

Firearms

Firearms

- 2011 Amendments
 - §2M5.2 (Exporting Arms or Munitions)
 - §2K2.1 (Straw Purchasers)
- Application of §2K2.1
- Categorical Approach and Armed Career Criminal

2011 Amendment: Exporting Arms or Munitions

§2M5.2

(a) Base Offense Level

- (1) 26, except as provided in subdivision (2) below;
- (2) 14 if the offense involved only (A) non fully-automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ~~10~~, (B) *ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or* (C) *both.*

2K2.1

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

2K2.1

Base Offense Level determined by:

- prior convictions
- status
- type of weapon

2K2.1

§2K2.1(a)(1) BOL **26**, if (A) the offense involved a (i) semi-automatic firearm capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C.

§ 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense

2K2.1

§2K2.1(a)(6) BOL **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d)

2K2.1 (Straw Purchaser Statues)

- 18 U.S.C. § 922(d) - defendant unlawfully acquires a firearm and transfers (or otherwise disposes of) that firearm with knowledge or reason to believe that the other person is a prohibited person

2K2.1 (Straw Purchaser Statues)

- 18 U.S.C. § 922(a)(6) - defendant unlawfully acquires a firearm by making a materially false statement regarding the lawfulness of the sale
- 18 U.S.C. § 924(a)(1)(A) - defendant unlawfully acquires a firearm by making a false statement regarding information to be kept by a licensed firearms dealer

2011 Amendment: §2K2.1 (Increasing Sentences for Straw Purchasers)

- Increases BOs for “straw purchasers” convicted under 18 USC § 922(a)(6) or 924(a)(1)(A) who commit the offense with knowledge, intent, reason to believe that the offense would result in transfer of firearm or ammunition to a prohibited person
 - Increased from 12 to 14 generally
 - Increased from 12 to 20 if certain firearms involved
 - Departure provision at App. Note 15 for certain “less culpable” straw purchasers

2011 Amendment: §2K2.1 (Firearms Crossing the Border)

- Adds a new alternative prong to §2K2.1(b)(6) (“in connection with” SOC) which applies if the defendant
 - Possessed any firearm or ammunition while leaving or attempting to leave the U.S., or
 - Possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the U.S.

Specific Offense Characteristics Issues

§2K2.1(b)(1)

- Number of firearms
 - Determined by relevant conduct

Specific Offense Characteristics Issues (cont.)

§2K2.1(b)(4)

- Stolen gun/obliterated serial number
 - Strict liability standard
 - If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels

Trafficking SOC

2K2.1(b)(5)

“If the defendant engaged in the trafficking of firearms, increase by 4 levels.”

Trafficking - 2K2.1, App. Note 13

- If the defendant:
 - transported, transferred, or otherwise disposed of two or more firearms to another individual or received such firearms with the intent to do so **AND**
 - knew or had reason to believe such conduct would result in the transport, transfer or disposal of a firearm to an individual
 - whose possession or receipt would be unlawful;
or
 - who intended to use or dispose of the firearm unlawfully

Trafficking - 2K2.1, App. Note 13 (cont.)

- Individual whose possession or receipt of the firearm would be unlawful means an individual who:
 - has a prior conviction for crime of violence, controlled substance offense, or misdemeanor domestic violence offense; **OR**
 - at the time of the offense was under a criminal justice sentence

Trafficking - 2K2.1, App. Note 13 (cont.)

In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5).

Issues in Application of Use/Possession SOC and Cross Reference

§2K2.1(b)(6) & (c)(1)

2K2.1(b)(6)

If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense; increase by 4 levels...

§2K2.1(c)(1)

If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense....

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

- Generally does not reflect substantive distinctions
- While the cross reference does not *require* a felony, offense level unlikely to be greater for misdemeanor offenses

Standard for “In Connection”

- 2K2.1, App. Note 14
 - if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense
- Adopted language from *Smith v. United States*, 508 U.S. 223 (1993)

Pointers for §2K2.1(b)(6) and (c)(1)

- No conviction necessary
- Can be based on state offense

Standard for Drug Trafficking Offense

Application Note 14(B)

SOC and cross reference applies when a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia

Standard for Burglary Offense

Application Note 14(B)

SOC and cross reference applies in the case of a defendant who takes a firearm during the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary

Armed Career Criminal

4B1.4

18 U.S.C. 924(e)

Armed Career Criminal

18 U.S.C. § 924(e)

- Statutory penalty enhancement
 - 15 year mandatory minimum to life
- Does not need to be charged
- Notice of penalty enhancement required

Armed Career Criminal

A defendant is an Armed Career Criminal if:

- Instant offense is violation of 18 U.S.C. 922(g)
- Defendant is subject to enhanced sentence under 18 U.S.C. 924(e)
- Defendant has three prior convictions for “violent felony” or “serious drug offense”

“Violent Felony”

18 U.S.C. § 924(e)(2)

Any crime punishable by imprisonment for a term exceeding one year that:

- Has an element the use, attempted use, or threatened use of physical force against the person of another; OR
- Is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury

“Violent Felony” (cont.)

18 U.S.C. § 924(e)(2)

Any juvenile offense involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for a term exceeding one year if committed by an adult that:

- Has an element the use, attempted use, or threatened use of physical force against the person of another; OR
- Is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury

“Violent Felony” (cont.)

18 U.S.C. § 924(e)(2)

- Distinct definition from §4B1.1/4B1.2, §2L1.2, and 18 U.S.C. § 16

Categorical Approach

Taylor v. U.S.

495 U.S. 575 (1990)

Shepard v. U.S.

544 U.S. 13 (2005)

“Crime of Violence”/ “Violent Felony”

- *Begay v. U.S.*, 128 S. Ct. 1581 (2008)
 - New Mexico DUI statute not a “violent felony” under Armed Career Criminal Act (ACCA)
 - Key question: “whether the crime involves purposeful, violent, and aggressive conduct”
- *U.S. v Chambers*, 129 S. Ct. 687 (2009)
 - Illinois offense of “failure to report” is not a “violent felony” under the ACCA
- *U.S. v. Johnson*, 130 S. Ct. 1265 (2010)
 - Florida’s battery conviction not a violent felony under “force” component because the statute did not require physical force of a violent nature

“Serious Drug Offense”

18 U.S.C. § 924(e)(2)

- A federal offense listed under Title 21 or Title 46, Section 1901 of the U.S.C. that has a maximum term of imprisonment of ten years or more
- A state offense
 - That has a maximum term of imprisonment of ten years or more and
 - Involves manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance
- **Note:** Distinct from §§2L1.2, 4B1.1/4B1.2 and 18 U.S.C. § 924(c)

Armed Career Criminal

§4B1.4

- May increase Chapter Two and Three offense level
- May increase Criminal History category

Impact of 924(c) on SOC's

2K2.4 App. Note 4 & Amdmt. #599

- Do not apply firearm SOC in guideline for underlying offense
 - 924(c) accounts for any weapon SOC for the underlying offense
 - 924(c) accounts for any weapon within the relevant conduct

Robbery & Use of a Firearm During Crime of Violence Offense

Count 1: §2B3.1

Robbery

20 + 2 = 20

Offense Level

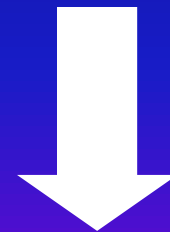
=20

Count 2: §2K2.4

Use of Firearm

18 USC § 924(c)

60 mos. consecutive



Count 2 Consecutively to Count 1

Impact of 924(c) on SOC's (cont.)

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

Impact of § 924(c) on Multiple Counts

§§3D1.1(b) & 5G1.2(a)

- § 924(c) count excluded from grouping with any other count
- Sentence for § 924(c) count imposed independently
- Non-§ 924(c) counts where firearm SOC not applied may still group under Rule (c)

“Grouping Rules”

§3D1.2

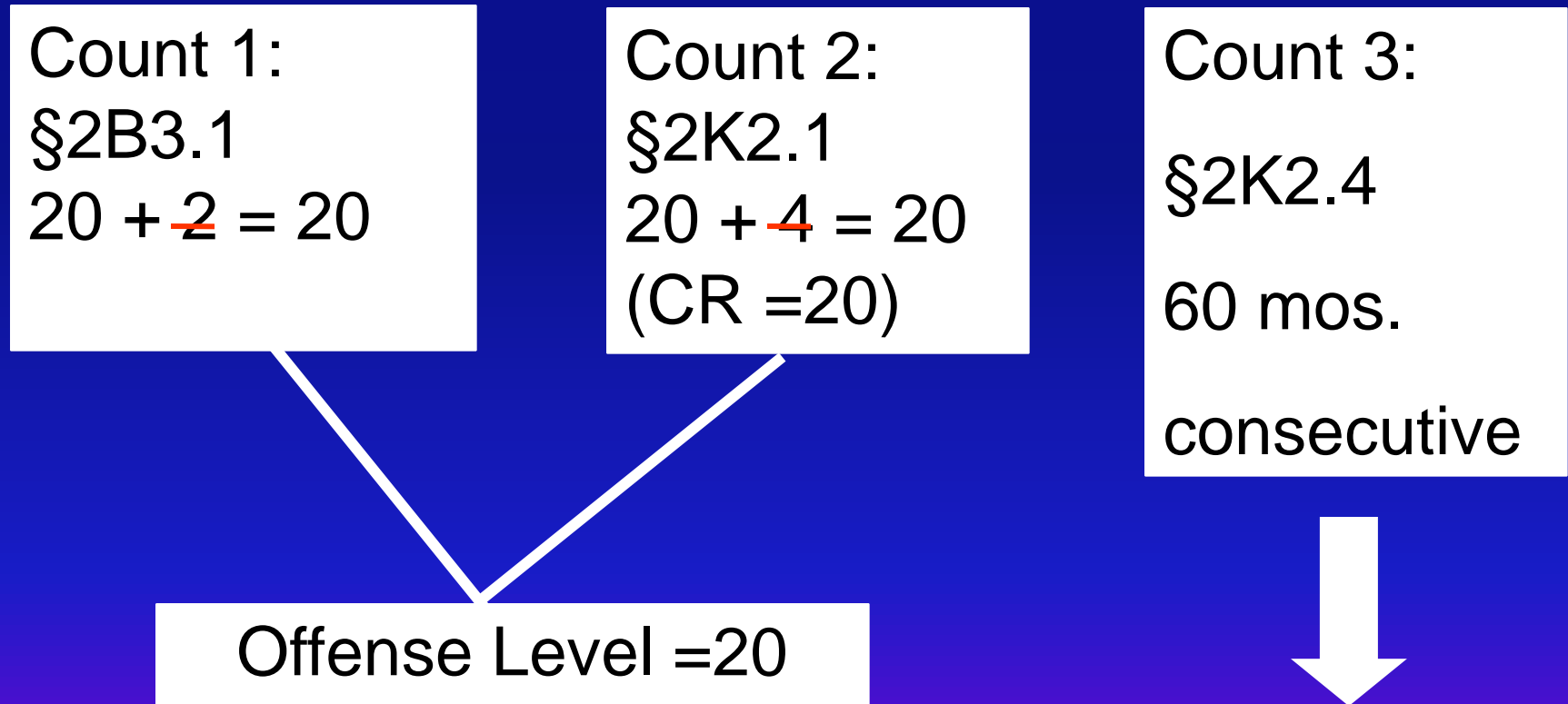
(a) Same Victim, Same Act

(b) Same Victim, Two or More Acts

(c) Conduct Treated by Characteristic

(d) Based on Aggregate

Robbery & Felon in Possession of a Firearm & Use of Firearm During Crime of Violence Offense



Group counts 1 and 2
under §3D1.2(c)

Count 3 runs
consecutively

Impact of a Single Count of 924(c) on Different Types of Offenses

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

Example:

Drugs-1

2D1.1

Drugs-2

2D1.1

Drugs-3

2D1.1

§ 924(c)
for Drugs-
2 2K2.4

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

§ 924(c) count runs
consecutively to all
counts

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

Example:

