Sentencing for the Possession or Use of Firearms During a Crime

Possible Commission Responses to Pub. L. No. 105-386 and Other Issues Pertaining to 18 U.S.C. § 924(c)

Report of the Firearms Policy Team

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INTRODUCTION TO THE WORK OF THE FIREARMS POLICY TEAM

I. Our Charter and Scope of Work

The Firearms Policy Team was given a broad mandate, with both short- and long-term components. In the short term, the Team was directed to develop options for the Commission to address recent legislation, specifically, Public Law 105-386, popularly known as the "Bailey Fix."[1] This legislation was designed to undo the effects of the Supreme Court's *Bailey* decision and expand the coverage of 18 U.S.C. § 924(c), which criminalizes and provides for mandatory minimum and consecutive penalties for using or carrying a firearm during and in relation to a violent or drug trafficking offense. The legislation adds possession of a firearm "in furtherance" of a crime to the prohibited acts, and also adds new tiered sanctions for brandishing or discharging a firearm. It also increases existing penalties for repeat offenders. This report presents options to address these changes.

On a slower track, the Team was directed to "undertake a comprehensive examination of the firearms and explosives guidelines with an eye toward recommendations that might be made to address problem areas, make them more internally consistent . . . and generally improve their operation." Part of this effort included review of recommendations for guideline amendments received by the Commission from the Department of the Treasury and the Bureau of Alcohol, Tobacco, and Firearms. In addition, in the past year firearms and gun control have become a higher priority on the national policy agenda. Bills affecting firearm sentencing have passed both houses of Congress in various forms, and may become law in the coming year. Developing responses to any such legislation is currently within the scope of the Team's work.

II. Two Parts to the Team's Subject Matter

The Team's subject matter can be divided into two subject areas: *firearm sentence enhancements*, which is the focus of this report, and *regulatory and status* offenses.

Firearm sentence enhancements (called FSEs in the research literature) increase penalties for offenders who use or possess a weapon during the commission of another offense. The most important of these include 18 U.S.C. § 924(c) and also the specific offense characteristics (or SOCs) for weapon use found in seventeen different guidelines. Legally, section 924(c) is not merely a sentencing enhancement, but defines a substantive offense with elements that must be proven beyond

[1] The original charter also included developing options to respond to Pub. L. 105-277, which adds to the list of persons prohibited from possessing a firearm under 18 U.S.C. 922(g) aliens present under a non-immigrant visa. It was later determined that this change is in the nature of a purely technical amendment to guideline commentary, and could be best handled with a package of other such amendments.

a reasonable doubt. Further, convictions under section 924(c) are sentenced under a separate guideline, USSG §2K2.4, with several unique characteristics. Because of the similar purposes of the statutory and SOC increases, we discuss them together in this report.

Firearm regulatory and status offenses are found in multiple provisions of Chapters 18, 44, 53, and 22 of Title 18 of the United States Code, and in Chapter 53 of Title 26. They are sentenced under separate guidelines, USSG §§2K2.1 and 2K2.5. These laws involve violations of licensing, registration, record-keeping, or taxation requirements for transactions involving firearms or explosives. They prohibit certain types of transactions involving some types of firearms, as well as the transfer of firearms to certain classes of people. They completely prohibit possession of some types of weapons, and possession of any weapons in certain places or by certain classes of people. By far the most commonly charged status violation has been 18 U.S.C. § 922(g), which bans possession of a firearm by felons and other "prohibited persons."

This report on firearms sentence enhancements is divided into two parts. Part One provides a general introduction to the statutory and guideline FSEs. Considerable background information is presented, often in footnotes, from case law, research, and from published commentary on the guideline. Part Two presents five specific "Action Items" for Commission consideration. Three of the items contain possible responses to Pub. L. 105-386, the so-called "Bailey Fix" legislation. One item involves a circuit split over the circumstances in which an offender may receive both a statutory and guideline sentence increase at the same time. The final item involves an incongruity in the sentencing of 18 U.S.C. § 924(o) convictions for conspiracy to commit an offense under section 924(c). Each Action Item is stated as a question and lists options for how it might be answered.

PART ONE: OVERVIEW OF SENTENCING FOR FIREARM POSSESSION AND USE

I. Introduction to 18 U.S.C. § 924(c)

A. History and structure

The most recent version of 18 U.S.C. § 924(c) makes it a crime for

> any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . .

Conviction under the statute carries a minimum sentence of "not less than" five years' imprisonment. Increased penalties of not less than seven and ten years are provided when firearms are "brandished" or "discharged," respectively, and still higher minimum penalties apply when more dangerous weapons are involved, or when the defendant has previously been convicted under section 924(c).

This version of section 924(c) is the latest in a long line of revisions.[2] Section 924(c) was first enacted as an amendment to the Gun Control Act of 1968. It provided a minimum sentence of one year's imprisonment and a maximum of ten years for whoever "uses a firearm to commit any felony" or "carries a firearm unlawfully during the commission of any felony."

In the Comprehensive Crime Control Act of 1984—the same legislation that contained the Sentencing Reform Act—Congress made clear that a conviction under section 924(c) constituted a separate offense and provided a mandatory minimum penalty of five years' imprisonment. The Act specifically provided that "the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection" and that the term of imprisonment "shall not run concurrently to any other term of imprisonment imposed on the person. . . ." Congress also provided a minimum sentence of 10 years' imprisonment "[i]n the case of a second or subsequent conviction" under the statute.

In 1986, the statute began to provide for more severe penalties for certain types of firearms that are considered more dangerous than simple handguns or sporting rifles: namely, short-barreled rifles or short-barreled (*e.g.*, sawed-off) shotguns, or semi-automatic assault weapons. Even longer

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[2] For comprehensive discussion of the legislative history of 18 U.S.C. § 924(c), *see* Thomas A. Clare, note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. § 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815 (1994); *United States v. Hill*, 971 F.2d 1461 (10th Cir. 1992). *See* also Kristin Whiting, *In the Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?*, 5 J. L. & POL'Y 679, 682-91 (1997).

mandatory minimum penalties were provided for the most dangerous weapons: machine guns, destructive devices, or firearms equipped with silencers or mufflers.

Amendments in 1988, 1990, 1994, and Pub. L. 105-386 in 1998, required ever-tougher mandatory sentences for offenders with prior convictions under the statute. Currently, a term of "not less than 25 years" is mandated for any second or subsequent conviction, and a minimum of life in prison is required if the second or subsequent conviction is for one of the most dangerous types of weapons.[3]

Revision of the statute may continue because bills to amend the provision are again pending in Congress.[4]

B. The *Bailey* and *Muscarello* decisions

In *Bailey v. United States*, 516 U.S. 137 (1995), the U. S. Supreme Court narrowed application of the "uses" provision in section 924(c). Different circuits had come to interpret this term in different ways. Some courts suggested that mere possession could support a conviction,[5] while others required that the firearm be possessed in a way that facilitated the crime, based on factors such as the gun's proximity and accessibility during the criminal conduct.[6] Other circuits held that possession of a gun was insufficient to support a conviction absent evidence that the weapon was actively used.[7]

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[3] It is now settled law that a second section 924(c) charge can count as a subsequent conviction even if the counts are sentenced in a single proceeding. Courts have held that the statutes require, and the Constitution does not bar, consecutive sentences amounting to life in prison for multiple counts of convictions sentenced at a single proceeding, even for offenders with "insignificant" prior criminal records. *See, e.g., United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998)(upholding constitutionality of a 1141 month sentence for a string of five armed robberies for defendants with mitigating circumstances including insignificant prior criminal records and productive lives as college students). *See generally, Deal v. United States* 508 U.S. 129 (1993).

[4] *See, e.g.*, S. 254, § 903, 106th Cong. (1999)(increasing penalty for discharge of a firearm to 12 years and adding a 15-year penalty when a firearm is used to injure a person).

[5] *See, e.g., United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991)(mere possession sufficient to satisfy section 924(c)).

[6] Such was the *en banc* holding of the D.C. circuit in *Bailey v. United States*, 36 F.3d 106 (D.C. Cir. 1994).

[7] *See, e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2nd Cir. 1988).

The U. S. Supreme Court granted *certiorari* in *Bailey* to clear up these conflicts, which were leading to disparate application of the statute.[8] It concluded that "use" should be given its ordinary meaning and was limited to those instances in which there was "active employment" of a firearm. The offender had to have fired or attempted to fire the weapon, brandished or displayed it, referred to the firearm in a way intended to threaten someone, or used the gun in some other way (*e.g.*, to strike a person or as barter for drugs). According to analysis of the Commission's ISS data,[9] this narrowing of "use" excluded approximately 1500-2200 cases per year from potential coverage under the statute.

The Supreme Court also noted that the "carry" prong of section 924(c) "brings some offenders who would not satisfy the 'use' prong within reach of the statute."[10] Defendants began to argue, however, that the carry prong also required that a gun be accessible or in some way ready for active employment in the offense. In *Muscarello v. United States*, 118 S.Ct. 1911 (1998), the Court held that Congress did not intend to limit "carry" for purposes of section 924(c) to carrying on one's person or in a manner making it ready for immediate use. Instead, the ordinary meaning of "carry", and the legislative history of the statute, support a definition that would include transporting a firearm in a vehicle, even if the weapon is not immediately accessible. The Court did note that "[t]he limiting phrase 'during and in relation to' should prevent misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims."

C. The legislative response

i. Legislative history

Following the Supreme Court's *Bailey* decision, several bills were introduced in Congress to expand the scope of section 924(c). Senator Helms introduced S. 191, which added "possession" to the list of acts for which defendants would receive the five-year enhancement, and increased the minimum to ten years if the firearm was discharged. H.R. 424 took an alternative approach and subsumed the "use" and "carry" prongs by *replacing* them with "possession," but only if the possession were "in furtherance of the crime." The House Judiciary Committee Report accompanying the bill stated that the "in furtherance" requirement was meant to be more stringent than the standard in the current statute ("during and in relation to") and in the guideline SOCs. "The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying

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[8] For more detailed discussion of the background to the Supreme Court decision, *see* Tiffany Gulley Becker, *The "Active Employment" Standard: Much-Needed Clarification for Determining Liability for "Use" of a Weapon During the Commission of a Drug-Related Crime*, 61 MO. L. REV. 1065 (1996).

[9] The Intensive Study Sample (ISS) is a randomly-selected five percent sample of cases sentenced in FY1995. It was developed by Commission staff to permit more detailed analysis of offense and offender characteristics, particularly the use of weapons, the nature of drug trafficking organizations, and the calculation of criminal history points.

[10] *Bailey v. United States* 516 U.S. 137 (1995).

offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence."[11]

The House bill also increased the mandatory minimum term to ten years for possession, use, or carrying, fifteen years for brandishing, and twenty years if the weapon was discharged. Both the House and Senate bills required thirty-year terms for certain particularly dangerous types of weapons, and also subjected repeat offenders to a doubling of penalties for possession and increases up to life in prison for other types of use.

The legislative history makes clear that Congress was convinced *Bailey* was a setback for law enforcement and crime control. The decision was characterized as "soft on crime."[12] The proposed bill was described as needed to restore a tool for prosecutors, and to ensure that gun possessors get a minimum of five years in prison.

Congress gave limited attention to the guideline approach to firearm sentencing during debate over the Act. At the Senate hearing, one witness testified that the Commission should be directed to implement changes to fill any gaps left by the *Bailey* decision.[13] But another witness stated that guideline enhancements are "relatively minor and have little or no impact on the sentence that is imposed."[14] During floor debates in the House, Congressman Scott urged that "The Sentencing Commission should review these crimes and deliberate without politics and without political considerations to assess a reasonable penalty."[15]

ii. Pub. L. 105-386, "A bill to throttle the criminal use of guns"

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[11] HOUSE COMM. ON THE JUDICIARY, TO PROVIDE FOR INCREASED MANDATORY MINIMUM SENTENCES FOR CRIMINALS POSSESSING FIREARMS, AND FOR OTHER PURPOSES, H.R. REP. NO. 344, 105th Cong.,1st Sess. 11 (1997) (To accompany H.R. 424).

[12] *A Bill to Throttle Criminal Use of Guns, 1997: Hearings on S. 191 Before the Comm. on the Judiciary*, 105th Cong., 1st Sess. 4 (1997) (Statement of Senator Jesse Helms "[a felon who] hides a weapon in a crack house when he hears the cops are coming will get off with a slap on the wrist.").

[13] *Violent and Drug Trafficking Crime: Hearing Before the Senate Judiciary Comm.*, 104th Cong. (Sept. 18, 1996) (Statement of Professor David Zlotnick).

[14] *Supra*, note 11 at 30 (Statement of Thomas G. Hungar). In his prepared statement, Mr. Hungar cites judges' ability to depart from the guidelines. He also described how the offense level for a first-time offender convicted of possessing 200 grams of marijuana would be increased only from level 6 to level 8, resulting in an imprisonment range in both cases of 0-6 months, which would permit the judge to impose probation.

[15] 144 Cong. Rec. H532 (Feb. 24, 1998).

The final version of the legislation, combining elements of both the House and Senate bills, was signed into law by President Clinton on November 13, 1998.[16] It adds "possession in furtherance of the crime" to the list of acts for which defendants can be convicted under section 924(c), while retaining the requirement that the use, carrying, or possession be "during and in relation" to the crime.[17] This effectively reverses the *Bailey* decision.

In addition, for reasons that are not made clear by the legislative history, the Act changed the specific increase required from a fixed term of years to increases of "*not less than*" five, ten, or some other term of years. This "not less than" construction, which is also found in several other mandatory minimum provisions, provides a specific minimum enhancement and has the legal effect of making the *maximum* possible sentence life in prison.[18] This change raises two issues in guideline application.

First, the change may raise a question about the proper interpretation of USSG §2K2.4, which states that the sentence increase for section 924(c) convictions should be the term that is "required by statute." While the best reading, in light of case law on related statutes, is that the sentence should be the *minimum* term required by statute, some may argue that *any* term within the authorized range is a legal sentence within the guidelines. Possible Commission responses to this issue are discussed in Action Item #1.

The new statutory maximum of life in prison may also affect application of the career offender guideline, §4B1.1. This guideline sets offense levels for repeat violent and drug trafficking offenders based on the highest statutory maximum for any qualifying offense of conviction. Application note 1 of §4B1.2 defines offenses that count as crimes of violence or drug trafficking, and convictions under section 924(c) appear to qualify as both prior or instant offenses. Thus, because section 924(c) carries a maximum of life, an offense level of 37—the highest possible under §4B1.1—could be applied in any case that includes a section 924(c) conviction. This result would substantially increase penalties for some offenders from what they were prior to the legislation, and it appears inconsistent with other guideline provisions. The ambiguity in the current guidelines may lead to litigation and disparate application. This issue is discussed in greater detail, along with possible Commission responses, in Action Item #2.

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[16] Appendix C contains the full text of the Act.

[17] S. 362, 105th Cong., 1st Sess. (1997), introduced by Senators Leahy and Biden, would have substituted "in close proximity to" a crime of violence or drug trafficking in lieu of the "in relation to" formulation.

[18] Penalty statutes without a specified maximum implicitly authorize a sentence of life. *See, e.g., United States v. Jackson*, 835 F.2d 1195, 1197 (7th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988); *Walberg v. United States*, 763 F.2d 143, 148-49 (2d Cir. 1985); *United States v. Brame*, 997 F.2d 1426 (11th Cir. 1993).

The amended statute also includes a regime of *tiered sanctions* for different types of firearm uses. The mandatory term is increased to not less than seven years if a gun is *brandished*, and not less than ten years if it is *discharged*. The term "brandish" is defined as "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." This is slightly broader than the definition found in the *Guidelines Manual*, which states that "'[b]randished' with reference to a dangerous weapon (including a firearm) means that the weapon was pointed or waved about, or displayed in a threatening manner."[19] Under the statute, an increase would apply if a defendant merely referred to a weapon that was present, even if the weapon was not visible.

The statute also establishes a standard for "possession in furtherance of the crime" that is different, at least linguistically, from the standards found in various guideline SOCs that call for increases when weapons are merely "possessed" or "possessed in connection with" the underlying offense. The implications of these differences between the statutory and guideline definitions and standards are the subject of Action Item #3.

The Act also calls for minimum terms of ten years if the firearm was a short-barreled rifle, shotgun, or semiautomatic assault weapon. Thirty-year minimum terms are required if it was a machine gun or destructive device, or was equipped with a silencer or muffler.[20] Offenders with previous convictions under the statute are subject to minimum terms of at least 25 years. If a repeat offender's current offense involves one of the more dangerous weapons or a silencer, the minimum sentence is life in prison.

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[19] USSG §1B1.1, commentary (n.1(c)).

[20] Based on the Commission's ISS data, hand guns are by far the most common type of weapon and these other types of weapons are relatively rare. COURTNEY SEMISCH, U.S.S.C., 1 MULTIPLE COUNTS (1998).

II. Introduction to the guideline weapon SOCs and USSG §2K2.4

A. The general guideline approach

The guidelines also punish the possession or use of a firearm, but there are important differences between the statutory and guideline approaches.

First, section 924(c) is a substantive offense, not a mere sentencing enhancement. Its mandatory minimum penalty is imposed only if the statute is charged and its elements proven beyond a reasonable doubt at trial or by a defendant's guilty plea. The applicability of guideline adjustments, in contrast, are determined by the judge at the sentencing hearing based on a preponderance of the evidence standard. Furthermore, under the relevant conduct rule, a defendant can be held accountable for a weapon at sentencing if some nexus between the gun and the offense can be established.[21] The gun need not have been specifically charged, nor must a conviction under section 924(c) have been obtained. A guideline firearm increase can be imposed even if the defendant has been acquitted of a section 924(c) count in a multi-count indictment.[22]

In addition, by using offense level increases and the Sentencing Table to determine imprisonment ranges, the guidelines punish firearms *proportionately* as a percentage increase over the time imposed for the underlying crime. The increase for the firearm depends on the seriousness of the underlying crime. For example, the five-level increase required by USSG §2B3.1 for a first offender who possess a gun during a non-bank robbery in which less than $10,000 is taken (offense level 20 + 5) results in a 24-month increase in the minimum guideline range. The same five-level increase for a first offender who possesses a gun during a *bank* robbery in which between $50,000 and $250,000 is taken (offense level 24 + 5) results in a 36-month increase.

Section 924(c), in contrast, increases sentences by a *fixed* minimum number of years. All first-time offenders who possess a handgun receive at least a five-year increase, regardless of the underlying crime. This difference in the way the increase is determined complicates the integration

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[21] *See* USSG §1B1.3. For fuller discussion of the purposes of the relevant conduct rule, *see* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines,* 41 S.C.L REV. 495 (1990).

[22] *See United States v. Watts*, 117 S.Ct. 633 (1997). For criticism of the guidelines' real-offense approach, *see* David Yellin, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993); K.R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing,* 45 STAN. L. REV. 523 (1993). For a defense of the approach, *see* J.R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System,* 91 NW U. L. REV. 1342 (1997).

of the statutory penalties with the guidelines in a way that avoids "cliffs," "tariffs," or other anomalies in the guidelines' system of calibrated proportionate punishment.[23]

B. Weapon SOCs

The original guidelines were partly based on an empirical analysis of sentences imposed on 10,000 cases in 1985. The presence of a weapon was found to be one of the factors correlated with increased sentences. The amount of increase was found to vary with the type of crime. In drug cases, involvement of a weapon increased sentences by about a third.[24] In burglaries, a weapon was somewhat less significant, while in rapes, robberies, and thefts, it was somewhat more. Because too few cases were available for reliable estimates, the analysis did not identify differences in the degree of increase associated with *how* weapons were used, *e.g.*, brandished, discharged, or merely possessed. Additional increases in sentences were found when victims were injured from the gun use.[25]

Based on this analysis, the Commission incorporated firearm enhancements in the form of specific offense characteristics (SOCs) in 17 different guidelines. The adjustments apply both to firearms and to other "dangerous weapons." Definitions for "dangerous weapon," "firearm," "destructive device," "brandished," and "otherwise used" are provided in application notes to USSG §1B1.1.

Appendix A provides the text of the SOC for each of the 17 guidelines. Note that the wording of the enhancements varies somewhat, and some guidelines provide for tiered sanctions while others do not. Several reasons explain the variety of approaches. In some cases, the amount of increase deemed appropriate depends on the base offense level associated with the guideline and on the

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[23] "Tariffs" occur when a single fact about an offense leads to a disproportionate increase in a sentence, without regard to other factors that are important in calibrating the offense seriousness. "Cliffs" arise when a mandatory minimum penalty creates a sharp break in the graduated increase in severity of punishment for offenses of increasing seriousness. For a general discussion of tariffs, cliffs, and other problems created by the interaction of the mandatory minimum penalty statutes and the guidelines, *see* USSC, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (August 1991), especially pages 27-33.

[24] Drug sentences were substantially shorter on average than today, however. The drug guidelines were ultimately based on the quantity thresholds and ratios found in the mandatory minimum statutes, not on the Commission's analysis of past practices. Data showing how sentences have changed for various types of crimes over the past fifteen years can be found in Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12 (1999).

[25] For the full report of these analyses *see* USSC, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, Table 1a, 36 and accompanying text (1987).

presence of other SOCs. In other cases, the Commission incorporated verbatim language from statutory directives.

Some guidelines, most notably §2D1.1 (drug trafficking), provide a single increase when a weapon was "possessed." An application note in the commentary states that the SOC should be applied if a weapon is *present*, unless it is "clearly improbable that the weapon was connected with the offense" (USSG §2D1.1, commentary (n. 3)). This appears to shift the burden to the defendant to prove that a weapon that is present at a crime scene is not connected to the offense, and several circuits have so held.[26]

The guidelines governing counterfeiting (§2B5.1) and fraud (§2F1.1) provide for a two-level increase if a weapon was "possessed *in connection with the offense*" [emphasis supplied]. They also provide for an *alternative base offense level* of 13 if the total punishment, including the firearm adjustment, does not reach that level. Thus, in any counterfeiting or fraud case involving a weapon, the offense level will be at least 13 regardless of the amount of loss or other factors, making the possibility of simple probation sentences unlikely. The unusual structure of the firearms SOCs in these guidelines is partly the result of previous Commissions' responses to Congressional directives regarding firearms and fraud-related injuries.

The guidelines provide for tiered sanctions in a variety of ways. As shown in Table 1, attached as Appendix B, the amount of offense level increase associated with each type of use also varies somewhat from guideline to guideline. The Table also shows the number of cases receiving each SOC increase in 1998 and their average final sentences. The number of offenders receiving the statutory increase and their average final sentences are also provided.

The most frequently applied adjustment is the two-level increase for possession of a weapon during a drug trafficking offense. The average increase under the guidelines—28 months—was considerably less than the average punishment of 70.1 months that the defendants received under section 924(c).[27]

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[26] *See, e.g., United States v. Hall*, 46 F.3d 62, 63 (11th Cir. 1995); *United States v. Roberts*, 980 F.2d 645, 647 (10th Cir. 1992); for a complete summary, *see* JEFRI WOOD, FED. JUD. CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES, 55 at II.C.1 (September 1998). This shift of the burden by the Commission's commentary is somewhat anomalous and has been criticized by defense attorneys because the general rule is that "the burden is on the government to establish the initial offense level, and the burden is then on the party seeking any adjustment to the offense level" (287).

[27] The effect of an SOC depends on what an offender's guideline range would be without it. To determine how much SOCs typically add to sentences, we examined the actual offense levels and criminal history categories of offenders who received them, using the Commission's FY1997 Monitoring Database for all violent and drug trafficking guidelines that contain firearm SOCs. The position of offenders' sentences within their guideline ranges were determined. For offenders who

The robbery guideline SOC was the next most frequently used, and was applied more often than the statutory penalty in these cases. The average guideline increase when a firearm was discharged was 60.4 months—essentially the same as the previous statutory increase, but less than the mandatory increase under the new legislation. For otherwise using a weapon, the average guideline increase was 55.6 months, but it dropped to 38.5 months for brandishing.

As Table 1 shows, the SOCs in other violent offense guidelines were applied to far fewer offenders, and were less severe than the robbery increases, with the exception of discharge of a firearm during an aggravated assault, which resulted in an average sentence increase of 30.3 months.

C. USSG §2K2.4

In addition to the SOCs in these 17 guidelines, which apply regardless of whether a defendant is convicted under section 924(c), a guideline was written specifically for violations of section 924(c) and two similar provisions. These involve the use of fires or explosives during the commission of any federally prosecutable felony (18 U.S.C. § 844(h)) or the use of armor-piercing ammunition during the commission of a violent or drug trafficking offense (18 U.S.C. § 929(a)). In several ways, this guideline—§2K2.4—is unique in the guideline system.

USSG §2K2.4 does not specify a base offense level or specific offense characteristics. Instead, it simply provides that "If the defendant, whether or not convicted of another crime, was convicted under sections 844(h), 924(c), or 929(a), the term of imprisonment is that required by statute." Application note 1 states that "[i]n each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment." USSG §5G1.2 and accompanying commentary further direct that sentences imposed for the statutes indexed to the guideline "shall be determined by that statute and imposed independently."

Together with the "set aside" procedures described below, these provisions implement the mandatory minimum consecutive punishment called for by the statutes indexed to the guideline.

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received an upward or downward departure, we placed them at the top or bottom of their range, respectively. We then placed them at the same position within the guideline range they would be in without the firearm SOC. The difference in months of imprisonment between the two points was calculated and averaged across all offenders. Just as the final sentences of some defendants who receive statutory enhancements will be affected by a departure, some defendants receiving SOCs will receive a departure. There is no way to know whether the departure was from the firearm enhancement or from some other component of the final sentence. The calculation method we used compares the effects of the firearm enhancements, per se.

They ensure that the full punishment mandated by the statute for the firearm will be imposed consecutively to the full punishment required by the guidelines for the underlying offense.

To avoid duplicative punishment—or "double counting" of the firearm—in cases in which an offender is convicted of both section 924(c) and a violent or drug trafficking offense, Application Note 1 to §2K2.4 provides that the offense level should not be increased by any weapon SOC found in a guideline for the "underlying offense." No defendant is to receive both the statutory and guideline increase for the same conduct. As discussed in Action Item #4, however, a split has developed in the circuits interpreting this note, and some defendants do receive both guideline and statutory increases as part of the same sentence.

Another unique aspect of the guidelines' treatment of section 924(c) convictions concerns offenders who are convicted both of the substantive offense and of conspiracy to commit the offense, which is charged under 18 U.S.C. § 924(o). The guidelines' current approach appears to violate a directive in the Sentencing Reform Act to avoid duplicative punishment when an offender is convicted both of a conspiracy and a substantive offense. This issue is discussed more fully in Action Item #5 below.

i. The "set aside"

The most unusual aspect of §2K2.4, and the one that raises the most practical and policy concerns, is the "set aside." This is a short-hand way of referring to the guideline procedures that exclude §2K2.4 from the grouping rules that apply to other convictions, and instead simply adds the consecutive term required by statute onto the guideline sentence. To fully appreciate the consequences of the set aside, it may be useful to describe in greater detail how it differs from normal procedure.

Ordinarily, when a case involves multiple counts of conviction, and conduct from one count is an SOC to another, the counts are grouped together.[28] For example, if a defendant is convicted of one count of bank robbery and one count of assault on a teller during the bank robbery, the counts are grouped because the robbery guideline (§2B3.1) includes an SOC for injury. The count with the highest offense level becomes the offense level for the group. This prevents persons who are charged with bank robbery plus assault from being treated differently from persons who are charged only with bank robbery. The grouping rules in guideline 3D1.2 reduce the impact of arbitrary charging variations on sentences for offenders who have engaged in similar conduct. The rules also prevent duplicative punishment that might occur if the assault were taken into account both by the SOC in the robbery guideline and by the separate assault guideline.

Similar dilemmas arise when there is a conviction for section 924(c) and the underlying offense is sentenced under a guideline that includes a firearm SOC. But to strictly satisfy the statutes' requirement of mandatory minimum and consecutive sentences—and to ensure that the term imposed for the firearm is added to the full guideline sentence for the underlying crime—§2K2.4 is excluded

[28] Section 3D1.2(c).

from the grouping rules,[29] and the sentences required by the statutes are imposed independently.[30] The punishment required by section 924(c) is simply added to the punishment for the other counts of conviction, without any attempt to calibrate the weight given to the firearm in relation to other aspects of the offense.

One effect of the set aside is that the firearm increase for offenders convicted of section 924(c) is different, and generally longer, than the guidelines would require. For example, the five-level increase for possession of a weapon during a robbery results in an increase in the minimum guideline range of five years or greater only in the most aggravated cases, such as those in which a victim is abducted and sustains permanent injury. Offense levels for first offenders must be 30 or higher, prior to addition of the weapon SOC, for the SOC to add five years or more to the minimum guideline range. First-time drug trafficking offenders need to be at the highest base offense levels before the two-point weapon adjustment in §2D1.1 will increase their sentences by more than 60 months. Even Criminal History Category VI drug traffickers must be at offense level 34.

For offenders with high offense levels or criminal history categories, however, the guideline increase can be greater than the statutory increase in some cases. To prevent charging of the statute from *lowering* sentences relative to what the guidelines would require, the second paragraph to Application Note 2 seeks to create an exception to the set aside in certain situations. It encourages upward departure if conviction under section 924(c) results in a lower sentence.[31] Judges appear reluctant to depart on these grounds, however. Since November 1993 when the application note was added, no §2K2.4 cases have involved such an upward departure.

The set aside procedures may be legally or politically compelled by the minimum and consecutive penalties mandated by the statutes indexed to §2K2.4. Certainly the Commission could have difficulty explaining to Congress, and perhaps to the Supreme Court,[32] any alternative system

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[29] Section 3D1.1(b).

[30] Section 5G1.2(a); commentary (par. 4).

[31] "An upward departure may be warranted so that the conviction under [the statute] does not result in a decrease in the total punishment." This language replaced a notoriously complicated procedure that *required* probation officers to determine what the sentence would have been without a section 924(c) conviction and if the firearm SOC for the underlying offense had been applied instead. Judges were directed to impose the greatest of the two sentences. *See* Amendment 489.

[32] *See United States v. Labonte*, 117 S.Ct. 1673, 1678-79 (1997)(holding that the Commission's interpretation of "statutory maximum" in 28 U.S.C. § 994(h), designed to avoid unwarranted double counting and unwarranted disparity resulting from charging variations, was

invalid because "Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity").

(such as the "combined guideline approach" found at USSG §2J1.6[33]) that could appear to give the statutes less than their full effect. But the set aside procedure has been problematic for users because it varies from normal guideline application. And as described in the next section, the set aside procedure fails to address two problems that concerned the original Commission that led to the creation of the grouping rules: the shift of discretion from judges to prosecutors, and the resulting potential for sentencing disparity.

III. Problems left unaddressed by the current guidelines and proposals for major revisions

A. A shift of discretion and potential sentencing disparity

One of the most common criticisms of the guidelines is that they have shifted sentencing discretion from judges to prosecutors.[34] Another frequent criticism of the guidelines is that they have failed to reduce sentencing disparity.[35] There is some evidence suggesting that these problems are particularly pronounced in the area of firearm sentencing, and that the recent legislation may exacerbate them.

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[33] *See* USSG §2J1.6, commentary (n. 3, par. 2). The combined guideline approach is used for several other statutes that require the imposition of consecutive punishment, such as 18 U.S.C. § 3146(b)(2), although these statutes do not call for a mandatory minimum *and* consecutive term of imprisonment. Under this approach, judges are instructed to impose the required consecutive term, but the term of imprisonment for the additional counts of conviction is adjusted so that the total punishment is what the guidelines would require. *See generally* USSG §5G1.2. The consecutive term is not simply added to the full guideline sentence for the additional counts, as it is under the set aside procedures used for §2K2.4.

[34] *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURT (1998), for the most recent and one of the most forceful statements of this argument.

[35] While the best evidence shows that the guidelines have reduced disparity on the whole, disparity has increased for some types of crimes. In an evaluation undertaken by Commission staff, robbery was one of only two offense types that failed to show a reduction of disparity under the guidelines. Field evidence suggests that charge bargaining, including dismissal of section 924(c) counts, is especially common in robbery cases and may help explain the continuing disparity. The evidence on disparity is reviewed in Paul J. Hofer et al, *The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity,* J. CRIM. L. & CRIMINOLOGY, (forthcoming) (available from the authors). The Commission's Four-Year Evaluation also found that sentencing disparity was reduced under the guidelines among offenders who were matched on a number of characteristics, including whether a weapon was present but not used. However, offenders convicted of section 924(c) were excluded from the study, so it could not capture disparity that might arise from disparate charging or plea bargaining practices.

Offenders whose crimes involve firearms are charged in three different ways. First, they may be convicted only of the underlying offense and receive any SOCs for firearms contained in the guideline for that offense. Second, they may be convicted of both section 924(c) *and* charges representing the underlying offense, in which case they do not generally receive SOC increases but a consecutive statutory penalty is imposed under §2K2.4. Third, they may be convicted *only* of section 924(c) and be sentenced under §2K2.4 alone. (The number of section 924(c)-only cases was 91 in 1998, continuing a downward trend from 206 in 1993.)

Obviously, the length of an offender's prison term can be dramatically affected by these differences in charging. If an applicable section 924(c) charge is not brought, sentences will almost always be shorter. Likewise, if the underlying offense is not charged, dramatic reductions of sentence are possible. Examination of a sample of cases convicted only of section 924(c) showed that defendants' sentences had often been reduced by half or more by the exclusion of counts representing the underlying offense.[36]

There is considerable evidence, spanning almost ten years and using different research methods, that section 924(c) violations are not charged and pressed in a significant number of cases that appear to legally qualify for them. The Commission's 1991 Mandatory Minimum Special Report to Congress found that section 924(c) was applied in about 41 percent of the bank robbery and drug trafficking cases in which it appeared warranted.[37] Field studies by Prof. Stephen Schulhofer and former Commissioner Ilene Nagel found that section 924(c) was a common subject of "charge bargaining" and the applicability of weapon SOCs were a subject of "fact bargaining."[38]

A more recent study by Commission staff found that convictions under section 924(c) were obtained in only a minority of cases in which a firearm was actually used, and that SOCs were also

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[36] Staff examined a random sample of 25 cases sentenced in FY1998. In two cases, defendants were sentenced for the underlying crime in a different federal or state proceeding. But in the remainder of the cases charges for the underlying offense had simply never been brought, or were dropped under the terms of a plea agreement. Recall that section 924(c) applies only to the involvement of a weapon in a crime "for which the person may be prosecuted in a court of the United States," which suggests there will always be a federal offense that could be charged in addition to the section 924(c) count.

One defendant in this sample was indicted for several counts of trafficking crack cocaine as well as for section 924(c). Under the terms of a plea agreement, the drug trafficking counts were dropped and the defendant was sentenced to 60 months, instead of the 211-248 months that would have applied to the drug trafficking counts. Drug trafficking charges were the most frequently declined or dismissed, but other defendants benefitted from the dismissal of car jacking, bank robbery, and conspiracy to commit murder charges.

[37] U.S. SENTENCING COMMISSION, SPECIAL REPORT, 56-58.

[38] Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 232, 272-78 (1989), describing fact bargaining over gun possession.

not applied uniformly.[39] While these individual studies have limitations that affect the precision of their estimates,[40] together they strongly suggest that potential section 924(c) charges are declined or dismissed in a sizeable number of cases in which they could apply, and that different regions and prosecutors have varying practices in this regard.

Several reasons for under-utilization of the firearm increases have emerged. First, problems of proof may make prosecutors reluctant to press for a section 924(c) conviction. For example, juries are reportedly reluctant to convict offenders who do not personally use a gun, and prosecutors may not bring section 924(c) charges in these situations even if they legally could apply. Second, offers to drop section 924(c) charges or exclude a weapon from guideline computations may be used to secure defendants' guilty pleas or their assistance in the prosecution of other persons. Third, both prosecutors and judges are willing to avoid weapon enhancements if they feel the "equities" of the situation demand it—*i.e.*, if a sentence for a particular defendant is long enough without it.[41] Staff analysis has shown that under-use of section 924(c) is more common in drug trafficking cases than in violent offenses.[42]

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[39] For a full account of these data, *see* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, AM. CRIM. L. REV. (forthcoming)(available from the author).

[40] *See, e.g.*, Patrick Langan's review of previous Commission work (on file). This study was discussed in Paul J. Hofer & Kevin Blackwell, *Identifying Sources of Unfairness in Federal Sentencing*, paper presented at the Annual Meeting of the American Society of Criminology (November 1998)(available from the authors).

[41] Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post*-Mistretta *Era*, 91 NW. U. L. REV. 1284 (1997). *See* pages 1309-11 for a summary of the effects of severity levels on the use of under-charging and plea bargaining to circumvent the mandatory minimum statutes and guidelines.

[42] Hofer, *supra* note 39, at 24. Under-use of weapon increases in drug cases is especially curious in light of survey data that suggests the public believes the drug trafficking guideline gives *too little* weight to the use of weapons and violence as part of drug trafficking. PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997), 111-16. Close inspection of the survey data and other research, however, suggests that the problem is not only that weapons are given too little weight in the drug trafficking guideline, but that drug quantity and type are given too much weight. Judges and prosecutors appear to feel that additional increases to the already-lengthy quantity-based sentences are often overkill. *See generally* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, not Disparity*, 29 AM. CRIM. L REV. 833; 870-72 (1992). For additional comment on the equity of the drug trafficking guideline, *see* MOLLY TREADWAY JOHNSON & SCOTT GILBERT, FJC, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997)(survey of federal judges finding that the emphasis given to drug quantity by the mandatory minimum statutes and the guidelines is considered one of the areas most in need of substantive change,

Prosecutorial discretion and charging variation is not limited to firearms. The original Commission was faced with trying to reduce the adverse effects of this variation while maintaining a workable system. The result is the "modified real offense" guidelines that we have today.[43] The general principles underlying the guidelines appear to be: 1) if possible, the judge's determination of the facts at sentencing, rather than the particular set of charges brought and pressed by the prosecutor, should determine the sentence, and 2) the weight given to a sentencing factor should be consistent from case-to-case. The set aside procedures for §2K2.4 are an exception to the Commission's general approach.

B. Proposals for a new guideline and more fully integrated penalties

Options for addressing specific issues created by the "Bailey Fix" legislation are reviewed in Part Two. However, long-standing concerns about §2K2.4 have led over the years to numerous proposals for more fundamental revision of the guidelines, and variations of these proposals could also address several issues raised by the recent legislation. Proposals for better integration of section 924(c) and the guidelines are somewhat complicated to explain and may involve a substantial policy change. But the Commission may wish to explore some of these proposals, perhaps over the long term. Because they are more sweeping, and are relevant to several of the specific issues addressed in Part Two, we briefly introduce them here.

One such proposal is to create a new guideline for section 924(c) offenses. A new guideline could include alternative base offense levels incorporating the tiered sanctions found in the revised statute. For example, the base offense level could be set at 26 for possession of a weapon (with a corresponding sentencing range of 63-78 months for a first offender). For brandishing and discharge the levels could be 29 and 32, respectively. A new guideline could also include SOCs for additional

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Table 2 and accompanying text); GAO, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED (August 1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); Peter Reuter & Jonathan P. Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 AM. J. PUB. HEALTH 1059 (1995)(reporting recommendations of a RAND corporation working group which concluded, "Federal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out. . . . The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug" 1062).

[43] Guidelines were generally written for generic crimes rather than specific statutes, and elements such as the presence of a gun were incorporated as SOCs. The relevant conduct rule and cross-references among guidelines were created to prevent under-charging from creating disparity among offenders who engaged in similar conduct. Rules for grouping related counts were created to prevent charge stacking from resulting in "double counting" or otherwise exaggerating the punishment. *See generally* GUIDELINES MANUAL §1A.4(e); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 25 (1988), for a discussion of the rationale underlying the grouping rules.

aggravating factors (such as use of stolen weapons) or cross-references to other guidelines, as does the other major firearms guideline, USSG §2K2.1.

A new guideline could be designed to address some of the long-standing concerns with section 924(c) convictions. For example, the effects of charging variations on sentence disparity could be reduced by including cross-references to other guidelines. If an offender possessed a firearm as part of a drug trafficking offense, but was charged only with a section 924(c) violation, the offense level for the underlying offense could be applied if it were greater than the level under the new guideline. (Cross references raise issues and problems of their own, of course, which would also need to be considered.[44])

If it were determined to be legally and politically feasible, the unusual set aside procedures might also be eliminated in a new guideline. Section 924(c) counts could be treated in the normal way, with Chapter Three adjustments, including the grouping rules, applied as they are to other counts. The combined offense level would integrate all of the offenses of conviction. A new guideline might provide that sentences should be imposed using the "combined guideline approach" now used for other statutes that call for mandatory consecutive sentences.[45] This would reduce the "tariff"and "cliff" effects associated with section 924(c) counts.

Depending upon how it was structured, a new guideline for section 924(c) offenses could increase penalties for some offenders, but would decrease penalties for others. It might best be considered along with other options for reform of the firearms guidelines. Obviously, the Commission would need more thorough evaluation of these options before taking action. The Team seeks guidance as to which, if any, of these approaches should be developed further.

- **Add tiered sanctions to the SOCs of more guidelines.** Tiered sanctions currently exist in most, but not all, guidelines concerning violent and drug trafficking offenses. Further, as shown in Appendix B there are some inconsistencies in the definition of the tiers and in the increases associated with each from guideline to guideline. Methods for improving the consistency of the guidelines could be explored.

- **Alter the weight given to weapons.** Increasing weapon SOC adjustments might be considered, although the impact of any changes on sentence lengths, prison populations, proportionality among different offenses, and the likelihood of circumvention of the increase would need to be

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[44] Commission analyses over the years have shown that cross references are not always used as the Commission intended, so that any undue leniency and disparity that arises from under-charging is not fully redressed. In addition, commentators (*see supra* note 22) have remained critical of the real-offense philosophy underlying cross references and the relevant conduct rule. They feel that basing sentences on conduct not within the scope of the offense of conviction, that may not have been charged, or that may have been included in charges that were dismissed as part of a plea agreement, is fundamentally unfair.

[45] The "combined guideline approach" is discussed at *supra* note 33.

considered. Note that previous Commissions have unsuccessfully attempted to increase the weight given to firearms in drug trafficking offenses while simultaneously reducing the role of drug type.[46]

C **Create alternative minimum base offense levels.** At the Senate hearing on the *Bailey* fix legislation, the guidelines were criticized because they sometimes permit, at least hypothetically, non-prison sentences for some offenders who possess or use guns during their drug trafficking crime.[47] The Commission may wish to establish a minimum offense level—such as level 26, corresponding to a five-year prison term—for any offense in which a gun was possessed. If a minimum were added to the drug trafficking guideline, all traffickers who possessed a firearm in furtherance of his or her crime would receive approximately a five-year guideline sentence,[48] regardless of the type or amount of drug involved.

[46] As part of the Commission's 1995 amendments concerning crack and powder cocaine, the Commission proposed amendments that would have added tiered firearm SOCs to the drug trafficking guideline. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25, 076 (May 10, 1995). These amendments were disapproved by Congress, Pub. L. No. 104-38, 109 Stat. 334 (1995), because of the higher quantity thresholds for crack cocaine. Interestingly, one of the arguments made in support of the current crack penalties is the increased violence associated with the crack trade. To the extent that crack penalties already reflect the increased use of firearms, additional increases for firearms would appear duplicative.

[47] *Supra*, note 14.

[48] The exact guideline sentence would depend on other adjustments that may apply, including the acceptance of responsibility adjustment. Of course, under USSG § 5G1.1 all offenders who are subject to a statutory mandatory minimum prison term receive at least that term.

Part Two: Options for Amendments

Because §2K2.4 simply directs judges to impose the term of imprisonment required by statute, any changes in the statute are self-executing and arguably no Commission action is required. But many practical and policy considerations reviewed in Part One suggest that some response to the legislation should be considered. In Part Two, five Action Items are presented for the Commission's consideration, each with several options.

I. ACTION ITEM #1: What, if any, amendments are needed to address the change in section 924(c) from fixed terms to sentences of "not less than" a term of years?

As discussed in Part One, the applicable guideline for a conviction under section 924(c) is §2K2.4, which contains no base offense level or SOCs, and simply provides that "the term of imprisonment is that required by statute." The penalty provision of the old 18 U.S.C. § 924(c) stated that a person who violated the statute "shall . . . be sentenced to imprisonment for five years." The statutory minimum and maximum were both five years. The new version requires a sentence of "not less than" a specified term (*e.g.*, seven years for brandishing a firearm). The legal effect is to make the expressed term a mandatory minimum with a statutory maximum of life imprisonment.

If left unchanged, the guideline's directive to impose "the term of imprisonment . . . required by statute" may lead to confusion, and its meaning might even be litigated if the Commission does nothing. The weight of argument appears to support the view that the term "required" by the guideline is the *minimum* set forth in the statute is (*e.g.*, five years for possession, seven years for brandishing, etc.). Any other interpretation violates the spirit, if not the letter, of the Sentencing Reform Act's 25 percent rule (28 U.S.C. § 994(b)(2)), which requires that the range of imprisonment provided by the guidelines shall not exceed six months or 25 percent of the minimum of the range. Under this view, any sentence greater than the statutory minimum would be a departure and could be appealed by the defendant. This view also appears consistent with the general rule of lenity that calls for ambiguity in a provision to be construed in favor of the defendant.

Some may argue, however, that any sentence within the statutory range satisfies the guideline. To avoid confusion, litigation, and potential disparity of application, the Commission may wish to clarify that the guideline sentence is the minimum required by statute. In addition, if the Commission makes the statutory minimum the guideline sentence in the ordinary case, it may wish to specify under what circumstances a more severe sentence would be appropriate.

It should be noted that the present guideline already applies to 18 U.S.C. § 929(a) (use of restricted ammunition), which also requires a mandatory consecutive sentence of "not less than" five years. There have been no sentences imposed for convictions under section 929(a) since §2K2.4 became the applicable guideline, so there has been no opportunity for courts to determine what the "term required by statute" means for offenses that require sentences of "not less than" a number of years.

To avoid confusion, litigation, and potential disparity of application, the Commission may wish to clarify the guideline. In addition, if the Commission makes the statutory minimum the guideline sentence in the ordinary case, it may wish to specify under what circumstances a more severe sentence would be appropriate, as discussed in Option B below.

A. Option A: Clarify that the minimum term required by statute is the guideline sentence

The Commission, of course, has the authority to amend the guideline to make the minimum or some other point within the statutory range the presumptive guideline sentence. This might be accomplished most simply by specifying that the minimum term required by statute is the guideline sentence.

Several points argue against such an amendment. The issue simply may not be ripe for action, because there has been no litigation over the amended statute, and no court has held that a sentence greater than the statutory minimum is allowable under the guidelines. On the other hand, clarifying the guideline's reference to the statute may avoid litigation. It would establish that any prison term for the section 924(c) component of a sentence other than the minimum term is a departure, which may be appealed. It would further uniformity by unambiguously requiring judges to impose the same sentence on all offenders convicted under the same statutory provisions, and the increase under the statute would be as near as possible to the increase that the guideline SOCs generally require.

B. Option B: Provide guidance as to when greater increases are appropriate

Some offenders will receive lengthier sentences because their crimes include the aggravating elements in the statute, *i.e.*, brandishing or discharging a weapon, involvement of more dangerous types of weapons, or prior convictions. Defendants who cause death with the firearm are also subject to increased sentences under section 924(j). Other offenders may receive upward departures based on unusual circumstances identified by sentencing judges—a contingency previously impossible for offenders convicted only of section 924(c).

However, previous Commissions have identified still other aggravating factors in firearms offenses in addition to those listed in the statute. These factors—such as the use of stolen weapons or guns with obliterated serial numbers—are found both in SOCs to the other major firearms guideline, §2K2.1, and in guideline commentary.

To promote consistency, it may be desirable to provide some guidance as to when sentences greater than the statutory minimum are appropriate. If the Commission chose, for example, to encourage departures in some situations, it would help to define the guideline's heartland, and the appropriate review under *Koon v. United States*, 518 U.S. 81 (1996). It would illustrate to judges that they have new authority under the statute, and how they might use it. Further, particularly if Option A is adopted, providing guidance as to when sentences greater than the minimum might be appropriate will demonstrate that the Commission has given effect to the new "not less than" language.

On the other hand, the new minimum sentences under the statute have not been demonstrated to be too lenient for any type of case sentenced under the guideline, particularly given that the guideline SOCs generally call for sentences that are still lower. There has been little experience with the new statute and no evidence to demonstrate that guidance is necessary or that judges will hesitate to depart in appropriate cases. And since downward departures are not possible given the mandatory minimum, providing only for upward departures may appear to create an unfair one-way ratchet that can work against defendants.

If the Commission decides that crimes sentenced under §2K2.4 should receive additional punishment if they involve additional aggravating factors, there are several possible approaches to incorporating them into the guideline. Current commentary could be expanded to encourage upward departure in appropriate cases. Alternatively, a new guideline with tiered base offense levels and SOCs for other aggravated types of gun use could be created, as described in Part One. The Team asks the Commission's guidance as to which, if any, of the following factors should be implemented, and by what approach they should be incorporated.

i. Other offense conduct

As reviewed in Part One, Application Note 2 to §2K2.4 currently encourages upward departure if the sentence under the guideline is lower than if section 924(c) had *not* been charged, and the firearm SOC for the underlying offense were applied. The circumstance covered by the application note arises only when defendants are convicted under both section 924(c) and an underlying offense.

Charging decisions can also affect sentences when defendants are convicted only of section 924(c). As described in Part One, failure to obtain conviction for the underlying offense can often substantially reduce a defendant's sentence, and plea bargains are the predominant reason that offenders are convicted only of section 924(c). When charging or plea bargaining results in inappropriately low sentences under other guidelines—such as §2K2.1, the major firearms regula-tory offense guideline—cross-references direct judges to apply the offense level for the underlying offense if it is greater.

For example, consider a defendant convicted only under section 924(o) (conspiracy to commit a 924(c)) which is sentenced under §2K2.1, but who had actually engaged in major drug trafficking. The cross reference at §2K2.1(c)(1)(A) seeks to ensure that the defendant's sentence reflects the real offense conduct and not merely the charge of conviction.

Because the new statute carries a life maximum, judges will have room within the statutory range to depart upward, even if section 924(c) is the only count of conviction. The Commission could expand the application note to encourage departure if the sentence under §2K2.4 understates the seriousness of the underlying offense.

Alternatively, a cross reference might be developed instructing judges to apply the guideline for any underlying offense, with its associated firearm SOC, if the resulting sentence is greater than the sentence under §2K2.4. But this may raise more problems than it solves. For example, if a defendant has been, or will be, sentenced in state court for the underlying conduct, sentencing him or her in

federal court for the same conduct would constitute double-counting. The guidelines governing imposition of consecutive and concurrent sentences at §5G1.3 will not prevent this since the term under section 924(c) must be consecutive to any other sentence, including a state sentence.[49]

ii. Other types of aggravated gun use not covered by statute

The amended section 924(c) punishes some types of firearm use—brandishing or discharging—more severely than possession or carrying. However, other guidelines also increase sentences if a firearm is "otherwise used." For example, the aggravated assault guideline requires a 4-level increase if a gun is otherwise used to "pistol whip" a victim. To prevent offenders sentenced under §2K2.4 who use firearms in these ways from being sentenced the same as offenders who merely possess a firearm, the Commission might encourage departure.

Congress may have been aware that the guidelines provide for increases when firearms are "otherwise used" and intentionally declined to make that an element in the statute. (In the definition of "possession," Congress appears to have specifically sought a result different from the guidelines.) Staff have found nothing in the legislative history to shed light on whether the omission of these types of uses was intentional. Note, however, that legislation introduced this past term would have required a 15-year sentence "if the firearm is used to injure another person," which would appear to cover conduct such as "pistol whipping."[50]

Additional aggravated circumstances that are covered by other guidelines, but not by the statute, include: 1) use of multiple firearms, 2) use of stolen firearms or firearms with obliterated serial numbers, or 3) use of firearms by defendants who are "prohibited persons." Amendment options will be developed for any of these situations if the Commission is interested.

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[49] *United States v. Gonzales*, 117 S.Ct. 1032 (1997).

[50] S. 6127, § 903.

II. ACTION ITEM #2: How, if at all, should the new section 924(c) statutory maximum of life in prison affect application of the career offender guideline §4B1.1?

The increased statutory maximum for section 924(c) raises questions about how the career offender guidelines (§4B1.1-2) should treat convictions under the statute. These questions involve a technical interplay of guideline provisions, therefore, the explanation of the problem below is more detailed than for the other Action Items.

A defendant qualifies as a career offender under guideline §4B1.1 if: (1) he was at least eighteen years old at the time he committed the instant offense, (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. "Crime of violence" and "controlled substance offense" are defined in §4B1.2, and the key issues are whether convictions under section 924(c) legally qualify under the current definitions, and whether it is good policy if they do. Thus far, there have been no cases where such convictions have been counted, but the issue seems certain to arise.[51]

Guideline 4B1.1 increases a defendant's offense level if the level determined under Chapters Two and Three is less than the level provided in the guideline, which is based on the highest statutory maximum for any offense of conviction. (*See* the table at §4B1.1, which equates various statutory maximums with different offense levels.) For offenses with a maximum of life, the offense level is set at 37. In addition, the criminal history category for career offenders is in every case set at Category VI, the highest category in the guidelines. The guideline range for criminal history category VI and offense level 37 is 360 months-Life. Under at least one possible interpretation of the current guideline rules, the consecutive penalty required by section 924(c) would then be added to these already-substantial guideline ranges.

The guideline provides that career offenders may still qualify for the acceptance of responsibility adjustment. Offenders with a statutory maximum of life who receive a 3-level reduction for acceptance of responsibility would receive an offense level of 34, criminal history category VI, with a corresponding guideline range of 262-327 months. If they qualify for the minimum 60-month increase under section 924(c), their final sentencing range would be 322-387 months. These are among the highest sentences provided by the guidelines for any crime.

[51] This issue was discussed at a recent meeting of the Appellate Chiefs of the US Attorneys. According to the Appellate Chiefs, this subject is becoming an issue at sentencing. After the meeting, the Department of Justice called the Commission to seek guidance and discuss the matter further.

Table 1: Comparison of Guideline Ranges when §924(c) is or is not used in §2K2.4

Defendants Convicted of:	Offense Level	Criminal History Category	Guideline Range
Aggravated Assault & § 924(c) *(no career offender applied)*	18	III	33-41 plus 60 months consecutive
Aggravated Assault & § 924(c) *(Career Offender based on Aggravated Assault)*	24	VI	100-125 plus 60 months consecutive
Aggravated Assault & § 924(c) *(Career Offender based on § 924(c))*	37	VI	360-Life plus 60 months consecutive
Armed Bank Robbery & § 924(c) *(no career offender applied)*	27	III	87-108 plus 60 months consecutive
Armed Bank Robbery & § 924(c) *(Career Offender based on Armed Bank Robbery)*	34	VI	262-327 plus 60 months consecutive
Armed Bank Robbery & § 924(c) *(Career Offender based on § 924(c))*	37	VI	360-Life plus 60 months consecutive

To further illustrate how using the new life maximum for section 924(c) may affect sentences under the career offender guideline, Table 1 compares guideline ranges for two common offenses: aggravated assault and armed robbery. The top box for each offense describes sentences for Criminal History Category III offenders who do not qualify as career offenders. The next two boxes show sentences for career offenders that result from basing the career offender adjustment on either: 1) the statutory maximum for the underlying offense, or 2) the new life maximum for the section 924(c) count. The minimum guideline range for both offenses more than triples when the section 924(c) count is used as an instant offense for career offender purposes. And recall that under some interpretations the section 924(c) penalty would then be added to the guideline sentence.

The use of section 924(c) as an instant offense under the career offender guideline arises because of a 1997 amendment to the guidelines. *See Guideline Manual*, Appendix C, Amendment 568. That year the Commission amended Application Note 1 to §4B1.2 to clarify that

> Possessing a firearm during and in relation to a crime of violence or drug trafficking offense (18 U.S.C. § 924(c)) is a "crime of violence" or "controlled substance offense" if the offense of conviction established that the underlying offense (the offense during and

in relation to which the firearm was carried or possessed) was a "crime of violence" or "controlled substance offense."

This definition, although it appears needlessly confusing,[52] seems to clearly establish that section 924(c) convictions qualify for purposes of the career offender guideline. The reason for the 1997 amendment, however, was only to ensure that *prior* convictions for section 924(c) would count as prior felony convictions under the career criminal guideline. The question of whether section 924(c) should count as an *instant* offense under the guideline appears not to have arisen, because in 1997 the statutory maximum for section 924(c) was low relative to other crimes. There was little likelihood that it would set the offense level under the guideline.

A consequence of the amendment in conjunction with the recent legislation, however, is that section 924(c) convictions may be considered instant offenses for purposes of the career criminal guideline. Thus, the recent legislation raises a question not considered in 1997—*should* section 924(c) convictions count as instant offenses? It is worth noting that this effect of the legislation appears not to have been anticipated by Congress; there is no mention of it in the legislative history. Of course the increased sentences may not be unwelcome. But there are several reasons to question whether counting section 924(c) convictions as instant offenses under §4B1.1 is good policy.

In addition to the very long sentences that result, using section 924(c) to establish the offense level appears inconsistent with other guideline provisions. Because of the unique procedures for §2K2.4, under the normal sequence of application there is no need to apply chapters three and four to determine the guideline range for section 924(c) counts. Furthermore, other rules of guideline application clearly state that violations of section 924(c) are to be sentenced "independently" of the guideline sentence on any other count. *See* §§3D1.1 and 5G1.2(a) and commentary; §2K2.4,

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[52] The definition appears intended to subject section 924(c) counts to the tests for "crime of violent" and "controlled substance offense" that appear earlier in the note. These require, for example, that a crime of violence that is not specifically listed must have ". . . by its nature presented a serious potential risk of physical injury to another." USSG §4B1.1, commentary (n.1, par. 2). All section 924(c) convictions appear likely to meet this test.

But more important, the fact of conviction itself establishes that the firearm must have been possessed, carried, or used "during and in relation to any crime of violence or drug trafficking crime" because that is an element of the offense. 18 U.S.C. 924(c)(1)(A). The statute defines "crime of violence" in a way that is very similar though not identical to the guideline (". . . a felony that . . . (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(A) and (B)). It would appear that any conviction under section 924(c) establishes that the underlying offense was a "crime of violence" or "drug trafficking crime," and thus the note qualifies the section 924(c) count itself for purposes of the guideline.

Because the note appears needlessly confusing, and because terms such as "possessing a firearm" do not track the amended statute, the Commission may wish to revise this note even if it does not change its policy regarding the inclusion of section 924(c) counts.

commentary (n. 2). If the section 924(c) count is used to determine the offense level under §4B1.1, it has been combined with other offenses and guideline determinations. The entire set of procedures developed for section 924(c) counts seems to preclude its use in Chapter Four.

If a section 924(c) count is paired with an underlying offense carrying a life maximum, the question of whether it qualifies as an instant offense is moot. But in two contexts considering a section 924(c) count as an instant offense can have a substantial effect on sentences: 1) where other counts of conviction carry shorter maximums, which include most violent offenses and drug trafficking offenses involving amounts below the 10-year mandatory minimum threshold; and even more dramatically 2) where section 924(c) is the only count of conviction.

Commission staff have begun prison impact analyses to determine the number of cases that fall under these last two conditions, and the effect on sentences that might be expected. At this point we can report that in 1998 there were 130 cases in which the career offender guideline was applied and a section 924(c) count was present. Of these, 30 percent already had a statutory maximum of life based on the underlying offense. It appears that the remaining 70 percent, or about 91 cases, would have their sentences increased if the section 924(c) statutory maximum of life were used.

The options to address this issue range from a fairly simple change in the Application Note to the creation of a whole new guideline, as described in Part One. The Commission may also wish to consider what might be accomplished through guideline amendment in the short or long terms, and also what might be achieved through the Commission's ongoing training and technical assistance operations.

A. Option A: Amend the Application Note to §4B1.2 to exclude section 924(c) convictions for purposes of the career offender guideline.

The easiest solution may be to amend the Application Note to exclude section 924(c) convictions, either only as instant offenses, or as both instant and prior offenses. Excluding section 924(c) counts only as instant offenses would preserve the intent of the 1997 amendment, while avoiding potential problems raised by the life maximum in the new legislation. Different treatment of instant and prior convictions may be hard to justify, however.

Excluding section 924(c) as an instant offense would return career offenders convicted of both section 924(c) and an underlying offense to the position they held prior to the recent legislation—the statutory maximum for the underlying count would control application of the career offender guideline and the offender would receive a consecutive sentence for the section 924(c) count.

For offenders convicted of section 924(c) alone, the career offender guideline would not apply. However, no offenders convicted of section 924(c) alone were sentenced as career offenders in 1998. If the Commission also excluded section 924(c) as prior convictions, only offenders previously convicted under section 924(c) alone would be affected, and this too appears to be extremely rare.

Excluding section 924(c) from the career offender guideline may be hard to justify politically, because it would lower sentences from the level that seems to apply based on the definitions in the current application note (even though the interpretation of the current guidelines may be disputed, and its application to instant convictions under section 924(c) was unintended). Any change may be seen as a substantive change to the guideline, which has the effect of giving a "break" to gun-toting repeat offenders.

B. Option B: Amend the guidelines to clarify that section 924(c) convictions are included as instant offenses for purposes of the career offender guideline.

If the Commission decides that the statutory maximum for section 924(c) convictions should be used to set the offense level under the career offender guideline, several changes in the *Guidelines Manual* should be made. Application Note 1 to §4B1.2 should be amended to clarify that section 924(c) convictions count as both prior and instant offenses. In addition, an application note might need to be added to §4K2.4 to direct that the career offender guideline should be applied in these cases. Other conforming amendments may also be desirable to clarify the sequence of application to be followed for these cases.

The Commission may also wish to consider adding commentary to USSG §4B1.1 encouraging downward departure in any circumstances in which simultaneous increases under both §4B1.1 and section 924(c) may result in sentences that are disproportionately long. While §4A1.3, "Adequacy of Criminal History Category," currently addresses cases in which defendants' criminal history categories significantly over-represent the seriousness of their criminal records or the likelihood of re-offending (par. 3), it may be desirable to specifically encourage downward departure in the unique circumstances created by simultaneous increases under §4B1.1 and section 924(c).

C. Option C: Create a new guideline for section 924(c) offenses that better integrates the statutory and guideline penalties.

Creating a new guideline for section 924(c) convictions would make available a range of approaches for integrating these convictions with the career offender guideline. For example, if the "set aside" were eliminated, the statutory maximum for the section 924(c) conviction could be used to determine the offense level under the career offender guideline, without resulting in duplicative, "tariff" punishment when the statutory term is also imposed consecutive to the guideline sentence.

A new guideline could be used to resolve the inconsistencies among the various guidelines and better integrate the section 924(c) penalties with other provisions. But it would represent a significant change in the way section 924(c) counts are currently treated, and should be undertaken only as part of a review of the firearm sentence enhancements found throughout the guidelines.

III. ACTION ITEM #3: Should the guidelines be amended to track the statutory language for "brandish" and "possession in furtherance?"

Past Commissions have felt obliged to closely track language contained in specific legislative directives to the Commission. However, Pub. L. 105-386 does not contain directives. It merely

adopts a definition of brandish that varies from the guidelines definition, and adopts a standard for section 924(c) in cases involving possession that uses different language than the standard in the guidelines.

Other things being equal, there are some advantages to consistency between the statutes and the guidelines. It makes the law of sentencing less complex and confusing, thereby reducing mistakes. It may reduce litigation and allow judicial interpretations of an ambiguous phrase to be applied to both statutes and guidelines, rather than foster multiple lines of caselaw to interpret, and possibly distinguish, closely related concepts such as possession "in furtherance of" or "in connection with" a crime.

On the other hand, there are often good reasons not to track statutory language. Most important, the statute may serve a different purpose than the guidelines, and applying language from one to the other may be bad policy. When guideline language is already established, as in the definition of brandish, an existing body of caselaw discusses the current definition and changing it could upset a settled area of law.

The two options below discuss and briefly summarize some of the policy pros and cons of tracking the statutory definition of "brandish" and the standard of "possession in furtherance."

A. Option A: Amend the guideline definition of "brandish" to conform to the statute

Because some guidelines already provide for tiered sanctions, Chapter One of the *Guidelines Manual* provides a definition of "brandished": "'Brandished' with reference to a dangerous weapon (including a firearm) means that the weapon was pointed or waved about, or displayed in a threatening manner." USSG §1B1.1, commentary (n.1(c)).

The definition of "brandish" set forth in section 924(c), however, is different from the guideline definition, in that a weapon need not be displayed or even visible to be brandished. ("For purposes of this subsection, the term 'brandish' means, with respect to a firearm, to display all or part of the firearm, *or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person*." Pub. L. 105-386, §1(a)(2) [emphasis supplied]). The term brandish is not used elsewhere in the United States Code, and is here explicitly defined only "[f]or purposes of this subsection."

If the statutory language were adopted for guideline purposes, it seems likely only a small number of cases would be affected. Examination of the guidelines with "brandish" SOCs shows that defendants who do not make their weapon visible would usually be punished at the same level as those who do, because the same SOC applies whenever a firearm is "brandished, displayed, *or possessed*" [emphasis supplied].[53] In addition, as a practical matter, the two definitions will rarely

[53] *See* USSG §2B3.1 (Robbery), §2B3.2 (Extortion), §2E2.1 (Extortionate Extension of Credit). In another guideline, the same 3-level increase applies "if a dangerous weapon (including a firearm) was brandished or its use was threatened." Section 2A2.2 (Aggravated Assault).

be called into play simultaneously, so any confusion that may be created by divergent definitions should be minimal.[54]

An expanded guideline definition of brandish would apply to all dangerous weapons and not solely to firearms. Thus threatening a person with a knife that was not visible would become subject to the increase. In addition, the guideline definition applies to guidelines for some offenses that are not the violent or drug trafficking crimes subject to section 924(c) charges (*e.g.*, §§2K2.5 and 2L1.1).

Finally, it should be noted that while a firearm need not be *visible* to trigger the increase under the statute, there must be an actual firearm present. The definition of "dangerous weapon" in Application Note 1 to USSG §1B1.1, however, states that: "Where an object that *appeared to be* a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon" [emphasis supplied].[55] Expanding the guideline definition of brandish, because it applies to all dangerous weapons, could result in defendants who threaten to use a concealed fake weapon receiving the enhancement. To avoid this the definition of dangerous weapon would also need to be amended.

Amending the guidelines would demonstrate that the Commission shares Congress's concern with the threatened use of weapons. On the other hand, the current guideline definition arguably better matches the common understanding of the word, and avoids confusion caused by use of "legalese."[56] Expanding the scope of the guideline definition increases punishment for conduct that is arguably less dangerous and culpable than visibly displaying a firearm.

In two other guidelines, "brandish" is used in the application notes. Note 4 in §2K2.5 (Possession of a Firearm or Dangerous Weapon in a Federal Facility) instructs that where a firearm was "brandished, discharged, or otherwise used" in a federal facility or other prohibited place, an upward departure may be warranted. Threatening the use of a gun that was not displayed would trigger the departure only if considered "otherwise used."

Section 2A3.1 (Criminal Sexual Abuse) also uses "brandish" in an explanatory note, but the context makes clear that the SOC applies if the offense was committed by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping. This appears to cover threatening the use of a gun that was not displayed.

Section 2L1.1 (Smuggling, Transporting, or Harboring an Illegal Alien) provides a 4-level increase if a dangerous weapon (including a firearm) was brandished or otherwise used, and a 2-level increase if the weapon was possessed. Again, threatening the use of a gun that is not displayed would receive the increase only if considered a form of "otherwise used."

[54] Recall that §2K2.4 directs judges not apply firearm SOCs if the defendant is convicted of section 924(c), although some courts have applied both types of increases in some situations.

[55] *See e.g., United States v. Dixon*, 982 F.2d 116 (3d Cir. 1992)(brandishing enhancement for defendant who pretended to have gun by wrapping towel around hand).

[56] Webster's New Collegiate Dictionary defines brandish: 1. to shake or wave (as a weapon) menacingly, 2. to exhibit in an ostentatious or aggressive manner.

B. Option B: Adopt for guideline purposes the statutory requirement that possession of the weapon be "in furtherance" of the crime

As described in Part One, some early versions of the legislation that ultimately became Pub. L. 105-386 penalized any person who uses, carries *or possesses* a firearm during a crime of violence or drug trafficking. The final bill, however, limited this to persons who "*in furtherance of any such crime*, possesses a firearm[.]"

The limitation was intentional. The House Committee Report accompanying their bill stated that the "in furtherance" requirement was meant to be slightly more stringent than the standard in the statute ("during and in relation to" the crime) as well as the standard in the guideline SOCs. "The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence."[57] Given Congress's concern to limit the types of possession that receive a sentence increase, the question arises whether the guidelines should be made consistent with the statute.

The practical difference between the two standards may be negligible. The guidelines already require some nexus between a firearm and the offense. The relevant conduct guideline requires that SOCs be based on acts that are related to the offense.[58] And while some guidelines state only that a weapon need be "possessed," others explicitly require that it be "possessed in connection with the offense." In addition, as described in Part One, the drug trafficking guideline contains an application note that makes it relatively easy for the government to establish a nexus. Unless the Commission were to change this note as well, the ease of establishing the necessary connection would likely remain even if possession in furtherance were required.[59]

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[57] HOUSE COMMITTEE ON THE JUDICIARY, TO PROVIDE FOR INCREASED MANDATORY MINIMUM SENTENCES FOR CRIMINALS POSSESSING FIREARMS, AND FOR OTHER PURPOSES, H.R. REP. NO. 344, 105th Cong. ,1st Sess. 11(1997) (To accompany H.R. 424). The legislative history as well as settled case law makes clear that "possession" requires only that a defendant have "dominion and control" over the weapon; it is not necessary that he or she be the legal owner of the gun. Further, the common law concept of "constructive possession" can cover some defendants who did not directly control the weapon.

[58] See *United States v. Ortega*, 94 F.3d 764, 768 (2d Cir. 1996)("it was necessary to make a prior determination that the asserted possession of a weapon occurred during conduct relevant to the offense of conviction before addressing the more particularized findings required by application note 3 . . .").

[59] Circuits have held that guns that are merely present must still be "possessed." *United States v. Ponce*, 168 F.3d 584, 585 (2d Cir. 1999) (sentencing judge did not err in refusing to enhance for "gun, which had been found in the wheel-well of a car in which the defendant was a passenger, was not in the possession of the defendant. . . . Arguably, the Note assumes that the gun in question is

On the other hand, adopting the statutory standard might send a signal that would cause judges to require a greater showing that weapons found, for example, in a home where drugs were sold were part of the criminal activity. Some analogy to the pre-*Bailey* case law might be drawn, which would require that the weapon facilitated the offense through its availability and proximity to drugs or money. Adopting an arguably higher standard may make it unreasonably difficult to prove that a weapon was possessed in furtherance of the offense, which could make it difficult to obtain increased sentences in appropriate cases.

Under the present definition, courts appear to vary in the degree of showing that they require. Some circuits have reversed application of the enhancement in the drug guideline where no connection between the weapon and the offense is shown,[60] implying that more than mere presence, and possibly mere possession, is required. Other courts, however, have required only a showing that the drugs and weapon were reasonably proximate in space and time.

Adopting the statutory definition would acknowledge Congress's concern to treat legitimate gun owners the same as non-owners, and not sanction them more heavily for mere possession of a gun unrelated to the furtherance of their crime. It might help target the SOC increase on the cases for which it is appropriate.

The guidelines could be amended in several different ways to uniformly adopt the statutory standard. Perhaps the easiest would be to add to §1B1.1 a definition for "possessed" that tracks the statutory language. This section already contains definitions for "dangerous weapon," "firearm,"

'possessed' by the defendant, and directs attention to the problem of a gun that is possessed by a defendant but is not connected with a drug offense." *See also United States v. Richmond*, 37 F.3d 418, 419 (8th Cir. 1994)(". . . in order for §2D1.1(b)(1) to apply, the government has to prove by a preponderance of the evidence that it is not clearly improbable that the weapon had a nexus with the criminal activity").

[60] FJC, *supra* note 26, at 58.

"brandished," and "otherwise used." It may be also desirable to delete the phrase "in connection with the offense" from the few guidelines that presently contain it.

IV. ACTION ITEM #4: Should guideline commentary to USSG §2K2.4 be amended to resolve the circuit conflict over when offenders may receive increases for both section 924(c) and weapon SOCs?

The general guideline rule is that a single weapon SOC adjustment is applied for all weapon possession or use for which an offender is accountable, regardless of the number of weapons involved. In addition, Application Note 2 to §2K2.4 specifically states that "[w]here a sentence under this section is imposed in conjunction with a sentence for an *underlying offense*, any [weapon SOC] is not to be applied in respect to the guideline for the underlying offense" [emphasis supplied]. This note was designed to prevent "double counting" of a weapon for the same crime. USSG 2K2.4, commentary (backg'd). It is also consistent with the general rule that a single adjustment applies to all weapon possession or use for which a defendant is accountable under the relevant conduct rules.

The case law shows, however, that some offenders continue to receive both increases when, for example, multiple weapons are involved in an offense or when both a defendant and co-participants use weapons. In some cases, this results from different interpretations of the scope of conduct considered part of the "underlying offense" for purposes of Application Note 2. In other cases, courts simply do not consider the limitations the note was intended to create.

For example, some circuits have narrowly interpreted "underlying offense" to mean only the specific violent or drug trafficking offense that is the predicate for the section 924(c) violation. The statutory penalty is imposed only for the weapon associated with the section 924(c) conviction; any other gun possession or use may result in an additional SOC increase.

This narrow interpretation can have a significant impact on the sentence of a defendant who receives a conviction under 18 U.S.C. § 922(g)(prohibited person in possession of a weapon), who may receive the enhancement in USSG §2K2.1 for use of the weapon, in addition to a consecutive sentence for the conviction under section 924(c).[61] The Sixth Circuit, however, noting that the guidelines do not define "underlying offense," has interpreted the phrase broadly to preclude

[61] *United States v. Flennory,* 145 F.3d 1264, 1268-69 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 1130 (1999) ("underlying offense" is the "crime of violence" or "drug trafficking offense" that serves as the basis for the section 924(c) conviction; no double counting where defendant sentenced under §2D1.1 drug guideline pursuant to cross-reference in USSG §2K2.1(c)(1) for felon in possession of firearm, in violation of 18 U.S.C. 922(g)(1), and mandatory five-year sentence for 924(c) conviction because 922(g) is not an "underlying offense" as that term is used in Application Note 2 of USSG §2K2.4); *United States v. Paredes,* 139 F3d 840 (11th Cir. 1998), *cert. denied,* 119 S.Ct. 572 (1998).

application of the adjustments in §2K2.1 when offenders are convicted under both sections 922(g) and 924(c).[62]

Some circuits allow application of a weapon enhancement and a consecutive sentence under section 924(c) if more than one gun is involved. For instance, several circuits have held that a defendant convicted under section 924(c) for personal use of a gun is also accountable for a co-defendant's possession of a gun.[63] Thus, a drug trafficking offender who receives a five-year sentence under section 924(c) may also receive a two-point increase for a co-defendant's use of a gun under guideline §2D1.1. This would result in a minimum guideline range approximately 25 percent longer than a defendant who received only the section 924(c) increase. In the Ninth Circuit, a defendant who possesses two weapons during an offense may receive the statutory sentence for one of the weapons and a guideline enhancement for the other weapon.[64]

The narrow reading of "underlying offense" and simultaneous increases under section 924(c) and guideline SOCs differs from the Commission staff's understanding that a section 924(c) conviction covers all weapon use for which a defendant is accountable. Under this view, a single increase punishes for all weapon use that is within the scope of the relevant conduct associated with the predicate offense (*i.e.*, weapons possessed or used by offenders during the same course of conduct or common scheme or plan as the violent or drug trafficking offense, or weapons possessed or used by co-participants as part of the joint criminal undertaking, so long as the possession or use was reasonably foreseeable). This is consistent with the definition of "offense" found in commentary to USSG §1B1.1 (Application Note 1(*l*)), which includes the offense of conviction and all relevant conduct.

A narrow interpretation limiting "underlying offense" to the section 924(c) predicate offense also differs from the interpretation urged by defense attorneys—who would provide a single firearm increase for all offenses sentenced at the same sentencing hearing.

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[62] *United States v. Vincent*, 20 F.3d 229 (6th Cir. 1994), *vacated on other grounds*, 516 U.S. 137 (1995) (double counting resulted from district court's application of the specific offense characteristics in §2K2.1(b)(1) and §2K2.1(b)(5) for defendant convicted of drug offense, 924(c) and 922(g)(3) because 922(g)(3) is "underlying offense" to 924(c) conviction within the meaning of §2K2.4, Application Note 2); *United States v. Smith*, 1999 WL 1016244 (6th Cir. 1999)(same).

[63] *United States v. Grier*, No. 97-4267, 1998 WL 71522 (4th Cir. 1998)(unpublished opinion); *United States v. Washington*, 44 F.3d 1271, 1281 (5th Cir. 1995); *United States v. Rodriguez*, 65 F.3d 932, 933 (11th Cir. 1995); *United States v. Kimmons*, 965 F.2d 1001(11th Cir. 1992) *vacated and remanded on other grounds*, 508 U.S. 902 (1993).

[64] *United States v. Willett*, 90 F.3d 404 (9th Cir. 1996)(commission of a drug trafficking crime with more than one weapon "poses a greater risk than does the commission of the same crime with only one gun;").

Because a large number of offenses each year involve drugs and weapons, these split interpretations can lead to significant disparity among offenders who engage in similar conduct. The recent legislation expanding the scope of section 924(c) is likely to increase the number of cases raising this issue.

A. Option A: Clarify that the "underlying offense" includes only conduct that provides the predicate for the section 924(c) conviction.

This is the interpretation adopted by circuits who have addressed the issue. Under this approach, offenders who are convicted of section 924(c) may still receive an increase if they possess or use a gun on a different occasion than the one cited in the section 924(c) count, or if a co-defendant possesses or uses a gun for which they are liable under the relevant conduct rules. A defendant convicted of multiple drug distributions and one conviction for 18 U.S.C. § 924(c) could receive the consecutive sentence for the section 924(c) conviction and a two-level SOC for possession of a firearm for the offenses not specifically connected with the section 924(c) count.

B. Option B: Clarify that the "underlying offense" includes the conduct providing the predicate for the section 924(c) conviction and all other relevant conduct to that offense.

This interpretation is consistent with the definition of "offense" provided in USSG §1B1.1(*l*), which includes the offense of conviction and all relevant conduct. The Commission may wish to explicitly define "underlying offense" in the Application Note to include relevant conduct, and may also wish to provide examples of applicability of the rule to cases involving multiple weapons or co-participant gun use.

Because multiple charges of drug trafficking are grouped under §3D1.2(d), the single section 924(c) increase would punish for all weapon use relevant to the drug trafficking conduct. Note however, that violent offenses, such as multiple bank robberies, are not grouped. Offenders who receive a section 924(c) increase for using a gun during one bank robbery could receive SOC increases for weapons used during other robberies if no section 924(c) count were charged.

C. Option C: Clarify that the "underlying offense" includes all conduct that is sentenced at the same time as the section 924(c) conviction, and to which the section 924(c) increase will run consecutively.

An arguably simpler approach has been advocated by some defense counsel in litigation over interpretation of the phrase. Rather than attempt to define a scope of conduct included within the "underlying offense," the Commission could direct that if a section 924(c) consecutive sentence is imposed, no weapon SOCs should be applied for *any* other violent or drug trafficking offenses included within the total sentence. The section 924(c) increase would punish for all weapon possession or use being sentenced at that time.

The increase under section 924(c) is generally greater than the increase resulting from SOCs, so this approach still results in sentences more severe than the guidelines' *alone* would require (but

less severe than if additional SOC increases are sometimes permitted, as in Options A and B). The differences in sentences between similar offenders who are 1) subject to the guidelines only, or 2) also charged under section 924(c), would be lessened by this approach more than by Option A or B. (Offenders whose sentences would have been longer under the guidelines—*i.e.*, if section 924(c) had not been charged—would be subject to an encouraged upward departure under paragraph two of Application Note 2.)

D. Option D: Create a new guideline for section 924(c) offenses that does not require suspension of the normal weapon SOCs when determining offense levels for underlying offenses.

Creating a new guideline for section 924(c) convictions in the manner described in Part One could avoid this problem entirely by making the rule in §2K2.4 unnecessary. If the normal grouping rules applied to section 924(c) offenses, these counts could be grouped with the underlying offense and the normal weapon SOCs applied. Possession or use of a firearm would then be punished through the SOC for the underlying offense, or through the alternative base offense level provided by the new guideline.

V. ACTION ITEM #5: Should the guidelines be revised to prevent double counting of section 924(c) and section 924(o) conspiracy counts?

The Sentencing Reform Act states that the guidelines should reflect ". . . the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation." 28 U.S.C. § 994(*l*)(2).

To implement this directive, convictions for conspiracy to commit most crimes are indexed to the guideline for the underlying substantive offense. *See* USSG §2X1.1. They are then grouped with any charges for that substantive offense under the rule at §3D1.2(b). Conspiracies to violate section 924(c) are charged under section 924(o). But because this section does not contain mandatory minimum and consecutive penalties like the other statutes indexed to USSG §2K2.4, it was indexed to §2K2.1, the general firearms guideline, rather than to §2K2.4 or §2X1.1. Further, because section 924(c) counts sentenced under §2K2.4 are set aside from the normal grouping rules, a conspiracy count under section 924(o) and a substantive count under section 924(c) will *not* be grouped.

The result of these rules is that offenders convicted under both sections 924(o) and 924(c) could get punished separately for both the conspiracy and the substantive offense.[65] For example, a

[65] In particular, offenders convicted of just two counts—section 924(c) and section 924(o)—will *always* have their sentence increased, because the §2K2.4 sentence for (c) will be added to the §2K2.1 sentence for (o). Offenders convicted of three counts—section 924(c), section 924(o) *and* a count for the underlying crime—will have their sentence increased by the (o) if the §2K2.1 sentence is greater than the sentence for the underlying crime (because the grouping rules use

defendant was recently convicted of trafficking 3 KG of marijuana as well as section 924(c), section 924(o), and section 922(g). He had been observed placing a stolen AK-47 rifle into the trunk of a car, apparently in exchange for a portion of the marijuana that was found in the car. The marijuana and the last two gun counts were grouped, since gun possession is an SOC under the drug trafficking guideline. The base offense level of 26 under guideline §2K2.1 represented the group, since it was higher than the base offense level of 12 under the drug trafficking guideline. Given the defendant's criminal history category of V, a guideline sentence of 170-197 was required (110-137 months for base offense level 26 under §2K2.1, plus 60 consecutive months for the section 924(c)). If the defendant had been charged only with drug trafficking and section 924(c), his guideline sentence would have been 87-93 months (27-33 months for base offense level 12, criminal history category V, plus 60 for the section 924(c)).[66]

While the potential impact of this type of double counting can be dramatic, Commission data show that it has not been a problem in practice. The above example is the only defendant convicted December 29, 1999 under both provisions in the last five years.[67] However, any offender who is subject to double counting in the future may argue that the Commission's treatment of section 922(o) and section 924(o) violates the directive in the Sentencing Reform Act. While the problem may not be worth addressing at this time, given that convictions under 18 U.S.C. § 924(o) are rare, if it happens it can have a dramatic and unfair effect on a defendant's sentence.

A. Option A: Amend the commentary to §2K2.4 to encourage downward departure if the defendant is convicted under 18 U.S.C. §§ 924(c) and 924(o)

The Commission could ameliorate the double counting problem by amending the commentary to §2K2.4 to provide that a downward departure may be appropriate if a defendant is convicted under both section 924(c) *and* section 924(o). This appears to be the simplest solution. By encouraging downward departure, unduly harsh sentences for defendants convicted of both section 924(c) and section 924(o) would be discouraged, but not absolutely prevented.

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the guideline with the greatest offense level to represent the entire group).

[66] The final sentence actually imposed in this case was 210 months, because the defendant was also found to be a career criminal subject to a guideline range of 360-Life, but the judge departed downward based on overstatement of the defendant's criminal history. Because section 922(g) was charged in addition to section 922(o), dropping only the section 922(o) count would not have affected the defendant's sentence in this case.

[67] There have been only two other convictions for section 924(o) in the past five years. Note that offenders convicted only of the conspiracy and not the substantive section 924(c) charge receive sentences under §2K2.1, which can be either less or greater than the mandatory minimum penalty required under section 924(c), depending on the number and types of weapons involved, the offender's prior record, whether they pled guilty, etc.

At the risk of adding complicated language (as in the current note encouraging upward departure in some circumstances) further guidance might be provided to indicate the *extent* of departure. The aim, consistent with the general principle that sentencing factors should receive the weight the Commission deems appropriate, would be for departures to be to the level that would apply if the offender had been convicted of section 924(o) instead of section 924(c). Sentences under this guideline are more consistent with the overall guideline approach, since they take into account a fuller range of aggravating and mitigating factors and avoid flat tariff penalties. Of course, the section 924(c) conviction creates a floor below which no sentence could be imposed. But judges would be encouraged to reduce sentences above this level if conviction under both statutory provisions resulted in a sentence above the level required by §2K2.1 and the guideline(s) for the underlying offense.[68]

The application note could include a reference to the language in 28 U.S.C. § 994(*l*)(2) directing that the guideline sentence reflect ". . . the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation."

Convictions under section 924(o) may not receive probation or a suspended sentence and section 924(c) requires that its term run consecutive to any other term. Thus, *some* term is required for the section 924(o) count, even if the judge determines that a departure to the section 924(c) level is appropriate. To guide the court in imposing an appropriate sentence, the commentary could recommend that the court impose a sentence of one day imprisonment on the section 924(o) count.

B. Option B: Create a new guideline for section 924(c) offenses and index section 924(o) counts to it.

Creating a new guideline for section 924(c) convictions in the manner described in Part One could avoid this problem by adopting the same approach used for other conspiracies. The conspiracy count would be indexed to the guideline for the underlying substantive offense, the section 924(c) conviction. Elimination of the "set aside" would then ensure that the counts were grouped and duplicative punishment would be avoided, as directed in the SRA.

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[68] For example, defendants convicted of both section 924(c) and section 924(o) will always have sentences above the section 924(c) level, because the §2K2.1 and §2K2.4 components are added together. In cases in which the §2K2.1 level is greater than the §2K2.4 level, the departure, in principle, should be only to the §2K2.1 level. For defendants convicted of more than two counts—section 924(c), section 924(o), and an underlying offense—the departure should be to the guideline with the greatest offense level: §2K2.1 or the guideline for the underlying offense, including the firearm SOC.