Primer

Firearms Offenses

Prepared by the
Office of the General Counsel

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UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
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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 primary 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. GENERAL FIREARMS STATUTES AND §2K2.1

A. STATUTES

Over thirty offenses are referenced in Appendix A of the *Guidelines Manual* to §2K2.1.[1] Most of these offenses are found in chapter 44 (Firearms) of title 18 of the United States Code, which codifies the Gun Control Act of 1968,[2] and chapter 53 (Machine Guns, Destructive Devices, and Certain Other Firearms) of title 26 of the United States Code, which codifies the National Firearms Act of 1934.[3] The primary difference between these two chapters is that the chapter 44 offenses may apply to all firearms, while the chapter 53 offenses only apply to a limited class of firearms described in 26 U.S.C. § 5845(a), such as machineguns and short-barreled shotguns.[4] This section discusses the most common firearms offense referenced to §2K2.1—18 U.S.C. § 922(g)—as well as selected less common firearms offenses to which various subsections of §2K2.1 apply.[5]

1. Prohibited Person Offenses

a. Prohibited Persons Generally—Section 922(g)

Section 922(g) of title 18 prohibits certain persons from possessing, shipping, or transporting any firearm or ammunition in or affecting interstate or foreign commerce, or

1 *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL App. A (Nov. 2024) [hereinafter USSG].

2 18 U.S.C. §§ 921–934.

3 26 U.S.C. §§ 5801–5872.

4 *Compare* 18 U.S.C. § 921(a)(3) (defining "firearm" in chapter 44, title 18), *with* 26 U.S.C. § 5845(a) (defining "firearm" in chapter 53, title 26).

5 This primer does not discuss other offenses referenced to §2K2.1. *See* USSG App. A (referencing, *inter alia*, 18 U.S.C. § 1715 (firearms as nonmailable), 18 U.S.C. § 2332g (aircraft-destroying missiles), and 26 U.S.C. § 5685 (violating liquor laws with a firearm) to §2K2.1).

receiving any firearm or ammunition that has been shipped or transported in such commerce.[6] A prohibited person under section 922(g) is any person who:

(1) has been convicted of a crime punishable by imprisonment for a term exceeding one year;[7]

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance;[8]

(4) "has been adjudicated as a mental defective or has been committed to any mental institution";[9]

(5) is (A) an illegal alien or (B) an alien admitted under a non-immigrant visa;[10]

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

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[6] 18 U.S.C. § 922(g).

[7] A term of imprisonment exceeding one year is commonly associated with felony offenses. *E.g.*, 18 U.S.C. § 932(a)(3) ("[T]he term 'felony' means any offense under Federal or State law punishable by imprisonment for a term exceeding 1 year."). Circuit courts have split regarding whether section 922(g)(1) violates the Second Amendment as applied to persons convicted of certain prior offenses in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022)). *Compare* United States v. Jackson, 110 F.4th 1120, 1125 (2024) (section 922(g)(1) does not violate the Second Amendment as applied to the defendant and other convicted felons), *with* Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (section 922(g)(1) violates the Second Amendment as applied to the defendant in light of his prior convictions), *vacated*, No. 23-374 (U.S. July 2, 2024). In United States v. Canada, the Fourth Circuit determined that "[n]o federal appellate court has held that [§] 922(g)(1) is facially unconstitutional . . . it 'has a plainly legitimate sweep' and may constitutionally be applied in at least some 'set of circumstances.' " 123 F.4th 159, 161 (4th Cir. 2024) (citation omitted).

[8] Most circuits have held that a defendant is a prohibited person under this prong if the defendant "used a controlled substance (1) regularly (2) 'over a long period of time' (3) 'proximate to or contemporaneous with the possession of the firearm.' " United States v. Espinoza-Roque, 26 F.4th 32, 35 (1st Cir. 2022) (citation omitted). *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" 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). The Fifth Circuit has held that section 922(g)(3) is unconstitutional as applied to "sober citizen[s] based exclusively on [their] past drug usage" or "nonviolent drug users." United States v. Daniels, 77 F.4th 337, 340 (5th Cir. 2023), *rev'd*, 124 F.4th 967 (5th Cir. 2025).

[9] The Fifth Circuit has noted that 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, 47 F.4th 258, 261 n.7 (5th Cir. 2022).

[10] The Attorney General is charged with promulgating regulations pertaining to section 922 and does so through the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). *See* 18 U.S.C. § 926 (Rules and regulations). The Fifth Circuit has held that section 922(g)(5) remains constitutional following *Bruen*, 597 U.S. at 70–71, and United States v. Rahimi, 602 U.S. 680 (2024). United States v. Medina-Cantu, 113 F.4th 537, 542 (5th Cir. 2024) (per curiam), *cert. denied*, 145 S. Ct. 1318 (2025).

(7) has renounced 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;[11]

(9) has been convicted of a misdemeanor crime of domestic violence.[12]

The Supreme Court held in *Rehaif v. United States* that to sustain a conviction under section 922(g), the government must prove four elements: (1) the defendant was a prohibited person; (2) the defendant knew they were a prohibited person; (3) the defendant knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce.[13] Every circuit to have addressed the question has interpreted *Rehaif* to require knowledge of the defendant's prohibited status, *e.g.*, the defendant knew he or she was in the United States illegally or was a felon, not knowledge that such status prohibits the possession of a firearm.[14]

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[11] Subsection (g)(8) only applies to court orders issued after 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(g)(8). The Supreme Court recently held that subsection (g)(8) is facially constitutional because "[o]ur tradition of firearm regulation allows the government to disarm individuals who present a credible threat to the physical safety of others." *Rahimi*, 602 U.S. at 700.

[12] 18 U.S.C. § 922(g). A "misdemeanor crime of domestic violence" is a misdemeanor under federal, state, tribal, or local law, which "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" and is committed against a current or former spouse, child, or co-parent of the defendant, or a person in "a current or recent former dating relationship" with the defendant. 18 U.S.C. § 921(a)(33)(A). Whether the offense has an element of force is determined by the "categorical approach" or "modified categorical approach." *See generally* U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2025), https://www.ussc.gov/guidelines/primers/categorical-approach [hereinafter CATEGORICAL APPROACH PRIMER]. In 2022, the Bipartisan Safer Communities Act amended the types of domestic relationship covered to include dating relationships, provided that a person who committed a misdemeanor crime of domestic violence against a person with whom they were in a dating relationship could have their rights restored after five years in certain circumstances. Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12005, 136 Stat. 1313, 1332 (2022).

[13] 588 U.S. 225, 237 (2019).

[14] *See*, *e.g.*, United States v. Minor, 63 F.4th 112, 126 (1st Cir. 2023) (en banc) (the government is not required to prove "the defendant knew that he could not possess a gun"); United States v. Boyd, 999 F.3d 171, 182 (3d Cir. 2021) (same); United States v. Heyward, 42 F.4th 460, 469 (4th Cir. 2022) (same); United States v. Trevino, 989 F.3d 402, 405 (5th Cir. 2021) (same); Wallace v. United States, 43 F.4th 595, 607 (6th Cir. 2022) (same); Santiago v. Streeval, 36 F.4th 700, 707 (7th Cir. 2022) (same); United States v. Robinson, 982 F.3d 1181, 1187 (8th Cir. 2020) (same); United States v. Singh, 979 F.3d 697, 727–28 (9th Cir. 2020) (same); United States v. Benton, 988 F.3d 1231, 1239 (10th Cir. 2021) (same); United States v. Johnson, 981 F.3d 1171, 1189 (11th Cir. 2020) (same); *see also* United States v. Bryant, 976 F.3d 165, 172–73 (2d Cir. 2020) (same, in dicta). The Supreme Court has clarified that in felon-in-possession of firearm cases, "a *Rehaif* error is not a basis for plain-error relief" absent "a sufficient argument or representation on appeal that [the defendant] would have presented evidence at trial that he did not in fact know he was a felon," which demonstrates "a 'reasonable probability' that the outcome of the district court proceeding would have been different." Greer v. United States, 593 U.S. 503, 514 (2021).

Because section 922(g) uses the general definition of "firearm" found in 18 U.S.C. § 921(a)(3), prohibited persons are not barred from possessing an "antique firearm."[15] The antique firearm exception is an affirmative defense to prosecution.[16]

Generally, a defendant may not be convicted of multiple violations of section 922(g) arising out of a single act of firearm possession, even if the defendant is a prohibited person under more than one listed category.[17] For example, a defendant with a prior felony conviction and a prior misdemeanor crime of domestic violence conviction who possesses a firearm may only be convicted of a single count of violating section 922(g).[18] Similarly, a prohibited person who possesses more than one firearm and ammunition generally is exposed to only one conviction under section 922(g).[19] Courts have held that sentencing courts may merge the counts of conviction that are duplicative.[20] However, where the evidence demonstrates that the defendant stored the weapons in different places or acquired the weapons at different times, the defendant can be convicted of multiple counts of illegal possession.[21]

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15 18 U.S.C. § 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[.]"); *id.* § 921(a)(16) (defining "antique firearm" as any firearm manufactured in 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).

16 *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).

17 *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).

18 *Grant*, 15 F.4th at 457 (court may not " 'impose multiple punishments on a defendant who commits one act of possession yet is both a felon and a domestic-violence misdemeanant' " (citation omitted)).

19 *See* United States v. Tann, 577 F.3d 533, 537 & n.5 (3d Cir. 2009) (collecting cases); *see also* United States v. Bloch, 718 F.3d 638, 643 (7th Cir. 2013) ("[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").

20 *See, e.g.*, United States v. Haynes, 62 F.4th 454, 460–61 (8th Cir. 2023) ("no error occurred until the evidence and the verdict established that [the defendant] was guilty of a single incident of possession" but the district court then erred in failing to "merge the two counts for sentencing purposes").

21 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) (citation omitted)); 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 were seized at different times and in different locations).

As recently amended by the Bipartisan Safer Communities Act, the statutory maximum penalty for a violation of section 922(g) is 15 years of imprisonment.[22] Prior to the Act, the maximum penalty was ten years.[23] In addition, a statutory enhancement, discussed in Section III, *infra*, provides for enhanced statutory penalties in certain cases.

b. Felony Indictees—Section 922(n)

Section 922(n) of title 18 makes it unlawful for persons "under indictment for a crime punishable by imprisonment for a term exceeding one year" to transport a firearm or ammunition in interstate or foreign commerce or to receive a firearm or ammunition which has been transported in interstate or foreign commerce.[24] The Supreme Court has held that while section 922(n) "does not contain a mens rea requirement," "the relevant sentencing provision, § 924(a)(1)(D), requires that a violation be committed willfully."[25] At least one circuit has held that "a defendant's 'receipt' of a firearm can be proven by his possession—actual or constructive—of it."[26]

The statutory maximum penalty for violating section 922(n) is five years of imprisonment.[27]

2. Firearms Transfer Offenses and False Statement Offenses

Several statutes cover firearms transfer or purchase offenses—namely, where the defendant purchased a firearm or ammunition for, or transferred a firearm or ammunition to, a prohibited person or a person who intends to use or dispose of the firearm or ammunition unlawfully. This section discusses three such offenses—18 U.S.C. §§ 922(d), 932, and 933—as well as false statement offenses, which can be charged under similar circumstances. The Bipartisan Safer Communities Act recently created sections 932 and 933 and revised both the offense definition and penalty for section 922(d).[28]

a. Transferring Firearms—Section 922(d)

Section 922(d) of title 18 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,

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22 Pub. L. No. 117–159, § 12004(c), 136 Stat. 1313, 1329 (2022) (raising the penalty); 18 U.S.C. § 924(a)(8).

23 18 U.S.C. § 924(a)(2) (2018).

24 18 U.S.C. § 922(n).

25 Dixon v. United States, 548 U.S. 1, 5 & n.3 (2006).

26 United States v. Sanchez-Badillo, 540 F.3d 24, 32 (1st Cir. 2008).

27 18 U.S.C. § 924(a)(1)(D).

28 Pub. L. No. 117–159, § 12004(a)–(c) 136 Stat. 1313, 1326–29 (2022). Sections 932 and 933 are referenced in Appendix A of the *Guidelines Manual* to §2K2.1. *See* USSG App. C, amend. 819 (effective Nov. 1, 2023) (amending Appendix A (Statutory Index) to reference the new offenses to §2K2.1).

"including as a juvenile," is a prohibited person;[29] intends to sell or dispose of the firearm or ammunition in furtherance of a felony or certain other offenses; or intends to sell or dispose of the firearm to a person to whom disposition of the firearm is unlawful under section 922(d).[30]

The statutory maximum penalty for a violation of section 922(d) is 15 years of imprisonment.[31] Prior to the Bipartisan Safer Communities Act, the maximum penalty was ten years.[32]

b. Straw Purchasing Firearms—Section 932

Section 932 of title 18 prohibits purchasing or conspiring to purchase a firearm for a person (1) to whom transfer is prohibited under section 922(d), (2) who "intends to use, carry, possess, or sell or otherwise dispose of the firearm in furtherance of a felony" or certain other offense types, or (3) who "intends to sell or otherwise dispose of the firearm to a person" who meets either criterion.[33] Section 932 defines "felony" as "any offense under Federal or State law punishable by imprisonment for a term exceeding 1 year."[34]

A violation of section 932 is punishable by a statutory maximum term of imprisonment of 15 years.[35] The statutory maximum increases to 25 years if the offense was committed knowing or having reasonable cause to believe that a firearm involved in the offense will be used to commit a felony or certain other offense types.[36]

c. Firearms Trafficking—Section 933

Section 933 of title 18 prohibits: (1) transporting or otherwise disposing of a firearm to another person, knowing or having reasonable cause to believe that the recipient's use,

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[29] Section 922(d) includes the same list of prohibited persons as in sections 922(g) and (n). *See supra* notes 6–12, 24 and accompanying text. The Bipartisan Safer Communities Act revised the prong of section 922(d) relating to mental health to require the transferee "has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older." 18 U.S.C. § 922(d)(4); Bipartisan Safer Communities Act § 12001(a)(1)(A)(ii).

[30] 18 U.S.C. § 922(d). The latter two categories were added by the Bipartisan Safer Communities Act § 12004(b).

[31] 18 U.S.C. § 924(a)(8).

[32] *See* Bipartisan Safer Communities Act § 12004(c) (increasing the maximum penalty); 18 U.S.C. § 924(a)(2) (2018) (ten years).

[33] 18 U.S.C. § 932(b).

[34] *Id.* § 932(a)(3). The other offense types listed are: drug trafficking crimes, as defined in 18 U.S.C. § 924(c)(2) (discussed *infra* Section IV.A.2) and including a state felony the conduct for which violates the statutes listed in section 924(c)(2); and federal crimes of terrorism, as defined in 18 U.S.C. § 2332b. *Id.* § 932(a)(1)–(2), (b)(2).

[35] *Id.* § 932(c)(1).

[36] *Id.* § 932(c)(2).

carrying, or possession of the firearm would constitute a felony; (2) receiving a firearm, knowing or having "reasonable cause to believe that such receipt would constitute a felony"; or (3) attempting or conspiring to violate either substantive prohibition.[37]

A violation of section 933 is punishable by a statutory maximum term of imprisonment of 15 years.[38]

d. False Statement Offenses—Sections 922(a)(6) and 924(a)(1)(A)

Section 922(a)(6) of title 18 prohibits knowingly making any false statement or furnishing any false identification in connection with the acquisition of any firearm or ammunition from a federal firearms licensee (*e.g.*, a licensed dealer), intended or likely to deceive the federal firearms licensee about a fact material to the lawfulness of such acquisition under the provisions of chapter 44 (Firearms) of title 18.[39] The government must prove that the defendant knew the statement was false but need not prove that the defendant knew it was unlawful to lie.[40] Where the defendant misrepresented a fact (*e.g.*, a prior felony conviction) that would prohibit them from possessing firearms, the government need not prove that the defendant knew they would not be allowed to possess a firearm.[41] A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years.[42]

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[37] *Id.* § 933(a).

[38] *Id.* § 933(b).

[39] *Id.* § 922(a)(6). Chapter 44 consists of 18 U.S.C. §§ 921–934. *See also, e.g.*, United States v. Manney, 114 F.4th 1048, 1053 (9th Cir. 2024) (The prohibition in section 922(a)(6) against making materially false or fictitious statements "in connection with the acquisition or attempted acquisition of any firearm" comports with the Second Amendment, which "does not protect an individual's false statements."), *cert. denied*, 145 S. Ct. 1151 (2025).

[40] *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. 2021) (§ 922(a)(6) requires "that the defendant knowingly made false statements and that such statements were intended to deceive or likely to deceive a federally licensed firearms dealer" about the lawfulness of a firearms sale, but it was not plain error for a district court to omit a mens rea requirement relating to the status of the federally licensed firearms dealer (citation omitted)).

[41] *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). At least two circuits have declined to extend *Rehaif*, discussed *supra* notes 13–14 and accompanying text, to convictions under section 922(a)(6). *Id.* (rejecting the argument that *Rehaif* applies to § 922(a)(6)); *Diaz*, 989 F.3d at 393–94 (same). The Seventh Circuit has held that a defendant lying about being under indictment "can be material to the propriety of a firearms sale," even if section 922(n) (prohibiting persons under indictment for a felony from possessing firearms) is unconstitutional. United States v. Holden, 70 F.4th 1015, 1017–18 (7th Cir. 2023).

[42] 18 U.S.C. § 924(a)(2).

Similarly, section 924(a)(1)(A) of title 18 provides that whoever knowingly makes any false statement or representation with respect to the information required to be kept in the records of a federal firearms licensee or in applying for any license or exemption or relief from disability under chapter 44 (Firearms) of title 18 is subject to a statutory maximum term of imprisonment of five years.[43]

Sections 922(a)(6) and 924(a)(1)(A) are commonly charged where a defendant makes a false statement on Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 (Firearms Transaction Record), the form required to lawfully transfer a firearm from a federally licensed dealer.[44] Courts have upheld convictions under one or both of these sections where the defendant provided false answers about eligibility to possess a firearm as well as where the defendant provided a false address.[45]

Straw purchase defendants who make a material misrepresentation as to the identity of the actual firearm purchaser on ATF Form 4473 also are chargeable under both section 922(a)(6) and section 924(a)(1)(A).[46] In *Abramski v. United States*, the Supreme Court held that the true identity of the purchaser of a firearm is a material fact under section 922(a)(6), even when the true purchaser is legally eligible to acquire a firearm.[47]

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[43] *Id.* § 924(a)(1)(A).

[44] Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Just., Firearms Transaction Record (2022), https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download (Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473); *see, e.g.*, 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)); *see also e.g.*, Abramski v. United States, 573 U.S. 169, 175–77, 191–92 (2014) (false statement on Form 4473 violates §§ 922(a)(6) and 924(a)(1)(A)); United States v. Fields, 977 F.3d 358, 364 (5th Cir. 2020) ("an untruthful answer on a Form 4473 violates both" § 922(a)(6) and § 924(a)(1)(A)).

[45] *See, e.g.*, United States v. Bowling, 770 F.3d 1168, 1177–78 (7th Cir. 2014) (a false address can be a material misrepresentation and a violation of § 922(a)(6)); United States v. Frazier, 605 F.3d 1271, 1279–80 (11th Cir. 2010) (collecting cases stating same); United States v. Cook, 970 F.3d 866, 871 (7th Cir. 2020) (defendant charged with § 924(a)(1)(A) 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).").

[46] *See Fields*, 977 F.3d at 364 ("[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[, and] . . . giving such an answer violates § 924(a)(1)(A) because it constitutes a false statement with respect to information that a firearms dealer must retain in his records."); 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)."); *Frazier*, 605 F.3d at 1280 ("[W]e find the act of falsifying the identity of the 'actual buyer' on Form 4473 to be a violation of § 922(a)(6)."); *see also supra* note 44 for ATF Form 4473, Question 21.a. ("Warning: You are not the actual transferee/buyer if you are acquiring any of the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer any of the firearm(s) to you.").

[47] 573 U.S. at 172.

The Supreme Court further held that section 922(d) also may be charged alongside section 922(a)(6) where the defendant's conduct violates both sections.[48]

3. Stolen/Altered and Obliterated Serial Number Offenses

a. Stolen Firearms Offenses—Sections 922(i), (j), (u) and 924(*l*), (m)

Several offenses prohibit stealing firearms or transporting or possessing stolen firearms. It is unlawful to steal a firearm from a federal firearms licensee under 18 U.S.C. §§ 922(u) and 924(m), and to steal any firearm that is moving or has moved in interstate or foreign commerce under 18 U.S.C. § 924(*l*).[49] Shipping or transporting a stolen firearm or stolen ammunition, knowing or having reasonable cause to believe it was stolen, is a violation of 18 U.S.C. § 922(i).[50] And receiving, possessing, concealing, storing, or disposing of a stolen firearm or stolen ammunition that is moving or has moved in interstate or foreign commerce, knowing or having reasonable cause to believe it was stolen, is a violation of 18 U.S.C. § 922(j).[51] Each of these offenses carries a statutory maximum term of imprisonment of ten years.[52]

b. Altered or Obliterated Serial Number Offenses—Sections 922(k) and 5861(g), (h)

Section 922(k) of title 18 prohibits transporting, shipping, or receiving a firearm with a removed, altered, or obliterated serial number, or possessing or receiving a firearm that has at any time been shipped or transported in interstate or foreign commerce.[53] Section 922(k) carries a statutory maximum term of imprisonment of five years.[54]

Similarly, 26 U.S.C. § 5861(g) makes it unlawful to alter or obliterate the serial number on a firearm described in section 5845(a) of title 26, and 26 U.S.C. § 5861(h) makes it unlawful to receive or possess a firearm described in section 5845(a) with an altered or obliterated serial number.[55] These offenses each carry statutory maximum terms of imprisonment of ten years.[56]

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[48] *Id.* at 188 (discussing the "potential for some transactions to run afoul of both" § 922(a)(6) and § 922(d)); *see also id.* at 191–92 (upholding a § 924(a)(1)(A) charge based on the same conduct).

[49] 18 U.S.C. §§ 922(u), 924(*l*), (m).

[50] *Id.* § 922(i).

[51] *Id.* § 922(j).

[52] *Id.* § 924(a)(2), (i)(1), (*l*), (m).

[53] *Id.* § 922(k).

[54] *Id.* § 924(a)(1)(B).

[55] 26 U.S.C. § 5861(g), (h).

[56] *Id.* § 5871.

4. Recordkeeping Offenses

Some firearms offenses relate to recordkeeping duties of federal firearms licensees. For example, 18 U.S.C. § 922(m) makes it unlawful for a federal firearms licensee to knowingly "make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain" records required to be kept under 18 U.S.C. § 923.[57] A violation of section 922(m) is a Class A misdemeanor, punishable by not more than one year of imprisonment.[58]

B. Section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)

Section 2K2.1 is the primary firearms guideline, containing eight base offense levels, nine specific offense characteristics, and a cross-reference provision.[59] This section discusses those provisions in turn.

1. Definitions

The guideline uses the definition of "firearm" in section 921(a)(3) of title 18: "(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" except for an "antique firearm."[60] Generally, courts are in agreement that section 921(a)(3) requires the government to prove only that the firearm in question was designed to fire a projectile; a firearm that was not operable at the time the offense occurred still met the definition.[61]

Section 2K2.1 defines "prohibited person" as "any person described in 18 U.S.C. § 922(g) or § 922(n)";[62] these statutes are discussed *supra* in Section II.A.1.

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57 18 U.S.C. § 922(m).

58 *Id.* § 924(a)(3)(B).

59 USSG §2K2.1.

60 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.

61 *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).

62 USSG §2K2.1, comment. (n.3).

The guideline defines "controlled substance offense" and "crime of violence" by reference to §4B1.2 (Definitions of Terms Used in Section 4B1.1).[63] These definitions are discussed further *infra*.

2. Base Offense Level

Section 2K2.1(a) provides eight base offense levels that range from 6 to 26, with an instruction to apply the greatest.[64] The base offense level is determined by the statute of conviction, whether the defendant is a prohibited person, the type of firearm involved in the offense, and whether the defendant has prior convictions for crimes of violence or controlled substance offenses.

a. Base Offense Levels 6 (Statutes of Conviction)

Base offense level 6 applies to specified offenses listed at §2K2.1(a)(8).[65]

b. Base Offense Level 12 (Otherwise Applicable)

Base offense level 12 applies if the defendant was not convicted of an offense listed at §2K2.1(a)(8) and does not meet the criteria for a higher base offense level.[66]

c. Base Offense Level 14 (Prohibited Person or Statutes of Conviction)

Base offense level 14 applies if the defendant either was a prohibited person at the time of the offense or was convicted of certain firearms transfer offenses.[67] The listed transfer offenses are sections 922(d), 932, 933 and sections 922(a)(6) and 924(a)(1)(A) (related to false statements), if committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person."[68] As described below, if these criteria are met and the offense involved certain types of firearms, base offense level 20 applies.

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63 USSG §2K2.1, comment. (n.1).

64 USSG §2K2.1(a).

65 USSG §2K2.1(a)(8) (listing 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715).

66 USSG §2K2.1(a)(7).

67 USSG §2K2.1(a)(6).

68 USSG §2K2.1(a)(6)(B)–(C); *see also* USSG App. C, amend. 819 (effective Nov. 1, 2023) (adding sections 932 and 933 of title 18 to the listed statutes at §2K2.1(a)(6)(B)).

d. Base Offense Levels 18 and 20 (Type of Firearm)

Base offense level 18 applies if the *offense* involved a "firearm described in 26 U.S.C. § 5845(a)," unless the defendant meets the criteria for a higher base offense level.[69]

Base offense level 20 applies if the *offense* involved either a "firearm that is described in 26 U.S.C. § 5845(a)" or a "semiautomatic firearm that is capable of accepting a large capacity magazine" and the *defendant* either was a prohibited person or was convicted of any listed transfer offense.[70] Base offense level 20 is applicable to defendants who would have received base offense level 14 but for the type of firearm.

The Sixth Circuit has held that it is not double counting to apply both the base offense level of 20, which applies when the "offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine," and the enhancement for using or possessing the same firearm "in connection with another felony offense" as they penalize separate harms.[71]

As described below, base offense levels 22 and 26 apply if the offense involved certain types of firearms *and* the defendant had specified prior convictions.

Section 5845(a) of title 26 defines "firearm" for purposes of the National Firearms Act, providing a more limited definition than used elsewhere. The definition includes certain shotguns, rifles, machineguns,[72] silencers, and destructive devices.[73] In addition, section 5845(a) includes as a firearm "any other weapon," defined in section 5845(e) to include weapons "capable of being concealed on the person from which a shot can be discharged through the energy of an explosive," smooth-bored pistols or revolvers or those "redesigned to fire a fixed shotgun shell," and certain short-barreled combination

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69 USSG §2K2.1(a)(5).

70 USSG §2K2.1(a)(4)(B).

71 United States v. Marsh, 95 F.4th 464, 472 (6th Cir. 2024) ("[W]hereas the base offense level [at §2K2.1(a)(4)(B)] focuses on the fact that a specific type of firearm was involved in [the] offense, the enhancement [at §2K2.1(b)(6)(B)] is concerned with how a firearm was used—to 'facilitate[ ]' an additional crime" (citing USSG §2K2.1, comment. (n.14(A))).

72 Section 5845(b) defines "machinegun" to include "any part designed and intended solely and exclusively . . . for use in converting a weapon into a machine gun." 26 U.S.C. § 5845(b). Courts have held that "chips" and "auto-sear devices," parts used to convert semi-automatic firearms into full-automatic, firearms, constitute "machineguns" under section 5845(a). Although such parts are not a "firearm" as defined in Application Note 1 to §2K2.1, they do qualify as a "firearm that is described in 26 U.S.C. § 5845(a)," the definition used in the text of §2K2.1(a) for the purposes of applying certain enhanced base offense levels. *See, e.g.*, United States v. Nieves-Díaz, 99 F.4th 1. 6–7 (1st Cir.), *cert. denied*, 145 S. Ct. 307 (2024).

73 26 U.S.C. § 5845(a). Courts have disagreed about whether an ATF regulation, Bump-Stock-Type Devices, 83 FR 66514 (Dec. 26, 2018), which added "bump stocks" to this definition is binding. *See* Hardin v. ATF, 65 F.4th 895, 898 (6th Cir. 2023) (collecting cases regarding this split).

shotguns/rifles.[74] Section 5845(a)'s definition excludes antique firearms[75] and those found to be "primarily . . . collector's item[s]."[76] Courts have held that the relevant base offense levels do not require the defendant to know that the firearm fits the definition of "firearm" in section 5845(a).[77]

Application Note 2 to §2K2.1 defines "semiautomatic firearm that is capable of accepting a large capacity magazine" as one "that has the ability to fire many rounds without reloading" because at the time of the offense either "(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."[78] The definition excludes "a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition."[79]

Courts interpreting this definition have concluded that the firearm need not be operable,[80] that the magazine must be compatible with the firearm,[81] and that "close proximity" accounts for both physical distance and accessibility.[82]

e. Base Offense Levels 20 and 24 (Prior Convictions)

The base offense level also is 20 if the defendant committed any part of the instant offense after a felony conviction for a "crime of violence" or a "controlled substance

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74 26 U.S.C. § 5845(e).

75 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. 26 U.S.C. § 5845(g). Unlike section 921, a muzzle loading firearm designed to use black powder is not included in section 5845. *Compare* 18 U.S.C. § 921(a)(16), *with* 26 U.S.C. § 5845(g).

76 26 U.S.C. § 5845(a).

77 *See* United States v. Miller, 11 F.4th 944, 956–57 (8th Cir. 2021) (collecting cases).

78 USSG §2K2.1, comment. (n.2); *see also* United States v. Trumbull, 114 F.4th 1114, 1121 (9th Cir. 2024) (definition of "large capacity magazine" in Application Note 2 to §2K2.1 is entitled to deference under *Kisor v. Wilkie*, 588 U.S. 558 (2019)), *cert. denied*, No. 24-6848 (U.S. Apr. 21, 2025).

79 USSG §2K2.1, comment. (n.2).

80 *See* United States v. Davis, 668 F.3d 576, 579 (8th Cir. 2012) (the definition "does not affect the applicability of § 2K2.1(a) to inoperable firearms, except perhaps in the unusual case where attaching the large capacity magazine rendered or would render the semiautomatic firearm inoperable").

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

82 United States v. Gordillo, 920 F.3d 1292, 1300 (11th Cir. 2019) ("Physical proximity is necessary to find accessibility, but physical distance may not end the story.").

offense."[83] The base offense level is 24 if the defendant had more than one such prior conviction.[84]

As described below, base offense levels 22 and 26 apply if the defendant had specified prior convictions *and* the offense involved certain types of firearms.

As noted above, the terms "crime of violence" and "controlled substance offense" in §2K2.1 use the definitions provided in §4B1.2.[85] Because the terms "crime of violence" and "controlled substance offense" are used elsewhere with different meanings, attention must be paid when applying those definitions.[86]

Section 4B1.2(a) defines the term "crime of violence" as any felony violation of federal or state 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).[87]

Section 4B1.2(b) defines the term "controlled substance offense" as any felony violation of federal or state 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."[88] As of November 1, 2023, a new subsection, §4B1.2(d) (Inchoate Offenses Included), instructs that " 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."[89] In addition, a new subsection,

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[83] USSG §2K2.1(a)(4)(A).

[84] *See* USSG §2K2.1(a)(2), (4)(A).

[85] USSG §2K2.1, comment. (n.1) (utilizing the definition from §4B1.2).

[86] As an example of the terms being defined differently, 18 U.S.C. § 16 defines the term "crime of violence" without including an "enumerated offense clause," but including offenses committed against property in its "force clause." *Compare* 18 U.S.C. § 16, *with* USSG §4B1.2(a).

[87] USSG §4B1.2(a). This definition previously included a "residual clause," which the Commission removed. *See* USSG App. C, amend. 798 (effective Aug. 1, 2016).

[88] USSG §4B1.2(b). Courts have disagreed about whether the controlled substance at issue must be illegal under federal law or whether substances controlled only by state law also qualify. *See* United States v. Lewis, 58 F.4th 764, 768–69 (3d Cir. 2023) (summarizing the split and collecting cases).

[89] USSG §4B1.2(d); *see also* USSG App C, amend. 822 (effective Nov. 1, 2023) (explaining that this amendment addresses "a circuit conflict regarding the authoritative weight afforded to certain commentary to §4B1.2" and collecting cases).

§4B1.2(e) (Additional Definitions), provides additional definitions for terms used in §4B1.1.[90]

Courts have applied the "categorical approach" and "modified categorical approach" to determine whether prior convictions were "crimes of violence" and "controlled substance offenses." Information on the categorical approach can be found in the Commission's *Categorical Approach* primer.[91]

f. Base Offense Levels 22 and 26 (Type of Firearm and Prior Convictions)

The guideline further provides two base offense levels that apply based on the type of firearm and whether the defendant had prior convictions of a "crime of violence" or a "controlled substance offense." Base offense level 22 applies if the *offense* involved a "semiautomatic firearm that is capable of accepting a large capacity magazine" or a "firearm that is described in 26 U.S.C. § 5845(a)" and the *defendant* had one such prior conviction. Base offense level 26 applies if the *offense* involved such a firearm and the *defendant* had more than one such prior conviction.[92]

3. Specific Offense Characteristics

This section discusses the nine specific offense characteristics provided in §2K2.1 and common issues that arise when determining whether a particular specific offense characteristic applies. Because §2K2.1 is listed at §3D1.2(d) (Groups of Closely Related Counts), it is subject to the provisions of §1B1.3(a)(2), which adopts "expanded relevant conduct" rules.[93]

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90 USSG §4B1.2(e).

91 CATEGORICAL APPROACH PRIMER, *supra* note 12.

92 USSG §2K2.1(a)(1), (a)(3).

93 *See* U.S. SENT'G COMM'N, PRIMER ON RELEVANT CONDUCT 2 (2024), 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."); *see also, 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); United States v. Bowens, 938 F.3d 790, 798–800 (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).

a. Number of 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.[94] Courts have applied this specific offense characteristic based on the defendant's actual or constructive possession of such firearms[95] or based on relevant conduct principles.[96]

Application Note 5 to §2K2.1 states that only firearms *unlawfully* sought, possessed, or distributed are counted for purposes of calculating the number of firearms under subsection (b)(1).[97] Courts have reached different conclusions about whether a firearm illegally possessed under state law but legally possessed under federal law is counted for purposes of the enhancement.[98]

The First Circuit has held that a district court did not err in varying upward based in part on the defendant's possession of two firearms.[99] The court held 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 fact.[100]

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

Under §2K2.1(b)(2), the offense level is reduced to 6 if 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

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94 USSG §2K2.1(b)(1).

95 *See, e.g.*, United States v. Banks, 43 F.4th 912, 919 (8th Cir. 2022) (defendant was responsible for seven firearms found in the trunk of a car, even though DNA testing tied him to only one, because evidence showed that he had dominion over the car and thus constructive possession over the firearms in the trunk); *see also* 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.' " (citation omitted)); 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." (citation omitted)).

96 *See, e.g.*, United States v. Burnett, 37 F.4th 1235, 1239 (7th Cir. 2022) (enhancement applied where some of "the guns were used as part of a joint criminal activity, furthered that activity, and their use was reasonably foreseeable").

97 USSG §2K2.1, comment. (n.5).

98 *Compare* United States v. Munoz, 57 F.4th 683, 685–86 (9th Cir. 2023) ("[A] firearm may be counted under §2K2.1(b)(1) when the defendant's possession of it violates a specific legal prohibition under federal or state law"), United States v. Gill, 864 F.3d 1279, 1280–81 (11th Cir. 2017) (per curiam) (same), *and* United States v. Jones, 635 F.3d 909, 919 (7th Cir. 2011) (same), *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).

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

100 *Id.* at 178–79.

ammunition."[101] This reduction does not apply if the defendant receives a base offense level premised on the offense involving certain types of firearms or the defendant having certain prior convictions, discussed above (base offense levels 26, 24, 22, 20, 18).[102]

Courts have held that a defendant need not produce evidence of actual *use* of the firearms in question, only that the firearms were *possessed* for sporting or collection purposes.[103] The Eighth Circuit has 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.[104]

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."[105] Courts have concluded that selling firearms does 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)."[106] Courts have held that "plinking," a form of target shooting for amusement and recreation, is a sporting purpose.[107]

In addition, courts have determined that if the defendant also possessed the firearm 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.[108]

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[101] USSG §2K2.1(b)(2). The defendant bears the burden of proving the applicability of this reduction. *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).

[102] USSG §2K2.1(b)(2) (excluding defendants with base offense levels under §2K2.1(a)(1)–(a)(5)).

[103] *See, e.g.*, United States v. Mason, 692 F.3d 178, 183 (2d Cir. 2012) ("The [g]uideline 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.").

[104] 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.").

[105] USSG §2K2.1, comment. (n.6).

[106] *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)).

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

[108] United States v. Moore, 860 F.3d 1076, 1078 (8th Cir. 2017) (evidence of the defendant's interest in hunting, fishing, and firearms competitions was insufficient where defendant acknowledged firearm was also

c. Destructive Devices—§2K2.1(b)(3)

Section 2K2.1(b)(3) provides for (A) a 15-level increase if the *offense* involved a portable rocket, a missile,[109] or a device for launching either type of projectile, or (B) a 2-level increase if the offense involved a different type of "destructive device."[110] The guideline references 26 U.S.C. § 5845(f) for the definition of "destructive device."[111] Section 5845(f) defines a destructive device as: "(1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device"; (2) a weapon which can "expel a projectile by the action of an explosive or other propellant" with a barrel having a bore more than one-half inch in diameter; or (3) any combination of parts designed or intended to convert another device into a destructive device as defined in (1) and (2) from which such a device may be readily assembled.[112]

Courts have held that it is not double counting to apply this enhancement in conjunction with other provisions of the guideline.[113]

Application Note 7 to §2K2.1 states that when the offense involves a destructive device, an upward departure may be warranted if "the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death

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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.").

[109] *See, e.g.*, United States v. Flores, 729 F.3d 910, 916 (9th Cir. 2013) (a "missile" "is a self-propelled device designed to deliver an explosive").

[110] USSG §2K2.1(b)(3).

[111] USSG §2K2.1 comment. (n.1).

[112] 26 U.S.C. § 5845(f). There are certain exceptions subject to Executive Branch approval. *See id.* The Ninth Circuit has held that "readily assembled," in this definition, does not require that a defendant have all the necessary parts "so long as the defendant could acquire the missing part quickly and easily, and so long as the defendant could incorporate the part into the device quickly and easily." United States v. Kirkland, 909 F.3d 1049, 1053 (9th Cir. 2018); *see also* United States v. Creek, 95 F.4th 484, 489–90 (7th Cir. 2024) (A tin can for chewing tobacco that contained sealed explosive powder and a fuse is a "destructive device" within the meaning of the National Firearms Act, 26 U.S.C. § 5845(f)(1), so a two-level "destructive device" enhancement under §2K2.1(b)(3)(A) properly applied.).

[113] *E.g.*, United States v. McCarty, 475 F.3d 39, 46–47 (1st Cir. 2007) (not double counting to apply aggravated base offense level for "firearm listed in 26 U.S.C. § 5845(a)" and destructive device enhancement); United States v. Maturino, 887 F.3d 716, 725 (5th Cir. 2018) (not double counting to apply number of firearms and destructive device enhancement because "[s]ubsection (b)(1)[] contemplates the *number* of firearms involved while subsection (b)(3)[] contemplates the *types* of firearms involved"); United States v. Eaton, 260 F.3d 1232, 1238–39 (10th Cir. 2001) (not double counting to apply destructive device enhancement and possession or transfer in connection with another felony enhancement, now §2K2.1(b)(6)(B), because the two provisions "serve distinct purposes"); *see also* USSG §2K2.1 comment. (n.7) (aggravated base offense levels for type of firearm and (b)(3) should both be applied where a destructive device is present).

or serious bodily injury that the destructive device created" is not adequately accounted for by the guideline.[114] 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.[115] 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).[116]

d. Stolen/Improperly Serialized Firearms—§2K2.1(b)(4)

Section 2K2.1(b)(4)(A) provides for a 2-level increase where a firearm is stolen,[117] and §2K2.1(b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number.[118] The 4-level increase also applies to unserialized firearms (except those manufactured prior to the effective date of the Gun Control Act of 1968).[119] For the enhancement to apply, a defendant need not have known that a firearm he illegally possessed was stolen[120] or had an altered or obliterated serial number,[121] With respect to unserialized firearms, by contrast, the defendant must have known or consciously avoided knowledge of or been willfully blind to this fact.[122] The court may not apply both §2K2.1(b)(4)(A) and (b)(4)(B); the provisions are alternative.[123]

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[114] USSG §2K2.1, comment. (n.7). The Commission recently promulgated an amendment that deletes departures from the guidelines, including the upward departure in Application Note 7 to §2K2.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[115] *Id.*

[116] *Id.*

[117] The Sixth Circuit has held that "stolen" retains its ordinary meaning in the absence of a definition and "fraudulently purchased firearms are 'stolen' for purposes of the stolen-firearm enhancement" at §2K2.1(b)(4)(A). United States v. Brown, 86 F.4th 1164, 1167 (6th Cir. 2023).

[118] USSG §2K2.1(b)(4).

[119] USSG App. C, amend. 819 (effective Nov. 1, 2023).

[120] USSG §2K2.1, comment. (n.8(B)) ("Subsection (b)(4)(A) or (B)(i) 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) (*Rehaif v. United States*, 588 U.S. 225 (2019), does not require a scienter requirement to be read into this provision); United States v. Palos, 978 F.3d 373, 375–78 (6th Cir. 2020) (same; additionally, lack of scienter requirement is supportable even absent commentary); 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).

[121] *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).

[122] USSG §2K2.1(b)(4)(B)(ii); *see also* USSG App. C, amend. 819 (effective Nov. 1, 2023).

[123] USSG §1B1.1, comment. (n.4(A)) ("Within each specific offense characteristic subsection, . . . the offense level adjustments are alternative; only the one that best describes the conduct is to be used."); United States v. Prado, 41 F.4th 951, 953–54 (7th Cir. 2022) (courts may not stack these enhancements).

Courts have held that for purposes of the enhancement, the term "stolen" should be interpreted broadly and that a firearm can be classified as stolen once taken from the owner without permission even if the defendant did not personally steal it from the owner.[124] If the defendant steals the firearm during the course of the instant offense, the stolen firearm enhancement applies.[125]

Courts have differed on whether a serial number must be illegible for the altered or obliterated serial number enhancement to apply.[126] Courts generally agree, however, that a serial number need not be scientifically untraceable for the enhancement to apply; rather, "a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes accurate information less accessible."[127] Courts also 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.[128] In 2024, the Commission promulgated an amendment that resolved the conflict by amending the enhancement so that it applies if "any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye."[129]

Application Note 8 to §2K2.1 states that the enhancement does not apply if (1) the defendant is convicted of one of the stolen or improperly serialized firearms offenses discussed *supra* Section II.A.3, and (2) the base offense level is 12, because the base offense level already takes into account that the firearm or ammunition was stolen or had an

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124 *See* United States v. Lavalais, 960 F.3d 180, 188 (5th Cir. 2020) (collecting cases).

125 *See* United States v. Wallace, 573 F.3d 82, 91 & n.8 (1st Cir. 2009) (collecting cases).

126 *Compare* United States v. Sands, 948 F.3d 709, 715 (6th Cir. 2020) ("[A] serial number that is visible to the naked eye is not 'altered or obliterated' under §2K2.1(b)(4)(B)"), *and* United States v. St. Hilaire, 960 F.3d 61, 66 (2d Cir. 2020) ("We follow the Sixth Circuit, which defines 'altered' to mean illegible."), *with* 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."), *and Perez*, 585 F.3d at 884–85 (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."). In addition, the Second, Fourth, and Sixth Circuits have held that "altered is less demanding than obliterated." *St. Hilaire*, 960 F.3d at 66 (citation omitted).

127 United States v. Carter, 421 F.3d 909, 916 (9th Cir. 2005); *see also Sands*, 948 F.3d at 715 (collecting cases adopting this standard).

128 *St. Hilaire*, 960 F.3d at 65 & n.2 (collecting cases).

129 USSG App. C, amend. 828 (effective Nov. 1, 2024). This amendment is consistent with the holdings of the Second and Sixth Circuits and "is consistent with the Commission's recognition in 2006 of 'both the difficulty in tracing firearms with altered and obliterated serial numbers, and the increased market for these types of weapons.' " *Id.* (citing USSG App. C, amend. 691 (effective Nov. 1, 2006)).

altered or obliterated serial number.[130] But the court may impose the enhancement for the characteristic that does not form the basis of the conviction.[131] Similarly, the increase applies if the defendant also was convicted of another firearm offense referenced to §2K2.1.[132]

Except for offenses involving a portable rocket, a missile, or a device for launching either type of projectile (to which a 15-level increase under subsection (b)(3)(A) applies), "[t]he cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level 29."[133]

e. Trafficking—§2K2.1(b)(5)[134]

In 2023, the Commission substantially revised §2K2.1(b)(5) in response to a congressional directive to increase penalties for straw purchasing and trafficking offenses.[135] Subsection (b)(5) previously provided for a 4-level increase if the defendant "transported, transferred, or otherwise disposed of two or more firearms to another individual, or received [such] firearms with the intent to [do so]" and knew or had reason to believe such conduct would result in the firearms being transferred to an individual who (i) could not legally possess or receive the firearm or (ii) had a prior conviction for a controlled substance offense, crime of violence, misdemeanor crime of domestic violence, or was under a criminal justice sentence.[136]

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[130] USSG §2K2.1, comment. (n.8(A)) (excluding offenses under 18 U.S.C. §§ 922(i), (j), (k), (u), 924(*l*), (m) or 26 U.S.C. § 5861(g) or (h), with a base offense level of 12 from receiving this specific offense characteristic).

[131] *Id.*

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

[133] USSG §2K2.1.

[134] The Commission recently promulgated an amendment to address the proliferation of machinegun conversion devices ("MCDs"), which adds a new specific offense characteristic related to MCDs at §2K2.1(b)(5) and re-numbers the current trafficking enhancement as §2K2.1(b)(6). *See* Amendment 3 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[135] USSG App. C, amend. 819 (effective Nov. 1, 2023); *see also* Bipartisan Safer Communities Act, Pub. L. No. 117–159, § 12004(a), 136 Stat. 1313, 1327 (2022).

[136] U.S. SENT'G COMM'N, GUIDELINES MANUAL §§2K2.1(b)(5); comment. (n.13(a), (b)) (Nov. 2021); *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) (enhancement applied where defendant purchased the "type of weapons preferred by Mexican cartels . . . in significant quantities" and weapons were recovered in Mexico, including from Zetas Cartel); United States v. Juarez, 626 F.3d 246, 252–53 (5th Cir. 2010) (clandestine nature of the firearms transactions and $200 premium per firearm gave reason to believe the weapons were intended for unlawful use (export to Mexican drug cartels) and justified the enhancement); *cf.* United States v. Moody, 915 F.3d 425, 429–30 (7th Cir. 2019) (enhancement may not be

The revised §2K2.1(b)(5) provides a tiered enhancement, with instructions to apply the greatest increase. A new subsection, §2K2.1(b)(5)(A), provides a 2-level enhancement for defendants convicted of illegally receiving a firearm under 18 U.S.C. § 933(a)(2) (the trafficking receipt provision) or section 933(a)(3) (attempting or conspiring to violate section 933).[137] This subsection "ensures that receipt-only defendants convicted under section 933 receive the requisite increase."[138]

A new subsection, §2K2.1(b)(5)(B), provides a 2-level increase if the defendant "transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of" a firearm or ammunition knowing or having reason to believe that the recipient "was a prohibited person[] or . . . intended to use or dispose of the firearm or ammunition unlawfully."[139] Subsection (b)(5)(B) also applies to defendants who attempt or conspire to engage in this conduct, or who receive a firearm as a result of inducing this conduct.[140]

The amendment further revised the criteria previously provided in subsection (b)(5) and Application Note 13, and moved those criteria to §2K2.1(b)(5)(C).[141] That subsection provides a 5-level increase if the defendant "transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of" two or more firearms knowing or having reason to believe the recipient "(I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully."[142] Subsection (b)(5)(C) also applies to defendants who attempt or conspire to engage in this conduct, or who receive a firearm as a result of inducing this conduct.[143] To conform with the addition of a restoration of rights provision relating to certain misdemeanor crime of domestic violence convictions,[144] §2K2.1(b)(5) includes a proviso that §2K2.1(b)(5)(C) does not apply where the transferee's rights were restored at the time of the offense.[145]

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based upon "inferences that were plainly too speculative" and requires "the seller knew something more about the buyers than that they were in the market for a gun").

137 USSG §2K2.1(b)(5)(A).

138 USSG App. C, amend. 819 (effective Nov. 1. 2023).

139 USSG §2K2.1(b)(5)(B)(i).

140 USSG §2K2.1(b)(5)(B)(ii)–(iii).

141 USSG App. C, amend. 819 (effective Nov. 1. 2023).

142 USSG §2K2.1(b)(5)(C)(i).

143 USSG §2K2.1(b)(5)(C)(ii)–(iii).

144 18 U.S.C. § 921(a)(33)(A) defines "misdemeanor crime of domestic violence" and in subsections (B) and (C) excepts from that definition convictions where the transferee's rights to possess a firearm have been restored.

145 USSG §2K2.1(b)(5).

Subsection (b)(5)(C) differs from subsection (b)(5)(B) in that it requires a transfer of two or more firearms as opposed to a single firearm or ammunition,[146] and it limits the types of prohibited transferees to those with certain types of prior convictions or who are currently serving a criminal sentence, as opposed to all prohibited persons. Circuits dispute whether the government must prove that the transferee actually had the necessary status for the enhancement to apply, or whether the defendant's subjective, but incorrect, belief suffices.[147]

Application Note 13(B), previously 13(C), states that where "the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted."[148]

Application Note 13(C), previously 13(D), explains that in a case in which three or more firearms were both possessed and trafficked, *both* the specific offense characteristics for number of firearms and for trafficking apply.[149] 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."[150] The Second, Fifth, Sixth, and Seventh Circuits have held that it is impermissible double

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[146] Addressing the pre-amendment version of §2K2.1(b)(5), the First Circuit held that the 4-level increase for trafficking firearms applies where a bulk transfer is made but not where the defendant made multiple individuals transfers. United States v. Daniells, 79 F.4th 57, 91 (1st Cir. 2023). Similarly, the Sixth Circuit held that the defendant must transfer two or more firearms to a single person: where a defendant sells multiple individuals a single firearm, the enhancement did not apply. United States v. Henry, 819 F.3d 856, 871 (6th Cir. 2016).

[147] *Compare Henry*, 819 F.3d at 870 ("[T]he [undercover] agent need not have *actually* been a felon for §2K2.1(b)(5) to apply."), *and* 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."), *with* 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).

[148] USSG §2K2.1, comment. (n.13(B)); *see, e.g.*, United States v. Hernandez, 633 F.3d 370, 378 (5th Cir. 2011) ("Application [N]ote 13([B]) 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([B]) to do so."). The Commission recently promulgated an amendment that deletes departures from the guidelines, including the upward departure in Application Note 13(B) to §2K2.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[149] USSG §2K2.1, comment. (n.13(C)) (referencing enhancements under subsections (b)(1) and (b)(5)).

[150] *Id.*

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.[151]

f. Firearm or Ammunition Leaving the United States—§2K2.1(b)(6)(A) and Firearm or Ammunition Used or Possessed "In Connection With" Another Offense—§2K2.1(b)(6)(B)

i. Generally

Section 2K2.1(b)(6) provides for a 4-level increase, with a minimum offense level of 18, if the defendant (A) "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 out of the United States" or (B) "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."[152] Courts have held that the enhancement could apply equally to firearms and ammunition-only cases.[153]

"[A]nother felony offense," as used in §2K2.1(b)(6)(B), means "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."[154] Section 2K2.1(b)(6)(B) applies if

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[151] *See* United States v. Fugate, 964 F.3d 580, 587 (6th Cir. 2020); United States v. Velasquez, 825 F.3d 257, 259 (5th Cir. 2016) (plain error, but did not affect the defendant's substantial rights under the circumstances of that case); United States v. Young, 811 F.3d 592, 600–01 (2d Cir. 2016); United States v. Johns, 732 F.3d 736, 740 (7th Cir. 2013).

[152] USSG §2K2.1(b)(6) (emphasis added).

[153] *See* United States v. Nieves-Díaz, 99 F.4th 1, 8 (1st Cir.) (recognizing that "the circumstances in which the display of ammunition—in and of itself—would affect an observer in a way akin to how the display of a firearm would are necessarily quite fact-dependent" and that the government must "show that the evidence in the record makes it more likely than not that the ammunition in this case had the required potentially facilitative effect" for proper application of §2K2.1(b)(6)(B)), *cert. denied*, 145 S. Ct. 307 (2024); 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."); *see also* United States v. Coleman, 627 F.3d 205, 212 (6th Cir. 2010) (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").

[154] USSG §2K2.1, comment. (n.14(C)); *see also, e.g.*, United States v. Henderson, 88 F.4th 534, 537 (4th Cir. 2023) (application of the enhancement was erroneous where the defendant was charged with a single violation of 18 U.S.C. § 922(g)(1) and application was based solely on the fact that the defendant falls into another class of prohibited persons under section 922(g)); United States v. Anderson, 62 F.4th 1260, 1269–70 (10th Cir. 2023) (district court appropriately applied the enhancement where, although the state charge was dismissed, the government presented sufficient evidence to determine by a preponderance of the evidence that the defendant committed the offense).

the firearm or ammunition "facilitated, or had the potential of facilitating," another felony offense.[155] The Commission has clarified that §2K2.1(b)(6)(B) applies so long as the other offense was relevant conduct to the firearms offense, whether or not the offenses would group under §3D1.2.[156]

ii. Application of §2K2.1(b)(6)(B) in Connection with Burglary, Receiving Stolen Property, or Drug Offenses

Application Note 14(B) to §2K2.1 provides further guidance regarding the "in connection with" requirement when the other offense is burglary or a drug trafficking offense. The application note provides that the enhancement applies when the defendant finds and takes a firearm in the course of committing a burglary.[157] The defendant need not have used the firearm in any other way in the course of the burglary.[158]

The Eighth and Eleventh Circuits have held §2K2.1(b)(6)(B) applies when the firearm the individual possessed "in connection with" theft by receiving stolen property when the stolen property the felon receives is the stolen firearm itself. [159]

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[155] USSG §2K2.1, comment. (n.14(A)); *see also* United States v. Bishoff, 58 F.4th 18, 24 (1st Cir. 2023) (defendant sold unserialized firearms to an undercover officer and discussed drug during a sale "create[ing] a reasonable inference that the desire to purchase the custom, untraceable weapons . . . stemmed from a desire to use them to unlawful ends"); 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 [the d]efendant to accept th[e] enhanced risk" that someone would "recognize the vehicle was stolen"). *But see* United States v. Aragon, 112 F.4th 1293, 1298–99 (10th Cir. 2024) (district court erred in applying §2K2.1(b)(6)(B) where the individual's use of a firearm had the potential to result in another offense (arson), but that offense never occurred; §2K2.1(b)(6)(B) "contemplates actual and completed felony offenses," not " 'potential' felony offenses"); United States v. Wilson, 75 F.4th 633, 637 (6th Cir. 2023) (enhancement was erroneously applied where the court failed to make factual findings regarding the defendant's self-defense claim, as self-defense may be invoked with respect to the other felony even where the defendant did not lawfully possess the firearm); 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").

[156] USSG App. C, amend. 784 (effective Nov. 1, 2014).

[157] USSG §2K2.1, comment. (n.14(B)).

[158] *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.").

[159] United States v. Brooks, 112 F.4th 937, 950 (11th Cir. 2024) ("[A] defendant possesses a firearm 'in connection with another felony offense,' § 2K2.1(b)(6)(B)—even if the firearm itself is the 'fruit' of the other offense—if it facilitates, or has the potential of facilitating, the other offense."); United States v. Canamore, 916 F.3d 718, 721 (8th Cir. 2019) ("The commentary 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 [§2K2.1(n.14(C))]. Theft by receiving stolen property was a felony under Arkansas law because the stolen property was a firearm.") (per curiam).

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."[160] Because Application Note 14(B) discusses only firearms, the First Circuit has held that there is no presumption of facilitation when ammunition alone is present, while the Sixth Circuit has applied a presumption in this context.[161] Courts have differed 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 the firearm.[162]

Typically, where the defendant has exchanged drugs for firearms, the enhancement will apply.[163] But the Sixth Circuit has held that where a defendant sells both firearms and drugs, even "in quick succession," the government must prove that a firearm facilitated or had the potential of facilitating the drug offense; if the two are "independent sales," the enhancement does not apply.[164]

The Sixth Circuit has applied §2K2.1(b)(6)(B) on the "fortress theory"—the presumption that firearms found in close proximity to drugs on premises controlled by the defendant and in his possession are for use in protecting the drugs or facilitating a drug

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[160] USSG §2K2.1, comment. (n.14(B)); *see, e.g.*, United States v. Wilson, 111 F.4th 567, 571–72 (5th Cir.) ("[B]ecause the drugs and firearms were in the same vehicle, the district court properly found that they were in close proximity."), *cert. denied*, 145 S. Ct. 785 (2024); United States v. Tirado-Nieves, 982 F.3d 1, 10–11 (1st Cir. 2020) (affirming enhancement based on the court's determination that the defendant "unlawfully possessed drug paraphernalia in a quantity that was indicative of drug trafficking").

[161] *Compare* United States v. Nieves-Díaz, 99 F.4th 1 (1st Cir.), *cert. denied*, 145 S. Ct. 307 (2024), *with* United States v. Coleman, 627 F.3d 205, 212 (6th Cir. 2010).

[162] *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 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).

[163] *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" and holding 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 firearm as collateral for drugs and then sold firearm to confidential informant for money and also gave informant drugs; in neither case was the firearm used to facilitate a drug crime).

[164] United States v. Jackson, 877 F.3d 231, 241–43 (6th Cir. 2017).

transaction.[165] In applying this theory, 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.[166]

Courts have generally held that Application Note 14(B) is not applicable where "the defendant possessed a small quantity of drugs and there was no evidence of involvement in drug trafficking."[167] However, even where a defendant has "user" amounts of drugs, if there are other factors that indicate that the firearm could facilitate another felony, the enhancement may apply.[168]

iii. Application of §2K2.1(b)(6)(B) to a Prohibited Person in Connection with a Transfer

The Seventh Circuit has held that §2K2.1(b)(6)(B) applies when an individual knowingly possesses a firearm after having previously been convicted of a felony and transfers the firearm to another individual prohibited from possessing a firearm because of a prior felony conviction.[169]

g. Recordkeeping Offenses—§2K2.1(b)(7)

Section 2K2.1(b)(7) provides that "[i]f a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition," the court should "increase to the offense level for the substantive offense."[170] For instance, "if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person."[171]

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165 *Id.* at 239.

166 *See* United States v. Shanklin, 924 F.3d 905, 920 (6th Cir. 2019).

167 United States v. Tirado-Nieves, 982 F.3d 1, 7–9 (1st Cir. 2020) (collecting cases); *cf.* United States v. Bishop, 940 F.3d 1242, 1252 (11th Cir. 2019) (enhancement not proper where defendant possessed one hydromorphone pill, a drug possession offense, and there was no finding the firearm facilitated or had the potential of facilitating the possession of the pill).

168 *Tirado-Nieves*, 982 F.3d at 8 ("[I]n such cases, the courts hold that Application Note 14(A), rather than Note 14(B)(ii) applies, and 'the district court must affirmatively make a finding that the weapon or weapons facilitated the drug offense before applying the adjustment.' " (citation omitted)); 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).

169 *See, e.g.*, United States v. Harvey, 92 F.4th 680, 683–84 (7th Cir. 2024).

170 USSG §2K2.1(b)(7).

171 USSG §2K2.1, comment. (n.9).

h. Organized Crime—§2K2.1(b)(8)

Section 2K2.1(b)(8), the organized crime enhancement, became effective on November 1, 2023, and implements a congressional directive to increase penalties for straw purchasers and traffickers affiliated with criminal organizations.[172] Subsection (b)(8) provides a 2-level increase if a defendant receives the trafficking enhancement under §2K2.1(b)(5) and "committed the offense in connection with the defendant's participation" in a grouping of five or more persons that the defendant either knows "had as one of its primary purposes the commission of criminal offenses," or acts with willful blindness or conscious avoidance of knowledge regarding such purpose.[173] The Commission intends that the nexus between the offense and the organization "ensure[s] that a defendant would not receive the enhancement based solely on . . . inclusion in gang databases . . . [or other unreliable criteria or] evidence unrelated to the criminal act."[174]

i. Mitigating Circumstances—§2K2.1(b)(9)

Section 2K2.1(b)(9), the mitigating circumstances reduction, also became effective on November 1, 2023, and implements a congressional directive to consider the impact of mitigating circumstances for straw purchasers without significant criminal history.[175] Subsection (b)(9) identifies the potentially eligible defendants as those who receive the trafficking enhancement at §2K2.1(b)(5) and have no more than one criminal history point.[176] For those who meet this criteria, §2K2.1(b)(9) provides for a 2-level reduction if the defendant "(i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or

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172 USSG App. C, amend. 819 (effective Nov. 1, 2023) (explaining that section 12004(a)(5) of the Bipartisan Safer Communities Act directed the Commission to increase penalties for defendants convicted under 18 U.S.C. § 932 or § 933 who are affiliated with organized crime).

173 USSG §2K2.1(b)(8); *see also* USSG App. C, amend. 819 (effective Nov. 1, 2023) ("[T]he Commission determined that the doctrines of 'willful blindness' and 'conscious avoidance' are 'well established in criminal law.' " (citations omitted)).

174 USSG App. C, amend. 819 (effective Nov. 1, 2023).

175 *Id.* ("[S]ection 12004(a)(5) of the [Bipartisan Safer Communities] Act, . . . directs the Commission to consider an amendment accounting for straw purchasers with mitigating circumstances.). Additionally, "[t]he amendment also deletes Application Note 15, which provided for a downward departure for certain straw purchasers, because subsection (b)(9) provides a reduction with broader criteria." *Id.*

176 USSG §2K2.1(b)(9)(A)–(B). Specifically, the defendant must have no "more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)." *Id.* The Commission recently promulgated an amendment that deletes departures from the guidelines, including the reference to §4A1.3 in §2K2.1(b)(9)(B). *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

(ii) was unusually vulnerable to being persuaded or induced to commit the offense due to physical or mental condition."[177]

4. 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.[178]

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."[179] The Commission has clarified that §2K2.1(c)(1) applies so long as the other offense was relevant conduct to the firearms offense, whether or not the offenses would group under §3D1.2.[180] 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.[181] 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.[182]

Unlike §2K2.1(b)(6)(B), application of the cross reference requires that the firearm involved in the other offense was the same firearm (or one of the same firearms) "cited in the offense of conviction."[183] The Eighth Circuit has held that this requirement "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."[184]

While §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,

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177 USSG §2K2.1(b)(9)(C).

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

179 USSG §2K2.1, comment. (n.14(C)); *see also* United States v. Perkins, 52 F.4th 742, 743–44 (8th Cir. 2022) ("The phrase 'another offense' . . . does not exclude state offenses.").

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

181 USSG §2K2.1(c)(1)(A).

182 USSG §2K2.1(c)(1)(B).

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

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

the cross reference requires "knowledge or intent."[185] Courts have held that the defendant need not have known what specific offense was going to be committed, only that another offense was going to be committed.[186] In addition, courts have held that if the cross reference directs application of a guideline that itself contains a firearm enhancement, that firearm enhancement should be applied.[187]

5. Additional Departure Provisions

The Commentary to §2K2.1 provides for upward departures in several different circumstances. In addition to those noted above, Application Note 11 provides four circumstances that may warrant an upward departure: (1) the number of firearms involved in the offense "substantially exceeded 200"; (2) the offense involved multiple weapons of particular types—firearms described in section 5845(a), "military type assault rifles, [and] non-detectable ('plastic') firearms"; (3) the offense involved "large quantities of armor-piercing ammunition"; or (4) "the offense posed a substantial risk of death or bodily injury to multiple individuals."[188]

III. THE ARMED CAREER CRIMINAL ACT AND §4B1.4

A. THE ARMED CAREER CRIMINAL ACT—SECTION § 924(E)

The Armed Career Criminal Act (ACCA) imposes a mandatory minimum 15-year sentence of imprisonment (and a maximum of life imprisonment) for defendants convicted under 18 U.S.C. § 922(g) who have three previous convictions, committed on occasions

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

186 *See, e.g.*, 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").

187 *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).

188 USSG §2K2.1, comment. (n.11). The Commission recently promulgated an amendment that deletes departures from the guidelines, including the upward departures in Application Note 11 to §2K2.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

different from one another,[189] for a "serious drug offense," a "violent felony," or both.[190] The ACCA is a mandatory sentencing enhancement and does not constitute a separate criminal offense.

Determining whether a prior offense is a "serious drug offense" or a "violent felony" involves applying the "categorical approach" or "modified categorical approach."[191] The Commission's *Categorical Approach* primer provides further information on that topic.[192]

"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.[193]

"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 by imprisonment 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; or

(ii) is burglary, arson, or extortion, [or] involves the use of explosives.[194]

The Supreme Court has instructed that the first clause of this definition (the "elements" or "force" clause) requires the use of "*violent* force—that is, force capable of causing physical pain or injury to another person," so an offense that requires mere

[189] 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, 595 U.S. 360, 367–72 (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.*

[190] 18 U.S.C. § 924(e)(1); *see also* Johnson v. United States, 576 U.S. 591, 593 (2015) (explaining that the range of punishment under the ACCA is 15 years to life).

[191] Shular v. United States, 589 U.S. 154, 157 (2020) ("To determine whether an offender's prior convictions qualify for ACCA enhancement, we have used a 'categorical approach . . . .' " (citation omitted)); Mathis v. United States, 579 U.S. 500, 505–06 (2016) ("[T]his Court approved the 'modified categorical approach' for use with statutes having multiple alternative elements.").

[192] CATEGORICAL APPROACH PRIMER, *supra* note 12.

[193] 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." 589 U.S. at 157.

[194] 18 U.S.C. § 924(e)(2)(B). This provision includes a "residual clause," which further defines a "violent felony" as a crime that "involves conduct that presents a serious potential risk of physical injury to another," but the Supreme Court held the residual clause is unconstitutionally vague. *Johnson*, 576 U.S. at 606; *see also infra* note 218 and accompanying text.

touching does not meet this definition.[195] The Court has also held that the amount of force sufficient to overcome the victim's resistance constitutes "physical force."[196] However, 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.[197]

The Supreme Court has explained that the second clause of the definition of "violent felony" (the "enumerated offense clause") requires courts to look to "the elements of the 'generic' version of the listed offense—*i.e.*, the offense as commonly understood."[198] Regardless of what a prior offense was *labeled*, if its elements are no broader than the elements of the generic offense, it meets the definition of that offense for purposes of the ACCA.[199] For example, generic "burglary" means the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[200] Generic burglary includes breaking into "vehicles designed or adapted for overnight use" but excludes breaking into "ordinary vehicles."[201]

B. SECTION 4B1.4 (ARMED CAREER CRIMINAL)

The guideline implementing this statutory provision is §4B1.4 (Armed Career Criminal).[202] 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 type described in 26 U.S.C. § 5845(a).[203] Otherwise, offense level 33 applies.[204] Alternatively, §4B1.4 uses the defendant's otherwise applicable offense level if it is higher than level 33 or 34.[205]

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195 Johnson v. United States, 559 U.S. 133, 138–40 (2010).

196 Stokeling v. United States, 586 U.S. 73, 85 (2019).

197 Borden v. United States, 593 U.S. 420, 429 (2021) (plurality opinion); *id.* at 445 (Thomas, J., concurring in the judgment).

198 Mathis v. United States, 579 U.S. 500, 503 (2016).

199 Taylor v. United States, 495 U.S. 575, 598–99 (1990).

200 *Id.* at 599; *see also* Quarles v. United States, 587 U.S. 645, 650 (2019) ("[R]emaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure.").

201 United States v. Stitt, 586 U.S. 27, 36 (2018).

202 *See* USSG App. A.

203 USSG §4B1.4(b)(3)(A); *see also supra* notes 85–90 and accompanying text; United States v. Crump, 65 F.4th 287, 300 (6th Cir. 2023) (courts may use precedent regarding §2K2.1(b)(6)—including the "fortress theory"—to determine application of §4B1.4(b)(3)(A)).

204 USSG §4B1.4(b)(3)(B).

205 USSG §4B1.4(b)(1), (2).

Section 4B1.4 assigns a Criminal History Category (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 the firearm was of a type described in 26 U.S.C. § 5845(a); or the defendant's otherwise applicable CHC.[206]

IV. 18 U.S.C. § 924(C) AND §2K2.4

A. Firearm Connected to Crime of Violence or Drug Trafficking Crime—Section 924(c)

Section 924(c) of title 18 provides for a mandatory prison term for defendants 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).[207] Courts have held that possession of a firearm can be joint with another person and may be constructive.[208] A defendant may be convicted under section 924(c) 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.[209] Section 924(c) provides for mandatory consecutive penalties that increase incrementally from five years to life imprisonment.[210]

1. "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 crime, depending on whether the

[206] USSG §4B1.4(c).

[207] 18 U.S.C. § 924(c)(1)(A).

[208] *See* United States v. Norris, 21 F.4th 188, 196 (1st Cir. 2021) (evidence of constructive possession was sufficient where the firearm was in a bedroom closet, evidence indicated the defendant was an occupant, and, while another adult and a baby may have resided there, the jury was instructed on joint possession); 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 [the defendant] had knowledge of, and access to' the Springfield pistol found in his wife's vehicle." (citation omitted)).

[209] *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."); United States v. Woods, 14 F.4th 544, 553 (6th Cir. 2021) (collecting cases). Practitioners should be cautious not to conflate the question of whether a conspiracy offense can serve as a predicate for section 924(c) with *Pinkerton* liability where a co-conspirator carries a firearm 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.").

[210] 18 U.S.C. § 924(c).

defendant (i) used or carried the firearm or (ii) possessed the firearm. If the defendant *used or carried* the firearm, these acts must have been done "during and in relation to" the underlying offense for a violation of the statute to have occurred.[211] If the defendant *possessed* the firearm, the possession must have been "in furtherance of" the underlying offense.[212] 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 crime.[213] In contrast, "a person does not '*use*' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs."[214]

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."[215]

Courts have similarly interpreted "in furtherance of" to require a nexus, sometimes further requiring specific factors be met.[216] For example, where the defendant only possessed the firearm and the underlying offense was a drug trafficking crime, 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."[217] However, the Ninth Circuit declines to use a "checklist" approach, concluding instead "that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense."[218]

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211 *Id.* § 924(c)(1)(A).

212 *Id.*

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

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

215 Dean v. United States, 556 U.S. 568, 573 (2009) (citation omitted).

216 *See* United States v. Irons, 31 F.4th 702, 712 (9th Cir. 2022) ("in furtherance" requires that the defendant's possession "promotes, facilitates, or advances" the underlying crime).

217 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 possessed cocaine and a large amount of cash near the weapon); *cf.* United States v. Hernandez, 919 F.3d 1102, 1108 (8th Cir. 2019) ("[J]ury 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 . . . ." (citation omitted)).

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

2. "Crime of violence" and "drug trafficking crime"

For purposes of section 924(c), a "crime of violence" is defined 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."[219] Courts use the "categorical approach" and "modified categorical approach" to determine whether an offense is a "crime of violence."[220] 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.[221] As noted above, these definitions differ from the definitions in §4B1.2, used in §2K2.1.[222]

3. Penalties

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, a destructive device, or equipped with a silencer, thirty years.[223] 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.[224] 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.[225] There is

firearms, which [the defendant] apparently kept for purposes unrelated to his drug business, . . . were stored elsewhere throughout his home"); *see also* United States v. Maya, 966 F.3d 493, 501 (6th Cir. 2020) ("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 [*Mackey* list of factors] is simply a tool to help answer whether the required illicit purpose exists."); 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).

219 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 the Supreme Court struck down the residual clause as unconstitutionally vague. United States v. Davis, 588 U.S. 445, 470 (2019).

220 United States v. Taylor, 596 U.S. 845, 850 (2022). For further information on the "categorical approach" and "modified categorical approach," see the Commission's *Categorical Approach* primer. CATEGORICAL APPROACH PRIMER, *supra* note 12.

221 18 U.S.C. § 924(c)(2).

222 *See supra* note 86.

223 18 U.S.C. § 924(c)(1)(A)–(B).

224 *Id.* § 924(c)(1)(C). A defendant may not be sentenced to probation if convicted under section 924(c). *Id.* § 924(c)(1)(D).

225 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);

no defined maximum penalty for section 924(c) violations, although courts have concluded that the implied maximum penalty is life imprisonment.[226]

Prior to the First Step Act of 2018, a defendant could be sentenced to multiple consecutive section 924(c) penalties in the same proceeding, resulting in one or more convictions being considered a "second or subsequent conviction under" section 924(c), commonly referred to as "stacking."[227] The First Step Act amended section 924(c) so that the 25-year enhanced penalty applies only to defendants whose instant violation of section 924(c) occurs after a prior section 924(c) conviction has become final, so it does not apply based on another section 924(c) conviction in the same case.[228] 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.[229] 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.[230]

The sentence for section 924(c) must be consecutive to any other sentence, including the sentence for the underlying offense.[231] Section 924(c) begins: "Except to the

see also United States v. Woodberry, 987 F.3d 1231, 1236 n.3 (9th Cir. 2021) ("[I]n *United States v. O'Brien* . . . the Court applied a multi-factor test to determine whether Congress intended for the 'machinegun provision' of § 924(c)(1)(B)(ii) to be an element of the offense. Although our decision today is consistent with *O'Brien*, that case has been rendered obsolete by *Alleyne*, so we need not apply that multi-factor analysis." (citations omitted)). The Fifth and Ninth Circuits have applied this precedent in section 924(c)(1)(B)(1) to the determination of whether the firearm possessed is a semiautomatic assault weapon or a short-barreled rifle or shotgun. *Woodberry*, 987 F.3d at 1236; United States v. Suarez, 879 F.3d 626, 636–38 (5th Cir. 2018).

226 *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)").

227 *See* Deal v. United States, 508 U.S. 129, 131–32 (1993), *superseded by statute*, First Step Act of 2018, Pub. L. No. 115–391, § 403, 132 Stat. 5194, 5221–22, *as recognized in* United States v. Davis, 588 U.S. 445, 450 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 a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.").

228 First Step Act of 2018, § 403, 132 Stat. at 5221–22.

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

230 First Step Act of 2018 § 403(b); *see also* USSG App. C, amend. 814 (effective Nov. 1, 2023) (amending §1B1.13 to provide that nonretroactive changes in law may be considered where the defendant "received an unusually long sentence," "has served at least 10 years of the term of imprisonment," and "such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances").

231 18 U.S.C. § 924(c)(1)(D)(ii).

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.[232] In *Abbott v. United States*, the Supreme Court confirmed that the clause "by any other provision of law" refers to the conduct section 924(c) proscribes, *i.e.*, possessing a firearm in connection with a predicate crime, not conduct that violates other criminal statutes.[233] However, 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.[234] 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, unlike other provisions that explicitly include such a limitation.[235]

4. Multiplicity in the charging instrument

Courts have disagreed on the necessary showing to authorize multiple section 924(c) convictions. Most circuits hold that each section 924(c) offense must be based upon a separate predicate criminal offense.[236] The Eighth Circuit, by contrast, has held that separate section 924(c) convictions may arise from one predicate offense.[237] 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

[232] *Id.* § 924(c).

[233] 562 U.S. 8, 25–26 (2010).

[234] 581 U.S. 62, 71 (2017).

[235] *Id.* at 69–70.

[236] *See* 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 firearm possession arising from the same predicate drug conspiracy."); United States v. Mejia, 545 F.3d 179, 204–05 (2d Cir. 2008) ("[T]he appropriate unit of prosecution under § 924(c)(1) is the predicate offense . . . ."); United States v. Johnson, 899 F.3d 191, 207 (3d Cir. 2018) ("[T]he Double Jeopardy Clause requires each § 924(c) conviction to be tied to a separate predicate offense."); United States v. Montemayor, 55 F.4th 1003, 1009 (5th Cir. 2022) ("We require each [§ 924(c) conviction] to be 'sufficiently linked to a separate drug trafficking offense' . . . ." (citation omitted)); United States v. Jackson, 918 F.3d 467, 488 (6th Cir. 2019) ("[P]ossession of multiple firearms in connection with a single predicate offense is insufficient to support multiple § 924(c) convictions . . . ."); 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. 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. 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. 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. 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.").

[237] 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).

contains more than one independent and unique use of a firearm.[238] The Fourth Circuit, however, has held that multiple section 924(c) convictions are allowable if there are *either* multiple predicate offenses *or* multiple uses of a firearm.[239]

B. Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or In Relation to Certain Crimes)

The guideline applicable to section 924(c) is §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).[240] 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.[241] Additionally, Chapters Three and Four do not apply to that count of conviction.[242] Section 2K2.4 includes specific rules relating to other firearms enhancements in place of grouping, discussed in Section VIII.A, *infra*.

V. 18 U.S.C. § 924(J)

A defendant who "causes the death of a person through the use of a firearm" "in the course of a violation of" section 924(c) violates 18 U.S.C. § 924(j).[243] If the killing constitutes murder, a violation of section 924(j) carries a penalty of up to life imprisonment, or death; if the killing constitutes manslaughter, a violation of section 924(j)

[238] 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," the defendant was properly convicted of multiple counts where "the evidence allowed for the inference of two different possessions and purposes for the firearm" (citation omitted)); United States v. Evans, 74 F.4th 833, 838 (7th Cir. 2023) ("[T]he government can stack § 924(c) charges only when the defendant makes more than one decision to use a firearm."); *Hamberg*, 675 F.3d at 1173 ("Each instance of use is separately punishable as a violation of § 924(c)."); *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); *see also* United States v. Wallace, 447 F.3d 184, 188–90 (2d Cir. 2006) (counts that "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 omitted)); *Jackson*, 918 F.3d at 494 ("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."); *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. 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 omitted)).

[239] United States v. Dire, 680 F.3d 446, 477 (4th Cir. 2012) ("[M]ultiple, consecutive sentences under § 924(c)(1) are appropriate whenever there have been multiple, separate acts of firearm use or carriage, *even when all of those acts relate to a single predicate offense*," but "the separate 'uses' of the firearms need not be tallied [where] there were multiple predicate crimes of violence" (citations omitted)).

[240] *See* USSG App. A.

[241] USSG §2K2.4(b).

[242] *Id.*

[243] 18 U.S.C. § 924(j).

carries a maximum penalty of either eight or fifteen years of imprisonment.[244] The Supreme Court has held that a sentence for a section 924(j) conviction is not subject to the bar on concurrent sentences in section 924(c), and "therefore can run either concurrently with or consecutively to another sentence."[245]

The *Guidelines Manual* references convictions for violating section 924(j) to the analogous homicide guideline, §§2A1.1–2A1.4.[246] If the defendant is federally prosecuted for the underlying crime of violence or drug trafficking crime, the offenses will group where the guideline for the underlying offense is driven by the same homicide that forms the basis of the section 924(j) count.[247]

VI. 18 U.S.C. §§ 922(Q), 930, 40 U.S.C. § 5140(E)(1), AND §2K2.5

Section 922(q)(2)(A) of title 18 prohibits the knowing possession of a firearm in a place that a person knows, or has reasonable cause to believe, is a school zone.[248] Section 922(q)(3)(A) prohibits the knowing or reckless discharge or attempted discharge of a firearm in a place that a person knows is a school zone.[249] Both subsections require that the firearm "has moved in or . . . otherwise affects interstate or foreign commerce."[250] A violation of either subsection is punishable by a statutory maximum term of imprisonment of five years.[251] The term of imprisonment for either offense must be imposed consecutively to any other term of imprisonment imposed under any other provision of law.[252]

Section 930 of title 18 makes it unlawful to possess or cause to be present a firearm or other dangerous weapon in a federal facility.[253] Section 930 is generally a Class A misdemeanor, punishable by not more than one year of imprisonment, but the punishment increases to two years if the facility is a federal court facility; to five years if the weapon possession was done with intent that the weapon would be used in the commission of a crime; and to life imprisonment or death if the defendant kills another person in the course

244 *Id.* (listing the penalty for murder and referencing the manslaughter penalties); *see also* 18 U.S.C. § 1112 (setting forth the penalties for manslaughter).

245 Lora v. United States, 599 U.S. 453, 455 (2023).

246 USSG App. A.

247 *See* USSG §3D1.2(a) (providing for grouping "[w]hen counts involve the same victim and the same act or transaction").

248 18 U.S.C. § 922(q)(2)(A).

249 *Id.* § 922(q)(3)(A).

250 *Id.* § 922(q)(2)(A), (q)(3)(A).

251 *Id.* § 924(a)(4).

252 *Id.*

253 *Id.* § 930(a).

of a section 930 violation or an attack on a federal facility involving a firearm or other dangerous weapon.[254]

Section 5104(e)(1) of title 40 similarly forbids possession of firearms, dangerous weapons, explosives, or incendiary devices in the Capitol buildings or on the Capitol grounds.[255] A violation of section 5104(e)(1) is punishable by a statutory maximum of five years of imprisonment.[256]

The guideline applicable to these statutes is §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).[257] 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.[258] Section 2K2.5 also 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."[259]

When a defendant is convicted of section 922(q) as well as another similar offense 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.[260]

VII. 22 U.S.C. § 2778 AND §2M5.2

Section 2778 of title 22 prohibits the exportation (and importation) of designated national defense-related articles (or services) without a valid license. 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

254 *Id.* § 930(a), (b), (c), (e)(1).

255 40 U.S.C. § 5104(e)(1).

256 *Id.* § 5109(a).

257 *See* USSG App. A.

258 USSG §2K2.5(a)–(b).

259 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 under §2K2.5, 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.*

260 *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)).

considered defense articles and services, and to promulgate regulations therefor.[261] Items designated by the President as defense articles are added to the United States Munitions List (USML).[262] Firearms, including their components, parts, and ammunition, along with a wide range of other defense-related equipment, such as military electronics, aircraft and aircraft parts, and night vision equipment, are on the USML.[263] A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.[264]

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).[265] Section 2M5.2 contains two base offense levels and no other provisions. 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.[266] Subsection (a)(1) provides for a base offense level of 26 otherwise.[267]

VIII. OTHER GUIDELINE ENHANCEMENTS FOR FIREARMS

A. CHAPTER TWO FIREARMS ENHANCEMENTS AND CHAPTER THREE GROUPING

The *Guidelines Manual* includes offense level increases outside of weapons-specific guidelines for firearm-related conduct. For example, the drug trafficking guideline (§2D1.1) contains an increase if the defendant possessed a firearm in connection with unlawful drug activities,[268] the robbery guideline (§2B3.1) contains an increase if the offense involved a firearm, a dangerous weapon, or a threat of death,[269] and the counterfeit bearer obligations

[261] 22 U.S.C. § 2778; *see also* Arms Export Control Act of 1976, Pub. L. No. 94–329, 90 Stat. 729.

[262] *See* 22 C.F.R. § 121.1.

[263] *Id.*

[264] 22 U.S.C. § 2778(c).

[265] *See* USSG App. A.

[266] USSG §2M5.2(a)(2). The Eleventh Circuit has held that this base offense level does not apply where the defendant "exports enough weapons parts for two operable firearms, along with additional parts to service additional firearms." United States v. Stines, 34 F.4th 1315, 1317 (11th Cir. 2022).

[267] USSG §2M5.2(a)(1).

[268] USSG §2D1.1(b)(1). This increase also is in section (b)(1) of the listed chemical guideline. *See* USSG §2D1.11. At least one circuit court has held that this increase does not violate the Second Amendment. United States v. Alaniz, 69 F.4th 1124, 1126 (9th Cir. 2023). More discussion of this increase is provided in the Commission's *Drug Offenses* primer. U.S. SENT'G COMM'N, PRIMER ON DRUG OFFENSES (2024), https://www.ussc.gov/guidelines/primers/drugs.

[269] USSG §2B3.1(b)(2)(A)–(F). The guideline also has an increase 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). More discussion of this increase is provided in the

guideline (§2B5.1) contains an increase if a dangerous weapon, including a firearm, was possessed in connection with the offense.[270]

These increases interact with the guidelines for firearms offenses. Under §3D1.2(c), when one count "embodies conduct that is treated as a specific offense characteristic in . . . the guideline applicable to another of the counts," the counts are grouped.[271] The commentary explains that "use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts."[272]

Because 18 U.S.C. § 924(c)(1)(D) requires that any sentence imposed under that statute run consecutive to any other sentence imposed, section 924(c) counts may not group with any other count charged. This requirement is reflected in §5G1.2(a), which provides that sentences for such offenses "shall be determined by that statute and imposed independently."[273] 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 possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense."[274] 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.[275] The same prohibition applies to fake firearms.[276] In addition, courts have held that the death threat enhancement at

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Commission's *Robbery Offenses* primer. U.S. SENT'G COMM'N, PRIMER ON ROBBERY OFFENSES (2024), https://www.ussc.gov/guidelines/primers/robbery.

[270] USSG §2B5.1(b)(4). The Third Circuit has 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." United States v. Gregory, 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 now under §2K2.1(b)(6)(B) where court found a connection between illicit drugs and the loaded firearm the defendant possessed)).

[271] USSG §3D1.2(c).

[272] USSG §3D1.2, comment. (n.5).

[273] USSG §5G1.2(a).

[274] USSG §2K2.4, comment. (n.4).

[275] *See* United States v. McGill, 815 F.3d 846, 910–11 (D.C. Cir. 2016) (per curiam) ("[A]n enhancement under §2D1.1(b)(1) and sentencing on a § 924(c) conviction are mutually exclusive." (citation omitted)); 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)).

[276] *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 [the defendant] 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." (citation omitted)).

§2B3.1(b)(2)(F) is inapplicable when related to the firearm that forms the basis of a section 924(c) sentence.[277]

The Eighth Circuit has held that 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."[278] The Seventh Circuit has disagreed, holding that drug and felon-in-possession offenses do not "group" under the "same harm" rule of §3D1.2(c) because those two offenses no longer embody conduct "treated as" an enhancement in the other guideline.[279]

In 2024, the Commission promulgated an amendment that revised Application Note 4 to §2K2.4 and reorganized it into three subparagraphs.[280] Subparagraph A retains the same instruction on the non-applicability of certain enhancements;[281] subparagraph B explains the impact on grouping; and subparagraph C retains the upward departure provision.[282] As amended, subparagraph B resolves the circuit conflict by explicitly instructing that "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A)."[283]

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[277] *See, e.g.*, United States v. Katalinic, 510 F.3d 744, 748 (7th Cir. 2007); 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); United Stats v. Franks, 230 F.3d 811, 814 (5th Cir. 2000).

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

[279] United States v. Sinclair, 770 F.3d 1148, 1157–59 (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).

[280] USSG App. C, amend. 828 (effective Nov. 1, 2024).

[281] *See, e.g.*, United States v. Feeney, 100 F.4th 841, 848 (7th Cir. 2024) (Application Note 4 to §2K2.4, which instructs courts not to apply specific offense characteristics for an explosive or firearm in sentencing an underlying offense, "extends to any . . . enhancement and not just those based on specific offense characteristics." Thus, the district court erred in applying §2K2.1(a)(5) because "an augmented base offense level that relies on conduct involving explosives or weapons counts as an 'enhancement' under the text of Note 4.").

[282] USSG App. C, amend. 828 (effective Nov. 1, 2024). The Commission recently promulgated an amendment that deletes departures from the guidelines, including the upward departures in Application Note 4(C) to §2K2.4. See Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[283] *Id.* "This amendment aligns with the holdings of the majority of circuits involved in the circuit conflict" and "clarifies the Commission's view that promulgation of this Application Note originally was not intended to place any limitations on grouping." *Id.*

B. Firearms Departure Provisions

Two departure provisions provide for an upward departures when a firearm is involved in an offense. Section 5K2.6 provides for an upward departure where a weapon or dangerous instrumentality was used or possessed, and specifically notes that "[t]he discharge of a firearm might warrant a substantial sentence increase."[284] Courts have held that, at least in some circumstances, a departure under §5K2.6 is appropriate where the defendant is sentenced under a Chapter Two firearms guideline such as §2K2.1.[285] Section 5K2.17 provides for an upward departure "[i]f the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense."[286]

[284] USSG §5K2.6. The Commission recently promulgated an amendment that deletes departures from the guidelines, including §5K2.6. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[285] *See, e.g.*, United States v. Settles, 43 F.4th 801, 807 (7th Cir. 2022) ("[T]he authorized section 922(g) guideline range may not . . . incorporate[] the complete set of possession offenses in a manner necessarily foreclosing all upward departures based on [§]5K2.6. Consider the difference between a gun locked in one's home and a gun loaded on another's doorstep—cases that vary dramatically along the three dimensions described in [§]5K2.6."); United States v. Peeples, 879 F.3d 282, 288–89 (8th Cir. 2018) (no double counting occurred where §2K2.1(b) accounted for intimidation with a dangerous weapon and §5K2.6 accounted for the danger of serious injury or death); United States v. Joshua, 40 F.3d 948, 951–52 (8th Cir. 1994) (§5K2.6 departure was appropriate "even in a weapons charge" sentenced under §2K2.5 because §2K2.5 "does not take into account whether the firearm was loaded, semi-automatic, easily accessible, or had an obliterated serial number").

[286] USSG §5K2.17. The definition of "semiautomatic firearm capable of accepting a large capacity magazine" is nearly the same in §5K2.17 as in §2K2.1, discussed in *supra* Section II.B.2.d. *Compare* USSG §2K2.1, comment. (n.1) *with* USSG §5K2.17; *see also* USSG App. C, amend. 691 (effective Nov. 1, 2006) (explaining the language in §5K2.17 was changed "in a manner consistent with §2K2.1, as amended, except that it excludes the language pertaining to .22 caliber rim fire ammunition in order to remain in conformity with a prior congressional directive"). The Commission recently promulgated an amendment that deletes departures from the guidelines, including §5K2.17. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.