⁴⁴

5. Firearms Leaving the United States – §2K2.1(b)(6)(A)

Section 2K2.1(b)(6)(A) provides for an enhancement where the defendant “possessed any firearm or ammunition while leaving or attempting to leave the United States” or possessed or transferred the same with knowledge, intent or reason to believe it would be transported outside the United States. Prior to 2011, when the Commission added what is now subsection (b)(6)(A), some courts applied what is now §2K2.1(b)(6)(B) to cases in which the defendant transported or attempted to transport firearms across an international border of the United States. Those courts concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as “another felony offense” for purposes of subsection (b)(6).¹⁴⁵

For clarity, and to promote consistency of application, in 2011 the Commission amended §2K2.1 to add a new prong (A) in subsection (b)(6) that applies “[i]f the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transported any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States,” and redesignated the existing provision as prong (B).¹⁴⁶ Under the amendment, a defendant receives a 4-level enhancement and minimum offense level 18 if either prong applies.

¹⁴⁴ United States v. Young, 811 F.3d 592 (2d Cir. 2016), *cert. denied*, 139 S. Ct. 652 (Dec. 10, 2018); ; United States v. Guzman, 623 F. App’x 151 (5th Cir. 2015) (unpublished); United States v. Johns, 732 F.3d 736 (7th Cir. 2013); *see also* United States v. Velasquez, 825 F.3d 257, 259 (5th Cir. 2016) (“Although our opinion in *Guzman* is unpublished, it is nonetheless persuasive.”).

¹⁴⁵ *See, e.g.*, United States v. Juarez, 626 F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying §2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. § 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such violations by up to 20 years’ imprisonment); *see also* discussion *supra* regarding 22 U.S.C. § 2778 and §2M5.2.

¹⁴⁶ *See* USSG App. C, amend. 753 (effective Nov. 1, 2011).

6. Firearm or Ammunition Possessed “in connection with” Another Offense – §2K2.1(b)(6)(B)

Section 2K2.1(b)(6)(B) provides an enhancement 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.”¹⁴⁷

Application Note 14(A) to §2K2.1 provides that a firearm or ammunition is possessed “in connection with” an offense if it “facilitated, or had the potential of facilitating” a felony offense.¹⁴⁸ The enhancement applies equally to firearms and ammunition only cases.¹⁴⁹ The defendant need not be convicted of another felony offense for the enhancement to apply, but the court must find by a preponderance of the evidence that the felony offense was committed.¹⁵⁰

Application Note 14(B) further discusses the “in connection with” requirement when the other offense is burglary or a drug offense. The note provides that the firearm is possessed in connection with a burglary when the defendant finds and takes the firearm in the course of committing the burglary. The defendant need not have used the firearm in any other way in the course of the burglary.¹⁵¹

¹⁴⁷ USSG §2K2.1(b)(6)(B) (emphasis added). A 2011 amendment redesignated the “in connection with” enhancement at §2K2.1(b)(6) as §2K2.1(b)(6)(B). See USSG App. C, amend. 753 (effective Nov. 1, 2011).

¹⁴⁸ Prior to 2006, circuits were split regarding the interpretation of the “in connection with” requirement of §2K2.1(b)(6)(B). Most circuits applied the rule announced by the Supreme Court in *Smith v. United States*, in which the Court interpreted the phrase “in relation to” as it is used in 18 U.S.C. § 924(c)(1); “the firearm must have some purpose or effect with respect to the . . . crime; its presence or involvement cannot be the result of accident or coincidence.” Other circuits declined to adopt this standard. The Commission resolved the circuit conflict in 2006, adopting the majority position in Amendment 691.

¹⁴⁹ *United States v. Eaden*, 914 F.3d 1004, 1010 (5th Cir. 2019) (vacating application of enhancement where the defendant possessed ammunition “stored in close proximity” to drugs but no firearm, finding no presumption that ammunition found close to drugs in a drug trafficking offense facilitated the offense), *but see United States v. Coleman*, 627 F.3d 205, 212 (6th Cir. 2010) (applying the “fortress theory” to find possession of ammunition stored in close proximity to drugs alone facilitated or had potential to facilitate felony drug trafficking offense by emboldening defendant in knowledge he was “one step closer to having a fully-loaded firearm to protect himself.”).

¹⁵⁰ See, e.g., *United States v. Hemsher*, 893 F.3d 525, 534 (8th Cir.), *cert. denied*, 139 S. Ct. 470 (Nov. 5, 2018).

¹⁵¹ See, e.g., *United States v. Canamore*, 916 F.3d 718, 721 (8th Cir. 2019) (per curiam); *United States v. Brake*, 904 F.3d 97, 102 (1st Cir.), *cert. denied*, 139 S. Ct. 577 (Nov. 19, 2018) (holding application of §§2K2.1(b)(4) and (b)(6) not double counting; §2K2.1(b)(6) addresses risk that possessing firearm during burglary might facilitate potentially more serious crime and §2K2.1(b)(4) addresses prior theft of firearm without regard to risk of use in further criminal act); *United States v. Blackburn*, 344 F. App’x 481, 484 (10th Cir. 2009) (unpublished); *United States v. Young*, 336 F. App’x 954, 959 (11th Cir. 2009) (unpublished) (per curiam).

When the other offense is a drug trafficking offense, the application note explains that if “a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia,” it is possessed “in connection with” the drug trafficking offense. Some courts have interpreted the guideline to mean that, in drug trafficking cases, “[t]he enhancement must be imposed unless it is clearly improbable that [the defendant] possessed the firearm in connection with another felony offense.”¹⁵² In such cases, then, the defendant must demonstrate that it is “clearly improbable” that the required relationship exists in order to avoid the enhancement. (The same rule applies to the enhancement at §2D1.1(b)(1), which provides a 2-level enhancement in drug trafficking cases “[i]f a dangerous weapon (including a firearm) was possessed.”). Courts have varied in whether they find proximity alone to be sufficient in these cases and the degree of fact-finding required to find a nexus between the drugs and guns.¹⁵³

In upholding application of the enhancement under the fortress theory, the Sixth Circuit considered the proximity of the firearm to the drugs, whether there was an innocent explanation for the presence of the weapon, including personal protection, the type of firearm, whether the firearm was loaded, the accessibility of the firearm, and the amount of drugs in proximity to the firearm.¹⁵⁴ Typically, where the defendant has exchanged drugs for guns, the enhancement will apply.¹⁵⁵ Because the explanatory language in the

¹⁵² United States v. Agee, 333 F.3d 864, 866 (8th Cir. 2003).

¹⁵³ Compare United States v. Clinton, 825 F.3d 809, 813–15 (7th Cir. 2016) (reversing enhancement because “[t]here was also little evidence regarding [defendant’s] drug trafficking activities that would support a determination that the firearm” facilitated any offense: firearm kept in closet in bedroom without any evidence of drugs was not in close enough proximity to drug evidence in living room under couch and error to find drugs were exchanged for a weapon where factual finding was merely that purchaser was a drug addict) with United States v. Johnson, 654 F. App’x 427, 428 (11th Cir. 2016) (unpublished) (“Mere possession of a firearm can be enough to apply a sentencing enhancement because drugs and guns generally go together, and the firearm was not required to serve a purpose related to the crime.”). See also United States v. Brockman, 924 F.3d 988, 991–92 (8th Cir. 2019) (enhancement proper where defendant usually sells half the marijuana he buys, drugs were packaged for distribution even if he did not plan to profit and drugs and firearms were found on his person).

¹⁵⁴ See United States v. Shanklin, 924 F.3d 905, 920 (6th Cir. 2019). See also United States v. Seymour, 739 F.3d 923, 929 (6th Cir. 2014); United States v. Taylor, 648 F.3d 417, 432 (6th Cir. 2011); United States v. Angel, 576 F.3d 318, 321 (6th Cir. 2009).

¹⁵⁵ See, e.g., United States v. Schmitt, 770 F.3d 524, 538–40 (7th Cir. 2014) (enhancement properly applied where preponderance of the evidence supported a finding that he purchased the firearm in exchange for cash and drugs and sold drugs in order to obtain the firearm); Clinton, 825 F.3d at 812 (“We have held that the §2K2.1(b)(6)(B) enhancement is proper when the defendant has engaged in an exchange of drugs for a weapon.”); See United States v. Ryan, 935 F.3d 40, 43 (2d Cir. 2019) (recognizing the “well-known connection between firearms and drug trafficking” to find that selling a shotgun and more heroin than previously negotiated in lieu of not supplying an agreed upon second firearm warranted enhancement because the shotgun “sweeten[ed] the pot” and facilitated drug sale). But see United States v. Gates, 845 F.3d 310 (7th Cir. 2017) (error to apply enhancement where defendant accepted gun as collateral for drugs and then sold gun

application note discusses only firearms, the Fifth Circuit has held that although the possession of ammunition alone can facilitate a drug trafficking offense for application of the enhancement, there is no presumption of facilitation when the ammunition alone is present.¹⁵⁶

The Eighth Circuit, however, emphasized one limitation on this rule: in a case in which the defendant was not alleged to have been a drug trafficker or to have carried the drugs and firearm outside his home, and the “other offense” in question was possession of trace amounts of methamphetamine (residue in a baggie), the court reversed the district court’s application of the enhancement, concluding that “the mere presence of drug residue . . . and firearms alone is [in]sufficient to prove the ‘in connection with’ requirement . . . when the ‘felony offense’ is drug possession.”¹⁵⁷ However, where a defendant has “user” amounts of drugs, more than mere residue, and there are other factors that indicate that the firearm could facilitate another felony, the enhancement may apply.¹⁵⁸

In *United States v. Jackson*,¹⁵⁹ the Sixth Circuit reversed application of the enhancement where a defendant made separate sales of a gun and drugs to a confidential informant. The court explained that, although the defendant sold “both a gun and drugs in quick succession,” the Government’s burden was to prove that the gun facilitated or had the potential of facilitating the other offense in some way and “the conduct here does not

to confidential informant for money and also gave informant drugs; in neither case was the gun used to facilitate a drug crime).

¹⁵⁶ *United States v. Eaden*, 914 F.3d 1004, 1007 (5th Cir. 2019).

¹⁵⁷ *United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008); *cf.* *United States v. Bishop*, 940 F.3d 1242 (11th Cir. 2019), *cert. denied*, No. 19-6675, 2020 WL 981869 (Mar. 2, 2020) (enhancement not proper where defendant possessed one hydromorphone pill, a drug possession offense, and there was no finding the firearm facilitated or had the potential of facilitating the possession of the pill); *United States v. Walker*, 900 F.3d 995 (8th Cir. 2018) (enhancement not appropriate where evidence does not show simultaneous possession of firearm and drugs where stolen firearm found in locked trunk of car and user quantity of drugs found in passenger compartment); *United States v. Johnson*, 846 F.3d 1249, 1250–51 (8th Cir. 2017) (same); *United States v. Butler*, 594 F.3d 955, 966 (8th Cir. 2010) (distinguishing *Smith* when the defendant possessed more than a “‘user’ amount of drugs”); *see also* *United States v. Jeffries*, 587 F.3d 690, 694 (5th Cir. 2009) (drug-possession felonies trigger enhancement only if the court makes an affirmative finding that the firearm facilitated, or had the potential to facilitate, the drug possession).

¹⁵⁸ *See* *United States v. Jarvis*, 814 F.3d 936, 938 (8th Cir. 2016) (enhancement appropriate even though felony offense was not trafficking because defendant left home with heroin and a loaded firearm in the same pocket and defendant had prior drug distribution conviction); *see also* *United States v. Briggs*, 919 F.3d 1030 (7th Cir. 2019) (reversing application of enhancement where court applied it solely based on felony possession of less than half a gram of cocaine, finding mere contemporaneous possession of firearm and drugs without additional facts insufficient).

¹⁵⁹ 877 F.3d 231, 242–43 (6th Cir. 2017).

provide sufficient reason to conclude that these were anything but independent sales of guns and drugs—both illegal and rightly punishable, but not subject to the extra punishment that our laws reserve for those who make the bad choice of mixing the two.”¹⁶⁰

In 2014, the Commission resolved another circuit split affecting both §2K2.1(b)(6)(B) and the §2K2.1(c)(1) cross reference. Circuits had disagreed over whether certain relevant conduct principles in §1B1.3(a)(2) operated to restrict application of these enhancements so that they applied only to offenses that would “group” under the rule in §3D1.2(c).¹⁶¹ Amendment 784 clarified that there was no such restriction; the SOC may apply to “grouping” and “non-groupable” offenses alike.¹⁶²

D. CROSS REFERENCE – §2K2.1(c)(1)

The cross reference at §2K2.1 provides for the use of another guideline “[i]f the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the 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 offense” and “if the resulting offense level is greater than that determined above.”

Application Note 14(C) defines “another offense” for purposes of this provision as “any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.” Subsection (c)(1)(A) directs the sentencing court to apply §2X1.1 “in respect to that other offense . . .” If death resulted, subsection (c)(1)(B) directs the sentencing court to use the most analogous homicide offense guideline. The Eighth Circuit has held that the requirement that a firearm be cited in “the offense of conviction” requires references in the entire record of the case and not just in the indictment.¹⁶³

As noted above, Amendment 784 resolved a circuit split over whether the cross reference (and the related section (b)(6)(B) SOC) could be applied only to “groupable” offenses by clarifying that there was no such limitation. Amendment 784 also, however,

¹⁶⁰ *Id.* at 242–43.

¹⁶¹ Compare *United States v. Horton*, 693 F.3d 463, 478–79 (4th Cir. 2012) (holding that the §2K2.1(c)(1) cross reference could not be applied to the non-grouping offense of murder) with *United States v. Kulick*, 629 F.3d 165, 170 (3d Cir. 2010) (holding that the cross reference could be applied to the non-grouping offense of extortion).

¹⁶² See USSG App C, amend. 784 (effective Nov. 1, 2014).

¹⁶³ *United States v. Edger*, 924 F.3d 1011, 1014 (8th Cir.), *cert. denied*, 140 S. Ct. (Oct. 15, 2019) (finding “offense of conviction” in the guideline “encompasses more broadly the offense conduct giving rise to the conviction.”).

restricted the application of the section (c)(1) cross reference to situations where the firearm involved in the other offense was the same firearm (or one of the same firearms) “cited in the offense of conviction.” Note that this restriction applies only to the cross reference and not to §2K2.1(b)(6)(B).

The cross reference also applies if the defendant possessed or transferred a firearm or ammunition cited in the offense of conviction “with knowledge or intent” that the firearm or ammunition would be used or possessed in connection with another offense. Where the cross reference is applied because the defendant knew it would be used or possessed in connection with another offense, the defendant need not have known what specific offense was going to be committed, only that another offense was going to be committed. However, note that while the 4-level enhancement at §2K2.1(b)(6)(B) can apply if the defendant possessed or transferred a firearm with “reason to believe” that it would be used in connection with another felony offense, the cross reference requires knowledge or intent.

If the cross reference directs the court to a guideline that itself contains a firearm enhancement, courts have generally held that the firearm enhancement should be applied.¹⁶⁴

E. DEPARTURES

The commentary to the guideline suggests upward departures in several different circumstances. Application Note 7 suggests that, when the offense involves a destructive device, an upward departure may be warranted when “the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created” are not adequately accounted for by the guideline. By way of example, the application note contrasts “a pipe bomb in a populated train station” with “an incendiary device in an isolated area” because the former presents “a substantially greater risk of death or serious bodily injury” than the latter. The application note also references several specific upward departures in Chapter Five that might apply in such cases, §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

Application Note 11 suggests three other circumstances that may warrant an upward departure. The first is where the number of firearms involved in the offense “substantially exceeded 200.” The second is where multiple weapons of particular types are involved: specifically, National Firearms Act weapons; “military type assault rifles, [and]

¹⁶⁴ See *United States v. Webb*, 665 F.3d 1380 (11th Cir. 2012); *United States v. Patterson*, 947 F.2d 635 (2d Cir. 1991); *United States v. Wheelwright*, 918 F.2d 226 (1st Cir. 1990). *But see* *United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992) (“astronomical” increase in defendant’s offense level from applying cross reference provisions required remand to district court to consider whether a departure was warranted).

non-detectable ('plastic') firearms." The third is where the offense involves "large quantities of armor-piercing ammunition."

IV. GUIDELINE ENHANCEMENTS FOR FIREARMS OUTSIDE §2K2.1

The *Guidelines Manual* provides other guidelines for increased offense levels through specific offense characteristics that penalize a range of firearm-related conduct.

A. SECTION 2D1.1(B)(1) - POSSESSION OF FIREARM DURING COMMISSION OF DRUG OFFENSE

In §2D1.1, the drug trafficking guideline, two offense levels are added in subsection (b)(1) if a dangerous weapon or firearm was possessed during a drug trafficking offense. Section (b)(1) applies where the defendant possesses a firearm in connection with unlawful drug activities. Possession can be actual or constructive, meaning the defendant is able to exercise control or dominion over the firearm.¹⁶⁵ Presence, not use, is the determining factor.¹⁶⁶

Application Note 11 states that the enhancement applies if a firearm was present "unless it is clearly improbable that the weapon was connected with the offense."¹⁶⁷ The Seventh Circuit held that Application Note 11 applied when the defendant constructively possessed firearms, even though they were not in the immediate vicinity of the drug operation.¹⁶⁸ The D.C. Circuit more recently held that Application Note 11 does not eliminate the requirement that, to prove constructive possession, there must be a sufficient connection between the firearm and the defendant. The court in that case concluded that the defendant did not constructively possess the firearm recovered from the compound he owned because the government presented no evidence linking the weapon to the

¹⁶⁵ *United States v. Rea*, 621 F.3d 595, 606 (7th Cir. 2010) ("The defendant need not have actual possession of the weapon; constructive possession is sufficient.") (internal citations omitted); *United States v. Keszthelyi*, 308 F.3d 557, 578 (6th Cir. 2002) ("Constructive possession of a firearm is sufficient and may be established by defendant's ownership, dominion, or control over the item itself, or dominion over the premises where the item is located.") (internal citation and quotation marks omitted); *United States v. Haren*, 952 F.2d 190, 198 (8th Cir. 1991) ("To receive an enhanced sentence, the defendant need not actually have the weapon in hand; constructive possession is sufficient.").

¹⁶⁶ *See, e.g., United States v. Manigan*, 592 F.3d 621, 629 (4th Cir. 2010) ("[G]uns found in close proximity to drug activity are presumptively connected to that activity." (quoting *United States v. Corral*, 324 F.3d 866, 873 (7th Cir. 2003)); *United States v. Smythe*, 363 F.3d 127, 129 (2d Cir. 2004) ("The [g]uideline is a *per se* rule that does not require a case-by-case determination that firearm possession made a particular transaction more dangerous.").

¹⁶⁷ *See* USSG §2D1.1, comment. (n.11).

¹⁶⁸ *United States v. Thurman*, 889 F.3d 356, 372 (7th Cir.), *cert. denied*, 139 S. Ct. 278 (Oct. 1, 2018).

defendant beyond his ownership of the compound where it was found.¹⁶⁹ However, application of the §2D1.1(b)(1) enhancement may constitute impermissible double punishment if it is levied in conjunction with a sentence for violating 18 U.S.C. § 924(c).¹⁷⁰

In most circuits, the government must first show the firearm was present when the unlawful activity occurred. The burden then shifts to the defendant to prove it was “clearly improbable” that the weapon had a nexus with the unlawful activity.¹⁷¹ In conspiracy cases, the reasonable foreseeability that a weapon may be present can be enough to prove possession.¹⁷²

In *United States v. Belitz*, the defendant argued he was not the owner of the gun used to increase his offense level in the drug offense.¹⁷³ His friend had asked him to repair the gun, and the defendant had it in the room for the friend to pick up. The court found lack of ownership and an innocent reason for possession were irrelevant in determining whether this enhancement applied. The gun was loaded and accessible, and the defendant knew

¹⁶⁹ *United States v. Bagcho*, 923 F.3d 1131 (D.C. Cir.), *petition for cert. filed* (Dec. 18, 2019) (No. 19-7001).

¹⁷⁰ *See, e.g., United States v. Cervantes*, 706 F.3d 603 (5th Cir. 2013).

¹⁷¹ *See, e.g., United States v. McCloud*, 935 F.3d 527, 531 (6th Cir. 2019); *United States v. Miller*, 890 F.3d 317, 328 (D.C. Cir. 2018) (sentencing court erred when imposing enhancement when no nexus shown between defendant’s drug convictions relating to heroin, cocaine, and cocaine base, and firearms found alongside vial that had odor of PCP); *United States v. Salado*, 339 F.3d 285 (5th Cir. 2003) (the government has the burden of proof under §2D1.1 of showing by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant); *United States v. Drozdowski*, 313 F.3d 819, 822 (3d Cir. 2002) (courts rely on a number of factors in making the “clearly improbable” determination, including: (i) the type of gun involved; (ii) whether the gun was loaded; (iii) whether the gun was stored near the drugs or drug paraphernalia; and (iv) whether the gun was accessible).

¹⁷² *United States v. Jones*, 900 F.3d 440, 449 (7th Cir. 2018) (enhancement applied as reasonably foreseeable where defendant received text from girlfriend co-conspirator with a picture of a gun and the words “meet the newest member of our family” before she carried same gun with her during a drug buy); *United States v. Villarreal*, 613 F.3d 1344, 1359 (11th Cir. 2010) (“A co-conspirator’s possession of a firearm may be attributed to the defendant for purposes of this enhancement if his possession of the firearm was reasonably foreseeable by the defendant, occurred while he was a member of the conspiracy, and was in furtherance of the conspiracy.”); *United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003) (the prosecution does not have to show that the defendant or his co-conspirators actually used the gun in perpetrating the offense or intended to do so); *United States v. Perez-Guerrero*, 334 F.3d 778, 783 (8th Cir. 2003) (for §2D1.1(b)(1) to apply, the government must demonstrate by a preponderance of the evidence that (i) a weapon was present and (ii) it was not “clearly improbable” that the weapon had a nexus with the conspiracy”); *United States v. Mendoza*, 341 F.3d 687 (8th Cir. 2003) (constructive possession suffices if it is reasonably foreseeable that a co-conspirator would have possessed a weapon); *United States v. Topete-Plascencia*, 351 F.3d 454 (10th Cir. 2003) (in a drug conspiracy case, the government is not required to prove that the defendant personally possessed the firearm if the possession of weapons was known to the defendant or reasonably foreseeable to him).

¹⁷³ 141 F.3d 815 (8th Cir. 1998).

there were drugs in the house. The defendant had not shown that it was clearly improbable that the gun was connected to the drug activity.

B. SECTION 2B3.1(B)(2)—ROBBERY

In §2B3.1, the robbery guideline, a specific offense characteristic at section (b)(2) provides for increases of three to seven offense levels where a firearm or dangerous weapon was involved in the robbery.¹⁷⁴ The particular increase depends on the type of firearm or weapon and the way the firearm was involved, *i.e.*, whether the firearm was simply possessed during the course of the robbery or whether the defendant used a firearm to threaten or coerce a victim. The different factual scenarios that arise in such cases have presented application issues for the enhancement; some of these are discussed below.

1. Weapon “Discharged,” “Brandished or Possessed,” or “Otherwise Used”

In applying the weapon enhancement at §2B3.1(b)(2) to a robbery offense, one question is whether the firearm, or the dangerous weapon, was merely “brandished” or whether it was “otherwise used” in the course of the robbery. The general rule is that “brandishing” constitutes an implicit threat that force might be used, while a firearm or dangerous weapon is “otherwise used” when the threat becomes more explicit.¹⁷⁵ In other words, the difference between “brandishing” and “otherwise used” is a difference based on the seriousness of the charged criminal conduct.¹⁷⁶ The guideline creates a hierarchy of culpability for varying degrees of involvement during the criminal offense.¹⁷⁷

The First Circuit has explained the difference between “brandishing” and “otherwise used” by stating that “specifically leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one’s direction, is a cessation of ‘brandishing’ and the commencement of ‘otherwise used.’”¹⁷⁸ The Fifth Circuit articulated a similar distinction: “Displaying a weapon without pointing or targeting should be classified as ‘brandished,’ but pointing the weapon at any individual or group of

¹⁷⁴ USSG §2B3.1(b)(2). The guideline also has an enhancement at subsection (b)(6) that provides a 1-level increase if a firearm was taken or if the taking of the firearm was the object of the offense.

¹⁷⁵ See *United States v. Johnson*, 199 F.3d 123 (3d Cir. 1999).

¹⁷⁶ See *United States v. Miller*, 206 F.3d 1051, 1053 (11th Cir. 2000).

¹⁷⁷ See *United States v. Wooden*, 169 F.3d 674, 675 (11th Cir. 1999).

¹⁷⁸ *United States v. LaFortune*, 192 F.3d 157, 161–62 (1st Cir. 1999).

individuals in a specific manner should be ‘otherwise used.’”¹⁷⁹ Other appellate courts have reached similar conclusions.¹⁸⁰

Although a “dangerous weapon” is defined in §1B1.1 Application Note 1(E), Application Note 2 of §2B3.1 instructs sentencing courts that the 3-level enhancement at §2B3.1(b)(2)(E) (if a dangerous weapon was brandished or possessed) applies whenever a harmless object that appears to be a dangerous weapon is brandished, displayed, or possessed by the defendant. In determining whether an enhancement applies under §2B3.1(b)(2)(E), most circuits apply an objective standard in determining whether an object may be considered a dangerous weapon.¹⁸¹ In other words, the ultimate inquiry is whether a reasonable individual would believe that the object is a dangerous weapon under the circumstances.

The Sixth Circuit applied this enhancement where a defendant brought a Styrofoam sandwich box into a bank asserting it was a bomb.¹⁸² In arriving at its conclusion, the Sixth Circuit relied on the Seventh Circuit’s holding in *United States v. Hart*, where the court upheld a §2B3.1(b)(2)(E) enhancement when the defendant robbed multiple banks by claiming in each instance that he was carrying a bomb in a box, including a lunch box on one occasion and a shoe box that was wrapped inside a bag on another—none of the boxes in fact contained an explosive device.¹⁸³ Similarly, courts have held that a concealed hand may serve as an object that appears to be a dangerous weapon, and therefore trigger a §2B3.1(b)(2)(E) enhancement.¹⁸⁴

¹⁷⁹ *United States v. Dunigan*, 555 F.3d 501, 505 (5th Cir. 2009).

¹⁸⁰ *See, e.g.*, *United States v. Orr*, 312 F.3d 141 (3d Cir. 2002) (holding a gun to someone’s head is sufficient to trigger the enhancement—infliction of physical violence or a verbalized threat is not required to trigger the enhancement); *United States v. Wooden*, 169 F.3d 674, 676 (11th Cir. 1999) (pointing a handgun at the victim’s head one-half inch away constituted “otherwise used”); *United States v. Johnson*, 199 F.3d 123 (3d Cir. 1999) (a threat to hit an employee with a baseball bat is sufficient to trigger the enhancement); *United States v. Taylor*, 135 F.3d 478, 482–83 (7th Cir. 1998) (poking a gun into the bank employee’s back while directing her to produce money was “otherwise use” of that weapon).

¹⁸¹ *See United States v. Wooten*, 689 F.3d 570, 577 (6th Cir. 2012) (collecting cases); *United States v. Hart*, 226 F.3d 602, 606 (7th Cir. 2000); *United States v. Dixon*, 982 F.2d 116, 124 (3d Cir. 1992); *United States v. Taylor*, 960 F.2d 115, 116 (9th Cir. 1992). *But see United States v. Bates*, 213 F.3d 1336 (11th Cir. 2000) (relying on the intent of the perpetrator and the subjective perception of the teller).

¹⁸² *See United States v. Rodriguez*, 301 F.3d 666, 669 (6th Cir. 2002).

¹⁸³ 226 F.3d 602 (7th Cir. 2000).

¹⁸⁴ *See United States v. Davis*, 635 F.3d 1222 (D.C. Cir. 2011) (deciding that a hand concealed in a backpack creates the appearance of a dangerous weapon); *United States v. Souther*, 221 F.3d 626, 628–29 (4th Cir. 2000) (holding a concealed hand appeared to be a dangerous weapon because defendant presented a note stating he had a gun); *United States v. Vincent*, 121 F.3d 1451, 1455 (11th Cir. 1997) (stating concealed hand appeared to be a dangerous weapon because it was pressed into the victim’s side); *United States v. Dixon*, 982 F.2d 116, 121–24 (3d Cir. 1992) (noting the concealed hand appeared to be a dangerous weapon because it was draped with a towel).

The Eighth Circuit concluded that a §2B3.1(b)(2)(E) enhancement was inapplicable where a defendant concealed an inoperable replica of a gun, which was possessed during the commission of a robbery, but never used in any way.¹⁸⁵ The court noted that the only reason it knew the defendant had an inoperable replica gun was because he admitted it to the police; therefore, not only did the defendant lack the actual ability to harm anyone during the robbery, but no one knew he had on his person an object that might have appeared to be dangerous.¹⁸⁶ Accordingly, a §2B3.1(b)(2)(E) enhancement was inappropriate.

2. *If a “Threat of Death” was Made*

Prior to the 1997 amendment to §2B3.1, there was a split among the circuits as to what constituted an “express threat of death.” This issue arose when the courts were confronted with a robbery where the defendant would either hand a note to the teller stating, “I have a gun,” or he would state “I have a gun.” Most circuits held that the defendant need not have expressed in words or actions an intention “to kill,” provided the words or actions employed were such as to place the victim in objectively reasonable fear for his or her life. On the other hand, the Sixth and Eleventh Circuits held that the term “express” contemplated nothing less than the defendant unambiguously declaring, either through words or unambiguous conduct, that he intended to kill the victim.¹⁸⁷

Effective November 1, 1997, the Commission resolved this conflict by deleting the word “express” and requiring only a “threat of death.”¹⁸⁸ The amendment adopted the “majority appellate view which holds that the enhancement applies when the combination of the defendant’s actions and words would instill in a reasonable person in the position of the immediate victim a greater amount of fear than necessary to commit the robbery.”¹⁸⁹ The deletion of the term “express” from §2B3.1(b)(2)(F) broadened the application of this enhancement.¹⁹⁰

Since the 1997 amendment, all circuits agree that the statement “I have a gun” constitutes a “threat of death,” and qualifies for a 2-level enhancement even though no

¹⁸⁵ United States v. Hutton, 252 F.3d 1013, 1017 (8th Cir. 2001).

¹⁸⁶ *Id.*

¹⁸⁷ See United States v. Alexander, 88 F.3d 427 (6th Cir. 1996); United States v. Moore, 6 F.3d 715 (11th Cir. 1993).

¹⁸⁸ See USSG App. C, amend. 552 (effective Nov. 1, 1997); United States v. Summers, 176 F.3d 1328, 1330 n.2 (11th Cir. 1999).

¹⁸⁹ *Id.*

¹⁹⁰ See United States v. Soto-Martinez, 317 F.3d 477, 479 (5th Cir. 2003); United States v. Day, 272 F.3d 216 (3d Cir. 2001).

express threat to use a gun is made. The Sixth and Eleventh Circuits have acknowledged that their pre-amendment interpretations of §2B3.1(b)(2)(F) are no longer good law.¹⁹¹

C. SECTION 2B5.1—OFFENSES INVOLVING COUNTERFEIT BEARER OBLIGATIONS OF THE U.S.

In §2B5.1, the counterfeiting bearer obligations guideline, two offense levels are added at §2B5.1(b)(4) if a dangerous weapon or firearm is used in connection with the offense. If the resulting offense level is less than 13, it is increased to level 13. Bearer obligations include currency and coins, food and postage stamps, and other items generally described as bearer obligations of the United States.¹⁹²

The Third Circuit applied this firearm enhancement in *United States v. Gregory*.¹⁹³ In *Gregory*, the defendant claimed he forgot about a gun in his jacket pocket when he passed counterfeit currency. The district court applied the firearm enhancement under §2B5.1(b)(4), stating prior circuit case law mandated it.¹⁹⁴ The defendant argued the district court must first resolve the factual dispute over whether he possessed the handgun “in connection with” the instant offense. The appeals court stated that for the purposes of §2B5.1 a causal, logical, or other type of relationship must exist between the firearm and instant offense to apply the enhancement.¹⁹⁵

V. STANDARD OF PROOF

A. STATUTES

Guilt on the statutory offenses must be established by guilty plea or by a verdict “beyond a reasonable doubt.” Section 924(e) of title 18, the ACCA, is a mandatory sentencing enhancement that does not have to be charged. In contrast, section 924(c) of title 18 describes an offense that must be charged, not a mere sentencing enhancement.

¹⁹¹ See *United States v. Winbush*, 296 F.3d 442 (6th Cir. 2002); *United States v. Murphy*, 306 F.3d 1087, 1090 (11th Cir. 2002).

¹⁹² See USSG §2B5.1, comment. (n.2).

¹⁹³ 345 F.3d 225 (3d Cir. 2003).

¹⁹⁴ See *United States v. Loney*, 219 F.3d 281 (3d Cir. 2000) (affirming the firearm enhancement under §2K2.1(b)(5) where court found a connection between illicit drugs and the loaded firearm the defendant possessed).

¹⁹⁵ *Id.* at 285.

B. GUIDELINES

The particular showing that must be made with respect to each specific offense characteristic varies, but like all sentencing factors, the standard of proof is a preponderance of the evidence.

C. CODEFENDANT OR CO-CONSPIRATOR LIABILITY

In practice, defendants are not usually held accountable under section 924(c) for firearms that they did not personally use or carry, although there is no legal impediment to holding them criminally liable under the law of conspiracy for an accomplice's foreseeable use or possession of a firearm during the conspiracy to commit the crime of violence or drug trafficking crime.¹⁹⁶ By contrast, under §1B1.3, courts are required to apply the specific offense characteristics based on a defendant's relevant conduct, which generally includes all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity.¹⁹⁷

VI. APPLICATION ISSUES RELATED TO 18 U.S.C. § 924(c)

A. §2K2.4 - INTERACTION OF FIREARMS ENHANCEMENTS AND SECTION 924(c)

Application Note 4 of §2K2.4 instructs that a defendant cannot receive both a guideline enhancement for firearms and a mandatory consecutive sentence for section 924(c) based on the same firearm.¹⁹⁸ Courts have held that this note plainly prohibits an enhancement for possession of any firearm—whether it be the one directly involved in the underlying offense or another firearm, even one in a different location. “If the court imposes a sentence for a drug offense along with a consecutive sentence under 18 U.S.C. § 924(c) based on that drug offense, it simply cannot enhance the sentence for the drug

¹⁹⁶ See, e.g., *United States v. Shea*, 150 F.3d 44 (1st Cir. 1998), *abrogated on other grounds by United States v. Encarnacion-Ruiz*, 787 F.3d 581 (1st Cir. 2015); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000); *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998), *post-conviction relief granted on other grounds*, *Wilson v. United States*, 2015 WL 13707564 (Aug. 21, 2015); *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997); *United States v. Washington*, 106 F.3d 1488 (9th Cir. 1997); *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996); *United States v. Myers*, 102 F.3d 227 (6th Cir. 1996); *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995).

¹⁹⁷ See USSG §1B1.3; *United States v. Block*, 705 F.3d 755 (7th Cir. 2013).

¹⁹⁸ See USSG §2K2.4, comment. (n.4).

offense for possession of any firearm.”¹⁹⁹ The same prohibition applies to fake firearms.²⁰⁰ And the death threat enhancement is inapplicable when related to the firearm that forms the basis of a section 924(c) sentence.²⁰¹

B. OFFENSES UNDER SECTION 924(c) AND GROUPING AT §3D1.2

Because 18 U.S.C. § 924(c)(1)(D) requires that any sentence imposed under that statute run consecutive to any other sentence imposed, 18 U.S.C. § 924(c) counts may not group with any other count charged. This is reflected in the guidelines at §5G1.2(a), which provides that sentences for such offenses “shall be determined by that statute and imposed independently.”

Most courts to address the issue have held that if a defendant is convicted of a section 924(c) count and additional counts that would ordinarily group under §3D1.2(c), the other counts still group even though §2K2.4 instructs that if a sentence for a section 924(c) conviction is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristics for use of a firearm in connection with the underlying offense do not apply. Ordinarily, §3D1.2(c) directs that offenses should be “grouped” when they reflect “substantially the same harm,” a condition that is met “[w]hen 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.”²⁰² In a case involving a section 924(c) conviction, however, §2K2.4 provides that “[i]f a sentence [for the section 924(c) conviction] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic” for use of a firearm in connection with the underlying offense that would otherwise apply.²⁰³ Thus, a defendant with a section 924(c)

¹⁹⁹ See *United States v. Knobloch*, 131 F.3d 366, 372 (3d Cir. 1997). Before 2001, some courts added the enhancement in addition to the § 924(c) sentence where defendant had multiple firearms or when a codefendant also possessed a firearm. See, e.g., *United States v. Johnson*, 208 F.3d 211 (4th Cir. 2000); *United States v. Willett*, 90 F.3d 404, 408 (9th Cir. 1996) (2-level enhancement on top of the § 924(c)(1) conviction proper where defendant committed drug trafficking offense with multiple weapons); *United States v. Washington*, 44 F.3d 1271, 1280–81 (5th Cir. 1995) (enhancement on top of § 924(c) conviction proper where accomplice in the crime had another gun); accord, *United States v. Kimmons*, 965 F.2d 1001, 1011 (11th Cir. 1992). However, in 2000, Amendment 599 changed the language in Application Note 4 to §2K2.4 to clarify that this application was not what the Commission intended, and courts have recognized that this addition is improper. See, e.g., *United States v. Aquino*, 242 F.3d 859, 864–65 (9th Cir. 2001).

²⁰⁰ See *United States v. Eubanks*, 593 F.3d 645, 649–50 (7th Cir. 2010) (remanding for resentencing because the enhancement at §2B3.1(b)(2)(D) if a dangerous weapon is otherwise used is not applicable to a “plastic B.B. gun”).

²⁰¹ See *United States v. Katalinic*, 510 F.3d 744, 748 (7th Cir. 2007) (joining the Fourth and Sixth Circuits holding the same); see also *United States v. Hazelwood*, 398 F.3d 792, 798–800 (6th Cir. 2005); *United States v. Reevey*, 364 F.3d 151, 158–59 (4th Cir. 2004).

²⁰² USSG §3D1.2(c).

²⁰³ USSG §2K2.4, comment. (n.4).

conviction, a drug conviction, and a felon-in-possession conviction will not receive the otherwise applicable enhancement at §2D1.1(b)(1) for possessing a firearm in connection with the drug offense, or the enhancement at §2K2.1(b)(6)(B) for using a firearm in connection with another felony offense.

The Eighth Circuit held that the drug and felon-in-possession offenses should still be grouped even when a defendant also has a section 924(c) conviction because the conduct is accounted for through the section 924(c) sentence even when the weapon enhancements are not applied.²⁰⁴ Only the Seventh Circuit has disagreed, holding that the drug and felon-in-possession offenses do not “group” under the “same harm” rule of §3D1.2(c), because those two offenses no longer embody conduct “treated as” an enhancement in the other guideline.²⁰⁵

VII. CRIMES OF VIOLENCE AND CONTROLLED SUBSTANCE OFFENSES AS PRIOR OFFENSES

As noted in the discussion of §2K2.1, that guideline incorporates by reference the definitions of the terms “crime of violence” and “controlled substance offense” from §4B1.1, the Career Offender guideline. Although a thorough treatment of all the case law surrounding these definitions is beyond the scope of this primer, the following sections describe some basic concepts and issues that arise in applying these definitions.

A. RELATIONSHIP TO OTHER GUIDELINE AND STATUTORY DEFINITIONS OF THE TERMS

As noted in Section II.B of this primer, there is a close relationship between the definition of the term “violent felony” as that term is used in the ACCA and the term “crime of violence” as that term is used in §4B1.2. When applying these definitions, it is important to be aware that there are other uses of the term “crime of violence” in other parts of the guidelines and the U.S. Code, so careful attention to the specific definition being analyzed is particularly important. For example, 18 U.S.C. § 16 defines the term “crime of violence” in a way that is different from the guidelines’ definition of the term in §4B1.2, although many of

²⁰⁴ See *United States v. Bell*, 477 F.3d 607, 616 (8th Cir. 2007); see also *United States v. Gibbs*, 395 F. App’x 248 (6th Cir. 2010) (unpublished); *United States v. King*, 201 F. App’x 715 (11th Cir. 2006) (unpublished) (reaching the same conclusion in unpublished opinions). *But see* *United States v. Espinosa*, 539 F.3d 926 (8th Cir. 2008) (where firearms enhancements not sought or applied and offenses not “closely intertwined,” drug and firearms counts do not group).

²⁰⁵ *United States v. Sinclair*, 770 F.3d 1148, 1158 (7th Cir. 2014). See also *United States v. Lamon*, 893 F.3d 369, 371 (7th Cir. 2018) (declining to overturn *Sinclair* to rectify the circuit split because “the mere existence of a circuit split does not justify overturning precedent . . . especially true here, because in *Sinclair* we knew that we were creating the split, and in doing so weighed the impact that our contrary decision would have on uniformity among the circuits.”).

the same offenses are treated similarly under each definition.²⁰⁶ Additionally, Application Note 1(B)(iii) to §2L1.2 of the guidelines defines the term “crime of violence” for purposes of that guideline’s specific offense characteristics. A similar situation exists with respect to the definitions of “drug trafficking offense” and “controlled substance offense” under various statutes and guidelines, so similar attention must be paid when applying those definitions.

B. DEFINITIONS IN §4B1.2

1. Crime of Violence

For an offense to qualify as a crime of violence under §4B1.2(a), it must have been “punishable by imprisonment for a term exceeding one year.” The term “punishable” signifies that the defendant himself need not have received a sentence in excess of one year; rather, the particular statute of conviction must have carried a possible penalty of greater than one year. The conviction may be under state or federal law.

The definition encompasses two basic types of offenses. One type is an offense that has as an *element* of the offense “the use, attempted use, or threatened use of physical force against the person of another.” These may be, for example, robbery offenses that are defined as taking property from the person of another using physical force. The second type are the offenses that are enumerated, namely murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).²⁰⁷

The categorical approach described at Section II.B above applies to determinations of crimes of violence as well. Application Note 1 also provides that convictions for aiding and abetting, conspiring, and attempting to commit crimes of violence are themselves crimes of violence.²⁰⁸

2. Controlled Substance Offense

To qualify as a controlled substance offense under §4B1.2, like a crime of violence, the offense must be punishable by a term of imprisonment of more than one year, and may be a violation of state or federal law.

²⁰⁶ See *Sessions v. DiMaya*, 138 S. Ct. 1204 (2018) (holding unconstitutional residual clause in 18 U.S.C. § 16(b) as possessing same flaws as the ACCA’s residual clause invalidated in *Johnson*).

²⁰⁷ See USSG App. C, amend. 798 (effective Aug. 1, 2016).

²⁰⁸ See USSG §4B1.2, comment (n.1).

Two basic types of drug offenses qualify: those that involve “the manufacture, import, export, distribution or dispensing” of drugs (or a counterfeit substance), and those that involve possession with “intent to manufacture, import, export, distribute or dispense” the drugs (or a counterfeit substance). Again, the categorical approach described at Section II.B above applies.

Application Note 1 provides that convictions for aiding and abetting, conspiring, and attempting to commit controlled substance offenses are themselves controlled substance offenses.²⁰⁹

3. Circuit Split on §4B1.2, Inchoate Offenses

Courts disagree on whether the definitions of “crime of violence” and “controlled substance offense” at §4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes. Most circuits have held that the definitions of “crime of violence” and “controlled substance offense” include such inchoate offenses, in accordance with the commentary to the guideline.²¹⁰ However, the D.C. Circuit concluded the definition of “controlled substance offense” in §4B1.2(b) “clearly excludes inchoate offenses,” in *United States v. Winstead*.²¹¹ Recently, the Sixth Circuit agreed with *Winstead* in an *en banc* decision in *United States v. Havis*, abrogating an earlier circuit opinion.²¹² In *Havis*, the court held that because the application note added an offense not listed in the guideline, attempt crimes are not included in the definition of “controlled substance

²⁰⁹ *Id.*

²¹⁰ See, e.g., *United States v. Nieves-Borrero*, 856 F.3d 5 (1st Cir. 2017) (attempt to possess with intent to distribute controlled substances under Puerto Rico law was controlled substance offense); *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995) (drug conspiracy was predicate controlled substance offense, noting that commentary is binding authority); *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017) (state conviction for attempt to distribute controlled substance constituted predicate controlled substance offense); *United States v. Guerra*, 962 F.2d 484 (5th Cir. 1992) (attempted burglary qualified as crime of violence for purposes of enhancement); *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012); *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), *cert. denied*, 2020 WL 129892 (Jan. 13, 2020) (noting circuit split, and finding, based on circuit precedent, that state conspiracy conviction was controlled substance offense); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019), *cert. denied*, No. 19-7103, 2020 WL 411888 (Jan. 27, 2020) (*en banc* precedent governs so that conspiracy to possess with intent to distribute under 21 U.S.C. § 846 was a controlled substance offense); *United States v. Sarbia*, 367 F.3d 1079 (9th Cir. 2004) (attempting to discharge firearm at occupied structure under state law was crime of violence); *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019), *petition for cert. filed* (Feb. 28, 2020) (No. 19-7811) (acknowledging doubts, holding that precedent governs it to hold that state conviction for delivery of marijuana qualifies as a controlled substance offense); *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017) (being a principal in the first degree to attempted manufacture of controlled substance under state law was controlled substance offense).

²¹¹ 890 F.3d 1082, 1091 (D.C. Cir. 2018).

²¹² 927 F.3d 382 (6th Cir. 2019) (*en banc*), *abrogating* *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012).

offenses.” After that opinion, the Fourth Circuit held that conspiracy to possess a controlled substance with intent to distribute was not a “controlled substance offense” under the guideline.²¹³

In 2018, the Commission proposed an amendment to §4B1.2 and its commentary.²¹⁴ The proposed amendment stated that the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines, subjecting the sentence imposed to possible reversal on appeal.²¹⁵ It proposed to move the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit’s decision. In addition to moving the inchoate offenses provision from the commentary to the guideline, the proposed amendment would revise the provision to provide that the terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense.”²¹⁶

²¹³ *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019) (application of base offense level based on prior conviction for conspiracy to possess cocaine not appropriate because “conspiracy” under 21 U.S.C. § 846 not categorically a “controlled substance offense.”).

²¹⁴ *See* 83 FR 65400, 65412-15 (Dec. 20, 2018). The Commission published its proposed amendment in 2018 and therefore did not take into account the decisions in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc); *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), *cert. denied*, No. 19-6748, 2020 WL 129892 (Jan. 13, 2020); *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019), *cert. denied*, No. 19-7103, 2020 WL 411888 (Jan. 27, 2020); and *Crum*, 934 F.3d at 963-68.

²¹⁵ *See* 18 U.S.C. § 3742.

²¹⁶ *See* 83 FR 65400, 65412-15 (Dec. 20, 2018). The Commission has not yet voted on any proposed amendments to §4B1.2 because it currently lacks a quorum of voting members.