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 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 common statutes of conviction 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. The Bipartisan Safer Communities Act,[1] enacted June 25, 2022, altered the penalties and definitions for certain offenses and created two new offenses. This primer notes where the statute altered the penalties and definitions in commonly charged offenses, but it does not discuss the new offenses, 18 U.S.C. §§ 932 and 933, nor discuss all changes to firearms offenses.

A. SUBSTANTIVE OFFENSES

1. Firearms Transfer Offenses

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

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

[1] Pub. L. No. 117–159, 136 Stat. 1313 (2022).

[2] *See* U.S. SENT'G COMM'N, *Guidelines Manual*, App. A (Nov. 2021) [hereinafter USSG].

title 18.[3] A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years.[4] Any firearm or ammunition involved is subject to seizure and forfeiture.[5]

A common offense charged under section 922(a)(6) is a "straw purchase," which entails a material misrepresentation as to the identity of the actual firearm purchaser on ATF Form 4473 (Firearms Transaction Record),[6] the form required to lawfully transfer a firearm from a federally licensed dealer.[7] 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.[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] The government must prove that the defendant knew his statement was false but need not prove that the defendant knew it was unlawful to lie.[12]

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3 18 U.S.C. § 922(a)(6). Chapter 44 consists of 18 U.S.C. §§ 921–934.

4 *Id.* § 924(a)(2).

5 *Id.* § 924(d)(1).

6 *See* United States v. Karani, 984 F.3d 163, 167 (1st Cir. 2021) (Form 4473 is "a document that [federal firearms licensees] must use to gather the details that they are required by federal law to report about persons purchasing firearms" (citing 18 U.S.C. § 923(g) and 27 C.F.R. § 478.124)).

7 *See, e.g.*, United States v. Fields, 977 F.3d 358, 364 (5th Cir. 2020) ("[I]ntentionally providing a false answer regarding the actual purchaser [on Form 4473] violates § 922(a)(6) as a materially false statement intended to deceive the dealer."); 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"); *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.").

8 573 U.S. 169, 172 (2014).

9 *See id.* at 184.

10 *See* 18 U.S.C. § 924(a)(1)(A); United States v. Rodriguez-Soriano, 931 F.3d 281, 287 (4th Cir. 2019) ("A false statement or representation on an ATF Form 4473 as to the identity of the actual buyer of a firearm constitutes a violation of § 924(a)(1)(A)."); *see also Fields*, 977 F.3d at 364 ("an untruthful answer on a Form 4473 violates both" § 922(a)(6) and § 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).

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."); *see also* United States v. Diaz, 989 F.3d 390, 393–94 (5th Cir.) (noting that under Fifth Circuit precedent, § 922(a)(6) requires "that the defendant knowingly made false statements and that such statements were intended to deceive or likely to

Where the defendant misrepresented a fact (*e.g.*, a prior felony conviction) that would prohibit him from possessing firearms, the government need not prove that the defendant knew he would not be allowed to possess a firearm.[13]

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, "including as a juvenile":

(1) is under indictment or has been convicted of a crime punishable by imprisonment for a term exceeding one year;[14]

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance;

(4) "has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older";[15]

(5) is (A) an illegal alien or (B) an alien admitted under a non-immigrant visa;[16]

(6) has been dishonorably discharged from the Armed Forces;

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deceive a federally licensed firearms dealer with respect to any fact material to the lawfulness of the sale" and holding that a district court's jury instructions in a prosecution for conspiracy to violate § 922(a)(6) were not plainly erroneous where they did not require the government to prove the defendant knew the person she lied to was a federally licensed firearms dealer (citation omitted)), *cert. denied*, 142 S. Ct. 368 (2021).

[13] *See, e.g.*, United States v. Kaspereit, 994 F.3d 1202, 1207–08 (10th Cir. 2021) ("a conviction under § 922(a)(6) only requires knowledge that the statement is false" and does not require that the defendant know "he belonged to a category of prohibited persons" even where the false statement was about his status as a person subject to a protective order).

[14] 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").

[15] The age limitation was added by the Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12001(a)(1)(A)(ii), 136 Stat. 1313, 1322 (2022).

[16] 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). It is unclear whether the ATF's regulation defining "illegally or unlawfully in the United States," 27 C.F.R § 478.11, is binding on courts. The Ninth Circuit has held that it is. United States v. Anaya-Acosta, 629 F.3d 1091, 1094 (9th Cir. 2011) (per curiam). However, at least one district court has determined that the Ninth Circuit's decision was abrogated by *United States v. Apel*, 571 U.S. 359, 369 (2014), and *Abramski v. United States*, 573 U.S. 169, 191 (2014), where the Supreme Court suggested that deference may not be owed to executive agencies in criminal cases. United States v. Venegas-Vasquez, 376 F. Supp. 3d 1094, 1102–03 (D. Or. 2019). The Sixth Circuit recently divided evenly over the question of whether, in a related context, the ATF's regulations were entitled to deference in a criminal case. Gun Owners of Am., Inc. v. Garland, 19 F.4th 890 (6th Cir. 2021) (en banc), *petition for cert. filed*, No. 21-1215 (U.S. Mar. 3, 2022).

(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;[17]

(9) has been convicted of a misdemeanor crime of domestic violence;

(10) intends to sell or dispose of the firearm or ammunition in furtherance of a felony or certain specified offenses; or

(11) intends to sell or dispose of the firearm or ammunition to a person in one of the groups in paragraphs (1) through (10).[18]

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.[19] Section 922(d) also may be charged alongside section 922(a)(6) charges for false statements on Form 4473 where the defendant's conduct violates both sections.[20] A violation of section 922(d) is punishable by a statutory maximum term of imprisonment of fifteen years; prior to the Bipartisan Safer Communities Act, such a violation was punishable by a maximum term of imprisonment of ten years.[21]

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. §§ 921–934 to be kept in the records of a person licensed under the same said provisions

[17] 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).

[18] 18 U.S.C. § 922(d). Paragraphs 10 and 11 were added in 2022 by the Bipartisan Safer Communities Act, Pub. L. No. 117–159 § 12004(b), 136 Stat. 1313, 1329 (2022).

[19] *See, e.g.*, United States v. Francis, 891 F.3d 888, 891–93, 895 (10th Cir. 2018) (defendant violated § 922(d) when he purchased a firearm for a convicted felon); United States v. Henry, 819 F.3d 856, 862 (6th Cir. 2016) (defendant violated § 922(d) by selling a firearm to a convicted felon); United States v. Stegmeier, 701 F.3d 574, 579–80 (8th Cir. 2012) (defendant violated § 922(d) by allowing a convicted felon "full, unrestricted control" over the recreational vehicle in which a firearm was kept.); *see also* discussion of 18 U.S.C. § 922(g), prohibiting possession of a firearm by a felon, *infra* at Section II.A.2.

[20] *See Abramski*, 573 U.S. at 188 (discussing the "potential for some transactions to run afoul of both" § 922(a)(6) and § 922(d)).

[21] *See* Pub. L. No. 117–159 § 12004(c), 136 Stat. 1313, 1329 (2022) (increasing the maximum penalty). *Compare* 18 U.S.C. § 924(a)(2) (2018) (10 years), *with* 18 U.S.C. § 924(a)(8) (2022) (15 years).

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.[22]

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 where the defendant provides a false address or falsely states they are not an unlawful drug user on Form 4473.[23] As previously noted, section 924(a)(1)(A) also may be charged in "straw purchase" cases.[24] In short, there is considerable overlap in the conduct covered by these statutes. However, the statutory 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 subject to a maximum of five years.[25]

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 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.[26]

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, ship, or transport any firearm or ammunition in or affecting interstate or foreign commerce, or to receive any firearm or ammunition which has been shipped or transported in such commerce.[27] Prohibited persons include: convicted felons; fugitives; unlawful drug users or those addicted to controlled substances; [28] adjudicated "mental defectives" or those who

[22] 18 U.S.C. § 924(a)(1)(A).

[23] *See* United States v. Cook, 970 F.3d 866, 871 (7th Cir. 2020) (defendant charged after falsely stating on Form 4473 that he was not an unlawful user of marijuana); United States v. Prince, 647 F.3d 1257, 1268 (10th Cir. 2011) ("[K]nowingly giving a false address when filling out ATF forms violates § 924(a)(1)(A).").

[24] *See Abramski*, 573 U.S. at 191–92 (response on Form 4473 that falsely stated a straw purchaser was buying a gun on his own behalf violated § 924(a)(1)(A)).

[25] 18 U.S.C. § 924(a)(1)(A), (2).

[26] *Id.* § 1715.

[27] *Id.* § 922(g).

[28] Most circuits have held that a defendant is a prohibited person under this prong if he " 'engages in . . . regular use' of drugs 'over a long period . . . proximate to or contemporaneous with the possession of the firearm.' " United States v. Flores-González, 34 F.4th 103, 109 (1st Cir. 2022) (quoting United States v. Caparotta, 676 F.3d 213, 216 (1st Cir. 2012)); *see also* United States v. Edwards, 540 F.3d 1156, 1162 (10th Cir. 2008) (government defeats a vagueness challenge where it "introduce[s] sufficient evidence of a temporal nexus between the drug use and firearm possession"); United States v. McCowan, 469 F.3d 386, 391 (5th Cir. 2006) ("[W]hen interpreting the term 'unlawful user,' circuit courts typically discuss contemporaneousness and regularity."). The Eighth Circuit has "declined to adopt . . . a rigorous definition"

have been committed to a mental institution;[29] illegal aliens or aliens admitted under a non-immigrant visa; 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.[30]

A "firearm" for purposes of section 922(g) is defined at section 921(a)(3) and does not include an antique firearm.[31] The antique firearm exception is an affirmative defense to prosecution, not an element of the offense.[32] The statutory maximum penalty for the offense is fifteen years' imprisonment; prior to the Bipartisan Safer Communities Act, the maximum penalty was ten years.[33] Any firearm or ammunition involved is subject to seizure and forfeiture.[34]

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 knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce.[35] The majority of 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.[36] The Supreme Court in *Greer v. United States*

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that "require[s] proof that a defendant used controlled substances regularly over an extended period" and held that a defendant's use of controlled substances "during the time he possessed firearms" sufficed where the defendant admitted to frequent drug use. United States v. Carnes, 22 F.4th 743, 749 (8th Cir. 2022), *petition for cert. filed*, No. 22-76 (U.S. July 22, 2022).

29 The term "mental defective" "has long carried a particular meaning, which speaks not to generalized mental illnesses but instead to an archaic class of intellectual disability." United States v. Tucker, 33 F.4th 739, 745 (5th Cir. 2022).

30 18 U.S.C. § 922(g).

31 *Id.* § 921(a)(3) (Firearm means "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."), (a)(16) (defining "antique firearm" as any firearm manufactured on or before 1898 (and certain replicas thereof) or any muzzle-loading rifle, shotgun, or pistol designed to use black powder or a substitute and which cannot use fixed ammunition).

32 *See* United States v. Benamor, 937 F.3d 1182, 1186 (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."); United States v. Royal, 731 F.3d 333, 338 (4th Cir. 2013) (collecting cases).

33 Pub. L. No. 117–159 § 12004(c), 136 Stat. 1313, 1329 (2022) (raising the penalty). *Compare* 18 U.S.C. § 924(a)(2) (2018) (10 years), *with* 18 U.S.C. § 924(a)(8) (2022) (15 years).

34 *Id.* § 924(d)(1).

35 139 S. Ct. 2191 (2019).

36 *See*, *e.g.*, United States v. Austin, 991 F.3d 51, 59–60 (1st Cir. 2021) (rejecting the argument that *Rehaif* requires the government to prove the defendant knew he violating the law, holding it only requires the government to prove the defendant knew of his status as a convicted felon); United States v. Moody, 2 F.4th 180, 197–98 (4th Cir. 2021) (same); United States v. Trevino, 989 F.3d 402, 405–06 (5th Cir. 2021)

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."[37]

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).[38]

b. Multiplicity in the charging instrument

The "allowable unit of prosecution" for a felon-in-possession offense is an incident of possession even if a defendant is a "prohibited person" under more than one category under section 922(g).[39] Similarly, courts have held that possession of more than one

(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. 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."); United States v. Maez, 960 F.3d 949, 954 (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."), *cert. denied*, 141 S. Ct. 2671 (2021); 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. 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."), *cert. denied*, 142 S. Ct. 567 (2021); *see also* United States v. Bryant, 976 F.3d 165, 172–73 (2d Cir. 2020) (stating, in dicta, "although a felon need not specifically know that it is illegal for him to possess a firearm under federal law, *Rehaif* requires him to know, at the time he possessed the firearm" that he was a felon), *cert. denied* 141 S. Ct. 2825 (2021). At least two circuits have declined to extend *Rehaif* to convictions under section 922(a)(6). United States v. Kaspereit, 994 F.3d 1202, 1207–08 (10th Cir. 2021) (rejecting the argument that *Rehaif* applies to § 922(a)(6)); United States v. Diaz, 989 F.3d 390, 393–94 (5th Cir.) (same), *cert. denied*, 142 S. Ct. 368 (2021).

[37] 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.*

[38] USSG App. A.

[39] *See*, *e.g.*, United States v. Grant, 15 F.4th 452, 456–57 (6th Cir. 2021) (stating "every circuit to address this question unanimously agrees that § 922(g) does not permit multiple punishments based on the statute's different subdivisions for a single incident of firearm possession" and collecting cases in support from the

firearm and ammunition by a prohibited person generally supports only one conviction under section 922(g).[40] However, 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.[41]

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."[42] The district court at sentencing may merge the counts of conviction that are duplicative.[43]

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

First, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits); United States v. Bloch, 718 F.3d 638, 643–44 (7th Cir. 2013) (holding that a defendant's convictions for possession of a firearm while a felon and a domestic-violence misdemeanant which "arose from this same incident of possession" had to be merged where "the only difference between them is the disqualified class to which [the defendant] belonged"); *see also* United States v. Richardson, 439 F.3d 421, 422 (8th Cir. 2006) (en banc) (per curiam) (reversing precedent to the contrary).

[40] *See* United States v. Tann, 577 F.3d 533, 537 & n.5 (3d Cir. 2009) (collecting circuit cases); *see also Bloch*, 718 F.3d at 643 ("[A] single act of possession can yield only one conviction under § 922(g), even if the defendant possessed multiple firearms at the same time."); United States v. Mahin, 668 F.3d 119, 128 (4th Cir. 2012) (an indictment including two counts, "one for the possession of a firearm and the other for the simultaneous possession of ammunition" charged "only one violation").

[41] United States v. Gilliam, 934 F.3d 854, 859 (8th Cir. 2019) ("separate acquisition and storage of the weapons is an element of the crime" where the government brings multiple charges under § 922(g) (quoting United States v. Woolsey, 759 F.3d 905, 908 (8th Cir. 2014))); United States v. Olmeda, 461 F.3d 271, 280–81 (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); *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).

[42] 470 U.S. 856, 861 (1985).

[43] *See, e.g.*, United States v. Carnes, 22 F.4th 743, 750 (8th Cir. 2022) (the district court correctly merged counts at sentencing where the defendant was charged with and convicted of violating § 922(g)(1) (felon in possession) and (g)(3) (unlawful drug user in possession) based on one incident; the district court plainly erred in imposing concurrent terms of supervised release after having merged the counts), *petition for cert. filed*, No. 22-76 (U.S. July 22, 2022).

years.[44] The term of imprisonment for either offense must be imposed consecutively to any other term of imprisonment imposed under any other provision of law.[45]

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).[46] Section 2K2.5 provides for a base offense level of 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.[47] 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.[48]

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.[49]

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 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).[50] Possession of a firearm can be joint with another person and may be constructive if the defendant does not have physical possession but does have the power and the intent to

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44 18 U.S.C. § 924(a)(4).

45 *Id.*

46 *See* USSG App. A.

47 USSG §2K2.5(a)–(b).

48 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.*

49 *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)).

50 18 U.S.C. § 924(c)(1)(A).

exercise control over the firearm.[51] 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.[52]

For purposes of section 924(c), a "crime of violence" is defined at section 924(c)(3) as "an offense that is a felony and [] has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[53] 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.[54]

Section 924(c) provides for mandatory consecutive penalties that increase incrementally from five years to life imprisonment. 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, short-barreled shotgun, or semiautomatic assault weapon, ten years; if the firearm is a machinegun,

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[51] *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. 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."); United States v. Gunn, 369 F.3d 1229, 1234 (11th Cir. 2004) (per curiam) ("[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.").

[52] *See*, *e.g.*, United States v. Gillespie, 27 F.4th 934, 941 (4th Cir. 2022) ("[V]icarious liability for a co-conspirator's act of carrying a gun during a crime of violence under *Pinkerton* [*v. United States*, 328 U.S. 640 (1946)] . . . remains a valid theory of § 924(c) liability."), *petition for cert. filed*, No. 21-8089 (U.S. June 6, 2022); United States v. Woods, 14 F.4th 544, 553 (6th Cir. 2021) (collecting cases in support of this proposition), *cert. denied*, 142 S. Ct. 910 (2022). This question is distinct from the question of whether there is a valid § 924(c) predicate; practitioners should be cautious not to conflate the question of whether a conspiracy offense can serve as a predicate for § 924(c) with *Pinkerton* liability where a co-conspirator carries a gun during a valid predicate offense. *See Gillespie*, 27 F.4th at 942 ("[A] defendant cannot be convicted under § 924(c) for personally carrying a gun during a Hobbs Act *conspiracy*. But if a conspirator commits a Hobbs Act *robbery* while carrying a gun, the conspirator has violated § 924(c). And under *Pinkerton*, their co-conspirators can be held vicariously liable for the § 924(c) violation so long as the robbery and use of the firearm were reasonably foreseeable to the defendant and in furtherance of a conspiracy.").

[53] 18 U.S.C. § 924(c)(3)(A). The definition also has a "residual clause," which defines "crime of violence" as an offense "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," 18 U.S.C. § 924(c)(3)(B), but in 2019, the Supreme Court in *United States v. Davis* struck down the residual clause as unconstitutionally vague. 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.

[54] 18 U.S.C. § 924(c)(2).

destructive device, or firearm equipped with a silencer, 30 years.[55] 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 machinegun or destructive device or bears a silencer or muffler.[56] These penalties are consecutive to any other sentence, including the sentence for the underlying offense.[57] There is no defined maximum penalty for 924(c) violations, although circuit courts have concluded that the implied maximum penalty is life.[58]

In 2018, Congress enacted the First Step Act, which, among other things, amended the penalties for successive convictions under section 924(c).[59] 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."[60] 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.[61]

Although this amendment to section 924(c)(1)(C) does not apply retroactively, it does apply to any sentencing that occurs after enactment of the First Step Act, regardless of when the offense occurred.[62] Circuit courts are split as to whether stacked 924(c) charges

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55 *Id.* § 924(c)(1)(A)–(B).

56 *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).

57 *See id.* § 924(c)(1)(D)(ii).

58 *See*, *e.g.*, United States v. Ortiz-García, 665 F.3d 279, 285 & n.6 (1st Cir. 2011) (holding that violations of § 924(c)(1)(A) have a maximum penalty of life imprisonment and collecting cases from every circuit except the D.C. Circuit); *see also* United States v. Abukhatallah, 41 F.4th 608, 645 (D.C. Cir. 2022) (per curiam) (referring to the penalty under § 924(c)(1)(B)(i) as "carr[ying] a statutorily mandated minimum sentence of ten years (and a maximum of life)").

59 First Step Act of 2018, Pub. L. No. 115–391, § 403, 132 Stat. 5194, 5221–22 (2018).

60 *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[] (i) be sentenced to a term of imprisonment of not less than 25 years; and (ii) if the firearm involved is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.").

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

62 First Step Act of 2018 § 403(b).

can serve as "extraordinary and compelling reasons" warranting compassionate release under 18 U.S.C. § 3582(c)(1)(A).[63]

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).[64] 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.[65] Additionally, Chapters Three and Four do not apply to that count of conviction.[66]

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.[67] In *United States v. Woodberry*, the Ninth

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[63] *Compare* United States v. Maumau, 993 F.3d 821, 837 (10th Cir. 2021) (the combination of the defendant's age at sentencing, the length of his stacked § 924(c) sentences, and the First Step Act's elimination of stacking constituted "extraordinary and compelling reasons"), *and* United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020) ("[T]he district courts permissibly treated as 'extraordinary and compelling reasons' for compassionate release the severity of the defendants' [stacked] § 924(c) sentences and the extent of the disparity between the defendants' sentences and those provided for under the First Step Act."), *with* United States v. Crandall, 25 F.4th 582, 583 (8th Cir.) (as a non-retroactive change in the law, the First Step Act's changes to § 924(c) cannot constitute extraordinary and compelling reasons), *cert. denied*, 142 S. Ct. 2781 (2022); United States v. Andrews, 12 F.4th 255, 261–62 (3d Cir. 2021) ("[W]e will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release . . . . [However, i]f a prisoner successfully shows extraordinary and compelling circumstances, the current sentencing landscape may be a legitimate consideration for courts at the next step of the analysis when they weigh the [18 U.S.C.] § 3553(a) factors."), *cert. denied*, 142 S. Ct. 1446 (2022); United States v. Thacker, 4 F.4th 569, 575–76 (7th Cir. 2021) ("[T]he change to § 924(c) can[not] constitute an extraordinary and compelling reason for a sentencing reduction," but if the defendant can show other extraordinary and compelling reasons, stacked § 924(c) charges may be considered under the 18 U.S.C. § 3553(a) factors), *cert. denied*, 142 S. Ct. 1363 (2022); *see also* United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022) (holding, not in the § 924(c) stacking context, that "it is within the district court's discretion, in the absence of a contrary directive in an applicable policy statement, to determine on a case-by-case basis whether [nonretroactive changes in sentencing] law predicated upon a defendant's particular circumstances comprise an extraordinary and compelling reason," and indicating agreement with the Fourth and Tenth Circuits and disagreement with the Third, Seventh, and Eighth Circuits).

The Sixth Circuit has granted an en banc hearing on the question of whether nonretroactive changes in law can serve as extraordinary and compelling reasons justifying compassionate release. *See* United States v. McCall, 29 F.4th 816 (6th Cir. 2022) (mem.) (granting rehearing en banc).

[64] *See* USSG App. A.

[65] USSG §2K2.4(b).

[66] *Id.*

[67] 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). 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.) ("[I]n *United States v. O'Brien* . . . the Court

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."[68] Similarly, 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.[69]

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.[70]

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 was 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."[71] However, the Ninth Circuit has rejected the use of this list

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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)), *cert. denied*, 142 S. Ct. 371 (2021).

[68] 987 F.3d at 1236.

[69] 879 F.3d 626, 636–38 (5th Cir. 2018).

[70] 18 U.S.C. § 924(c)(1)(A).

[71] United States v. Mackey, 265 F.3d 457, 462 (6th Cir. 2001) (citing United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1998), and 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, 658 (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. Maya, 966 F.3d 493, 501 (6th Cir. 2020) (suggesting, in dicta, that the ready accessibility of a firearm, like the other factors, "is a 'non-exclusive' data point to help answer the ultimate

of factors "in closer, and more common, cases" and declines to use a "checklist" approach.[72] 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."[73]

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.[74] In contrast, "a person does not '*use*' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs."[75]

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. At a high level, the requirement is "that the firearm must have some purpose or effect with respect to the [predicate] crime; its presence or involvement cannot be the result of accident or coincidence."[76]

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.[77] In *Abbott v. United States*, the Court confirmed that the clause "by any other provision of law" refers to the conduct section 924(c) proscribes,

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question"); 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))).

72 United States v. Krouse, 370 F.3d 965, 968 (9th Cir. 2004); *see also Maya*, 966 F.3d at 501 ("Courts should not lose sight of the forest (whether the defendant possessed the firearm to facilitate the crime) for the trees (whether or how each factor applies). . . . The list is simply a tool to help answer whether the required illicit purpose exists.").

73 *Krouse*, 370 F.3d 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).

74 *See* United States v. Miranda, 666 F.3d 1280, 1284 (11th Cir. 2012) (per curiam) (collecting cases).

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

76 Dean v. United States, 556 U.S. 568, 574 (2009) (quoting Smith v. United States, 508 U.S. 223, 238 (1993)).

77 18 U.S.C. § 924(c).

i.e., possessing a firearm in connection with a predicate crime, not conduct that violates other criminal statutes.[78]

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 sentence for the underlying predicate offense.[79] 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.[80] 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.[81]

e. Whether section 924(c) authorizes multiple firearm possession counts arising out of the same offense

Circuit courts have disagreed on the necessary showing to authorize multiple section 924(c) convictions. Most circuits hold that section 924(c) requires that each section 924(c) offense be based upon a separate predicate criminal offense.[82] The Eighth Circuit, by contrast, has held that separate section 924(c) convictions may arise from one

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78 562 U.S. 8, 25–26 (2010).

79 137 S. Ct. 1170 (2017).

80 *Id.* at 1176–77.

81 *Id.* at 1177.

82 *See* United States v. Voris, 964 F.3d 864, 872 (9th Cir. 2020) ("[E]ach § 924(c) charge must be based on a separate, properly charged predicate offense."); United States v. Jordan, 952 F.3d 160, 170 (4th Cir. 2020) (where the defendant's § 924(c) convictions are "predicated on different underlying offenses" which "are not duplicative for double jeopardy purposes," the predicate offenses "may support two § 924(c) convictions and sentences"); United States v. Hodge, 870 F.3d 184, 197 (3d Cir. 2017) (two § 924(c) convictions were properly "based on two separate predicate offenses: robbery and attempted murder"); United States v. Rentz, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc) ("[F]or each separate § 924(c)(1)(A) charge it pursues the government must prove a separate crime of violence or drug trafficking crime."); United States v. Cejas, 761 F.3d 717, 731 n.3 (7th Cir. 2014) ("[T]he statute unambiguously authorizes a separate conviction for each distinct predicate offense in which a firearm is used, carried, or possessed . . . ."); United States v. Mejia, 545 F.3d 179, 205–06 (2d Cir. 2008) (although all part of one overarching conspiracy, defendants committed three separate assaults which were separate predicate crimes); United States v. Rodriguez, 525 F.3d 85, 112 (1st Cir. 2008) ("[T]he district court plainly erred in imposing multiple consecutive sentences for two acts of firearms possession arising from the same predicate drug conspiracy."); United States v. Rahim, 431 F.3d 753, 757–58 (11th Cir. 2005) (per curiam) (defendant's predicate convictions for bank robbery and carjacking could support two § 924(c) convictions); United States v. Baptiste, 309 F.3d 274, 278–79 (5th Cir. 2002) (one drug trafficking offense could not support multiple § 924(c) convictions); United States v. Anderson, 59 F.3d 1323, 1334 (D.C. Cir. 1995) (en banc) ("[O]nly one § 924(c)(1) violation may be charged in relation to one predicate crime."); United States v. Taylor, 13 F.3d 986, 992–93 (6th Cir. 1994) ("Where the indictment charges a single predicate offense, a court may not enter a judgment of conviction against a defendant, and may not sentence a defendant, for multiple § 924(c) counts in relation to that single predicate offense.").

predicate offense.[83] The majority of circuits also have held that 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] But at least one circuit does not require multiple uses of a firearm to support multiple § 924(c) convictions.[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,

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[83] *See* Hamberg v. United States, 675 F.3d 1170, 1172–73 (8th Cir. 2012) (allowing prosecution of multiple § 924(c) offenses predicated on a single predicate offense); *see also* United States v. Camps, 32 F.3d 102, 107–09 (4th Cir. 1994) ("[A] defendant who has 'used' or 'carried' a firearm on several separate occasions during the course of a single continuing offense . . . has committed several section 924(c)(1) offenses.").

[84] *Voris*, 964 F.3d at 873 (four separate discharges of a firearm were four separate uses of a firearm, allowing for multiple § 924(c) convictions); United States v. Abdo, 733 F.3d 562, 567 (5th Cir. 2013) (although a defendant may not be convicted of multiple § 924(c) counts "for a single use of a firearm based on multiple predicate offenses," a defendant was properly convicted of multiple counts where "the evidence allowed for the inference of two different possessions and purposes for the firearm" (citation and internal quotation marks omitted)); *Hamberg*, 675 F.3d at 1173 (the defendant "used the firearm in two different places, threatening and assaulting two different victims, and for two different, although related, purposes. Each instance of use is separately punishable as a violation of § 924(c)."); *see also* United States v. Jackson, 918 F.3d 467, 494 (6th Cir. 2019) ("Because [the defendant] made a single choice to 'use, carry, or possess' a firearm in connection with the simultaneous carjackings, he cannot be convicted of two separate violations of § 924(c) as a principal."); United States v. Bostick, 791 F.3d 127, 162 (D.C. Cir. 2015) ("Merger is appropriate where multiple convictions under Section 924(c) arise from only one use of the firearm." (citation and internal quotation marks omitted)); *Rentz*, 777 F.3d at 1115 ("[T]his case involves only one use, carry, or possession of a firearm . . . [so] the government may seek and obtain no more than one § 924(c)(1)(A) conviction."); United States v. Cureton, 739 F.3d 1032, 1043 (7th Cir. 2014) ("Because [the defendant] only used a firearm once, in the simultaneous commission of two predicate offenses, we agree with him that he may only stand convicted of one violation of § 924(c)."); United States v. Wallace, 447 F.3d 184, 188–90 (2d Cir. 2006) (counts which "involve a single use of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct" were based on the same "unit of prosecution" (citation and internal quotation marks omitted)).

[85] *Jordan*, 952 F.3d at 170 (noting that Fourth Circuit precedent holds "there is no requirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm").

[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.

and night vision equipment, are on the USML.[88] Firearms cases prosecuted under section 2778 often involve the exportation, or attempted exportation, of firearms or ammunition across the U.S. border. A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.[89]

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).[90] Subsection (a)(2) at §2M5.2 provides for a base offense level of 14 if the offense involved only (A) two or fewer non-fully automatic small arms (rifles, handguns, or shotguns), (B) 500 or fewer rounds of ammunition for non-fully automatic small arms, or (C) both.[91] Subsection (a)(1) provides for a base offense level of 26 if subsection (a)(2) does not apply.[92]

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,[93] for a "serious drug offense," a "violent felony," or both.[94] 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.[95]

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88 *Id.*; *see also* International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 FR 3819 (Mar. 9, 2020) (describing defense articles).

89 22 U.S.C. § 2778(c).

90 *See* USSG App. A.

91 USSG §2M5.2(a)(2).

92 USSG §2M5.2(a)(1).

93 The Supreme Court has held that "occasion" means "an event or episode" such that a spree of offenses may occur on one occasion. Wooden v. United States, 142 S. Ct. 1063, 1069–71 (2022). The Court instructed that in determining whether multiple offenses occurred on one occasion, courts should consider the time between offenses, physical proximity, and the character and relationship of the offenses. *Id.*

94 18 U.S.C. § 924(e)(1); Johnson v. United States, 576 U.S. 591, 593 (2015) (explaining that the range of punishment under the ACCA is 15 years to life).

95 18 U.S.C. § 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).

"Violent felony" means any crime punishable by imprisonment for more than one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable for such term if committed by an adult, that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; [96] or

(ii) is burglary, arson, or extortion, involves the use of explosives,[97] or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.[98]

The guideline implementing this statutory provision is §4B1.4 (Armed Career Criminal).[99] Section 4B1.4 provides alternative offense levels and alternative criminal history categories for defendants subject to enhanced sentences under the ACCA. Section 4B1.4 assigns an offense level of 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.[100] Otherwise, offense level 33 applies.[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 CHC.[103]

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

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

98 18 U.S.C. § 924(e)(2)(B) (emphasis added). As explained in greater detail below, the Supreme Court invalidated the italicized 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.

99 *See* USSG App. A.

100 USSG §4B1.4(b)(3)(A). 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 131–135 and accompanying text.

101 USSG §4B1.4(b)(3)(B).

102 USSG §4B1.4(b)(1), (2).

103 *See* USSG §4B1.4(c).

2. What is a "Violent Felony"?

The definition of "violent felony" for purposes of the ACCA has been the subject of a 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. This section describes the major Supreme Court cases on the issue.

a. Categorical approach

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]

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.[107] 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.[108]

The Court addressed this modification of the categorical approach in *Shepard v. United States*.[109] 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

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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.").

105 495 U.S. 575 (1990).

106 *Id.* at 598–99.

107 *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 (2022), https://www.ussc.gov/guidelines/primers/categorical-approach.

108 *Taylor*, 495 U.S. at 602.

109 544 U.S. 13 (2005).

defendant, or to some comparable judicial record of this information."[110] 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.[111] 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.[112]

b. Burglary

In *Taylor*, the Supreme 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."[113] In *Quarles v. United States*, the Court 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. [114] In *United States v. Stitt*, the Supreme Court held that the 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.[115]

c. "Physical force"

The Court interpreted the phrase "physical force" as used in force clause of the ACCA's "violent felony" definition in a 2010 case captioned *Johnson v. United States*.[116] The Court held that "physical force" means "*violent* force—that is, 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]

Subsequently, in *Stokeling v. United States*, a robbery case, the Court held that "physical force" includes the amount of force sufficient to overcome the victim's

110 *Id.* at 26.

111 570 U.S. 254 (2013).

112 579 U.S. 500 (2016).

113 495 U.S. at 598–99.

114 139 S. Ct. 1872, 1879 (2019).

115 139 S. Ct. 399, 407 (2018).

116 559 U.S. 133 (2010).

117 *Id.* at 140.

118 *Id.* at 138, 142.

resistance.[119] However, in *Borden v. United States*, the Court held that an offense with a *mens rea* of recklessness, as opposed to knowledge or intent, does not involve the use of physical force against the person of another.[120]

d. Residual clause

In a 2015 case also captioned *Johnson v. United States*, the Supreme Court focused on the "residual clause" of the ACCA's "violent felony" definition.[121] The "residual clause" provides that an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is a "violent felony."[122] 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.[123] Thus, under the ACCA, the residual clause may no longer be used to classify offenses as violent felonies.

In 2016, in *Welch v. United States*, the Supreme Court held that *Johnson's* holding applies retroactively to cases on collateral review.[124] Thus, an offender previously sentenced as an armed career criminal on the basis of a conviction qualifying under the ACCA's residual clause can challenge his status as an armed career criminal and the resulting enhanced penalty.

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 (if any) for violent felonies or drug-related felonies, and whether the defendant was a "prohibited person"—prohibited by law from possessing firearms (for example, a convicted felon or an illegal alien)—in addition to other offense and offender characteristics, as discussed below. The base offense level ranges from 6 to 26.

119 139 S. Ct. 544, 554 (2019).

120 141 S. Ct. 1817, 1825 (2021) (plurality opinion); *id.* at 1834 (Thomas, J., concurring in the judgment).

121 576 U.S. 591 (2015).

122 18 U.S.C. § 924(e)(2)(B)(ii).

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

124 578 U.S. 120, 135 (2016).

B. Base Offense Level Factors

1. Type of 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."[125] Generally, the circuit courts are in agreement that section 921(a)(3) requires the government only to prove that the firearm in question was designed to fire a projectile, not that the firearm was operable at the time the offense occurred.[126]

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," which is defined in Application Note 2, as

> 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.[127]

The Eleventh Circuit has held that "close proximity" for purposes of the application note accounts for both physical distance and accessibility, thus the enhancement was applicable when a firearm is locked in a case in a room ten feet away from a high-capacity magazine.[128] 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.[129] The Fifth Circuit

[125] USSG §2K2.1, comment. (n.1); 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.

[126] *See*, *e.g.*, United States v. Dotson, 712 F.3d 369, 370 (7th Cir. 2013) ("significant damage, missing/broken parts, and extensive corrosion"); United States v. Davis, 668 F.3d 576, 576 (8th Cir. 2012) (no trigger); United States v. Gwyn, 481 F.3d 849, 851 (D.C. Cir. 2007) (faulty firing pin); United States v. Rivera, 415 F.3d 284, 286 (2d Cir. 2005) (firing pin broken; firing pin channel blocked).

[127] USSG §2K2.1, comment. (n.2).

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

[129] *See Davis*, 668 F.3d at 579.

has held that the government must prove the firearm is "*capable of accepting* the magazine" even if the magazine is in close proximity to the firearm.[130]

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,[131] 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.[132] In addition, section 5845 includes as a firearm "any other weapon," defined in section 5845(e) 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 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.[133]

Section 5845(a)'s definition excludes antique firearms[134] and those found to be "primarily . . . collector's item[s]."[135] Circuit courts have held that the alternative offense levels do not require the defendant know the firearm fits the definition of "firearm" in section 5845.[136]

2. Prior Convictions: "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.[137]

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130 United States v. Luna-Gonzalez, 34 F.4th 479, 481 (5th Cir. 2022) ("[C]loseness does not supplant compatibility; the magazine must actually fit.").

131 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, 1230–32.

132 26 U.S.C. § 5845(a).

133 *Id.* § 5845(e).

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

135 26 U.S.C. § 5845(a).

136 *See* United States v. Miller, 11 F.4th 944, 956–57 (8th Cir. 2021) (collecting cases in support of this proposition), *cert. denied*, 142 S. Ct. 2796 (2022).

137 *See* USSG §2K2.1, comment. (n.1).

The terms "crime of violence," "drug trafficking offense," and "controlled substance offense" are used in other parts of the guidelines and the United States Code with different meanings, so attention must be paid when applying those definitions.[138]

a. Crime of Violence

Section 4B1.2(a) defines the term "crime of violence" 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 possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[139]

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.[140]

Courts have applied the categorical approach described at Section II.B.2.a 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.[141]

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[138] For example, 18 U.S.C. § 16 defines the term "crime of violence" differently from the guidelines' definition of the term in §4B1.2. Section 16 does not include an enumerated offense clause, but it does include offenses committed against property in its force clause. *Compare* 18 U.S.C. § 16, *with* USSG §4B1.2(a). *See also* Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (holding unconstitutional the residual clause in 18 U.S.C. § 16(b) for possessing the same flaws as the ACCA's residual clause invalidated in Johnson v. United States, 576 U.S. 591 (2015)). In addition, 18 U.S.C. § 924(c) defines a "drug trafficking crime" as a felony punishable under certain federal statutes, while the newly-enacted 18 U.S.C. § 932 adds to this definition state offenses which would constitute a felony under those statutes. 18 U.S.C. §§ 924(c)(2), 932(a)(1).

[139] USSG §4B1.2(a); *see also* USSG §2K2.1, comment. (n.1) ("'Crime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)"). Like the ACCA, a "residual clause" previously 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 2015 *Johnson* decision, striking the residual clause to alleviate any application issues relating to it. *See* USSG App. C, amend. 798 (effective Aug. 1, 2016). In *Beckles v. United States*, the Supreme Court held that the guidelines, including the residual clause at §4B1.2, are not subject to vagueness challenges, so the residual clause in §4B1.2 was not invalid. 137 S. Ct. 886, 894–95 (2017).

[140] USSG §4B1.2(a).

[141] USSG §4B1.2, comment (n.1).

b. Controlled substance offense

Section 4B1.2(b) defines the term "controlled substance offense" 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."[142]

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.[143]

Courts have applied the categorical approach described at Section II.B.2.a 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.[144]

c. Circuit split on inchoate offenses

Although the commentary to §4B1.2 provides that the definitions of "crime of violence" and "controlled substance offense" include inchoate offenses, in recent years circuit courts have split on the deference to be given to this commentary. The First, Second, Seventh, Eighth, and Ninth Circuits have held that Application Note 1 to §4B1.2 is binding and, consequently, inchoate offenses are included in the relevant definitions.[145] However,

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[142] USSG §4B1.2(b) *see* USSG §2K2.1, comment. (n.1) ("'Controlled substance offense' has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).").

[143] USSG §4B1.2(b). Circuit courts have disagreed about whether the controlled substance at issue must be illegal under federal law. *See* United States v. Jones, 15 F.4th 1288, 1291–92 & nn.3–4 (10th Cir. 2021) (collecting cases from the Second, Fifth, and Ninth Circuits for the proposition that the controlled substance must be federally controlled and from the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits that the controlled substance need not be federally controlled, and agreeing with the latter set of cases).

[144] USSG §4B1.2, comment. (n.1).

[145] *See, e.g.*, United States v. Lewis, 963 F.3d 16, 23–25 (1st Cir. 2020) (holding "that the case for finding the prior panels would have reached a different result today" about the validity of Application Note 1 "is not so obviously correct as to allow this panel to decree that the prior precedent is no longer good law in this circuit"); United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir. 2020) (Application Note 1 is valid and consistent with the guideline text of §4B1.2); United States v. Kendrick, 980 F.3d 432, 444 (5th Cir. 2020) (circuit precedent relying on Application Note 1 "remains binding"), *cert. denied*, 141 S. Ct. 2866 (2021); United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019) (Application Note 1 is valid and consistent with the guideline text); United States v. Jefferson, 975 F.3d 700, 708 (8th Cir. 2020) (upholding Application Note 1 based on prior precedent), *cert. denied*, 141 S. Ct. 2820 (2021); United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (same). The Tenth and Eleventh Circuits have precedent applying Application Note 1 predating the circuit split discussed in this part. *See* United States v. Chavez, 660 F.3d 1215, 1228 (10th Cir. 2011); 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).

the Third, Fourth, Sixth, and D.C. Circuits have concluded that Application Note 1 conflicts with the text of §4B1.2 and so inchoate offenses are not included unless the text of §4B1.2 includes them directly.[146] The Third Circuit has applied this precedent in the context of §2K2.1(a)(4).[147]

3. "Prohibited Person"

A defendant is a prohibited person, for purposes of subsections (a)(4)(B) and (a)(6), if he meets any of the criteria in 18 U.S.C. § 922(g) or § 922(n):[148] 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 his citizenship; is subject to certain court orders relating to domestic violence; has been convicted of a misdemeanor crime of domestic violence; or is under indictment for a crime punishable by imprisonment for a term exceeding one year.[149]

C. SPECIFIC OFFENSE CHARACTERISTICS

This section discusses common issues that arise when determining whether a particular specific offense characteristic under §2K2.1 applies.

[146] United States v. Campbell, 22 F.4th 438, 444, 446 (4th Cir. 2022) (the text of §4B1.2 does not mention attempt in its "lengthy definition" of controlled substance offense so the commentary may not add attempt offenses, "which are generally thought of as less culpable than the relevant substantive crime"); United States v. Nasir, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) ("[I]nchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines."); United States v. Havis, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam) (Application Note 1 cannot "add attempt crimes to the definition of 'controlled substance offense'"; "[t]he text of §4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses."); United States v. Winstead, 890 F.3d 1082, 1091–92 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses" and Application Note 1 cannot add to this definition).

[147] United States v. Abreu, 32 F.4th 271, 276–78 (3d Cir. 2022).

[148] *See* USSG §2K2.1, comment. (n.3) (citing 18 U.S.C. §§ 922(g) and 922(n)); *see also supra* Section II.A.2.

[149] 18 U.S.C. § 922(g), (n).

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.[150] Possession of such firearms by the defendant can be actual or constructive.[151]

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.[152] 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.[153] 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.[154]

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).[155] Courts have reached different conclusions about whether a firearm illegally possessed under state law but legally possessed under federal law is

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150 USSG §2K2.1(b)(1).

151 *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).

152 *See* U.S. SENT'G COMM'N, PRIMER ON RELEVANT CONDUCT 2 (2022), 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.").

153 *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 and was relevant conduct); United States v. Maturino, 887 F.3d 716, 720–23 (5th Cir. 2018) (enhancement at §2K2.1(b)(1) applies based on number of firearms sought even if number obtained is less, and purchase of 143 inert grenades was relevant conduct to the purchase of a live grenade and a silencer).

154 *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).

155 USSG §2K2.1, comment. (n.5).

counted for purposes of the enhancement.[156] Traditional doctrines of constructive possession may apply.[157]

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.[158] 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.[159] 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.[160]

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."[161] 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, 12, and 6) but does not apply to base offense levels determined under subsections (a)(1)–(a)(5) (offense levels 26, 24, 22, 20, 18).[162]

The defendant bears the burden of proving the applicability of this reduction.[163] However, the guidelines do not state a requirement that a defendant produce evidence of

156 *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, 591–92 (2d Cir. 2000) (only firearms illegal under federal law count for purposes of enhancement).

157 *See, e.g.*, United States v. Caudle, 968 F.3d 916, 920 (8th Cir. 2020) ("Constructive possession 'is established if the person has dominion over the premises where the firearm is located, or control, ownership, or dominion over the firearm itself.'" (quoting United States v. Cross, 888 F.3d 985, 990 (8th Cir. 2018))); 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))).

158 United States v. Matos-de-Jesús, 856 F.3d 174, 178 (1st Cir. 2017).

159 *Id.* at 177.

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

161 USSG §2K2.1(b)(2).

162 *Id.*

163 *See*, *e.g.*, United States v. Moore, 860 F.3d 1076, 1077–78 (8th Cir. 2017); United States v. Nichols, 847 F.3d 851, 860 (7th Cir. 2017).

actual *use* of the firearms in question, only that the firearms were *possessed* for sporting or collection purposes.[164] 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.[165]

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."[166] 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)."[167] Courts have found that "plinking," a form of target shooting for amusement and recreation, can be a sporting purpose under the guidelines.[168]

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.[169]

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

[164] 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.").

[165] United States v. Sholley-Gonzalez, 996 F.3d 887, 898 (8th Cir. 2021) ("[Section] 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."), *cert. denied*, 142 S. Ct. 817 (2022).

[166] USSG §2K2.1, comment (n.6).

[167] *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)).

[168] *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 [g]uidelines.").

[169] 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.").

serial number.[170] Note that a defendant need not have *known* that a firearm he illegally possessed was stolen[171] or had an altered or obliterated serial number.[172]

If the defendant steals the firearm in a burglary, the enhancement applies.[173] 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.[174]

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.[175] 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 information less accessible."[176] The enhancement applies even where partially obliterated serial numbers can be discerned through use of microscopy or other techniques.[177]

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."[178] In contrast, the Fifth and Eleventh Circuits

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170 USSG §2K2.1(b)(4).

171 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. Price, 28 F.4th 739, 756 (7th Cir. 2022) (explaining that the Supreme Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), does not require a scienter element to be read into this provision); United States v. Prien-Pinto, 917 F.3d 1155, 1160–61 (9th Cir. 2019) (holding strict liability of §2K2.1(b)(4) is constitutional and citing supportive cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits); United States v. Taylor, 937 F.2d 676, 682 (D.C. Cir. 1991) (the enhancement applies regardless of defendant's knowledge).

172 *See* USSG §2K2.1 comment. (n.8(B)); 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).

173 *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).

174 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).

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

176 *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).

177 *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).

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

have held that a serial number can be considered "altered" even if the serial number is legible; the Fourth Circuit takes a similar view.[179] 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.[180]

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).[181] It is not double counting, though, 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.[182]

4. Trafficking—§2K2.1(b)(5)

Section 2K2.1(b)(5) provides for a 4-level increase if the defendant trafficked in firearms. Application Note 13(A) explains that this enhancement applies when two 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 or receive the firearm or (ii) intended to use or dispose of the firearm unlawfully.[183]

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[179] 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 [18 U.S.C.]§ 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.").

[180] *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).

[181] USSG §2K2.1, comment. (n.8(A)).

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

[183] USSG §2K2.1, comment. (n.13(A)); *see also, e.g.*, United States v. Ilarraza, 963 F.3d 1, 12–13 (1st Cir. 2020) ("a sentencing court may rely on circumstantial evidence and the plausible inferences therefrom to find that a defendant" had the requisite knowledge; the unlawfulness of the purchase, knowledge that the purchaser intended to export the firearms, the number and type of the firearms, and the defendant's reminder to a coparticipant to obliterate the serial numbers sufficed); 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

The Sixth Circuit has interpreted the requirement at §2K2.1(b)(5) that two or more firearms be transferred to "*another individual*" to mean that at least two firearms must be transferred to the same individual, and not to multiple individuals in the aggregate.[184] 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.[185] The Tenth Circuit has disagreed, holding that the government must show the transferee was actually an unlawful possessor for the enhancement to apply.[186]

Application Note 13(C) states that where "the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted."[187]

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 for trafficking apply. [188] 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."[189] 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)(B) enhancement when they are based on the same trafficking offense.[190]

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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").

184 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.").

185 *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.").

186 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).

187 USSG §2K2.1, comment. (n.13(C)); *see, e.g.*, United States v. Hernandez, 633 F.3d 370, 378–79 (5th Cir. 2011) ("Application [N]ote 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 [A]pplication [N]ote 13(C) to do so.").

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

189 *Id.*

190 *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

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

Section 2K2.1(b)(6)(A) provides for a 4-level increase, with a minimum offense level of 18, if 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 that it would be transported outside the United States."[191] The Commission added this provision in 2011; previously, certain circuits applied the enhancement for "use or possession of a firearm or ammunition in connection with another felony" (now §2K2.1(b)(6)(B)) when the defendant transported firearms or ammunition into or out of the United States.[192]

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

Section 2K2.1(b)(6)(B) provides for a 4-level increase, with a minimum offense level of 18, 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."[193]

Application Note 14(A) explains that this enhancement applies if the firearm or ammunition "facilitated, or had the potential of facilitating," another felony offense.[194] The enhancement applies equally to firearms and ammunition-only cases.[195] The defendant

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.").

191 USSG §2K2.1(b)(6)(A).

192 *See* USSG App. C, amend. 753 (effective Nov. 1, 2011) ("[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.").

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

194 USSG §2K2.1, comment. (n.14(A)); *see also* United States v. Sanchez, 22 F.4th 940, 942 (10th Cir. 2022) (firearm had the potential to facilitate possession of a stolen vehicle where it "emboldened Defendant to accept th[e] enhanced risk" that someone would "recognize the vehicle was stolen"); United States v. Price, 16 F.4th 1263, 1265 (7th Cir. 2021) (district court erred in applying the enhancement where it found that the defendant possessed the firearm while committing another offense but did not find it "was involved in, or contributed to, the other felony"); 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—a defendant's felonious conduct" (quoting United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994))).

195 *See* United States v. Eaden, 914 F.3d 1004, 1010 (5th Cir. 2019) ("[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."); *see also* United States v. Coleman, 627 F.3d 205, 212 (6th Cir. 2010)

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.[196]

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.[197] The defendant need not have used the firearm in any other way in the course of the burglary.[198]

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."[199]

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."[200] 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."[201] 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.[202]

(applying the "fortress theory" to find possession of ammunition alone, stored in close proximity to drugs, 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").

196 *See, e.g.*, United States v. Hester, 910 F.3d 78, 88 (3d Cir. 2018); United States v. Hemsher, 893 F.3d 525, 534 (8th Cir. 2018); United States v. Chadwell, 798 F.3d 910, 916–17 (9th Cir. 2015).

197 USSG §2K2.1, comment. (n.14(B)).

198 *See id.*; *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 [§2K2.1(b)(6)(B)] is wholly unrelated to whether the weapon was stolen during the burglary or at any 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.").

199 USSG §2K2.1, comment. (n.14(C)).

200 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").

201 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, 1175–76 (8th Cir. 2008) (explaining that the "clearly improbable" standard applies to drug trafficking while the "facilitation" standard applies to simple possession).

202 *Compare* United States v. Clinton, 825 F.3d 809, 812–15 (7th Cir. 2016) (reversing enhancement because "[t]here was . . . little evidence regarding [defendant's] drug trafficking activities that would support a determination that the firearm facilitated or had the potential to facilitate the drug offense": the firearm was kept in a bedroom closet; the drug evidence was found under a couch in the living room; and the mere fact

In upholding application of the enhancement under the "fortress theory"—the notion that a defendant 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.[203] Typically, where the defendant has exchanged drugs for guns, the enhancement will apply.[204] 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.[205]

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."[206] However, where a

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that the defendant purchased the firearm from a drug addict was insufficient to show he exchanged drugs for the weapon), *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).

[203] *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) (explaining that the fortress theory "presume[s] that, under certain circumstances, guns in close proximity to drugs warrant the §2K2.1(b)(6)(B) enhancement" and "applies 'if it reasonably appears that the 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)).

[204] *See, e.g.*, United States v. Ryan, 935 F.3d 40, 42–43 (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); *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).

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

[206] 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"); *see* United States v. Tirado-Nieves, 982 F.3d 1, 8–9 (1st Cir. 2020) (collecting cases supportive of this proposition); *cf.* United States v. Bishop, 940 F.3d 1242, 1252 (11th Cir. 2019) (enhancement not proper where defendant possessed one hydromorphone pill, a drug

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.[207]

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.[208] 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."[209]

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).[210] 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.[211]

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."[212]

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possession offense, and there was no finding the firearm facilitated or had the potential of facilitating the possession of the pill).

[207] *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).

[208] 877 F.3d at 241–43.

[209] *Id.* at 242–43.

[210] *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).

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

[212] USSG §2K2.1(c)(1) (emphasis added).

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."[213] 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.[214] 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.[215] The Eighth Circuit has held that the requirement that a firearm "be cited in the offense of conviction"[216] is one that "encompasses more broadly the offense conduct giving rise to the conviction, and the court may refer to the entire record of the case," not just the indictment, "to determine whether a firearm is 'cited' in the offense."[217]

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."[218] 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."[219] 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.[220] 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."[221]

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213 USSG §2K2.1, comment. (n.14(C)).

214 USSG §2K2.1(c)(1)(A).

215 USSG §2K2.1(c)(1)(B).

216 USSG §2K2.1(c)(1).

217 United States v. Edger, 924 F.3d 1011, 1014 (8th Cir. 2019).

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

219 USSG §2K2.1(c).

220 United States v. Cobb, 250 F.3d 346, 349–50 (6th Cir. 2001) (the cross reference "focuses on a defendant's state of mind with respect to some other offense generally rather than on his or her state of mind with respect to some specific offense").

221 *Compare* USSG §2K2.1(b)(6)(B), *with* USSG§2K2.1(c)(1).

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.[222]

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.[223] 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.[224] The application note also references 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).[225]

Application Note 11 provides four specific circumstances that may warrant an upward departure.[226] The first is where the number of firearms involved in the offense "substantially exceeded 200."[227] The second is where multiple weapons of particular types are involved: National Firearms Act weapons, "military type assault rifles, [and] non-detectable ('plastic') firearms."[228] The third is where the offense involves "large quantities of armor-piercing ammunition."[229] The fourth is where "the offense posed a substantial risk of death or bodily injury to multiple individuals."[230]

The commentary also provides for a downward departure for offenses under sections 922(a)(6), 922(d), and 924(a)(1)(A) if no specific offense characteristics applied to enhance the offense, the defendant "was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to

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222 *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).

223 USSG §2K2.1, comment. (n.7).

224 *Id.*

225 *Id.*

226 USSG §2K2.1, comment. (n.11).

227 USSG §2K2.1, comment. (n.11(A)).

228 USSG §2K2.1, comment. (n.11(B)).

229 USSG §2K2.1, comment. (n.11(C)).

230 USSG §2K2.1, comment. (n.11(D)).

commit such an offense," and the defendant was not monetarily compensated for committing the offense.[231]

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 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 the defendant possessed a firearm in connection with unlawful drug activities.[232] Possession can be actual or constructive, meaning the defendant is able to exercise control or dominion over the firearm.[233] Presence, not use, is the determining factor.[234]

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."[235] The Third and Seventh Circuits have held that Application Note 11 applies

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231 USSG §2K2.1, comment. (n.15).

232 USSG §2D1.1(b)(1). This specific offense characteristic 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*).

233 *See, e.g.*, United States v. Ford, 22 F.4th 687, 692 (7th Cir. 2022) ("[T]he government must establish by a preponderance of the evidence that the defendant possessed the weapon either actually or constructively."); United States v. Gomez, 6 F.4th 992, 1009 (9th Cir. 2021) ("possession of the firearm may be actual or constructive" for §2D1.1(b)(1) to apply); United States v. Hargrove, 911 F.3d 1306, 1329 n.12 (10th Cir. 2019) (Section 2D1.1(b)(1) "merely requires 'constructive possession,' based on the proximity of the gun" (citation omitted)).

234 *See, e.g.*, United States v. Smythe, 363 F.3d 127, 129 (2d Cir. 2004) (per curiam) ("The [g]uideline is a *per se* rule that does not require a case-by-case determination that firearm possession made a particular transaction more dangerous.").

235 USSG §2D1.1, comment. (n.11); *see also* 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))). Similarly, 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

when the defendant constructively possessed firearms, even though they were not in the immediate vicinity of the drug operation.[236] 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.[237] 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.[238]

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).[239] 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 (covering use of firearm in relation to certain crimes) is imposed in conjunction with a sentence for an underlying offense.[240]

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.[241] In

defendant were found in the same interior compartment of the vehicle as the firearm and record supported knowledge and the exercise of control of that compartment by the defendant).

[236] United States v. Denmark, 13 F.4th 315, 319 (3d Cir. 2021) (the government needs to show "*only* that the defendant possessed a dangerous weapon without regard to where that weapon was located at the time of the crime" (internal quotation marks and citations omitted)); United States v. Thurman, 889 F.3d 356, 372–73 (7th Cir. 2018) (government satisfied its burden where firearms were in the same house the defendant used to distribute narcotics and one was near the defendant's proceeds).

[237] United States v. Bagcho, 923 F.3d 1131, 1138–40 (D.C. Cir. 2019).

[238] *Id.*

[239] *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))).

[240] USSG §2K2.4, comment. (n.4); *see infra* Section V.A.

[241] *See, e.g.*, *Denmark*, 13 F.4th at 319–20 (if the government shows the defendant possessed the weapon, defendant has the burden of proving it was "clearly improbable" that there was connection; in this inquiry court looks to (1) the type of gun involved; (2) whether the gun was loaded; (3) whether the gun was stored near the drugs or drug paraphernalia; and (4) whether the gun was accessible); United States v. Montenegro, 1 F.4th 940, 946 (11th Cir. 2021) (describing this burden shifting framework); United States v. McCloud, 935 F.3d 527, 531 (6th Cir. 2019) (same); United States v. Miller, 890 F.3d 317, 328–29 (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 paraphernalia and vial that had odor of PCP).

conspiracy cases, the reasonable foreseeability that a weapon may be present can be enough to prove possession.[242]

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 dangerous weapon was involved in the robbery or if a threat of death was made.[243] The particular increase depends on the way the firearm or weapon was involved, *i.e.*, whether possessed, brandished, discharged, or "otherwise used," and whether the weapon constituted a "firearm" or a "dangerous weapon." 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 merely was "brandished" or whether it was "otherwise used" in the course of the robbery.[244] A dangerous weapon is "brandished" when "all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person," regardless of the weapon's visibility.[245] On the other hand, a dangerous weapon is "[o]therwise used" when the conduct "did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm

[242] *See, e.g.*, United States v. Wynn, 37 F.4th 63, 67 (2d Cir. 2022) ("[W]hen a defendant traffics narcotics as part of a larger 'narcotics conspiracy' . . . 'the defendant need not have had personal possession, or even actual knowledge of the weapon's presence' . . . 'so long as the possession of the firearm was reasonably foreseeable to the defendant' " and was in furtherance of the conspiracy (quoting United States v. Batista, 684 F.3d 333, 343 (2d Cir. 2012))); United States v. Sincleair, 16 F.4th 471, 475 (5th Cir. 2021) (government can prove possession if a co-conspirator possessed a weapon and such possession was reasonably foreseeable to the defendant); 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. Coleman, 854 F.3d 81, 85 (1st Cir. 2017) (enhancement properly applied where it was reasonably foreseeable to the defendant that co-conspirators possessed firearms); 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.").

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

[244] USSG §2B3.1(b)(2)(B)–(C).

[245] USSG §1B1.1, comment. (n.1(C)).

or other dangerous weapon."[246] Courts have held that the difference between "brandished" and "otherwise used" is based on the seriousness of the criminal conduct.[247]

The First Circuit has analyzed the difference between "brandished" 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.' "[248] Likewise, the Fifth Circuit has stated: "While brandishing 'can mean as little as displaying part of a firearm or making the presence of the firearm known in order to intimidate,' otherwise using a weapon includes pointing the weapon at an individual in a specifically threatening manner."[249] Other appellate courts have reached similar conclusions.[250]

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.[251] 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.[252] In other words, "[t]he ultimate inquiry is whether a

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246 USSG §1B1.1, comment. (n.1(J); *see* United States v. Johnson, 803 F.3d 610, 616–17 (11th Cir. 2015) ("otherwise used" "includes the use of the firearm to make an explicit or implicit threat against a specific person"; finding the defendant did not merely "brandish" his firearm where he made an implicit threat and pointed the firearm at a group of bank tellers); *cf.* United States v. Johnson, 199 F.3d 123, 127 (3d Cir. 1999) (describing a firearm "waved about in a generally menacing manner during a robbery" as "brandished" but a firearm "leveled at the head of a victim, and . . . accompanied by explicit verbal threats" as "otherwise used").

247 *See* United States v. Bendtzen, 542 F.3d 722, 727 (9th Cir. 2008) (district court correctly found the defendant "otherwise used" a fake bomb because his "conduct was more culpable than mere 'brandishing' "); United States v. Miller, 206 F.3d 1051, 1053 (11th Cir. 2000) (The "difference [is] based on the seriousness of the charged criminal conduct."); United States v. Hart, 226 F.3d 602, 605 (7th Cir. 2000) (the robbery guideline "creates a 'hierarchy of culpability' for varying degrees of involvement" during the criminal offense (citation omitted)).

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

249 United States v. Jordan, 945 F.3d 245, 264 (5th Cir. 2019) (quoting United States v. Dunigan, 555 F.3d 501, 505 (5th Cir. 2009)).

250 *See, e.g.*, United States v. Bell, 947 F.3d 49, 61–62 (3d Cir. 2020) (quoting *LaFortune* and holding that placing a toy gun on a victim's neck, and later striking the victim with it, constituted "otherwise using" a dangerous weapon"); United States v. Wooden, 169 F.3d 674, 676 (11th Cir. 1999) (pointing a handgun at the victim's head one-half inch away constituted "otherwise used"); *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).

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

252 *See* United States v. Wooten, 689 F.3d 570, 577 (6th Cir. 2012) (collecting cases); *Hart*, 226 F.3d at 606 (same).

reasonable individual would believe that the object is a dangerous weapon . . . under the circumstances."[253]

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.[254] 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.[255] 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.[256]

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."[257] The threat may be in the form of an oral or written statement, act, gesture, or a combination of same.[258] The circuits agree that the statement "I have a gun" generally constitutes a "threat of death," and qualifies for a 2-level enhancement even if no express threat to use a gun is made.[259]

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253 United States v. Tolbert, 668 F.3d 798, 801 (6th Cir. 2012) (citation omitted).

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

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

256 *See, e.g.*, United States v. Tate, 999 F.3d 374, 384 (6th Cir. 2021) (joining the "uniform line of cases treating a robber that uses his concealed hand to reasonably suggest the existence of a weapon as having committed an act sufficient to satisfy §2B3.1(b)(2)(E)."); 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); *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).

257 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.").

258 USSG §2B3.1, comment. (n.6).

259 *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 explaining that "the statement 'I have a gun' can constitute a threat of death for purposes of the §2B3.1(b)(2)(F) enhancement," 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

C. Section 2B5.1—Offenses Involving Counterfeit Bearer Obligations of the United States

In the counterfeit bearer obligations guideline, two offense levels are added at §2B5.1(b)(4), with a minimum offense level of 13, if a dangerous weapon, including a firearm, was "possessed in connection with the offense."[260] Bearer obligations include currency and coins, food and postage stamps, treasury bills, and other items generally described as bearer obligations of the United States.[261]

In *United States. v. Gregory*, the Third Circuit held that although "in connection with" requires "some relationship or association," the government need not "show a causal relationship between the weapon and the offense"; "the 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."[262]

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 firearm-related guideline enhancement for an underlying offense and a mandatory consecutive sentence for section 924(c).[263] Courts have held that this application note plainly prohibits an enhancement for possession of any firearm, whether the one directly involved in the underlying offense or another firearm, even one in a different location.[264] The same

not *necessarily* enough, especially when contextual circumstances undermine the otherwise threatening nature of the declaration"); United States v. Pike, 473 F.3d 1053, 1061 (9th Cir. 2007) (a note stating the defendant had a gun was not, as a matter of law, sufficient to warrant the enhancement; district court needed to make further factual findings to determine if any mitigating circumstances "deprived the words in the note of their ordinary meaning").

260 USSG §2B5.1(b)(4).

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

262 345 F.3d 225, 229 (3d Cir. 2003) (citing 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)).

263 *See* USSG §2K2.4, comment. (n.4). The §2K2.4 guideline applies to offenders convicted of violating 18 U.S.C. §§ 844(h), 844(o), 924(c), and 929(a). *See* USSG §2K2.4(a)–(c) and USSG App. A.

264 *See* United States v. McGill, 815 F.3d 846, 910–11 (D.C. Cir. 2016) ("[A]n enhancement under §2D1.1(b)(1) and sentencing on a § 924(c) conviction are mutually exclusive." (quoting United States v. Rhodes, 106 F.3d 429, 432 (D.C. Cir. 1997))); United States v. Cervantes, 706 F.3d 603, 620 (5th Cir. 2013) (district court clearly erred in applying enhancement under §2D1.1(b)(1) where defendant was convicted of violating § 924(c)).

prohibition applies to fake firearms.[265] 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.[266]

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 §5G1.2(a), which provides that sentences for such offenses "shall be determined by that statute and imposed independently."[267]

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."[268] In a case involving a section 924(c) conviction, however, the commentary to §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.[269] 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 each includes "conduct that is 'treated as a specific offense characteristic in' the other offense" "even though the applicable enhancements are not utilized."[270] Only the Seventh

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[265] *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." (quoting United States v. White, 222 F.3d 363, 374 (7th Cir. 2000)).

[266] *See* United States v. Katalinic, 510 F.3d 744, 748 (7th Cir. 2007) (joining the Fourth and Sixth Circuits holding the same); s*ee 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).

[267] USSG §5G1.2(a).

[268] USSG §3D1.2(c).

[269] USSG §2K2.4, comment. (n.4).

[270] *See* United States v. Bell, 477 F.3d 607, 615–16 (8th Cir. 2007) (quoting USSG §3D1.2(c)); *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.

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.[271]

Espinosa, 539 F.3d 926, 930 (8th Cir. 2008) (where firearms enhancements not sought or applied and offenses not "closely intertwined," drug and firearms counts do not group).

[271] United States v. Sinclair, 770 F.3d 1148, 1158–59 (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" and "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").