

**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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**United States Court of Appeals
For the First Circuit**

No. 17-1665

UNITED STATES

Appellee

v.

THOMAS BOIS

Defendant - Appellant

MANDATE

Entered: May 20, 2019

In accordance with the judgment of April 29, 2019, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this Court.

By the Court:

Maria R. Hamilton, Clerk

cc:

Thomas Bois
Jessica L. Conklin
Rachel Yasmin Hemani
Mark David Smith
Cynthia A. Young

United States Court of Appeals For the First Circuit

No. 17-1665

UNITED STATES,

Appellee,

v.

THOMAS BOIS,

Defendant, Appellant.

Before

Howard, Chief Judge,
Thompson and Kayatta, Circuit Judges.

JUDGMENT

Entered: April 29, 2019

After careful review of the parties' filings, we grant the government's motion for summary disposition and affirm the judgment of the district court. As appellant concedes, the challenge he raises is foreclosed by circuit precedent. See, e.g., United States v. Fields, 823 F.3d 20, 35 (1st Cir. 2016) ("We thus conclude that . . . Fields's July 2010 [Massachusetts assault with a dangerous weapon] conviction qualifies as a conviction of a crime of violence under the force clause of the career offender guideline.").

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Cynthia A. Young, Rachel Yasmin Hemani, Mark David Smith, Jessica L. Conklin,
Thomas Bois

A-003

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

THOMAS BOIS

JUDGMENT IN A CRIMINAL CASE

Case Number: 15-cr-10072-RGS-1

USM Number: 96588-038

Mark D. Smith

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the indictment on 1/13/2017

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm and Ammunition	7/15/2014	1 of 1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/20/2017

Date of Imposition of Judgment

Signature of Judge

Richard G. Stearns, United States District Judge

Name and Title of Judge

6-20-17.

Date



DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

108 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends participation in the BOP's Residential Drug Abuse Program due to the defendant's substance abuse history and based on an informal pre-screening performed by the Probation Office. See page 7 for add'l recommendations.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

A-005

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

**ADDITIONAL RECOMMENDATIONS BY THE COURT TO THE
BOP:**

The Court recommends that, if the defendant completes the Residential Drug Abuse Program (RDAP), he shall be considered for the Bureau of Prisons' Alternative Community Placement Program allowing him/her to transition to a treatment setting as an alternative to a Residential Reentry Center prior to release.

AO 245B (Rev. 02/16) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment—Page 4 of 7

DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
3 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed by the Probation Office.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional condition on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall reside for a period of up to 6 months, or until you secure a residence approved by the Probation Office, in a Residential Re-Entry Center, and must observe the rules of that facility.

The defendant must participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 104 drug tests per year to determine whether you have reverted to the use of alcohol or drugs.

The defendant must participate in a mental health treatment program, to include anger management and gambling treatment, as directed by the Probation Office.

The defendant must take all medications as directed by your mental health treatment provider.

The defendant is prohibited from participating in any gambling activities, including casino gambling, on-line gambling, lotteries, instant scratch tickets, Keno, and any other activities similar in nature.

You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see conditions above), based on the ability to pay or availability of third-party payment.

Additionally, the Court makes a judicial recommendation that the defendant participate in the Probation Office's CARE Program during the term of supervised release if deemed to be an appropriate candidate.

The defendant shall not consume any alcoholic beverages.

DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ 0.00	\$ 0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after

DEFENDANT: THOMAS BOIS
CASE NUMBER: 15-cr-10072-RGS-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ In accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- The defendant shall pay the special assessment of \$100.00, immediately, or it shall be made according to the requirements of the Federal Bureau of Prisons' Inmate Financial Responsibility Program while the defendant is incarcerated and according to a court-ordered repayment schedule established by the Court in consultation with the probation officer, during the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
- See attached Final Order of Forfeiture.

A-010

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 265. Crimes Against the Person (Refs & Annos)

M.G.L.A. 265 § 15B

§ 15B. Assault with dangerous weapon; victim sixty or older; punishment; subsequent offenses

Effective: August 13, 2014
Currentness

(a) Whoever, by means of a dangerous weapon, commits an assault upon a person sixty years or older, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault upon a person sixty years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until one year of said sentence has been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this subsection.

For the purposes of prosecution, a conviction obtained under subsection (a) of section fifteen A or paragraph (a) of section 18 shall count as a prior criminal conviction for the purpose of prosecution and sentencing as a second or subsequent conviction.

(b) Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Credits

Added by St.1955, c. 112. Amended by St.1981, c. 678, § 2; St.1995, c. 297, § 6; St.2014, c. 284, § 79, eff. Aug. 13, 2014.

Notes of Decisions (113)

M.G.L.A. 265 § 15B, MA ST 265 § 15B
Current through Chapter 23 of the 2019 1st Annual Session

§ 1254. Courts of appeals; certiorari; certified questions, 28 USCA § 1254

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Currentness

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 928; Pub.L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

Notes of Decisions (518)

28 U.S.C.A. § 1254, 28 USCA § 1254

Current through P.L. 116-29.

End of Document

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 922

§ 922. Unlawful acts

Currentness

(a) It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that--

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

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(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless--

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery--

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(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;¹

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are

Signature Date"

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

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

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(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who² has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment--

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

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(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm--

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection--

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is--

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of

firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which--

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that--

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the³ House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm--

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is--

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

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(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm--

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to--

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless--

(A) after the most recent proposal of such transfer by the transferee--

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(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

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(E) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who--

(I) is illegally or unlawfully in the United States; or

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(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

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(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

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(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after

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notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than \$5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000.]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to--

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile--

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except--

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

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(y) Provisions relating to aliens admitted under nonimmigrant visas.--

(1) Definitions.--In this subsection--

(A) the term “alien” has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term “nonimmigrant visa” has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.--Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is--

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver.--

(A) Conditions for waiver.--Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if--

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

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(B) Petition.--Each petition under subparagraph (B) shall--

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.--The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner--

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

(z) Secure gun storage or safety device.--

(1) In general.--Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

(2) Exceptions.--Paragraph (1) shall not apply to--

(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

(B) the transfer to, or possession by, a rail police officer directly employed by or contracted by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed

dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

(3) Liability for use.--

(A) In general.--Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

(B) Prospective actions.--A qualified civil liability action may not be brought in any Federal or State court.

(C) Defined term.--As used in this paragraph, the term "qualified civil liability action"--

(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if--

(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.

[APPENDIX A Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 228; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1216; Pub.L. 97-377, Title I, § 165(a), Dec. 21, 1982, 96 Stat. 1923; Pub.L. 99-308, § 102, May 19, 1986, 100 Stat. 451; Pub.L. 99-408, § 2, Aug. 28, 1986, 100 Stat. 920; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 100-649, § 2(a), (f)(2)(A), Nov. 10, 1988, 102 Stat. 3816, 3818; Pub.L. 100-690, Title VII, § 7060(c), Nov. 18, 1988, 102 Stat. 4404; Pub.L. 101-647, Title XVII, § 1702(b)(1), Title XXII, §§ 2201, 2202, 2204(b), Title XXXV, § 3524, Nov. 29, 1990, 104 Stat. 4844, 4856, 4857, 4924; Pub.L. 103-159, Title I, § 102(a)(1), (b), Title III, § 302(a) to (c), Nov. 30, 1993, 107 Stat. 1536, 1539, 1545; Pub.L. 103-322, Title XI, §§ 110102(a), 110103(a), 110105(2), 110106, 110201(a), 110401(b), (c), 110511, 110514, Title XXXII, §§ 320904, 320927, Title XXXIII, § 330011(i), Sept. 13, 1994, 108 Stat. 1996, 1998, 2000, 2010, 2014, 2019, 2125, 2131, 2145; Pub.L. 104-208, Div. A, Title I, § 101(f) [Title VI, §§ 657, 658(b)], Sept. 30, 1996, 110 Stat. 3009-314, 3009-369, 3009-372; Pub.L. 104-294, Title VI, § 603(b), (c)(1), (d) to (f)(1), (g), Oct. 11, 1996, 110 Stat. 3503, 3504; Pub.L. 105-277, Div. A, § 101(b) [Title I, § 121], Oct. 21, 1998, 112 Stat. 2681-50, 2681-71; Pub.L. 107-273, Div. B, Title IV, § 4003(a)(1), Nov. 2, 2002, 116 Stat. 1811; Pub.L. 107-296, Title XI, § 1112(f)(4), (6), Nov. 25, 2002, 116 Stat. 2276; Pub.L. 109-92, §§ 5(c) (1), 6(a), Oct. 26, 2005, 119 Stat. 2099, 2101; Pub.L. 114-94, Div. A, Title XI, § 11412(c)(2), Dec. 4, 2015, 129 Stat. 1688.)

REPEAL OF SUBSEC. (P)

<Pub.L. 100-649, § 2(f)(2)(A), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1(1), Dec. 9, 2003, 117 Stat. 2481; Pub.L. 113-57, § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under this section], subsec. (p) of this section is repealed.>

MEMORANDA OF PRESIDENT

PRESIDENTIAL MEMORANDUM

Memorandum of the President of the United States, dated January 16, 2013, 78 F.R. 4295, authorizing the Secretary of Health and Human Services to conduct or sponsor research on the causes and prevention of gun violence, is set out as a note under 42 U.S.C.A. § 241.

PRESIDENTIAL MEMORANDUM

Memorandum of the President of the United States, January 16, 2013, 78 F.R. 4301, directing the Heads of Executive Departments and Agencies to take steps to ensure that firearms recovered in the course of criminal investigations and taken into Federal custody are traced through ATF, is set out as a note under Chapter 44 of this title, see 18 U.S.C.A. prec. § 921.

Notes of Decisions (2394)

Footnotes

- 1 So in original. Probably should be followed with "and".
- 2 So in original. The word "who" probably should not appear.
- 3 So in original. Probably should be "of the".

18 U.S.C.A. § 922, 18 USCA § 922

Current through P.L. 116-29.

End of Document

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A-034

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Four. Criminal History and Criminal Livelihood (Refs & Annos)
Part B. Career Offenders and Criminal Livelihood

USSG, § 4B1.2, 18 U.S.C.A.

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

Currentness

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, 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).

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, 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.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1991; November 1, 1992; November 1, 1995; November 1, 1997; November 1, 2000; November 1, 2002; November 1, 2004; November 1, 2007; November 1, 2009; November 1, 2015; August 1, 2016.)

COMMENTARY

<Application Notes:>

A-035

<1. Definitions.--For purposes of this guideline-->

<“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.>

<“Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.>

<“Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.>

<Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”>

<Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”>

<Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”>

<Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”>

<A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)>

<“Prior 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 or older is an adult conviction. A conviction for an offense committed prior to age eighteen 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).>

<2. Offense of Conviction as Focus of Inquiry.--Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.>

A-036

§ 4B1.2. Definitions of Terms Used in Section 4B1.1, FSG § 4B1.2

<3. Applicability of § 4A1.2.--The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.>

<4. Upward Departure for Burglary Involving Violence.--There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.>

Notes of Decisions (699)

Federal Sentencing Guidelines, § 4B1.2, 18 U.S.C.A., FSG § 4B1.2

As amended to 7-12-19.

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A-037

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part K. Offenses Involving Public Safety
2. Firearms

USSG, § 2K2.1, 18 U.S.C.A.

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

Currentness

(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

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms..., FSG § 2K2.1

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) 7.....	add 2
(B) 24.....	add 4
(C) 5-99.....	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.

A-039

(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.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; November 1, 2010; November 1, 2011; November 1, 2014; November 1, 2015; November 1, 2016.)

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:>

A-040

<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).>

A-042

<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-043

<(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 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.>

Notes of Decisions (642)

Federal Sentencing Guidelines, § 2K2.1, 18 U.S.C.A., FSG § 2K2.1
As amended to 7-12-19.

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A-045

ASSAULT

The defendant is charged with having committed an assault upon _____ *[alleged victim]* _____. Section 13A of chapter 265 of our General Laws provides that “Whoever commits an assault . . . upon another shall be punished”

An assault may be committed in either of two ways. It is *either* an attempted battery *or* an immediately threatened battery. A battery is a harmful or an unpermitted touching of another person. So an assault can be either an attempt to use some degree of physical force on another person — for example, by throwing a punch at someone — or it can be a demonstration of an apparent intent to use immediate force on another person — for example, by coming at someone with fists flying. The defendant may be convicted of assault if the Commonwealth proves *either* form of assault.

In order to establish the first form of assault — an attempted battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to commit a battery — that is, a harmful or an unpermitted touching — upon _____ *[alleged victim]* _____, took some overt step

toward accomplishing that intent, and came reasonably close to doing so. With this form of assault, it is not necessary for the Commonwealth to show that [alleged victim] was put in fear or was even aware of the attempted battery.

In order to prove the second form of assault — an imminently threatened battery — the Commonwealth must prove beyond a reasonable doubt that the defendant intended to put [alleged victim] in fear of an imminent battery, and engaged in some conduct toward [alleged victim] which [alleged victim] reasonably perceived as imminently threatening a battery.

Here instruct on Intent (Instruction 3.120), since both branches of assault are specific intent offenses. If additional language on the first branch of assault is appropriate, see Instruction 4.120 (Attempt).

Commonwealth v. Barbosa, 399 Mass. 841, 845 n.7, 507 N.E.2d 694, 696 n.7 (1987) (an assault is "any manifestation, by a person, of that person's present intention to do another immediate bodily harm"); *Commonwealth v. Delgado*, 367 Mass. 432, 435-437 & n.3, 326 N.E.2d 716, 718-719 & n.3 (1975) ("an act placing another in reasonable apprehension that force may be used is sufficient for the offense of criminal assault"; words threatening future harm are insufficient to constitute an assault unless "they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person"); *Commonwealth v. Chambers*, 57 Mass. App. Ct. 47, 49, 781 N.E.2d 37, 40 (2003) (threatened-battery branch "requires proof that the defendant has engaged in objectively menacing conduct with the intent of causing apprehension of immediate bodily harm on the part of the target"); *Commonwealth v. Musgrave*, 38 Mass. App. Ct. 519, 649 N.E.2d 784 (1995), *aff'd*, 421 Mass. 610, 659 N.E.2d 284 (1996) (threatened-battery branch of assault requires specific intent to put victim in fear or apprehension of immediate physical harm); *Commonwealth v. Spencer*, 40 Mass. App. Ct. 919, 922, 663 N.E.2d 268, 271 (1996) (same); *Commonwealth v. Enos*, 26 Mass. App. Ct. 1006, 1008, 530 N.E.2d 805, 807 (1988) (necessary intent inferable from defendant's overt act putting another in reasonable fear, irrespective of whether defendant intended actual injury); *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990, 470 N.E.2d 799, 802 (1984) (assault is "an overt act undertaken with the intention of putting another person in fear of bodily harm and reasonably calculated to do so, whether or not the defendant actually intended to harm the victim"). See

Commonwealth v. Hurley, 99 Mass. 433, 434 (1868) (assault by joint venture by intentionally inciting assault by others); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 421-422, 426-430, 467 N.E.2d 214, 217-218, 220-222 (1984) (assault by joint venture).

NOTES:

1. **Aggravated forms of offense.** It is an aggravated form of assault if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant. G.L. c. 265, § 13A(b). An additionally-aggravated sentence is provided for subsequent offenses.

2. **Assault with a dangerous weapon** (G.L. c. 265, § 15B[b]) has one element in addition to those required for simple assault: that the assault was done by means of a dangerous weapon. *Commonwealth v. Burkett*, 5 Mass. App. Ct. 901, 903, 370 N.E.2d 1017, 1020 (1977). J.R. Nolan, *Criminal Law* § 323 (1976). See *Commonwealth v. Nardi*, 6 Mass. App. Ct. 180, 181-184, 374 N.E.2d 323, 324-326 (1978). Simple assault is a lesser included offense of assault with a dangerous weapon, but assault and battery is not. *A Juvenile v. Commonwealth*, 404 Mass. 1001, 533 N.E.2d 1312 (1989).

Assault with a dangerous weapon on a person 60 years or older (G.L. c. 265, § 15B[a]) is an aggravated form of the offense. The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of "a marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess" *Commonwealth v. Pittman*, 25 Mass. App. Ct. 25, 28, 514 N.E.2d 857, 859 (1987). Prior to St. 1995, c. 297, § 6 (effective March 17, 1996), the aggravated offense covered persons 65 years or older.

3. **Multiple victims of single assault.** Where the defendant assaults multiple victims in a single act, the defendant may be convicted of multiple counts of assault and, in the judge's discretion, given consecutive sentences. *Commonwealth v. Dello Iacono*, 20 Mass. App. Ct. 83, 89-90, 478 N.E.2d 144, 148-149 (1985) (firing gun into house with several residents).

4. **Simultaneous assault and property destruction.** A single act may support simultaneous convictions of assault by means of a dangerous weapon upon the victim who was assaulted and of malicious destruction of property (G.L. c. 266, § 127) with respect to the area where the victim was standing. *Domingue, supra* (firing gun in order to damage bar and frighten bartender).

5. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

6. **Victim's apprehension or fear.** The first (attempted battery) branch of assault does not require that the victim was aware of or feared the attempted battery. *Commonwealth v. Slaney*, 345 Mass. 135, 138-139, 185 N.E.2d 919, 922 (1962); *Commonwealth v. Richards*, 363 Mass. 299, 303, 293 N.E.2d 854, 857-858 (1973); *Commonwealth v. Gorassi*, 432 Mass. 244, 248, 733 N.E.2d 106, 110 (2000).

The second (threatened battery) branch of assault requires that the victim was aware of the defendant's objectively menacing conduct. *Chambers*, 57 Mass. App. Ct. at 48-52, 781 N.E.2d at 39-42. Some older decisions seem to suggest that under the second branch of assault the victim must have feared as well as perceived the threatened battery. This may have resulted from the inherent ambiguity of the term "apprehend," which may signify either. *Chambers, supra*, concluded that subjective fear is not an element of either branch. Other recent decisions appear to be in accord. See *Commonwealth v. Melton*, 436 Mass. 291, 295 n.4, 763 N.E.2d 1092, 1096 n.4 (2002); *Gorassi*, 432 Mass. at 248-249, 733 N.E.2d at 110; *Commonwealth v. Gordon*, 407 Mass. 340, 349, 553 N.E.2d 915, 920 (1990); *Slaney*, 345 Mass. at 139-141, 185 N.E.2d at 922-923; *Richards*, 363 Mass. at 303-304, 293 N.E.2d at

857-858. See also the extended discussion of this issue in R.G. Stearns, *Massachusetts Criminal Law: A Prosecutor's Guide* (28th ed. 2008). The model instruction requires perception, but not subjective fear, by the victim under the second branch of assault.

7. **Assault with intent to murder & assault with intent to kill.** Assault with intent to murder (G.L. c. 265, § 15) requires assault, specific intent to kill, and malice. The lesser included offense of assault with intent to kill (G.L. c. 265, § 29) requires assault, specific intent to kill, and absence of malice. "[P]erhaps the simplest and most distinct way to describe the difference" is that the lesser offense has an additional element — namely, the presence of mitigation provided by reasonable provocation, sudden combat, or excessive force in self-defense. If there is no evidence of mitigation, the Commonwealth satisfies its burden on the issue of malice simply by proving specific intent to kill. *Commonwealth v. Nardone*, 406 Mass. 123, 130-132, 546 N.E.2d 359, 364-365 (1989); *Commonwealth v. Bourgeois*, 404 Mass. 61, 65, 533 N.E.2d 638, 641 (1989). Assault with intent to kill is, in effect, an assault with intent to commit manslaughter. *Commonwealth v. Cowie*, 28 Mass. App. Ct. 742, 745, 556 N.E.2d 103, 105 (1990). Neither offense is within the final jurisdiction of the District Court.

8. **Armed assault in a dwelling** (G.L. c. 265, § 18A), which is not within the final jurisdiction of the District Court, requires proof of: (1) entry of a dwelling while armed; (2) an assault on someone in the dwelling; and (3) accompanying the assault, a specific intent to commit a felony. The intended felony may be a compounded assault charge (such as ABDW) and need not be an additional, factually distinct felony. *Commonwealth v. Donoghue*, 23 Mass. App. Ct. 103, 111-113, 499 N.E.2d 832, 838 (1986). Where the Commonwealth alleges that the intended felony is an attack on a second victim, it must prove specific intent to commit that second attack. *Commonwealth v. Smith*, 42 Mass. App. Ct. 906, 907, 674 N.E.2d 1096, 1098 (1997). Since § 18A does not require that the weapon be used in the assault, it does not have assault by means of a dangerous weapon (G.L. c. 265, § 15B) as a lesser included offense. *Commonwealth v. Flanagan*, 17 Mass. App. Ct. 366, 371-372, 458 N.E.2d 777, 781 (1984).

9. **Verdict slip.** Where the jury is presented with a lesser included offense of assault, and the Commonwealth proceeds upon the alternate theories of an attempted battery or an imminently threatened battery, the jury need not be unanimous as to the theory and a special verdict slip requiring the jury to elect between the theories is not proper. *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 433, 939 N.E.2d 1169, 1173 (2010). A verdict slip need not distinguish between a conviction for an attempted battery and a threatened battery even when the Commonwealth proceeds upon both theories. The jury may return a unanimous verdict for assault even if they are split between the two theories. "Because attempted battery and threatened battery 'are closely related,' *Commonwealth v. Santos*, 440 Mass. 281, 289 (2003), we do not require that a jury be unanimous as to which theory of assault forms the basis for their verdict; a jury may find a defendant guilty of assault if some jurors find the defendant committed an attempted battery (because they are convinced the defendant intended to strike the victim and missed) and the remainder find that he committed a threatened battery (because they are convinced that the defendant intended to frighten the victim by threatening an assault). See *Id.* at 284, 289 (jury were not required to be unanimous as to which form of assault was relied on to satisfy assault element of armed robbery)." *Commonwealth v. Porro*, 458 Mass. 526, 393 N.E.2d 1157 (2010). See also *Commonwealth v. Arias*, *supra*.

**ASSAULT AND BATTERY
BY MEANS OF A DANGEROUS WEAPON**

G.L. c. 265, § 15A

I. INTENTIONAL ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

The defendant is charged with having committed an intentional assault and battery by means of a dangerous weapon.

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant touched the person of alleged victim, however slightly, without having any right or excuse for doing so;

Second: That the defendant intended to touch alleged victim; and

Third: That the touching was done with a dangerous weapon.

If additional language on intent is appropriate.

The Commonwealth must prove beyond a reasonable doubt that the defendant intended to touch alleged victim with the dangerous weapon, in the sense that the defendant consciously and deliberately intended the touching to occur, and that the touching was not

merely accidental or negligent. The Commonwealth is *not* required to prove that the defendant specifically intended to cause injury to [alleged victim] .

If no injury was sustained. It is not necessary for the Commonwealth to prove that the defendant actually caused injury to [alleged victim] with a dangerous weapon. Any slight touching is sufficient, if it was done with a dangerous weapon.

A. If the alleged weapon is inherently dangerous. A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a is a dangerous weapon.

B. If the alleged weapon is not inherently dangerous. An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding

whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

G.L. c. 265, § 15A(b). *Commonwealth v. Ford*, 424 Mass. 709, 711 (1997) (ABDW is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Commonwealth v. Waite*, 422 Mass. 792, 794 n.2 (1996) (ABDW does not require specific intent to do bodily harm with the dangerous weapon); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 887 n.4 (1984) (ABDW "requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm"); *Commonwealth v. Manning*, 6 Mass. App. Ct. 430, 436-438 (1978) (ABDW must be "by means of" dangerous weapon, that is, weapon must come into contact with victim); *Commonwealth v. Moffett*, 383 Mass. 201, 212 (1981) (same); *Commonwealth v. Liakos*, 12 Mass. App. Ct. 57, 60-61 (1981) (use of dangerous weapon, though not found or testified to, inferable from nature of victim's wounds).

The Appeals Court approved giving "helpful examples to guide the jury's analysis" in *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 923 (1984), and much of the wording of the instruction regarding an item that is not inherently dangerous was reviewed in *Commonwealth v. Tevlin*, 433 Mass. 305, 310 (2001).

Where the dangerousness of the object is for the jury to decide, a lesser included instruction on assault and battery should always be given, and must be given on request. *Commonwealth v. Connolly*, 49 Mass. App. Ct. 424, 426 (2000).

II. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

A. If intentional ABDW was already charged on.

There is a second way in which a person may be guilty of an assault and battery by means of a dangerous weapon. Instead of intentional conduct, it involves a *reckless* touching with a dangerous weapon that results in bodily injury.

B. If intentional ABDW was not already charged on. The defendant is charged with having committed a reckless assault and battery by means of a dangerous weapon upon [alleged victim].

In order to prove that the defendant is guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant engaged in actions which caused bodily injury to [alleged victim].

Second: That the bodily injury was done with a dangerous weapon; and

Third: That the defendant's actions amounted to reckless conduct.

With regard to the first element, the bodily injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

A. *If the alleged weapon is inherently dangerous.* A dangerous weapon is an item which is capable of causing serious injury or death. I instruct you, as a matter of law, that a _____ is a dangerous weapon.

B. *If the alleged weapon is not inherently dangerous.* An item that is normally used for innocent purposes can become a dangerous weapon if it is used as a weapon in a dangerous or potentially dangerous fashion. The law considers an item to be used in a dangerous fashion if it is used in a way that it reasonably appears to be capable of causing serious injury or death to another person.

For example, a brick can be a dangerous weapon if it is thrust against someone's head or a pillow if it is used to suffocate someone. In deciding whether an item was used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

With regard to the third element, it is not enough for the Commonwealth to prove that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to

recklessness. The defendant acted recklessly if he (she) knew, or should have known, that such actions were very likely to cause substantial harm to someone, but he (she) ran that risk and went ahead anyway.

But it is not necessary that he (she) intended to injure or strike the alleged victim, or that he (she) foresaw the harm that resulted. If the defendant actually realized in advance that his (her) conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if he (she) was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

G.L. c. 265, § 15A(b). *Ford*, 424 Mass. at 711 (the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon).

No verdict slip or specific unanimity instruction required where both intentional and reckless assault and battery by means of a dangerous weapon are alleged. Where the evidence warrants instructing on both intentional and reckless branches, the jurors need not be unanimous on whether the ABDW was intentional or reckless. The judge, therefore, need not give a specific unanimity instruction or provide verdict slips for the jury to indicate the basis of its verdict. See *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906, 906-07, rev. denied, 466 Mass. 1108 (2013). This is because "the forms of assault and battery are . . . closely related subcategories of the same crime." *Id.* at 907. "Specific unanimity is not required, because they are not 'separate, distinct, and essentially unrelated ways in which the same crime can be committed.'" *Id.*, quoting *Commonwealth v. Santos*, 440 Mass. 281, 288 (2003).

NOTES:

1. **"Dangerous weapon."** A weapon is "an instrument of offensive or defensive combat; . . . anything used, or designed to be used, in destroying, defeating, or injuring an enemy." *Commonwealth v. Sampson*, 383 Mass. 750, 754 (1981). A dangerous weapon is "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." *Commonwealth v. Farrell*, 322 Mass. 606, 614-615 (1948).

If a weapon is inherently dangerous, it need not have been used in a dangerous fashion. *Appleby*, 380 Mass. at 307 n.6. For the list of weapons which are considered inherently dangerous, see G.L. c. 269, § 10(a) & (b) and *Commonwealth v. Appleby*, 380 Mass. 296, 303 (1980) (item is inherently dangerous "if designed for the purpose of bodily assault or defense"). See *Commonwealth v. Lord*, 55 Mass.App.Ct. 265, 267 (2002) (mace spraying device dangerous per se).

Usually-innocent items are also considered to be dangerous weapons if used in a dangerous or potentially dangerous fashion. *Id.* at 303-304, 307 (riding crop; and collecting cases on particular items). See also *Commonwealth v. Scott*, 408 Mass. 811, 822-823 (1990) (gag); *Commonwealth v. Gallison*, 383 Mass. 659, 667-668 (1981) (lit cigarette); *Commonwealth v. Barrett*, 386 Mass. 649, 654-656 (1980) (aerosol can sprayed in eyes of operator of moving vehicle); *Commonwealth v. Fettes*, 64 Mass. App. Ct. 917, 918 (2005) (dog). However, the fact that an appellate court previously held that the object was capable of being used as a dangerous weapon does not make it such in all future cases, regardless of circumstances. *Appleby*, *supra*. "The essential question, when an object which is not dangerous per se is alleged to be a dangerous weapon, is whether the object, as used by the defendant, is capable of producing serious bodily harm." *Marrero*, 19 Mass. App. Ct. at 922. This is determined by how the object's potential for harm would have appeared to a reasonable observer. *Commonwealth v. Tarrant*, 367 Mass. 411, 414 (1975). This determination is normally for the jury, to be decided on the basis of the circumstances surrounding the crime, the nature, size and shape of the object, and the manner in which it was handled or controlled. *Appleby*, 380 Mass. at 307 n.5; *Marrero*, *supra*; *Commonwealth v. Davis*, 10 Mass. App. Ct. 190, 193 (1980). "That a dangerous weapon was used can be inferred from the victim's injuries." *Commonwealth v. Roman*, 43 Mass. App. Ct. 733, 736, S.C., 427 Mass. 1006 (1998). Whether an item is a dangerous weapon turns on how it is used, and not the subjective intent of the actor. *Commonwealth v. Lefebvre*, 60 Mass. App. Ct. 912, 913 (2004); *Commonwealth v. Connolly* 49 Mass. App. Ct. 424, 425 (2000).

To qualify as a dangerous weapon, an item need not be capable of being wielded, possessed or controlled, and may be stationary. *Commonwealth v. Sexton*, 425 Mass. 146, 152 (1997) (concrete pavement against which victim's head was repeatedly struck; and collecting cases). See also *Commonwealth v. McIntosh*, 56 Mass. App. Ct. 827, 829 (2002) (windowpane). It may not, however, be a human body part. *Davis*, 10 Mass. App. Ct. at 192-193 (teeth and other body parts). The ocean is not a dangerous weapon for purposes of § 15A where the victim is abandoned far from shore, *Commonwealth v. Shea*, 38 Mass. App. Ct. 7, 15-16, (1995), but perhaps it would be if the victim's head were held underwater, see *Sexton*, 425 Mass. at 150 & n.1.

2. **Knives.** Not all knives are dangerous per se. *Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1 (1986) (noting Legislature has not designated all knives as dangerous per se, and discussing the definition of "dirk knife"). By statute, "any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches" is a dangerous weapon per se. G.L. c. 269, § 10(b). See *Commonwealth v. Smith*, 10 Mass. App. Ct. 770, 776-78 (1996) (a "knife having a double-edged blade" need not be double-edged for its entire length); *Miller*, *supra* (discussing the difficulties in defining a "dirk knife"). Straight knives typically are regarded as dangerous per se while folding knives, at least those without a locking device, typically are not. *Commonwealth v. Turner*, 59 Mass. App. Ct. 825, 828 (2003). See *Commonwealth v. Young*, 461 Mass. 198, 211-12 (2012) (affirming instruction that a nine-inch knife with a five-inch double-edge blade was dangerous per se). Possession of a closed folding knife is a dangerous weapon for purposes of G.L. c. 269, § 10(b) only if used or handled in a manner that made it a dangerous weapon. *Turner*, 59 Mass. App. Ct. at 828-29.

3. **Shod foot.** "Footwear, such as a shoe, when used to kick, can be a dangerous weapon." *Commonwealth v. Tevlin*, 433 Mass. 305, 311 (2001); *Commonwealth v. Fernandez*, 43 Mass. App. Ct. 343, 356 (1997) (sneakers); *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984) (boots or sneakers); *Commonwealth*

ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON

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v. Zawatsky, 41 Mass. App. Ct. 392, 398-399 (1996) (unnecessary for prosecutor to prove exactly what type of shoes defendant wore where there was evidence that defendant was wearing shoes and gave victim a vicious kick to the head resulting in injury). Compare *Commonwealth v. Charles*, 57 Mass. App. Ct. 595, 599 (2003) (kicking was "not so minimal as to foreclose an inference" that shod feet were being used as dangerous weapons capable of causing serious injury) with *Commonwealth v. Mercado*, 24 Mass. App. Ct. 391, 397 (1987) (jury may infer that foot was shod, but no more than a nudge was insufficient).

4. **Unseen weapon.** A defendant who claimed to have a weapon may be taken at his word, if it is possible that he did have such a weapon. *Commonwealth v. Hastings*, 22 Mass. App. Ct. 930, 930 (1986) (where victim felt sharp object against her, defendant claiming to have unseen knife may be convicted of ABDW).

5. **Specification of dangerous weapon.** The particular type of dangerous weapon with which the offense was committed is not an essential element of ABDW. *Commonwealth v. Salone*, 26 Mass. App. Ct. 926, 929 (1988). It is therefore surplusage in a complaint and, if the defendant is not surprised, its specification in the complaint may be amended at any time to conform to the evidence. See G.L. c. 277, § 21.

6. **Automobile as extension of occupants.** As to whether a battery of an automobile is also a battery of its occupants, see *Commonwealth v. Burno*, 396 Mass. 622, 627-628 (1986) (agreeing that "a battery could occur although no force was applied to a person directly," but reserving decision on whether "a battery could occur even if no force at all, direct or indirect, was applied to a person").

7. **Victim injured while escaping.** A defendant may be convicted of ABDW where the victim was cut with the defendant's knife while trying to grab the knife away from the pursuing defendant. *Commonwealth v. Rajotte*, 23 Mass. App. Ct. 93, 96 (1986). See the supplemental instruction to Assault and Battery (Instruction 6.140).

8. **Consent not a defense.** *Commonwealth v. Appleby*, 380 Mass. 296, 310 (1980) (consent is not a defense to ABDW). *Commonwealth v. Burke*, 390 Mass. 480, 482-483 (1983); *Commonwealth v. Leonard*, 90 Mass. App. Ct. 187 (2016).

9. **Transferred Intent.** An instruction on transferred intent indicates that the Commonwealth need only prove an intent to touch one of the intended victims and does not have to prove intent specifically directed at each of the actual victims. *Commonwealth v. Melton*, 436 Mass. 291, 299 n.11 (2002). "It is a familiar rule that one who shoots, intending to hit A., and accidentally hits and injures B., is liable for an assault and battery on B." *Commonwealth v. Hawkins*, 157 Mass. 551, 553 (1893). Accord, *Commonwealth v. Dung Van Tran*, 463 Mass. 8, 25 & n.19 (2012); *Commonwealth v. Drumgold*, 423 Mass. 230, 259, (1996); *Commonwealth v. Pitts*, 403 Mass. 665, 668-669 & n. 6 (1989); *Commonwealth v. Pulelo*, 394 Mass. 101, 109-110, (1985); *Commonwealth v. Ely*, 388 Mass. 69, 76 n.13 (1983).

10. **Joint venture.** A conviction of ABDW by joint venture requires knowledge that the co-venturer had a dangerous weapon, but this may be inferred from the circumstances. *Commonwealth v. Ferguson*, 365 Mass. 1, 8-9 (1974); *Commonwealth v. Meadows*, 12 Mass. App. Ct. 639, 644 (1981). See *Commonwealth v. Britt*, 465 Mass. 87, 100 (2013) (where conviction is based on joint venture theory of crime that has as element use or possession of weapon, Commonwealth bears "the burden of proving that [the defendant] had knowledge that a member of the joint venture had a weapon"). However, "there is no need to prove an anticipatory compact between the parties to establish joint venture, if, at the climactic moment the parties consciously acted together in carrying out the criminal endeavor." *Commonwealth v. Sexton*, 425 Mass. 146, 152 (1997) (joint venture liability for ABDW upheld where defendant continuously kicked and punched the victim while his coventurer repeatedly slammed the victim's head into the pavement, and at no time during this conflict did the defendant seek to withdraw).

11. **Aggravated forms of offense.** Assault and battery on a person 60 years or older by means of a dangerous weapon (G.L. c. 265, § 15A[a]) is an aggravated form of ABDW (§ 15A[b]). The Commonwealth must charge and prove that the victim was 60 years of age or older. The jury may consider the victim's physical appearance as one factor in determining age, but appearance alone is not sufficient evidence of age unless the victim is of a "marked extreme" age, since "[e]xcept at the poles, judging age on physical appearance is a guess"

Commonwealth v. Pittman, 25 Mass. App. Ct. 25, 28 (1987). A further-aggravated sentence is provided for subsequent offenses.

An ABDW is also aggravated if it causes serious bodily injury, or if the defendant knows or has reason to know that the victim is pregnant, or if the defendant knows that the victim has an outstanding abuse restraining order against the defendant, or if the defendant is 18 years of age or older and the victim is under the age of 14. G.L. c. 265, § 15A(c)).

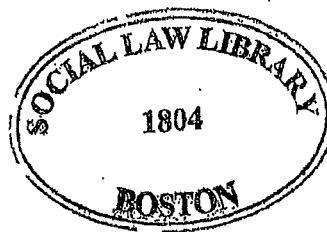
12. **Lesser included offenses.** ABDW has as lesser included offenses assault with a dangerous weapon, and assault and battery (Instruction 6.140). *Commonwealth v. Beal*, 474 Mass. 341, 347 (2016) (ADW lesser included offense of ABDW); *Commonwealth v. Connolly*, 49 Mass. App. Ct. 424, 426 (2000) (assault and battery lesser included offense of ABDW). Both theories of assault (Instruction 6.120) are lesser included offenses of *intentional* ABDW; there is still an open question about whether both theories are lesser included offenses of *reckless* ABDW. See *Commonwealth v. Porro*, 458 Mass. 526, 534 & n.8 (2010). If the evidence would also permit a jury finding of a lesser included offense, the jury should be instructed on lesser included offenses (Instruction 2.280).

13. **Statement of reasons required if imprisonment not imposed.** A jury session judge sentencing for this or one of the other crimes against persons found in G.L. c. 265 who does not impose a sentence of incarceration "shall include in the record of the case specific reasons for not imposing a sentence of imprisonment," which shall be a public record. G.L. c. 265, § 41.

MODEL PENAL CODE
AND
COMMENTARIES
(Official Draft and Revised Comments)

With text of Model Penal Code as adopted
at the 1962 Annual Meeting of
The American Law Institute
at Washington, D.C., May 24, 1962

PART II
DEFINITION OF SPECIFIC CRIMES
§§ 210.0 to 213.6



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A.L.I. Model Penal Code Arts. 210 to 213

A-060

§ 210.0 OFFENSES AGAINST THE PERSON Art. 210

§ 210.0 Definitions *

In Articles 210-213, unless a different meaning plainly is required:

- (1) "human being" means a person who has been born and is alive;
- (2) "bodily injury" means physical pain, illness or any impairment of physical condition;
- (3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;
- (4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

Comment

Section 210.0 defines several terms which are applicable to the provisions of Articles 210 through 213. Commentary on each of the definitions is contained in the discussion of the substantive provisions to which it is relevant.

§ 210.1 Criminal Homicide **

- (1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.
- (2) Criminal homicide is murder, manslaughter or negligent homicide.

* *History.* Presented to the Institute as Section 201.60 of Tentative Draft No. 9 and considered at the May 1959 meeting. *See generally* ALI Proceedings 105-219 (1959). Reprinted as Section 211.4 in Tentative Draft No. 11. Presented again to the Institute in the Proposed Official Draft and approved at the May 1962 meeting. *See* ALI Proceedings 226-27 (1962).

** *History.* Presented to the Institute as Section 201.1 of Tentative Draft No. 9 and considered at the May 1959 meeting. *See* ALI Proceedings 106-21 (1959). Approved by the Institute at the May 1959 meeting. *See* ALI Proceedings 191 (1959). Presented again to the Institute in the Proposed Official Draft and again approved at the May 1962 meeting. *See* ALI Proceedings 226-27 (1962). Detailed commentary was originally included in Tentative Draft No. 9 at 25-28 (1959).