Primer

Firearms Offenses

Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law relating to sentencing of firearms offenses. In particular, this primer discusses the application of the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and firearms-related enhancements in guidelines that cover other offenses. Although the primer identifies some of the key cases and concepts related to the sentencing of firearms offenses, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. RELEVANT STATUTES

This section of the primer discusses the most commonly used firearms statutes for which §2K2.1 serves as the primary sentencing guideline. The application of §2K2.1 is discussed in detail in Section III of this primer. A handful of other guidelines also cover firearms offenses. They are described briefly below each of the relevant statutes.

A. SUBSTANTIVE OFFENSES

1. Firearms Transfer Offenses

Several statutes cover firearms transfer offenses. The guideline applicable to each of these statutes—18 U.S.C. §§ 922(a)(6), 922(d), 924(a)(1)(A), and 1715—is §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).[1]

a. 18 U.S.C. § 922(a)(6) ("Straw purchase")

Section 922(a)(6) makes it unlawful for any person, in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, manufacturer, dealer, or collector, to knowingly make any false oral or written statement or to furnish any false or fictitious identification intended or likely to deceive such an individual with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of chapter 44 (Firearms) of title 18.[2] A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years.[3] Any firearm or ammunition involved is subject to seizure and forfeiture.[4]

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1 *See* U.S. SENT'G COMMISSION, *Guidelines Manual*, App. A (Nov. 2018) [hereinafter USSG].

2 18 U.S.C. § 922(a)(6). Chapter 44 consists of 18 U.S.C. §§ 921–931.

3 *Id.* § 924(a)(2).

4 *Id.* § 924(d)(1).

A common offense charged under section 922(a)(6) is a "straw purchase," which entails a material misrepresentation on ATF Form 4473 (Firearms Transaction Record),[5] the form required to lawfully transfer a firearm from a federally licensed dealer, as to the identity of the actual firearm purchaser.[6] 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.[7] 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.[8] Although frequently charged in such cases, section 922(a)(6), on its face, does not prohibit straw purchases,[9] and section 924(a)(1)(A) may be charged instead.[10]

Courts have held that the firearm purchaser's place of residence can be a material fact and have upheld convictions under section 922(a)(6) for providing an incorrect street address on Form 4473.[11] Note that the defendant's intent also may 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.[12]

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5 *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))).

6 *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) (per curiam) (" '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 21.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.").

7 573 U.S. 169 (2014).

8 *Compare* United States v. Abramski, 706 F.3d 307, 315–16 (4th Cir. 2013) (misrepresentation about true purchaser's identity is material even when legally able to own a gun), United States v. Morales, 687 F.3d 697, 700–01 (6th Cir. 2012) (same), *and* 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*, 573 U.S. at 189.

9 *See Abramski*, 573 U.S. at 184.

10 *See* United States v. Wilson, 175 F. App'x 294, 297 (11th Cir. 2006) (per curiam) (falsely claiming on Form 4473 to be the actual purchaser of the firearm is a violation of § 924(a)(1)(A)).

11 *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)); *Frazier*, 605 F.3d at 1279–80 (collecting cases stating same); United States v. Ortiz-Loya, 777 F.2d 973, 982 (5th Cir. 1985) (materiality in a § 922(a)(6) is a question of law; false statement regarding name, age, or place of residence of purchaser is a misrepresentation of a material fact (citing United States v. Gudger, 472 F.2d 566, 568 (5th Cir. 1972) and United States v. Buck, 548 F.2d 871, 876 (9th Cir. 1977))); United States v. Behenna, 552 F.2d 573, 575–76 (4th Cir. 1977) (false statement as to address can be a violation of § 922(a)(6)).

12 *See, e.g.*, United States v. Edgerton, 510 F.3d 54, 57 (1st Cir. 2007) ("Section 922(a)(6) requires proof that the defendant knowingly made a false or fictitious statement. This requirement, however, does not presuppose deceptive intent or even knowledge that one's conduct is unlawful."); United States v. Elias,

b. 18 U.S.C. § 922(d) (Prohibited persons)

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

(1) is under indictment or has been convicted of a crime punishable by imprisonment for a term exceeding one year;[13]

(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;[14]

(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 that includes certain findings or terms;[15] or

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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."); *see also Behenna*, 552 F.2d at 575 ("The general rule is that the prosecution does not have to show affirmative criminal intent on the part of the accused to establish a violation of section 922(a)(6). Nevertheless, the statute does require proof that the defendant knowingly made a false statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the sale. This court has recognized that 'the word "knowingly" in § 922(a)(6) incorporates scienter as an asserted element of the offense.' " (citations omitted)).

[13] A term of imprisonment exceeding one year is commonly associated with felony offenses. *See* USSG §2K2.1, comment. (n.1) (defining "felony conviction" as "a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.").

[14] The Attorney General is charged with promulgating regulations pertaining to § 922 and does so through the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). *See* 18 U.S.C. § 926 (Rules and regulations). 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. *See, e.g.*, United States v. Anaya-Acosta, 629 F.3d 1091, 1094 (9th Cir. 2011) (per curiam) (using the meaning of "illegally or unlawfully in the United States" at 27 C.F.R. § 478.11 to interpret § 922(g)(5)(A)), *abrogation recognized by* United States v. Venegas-Vasquez, 376 F. Supp. 3d 1094 (D. Or. 2019). *But see* Gun Owners of Am., Inc., v. Garland, 992 F.3d 446, 454 (6th Cir. 2021) (rejecting ATF classification of bump stocks as "machineguns" for purposes of 26 U.S.C. § 5845(b) and holding that "*Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct, i.e., that impose criminal penalties"), *vacated, reh'g granted, en banc, and stay granted by* 2 F.4th 576 (6th Cir. 2021).

[15] 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. 18 U.S.C. § 922(d)(8).

(9) has been convicted of a misdemeanor crime of domestic violence.[16]

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 person is prohibited from acquiring it. Typically, the offense involves the transfer of a firearm to a convicted felon.[17] Section 922(d) also may be charged in cases where a firearm purchaser makes a misrepresentation on Form 4473. Each of the nine circumstances enumerated in section 922(d) are listed on Form 4473 at Question 21, and the transferee must affirmatively state whether any are applicable. A violation of section 922(d) is punishable by a statutory maximum term of imprisonment of ten years.[18]

c. 18 U.S.C. § 924(a)(1)(A) (False statement in a record)

Section 924(a)(1)(A) provides that whoever knowingly makes any false statement or representation with respect to the information required by the provisions of 18 U.S.C. §§ 921–931 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.[19]

Section 924(a)(1)(A) also may be charged when a person provides false responses to questions on Form 4473. Examples of such cases include the purchase of a firearm after conviction for a misdemeanor crime of domestic violence and counseling another person to falsely state that she was the transferee/buyer of a firearm.[20] As previously noted, section 924(a)(1)(A) also may be charged in "straw purchase" cases. However, 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. In short, there is considerable overlap in the conduct covered by these statutes.

d. 18 U.S.C. § 1715 (Firearms as nonmailable)

In addition to the firearms transfer offenses described above, section 1715 makes it unlawful to knowingly deposit for mailing or delivery any pistols, revolvers, and other

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16 18 U.S.C. § 922(d).

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

18 18 U.S.C. § 924(a)(2).

19 *Id.* § 924(a)(1)(A).

20 *See* United States v. Tooley, 717 F. Supp. 2d 580 (S.D. W. Va. 2010) (domestic violence conviction); United States v. Sanelli, No. 5:10cr00010, 2010 WL 1608416 (W.D. Va. Apr. 20, 2010) (counseling another to make false statement).

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.[21]

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

a. Generally

Section 922(g) makes it unlawful for prohibited persons to possess any firearm or ammunition in or affecting commerce, or to ship or transport (or receive any firearm or ammunition which has been shipped or transported) in interstate or foreign commerce.[22] Prohibited persons include: convicted felons; fugitives; unlawful drug users or those addicted to controlled substances; adjudicated "mental defectives" or those 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.[23]

A "firearm" for purposes of section 922(g) is defined at section 921(a)(3) and does not include an antique firearm, one manufactured on or before 1898.[24] The antique firearm exception is an affirmative defense to prosecution, not an element of the offense.[25] The statutory maximum penalty for the offense is ten years of imprisonment.[26] Any firearm or ammunition involved is subject to seizure and forfeiture.[27]

The Supreme Court 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

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21 18 U.S.C. § 1715.

22 *Id.* § 922(g).

23 *Id.*

24 *Id.* § 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. Such term does not include an antique firearm.") and (a)(16) (defining "antique firearm" as any firearm manufactured on or before 1898 or certain replicas).

25 *See* United States v. Benamor, 937 F.3d 1182, 1186–87 (9th Cir. 2019) ("Every circuit to address the 'antique firearm' exception in the criminal context has held that the exception is an affirmative defense to a § 922(g) prosecution, not an element of the crime."), *cert. denied*, 140 S. Ct. 818 (2020); United States v. Royal, 731 F.3d 333, 338 (4th Cir. 2013) (collecting cases); Gil v. Holder, 651 F.3d 1000, 1005 n.3 (9th Cir. 2011) ("Consistent with this holding, every other circuit of which we are aware that has considered the § 921(a)(3) 'antique firearm' exception in the criminal context, has treated it as an affirmative defense rather than an element of the crime."), *overruled in part on other grounds by* Moncrieffe v. Holder, 569 U.S. 184 (2013).

26 18 U.S.C. § 924(a)(2).

27 *Id.* § 924(d)(1).

knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce.[28] Circuit courts have interpreted *Rehaif* to require knowledge of the defendant's felon status, not knowledge that his or her status prohibits the possession of a firearm.[29] The Supreme Court in *Greer v. United States* clarified that in felon-in-possession of firearm cases, "a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon."[30]

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).[31]

[28] 139 S. Ct. 2191 (2019). In the same term, the Court also reaffirmed the "dual sovereignty" doctrine in a case involving a defendant convicted in Alabama for possessing a firearm as a felon who additionally faced federal prosecution under section 922(g). Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) ("We have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign. Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. Or the reverse may happen, as it did here . . . . Today we affirm that precedent[.]").

[29] *See*, *e.g.*, United States v. Benton, 988 F.3d 1231, 1239 (10th Cir. 2021) ("[T]he government must prove the defendant knew he was a domestic violence misdemeanant, but not that he knew domestic violence misdemeanants are prohibited from possessing firearms under federal law."); United States v. Trevino, 989 F.3d 402, 405 (5th Cir. 2021) (government did not have to prove knowledge of statutory prohibition contained in section 922(g) but must and did prove, among other elements, defendant knew he had a prior felony conviction at the time of possession); United States v. Maez, 960 F.3d 949, 954–55 (7th Cir. 2020) ("We do not read *Rehaif* as imposing a willfulness requirement on § 922(g) prosecutions."); United States v. Robinson, 982 F.3d 1181, 1187 (8th Cir. 2020) ("While Rehaif makes clear that the government must prove that a defendant knew he was in the category of persons prohibited under federal law from possessing firearms, *Rehaif* did not alter the 'well-known maxim that "ignorance of the law" (or a "mistake of law") is no excuse.' "); United States v. Singh, 979 F.3d 697, 728 (9th Cir. 2020) ("[T]he Government must prove only that [defendant] knew, at the time he possessed the firearm, that he belonged to one of the prohibited status groups enumerated in § 922(g)—*e.g.*, nonimmigrant visa holders."); United States v. Johnson, 981 F.3d 1171, 1189 (11th Cir. 2020) ("[U]nder *Rehaif*'s knowledge-of-status requirement, that a defendant does not recognize that he personally is prohibited from possessing a firearm under federal law is no defense if he knows he has a particular status and that status happens to be one prohibited by § 922(g) from possessing a firearm."); United States v. Bowens, 938 F.3d 790, 797 (6th Cir. 2019) ("[T]he Government arguably must prove that defendants knew they were unlawful users of a controlled substance, but not, as defendants appear to argue, that they knew unlawful users of controlled substances were prohibited from possessing firearms under federal law."), *cert. denied*, 140 S. Ct. 2572 (2020).

[30] 141 S. Ct. 2090, 2100 (2021). The Court further stated that "[w]hen a defendant advances such an argument or representation on appeal, the court must determine whether the defendant has carried the burden of showing a 'reasonable probability' that the outcome of the district court proceeding would have been different." *Id.*

[31] *See* USSG App. A.

b. Multiplicity in the charging instrument

All circuits now have 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).[32] In *United States v. Richardson*, the Eighth Circuit reversed its past 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.[33]

A related set of issues, to which a similar analysis applies, arises in situations in which a defendant possesses multiple firearms or both 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 section 922(g).[34] Courts have noted that the prohibited conduct, possession of any firearm or ammunition, arguably could 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.[35]

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.[36] 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

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[32] *See*, *e.g.*, 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, 759 (5th Cir. 1993) (felon and illegal alien), United States v. Winchester, 916 F.2d 601, 606 (11th Cir. 1990) (felon and fugitive); *accord* United States v. Shea, 211 F.3d 658, 673 (1st Cir. 2000) (felon and drug user). The "unit of prosecution" test is from Bell v. United States, 349 U.S. 81, 82 (1955) (describing test to look at congressional intent and ask what Congress made allowable under the statute).

[33] 439 F.3d 421, 422 (8th Cir. 2006) (en banc) (per curiam).

[34] *See* United States v. Tann, 577 F.3d 533, 537 & n.5 (3d Cir. 2009) (collecting circuit cases).

[35] *See, e.g.*, *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); *Dunford*, 148 F.3d at 389 (reversing all but one conviction where defendant possessed six firearms and ammunition, stating: "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 possession of a six-shooter loaded with six bullets constitutes one or two or seven violations.").

[36] United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir. 1996) (affirming 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) (possession of pistol and bullet did not constitute "same offense" where pistol and bullet seized at different times and in different locations).

were separately acquired or stored."[37] The Eighth Circuit also has found that where the government seeks to bring more "than one charge under section 922(g), separate acquisition and storage of the weapons is an element of the crime."[38]

From a procedural standpoint, this general rule does not preclude the *charging* of multiple counts, but only prevents multiple convictions. As the Supreme Court explained in *Ball v. United States*: "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."[39] The district court at sentencing may merge the counts of conviction that are duplicative.[40]

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.[41] 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.[42] 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.[43]

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[37] 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) (affirming two § 922(g)(1) convictions where defendant maintained ammunition and weapons separately in home and in car, and citing cases for same).

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

[39] 470 U.S. 856, 861 (1985).

[40] *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).

[41] 18 U.S.C. § 924(a)(4).

[42] *Id.* As a result, when a defendant is convicted of section 922(q)(2)(A) as well as another offense arising out of the same act or transaction, the court first should 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. *See* USSG §2K2.5, comment. (n.3); *see also* United States v. Figueroa-Ocasio, 805 F.3d 360, 373 (1st Cir. 2015) (applying §2K2.5, comment. (n.3)).

[43] *See* USSG §2K2.5, comment. (n.3); *see also Figueroa-Ocasio*, 805 F.3d at 373.

The guideline applicable to section 922(q) is §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).[44] Section 2K2.5 provides for Base Offense Level (BOL) 6 and a 2-level increase if the defendant unlawfully possessed or caused (1) any firearm or dangerous weapon to be present in a federal court facility or (2) any firearm to be present in a school zone.[45] In addition, §2K2.5 provides a cross reference if the defendant used or possessed any firearm or dangerous weapon in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or dangerous weapon with knowledge or intent that it would be used or possessed in connection with another offense.[46]

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

a. Generally

Section 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).[47] To convict a defendant of more than one section 924(c) charge, the government must show that the defendant used, carried, or possessed a firearm more than once; that showing depends on whether the defendant made more than one choice to use, carry, or possess the firearm.[48] Possession of a firearm can be joint with another person and may be

[44] *See* USSG App. A.

[45] USSG §2K2.5(a)–(b).

[46] USSG §2K2.5(c). The court should apply (1) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the other offense if the resulting offense level is greater than that determined above, or (2) the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide) if death resulted and the resulting offense level is greater than that determined by §2K2.5. *Id.*

[47] 18 U.S.C. § 924(c)(1)(A).

[48] *See* United States v. Jackson, 918 F.3d 467, 490–92 (6th Cir. 2019) ("[T]he record supports that just as in *Vichitvongsa*, Jackson's two § 924(c) convictions were premised on his use of 'the same firearm *one* time to simultaneously further *two* different' criminal acts. Jackson made only a single choice to 'use, carry, or possess' a firearm and, as we made clear in *Vichitvongsa*, a defendant must make 'more than one choice to use, carry, or possess a firearm' in order to be convicted of more than one § 924(c) offense." (citing United States v. Vichitvongsa, 819 F.3d 260, 266–70 (6th Cir. 2016))); *see also* United States v. Voris, 964 F.3d 864, 872 n.5 (9th Cir. 2020) (collecting cases holding that section 924(c) requires a separate firearm use for each § 924(c) conviction). Courts have upheld multiple section 924(c) convictions where the defendant chooses to use or possess the firearm more than once in the same criminal episode. *See id.* at 873 ("In this case, the undisputed facts make clear that Voris's conduct amounts to four such 'uses.' Here Voris used his gun four separate times when he fired four shots toward the door—he pulled the trigger four times, in four slightly different directions, resulting in four separate discharges, and there were at least four potential victims."); United States v. Moore, 729 F. App'x 787, 792 n.2 (11th Cir. 2018) (per curiam) ("Moore committed several, distinct crimes through several, distinct acts. The five carjackings occurred at different times, in different

constructive if the defendant does not have physical possession but does have the power and the intent to exercise control over the firearm.[49] 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.[50]

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 as 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 (known as the "residual clause").[51] In 2019, the Supreme Court in *United States v. Davis*, struck down the residual clause in section 924(c)(3)(B) as unconstitutionally vague.[52]

A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or chapter 705 of title 46.[53] Although an exhaustive treatment of these definitions is beyond the scope of this primer, this section will discuss a few relevant issues.

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locations, with different victims, and he brandished a gun during each carjacking. Those differences make the difference.").

[49] *See* United States v. Caudle, 968 F.3d 916, 921 (8th Cir. 2020) ("[T]he couple's joint occupancy of the home and joint possession of the three firearms 'support an inference that [Caudle] had knowledge of, and access to' the Springfield pistol found in his wife's vehicle."); United States v. Gunn, 369 F.3d 1229, 1234 (11th Cir. 2004) ("[T]he loaded firearms were found in the Mitsubishi automobile in the warehouse where defendants were waiting for the address of the stash house. As occupant of the Mitsubishi and owner of the tags on the vehicle, Gunn, controlled the vehicle and, therefore, had—at least—constructive possession of the firearms."); United States v. Paige, 470 F.3d 603, 610 (6th Cir. 2006) ("The evidence was more than sufficient to support a finding that the defendant had constructive possession of the firearms found in close proximity to the defendant and kept openly in the duplex where he resided.").

[50] *See*, *e.g.*, United States v. Shea, 150 F.3d 44, 50 (1st Cir. 1998) ("We agree with a number of our sister circuits that [Pinkerton v. United States, 328 U.S. 640 (1946)] liability attaches to the use-or-carrying-of-a-firearm offense proscribed in § 924(c)."), *abrogated on other grounds by* United States v. Mojica-Baez, 229 F.3d 292, 310 (1st Cir. 2000); United States v. Washington, 106 F.3d 983, 1011 (D.C. Cir. 1997) (per curiam) ("As long as the use or carrying of a firearm in relation to a drug trafficking offense was done in furtherance of the conspiracy and was reasonably foreseeable to the co-conspirators, we see no reason, and appellants offer none, that would render *Pinkerton* liability inapplicable to § 924(c)(1) offenses."); United States v. Masotto, 73 F.3d 1233, 1240–41 (2d Cir. 1996) ("[W]e hold that the district court did not err by instructing the jury on a *Pinkerton* theory of liability in connection with the § 924(c) violation.").

[51] 18 U.S.C. § 924(c)(3).

[52] 139 S. Ct. 2319, 2336 (2019). The *Davis* decision followed the Supreme Court's decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 576 U.S. 591 (2015), which struck down similarly-worded residual clauses in sections 16(b) and 924(e)(2)(B)(ii) of title 18 as unconstitutionally vague. The *Johnson* decision is discussed in more detail at Section II.B.

[53] 18 U.S.C. § 924(c)(2).

Section 924(c) provides a mandatory consecutive penalty that ranges from five years to life imprisonment, with penalties that increase incrementally within that range if the firearm was used, if the offender possessed or the offense involved certain types of firearms, or if the offender has prior section 924(c) convictions. Specifically, unless a greater minimum sentence applies, the mandatory minimum penalty for violations of section 924(c) 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, shotgun, or semiautomatic assault weapon, ten years; if the firearm is a machine gun, destructive device, or firearm equipped with a silencer, 30 years.[54] If the defendant violates section 924(c) after a prior conviction under section 924(c) has become final, the mandatory minimum sentence is 25 years of imprisonment or life imprisonment if the firearm involved is a machine gun or destructive device or bears a silencer or muffler.[55] These penalties are consecutive to any other sentence, including the sentence for the underlying offense.[56] There is no defined maximum penalty, although most circuit courts conclude that the implied maximum penalty is life.[57]

In 2018, Congress enacted the First Step Act, which, among other things, amended the penalties for successive convictions under section 924(c).[58] Before the First Step Act's changes to section 924(c)(1)(C), a defendant could be sentenced to multiple consecutive section 924(c) penalties in the same proceeding, commonly referred to as "stacking."[59] 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 sentenced to a "stacked" 25-year penalty based on another section 924(c) conviction in the same case. Because the First Step Act did not make any changes to the other penalty provisions in section 924(c), however, a defendant who commits multiple violations of section 924(c) during the course of a crime remains subject to other consecutive penalties as provided in the statute.[60] Although this amendment to section 924(c)(1)(C) does not apply

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54 *Id.* § 924(c)(1)(A)–(B).

55 *Id.* § 924(c)(1)(C). An offender may not be sentenced to probation if convicted under section 924(c). 18 U.S.C. § 924(c)(1)(D). In addition, the firearms involved are subject to seizure. *See* 18 U.S.C. § 924(d)(1).

56 *See id.* § 924(c)(1)(D)(ii).

57 *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), *abrogated on other grounds by* United States v. Jones, 802 F. App'x 325 (10th Cir. 2020); United States v. Sandoval, 241 F.3d 549, 551 (7th Cir. 2001); United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000).

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

59 *See* Deal v. United States, 508 U.S. 129, 131–32 (1993), *superseded by statute*, First Step Act of 2018 § 403, *as recognized in* United States v. Davis, 139 S. Ct. 2319, 2324 n.1 (2019); *see also* 18 U.S.C. § 924(c)(1)(C) (2017) ("In the case of a second or subsequent conviction under this subsection, the person shall be sentenced" to 25 years, or to life in the case of a second or subsequent conviction under § 924(c) and the firearm involved is a machine gun, destructive device, or is equipped with a firearm silencer or muffler).

60 *See* 18 U.S.C. § 924(c)(1)(A), (B), and (D).

retroactively, it does apply to any sentencing that occurs after enactment of the First Step Act, regardless of when the offense occurred.[61]

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).[62] 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 do not apply to that count of conviction.[63]

b. Type of gun and manner of use

The nature of the firearm is an element of the offense to be found by the jury, not a sentencing factor to be found by the judge.[64] In *United States v. Woodberry*, the Ninth Circuit held that the provision in section 924(c)(1)(B)(i), which increases the minimum penalty to ten years if the firearm possessed is a semiautomatic assault weapon or a short-barreled rifle or shotgun, is "an essential element that must be proven to a jury beyond a reasonable doubt."[65] 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 a ten-year mandatory minimum, or a handgun, which would carry a five-year mandatory minimum sentence, was not submitted to the jury.[66]

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61 First Step Act of 2018 § 403(b).

62 *See* USSG App. A.

63 USSG §2K2.4(b).

64 United States v. O'Brien, 560 U.S. 218, 235 (2010) ("machinegun," triggering 30-year mandatory minimum, is an element of the offense to be found by the jury). Before *O'Brien*, six circuits construed section 924(c) as creating a sentencing issue for the judge, while two circuits construed the statute as creating an element for the jury. *Compare* 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, 811–12 (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), *and* United States v. Sandoval, 241 F.3d 549, 550 (7th Cir. 2001), *with* United States v. O'Brien, 542 F.3d 921, 926 (1st Cir. 2008), *and* United States v. Harris, 397 F.3d 404 (6th Cir. 2005). Following *O'Brien*, the Supreme Court further held, in *Alleyne v. United States*, that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. 99, 103 (2013). *See also* United States v. Woodberry, 987 F.3d 1231, 1236 n.3 (9th Cir. 2021) ("[I]n United States v. O'Brien . . . the Court applied a multi-factor test to determine whether Congress intended for the 'machinegun provision' of § 924(c)(1)(B)(ii) to be an element of the offense. Although our decision today is consistent with *O'Brien*, that case has been rendered obsolete by *Alleyne*, so we need not apply that multi-factor analysis." (citations omitted)), *petition for cert. filed*, No. 21–5503 (U.S. Aug. 26, 2021).

65 *Woodberry*, 987 F.3d at 1236.

66 879 F.3d 626, 636–38 (5th Cir. 2018).

c. "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.[67]

A significant body of case law has developed interpreting these two phrases, with the general consensus being 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 found."[68] However, the Ninth Circuit has rejected the use of this list of factors "in closer, and more common, cases" and declines to use a "checklist" approach.[69] 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."[70]

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[67] 18 U.S.C. § 924(c)(1)(A).

[68] 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. 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, it is quickly accessible . . ." (quoting United States v. Close, 518 F.3d 617, 619 (8th Cir. 2008))); United States v. Swafford, 385 F.3d 1026, 1029 (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).

[69] United States v. Krouse, 370 F.3d 965, 968 (9th Cir. 2004).

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

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.[71] In contrast, "a person does not '*use*' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs."[72]

Courts have interpreted the "during and in relation to" requirement for the use or carrying of a firearm 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 offense, 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.[73] Rather, "the evidence must support a finding that the firearm furthered the purpose or effect of the crime . . . ."[74]

d. Whether a sentence imposed for a separate offense can supplant a section 924(c) sentence under the statute's prefatory clause

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.[75] Prior to the Supreme Court's decision in *Abbott v. United States*, several circuits interpreted this language to refer to other minimum sentences that may be imposed for violations of section 924(c), not separate offenses.[76] In *Abbott*, the

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

72 Watson v. United States, 552 U.S. 74, 83 (2007) (emphasis added).

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

74 United States v. McRae, 156 F.3d 708, 712 (6th Cir. 1998); *see also* United States v. Shuler, 181 F.3d 1188, 1190 (10th Cir. 1999) (citing *McRae*).

75 18 U.S.C. § 924(c).

76 United States v. Abbott, 562 U.S. 8 (2010). The *Abbott* decision 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, with most circuits holding that "a defendant is subject to a mandatory, consecutive sentence for a § 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." *See id* at 13; *see also* United States v. Abbott, 574 F.3d 203, 208 (3d Cir. 2009), *aff'd,* 562 U.S. 8 (2010); United States v. London, 568 F.3d 553, 564 (5th Cir. 2009) (adopting the reasoning of United States v. Collins, 205 F. App'x 196 (5th Cir. 2006)); United States v. Studifin, 240 F.3d 415, 423 (4th Cir. 2001); United States v. Jolivette, 257 F.3d 581, 587 (6th Cir. 2001); United States v. Alaniz, 235 F.3d 386, 389 (8th Cir. 2000). 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. *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); United States v. Almany, 598 F.3d 238 (6th Cir. 2010), *vacated by*, 562 U.S. 1056 (2010). In holding that the clause refers to the conduct section 924(c) proscribes, 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. *Abbott*, 562 U.S. at 18–20.

Court confirmed 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.[77]

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*, 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.[78] 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.[79] The Court further noted that, in other sections of the criminal code, Congress explicitly prohibited consideration of a mandatory minimum penalty in determining the sentence for other counts of conviction.[80] 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.[81] Prior to the *Dean* decision, many courts had interpreted section 924(c) to bar consideration of the mandatory minimum penalty when calculating a sentence for an underlying predicate offense.[82]

e. Whether section 924(c) authorizes multiple 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

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77 *Abbott*, 562 U.S. at 25–26.

78 137 S. Ct. 1170 (2017).

79 *Id.* at 1176–77.

80 *Id.* at 1177.

81 *Id.*

82 *See, e.g.*, United States v. Dean, 810 F.3d 521, 533 (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*, 137 S. Ct. at 1177; 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, 737 F. App'x 235 (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); United States v. Working, 287 F.3d 801, 807 (9th Cir. 2002). *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.").

crime.[83] 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.[84] Other circuits have held that separate section 924(c) convictions may arise from one predicate offense.[85]

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.[86] 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 to promulgate regulations therefor. Items designated by the President as defense articles are added to the United States Munitions List (USML).[87] Firearms, including their components, 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.[88] A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.[89]

Firearms cases prosecuted under section 2778 often 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 also may be destined for other

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[83] *See* United States v. Rentz, 777 F.3d 1105, 1115 (10th Cir. 2015) (en banc); United States v. Diaz, 592 F.3d 467, 473 (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, 1333 (D.C. Cir. 1995) (en banc); 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).

[84] 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) ("Whether a criminal episode contains more than one unique and independent use, carry, or possession depends at least in part on whether the defendant made more than one choice to use, carry, or possess a firearm."), *post-conviction relief granted in part, denied in part by* 2020 WL 3101020 (M.D. Tenn. June 11, 2020); *see also supra* note 48.

[85] *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).

[86] 22 U.S.C. § 2778; *see also* Arms Export Control Act of 1976, Pub. L. No. 94–329, 90 Stat. 729.

[87] *See* 22 C.F.R. § 121.1.

[88] *Id.* Effective March 9, 2020, the Department of State amended the International Traffic in Arms Regulations to revise the ammunitions ordinance of the USML "to describe more precisely the articles that provide a critical military or intelligence advantage or, in the case of weapons, perform an inherently military function and thus warrant export and temporary import control on the USML, [which] complete[s] the initial review of the USML that the Department began in 2011." International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 FR 3819 (Mar. 9, 2020).

[89] 22 U.S.C. § 2778(c).

countries.[90] Violations of section 2778 that involve defense articles and services other than firearms are outside the scope of this primer.[91]

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).[92] Subsection (a)(2) at §2M5.2 provides for BOL 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.[93] Subsection (a)(1) provides for BOL 26 if subsection (a)(2) does not apply.[94]

B. STATUTORY SENTENCING ENHANCEMENT—ARMED CAREER CRIMINAL ACT

1. Generally

The Armed Career Criminal Act (ACCA), imposes a mandatory minimum 15-year sentence of imprisonment (and a maximum of life imprisonment) for section 922(g) violators who have three previous convictions, committed on occasions different from one another, for a "serious drug offense," a "violent felony," or both.[95] The ACCA is a mandatory sentencing enhancement and does not constitute a separate criminal offense.

"Serious drug offense" is defined as either certain federal drug offenses with a statutory maximum of ten years or more of 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 of imprisonment.[96]

"Violent felony" means any crime punishable by imprisonment for more than one year, that

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[90] *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. Galvan-Revuelta, 958 F.2d 66 (5th Cir. 1992) (same); United States v. Muthana, 60 F.3d 1217 (7th Cir. 1995) (exporting ammunition to Yemen).

[91] *See, e.g.*, United States v. Henry, 888 F.3d 589 (2d Cir. 2018) (exporting military technology used in rockets and missiles from American distributor to a customer in Taiwan); United States v. Reyes, 270 F.3d 1158 (7th Cir. 2001) (exporting aircraft components to Iran).

[92] *See* USSG App. A.

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

[94] USSG §2M5.2(a)(1).

[95] 18 U.S.C. § 924(e)(1).

[96] *Id.* § 924(e)(2)(A). In *Shular v. United States*, the Supreme Court clarified that the latter provision "requires only that the state offense involve the conduct specified in the federal statute," and that "it does not require that the state offense match certain generic offenses." 140 S. Ct. 779, 782 (2020).

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; [97] or

(ii) is burglary, arson, or extortion, involves the use of explosives,[98] or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.[99]

The guideline implementing this statutory provision is §4B1.4 (Armed Career Criminal).[100] Section 4B1.4 provides alternative offense levels and alternative criminal history categories. For the offense level, §4B1.4 assigns an offense level of 33, or 34 if the defendant used or possessed the firearm or ammunition in connection with a "crime of violence" or a "controlled substance offense," or if the firearm possessed was of a particularly dangerous type.[101] Alternatively, §4B1.4 uses the offender's otherwise applicable offense level if it is higher than level 33 or 34.[102] For the Criminal History Category (CHC), §4B1.4 assigns a CHC that is the greatest of: Category IV; Category VI if the defendant used or possessed the firearm or ammunition in connection with a "crime of violence" or a "controlled substance offense," or if the firearm possessed was of a particularly dangerous type; or the offender's otherwise applicable criminal history category.[103]

2. 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.[104] 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, this section will describe the major Supreme Court cases on the issue and sketch the general contours of the question.

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97 This portion of the definition is commonly referred to as the "elements" or "force" clause.

98 This portion of the definition is commonly referred to as the "enumerated-offense" clause.

99 18 U.S.C. § 924(e)(2)(B) (emphasis added). As explained in greater detail below, the Supreme Court invalidated the underlined text—known as the "residual clause"—in *Johnson v. United States*, 576 U.S. 591 (2015). Accordingly, a prior conviction may no longer be counted as an ACCA predicate solely because it meets the residual clause's definition.

100 *See* USSG App. A.

101 USSG §4B1.4(b)(3). Particularly dangerous firearms are of a type described in 26 U.S.C. § 5845(a), such as short-barreled shotguns or rifles, machineguns, and destructive devices. *See* USSG §4B1.4(b)(3)(A); 26 U.S.C. § 5845(a); *see also infra* notes 135–139 and accompanying text.

102 USSG §4B1.4(b)(1), (2).

103 *See* USSG §4B1.4(c).

104 *See generally* Dotson v. United States, 949 F.3d 317, 318 (7th Cir. 2020) ([F]ederal courts have seen a floodtide of litigation over what qualifies as an ACCA predicate.").

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*.[105] 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.[106] The Court determined that the generic statutory term "burglary" means the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[107]

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 to the elements of the statute under which the defendant was convicted.[108] 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 actually had committed the generic offense.[109]

The Court addressed this modification of the categorical approach in *Shepard v. United States*.[110] 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."[111] In *Descamps v. United States*, 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.[112] In *Mathis v. United States*, the Court further clarified that this restriction means that even a statute that is indivisible but lists "alternative means" of commission is not subject to the modified categorical approach.[113]

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105 495 U.S. 575 (1990).

106 *Id.* at 598–99.

107 *Id.*

108 *Id.* at 600–01. Notably, even though the Supreme Court's decisions on the "categorical approach" relate to the statutory provisions in the ACCA, courts have used the categorical approach to decide the nature of prior convictions referenced in the sentencing guidelines. *See* U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2021), https://www.ussc.gov/guidelines/primers/categorical-approach.

109 *Id.* at 602.

110 544 U.S. 13 (2005).

111 *Id.* at 26.

112 570 U.S. 254 (2013).

113 136 S. Ct. 2243 (2016).

Recently in *Quarles v. United States*, the Court looked to the scope of generic "remaining in" burglary outlined under *Taylor*, with respect to the timing of the intent requirement.[114] It held that the definition of burglary 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 that such intent need not be present at the exact time of the unlawful entry or the time when the remaining in becomes unlawful.[115]

The Court subsequently interpreted the phrase "physical force" as used in the ACCA's "violent felony" definition in *Johnson v. United States*.[116] The Court held that in the context of "violent felony," "physical force" means "violent force—*i.e.*, force capable of causing physical pain or injury to another person."[117] Therefore, it concluded that the Florida felony offense of battery by "[a]ctually and intentionally touch[ing] another person" did not have as an element the use of "physical force" and did not constitute a "violent felony" under the ACCA.[118]

In 2015, *Johnson v. United States*, the Supreme Court focused on the application of the ACCA's "residual clause."[119] The "residual clause" follows enumerated "violent felony" offenses, such as burglary; it provides that, in addition to these offenses, an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is a "violent felony."[120] In *Johnson*, the Court held that the ACCA's "residual clause" is unconstitutionally vague and that, therefore, imposing an increased sentence under that provision violates the Due Process Clause.[121] 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 applies retroactively to cases on collateral review.[122] 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 definition of "crime of violence" in the career offender guideline at §4B1.2 (Definitions of Terms Used in Section 4B1.1). The Commission amended the career offender guideline following the

114 139 S. Ct. 1872 (2019).

115 *Id.* at 1876.

116 559 U.S. 133 (2010).

117 *Id.* at 134.

118 *Id.* at 138, 142.

119 576 U.S. 591 (2015).

120 18 U.S.C. § 924(e)(2)(B)(ii).

121 *Johnson*, 576 U.S. at 606.

122 136 S. Ct. 1257, 1268 (2016).

Johnson decision, striking the residual clause to alleviate any application issues relating to it.[123] 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 because the provisions were similarly phrased.[124]

In *Beckles v. United States*, the Supreme Court resolved a circuit split on whether the guidelines are subject to due process vagueness challenges, holding that the guidelines, including the residual clause at §4B1.2, are not subject to such challenges.[125] 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 next year, in *United States v. Stitt*, the Supreme Court held that generic definition of 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.[126] The Court based its conclusion on the principle articulated in

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

124 *See*, *e.g.*, United States v. Pratt, 568 F.3d 11, 19 n.7 (1st Cir. 2009) ("The definition of 'crime of violence' under the Career Offender Guideline is almost identical to the definition of 'violent felony' under the ACCA; therefore, 'cases construing one such term should be considered instructive with respect to the scope of the other.' " (citing United States v. Richards, 456 F.3d 260, 263 n.2 (1st Cir. 2006))).

125 137 S. Ct. 886 (2017). Prior to *Beckles*, only the Eleventh Circuit had held that *Johnson* did not affect the residual clause in §4B1.2. United States v. Matchett, 802 F.3d 1185, 1194–96 (11th Cir. 2015) (*Johnson* did not make the residual clause of §4B1.2(a) unconstitutionally vague). In cases abrogated by *Beckles*, the Third, Sixth, and Tenth Circuits had held that the holding in *Johnson* rendered the residual clause in §4B1.2 void for vagueness. *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, 178 (3d Cir. 2015) (*Johnson* applies to identical language in the guidelines' career offender enhancement).

The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits either accepted the government's concessions that *Johnson* invalidated the guidelines' residual clause, or assumed without deciding, that *Johnson* applies and remanded cases for resentencing. *See* United States v. Hudson, 823 F.3d 11, 18 (1st Cir. 2016) (accepting the government's concession that "as th[e] definition of "crime of violence" in [former §4B1.2(a)(2)] is the same as in the ACCA, the government acknowledges that it is invalid after Johnson II"); United States v. Maldonado, 636 F. App'x 807, 810 (2d Cir. 2016) ("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) (per curiam) (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) (per curiam) (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*[.]").

126 139 S. Ct. 399 (2018).

Taylor that the 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 ACCA.[127] 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.[128]

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 "physical force" as contemplated by *Johnson*, includes the amount of 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.[129]

III. GUIDELINE OVERVIEW: §2K2.1 (UNLAWFUL RECEIPT, POSSESSION, OR TRANSPORTATION OF FIREARMS OR AMMUNITION; PROHIBITED TRANSACTIONS INVOLVING FIREARMS OR AMMUNITION)

A. GENERALLY

The base 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 whether the defendant is 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

1. "Firearm"

The guideline defines "firearm" as it is defined in 18 U.S.C. § 921(a)(3): "(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."[130] Generally, the circuit courts are in agreement that section 921(a)(3) requires the government only to prove that the firearm in question was

127 *Id.* at 406.

128 *Id.*

129 139 S. Ct. 544 (2019).

130 18 U.S.C. § 921(a)(3). As discussed above, 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.

designed to fire a projectile, not that the firearm was operable at the time the offense occurred.[131]

The alternative offense levels in §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 include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.[132]

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.[133] The Eighth 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.[134]

The alternative offense levels in subsections (a)(1)(A)(ii), (a)(3)(A)(ii), (a)(4)(B)(i)(II), and (a)(5) apply if the offense involved a firearm that is described in 26 U.S.C. § 5845(a), a provision of the National Firearms Act,[135] which separately defines "firearm" in a more limited fashion than 18 U.S.C. § 921(a)(3). Its definition includes certain shotguns, rifles, machineguns, silencers, and destructive devices.[136] In addition, section 5845(e) defines "any other weapon" as:

> 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

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131 *See*, *e.g.*, United States v. Davis, 668 F.3d 576 (8th Cir. 2012) (no trigger); 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 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. Ruiz, 986 F.2d 905 (5th Cir. 1993) (damaged hammer); United States v. Martinez, 912 F.2d 419 (10th Cir. 1990) (unloaded firearm).

132 USSG §2K2.1, comment. (n.2).

133 United States v. Gordillo, 920 F.3d 1292, 1300 (11th Cir. 2019).

134 *See Davis*, 668 F.3d at 579.

135 Pub. L. No. 73–474, 48 Stat. 1236 (1934), *as amended by* the Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213, 1230.

136 26 U.S.C. § 5845(a).

> 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.[137]

Section 5845(a)'s definition excludes antique firearms[138] and those found to be "primarily . . . collector's item[s]."[139]

2. "Crime of Violence" and "Controlled Substance Offense"

The alternative offense levels in subsections (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 felony convictions for either a "crime of violence" or a "controlled substance offense," as those terms are defined in §4B1.2.

For an offense to qualify as a "crime of violence" or "controlled substance offense" under §4B1.2, it must have been "punishable by imprisonment for a term exceeding one year."[140] The term "punishable" signifies that the defendant 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.[141] The conviction may be under state or federal law.[142]

The Commentary to §2K2.1[143] defines the term "crime of violence" by reference to §4B1.2, which in turn defines the term as any felony violation of a law that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful

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137 *Id.* § 5845(e).

138 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. *See* 26 U.S.C. § 5845(g). Unlike § 921, a muzzle loading firearm designed to use black powder is not included in § 5845. *See* 18 U.S.C. § 921(a)(16); 26 U.S.C. § 5845(g).

139 26 U.S.C. § 5845(a).

140 USSG §4B1.2(a), (b).

141 *See* USSG §2K2.1, comment. (n.1) (" 'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed."); USSG §4B1.2, comment. (n.1) (same for definition of "prior felony conviction").

142 USSG §2K2.1, comment. (n.1).

143 *Id.*

possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[144]

The Commentary to §2K2.1 also defines the term "controlled substance offense" 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."[145] Some of the issues surrounding the definition of this term and "crime of violence" are discussed separately below.[146]

3. "Prohibited Person"

A defendant is a prohibited person, for purposes of subsections (a)(4)(B) and (a)(6), if any of the following circumstances exist: the person 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 "alien [] illegally or unlawfully in the United States" or a non-citizen in the country pursuant to certain types of visas; has been dishonorably discharged from the Armed Forces; has renounced 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.[147]

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144 USSG §4B1.2(a).

145 USSG §4B1.2(b).

146 *See infra* Section VI.B.

147 *See* USSG §2K2.1, comment. (n.3) (citing 18 U.S.C. §§ 922(g) and 922(n)). Recognizing that many of the firearm transfer statutes sometimes cover similar conduct, the Commission amended subsections (a)(4)(B) and (a)(6) of §2K2.1 in 2011 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. *See* USSG App. C, amend. 753 (effective Nov. 1, 2011) ("The Commission determined that defendants who are convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) for making a false statement in connection with a firearms transaction and 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 have engaged in conduct similar to the elements of 18 U.S.C. § 922(d), are similarly culpable, and therefore warrant a similar sentence under §2K2.1.").

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. *Id.* In addition, the amendment provided a new application note 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. *Id.*

C. Specific Offense Characteristics

The specific offense characteristics represent various increases or decreases to the base offense level described above. A number of common issues arise when determining whether a particular specific offense characteristic under §2K2.1 applies.

1. Multiple Firearms—§2K2.1(b)(1)

If the offense involved three or more firearms, §2K2.1(b)(1) specifies an increase of two, four, six, eight, or ten levels, depending on the number of firearms. Possession of such firearms by the defendant can be actual or constructive.[148]

Note that §2K2.1 is listed at §3D1.2(d) (Groups of Closely Related Counts) and is therefore subject to the provisions of §1B1.3(a)(2), which adopts broader relevant conduct rules for certain offense types.[149] 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 also will be counted.[150] However, if the court determines that other offenses in a purported "common scheme or plan" are not substantially connected to each other by at least one factor, or are not sufficiently connected or related to each other to warrant the conclusion that they are part of the "same course of conduct" (*i.e.*, a single episode, spree, or ongoing series of offenses considering the degree of similarity, regularity, and/or time interval between the offenses), the offense may not count as relevant conduct.[151]

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

[149] *See* U.S. Sent'g Comm'n, Primer on Relevant Conduct 1–2 (2021), https://www.ussc.gov/guidelines/primers/relevant-conduct ("Subsection (a)(2) adopts broader rules, often referred to as 'expanded relevant conduct,' that hold certain defendants accountable for acts outside the offense of conviction. These rules only apply to defendants whose offenses of conviction are groupable under §3D1.2(d) (for which the guidelines rely on aggregate amounts to determine culpability), and only to acts and omissions that involved the 'same course of conduct' or a 'common scheme or plan' as the offense of conviction.").

[150] *See*, *e.g.*, United States v. Goodson, 920 F.3d 1209, 1211 (8th Cir. 2019) (defendant's statement that he handled a firearm a month prior to instant offense amounted 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, 723 (5th Cir. 2018) (enhancement at §2K2.1(b)(1) applies based on number of firearms sought even if number obtained is less).

[151] *See*, *e.g.*, United States v. Bowens, 938 F.3d 790, 800 (6th Cir. 2019) (possession of a third firearm, which defendant left under a pillow at mother's house four months before the offense at issue, should not have been counted as relevant conduct because the circumstances of that possession were unrelated to the offense of conviction, given the lack of regularity and similarity, and the weak temporal proximity), *cert. denied*, 140 S. Ct. 2572 (2020).

Application Note 5 to §2K2.1 also emphasizes that only firearms *unlawfully* sought, possessed, or distributed are counted for purposes of calculating the number of firearms under subsection (b)(1).[152] Courts have reached different conclusions about whether a firearm illegally possessed under state law but legally possessed under federal law is counted for purposes of the enhancement.[153] Traditional doctrines of constructive possession may apply.[154]

The First Circuit has held that a district court did not err in varying upwards based in part on the defendant's possession of two firearms.[155] 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, accordingly, the district court's upward variance for the second firearm was impermissible double counting.[156] The court rejected this argument, finding that the guidelines did not address possession of two firearms and that nothing in the guidelines or any federal criminal statute prohibited consideration of this factor.[157]

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."[158] 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 14–6) but does not apply to base offense levels determined under subsections (a)(1)–(a)(5) (offense levels 26–18). The defendant bears the burden of proving the applicability of this reduction.[159] However, the

[152] USSG §2K2.1, comment. (n.5).

[153] *Compare* United States v. Gill, 864 F.3d 1279, 1280–81 (11th Cir. 2017) (per curiam) (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, 592 (2d Cir. 2000) (only firearms illegal under federal law count for purposes of enhancement).

[154] *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. Houston, 364 F.3d 243, 248 (5th Cir. 2004) ("Possession may be actual or constructive. 'Constructive possession' is ownership, dominion, or control over the item itself, or control over the premises in which the item is concealed.") (citations omitted).

[155] United States v. Matos-de-Jesus, 856 F.3d 174, 178 (1st Cir. 2017).

[156] *Id.* at 177.

[157] *Id.* at 178–79 (finding instructive the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017)).

[158] USSG §2K2.1(b)(2).

[159] *See* United States v. Cousens, 942 F.2d 800, 802 (1st Cir. 1991) (collecting cases).

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.[160] Additionally, the Eighth Circuit recently held that the reduction only relates to firearms or ammunition that the defendant actually possessed and, therefore, does not cover firearms or ammunition the defendant attempted or intended to possess.[161]

A district court's finding on this reduction is reviewed for clear error on appeal.[162] 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."[163] Selling weapons may 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)."[164] Courts have found that "plinking," a form of target shooting for amusement and recreation, can be a sporting purpose under the guidelines.[165]

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.[166]

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[160] United States v. Mason, 692 F.3d 178, 183 (2d Cir. 2012) ("The Guideline and Application Note cannot be read to require a showing that the defendant actually used each firearm for lawful sporting purposes. Instead, as other courts considering this question have concluded, the relevant inquiry is the broader question whether, in the totality of the circumstances, a defendant possessed firearms with the *intent* to use them for a lawful sporting purpose.").

[161] United States v. Sholley-Gonzalez, 996 F.3d 887, 898 (8th Cir. 2021) ("[USSG] § 2K2.1(b)(2)'s text only considers the firearms or ammunition the defendant actually 'possessed,' not those the defendant 'attempted' or 'intended' to possess. Nor does § 2K2.1(b)(2)'s commentary note include attempted possessions as relevant to the sporting-use reduction's application.").

[162] *See Mason,* 692 F.3d at 182; United States v. Massey, 462 F.3d 843, 846 (8th Cir. 2006).

[163] USSG §2K2.1, comment (n.6).

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

[165] *See, e.g.*, United States v. Hanson, 534 F.3d 1315, 1317 (10th Cir. 2008) (describing "plinking" and collecting cases on target shooting, stating: "We and several other circuits have assumed that target shooting, organized or unorganized, is a sporting purpose under the Guidelines.").

[166] 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, 928 (11th Cir. 1990) (per curiam) ("Self-defense or self-protection is not sport or recreation."); *see also* United States v. Gavilan, 966 F.2d 530, 531 (9th Cir. 1992) ("Here, the court found Gavilan's gun possession was in part for the purpose of protecting the marijuana. Therefore, [subsection (b)(2)] is inapplicable even if the firearm was also possessed for a separate purpose that may be lawful[.]").

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

Section 2K2.1(b)(4)(A) provides for a 2-level increase where a firearm is stolen and (b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number.[167] Note that a defendant need not have *known* that a firearm he illegally possessed was stolen[168] or had an altered or obliterated serial number.[169]

If the defendant steals the firearm in a burglary, the enhancement applies.[170] 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.[171]

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.[172] Rather, the court held that "a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes accurate

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[167] USSG §2K2.1(b)(4).

[168] USSG §2K2.1, comment. (n.8(B)) ("Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."); *see also* United States v. Prien-Pinto, 917 F.3d 1155, 1160–61 (9th Cir. 2019) (strict liability of §2K2.1(b)(4) is constitutional), *cert. denied*, 140 S. Ct. 172 (2019); United States v. Gonzalez, 857 F.3d 46, 55–56 (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) (the lack of a scienter requirement in the stolen firearm enhancement is permissible); United States v. Murphy, 96 F.3d 846, 848–49 (6th Cir. 1996) (the enhancement does not violate due process despite the absence of a scienter requirement); United States v. Griffiths, 41 F.3d 844, 846 (2d Cir. 1994) (per curiam) (same); United States v. Richardson, 8 F.3d 769, 770 (11th Cir. 1993) (same); United States v. Mobley, 956 F.2d 450, 454–55 (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).

[169] *See* United States v. Perez, 585 F.3d 880, 883 (5th Cir. 2009) (the enhancement does not require defendant to know the serial number is altered or obliterated); United States v. Webb, 403 F.3d 373, 384 (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) (per curiam) ("Nor is due process offended by a strict liability construction of [the enhancement][.]"); *Schnell*, 982 F.2d at 219–22 (absence of scienter requirement in enhancement does not violate substantive due process).

[170] *See* United States v. Goff, 314 F.3d 1248, 1250 (10th Cir. 2003) (collecting cases); United States v. Hurst, 228 F.3d 751, 763–64 (6th Cir. 2000) (same).

[171] United States v. Lavalais, 960 F.3d 180, 188 (5th Cir. 2020) (collecting cases); United States v. Colby, 882 F.3d 267, 272 (1st Cir. 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).

[172] United States v. Carter, 421 F.3d 909, 916 (9th Cir. 2005). In addition, the Second, Fourth, Sixth, and Ninth Circuits have held that "altered is less demanding than obliterated." United States v. St. Hilaire, 960 F.3d 61, 66 (2d Cir. 2020).

information less accessible."[173] The enhancement applies even where partially obliterated serial numbers can be discerned through use of microscopy or other techniques.[174]

The Sixth Circuit has held that "a serial number that is visible to the naked eye is not 'altered or obliterated' under § 2K2.1(b)(4)(B)," and the Second Circuit has held that the same standard applies to the term "altered."[175] In contrast, the Fifth and Eleventh Circuits have held that a serial number can be considered "altered" even if the serial number is legible; the Fourth Circuit takes a similar view.[176] The First, Second, Fifth, Sixth, 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.[177]

To avoid double counting, Application Note 8 states that the enhancement does 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).[178] It is not double counting, therefore, to impose the enhancement even if the fact that the firearm was stolen is an element of an offense for which the defendant was convicted if the defendant also was convicted of another firearm offense.[179]

4. Trafficking—§2K2.1(b)(5)

Section 2K2.1(b)(5) provides a 4-level increase if the defendant trafficked in firearms. Application Note 13(A) explains that this enhancement applies when two

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[173] *Carter*, 421 F.3d at 916; *see also* United States v. Sands, 948 F.3d 709, 715 (6th Cir. 2020) (collecting cases adopting this standard).

[174] *See*, *e.g.*, *Carter*, 421 F.3d at 910 ("[A] serial number which is not discernible to the unaided eye, but which remains detectable via microscopy, is altered or obliterated."); *see also Sands*, 948 F.3d at 715 (same); United States v. Jones, 643 F.3d 257, 258–59 (8th Cir. 2011) (citing *Carter*, 421 F.3d at 916).

[175] *Sands*, 948 F.3d at 715; *St. Hilaire*, 960 F.3d at 66 ("We follow the Sixth Circuit, which defines 'altered' to mean illegible.").

[176] United States v. Millender, 791 F. App'x 782, 783 (11th Cir. 2019) (per curiam) ("[T]he district court properly declined to adopt an interpretation of 'altered' that would require illegibility because that interpretation would render 'obliterated' superfluous."); United States v. Perez, 585 F.3d 880, 884–85 (5th Cir. 2009) (upholding enhancement where "damage to a serial number [] did not render it unreadable"); *see also* United States v. Harris, 720 F.3d 499, 503–04 (4th Cir. 2013) ("[W]hile the possession of a firearm with a serial number that is no longer legible and conspicuous falls in the heartland of § 922(k) and [] § 2K2.1(b)(4)(B), a serial number that is *less legible* or *less conspicuous*, but not illegible, is also covered . . . . This interpretation that a serial number rendered *less legible* by gouges and scratches is 'altered' prevents the word 'obliterated' from becoming superfluous.").

[177] *St. Hilaire*, 960 F.3d at 65; *Sands*, 948 F.3d at 713; United States v. Jones, 927 F.3d 895, 897 (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).

[178] USSG §2K2.1, comment. (n.8(A)).

[179] *See, e.g.*, United States v. Shelton, 905 F.3d 1026, 1033 (7th Cir. 2018).

elements are met: 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 such conduct would result in the firearms being transferred to an individual who (i) could not legally possess the firearm or (ii) intended to use or dispose of the firearm unlawfully.[180]

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.[181] In that case, which involved an undercover agent posing as a prohibited person, the Sixth Circuit also held that the transferee need not actually be 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.[182] The Tenth Circuit disagreed, holding that the government must show the transferee was actually an unlawful possessor for the enhancement to apply.[183]

Application Note 13(C) states that where "the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted."[184]

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

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[180] USSG §2K2.1, comment. (n.13(A)); *see also, e.g.*, United States v. Garcia, 635 F.3d 472, 479–80 (10th Cir. 2011) (defendant purchased "type of weapons preferred by Mexican cartels . . . in significant quantities" and weapons were recovered in Mexico, including from Zetas Cartel); United States v. Juarez, 626 F.3d 246, 252–53 (5th Cir. 2010) (clandestine nature of the firearms transactions and $200 premium per firearm gave reason to believe the weapons were intended for unlawful use (export to Mexican drug cartels) and justified the enhancement); *cf.* United States v. Moody, 915 F.3d 425, 428 (7th Cir. 2019) (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.").

[181] 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.").

[182] *Id.* at 870 ("[T]he agent need not have *actually* been a felon for §2K2.1(b)(5) to apply."); *see also* United States v. Asante, 782 F.3d 639, 644 (11th Cir. 2015) ("[I]n applying the trafficking enhancement in this manner, a court looks, not to what actually happened to the firearms, but instead to the circumstances known to the defendant."); 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).

[183] 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).

[184] USSG §2K2.1, comment. (n.13(C)); *see, e.g.*, United States v. Hernandez, 633 F.3d 370, 378–79 (5th Cir. 2011) ("Application note 13(C) represents the Sentencing Commission's recognition that it may be appropriate to tie the §2K2.1(b)(5) trafficking enhancement to the number of firearms trafficked where that number becomes large, because otherwise it would not adequately reflect the seriousness of the crime. That is a perfectly good reason to depart from the guidelines, and the district court was entitled to rely on application note 13(C) to do so.").

for trafficking apply. [185] The application note further provides that if the defendant "used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under [§2K2.1](b)(6)(B), [discussed further below,] also would apply."[186] The Second, Fifth, Sixth, 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.[187]

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

Section 2K2.1(b)(6)(A) provides for a 4-level increase 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. This provision establishes a minimum offense level of 18 in such cases.[188]

Prior to 2011, some courts applied what is now §2K2.1(b)(6)(B) (use or possession of any firearm of ammunition in connection with another felony or possession or transfer with reason to believe it would be used or possessed for same) 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).[189] In 2011, the Commission amended §2K2.1 to add the current prong (A) and redesignated the existing provision as prong (B) for clarity and to promote consistency.[190]

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185 USSG §2K2.1, comment. (n.13(D)) (referencing enhancements under subsections (b)(1) and (b)(5)).

186 *Id.*

187 *See* United States v. Fugate, 964 F.3d 580, 587 (6th Cir. 2020); United States v. Young, 811 F.3d 592, 600–01 (2d Cir. 2016); United States v. Guzman, 623 F. App'x 151, 156 (5th Cir. 2015) (per curiam); United States v. Johns, 732 F.3d 736, 740 (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.").

188 USSG §2K2.1(b)(6).

189 *See*, *e.g.*, United States v. Juarez, 626 F.3d 246, 253–54 (5th Cir. 2010) (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.

190 *See* USSG App. C, amend. 753 (effective Nov. 1, 2011) (discussing courts' application of prior subsection to cases in which defendant transported firearms across the border: "[F]or clarity and to promote consistency of application, the Commission created a separate, distinct prong (A) in subsection (b)(6) to cover this conduct."); *see also* United States v. Wiebe-Neudorf, 806 F. App'x 331, 332–33 (5th Cir. 2020) (per curiam) (upholding enhancement under subsection (b)(6)(A) where defendant "knew, or had reason to believe, the individuals to whom he was delivering the firearms in Columbus would export them to

6. Firearm or Ammunition Possessed "In Connection With" Another Offense—§2K2.1(b)(6)(B)

Section 2K2.1(b)(6)(B) provides for a 4-level increase 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."[191] As with subsection (b)(6)(A), this provision establishes a minimum offense level of 18 in such cases.

Application Note 14(A) explains that this enhancement applies if the firearm or ammunition "facilitated, or had the potential of facilitating" a felony offense.[192] The enhancement applies equally to firearms and ammunition only cases.[193] 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.[194]

Application Note 14(B) further discusses the "in connection with" requirement when the other offense is burglary or a drug offense. The application note provides that the enhancement applies when the defendant finds and takes a 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.[195]

Mexico . . . and he possessed the firearms and ammunition with knowledge, intent, or reason to believe they would be transported out of the United States.").

191 USSG §2K2.1(b)(6)(B) (emphasis added).

192 USSG §2K2.1, comment. (n.14(A)); *see also* United States v. Grimaldo, 993 F.3d 1077, 1082–83 (9th Cir. 2021) (district court plainly erred in applying a 4-level enhancement without determining whether possession of the firearm "facilitated or potentially facilitated — *i.e*, had some potential emboldening role in" the defendant's felonious conduct).

193 *See* United States v. Eaden, 914 F.3d 1004, 1010 (5th Cir. 2019) (disagreeing with the Sixth Circuit's approach in *United States v. Coleman*: "[W]e have held that possession of ammunition alone may, under appropriate circumstances, be sufficient to show facilitation for purposes of § 2K2.1(b)(6)(B)'s four-level enhancement. But . . . possession of ammunition alone does not enjoy a presumption that it was connected with a drug trafficking offense. In this context, to demonstrate facilitation, the government must adduce facts tending to show that the ammunition facilitated or had the potential to facilitate the drug trafficking 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.").

194 *See, e.g.*, United States v. Hemsher, 893 F.3d 525, 534 (8th Cir. 2018); United States v. Legros, 529 F.3d 470, 474 (2d Cir. 2008); United States v. Richardson, 510 F.3d 622, 626 (6th Cir. 2007), *abrogation recognized by* United States v. Taylor, 648 F.3d 417, 431 (6th Cir. 2011).

195 USSG §2K2.1, comment. (n.14(B)); *see also, e.g.*, United States v. Stinson, 978 F.3d 824, 827–28 (1st Cir. 2020) (enhancement proper where defendant possessed firearms in burglary but did not use or transfer them); United States v. Brake, 904 F.3d 97, 102 (1st Cir. 2018) ("[T]he sentencing concern addressed by [subsection (b)(6)(B)] is wholly unrelated to whether the weapon was stolen during the burglary or at any

For purposes of subsection (b)(6)(B), Application Note 14(C) defines "another felony offense," as "any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained."[196]

When the other offense is a drug trafficking offense, the enhancement applies if "a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia."[197] The Eighth Circuit has interpreted this language 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."[198] Courts have varied in whether they find proximity alone to be sufficient in these cases and in the degree of fact-finding required to find a nexus between the drugs and guns.[199]

In upholding application of the enhancement under the "fortress theory"—the notion that a defendant who possesses a firearm to protect drugs or facilitate drug trafficking on a premises owned or controlled by the defendant—the Sixth Circuit has 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.[200] Typically, where the defendant has exchanged drugs

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other point. Rather, it speaks to the risk that possessing a firearm during a burglary might facilitate that offense or portend other, potentially more serious, crimes.").

196 USSG §2K2.1, comment. (n.14(C)).

197 USSG §2K2.1, comment. (n.14(B)); *see, e.g.*, United States v. Tirado-Nieves, 982 F.3d 1, 10–11 (1st Cir. 2020) (affirming enhancement based on the court's determination that defendant "unlawfully possessed drug paraphernalia in a quantity that was indicative of drug trafficking").

198 United States v. Agee, 333 F.3d 864, 866 (8th Cir. 2003). The Eighth Circuit has held that "different rules govern the application of § 2K2.1(b)(6) in drug trafficking cases and drug possession cases." United States v. Almeida-Perez, 549 F.3d 1162, 1175 (8th Cir. 2008) (also noting that the "clearly improbable" standard applies to drug trafficking while the "facilitation" standard applies to simple possession).

199 *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; error to find drugs were exchanged for a weapon where factual finding was merely that purchaser was a drug addict), *with* United States v. Smith, 480 F.3d 1277, 1280 (11th Cir. 2007) (citing precedent rejecting more restrictive interpretations of the enhancement, including requiring the firearm to serve a purpose related to the crime or requiring more than mere possession). *See also* United States v. Perez, 5 F.4th 390, 399–402 (3d Cir. 2021) (although physical proximity alone is insufficient, a rebuttable presumption that the enhancement applies arises where a firearm and drugs or drug-related items are found in close proximity in a drug trafficking case); United States v. Brockman, 924 F.3d 988, 991–94 (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).

200 *See* United States v. Shanklin, 924 F.3d 905, 920 (6th Cir. 2019); *see also* United States v. Jackson, 877 F.3d 231, 239–40 (6th Cir. 2017) (the fortress theory "presumes, under certain circumstances, guns in close proximity to drugs warrant the [] enhancement . . . [and] applies 'if it reasonably appears that the

for guns, the enhancement will apply.[201] Because Application Note 14(B) 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.[202]

The Eighth Circuit, however, has emphasized one limitation on the application of the enhancement in subsection (b)(6) as it relates to drug possession offenses: 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 stated 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."[203] 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.[204]

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firearms found on the premises controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction' " (citations omitted)); United States v. Taylor, 648 F.3d 417, 432 (6th Cir. 2011) (applying fortress theory); United States v. Angel, 576 F.3d 318, 321 (6th Cir. 2009) (same).

[201] *See, e.g.*, 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); 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 defendant 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."). *But see* United States v. Gates, 845 F.3d 310, 312–13 (7th Cir. 2017) (error to apply enhancement where defendant accepted gun as collateral for drugs and then sold gun to confidential informant for money and also gave informant drugs; in neither case was the gun used to facilitate a drug crime).

[202] United States v. Eaden, 914 F.3d 1004, 1007–08 (5th Cir. 2019).

[203] United States v. Smith, 535 F.3d 883, 886 (8th Cir. 2008) (also clarifying that it "make[s] no bright line rule that § 2K2.1(b)(6) requires a certain amount of drugs"); *cf.* United States v. Bishop, 940 F.3d 1242, 1252 (11th Cir. 2019) (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), *cert. denied*, 140 S. Ct. 1274 (2020); United States v. Walker, 900 F.3d 995, 997 (8th Cir. 2018) (per curiam) (enhancement not appropriate where evidence did 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. Butler, 594 F.3d 955, 966 (8th Cir. 2010) (distinguishing *Smith* when the defendant possessed more than a " 'user' amount of drugs").

[204] *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, 1032–33 (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).

In *United States v. Jackson*, the Sixth Circuit reversed application of the enhancement where a defendant made separate sales of a gun and drugs to a confidential informant.[205] 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 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."[206]

In 2014, the Commission resolved a circuit split affecting both §2K2.1(b)(6)(B) and the §2K2.1(c)(1) cross reference, discussed further below. 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(d).[207] Amendment 784 clarified that there was no such restriction; the enhancement may apply to "groupable" (such as drug) and "non-groupable" (such as murder or robbery) offenses alike.[208]

D. Cross Reference—§2K2.1(c)(1)

The cross reference at §2K2.1(c)(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."[209]

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."[210] The cross reference in subsection (c)(1)(A) directs the sentencing court to apply §2X1.1 "in respect to that other offense," if it results in a greater offense level. If death resulted, subsection (c)(1)(B) directs the sentencing court to use the most analogous homicide offense guideline, if it results in a greater offense level.[211] The Eighth Circuit has

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205 *Jackson*, 877 F.3d at 242–43.

206 *Id.*

207 *Compare* United States v. Horton, 693 F.3d 463, 478–79 (4th Cir. 2012) (§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) (cross reference could be applied to the non-grouping offense of extortion).

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

209 USSG §2K2.1(c)(1) (emphasis added).

210 USSG §2K2.1, comment. (n.14(C))

211 USSG §2K2.1(c).

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.[212]

As noted above, Amendment 784 resolved a circuit split over whether the cross reference (and the section (b)(6)(B) enhancement) could be applied only to "groupable" offenses by clarifying that there was no such limitation. Amendment 784 also, however, restricted the application of the 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."[213] 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. In such circumstances, 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 generally have held that the firearm enhancement should be applied.[214]

E. DEPARTURES

The Commentary to §2K2.1 provides for upward departures in several different circumstances. Application Note 7 states 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

[212] United States v. Edger, 924 F.3d 1011, 1014 (8th Cir.) (term "offense of conviction" in the guideline "encompasses more broadly the offense conduct giving rise to the conviction"), *cert. denied*, 140 S. Ct. 420 (2019).

[213] *See* USSG App C, amend. 784 (effective Nov. 1, 2014).

[214] *See* United States v. Webb, 665 F.3d 1380, 1381 (11th Cir. 2012) (per curiam); United States v. Patterson, 947 F.2d 635, 637–38 (2d Cir. 1991); United States v. Wheelwright, 918 F.2d 226, 228 (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).

several upward departures found in Chapter Five that might apply in such cases: §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).[215]

Application Note 11 provides three circumstances that may warrant an upward departure in addition to the circumstances in Application Note 7. 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: National Firearms Act weapons; "military type assault rifles, [and] non-detectable ('plastic') firearms." The third is where the offense involves "large quantities of armor-piercing ammunition." [216]

IV. OTHER GUIDELINE ENHANCEMENTS FOR FIREARMS

The *Guidelines Manual* includes enhancements outside of §2K2.1 for firearm-related conduct, such as a 2-level enhancement if a dangerous weapon or firearm is possessed in connection with the drug trafficking activities. The following section describes enhancements outside of §2K2.1 that relate to firearms.

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. Subsection (b)(1) applies where the defendant possesses a firearm in connection with unlawful drug activities.[217] Possession can be actual or constructive, meaning the defendant is able to exercise control or dominion over the firearm.[218] Presence, not use, is the determining factor.[219]

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[215] USSG §2K2.1, comment. (n.7).

[216] USSG §2K2.1, comment. (n.11).

[217] USSG §2D1.1(b)(1). This SOC also is provided for in section (b)(1) of the listed chemical guideline. *See* USSG §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). When interpreting §2D1.11, some courts seek guidance from case law interpreting §2D1.1(b)(1) because of the provisions' identical language. *See* United States v. Anderson, 61 F.3d 1290, 1303 n.13 (7th Cir. 1995) ("There is a dearth of case law interpreting this guideline. Accordingly, we shall seek guidance from the cases interpreting [] § 2D1.1(b)(1), which contains identical language."); United States v. Cline, 75 F. App'x 727, 729 (10th Cir. 2003) (citing *Anderson*).

[218] *See* 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.").

[219] *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) (per curiam) ("The

Application Note 11 to §2D1.1 states that the enhancement applies if a firearm was present "unless it is clearly improbable that the weapon was connected with the offense."[220] 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.[221] The D.C. Circuit 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 defendant beyond his ownership of the compound where it was found.[222]

Courts have found that 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).[223] This view comports with the approach described in Application Note 4 to §2K2.4, which provides that courts should not apply weapon enhancements if a sentence under §2K2.4 is imposed in conjunction with a sentence for an underlying offense.[224]

In most circuits, the government first must show that 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.[225] In

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[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.").

[220] USSG §2D1.1, comment. (n.11). Application Note 2 to §2D1.11 provides that the adjustment "should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense." USSG §2D1.11, comment. (n.2); *see also Anderson*, 61 F.3d at 1304–05 (court did not err in applying the enhancement where phenyl magnesium bromide bottles picked up by the defendant were found in the same interior compartment of the car as the firearm and record supported knowledge and the exercise of control of that compartment by the defendant).

[221] United States v. Thurman, 889 F.3d 356, 372 (7th Cir. 2018).

[222] United States v. Bagcho, 923 F.3d 1131, 1138–39 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2677 (2020).

[223] *See*, *e.g.*, United States v. Cervantes, 706 F.3d 603, 620 (5th Cir. 2013) ("This Court has held that the enhancement contained in § 2D1.1(b)(1) impermissibly punishes a defendant twice for the same conduct if it is levied in conjunction with a sentence for violating 18 U.S.C. § 924(c). This comports with the approach advocated by the Sentencing Guidelines[.]" (citing USSG §2K2.4, comment. (n.4) and United States v. Benbrook, 119 F.3d 338, 339 (5th Cir. 1997))).

[224] USSG §2K2.4, comment. (n.4); *see* discussion *infra* Section V.A. (§2K2.4—Interaction of Firearms Enhancements and Section 924(c)).

[225] *See, e.g.*, United States v. McCloud, 935 F.3d 527, 531 (6th Cir. 2019) (once government proves defendant possessed the weapon during commission of the offense, presumption arises and burden shifts to defendant "to demonstrate that 'it is clearly improbable that the weapon was connected to the offense,' in which case the enhancement would not be applicable."); United States v. Miller, 890 F.3d 317, 328 (D.C. Cir. 2018) (sentencing court erred when imposing enhancement when no nexus was 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, 293–94 (5th Cir. 2003) (the government has the burden of proof under §2D1.1(b)(1) of showing by a preponderance of the evidence that a temporal and spatial relation

conspiracy cases, the reasonable foreseeability that a weapon may be present can be enough to prove possession.[226]

In *United States v. Belitz*, the defendant argued that he was not the owner of the gun used to increase his offense level in the drug offense.[227] His friend had asked him to repair the gun, and the defendant had it in the room for the friend to pick up.[228] The Eighth Circuit found lack of ownership and an innocent reason for possession were irrelevant in determining whether this enhancement applied.[229] The gun was loaded and accessible, and the defendant knew there were drugs in the house.[230] The court concluded that the defendant had not shown that it was clearly improbable that the gun was connected to the drug activity.[231]

B. SECTION 2B3.1(b)(2)—ROBBERY

In §2B3.1, the robbery guideline, a specific offense characteristic at subsection (b)(2) includes increases of two to seven offense levels where a firearm or

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).

226 *See, e.g.*, United States v. Jones, 900 F.3d 440, 449 (7th Cir. 2018) (enhancement applied as presence of firearm was 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, 59 (1st Cir. 2003) (the government 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, 694 (8th Cir. 2003) (constructive possession suffices "if it is reasonably foreseeable that a co-conspirator would have possessed a weapon" (quoting United States v. Braggs, 317 F.3d 901, 904 (8th Cir. 2003))); United States v. Topete-Plascencia, 351 F.3d 454, 458 (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).

227 141 F.3d 815 (8th Cir. 1998).

228 *Id.* at 817.

229 *Id.* at 818.

230 *Id.*

231 *Id.*

dangerous weapon was involved in the robbery or if a threat of death was made.[232] The particular increase depends on the type of firearm or weapon and the way the firearm was involved, *i.e.*, whether the firearm or dangerous weapon was possessed by the defendant or whether the defendant used, brandished, or discharged a firearm or dangerous weapon during the course of the robbery. The different factual scenarios that arise in such cases have presented application issues for the enhancement, some of which are discussed below.

1. Weapon "Discharged," "Brandished or Possessed," or "Otherwise Used"

One application issue is whether the firearm or 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.[233] In other words, the difference between "brandishing" and "otherwise used" is a difference based on the seriousness of the charged criminal conduct.[234] The guideline creates a hierarchy of culpability for varying degrees of involvement during the criminal offense.[235]

The First Circuit has analyzed 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.' "[236] Likewise, the Fifth Circuit has stated: "Displaying a weapon without pointing or targeting should be classified as 'brandished,' but pointing the weapon at any individual or group of individuals in a specific manner should be 'otherwise used.' "[237] Other appellate courts have reached similar conclusions.[238]

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[232] USSG §2B3.1(b)(2)(A)–(F). The guideline also has an enhancement at subsection (b)(6) that provides a 1-level increase if a firearm (or destructive device or controlled substance) was taken or if the taking of the firearm (or same) was the object of the offense. USSG §2B3.1(b)(6).

[233] *See* United States v. Johnson, 199 F.3d 123, 126–27 (3d Cir. 1999) (collecting cases).

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

[235] *See id.*; United States v. Hart, 226 F.3d 602, 605 (7th Cir. 2000) ("Essentially, the guideline creates a 'hierarchy of culpability' for varying degrees of criminal involvement during the commission of a robbery." (quoting United States v. Wooden, 169 F.3d 674, 675 (11th Cir. 1999))).

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

[237] United States v. Dunigan, 555 F.3d 501, 505 (5th Cir. 2009).

[238] *See, e.g.*, United States v. Orr, 312 F.3d 141, 145 (3d Cir. 2002) (holding a gun to someone's head is sufficient for the enhancement—infliction of physical violence or a verbalized threat is not required); *Wooden*, 169 F.3d at 676 (pointing a handgun at the victim's head one-half inch away constituted "otherwise used"); *Johnson*, 199 F.3d at 128 (using sledgehammer to "smash jewelry cases in front of customers and employees, while [] co-defendant held a baseball bat aloft to 'break necks' or 'knock heads off' " 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).

Application Note 2 to §2B3.1 instructs courts that, for purposes of the 3-level enhancement at §2B3.1(b)(2)(E) (if a dangerous weapon was brandished or possessed), an object is considered a dangerous weapon if it closely resembles an instrument capable of inflicting death or serious bodily injury or the defendant uses the object in a way to create the impression of same.[239] In determining whether an enhancement applies under §2B3.1(b)(2)(E), most circuits apply an objective standard to decide whether an object may be considered a dangerous weapon.[240] 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 upheld the district court's application of this enhancement where a defendant brought a Styrofoam sandwich box into a bank asserting it was a bomb.[241] 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.[242] Similarly, other 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.[243]

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.[244] 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

[239] USSG §§2B3.1, comment. (n.2), 1B1.1, comment (n.1(E)) (defining "dangerous weapon").

[240] *See* United States v. Wooten, 689 F.3d 570, 577 (6th Cir. 2012) (collecting cases); *Hart*, 226 F.3d at 606 (same); United States v. Dixon, 982 F.2d 116, 124 (3d Cir. 1992) (even though defendant did not possess actual weapon under towel, defendant's actions created reasonable belief that she had a gun); United States v. Taylor, 960 F.2d 115, 116 (9th Cir. 1992) (defendant "intentionally created the appearance that he possessed a dangerous weapon . . . and the victim reasonably believed that [the defendant] was armed").

[241] United States v. Rodriguez, 301 F.3d 666, 669 (6th Cir. 2002).

[242] *Id.*; *see also Hart*, 226 F.3d at 603–04, 607–08.

[243] *See* United States v. Davis, 635 F.3d 1222, 1225–26 (D.C. Cir. 2011) (hand concealed in a backpack created the appearance of a dangerous weapon); United States v. Souther, 221 F.3d 626, 628–29 (4th Cir. 2000) (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, 1455–56 (11th Cir. 1997) (concealed hand appeared to be a dangerous weapon because it was pressed into the victim's side); *Dixon*, 982 F.2d at 121–24 (concealed hand appeared to be a dangerous weapon because it was draped with a towel); *see also* United States v. Taylor, 961 F.3d 68, 75–77 (2d Cir. 2020) (district court erred in applying enhancement where defendant pretended to possess firearms by holding belt with unconcealed hand)

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

during the robbery, but no one knew he had on his person an object that might have appeared to be dangerous.[245]

2. *"Threat of Death"*

Another issue that arises is what constitutes a "threat of death" sufficient to trigger a two-level increase under §2B3.1(b)(2)(F). The enhancement applies when the defendant engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death, such as a written demand using the words, "Give me the money or I will shoot you."[246] The threat may be in the form of an oral or written statement, act, gesture, or a combination of same.[247] All circuits agree that the statement "I have a gun" constitutes a "threat of death," and qualifies for a 2-level enhancement even if no express threat to use a gun is made.[248]

C. SECTION 2B5.1—OFFENSES INVOLVING COUNTERFEIT BEARER OBLIGATIONS OF THE UNITED STATES

In §2B5.1, the counterfeit bearer obligations guideline, two offense levels are added at §2B5.1(b)(4) if a dangerous weapon, including a firearm, was possessed 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.[249]

The Third Circuit analyzed this firearm enhancement in *United States. v. Gregory*.[250] 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

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245 *Id.*

246 USSG §2B3.1, comment. (n.6); *see also* USSG App. C, amend. 552 (effective Nov. 1, 1997) ("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 (*e.g.*, a bank teller) a greater amount of fear than necessary to commit the robbery.").

247 USSG §2B3.1, comment. (n.6).

248 *See, e.g.*, United States v. Martinez, 602 F.3d 1156, 1159 (10th Cir. 2010) ("Other circuits have uniformly held that threatening language or conduct coupled with a perception that the threat could be consummated suffices under §2B3.1. For instance, stating 'I have a gun' constitutes a threat of death, even if the defendant does not show the gun."); United States v. Jennings, 439 F.3d 604, 611 (9th Cir. 2006) (collecting cases). *But see* United States v. Wooten, 689 F.3d 570, 575 (6th Cir. 2012) (collecting cases and stating: "[W]e have clearly established that the statement 'I have a gun' can constitute a threat of death for purposes of the §2B3.1(b)(2)(F) enhancement. Other circuits are in accordance with this general proposition[.]"; but clarifying that, "while the statement 'I have a gun' certainly *can* be enough to support the threat-of-death enhancement—and in the majority of cases it is—the statement is not *necessarily* enough, especially when contextual circumstances undermine the otherwise threatening nature of the declaration.").

249 *See* USSG §2B5.1, comment. (n.2).

250 345 F.3d 225 (3d Cir. 2003).

§2B5.1(b)(4), stating prior circuit case law mandated it.[251] In clarifying its precedent, the Third Circuit held that while

> the phrase "in connection with," expresses some relationship or association, one that can be satisfied in a number of ways such as a causal or logical relation or other type of relationship . . . this does not, however, mean that the government must show a causal relationship between the weapon and the criminal offense . . . . [T]he enhancement applies to possession as well as use, and a concealed weapon can further a criminal objective even if a defendant never lets anyone know that he/she is in possession of it.[252]

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

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

Application Note 4 to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), the guideline covering offenses under 18 U.S.C. § 924(c), instructs that a defendant cannot receive both a guideline enhancement for firearms for the underlying offenses and a mandatory consecutive sentence for section 924(c) based on the same firearm.[253] Courts have held that this application 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.[254] The same prohibition applies to fake firearms.[255] In addition, courts have held that the death threat enhancement at §2B3.1(b)(2)(F) is inapplicable when related to the firearm that forms the basis of a section 924(c) sentence.[256]

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[251] *Id.* at 228; *see also* United States v. Loney, 219 F.3d 281, 284–85 (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).

[252] *Gregory*, 345 F.3d at 229.

[253] *See* USSG §2K2.4, comment. (n.4). The §2K2.4 guideline applies to offenders convicted of violating sections 844(h), 844(o), 924(c), and 929(a). *See* USSG §2K2.4(a)–(c) and USSG App. A.

[254] *See* United States v. Knobloch, 131 F.3d 366, 372 (3d Cir. 1997) ("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 offense for possession of any firearm.").

[255] *See, e.g.*, United States v. Eubanks, 593 F.3d 645, 649–50 (7th Cir. 2010) ("[F]or enhancement purposes, real guns are treated as indistinguishable from fake guns . . . . [T]he sentence under § 924(c) 'account[ed] for all of the guns possessed, carried, or used' by Eubanks and the co-defendants in relation to the robbery, including the plastic B.B. gun. So the district court's four-level enhancement under []§2B3.1(b)(2)(D) was impermissible double counting.").

[256] *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).

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 restriction 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. 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."[257] 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.[258] Thus, a defendant with a section 924(c) 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 in such a case, the drug and felon-in-possession offenses still should 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.[259] Only the Seventh Circuit has disagreed, holding that 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.[260]

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257 USSG §3D1.2(c).

258 USSG §2K2.4, comment. (n.4).

259 *See* United States v. Bell, 477 F.3d 607, 616 (8th Cir. 2007); *see also* United States v. Gibbs, 395 F. App'x 248, 250 (6th Cir. 2010) and United States v. King, 201 F. App'x 715, 718 (11th Cir. 2006) (both 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).

260 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) (per curiam) (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.").

VI. 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 §4B1.2. 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 some issues that arise in applying these definitions.

A. Relationship to Other Guideline and Statutory Definitions of the Terms

When applying the definition of a "crime of violence," it is important to be aware that there are other uses of the term in other parts of the guidelines and the United States 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.[261] Additionally, Application Note 2 to §2L1.2 of the guidelines defines the term "crime of violence" for purposes of that guideline's specific offense characteristics somewhat differently. The definitions of "drug trafficking offense" and "controlled substance offense" also differ 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.[262]

The definition encompasses two basic types of offenses. One type is an offense that has as an *element* "the use, attempted use, or threatened use of physical force against the person of another," for example, robbery offenses that are defined as taking property from the person of another using physical force. The second type is 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

[261] *Compare* 18 U.S.C. § 16, *with* USSG §4B1.2(a); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (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*).

[262] USSG §4B1.2(a).

firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[263]

Courts have applied the categorical approach described at Section II.B above to determinations of crimes of violence. Application Note 1 provides that the definition includes the offenses of aiding and abetting, conspiring, and attempting to commit crimes of violence.[264]

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.

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).[265] Courts have applied the categorical approach described at Section II.B above to determinations of controlled substance offenses as well. Application Note 1 provides that the definition includes the offenses of aiding and abetting, conspiring, and attempting to commit controlled substance offenses.[266]

3. Circuit Split on Inchoate Offenses

Most circuits have held that the definitions of "crime of violence" and "controlled substance offense" include inchoate offenses, in accordance with the commentary to the guideline.[267] However, the D.C. Circuit concluded in *United States v. Winstead* that the

[263] *Id.*

[264] USSG §4B1.2, comment (n.1).

[265] USSG §4B1.2(b).

[266] USSG §4B1.2, comment. (n.1).

[267] *Id.*; *see also* Stinson v. United States, 508 U.S. 36, 38 (1993) ("commentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."); *see, e.g.*, United States v. Nieves-Borrero, 856 F.3d 5, 9 (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, 131–33 (2d Cir. 1995) (drug conspiracy was predicate controlled substance offense, noting that commentary is binding authority); United States v. Dozier, 848 F.3d 180, 188 (4th Cir. 2017) (state conviction for attempt to distribute controlled substance constituted predicate controlled substance offense); United States v. Guerra, 962 F.2d 484, 486–87 (5th Cir. 1992) (attempted burglary qualified as crime of violence for purposes of enhancement); United States v. Adams, 934 F.3d 720, 728–29 (7th Cir. 2019) (noting circuit split, and finding, based on circuit precedent, that state conspiracy conviction was controlled substance offense), *cert. denied*, 140 S. Ct. 824 (2020); United States v. Merritt, 934 F.3d 809, 811–12 (8th Cir. 2019) (en banc precedent governs so that conspiracy to possess with intent to distribute under 21 U.S.C. § 846 was a controlled substance offense), *cert. denied*, 140 S. Ct. 981 (2020); United States v. Crum, 934 F.3d 963, 966–67 (9th Cir.

definition of "controlled substance offense" in §4B1.2(b) "clearly excludes inchoate offenses."[268] Recently, the Sixth Circuit agreed with *Winstead* in an *en banc* decision in *United States v. Havis*, abrogating an earlier circuit opinion.[269] 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 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,[270] and the Third Circuit concluded that "inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines."[271] Noting the decisions in *Havis* and *Winstead*, the Second Circuit in *United States v. Tabb* rejected the defendant's argument that Application Note 1 of §4B1.2 conflicts with the text of §4B1.2(b) and concluded that, based on prior precedent, the language in Application Note 1 does not conflict with the text of §4B1.2 nor does it expand the definitions in the guideline.[272] In addition, the court in *Tabb* disagreed with the Fourth Circuit's decision regarding conspiracy offenses. [273]

2019) (per curiam) (acknowledging doubts, holding that precedent governs it to hold that state conviction for delivery of marijuana qualifies as a controlled substance offense), *cert. denied,* 140 S. Ct. 2629 (2020); United States v. Sarbia, 367 F.3d 1079, 1084–86 (9th Cir. 2004) (attempting to discharge firearm at occupied structure under state law was crime of violence); United States v. Lange, 862 F.3d 1290, 1295–96 (11th Cir. 2017) (being a principal in the first degree to attempted manufacture of controlled substance under state law was controlled substance offense).

[268] 890 F.3d 1082, 1091 (D.C. Cir. 2018).

[269] 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), *abrogating* United States v. Evans, 699 F.3d 858 (6th Cir. 2012).

[270] United States v. Norman, 935 F.3d 232, 238 (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."), *post-conviction relief granted in part, denied in part by* 2020 WL 4043648 (D. S.C. July 17, 2020).

[271] United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc) ("In light of [] limitations [by Kisor v. Wilkie, 139 S. Ct. 2400 (2019)] on deference to administrative agencies, we conclude that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines.").

[272] United States v. Tabb, 949 F.3d 81, 87 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021) (No. 20–579); *see also* United States v. Smith, 989 F.3d 575, 585 (7th Cir. 2021) (noting split in authority then stating: "Our court's precedent holds otherwise, and we see no reason here to diverge from it."); United States v. Crosby, 838 F. App'x 891, 893 (5th Cir. 2021) (per curiam) (describing defendant's challenge based on *Winstead* then stating: "Crosby cites no authority from our court applying *Stinson* to hold that the commentary to § 4B1.2 should not be considered in determining whether an offense qualifies as a crime of violence for career offender purposes. Instead, as the Government notes, we have held that inchoate offenses may be used as predicate crimes.").

[273] *Tabb*, 949 F.3d at 88.