

APPENDIX A

United States v. Adiar,
No. 21-50218, pub. op.,
16 F.4th 469 (5th Cir. 2021)

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 26, 2021

Lyle W. Cayce
Clerk

No. 21-50218
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JACOB ALLEN ADAIR,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CR-303-1

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Jacob Allen Adair appeals the 57-month within-guidelines prison sentence that the district court imposed following his guilty-plea conviction for possessing a firearm after a felony conviction. He argues that the district court erred in assigning a base offense level under U.S.S.G. § 2K2.1(a)(4)(A) because his prior Texas robbery conviction does not constitute a “crime of violence.”

We review challenges to a district court’s interpretation and application of the Sentencing Guidelines de novo. *United States v. Howell*,

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838 F.3d 489, 493 (5th Cir. 2016). “In determining if a prior conviction is for an offense enumerated or defined in a Guidelines provision, we generally apply the categorical approach.” *Id.* at 494. That is, we “look to the elements of the offense enumerated or defined by the Guideline section and compare those elements to the elements of the prior offense for which the defendant was convicted.” *Id.* “If the offense is an enumerated offense, . . . we first determine the elements contained in the generic, contemporary meaning of that offense.” *Id.*

The term “crime of violence,” as used in § 2K2.1, is defined in U.S.S.G. § 4B1.2(a). § 2K2.1 cmt. n.1. That subsection provides that “‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year,” that either “(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 . . . or explosive material.” U.S.S.G. § 4B1.2(a). While the Government concedes that Texas robbery does not constitute a crime of violence under § 4B1.2(a)(1), it contends that the state offense fits within the generic, contemporary meaning of “robbery” and thus corresponds to an enumerated crime of violence under § 4B1.2(a)(2). In support of this position, the Government cites *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 554-55 (5th Cir. 2013) (en banc). Adair maintains that *Santiesteban-Hernandez* is not dispositive.

In *Santiesteban-Hernandez*, the court determined that the elements of Texas robbery “substantially correspond to the basic elements of the generic offense” of robbery. 469 F.3d at 381. Accordingly, the court held that Texas robbery qualifies as a “crime of violence” for purposes of U.S.S.G. § 2L1.2. *Id.* at 378. We have held that “a prior conviction that would qualify for the

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‘crime of violence’ enhancement under § 2L1.2 would also qualify for the enhancement under § 4B1.2.” *United States v. Flores-Vasquez*, 641 F.3d 667, 671 n.1 (5th Cir. 2011). Therefore, Adair’s Texas robbery conviction qualifies as a crime of violence under § 4B1.2(a)(2), and the district court properly applied § 2K2.1(a)(4)(A).

Adair contends that *Santiesteban-Hernandez*’s fourth footnote left open the possibility that generic robbery has a narrower mens rea element than Texas robbery. That footnote reads as follows:

This appeal does not present the question of whether the mens rea differs between the statute governing the defendant’s offense and the generic, contemporary meaning of the offense. However, such a situation would not alter the analysis; rather, mens rea would be another basic element on which the two definitions must correspond.

Santiesteban-Hernandez, 469 F.3d at 379 n.4.

Adair misconstrues this footnote, which, we have explained in an unpublished opinion, simply recognizes that the “generic definition of robbery did not require a particular mens rea.” *United States v. Ortiz-Rojas*, 575 F. App’x 494, 495 (5th Cir. 2014) (unpublished).¹ Moreover, Adair’s reading of this footnote is at odds with the opinion’s conclusion that Texas robbery and generic robbery “substantially correspond.” *Id.* at 381; see *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (explaining that “if the crime of conviction covers any more conduct than the generic offense,” the

¹ Of course, Texas robbery is not a strict liability crime. As *Santiesteban-Hernandez* recognized, Texas robbery has theft as one of its elements, 469 F.3d at 380, and Texas theft requires a “specific intent to deprive the owner of property.” *Ex parte Smith*, 645 S.W.2d 310, 312 (Tex. Crim. App. 1983).

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two do not correspond under the categorical approach). Two offenses cannot substantially correspond if they do not require the same mens rea.

The judgment of the district court is AFFIRMED.

APPENDIX B

U.S.S.G. §2K2.1

§2K1.7

Commentary

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

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

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

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

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

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

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

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

(b) Specific Offense Characteristics

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

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

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

- (3) If the offense involved—
 - (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or
 - (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

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

- (5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.
- (6) If the defendant—
 - (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
 - (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.
- (7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with

knowledge or intent that it would be used or possessed in connection with another offense, apply—

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

Commentary

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

Application Notes:

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

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

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

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

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

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

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

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a “**semiautomatic firearm that is capable of accepting a large capacity magazine**” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.
3. **Definition of “Prohibited Person.”**—For purposes of subsections (a)(4)(B) and (a)(6), “**prohibited person**” means any person described in 18 U.S.C. § 922(g) or § 922(n).

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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).

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, impris-

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onment, work release, or escape status. “Crime of violence” and “controlled substance offense” have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term “*defendant*”, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

- (C) **Upward Departure Provision.**—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
- (D) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

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

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

“*Another felony offense*”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

“*Another offense*”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

- (D) **Upward Departure Provision.**—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

- (E) **Relationship Between the Instant Offense and the Other Offense.**—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

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

For example:

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

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

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the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629–631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804).
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§2K2.2. [Deleted]

<i>Historical Note</i>	Section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), effective November 1, 1987, amended effective January 15, 1988 (amendment 34), November 1, 1989 (amendment 189), and November 1, 1990 (amendment 333), was deleted by consolidation with §2K2.1 effective November 1, 1991 (amendment 374).
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§2K2.3. [Deleted]

<i>Historical Note</i>	Section 2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense), effective November 1, 1989 (amendment 189), was deleted by consolidation with §2K2.1 effective November 1, 1991 (amendment 374). A former §2K2.3 (Prohibited Transactions in or Shipment of Firearms and Other Weapons), effective November 1, 1987, was deleted by consolidation with §2K2.2 effective November 1, 1989 (amendment 189).
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§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

- (a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.
- (c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined

APPENDIX C

U.S.S.G. §4B1.1

PART B — CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

- (c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:
- (1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).
 - (2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—
 - (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or

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§ 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C. § 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	262–327.

Commentary

Application Notes:

- Definitions.**—“*Crime of violence*,” “*controlled substance offense*,” and “*two prior felony convictions*” are defined in §4B1.2.
- “Offense Statutory Maximum.”**—“*Offense Statutory Maximum*,” for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the “Offense Statutory Maximum” for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.
- Application of Subsection (c).**—
 - In General.**—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).
 - Subsection (c)(2).**—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.
 - “Otherwise Applicable Guideline Range.”**—For purposes of subsection (c)(2)(A), “otherwise applicable guideline range” for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

- (i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).
 - (ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).
- (D) **Imposition of Consecutive Term of Imprisonment.**—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).
- (E) **Example.**—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. **Departure Provision for State Misdemeanors.**—In a case in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure

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consistent and rational implementation for the Committee’s view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E.1.1 applies).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).
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§4B1.2. Definitions of Terms Used in Section 4B1.1

- (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*.

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consistent and rational implementation for the Committee’s view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E.1.1 applies).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).
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 - (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*.

Commentary

Application Notes:

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

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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.

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.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).
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§4B1.3. Criminal Livelihood

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than **13**, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than **11**.

Commentary

Application Notes:

1. **“Pattern of criminal conduct”** means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.
2. **“Engaged in as a livelihood”** means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant’s primary occupation in that twelve-month period (*e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant’s legitimate employment was merely a front for the defendant’s criminal conduct).

Background: Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to ensure that the guidelines specify a “substantial term of imprisonment” for a defendant who committed an offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant’s income.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 50); November 1, 1989 (amendment 269); November 1, 1990 (amendment 354); November 1, 2010 (amendment 747).
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