

Firearms

June 5, 2008

§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

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

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

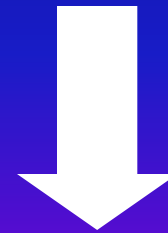
=20

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

Count 1:
§2B3.1
 $20 + \underline{2} = 20$

Count 2:
§2K2.1
 $20 + \underline{4} = 20$
(CR = 20)

Count 3:
§2K2.4
60 mos.
consecutive

Offense Level = 20

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

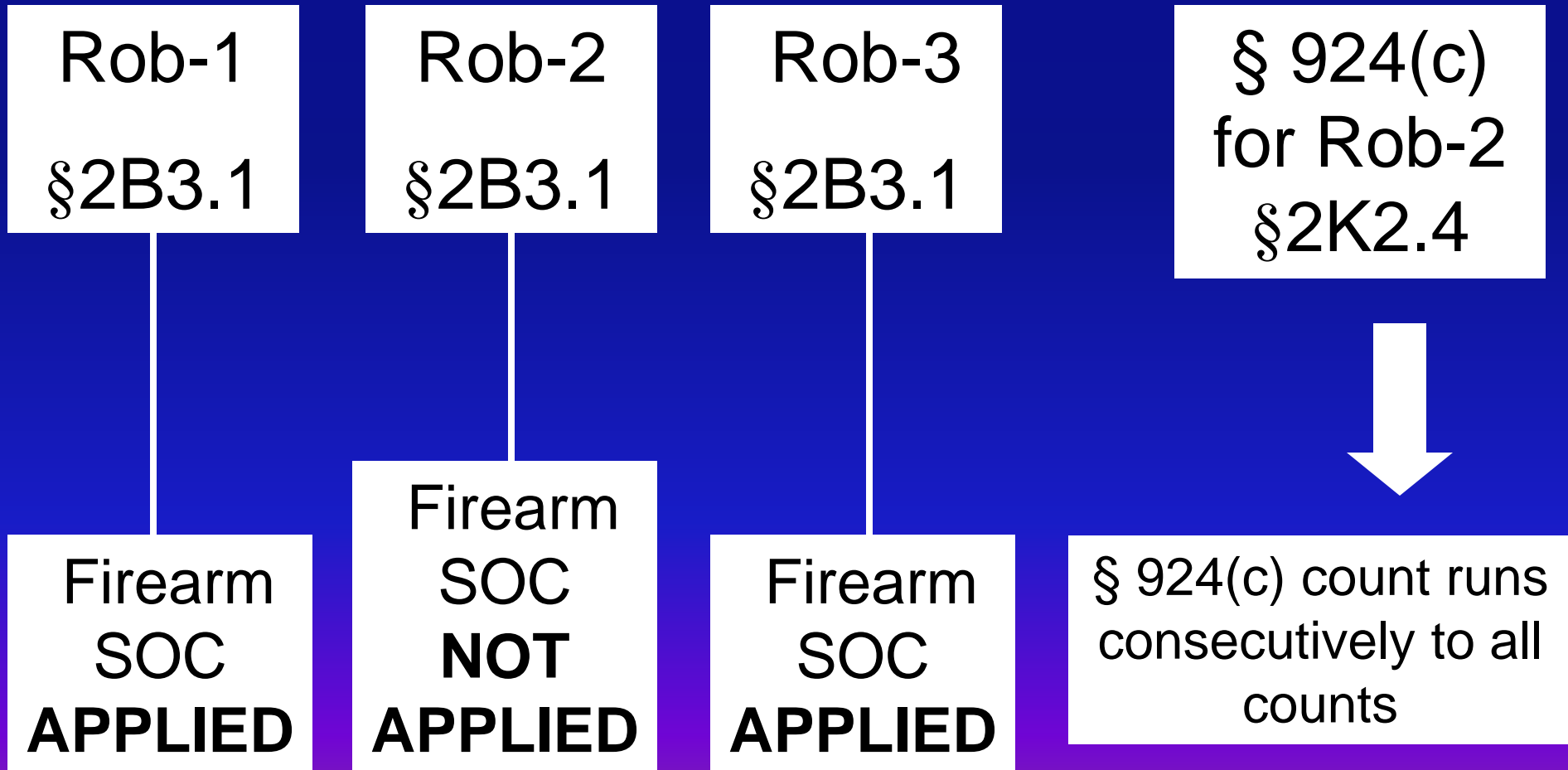
§ 924(c)
for Drugs-
2 §2K2.4

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:



Categorical Approach

Taylor v. U.S.

495 U.S. 575 (1990)

Shepard v. U.S.

544 U.S. 13 (2005)

“Crime of Violence”

- *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