

APPENDIX A

United States v. David Prien-Pinto,
917 F.3d 1155 (9th Cir. 2019)

917 F.3d 1155

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

David PRIEN-PINTO, Defendant-Appellant.

No. 18-30055

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Submitted December 7, 2018 * Seattle, Washington

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Filed March 12, 2019

Synopsis

Background: Defendant pled guilty in the United States District Court for the District of Montana, No. 9:17-cr-00025-DLC-1, [Dana L. Christensen](#), Chief Judge, to being felon in possession of firearm, and he appealed.

The Court of Appeals, [Bybee](#), Circuit Judge, held that strict liability standard for application of stolen gun enhancement in sentencing defendant did not violate due process.

Affirmed.

Attorneys and Law Firms

[John Rhodes](#), Assistant Federal Defender; [Anthony R. Gallagher](#), Federal Defender; Federal Defenders of Montana, Missoula, Montana; for Defendant-Appellant.

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Appeal from the United States District Court for the District of Montana, Dana L. Christensen, Chief Judge, Presiding, D.C. No. 9:17-cr-00025-DLC-1

Before: [William A. Fletcher](#) and [Jay S. Bybee](#), Circuit Judges, and [Larry A. Burns](#), ** District Judge.

OPINION

[BYBEE](#), Circuit Judge:

***1156** We are asked to review the vitality of our 1993 holding that the Sentencing Guidelines may constitutionally impose a strict-liability enhancement where a defendant committed a crime with a stolen firearm. See [United States v. Goodell](#), 990 F.2d 497 (9th Cir. 1993). Since that time, the Supreme Court has issued a number of opinions recasting the role the Guidelines play in a district court's sentencing decision. We conclude that none of these decisions affect [Goodell](#). In holding once more that the strict-liability enhancement of § 2K2.1(b)(4) of the Sentencing Guidelines is constitutional, we join all ten of the other regional circuit courts.

I

David Prien-Pinto was convicted in Montana state court in 2014 of felony assault on a peace officer and burglary and sentenced to a term in state prison. He was released on parole in March 2016. After his release, a confidential source alerted a joint task force of federal and local law enforcement officers that Prien-Pinto was selling narcotics out of his home in Missoula. In September 2016, officers raided the home and arrested Prien-Pinto on marijuana and methamphetamine charges. Shortly after, Prien-Pinto's wife reported to local police that she had hidden a Taurus Model 94 .22 caliber revolver ("the firearm") at Prien-Pinto's instruction. Prien-Pinto admitted to possessing the firearm and told police that a friend had given him the firearm as payment for a marijuana debt.

Police traced the firearm's serial number and determined that it had been stolen the previous summer from its owner in Kalispell, about 120 miles north of Missoula. The owner identified the firearm and told police it had been taken from the glove compartment of his vehicle during a break-in. The owner denied knowing Prien-Pinto.

Montana authorities held Prien-Pinto on a parole violation. He has remained in state custody since his arrest, serving a prison sentence on various state charges. In August 2017, a federal grand jury indicted Prien-Pinto

on one count of being a felon in possession of a firearm in violation of [18 U.S.C. § 922\(g\)\(1\)](#). He pleaded guilty, without a plea agreement, in November 2017.

The district court sentenced Prien-Pinto to 36 months' imprisonment: 18 months to be served concurrently to his Montana state sentence, and 18 months to be served consecutively in federal custody. In calculating Prien-Pinto's Guidelines offense level, the district court applied a two-level enhancement pursuant to [U.S.S.G. § 2K2.1\(b\)\(4\)](#) because Prien-Pinto's crime involved a stolen firearm. Prien-Pinto objected to this enhancement, arguing that nothing in the record suggested he knew the firearm was stolen and that application of the enhancement without a mens rea would violate his Fifth Amendment rights, or alternatively, the federal statutes criminalizing possession of a stolen firearm. The district court noted that "the facts are pretty compelling that Mr. Prien-Pinto did not have any knowledge that this firearm had been stolen." However, it held that Application Note 8(B) in the Commentary following [§ 2K2.1\(b\)\(4\)](#)—which provides that the enhancement applies "regardless of whether the defendant knew or had reason to believe that the firearm was stolen"—was "not ambiguous." It thus applied the enhancement but invited us, on the record, to review the constitutionality of [§ 2K2.1\(b\)\(4\)](#) and the Application Note.

II

The constitutionality of [U.S.S.G. § 2K2.1\(b\)\(4\)](#)'s strict-liability enhancement ***1157** is the only issue before us on appeal. We review a claim that the Sentencing Guidelines are unconstitutional de novo. [United States v. Padilla-Diaz](#), 862 F.3d 856, 860 (9th Cir. 2017).

A

All sentencing proceedings begin with the district court's calculations of the applicable Guidelines range. *See Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Section 2K2.1 provides the offense levels for crimes like Prien-Pinto's, which involve unlawful receipt, possession, or transportation of firearms. Paragraph (b) provides a number of enhancements that increase the base offense level for firearm crimes, including this provision in subparagraph (4): "If any firearm (A) was stolen, increase

by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels." [U.S.S.G. § 2K2.1\(b\)\(4\)](#). In the Commentary section following [§ 2K2.1](#), Application Note 8(B) provides: "Knowledge or Reason to Believe. —Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number." [U.S.S.G. § 2K2.1](#), App. Note 8(B). In other words, this Application Note directs courts to apply [§ 2K2.1\(b\)\(4\)](#)'s enhancements on a strict liability basis and not to read a mens rea requirement into the text of the provision.

Application Notes are not formally part of the Guidelines, but serve to "interpret[]" and "explain[]" the Guidelines for district courts. *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). Like the Guidelines themselves, the Application Notes are drafted by the Sentencing Commission and may be revised annually. *See id.* at 41, 45, 113 S.Ct. 1913. However, Congress lacks the power to modify or disapprove of Application Notes, as it may Guidelines. *Id.* at 40, 113 S.Ct. 1913. The Supreme Court told us in *Stinson* that an Application Note "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.*; *see also id.* at 42–43, 113 S.Ct. 1913 ("Commentary which functions to interpret a guideline or explain how it is to be applied controls, and if failure to follow, or a misreading of, such commentary results in a sentence selected from the wrong guideline range, that sentence would constitute an incorrect application of the sentencing guidelines." (internal citations, punctuation, and alterations omitted)). The Court also analogized the Sentencing Commission's use of Application Notes to an agency's interpretation of its own legislative rules, and thus directed courts to apply Application Notes with the same force as other such interpretations. *Id.* at 44–45, 113 S.Ct. 1913. Thus, we ascribe somewhat less legal weight to the Application Notes than to the Guidelines proper: if the Guideline and Application Note are inconsistent, the Guideline prevails. *See id.* at 38, 113 S.Ct. 1913.

After publishing *Stinson* in 1993, the Supreme Court issued a series of opinions that have dramatically altered the role the Guidelines play in sentencing. Most significantly, the Court struck down the federal sentencing statute making the Guidelines mandatory, finding it inconsistent with the Sixth Amendment. *United States v.*

Booker, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). However, we and the Supreme Court have continued to apply the holding of *Stinson* in the years following *Booker*. See, e.g., *Freeman v. United States*, 564 U.S. 522, 529, 131 S.Ct. 2685, 180 L.Ed.2d 519 (2011) (citing *Stinson*, 508 U.S. at 38, 113 S.Ct. 1913) (“Guidelines commentary is authoritative[.]”); *United States v. Thornton*, 444 F.3d 1163, 1165 n.3 (9th Cir. 2006) (“[C]ommentary in the *1158 Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” (internal quotation marks omitted)). We thus follow *Stinson* in considering whether the district court properly applied § 2K2.1(b)(4) and Application Note 8(B) when calculating Prien-Pinto’s sentence.

B

We considered and rejected a Fifth Amendment due process challenge to the lack of a mens rea requirement in § 2K2.1(b)’s enhancement for a stolen firearm in *Goodell*. At that time, the stolen-firearm enhancement was codified at § 2K2.1(b)(2), and the Sentencing Commission had not yet drafted Application Note 8(B), which first appeared in the Guidelines in 2007. Compare U.S.S.G. § 2K2.1 (1990) with U.S.S.G. § 2K2.1 (2007).

Working without the “authoritative,” *Stinson*, 508 U.S. at 38, 113 S.Ct. 1913, weight of this Application Note, we reached the result it now prescribes through sound construction of the Guidelines. We first scrutinized “[t]he plain language” of § 2K2.1(b) and found that it “does not require [a mens rea.]” *Goodell*, 990 F.2d at 498. Second, we examined the drafting history to determine whether the Guideline’s text was a “deliberate” exception to the “rule of ... Anglo-American criminal jurisprudence” that a penalty requires a mens rea. See *id.* at 498–99. Our review found that the Sentencing Commission “promulgated [the enhancement] on the premise that ‘stolen firearms are used disproportionately in the commission of crimes.’ ” *Id.* at 499 (quoting *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992)). Because the Fifth Amendment permits a regulatory statute in the interest of public safety to provide for criminal liability in the absence of mens rea, *United States v. Freed*, 401 U.S. 601, 607–09, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), and because an enhancement for possession of a stolen firearm is rationally related to the

goal of crime prevention, *Goodell*, 990 F.2d at 499 (citing *Mobley*, 956 F.2d at 454) (noting that stolen firearms are disproportionately used in the commission of crimes), we held that there was no Fifth Amendment violation. *Id.* In the end, strict liability “reflects the greater culpability of an ex-felon possessing a stolen weapon.” *Id.* at 501.

Goodell’s analysis of the plain language and legislative history of the enhancement seems to foreclose Prien-Pinto’s argument that Application Note 8(B) is “a plainly erroneous reading” of § 2K2.1(b)(4). See *Stinson*, 508 U.S. at 38, 113 S.Ct. 1913. Through traditional techniques of construction, we had been reading this enhancement to apply without a mens rea for fourteen years before the Sentencing Commission began directing us to do so. Application Note 8(B) simply serves as confirmation that *Goodell*’s reading has always been the correct one.

C

Prien-Pinto raises several arguments that *Goodell* does not control this case. He first argues that the Supreme Court’s decision in *Booker* overruled *Stinson*, and—apparently—all other pre-*Booker* decisions about the constitutionality of the Guidelines, including *Goodell*. *Stinson*’s holding that the Application Notes carry authority akin to an agency’s interpretation of its legislative rules, he avers, is now incorrect, and courts would thus violate the Administrative Procedure Act by giving the Application Notes the force of law because they are not promulgated through notice-and-comment rulemaking.

This argument misunderstands the case law. We relied upon neither *Stinson* nor the Application Notes in deciding in *1159 *Goodell* that the stolen-firearm enhancement does not carry a mens rea; rather, we based that holding on the text of § 2K2.1(b) alone. Thus, an overruling of *Stinson* would not abrogate our holding in *Goodell*. Moreover, *Stinson* has not been overruled. The Supreme Court, post-*Booker*, continues to cite its holding regarding the Application Notes as positive law—as do we. See, e.g., *Freeman*, 564 U.S. at 529, 131 S.Ct. 2685; *Thornton*, 444 F.3d at 1165 n.3.

Second, Prien-Pinto argues that *Goodell* is no longer good law because that decision relied on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). *McMillan* established a three-factor test to

determine whether a sentencing enhancement factor violates the Fifth Amendment. *Goodell*, 990 F.2d at 499–500 (citing *McMillan*, 477 U.S. at 87–88, 106 S.Ct. 2411). Fourteen years after *McMillan*, the Supreme Court interpreted the Sixth Amendment to require that sentencing enhancements beyond the statutory maximum be based on facts proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 486–87, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court subsequently clarified that *Apprendi* did not disturb the *McMillan* due process standard in *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). However, eleven years later, the Court overruled *Harris* and questioned the “vitality, if not validity” of *McMillan*. *Alleyne v. United States*, 570 U.S. 99, 106, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); see also *id.* at 118, 133 S.Ct. 2151 (Sotomayor, J., concurring) (expressing a view that *McMillan* was “wrongly decided”). Prien-Pinto argues that if *McMillan* is no longer valid, *Goodell* cannot be either.

We need not reach the question of *McMillan*'s continued vitality because, when we decided the portion of *Goodell* which controls this appeal, we neither relied on nor engaged with *McMillan*. Only after determining that the stolen-firearm enhancement did not carry a mens rea and that this strict-liability enhancement did not violate the Fifth Amendment did we turn to Mr. Goodell's separate argument that the enhancement was invalid under the standard of *McMillan*. *Goodell*, 990 F.2d at 499. In fact, we even transitioned into the *McMillan* portion of our opinion with the phrase “[t]he scienter issue aside” *Id.* Our subsequent analysis of whether the enhancement altered the statutory maximum penalty for Goodell's crime is not relevant to Prien-Pinto's appeal.

Third, Prien-Pinto urges us to distinguish *Goodell* because there, unlike here, the government and the defendant stipulated to the fact that the defendant did not know the firearm he possessed was stolen. *Id.* at 498. However, nothing in our analysis or holding in *Goodell* relied on this stipulation. Moreover, the district court here stated on the record at sentencing that “the facts are pretty compelling that Mr. Prien-Pinto did not have any knowledge that this firearm had been stolen,” a finding we consider of equivalent force to a stipulation.

Fourth, Prien-Pinto argues that § 2K2.1(b)(4)'s strict-liability enhancement is in tension with the federal statute

criminalizing possession of a stolen firearm, which does require a mens rea. See 18 U.S.C. § 922(j) (making it a crime to possess a stolen firearm or ammunition while “knowing or having reasonable cause to believe that the firearm or ammunition was stolen”). Because Application Note 8(B) may not stand if it “violates ... a federal statute,” *Stinson*, 508 U.S. at 38, 113 S.Ct. 1913, Prien-Pinto avers that the statute's requirement of a mens rea disallows the Guidelines from imposing a strict-liability penalty for the same conduct. See *1160 *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (holding that where an Application Note and the plain language of a federal statute are “at odds,” the Application Note must “must give way”). However, we considered and rejected this statutory argument in *United States v. Ellsworth*, 456 F.3d 1146, 1150–51 (9th Cir. 2006), which we published after the Supreme Court's decision in *Booker*.

In *Ellsworth*, the defendant argued, like Prien-Pinto, that § 2K2.1(b)(4) was “at odds with Congress' plain language as expressed in 18 U.S.C. § 922(j).” *Id.* at 1151 (internal quotation marks omitted). We, however, distinguished between § 922(j) as “an independent basis for criminal liability” and § 2K2.1(b)(4) as a mere “enhancement” applied only after liability has been established for the *separate* crime of being a felon in possession of a firearm, describing the provisions as only “superficially similar.” See *id.* The enhancement, we reasoned, does not establish culpability for possession of a stolen firearm, but increases the penalty for a “small[] and distinct category of persons” who “may not legitimately possess *any* firearm,” stolen or not: convicted felons. *Id.* (emphasis in original); see also *Goodell*, 990 F.2d at 501 (describing the “greater culpability” of a felon who possesses a stolen firearm). The provisions are thus fundamentally different, and we cannot assume that Congress intended to include an unwritten mens rea for the Guidelines enhancement because it included a written one for the statutory offense. Guessing at Congress's intent where the text is clear on its face is a dangerous game, and one that we have chosen not to play. *Ellsworth* thus has foreclosed Prien-Pinto's statutory argument.

Finally, Prien-Pinto argues that *Booker* represented a “sea change” which fundamentally altered due process jurisprudence on the Guidelines and compels a re-evaluation of *Goodell*. He relies on a lone opinion from the Eastern District of New York, *United States v. Handy*,

570 F.Supp.2d 437 (E.D.N.Y. 2008), the logic of which has been rejected by the Second, Third, Sixth, and Eleventh Circuits.¹ See *United States v. Thomas*, 628 F.3d 64, 72 (2d Cir. 2010) (re-affirming a pre-*Booker* decision holding the lack of a mens rea requirement to § 2K2.1(b)(4) valid and noting “respectful disagreement” with *Handy*); see also *United States v. Stokes*, 621 F. App’x 316, 320 (6th Cir. 2015) (rejecting *Handy*); *United States v. Fields*, 608 F. App’x 806, 812 (11th Cir. 2015) (same); *United States v. Black*, 386 F. App’x 238, 241 (3d Cir. 2010) (same).

Further, although the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have not addressed the *Handy* opinion, each has continued to apply § 2K2.1(b)(4)’s strict-liability enhancement in the years after *Booker*. See *United States v. Gonzalez*, 857 F.3d 46, 55–56 (1st Cir. 2017) (“[U]nlike a mens-rea-less criminal statute, the Guidelines may compound the punishment for the offense, but they fall far short of criminalizing apparently innocent conduct. ... The history of the Guideline itself confirms that the omission was intentional[.]” (internal quotation marks and alteration omitted)); *United States v. Taylor*, 659 F.3d 339, 344 (4th Cir. 2011) (“[I]t is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.” (quoting *Dean v. United States*, 556 U.S. 568, 575, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009))); *United States v. Perez*, 585 F.3d 880, 883 (5th Cir. 2009) (“This court has continually enforced the clear and unambiguous language of § 2K2.1(b)(4)

and its strict liability *1161 standard.”); *United States v. Statham*, 581 F.3d 548, 553 (7th Cir. 2009) (applying § 2K2.1(b)(4)’s parallel strict-liability enhancement for use of a firearm with an altered or obliterated serial number); *United States v. Bates*, 584 F.3d 1105, 1109 (8th Cir. 2009) (applying Application Note 8(B) to impose the strict-liability enhancement); *United States v. Ellis*, 351 F. App’x 307, 309 (10th Cir. 2009) (“We like other circuits have long and unanimously held that Section 2K2.1(b)(4) lacks a scienter requirement.”).

III

We join the unanimous ranks of these ten circuits and decline to reverse our longstanding precedent. We fail to understand how the Supreme Court’s Sixth Amendment jurisprudence requiring that all facts leading to a sentence enhancement beyond the statutory maximum be proven to a jury overrules the long-settled position that the Fifth Amendment permits a sentencing enhancement for possession of a stolen firearm to apply on a strict-liability basis. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

All Citations

917 F.3d 1155, 19 Cal. Daily Op. Serv. 2229, 2019 Daily Journal D.A.R. 2023

Footnotes

- * The panel unanimously concludes this case is suitable for decision without oral argument. See *Fed. R. App. P. 34(a)(2)*.
- ** The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.
- 1** The government did not appeal *Handy* to the Second Circuit; thus, that court did not have an opportunity to directly review the decision.

APPENDIX B

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

USSG § 2K2.1

§2K2.1

(b) Cross Reference

- (1) If a recordkeeping offense reflected an effort to conceal a substantive explosive materials offense, apply §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials).

Commentary

Statutory Provisions: 18 U.S.C. § 842(f), (g).

Background: The above-referenced provisions are recordkeeping offenses applicable only to “*licensees*,” who are defined at 18 U.S.C. § 841(m).

<i>Historical Note</i>	Effective November 1, 1991 (amendment 373). A former §2K1.6 (Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes), effective November 1, 1987, amended effective November 1, 1989 (amendment 303) and November 1, 1990 (amendment 331), was deleted by consolidation with §2K1.3 effective November 1, 1991 (amendment 373).
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§2K1.7. [Deleted]

<i>Historical Note</i>	Section 2K1.7 (Use of Fire or Explosives to Commit a Federal Felony), effective November 1, 1989 (amendment 188), amended effective November 1, 1990 (amendment 332), was deleted by consolidation with §2K2.4 effective November 1, 1993 (amendment 481).
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2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is 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;
- (2) **24**, if 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;

- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is 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 one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if—
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) 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); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and 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;
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and 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;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

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

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(A)	3–7	add 2
(B)	8–24	add 4
(C)	25–99	add 6
(D)	100–199	add 8
(E)	200 or more	add 10 .

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.
- (3) If the offense involved—
- (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or
- (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

- (5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.
- (6) If the defendant—
- (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition 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,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

- (7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

- (1) If 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, apply—
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

“Ammunition” has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

“**Destructive device**” has the meaning given that term in 26 U.S.C. § 5845(f).

“**Felony conviction**” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

“**Firearm**” has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a “**semiautomatic firearm that is capable of accepting a large capacity magazine**” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.
3. **Definition of “Prohibited Person.”**—For purposes of subsections (a)(4)(B) and (a)(6), “**prohibited person**” means any person described in 18 U.S.C. § 922(g) or § 922(n).
4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.
5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.
6. **Application of Subsection (b)(2).**—Under subsection (b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include 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. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.
7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable

enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. **Application of Subsection (b)(4).—**

(A) **Interaction with Subsection (a)(7).—**If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) **Knowledge or Reason to Believe.**—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. **Application of Subsection (b)(7).—**Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, 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).

10. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

§2K2.1

11. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable (“plastic”) firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).
12. **Armed Career Criminal.**—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. *See* §4B1.4.
13. **Application of Subsection (b)(5).**—
 - (A) **In General.**—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
 - (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
 - (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.
 - (B) **Definitions.**—For purposes of this subsection:

“Individual whose possession or receipt of the firearm would be unlawful” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. “Crime of violence” and “controlled substance offense” have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term “**defendant**”, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
 - (C) **Upward Departure Provision.**—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
 - (D) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). 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 subsection (b)(6)(B) also would apply.

14. **Application of Subsections (b)(6)(B) and (c)(1).—**

- (A) **In General.**—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.
- (B) **Application When Other Offense is Burglary or Drug Offense.**—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) **Definitions.—**

“Another felony offense”, for purposes of subsection (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.

“Another offense”, for purposes of subsection (c)(1), means 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.

- (D) **Upward Departure Provision.**—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.
- (E) **Relationship Between the Instant Offense and the Other Offense.**—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

- (i) **Firearm Cited in the Offense of Conviction.** Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful

§2K2.1

possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

- (ii) **Firearm Not Cited in the Offense of Conviction.** Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not “part of the same course of conduct or common scheme or plan,” then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. **Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).**—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant 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, and (C) the defendant received no monetary compensation from the offense.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629–631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804).
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