



§2K2.1 | Firearms

Selected Issues

2023 National Seminar

August 29-31, 2023

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Learning Objectives

Your active engagement in this session will empower you to:

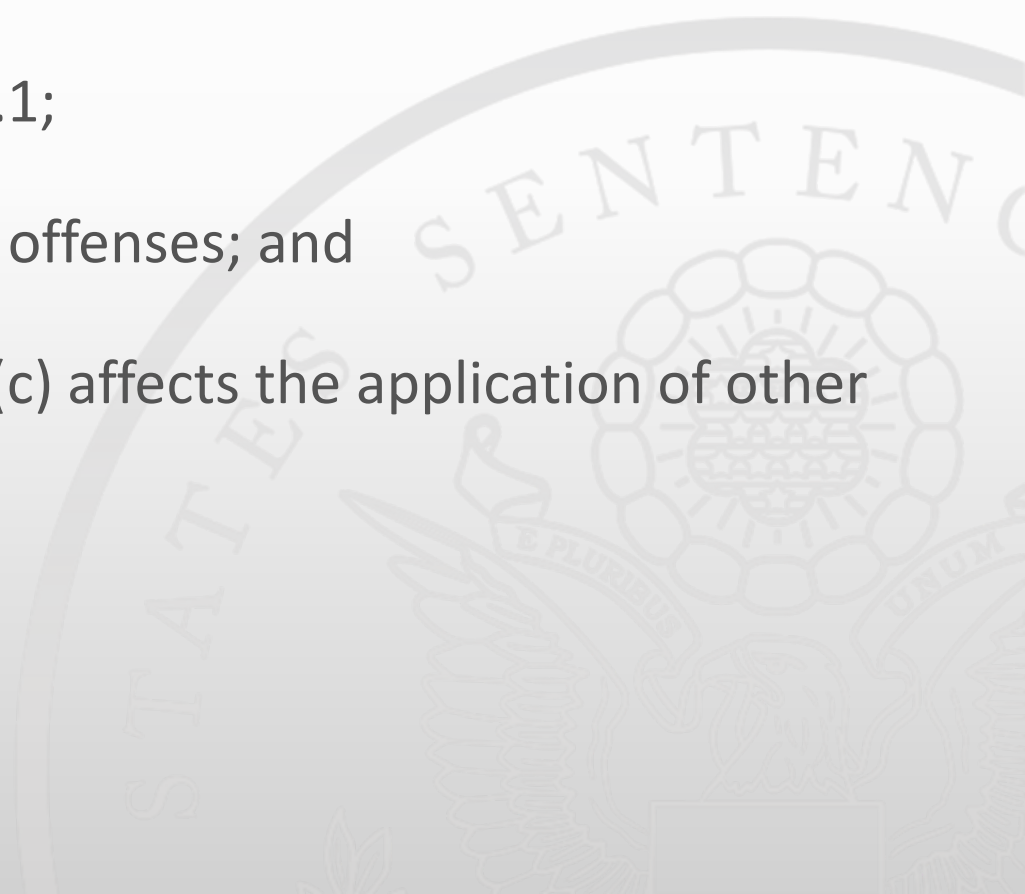
Describe relevant conduct principles for firearm offenses;

Resolve common application issues under §2K2.1;

Identify advanced application issues for firearm offenses; and

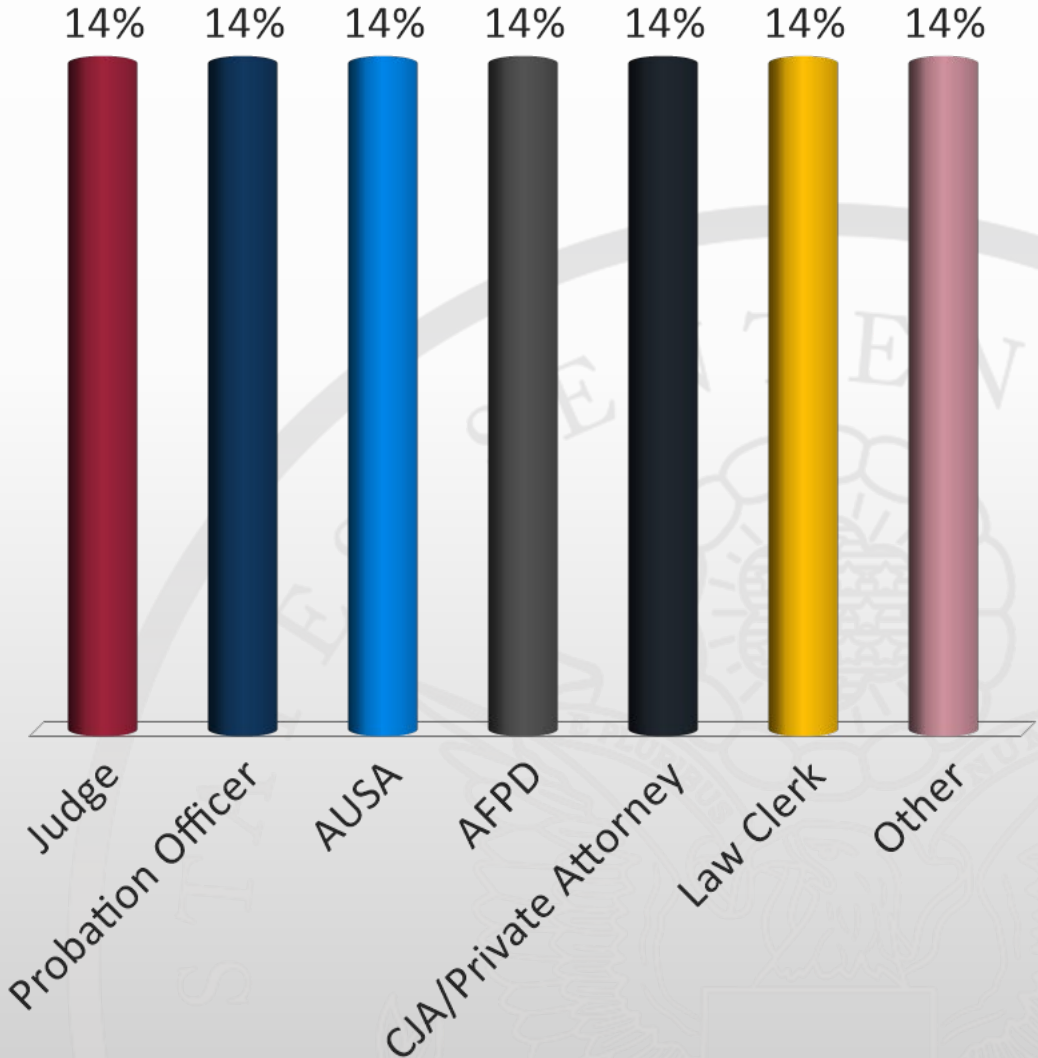
Identify how a conviction under 18 U.S.C. § 924(c) affects the application of other specific offense characteristics.

Describe the new firearms amendments.



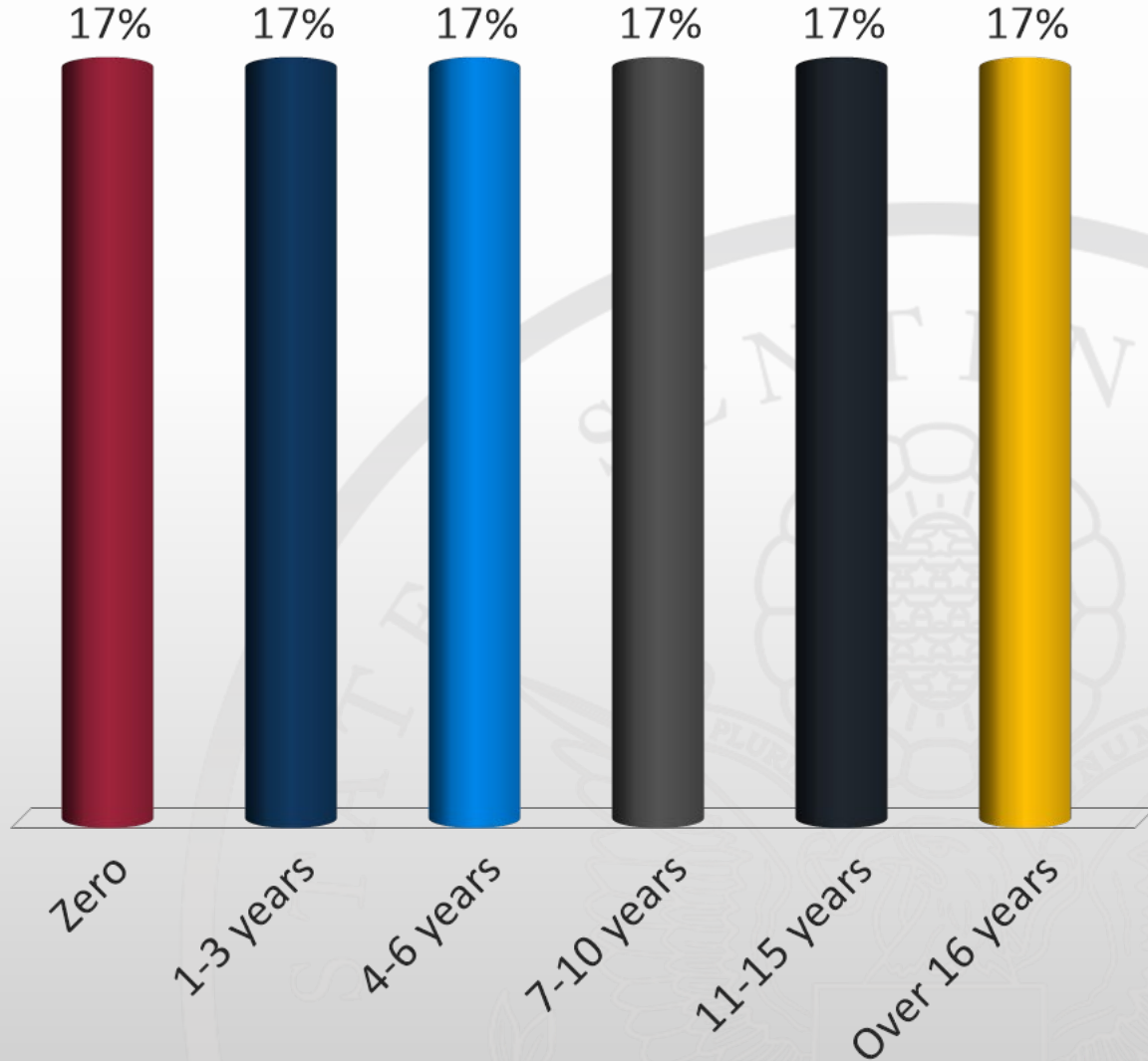
What is your position?

- A. Judge
- B. Probation Officer
- C. AUSA
- D. AFPD
- E. CJA/Private Attorney
- F. Law Clerk
- G. Other



How many years of experience with federal sentencing do you have?

- A. Zero
- B. 1-3 years
- C. 4-6 years
- D. 7-10 years
- E. 11-15 years
- F. Over 16 years





United States Sentencing Commission

July 2022

What Do Federal Firearms Offenses Really Look Like?



Key Findings

Cases have increased by 45.3% since fiscal year 2015, from 5,325 to 7,735.

Firearm offenders' criminal histories are more extensive and more serious than other offenders.

88.8% of firearms offenders were prohibited persons.

32.4% of prohibited persons committed an offense involving a stolen firearm or a firearm with an altered or obliterated serial number.

In more than one-quarter of cases, the firearm facilitated, or had the potential of facilitating, another felony offense.

Quick Facts FY 2022

18 U.S.C. § 922(g)

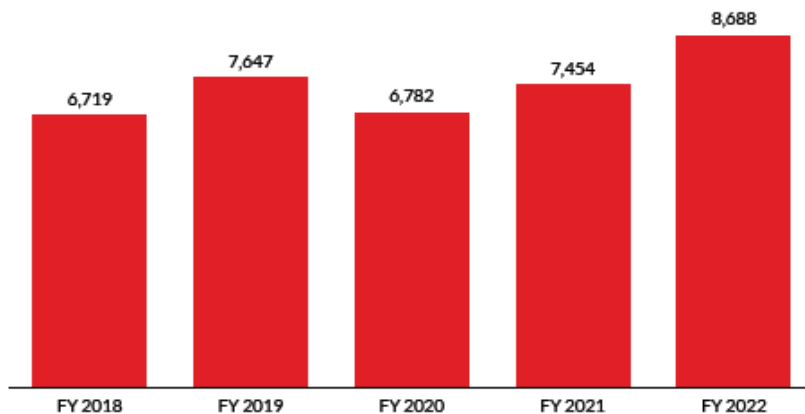
Population Snapshot

64,142 cases were reported in FY22;

8,688 involved convictions under 18 U.S.C. § 922(g).¹

87.8% were convicted under 18 U.S.C. § 922(g)(1) because of a prior felony conviction.

Numbers Over Time



The average sentence for all § 922(g) offenders was 63 months.

The average sentence for offenders convicted of violating § 922(g) and sentenced under ACCA was 186 months.

The average sentence for offenders convicted of violating § 922(g) but not sentenced under ACCA was 60 months.

Key Areas for Firearms

1

Expanded Relevant Conduct

2

**Otherwise Specified Relevant
Conduct**

3

Criminal History for BOL

Offenses *Included* at §3D1.2(d)

Fraud | §2B1.1

Money Laundering | §2S1.1

Tax Violations | §2T1.1

Counterfeiting | §2B5.1

Bribery | §2C1.1

Drugs | §2D1.1

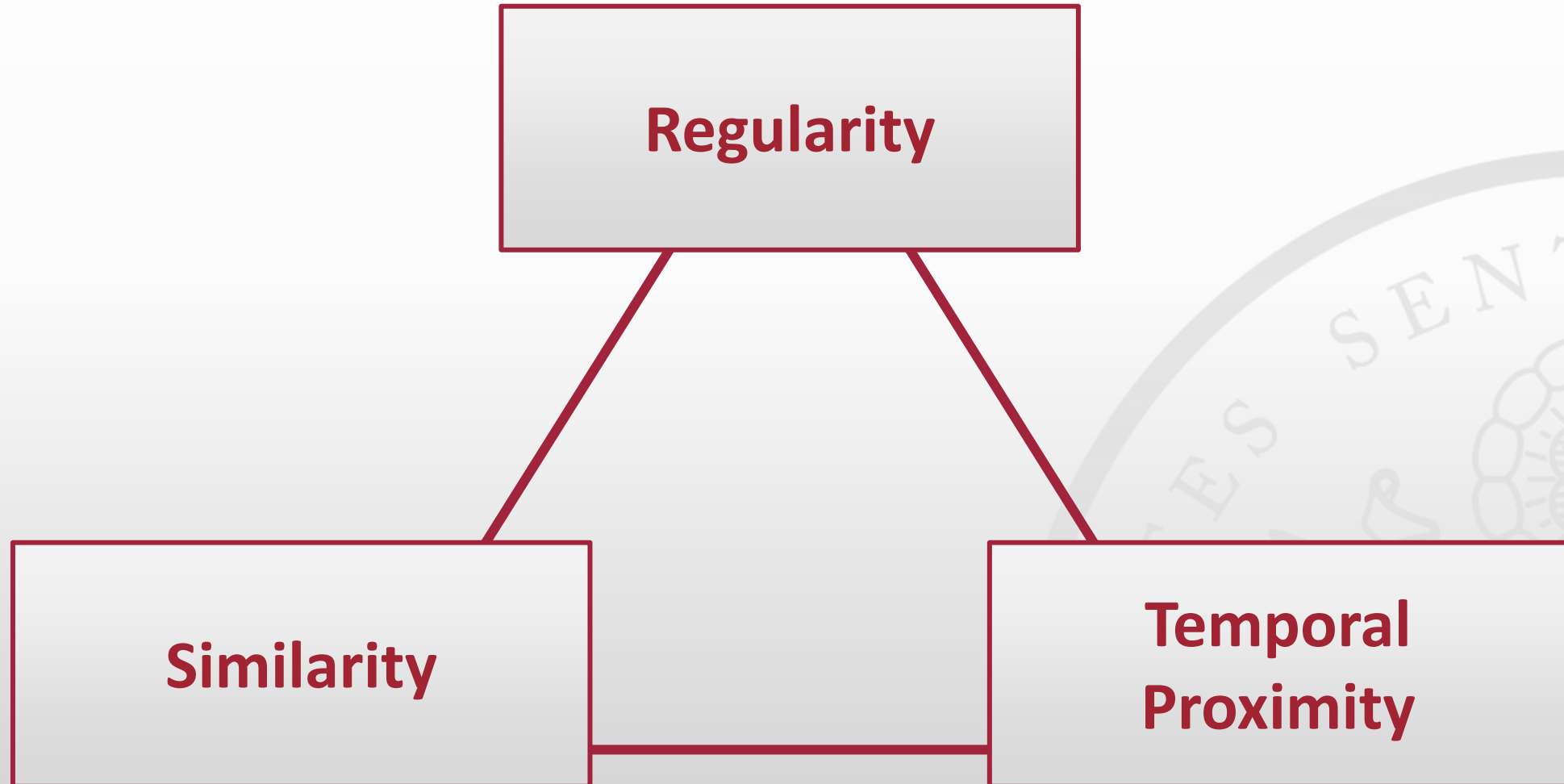
Firearms | §2K2.1

Alien Smuggling | §2L1.1

Possession of Child
Pornography | §2G2.2

Same Course of Conduct

§1B1.3(a)(2), App. Note 5(B)(ii) (p. 30)



Common Scheme or Plan

§1B1.3(a)(2), App. Note 5(B)(i) (p. 29)

Other Offense



Conviction



Victims

Accomplices

Purpose

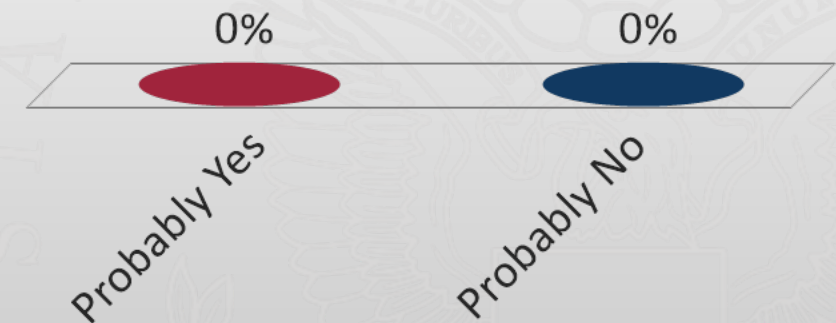
Modus Operandi

Scenario 1

Todd Alquist was charged with Felon in Possession of a Firearm, one that he had stolen from his grandfather. One month prior, Alquist was also caught with two stolen firearms.

Based on these facts, can you include, for relevant conduct purposes, all 3 firearms that the defendant possessed?

- ✓ A. Probably Yes
- B. Probably No



§1B1.3(a)(4)

Relevant Conduct “Tweaks” Specific Provisions

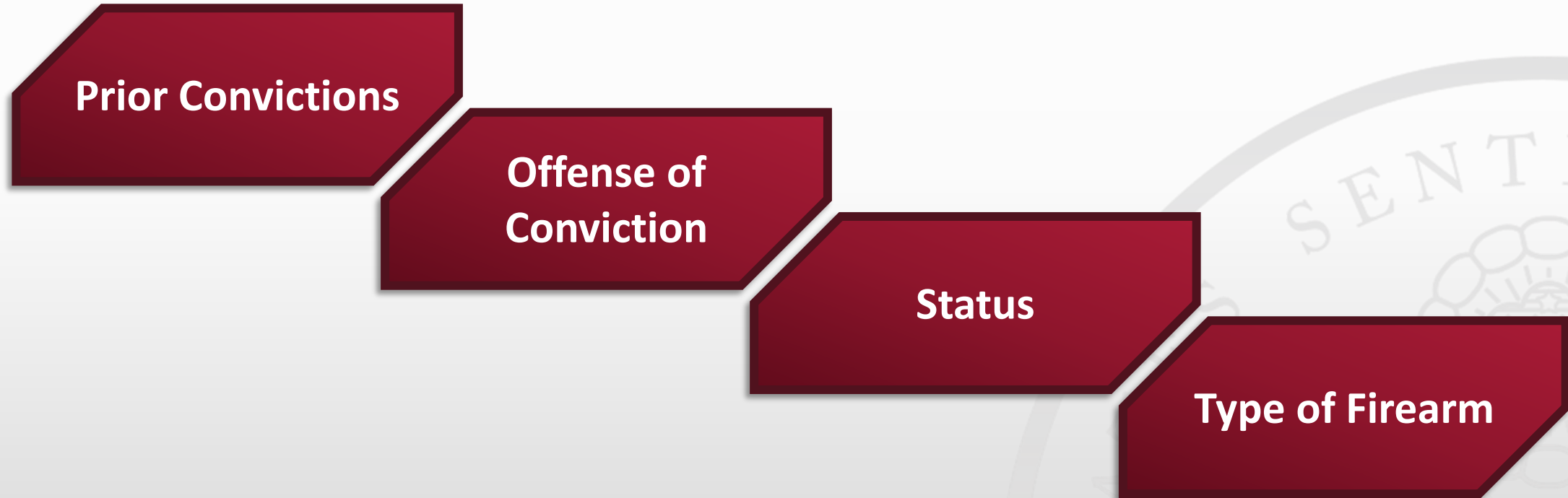
**Offense of
Conviction**

Defendant Specific

Criminal History

**“In Connection
With”**

Base Offense Level Determined By Various Factors



Criminal History and BOL

§2K2.1, App. Note 10 (p. 255)

Prior Felony Convictions means -

- (a)(1) use only those **felony**
- (a)(2) **convictions** that receive
- (a)(3) criminal history points under
- (a)(4)(A) 4A1.1(a), (b), or c)

- (a)(1) use only those **felony**
- (a)(2) **convictions** counted separately

Must be crime of violence or controlled substance offense

**Defendant's instant federal offense occurred on December 20, 2020.
Is the defendant subject to a higher base offense level (BOL) in §2K2.1**

<u>Arrest Date</u>	<u>Charge / Court</u>	<u>Date / Sentence Imposed</u>	<u>Guideline/Points</u>
07/13/2020 (Age 23)	Grand Theft Auto; Superior Court, Spokane, WA	10/25/2020: pled guilty, 3 years' probation	§4A1.1(c) 1 Point

A. Yes

✓ B. No





Calculating the Base Offense Level at §2K2.1(a)(4)(B)

Determining the base offense level (BOL) at §2K2.1(a)(4)(B) requires careful navigation of its subsections. This graphic will guide you through the process. You should also review §2K2.1, Application Notes 2 and 3 as they also provide definitions for this BOL determination (see below).

Step 1: If the offense involved:

(I) a semiautomatic firearm that is capable of accepting a large capacity magazine;



(II) a firearm that is described in 26 U.S.C. § 5845(a);

Step 2: ...and the defendant:

(I) was a prohibited person at the time the defendant committed the instant offense;



(II) is convicted under 18 U.S.C. §§ 922(d), 932, or 933;



(III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) – AND – the defendant committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.

Step 1 + Step 2

BOL 20

If conditions are met for both steps 1 and 2, the base offense level is 20.

Stop Illegal Trafficking in Firearms Act

Effective June 25, 2022

Created Two New Offenses

18 U.S.C. § 932

Straw Purchasing of Firearms

18 U.S.C. § 933

Trafficking in Firearms

* Statutory Appendix Now References §2K2.1

Base Offense Levels: §§ 932, 933 Convictions

Promulgated §§2K2.1(a)(4)(B)(ii)(II), (a)(6)(B)

20

(Special Firearm) + (§§ 932, 933 Convictions)

14

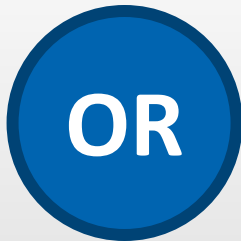
§§ 932, 933 Convictions

Large Capacity Magazine

§2K2.1, App. Note 2 (p. 253)

A semiautomatic firearm that has **the ability to fire many rounds without reloading** because at the time of the offense:

(A) the firearm **had attached to it** a magazine or similar device that could accept more than 15 rounds of ammunition;



(B) a magazine or similar device that could accept more than 15 rounds of ammunition was **in close proximity** to the firearm.

Base offense levels

**Stolen, obliterated serial
number, or ghost gun**

**Common §2K2.1
Application Issues**

Trafficking in firearms

**Use of a firearm in connection
with another offense**

Number of Firearms

§2K2.1, (b)(2) and App. Note 5 (p. 254)

(1) - If the offense involved three or more firearms, increase as follows:

Number of Firearms	Increase in level
(A) 3-7	+2
(B) 8-24	+4
(C) 25-99	+6
(D) 100-199	+8
(E) 200 or more	+10

Number of Firearms

§2K2.1, (b)(2) and App. Note 5 (p. 254)

Firearm

18 U.S.C. § 921(a)(3) and 26 U.S.C. § 5845(a)

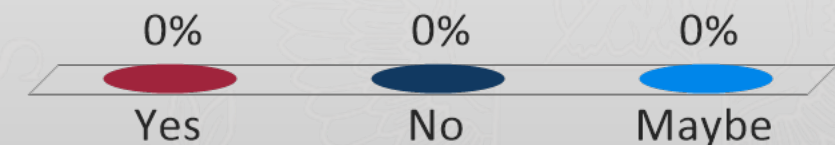
- **unlawfully sought to be obtained**
- **unlawfully possessed**
- **unlawfully distributed**
- **including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.;**

Scenario 2

Skyler White was convicted of Felon in Possession of a Firearm. During a search warrant at White's residence, officers located 4 additional firearms.

Based on these facts, does the increase for number of firearms at §2K2.1(b)(1)(A) apply?

- ✓ A. Yes
- B. No
- C. Maybe



Firearms

§2K2.1(b)(4)(A) and (B)

+2

(A) any firearm was stolen

OR

+4

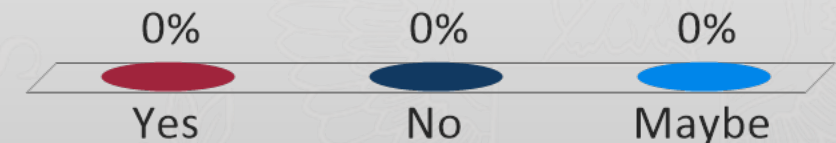
(B)(i) any firearm had an altered or obliterated serial number;

Scenario 3

Skyler White was convicted of Felon in Possession of a Firearm. The firearm she possessed had serial number that was not legible to the naked eye. The crime lab utilized a chemical solvent and was able to then identify the serial number.

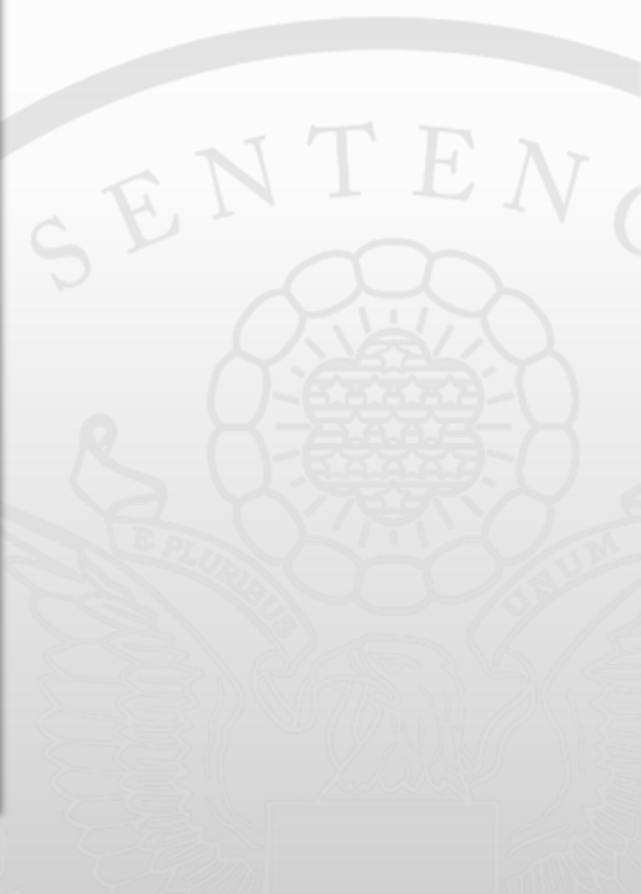
Based on these facts, does the increase for an altered or obliterated serial number at §2K2.1(b)(4)(B)(i) apply?

- ✓ A. Yes
- B. No
- C. Maybe



Ghost Gun

What is it?



Ghosts Guns

Promulgated §2K2.1(b)(4)(B)

The **defendant knew** that any firearm involved in the offense was **not otherwise marked with a serial number** or was **willfully blind to or consciously avoided knowledge** of such fact...

Defendant

Mental State

Not Serialized

*Exception for Old Guns

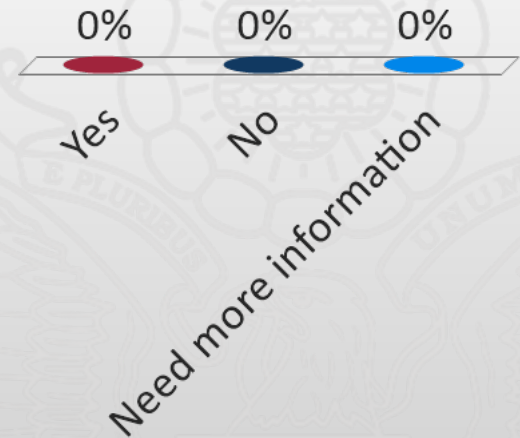
+4

Scenario 4

Skinny Pete was convicted of Felon in Possession of a Firearm. In this case, the firearm is a “ghost gun” Pete purchased on the dark web.

Would the new SOC for the new enhancement at §2K2.1(b)(4) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number or was willfully blind to or consciously avoided knowledge of such fact, apply after November 1, 2023?

- A. Yes
- B. No
- ✓ C. Need more information



Trafficking Firearms

§2K2.1(b)(5) (p. 252)

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

defendant

trafficking



Trafficking Firearms

Key Points, App. Note 13 (pp. 255-56)

Transfers **two** or more firearms to an individual whose possession is unlawful.



Mental State



Unlawful possession is narrowly defined



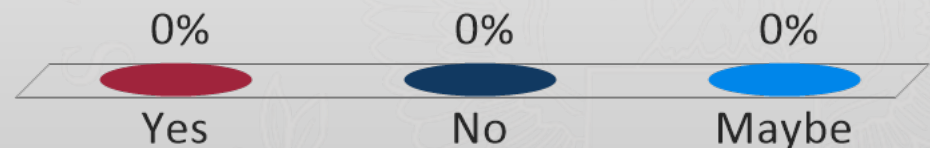
DEFINITION

Scenario 5

Badger pled guilty to one count of felon in possession (§2K2.1). During the offense, Badger sold the CI three firearms. The CI told Badger that she “had to be careful” when obtaining guns because she has a felony record.

Does the SOC for trafficking of firearms at §2K2.1(b)(5) apply?

- A. Yes
- ✓ B. No
- C. Maybe



Proposed Specific Offense Characteristic: Straw Purchasing or Trafficking Promulgated §2K2.1(b)(5)

Apply the Greatest

+2

§§ 933(a)(2), (3) Convictions

+2

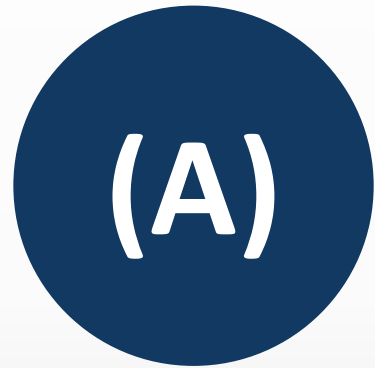
Straw Purchasing & Trafficking Conduct

+5

Multiple Firearms + Particular Individuals

Firearms – New SOC

§2K2.1(b)(5)



Apply the Greatest



Firearms – New SOC

§2K2.1(b)(5)

(A)

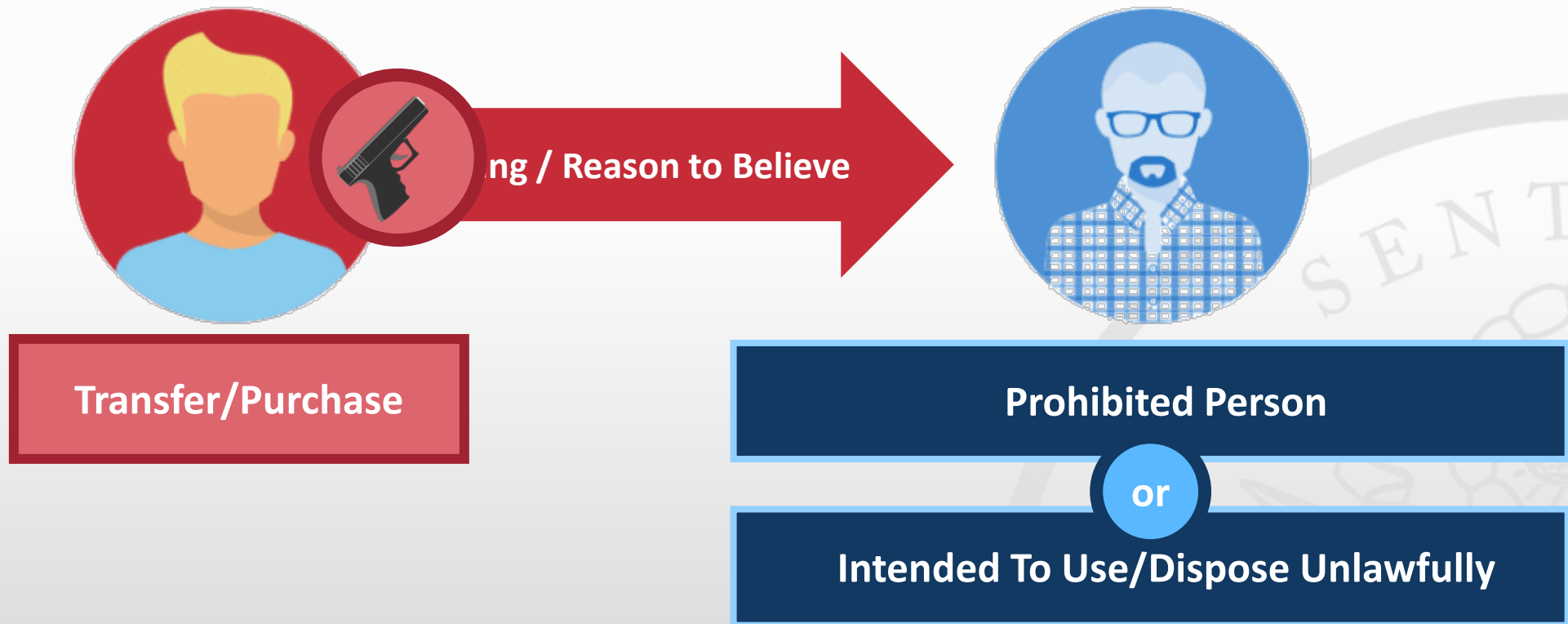
If the defendant...

Was convicted under **18 U.S.C. § 933(a)(2) or (a)(3)**

+2

Specific Offense Characteristic: Straw Purchasing or Trafficking

Promulgated §2K2.1(b)(5)(B)

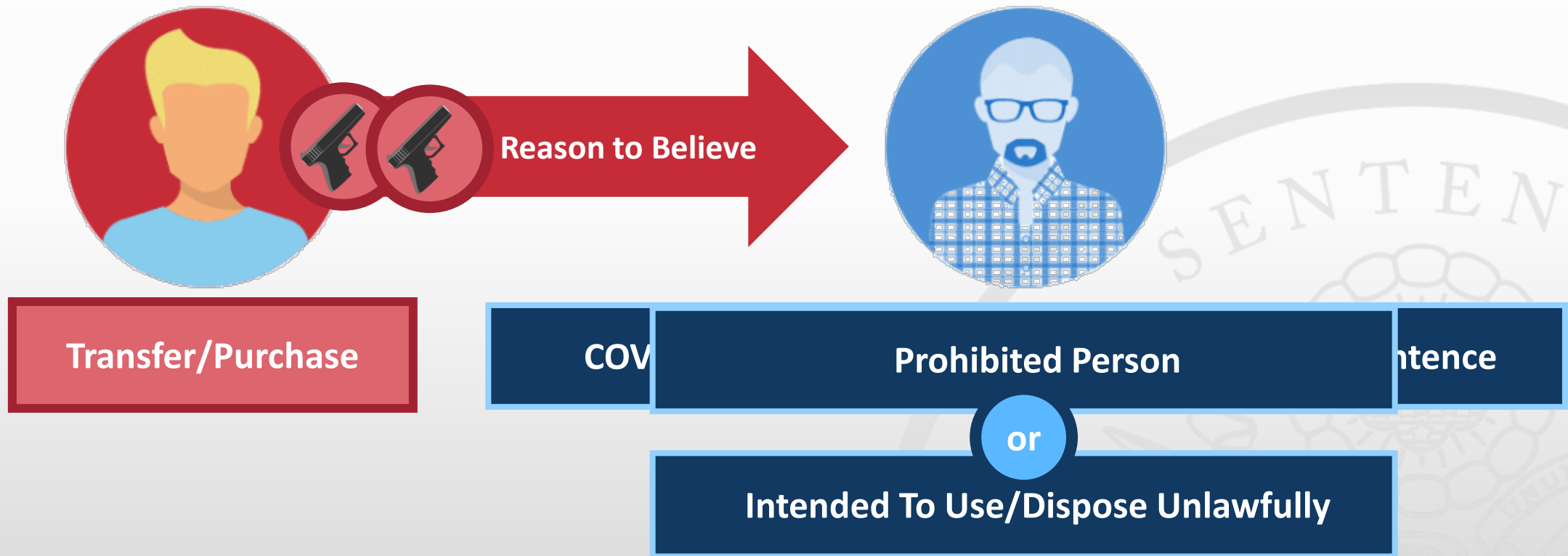


*Includes Attempts and Conspiracies

**Includes Receipt by Inducement

Specific Offense Characteristic: Straw Purchasing or Trafficking

Promulgated §2K2.1(b)(5)(C)



*Includes Attempts and Conspiracies

**Includes Receipt by Inducement

Scenario 6

Tuco Salamanca pled guilty to one count of felon in possession (§2K2.1). During the offense, Salamanca sold the CI three firearms. The CI told Salamanca that he “was in a motorcycle gang had to be careful” when obtaining guns because he has a felony record.

Which new §2K2.1(b)(5) trafficking enhancement applies?

- ✓ A. +2
- B. +5
- C. No Increase



Trafficking/Straw Purchasing: Organized Crime

Promulgated §2K2.1(b)(8)

If §2K2.1(b)(5) applies

&

- ✓ Part of a Group
- ✓ Knowledge / Willful Blindness
- ✓ Criminal Activity a Primary Purpose

+2

Trafficking/Straw Purchasing: Mitigating Circumstances

Promulgated §2K2.1(b)(9)

A

If §2K2.1(b)(5) applies, and defendant has 1 or fewer criminal history points

B

&

i

Familial Relationship
Threats/Fear

C

&

Otherwise Unlikely

OR

ii

vulnerable to
persuasion due to
mental or physical
condition

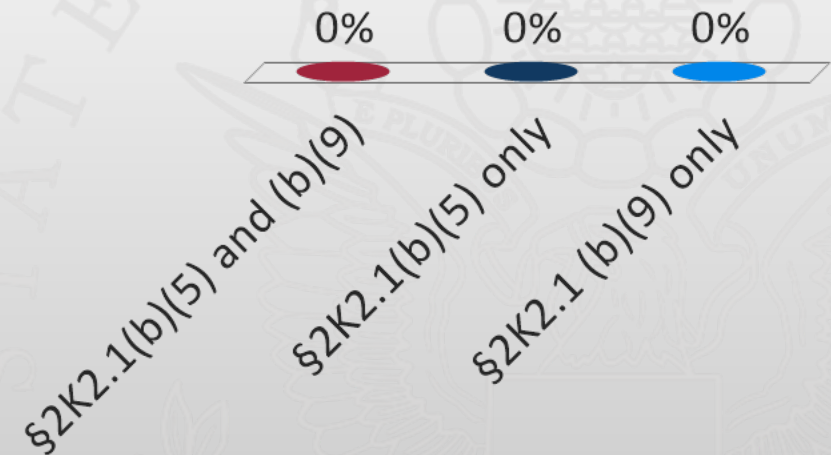
-2

Scenario 7

Jane Margolis pled guilty to one count of Straw Purchasing of a Firearm (§2K2.1). During the offense, Margolis' boyfriend (a convicted felon) threatened to beat her up again if she didn't buy a firearm for him. Margolis has no prior convictions and told investigators she bought the gun with money provided by her boyfriend.

Which of the following is true?

- ✓ A. §2K2.1(b)(5) and (b)(9)
- B. §2K2.1(b)(5) only
- C. §2K2.1 (b)(9) only



Firearms and Other Felony Offenses

§2K2.1(b)(6)(B) (p. 252)

If the **defendant** used or possessed any firearm or ammunition **in connection with another felony offense**, increase by 4 levels, with a floor of BOL 18.

defendant **in connection with** **another felony offense**

Firearms and Other Felony Offenses

Key Definitions, App. Note 14(A), (C) (p. 256)

In connection with...

Firearm or ammunition facilitated, or had the potential of facilitating, another felony offense

Another felony offense...

Any federal, state, or local offense

No charge or conviction required

Cannot be firearms offense

Firearms and Other Felony Offenses

Special Rules, App. Note 14(B) (p. 256)

Burglary

When a firearm is taken in a burglary.

Drug trafficking

When a firearm is in close proximity to drugs or drug paraphernalia.

Scenario 8

During approximately a one-month period, **Saul Goodman** sold undercover ATF agents a total of six firearms and various quantities of fentanyl. He was convicted of § 922(g). Following a search warrant, law enforcement found 100 grams of fentanyl and a firearm in the Goodman's bedroom closet.

Does §2K2.1(b)(6)(B) apply?

- ✓ A. Yes
- B. No



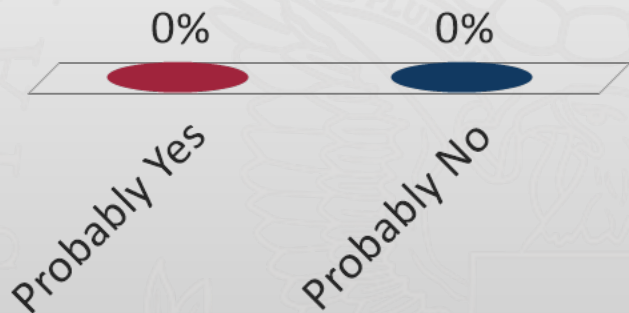
Scenario 9

Jesse Pinkman is convicted of unlawful possession of a firearm. During the search of his home, officers also discovered a personal use amount of methamphetamine, which is a felony. **Pinkman** has a substantiated history of methamphetamine addiction.

Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply?

A. Probably Yes

✓ B. Probably No



Scenario 10

Hank Schrader is convicted of felon-in-possession. Schrader was pulled over in an area known for drugs and police had found small amount of methamphetamine, a scale, baggies, and a grinder in his car.

Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply?

- ✓ A. Yes
- B. No



Firearm Cross Reference

§2K2.1(c)(1), App. Note 14(E) (pp. 252-53, 257)

Apply same
rules as
§2K2.1(b)(6)(B)

Limited to the
firearm cited
in the **offense
of conviction**

Compare and
**use the
greater
offense level**

“In connection with” Differences Explained

Use/Possession SOC

§2K2.1(b)(6)(B)

“Used or possessed **any firearm or ammunition** in connection with another felony offense.”

Use/Possession Cross Reference

§2K2.1(c)

“Used or possessed **any firearm or ammunition cited in the offense of conviction** in connection with ... another felony offense.”

Scenario 11

Walter White was convicted of Felon in Possession of a Firearm – a model 23 Glock, serial number FNK 625. During a search warrant of the White's residence, officers located a 9mm Smith and Wesson firearm. An ATF trace and ballistics revealed the Smith and Wesson was used in a murder 2 years earlier in which the White was positively identified as the shooter.

Does the cross reference at §2K2.1(c)(1) apply?

A. Yes

✓ B. No

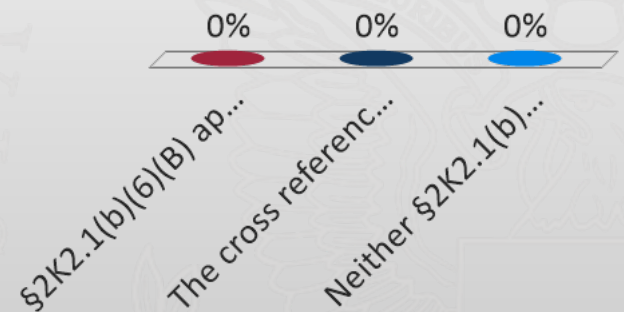


Scenario 12

Steven Gomez is convicted of unlawful possession of a firearm. The offense of conviction charges him with possessing one firearm on a single day. Less a week after the date alleged in the indictment, law enforcement executed a search of his apartment and discovered three additional firearms and 1 kilogram of meth.

Which of the following is true?

- ✓ A. §2K2.1(b)(6)(B) applies, but not the cross reference.
- B. The cross reference applies if the resulting offense level is greater.
- C. Neither §2K2.1(b)(6)(B) nor the cross reference apply.



18 U.S.C. § 924(c)

Carry, use, or possess a firearm in relation to a “crime of violence” or a “drug trafficking crime” with mandatory minimums depending on:

1. Whether firearm was:

used, carried, or possessed
(5 years)

brandished
(7 years)

discharged
(10 years)

AND

2. Type of firearm:

short-barreled rifle, short-barreled shotgun,
semiautomatic assault weapon
(10 years)

machine gun, destructive device, or equipped
with silencer or muffler
(30 years)

Impact of § 924(c) on SOCs

§2K2.4, App. Note 4 (p. 259)

Do not apply firearm and certain other SOCs in guideline for the underlying offense, for example:

§2D1.1(b)(1)

If a dangerous weapon
(including firearm)
was possessed...

§2K2.1(b)(6)(B)

If the defendant used or
possessed a firearm or
ammunition in connection with
another felony offense...

Scenario 13

Mike Ehrmantraut pled guilty to each of the following three offenses: Conspiracy to Distribute Methamphetamine 21 U.S.C. § 841; Felon in Possession of a Firearm and Ammunition 18 U.S.C. § 922(g); and Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c). The offense conduct involved a total of 35 grams of fentanyl and 5 firearms. The drugs and the guns were found together in a safe in the defendant's home.

Does the SOC for possession any firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

A. Yes

✓ B. No



Multiple Counts Scenario

Count 1
Drugs
Victim 1
§2D1.1
24 

Count 2
Felon in Possession
Victim 1
§2K2.1
20 

Count 3
924(c)
Victim 2
§2K2.4
60 Months
Consecutive

Avoid Double Counting - §2K2.4, App. Note 4

Scenario 14

Walter White Jr. is convicted of §§ 922(g) and 924(c). During a search of the White Jr.'s residence, officers located 9 additional firearms.

Does §2K2.1(b)(1)(B) for 8-24 firearms, a 4-level increase apply in this case?

- ✓ A. Yes
- B. No
- C. No – it's double counting



Drug and Firearm Issues

Drug and firearm offenses will likely group together.

Unlawful firearm possession offenses raise the possibility of ACCA.

Drug offenses raise the possibility of career offender.

Key Take Aways for Firearms Offenses

- 1 BOL – countable criminal history convictions
- 2 Expanded relevant conduct
- 3 Relevant conduct tweaks
- 4 Cross Reference – Firearm cited in offense of conviction
- 5 § 924(c) conviction might affect SOC's

Learning Outcomes

You should now be able to:

Describe relevant conduct principles for firearm offenses;

Resolve common application issues under §2K2.1;

Identify advanced application issues for firearm offenses;

Identify how a conviction under 18 U.S.C. §924(c) affects the application of other specific offense characteristics; and

Describe some of the new firearms' amendments.