How a Person Who Was Convicted of a Firearms Offense, or Was Convicted of a Drug Offense and Received a Guideline Increase Because a Firearm "Was Possessed" May Qualify for Commutation

I. Statutes and Guidelines

a) Guideline increase in drug cases

In drug cases, the guideline range is increased by 2 levels if a weapon "was possessed." USSG § 2D1.1(b)(1). The increase applies as long as the firearm "was present, unless it is clearly improbable that the weapon was connected with the offense," *id*., cmt. (n.3), and may be proved to a judge by a preponderance of the information at sentencing.

b) Possession of a firearm or ammunition, 18 U.S.C. § 922(g). It is unlawful for a person previously convicted in any court of a crime punishable by a term of imprisonment exceeding one year to possess any firearm or ammunition. 18 U.S.C. § 922(g). The "felon-in-possession" offense is punishable by 0-10 years. *Id*., § 924(a)(2). The applicable guideline is USSG § 2K2.1. Unlawful drug users or addicts and other prohibited persons are also barred from possessing a firearm or ammunition, subject to the same punishment.

Given the 10-year statutory maximum and the 10-years-served requirement for clemency, you are unlikely to be seeking commutation for anyone convicted of this offense unless (1) s/he was also convicted of another offense, *e.g.*, drug trafficking, that subjected him/her to a higher sentence, or (2) the sentence for the felon-in-possession offense was enhanced under the ACCA at 18 U.S.C. § 924(e).

c) ACCA, 18 U.S.C. § 924(e). Simple possession of a firearm or ammunition under 18 U.S.C. § 922(g) is subject to a 15-year mandatory minimum if the person has three prior convictions for a "violent felony" or a "serious drug offense," committed on occasions different from one another, no matter how old. *See* 18 U.S.C. § 924(e). Courts have assumed that the statutory maximum (though unstated in the statute) is life. The applicable guideline is USSG § 4B1.4, which requires a range not less than 188-235 months and can be as much as 360 months to life.

The ACCA enhancement applies automatically based on prior convictions. The fact of a prior conviction need not be charged in an indictment and may be proved to a judge by a preponderance of the evidence. *Almendarez-Torres v. United States*, 524 U.S. 223 (1998). The ACCA enhancement is not charged by the prosecutor in the indictment. Rather, the prior convictions and the application of the ACCA to the defendant generally appear in the PSR. However, the burden is on the prosecutor to prove the prior convictions at sentencing, and that they meet the definition of a "serious drug offense" or "violent felony" under the ACCA.[1]

[1] *See, e.g.*, *United States v. Terry*, 284 F. App'x 242 (6th Cir. 2008) ("Given that it was the government's burden to establish that Terry committed three violent felonies, the government should have provided the district court with the relevant Ohio statutory provision . . . ."); *United States v. Johnson*, 648 F. Supp. 2d 764, 779 (D.S.C. 2009) ("It is the government's burden to prove that defendant qualifies under the ACCA and the record does simply not support a decision that defendant's convictions constitute violent felonies."); *United States v. Stanford*, 2012 WL 178340 (D. Del. Jan. 23, 2012) ("It is the government's burden to demonstrate, by a preponderance of

d) 18 U.S.C. § 924(c). The prosecutor decides whether to charge a violation of 18 U.S.C. § 924(c). The statute is violated when a person "uses or carries" a firearm "during and in relation to," or "possesses" a firearm "in furtherance of," a "crime of violence" or "drug trafficking crime." The basic offense is subject to a mandatory minimum of 5 years, with increasing mandatory minimums based on additional elements, *i.e.*, 7 years (brandishing), 10 years (discharge), 25 years (second or subsequent conviction, or short-barreled rifle/shotgun or semiautomatic assault rifle), 30 years (machinegun, destructive device or firearm with a silencer or muffler), or life (second or subsequent conviction, and machinegun, destructive device or firearm with a silencer or muffler). As above, courts have assumed that the unstated statutory maximum is life.

Each second or subsequent conviction requires a consecutive sentence of 25 years. *See* 18 U.S.C. § 924(c)(1)(C). "Second or subsequent" is something of a misnomer because the first conviction need not be final before any second or subsequent violation. Multiple violations can be charged in the same indictment, a practice known as "stacking."

Section 924(c) is a separate substantive offense, but is typically prosecuted in conjunction with the underlying drug trafficking crime or crime of violence. The § 924(c) sentence must be imposed to run consecutively to any other sentence, including a sentence for an underlying crime.

Only recently, the Supreme Court held that any fact that raises the mandatory minimum above 5 years under § 924(c) is an element that must be charged in an indictment and proved to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

A § 924(c) offense can be prosecuted under an aiding and abetting theory, punishable the same as a principal. *See* 18 U.S.C. § 2. A § 924(c) offense can also be prosecuted under a conspiracy theory. A person "who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, … and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life." 18 U.S.C. § 924(o).

The applicable guideline is USSG § 2K2.4.

II. Analysis

Of the eight people whose sentences were commuted in December 2013, in addition to being convicted of drug trafficking, one was convicted of possessing a firearm and another received a guideline increase for a firearm someone else possessed. The Department of Justice has said that it is looking for candidates "similar to" those whose sentences were commuted in December. Thus, unless the client himself used a firearm (or directed its use), he should not be disqualified on the basis of a conviction for a firearms offense or a guideline increase based on a firearm.

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the evidence, that defendant qualifies as an Armed Career Criminal under the ACCA for purposes of sentencing.").

A guideline provision recently added in 2011 providing for a 2-level increase based on violence supports this conclusion. It provides "in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence," this subsection "would not apply," USSG § 2D1.1(b)(2), cmt. (n. 11(B)) (eff. Nov. 1, 2011). Note that use of the phrase "the defendant" means that this is not determined based on "relevant conduct" of others, but on the defendant's own conduct.

A. Guideline increase in drug cases

At the inception of the guidelines in 1987, the drug guideline required a 2-level increase if a firearm or other dangerous weapon "was possessed during commission of the offense," and said that the increase "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG § 2D1.1(b)(1) & cmt. (n.3) (Nov. 1, 1987). In 1991, the adjustment was broadened even further by deleting "during the commission of the offense." USSG § 2D1.1(b)(1) & cmt. (n.3) (Nov. 1, 1991).

There does not appear to be any argument that the enhancement under USSG § 2D1.1(b)(1) would not be applied today, given the breadth of the definition and the forgiving standard of proof.

The only issue is whether the client's conduct with respect to the weapon was violent. The increase applies when the gun was merely present on the defendant's premises (*e.g.*, in a closet, the attic, the trunk of a car), was possessed or used by a confederate, or was merely present on the premises of a confederate, whether the defendant was present or not. If the enhancement was based on the client's mere possession of a firearm, or someone else's possession or use of a firearm (and the client did not direct that a firearm be used), his conduct is fairly characterized as non-violent.

B. Possession of a Firearm or Ammunition, 18 U.S.C. § 922(g)

1. Was the Client a Non-Violent Offender?

Possession of a firearm by a convicted felon or other prohibited person under 18 U.S.C. § 922(g) is not itself violent, and is not a "crime of violence" under the sentencing guidelines. *See* USSG § 4B1.2, cmt. (n.1).

Because the statutory maximum for a violation of § 922(g) is ten years, you will not have a clemency client who was convicted of that offense alone, unless the sentence was enhanced under the ACCA, in which case go to Part II.C. You may have a clemency client who was convicted under § 922(g) if s/he was convicted at the same time of another offense with a sentence greater than 10 years, *e.g.*, a drug trafficking offense.

If you have such a case, the prior "felony" upon which the client's status as a felon is based may no longer be a felony, in which case it will be helpful to point out that the client would not even be a felon-in-possession today. As a result of the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), some clients whose § 922(g) convictions were based on one or more prior North

Carolina or Kansas convictions were not convicted of an offense "punishable by imprisonment for more than one year." The basics are as follows:

Before 2011, the question whether a defendant's prior North Carolina conviction was an offense "punishable by imprisonment for more than one year" was determined by reference to a hypothetical North Carolina defendant with the worst possible criminal record and greatest number of facts in aggravation. Under this approach, a client previously convicted of two North Carolina Class H felonies, one for possession with intent to sell and deliver cocaine and one for fleeing to elude arrest with two facts in aggravation, for which a hypothetical defendant with the worst prior record and the greatest number of facts in aggravation could have received a sentence greater than one year, was deemed to have been convicted of two "felonies" for purposes of § 922(g). This was true even though the client, who had a less severe criminal history and just two facts in aggravation, could not have actually been sentenced to more than 8 months in prison.

In *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (*en banc*), the Fourth Circuit, relying on *Carachuri-Rosendo*, ended the use of this hypothetical approach. It held that the federal sentencing court may consider only the maximum sentence that the particular offender, with his particular criminal record and any particular aggravating facts proved by the state, could have actually received, not the sentence that could have been imposed on a defendant with a more severe criminal history or subject to an aggravated sentence. *Id.* at 243-45. Under *Simmons*, because the client could not have actually been sentenced to more than 8 months for either Class H felony, and because the client has no other prior convictions that were punishable by more than one year, his § 922(g)(1) conviction is invalid.

The sentencing system in Kansas operates in a similar manner. In June 2014, the Tenth Circuit held in *United States v. Brooks*, No. 13-3166, __ F.3d __, 2014 WL 2443032 (10th Cir. 2014), that after *Carachuri-Rosendo*, a prior Kansas conviction for fleeing and eluding, for which the particular defendant could not have been sentenced to more than 7 months, did not qualify as a "felony" for purposes of the career offender guideline. *See also United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011) (reaching same conclusion regarding a prior Kansas conviction).

If a client's § 922(g) conviction was based on a prior conviction under North Carolina or Kansas law, you will need to determine whether his prior conviction was for an offense that was actually punishable by more than one year. If the client was sentenced to more than one year, the answer is obvious, and you need look no further. In some cases, the client will have already gotten habeas relief, or has a pending request for habeas relief, and these documents may provide helpful information regarding relevant facts and state law. In other cases, you will have to figure it out yourself, which may be difficult because the sentencing schemes of Kansas and North Carolina are not easy to decipher for the inexperienced. Unless you have experience determining maximum penalties under Kansas and North Carolina law, seek assistance with any prior Kansas or North Carolina conviction.

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.
- If you are a Federal Defender, contact abaronevans@gmail.com.

2. Would the Sentence be Lower if Imposed Today?

It is highly unlikely, though not impossible, that when a client was convicted of a § 922(g) offense in addition to another offense, the guideline range for the § 922(g) offense would increase the overall guideline range under the multiple count grouping rules.[2]

If so, the guideline calculation for the § 922(g) offense may be lower today if the base offense level was increased based on one or more prior felony convictions of either a "crime of violence" or a "controlled substance offense." *See* USSG § 2K2.1(a). These terms have the same meaning as they do under the career offender guideline. *Id.*, cmt. (n.1)). Such prior convictions may no longer qualify under current law as a "crime of violence" or a "controlled substance offense." *See* How an Applicant Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today.

The guideline range may be lower today if the Commission subsequently promulgated an ameliorating amendment that would apply in calculating the client's guideline range. Check the amendments listed for § 2K2.1, and any other guideline that might lower the range, *e.g.*, an amendment to a Chapter Three adjustment or a Chapter Four criminal history guideline. *See* Ameliorating Amendments to U.S. Sentencing Guidelines. Compare the guideline range as it was calculated in the PSR with the guideline range as it would be calculated today. *See* Calculating the Guideline Range Then and Now.

C. ACCA, 18 U.S.C. § 924(e)

1. Was the Client a Non-Violent Offender?

The instant offense of possessing a firearm or ammunition is nonviolent, and people sentenced under the ACCA rarely are convicted of a violent offense at the same time. In 2013, of 582 people sentenced under the ACCA, 576 were convicted only of possession of a firearm by a felon; six were convicted of a drug offense at the same time; none were convicted of any violent offense. U.S. Sent'g Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, tbl. 22.

The prior convictions that subject a person convicted under § 922(g) to a sentence under the ACCA may be non-violent as well. A "serious drug offense" can be low-level non-violent drug activity as long as the statutory maximum for the offense is ten years or more. 18 U.S.C. § 924(e)(2)(A). A prior "violent felony," *id.*, § 924(e)(B), may no longer be a "violent felony" under current law. *See* How a Person Who Was Sentenced Under the ACCA, 18 U.S.C. § 924(e), Would Likely Receive a Lower Sentence Today. Offenses that do count as "violent felonies" can be non-violent in fact.[3] And because

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[2] *See* USSG § 3D1.1(a); § 3D1.2(a), (c); § 3D1.3(a); § 3D1.4.

[3] *See United States v. Jarmon*, 598 F.3d 228 (4th Cir. 2010) (pickpocketing); *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting) (entering a telephone booth to steal change from a coin box); *Johnson v. United States*, 616 F.3d 85, 90 (2d Cir. 2010) (inciting or participating in a prison hunger strike); *Sykes v. United States*, 131 S. Ct. 2267 (2011) (failing to pull over for a police officer); *James v. United States*, 550 U.S. 192 (2007) (attempted burglary of a dwelling). *See Derby et al. v. United States*, 131 S. Ct. 2858, 2859 (2011)

there is no limit on remoteness, the prior offenses can be so old that that they fail to show that the offender was a violent offender when he was sentenced. *See*, e.g., *United States v. Turner*, No. 09CR156 (E.D. Va.) (ACCA applied to 50-year-old drug-free man based on pickpocketing, burglary and robbery committed when he was a heroin addict in his early 20s).

2. Would the Sentence be Lower if Imposed Today?

a. if the ACCA would not apply today

A prior conviction necessary to the ACCA enhancement may no longer qualify as a "violent felony" or "serious drug offense" under current law. *See* How a Person Who Was Sentenced Under the ACCA, 18 U.S.C. § 924(e), Would Likely Receive a Lower Sentence Today. In that case, the 15-year mandatory minimum would be eliminated, and the ten-year statutory maximum for the § 924(g) offense would apply. You could stop there because the client will already have served at least ten years. However, the most persuasive case for sentence commutation is if the client has already served much more time than the sentence he would receive today.

If the client would not be sentenced under the ACCA today, the sentence would be based on the guideline range as it would be calculated today, and any variance from it under *Booker* and its progeny.

The guideline range would be calculated under USSG § 2K2.1 as it appears in the current version of the Guidelines Manual. Calculate that guideline range. *See* Calculating the Guideline Range Then and Now.

The base offense level under § 2K2.1(a)(1), (2), (3), and (4)(A) depends upon whether the client possessed the firearm "subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense," or "one" such conviction. *See* USSG § 2K2.1(a)(1), (2), (3), (4)(A). The terms "crime of violence" and "controlled substance offense" have the same meaning as those terms are given under the career offender guideline. *Id.*, cmt. (n.1)). One or more of the client's prior convictions may not qualify under current law as a "crime of violence" or a "controlled substance offense." *See* How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today; Ameliorating Amendments to U.S. Sentencing Guidelines.

If the client were sentenced today, the sentencing judge may impose a sentence below the advisory guideline range calculated under USSG § 2K2.1 under the Supreme Court's decisions in *United States v.* Booker, 543 U.S. 220 (2005) and its progeny. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

(Scalia, J., dissenting from denial of certiorari) ("I would grant certiorari, declare ACCA's residual provision to be unconstitutionally vague, and ring down the curtain on the ACCA farce playing in federal courts throughout the Nation.").

b. if the ACCA would apply today

If the ACCA would apply today, the sentence would be at least 15 years as required by statute. If the sentence imposed was 15 years, it will be more difficult to show that the sentence would be lower today. As noted in Part I, the ACCA applies automatically based on the prior convictions, assuming they qualify as ACCA predicates under current law.

Sometimes, a defendant pleads guilty to the § 922(g) offense expecting a guideline sentence and a statutory maximum of 10 years, only to learn from the PSR that he is subject to a statutory minimum of 15 years. There are cases in which the sentencing judge, and sometimes the prosecutor, state on the record that the 15-year mandatory minimum required by the ACCA is too harsh. There are also cases in which the parties avoid the ACCA by agreeing that the defendant will plead guilty to a charge that does not invoke the ACCA, or by entering into a binding plea agreement to a specific sentence.[4]

The Department of Justice recognizes that the ACCA can apply unfairly. In testimony before the Sentencing Commission on May 18, 2010, the Department's witness advised the Commission that it should look into making a recommendation to Congress regarding the ACCA. She testified that "it is not unusual at all for a defendant to be charged and convicted and plead guilty of drug trafficking [in state court] and never serve a day in prison. This can happen . . . more than a couple of times in our state system. And then we [the federal authorities] may arrest that offender, and they have a gun, and now they're looking automatically at 15 years. Even though they've never really done any time."[5]

But since the ACCA is not charged in the indictment, the Department of Justice has no charging policy that applies to it.

In an appropriate case, for example, one in which the judge and/or prosecutor expressed concerns about the ACCA sentence, and the case would meet the criteria under Attorney General Holder's charging policy for when prosecutors should decline to charge § 851 enhancements in drug cases, *see* Appendix, you can argue by analogy to that policy that if the client were sentenced today, the prosecutor would agree to a resolution that would avoid the ACCA enhancement, *see* footnote 4, *supra*. If you

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[4] *See United States v. Wordsley*, 2014 WL 1327526 (E.D. Pa. April 2, 2014) (defendant pled guilty to possessing a firearm in violation of § 922(g)(1), under a binding Rule 11(c)(1)(C) plea agreement, which provided that the government agreed to forego presenting proof of the prior convictions that would otherwise require a 15-year mandatory minimum under the ACCA, and that a sentence of 96 months was appropriate); *United States v. Blanding*, 2012 WL 4321746 (D. Conn. Sept. 20, 2012) (parties entered into a binding plea agreement under Rule 11(c)(1)(C) to a sentence of 96 months, where it was uncertain whether the ACCA would apply under the law, and the government was unlikely to be able to prove that the prior conviction was a "serious drug offense" because the state court plea transcript could not be located).

[5] *See* U.S. Sent'g Comm'n, Public Hearing, May 27, 2010, at 60-61 (testimony of Sally Quillian Yates), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Hearing_Transcript.pdf.

pursue that course, you may want to try to obtain an understanding with the prosecutor that s/he will support commutation when asked, and ask the sentencing judge for a letter supporting commutation.[6]

If the sentence imposed was more than 15 years (*i.e.*, more than 180 months) because the mandatory guideline range under USSG § 4B1.4 required a higher sentence, you may be able to show that the guideline range would be lower, or that the judge would impose a sentence below the now-advisory guideline range (but no less than the statutory minimum of 15 years) under *United States v. Booker*, 543 U.S. 220 (2005) and its progeny. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

Under § 4B1.4 (from 1990 up to the present[7]), the offense level must be at least 33 and the criminal history category at lease IV, yielding a guideline range of at least 188-235 months. *See* § 4B1.4(b)(3)(B), (c)(3). The offense level is the greatest of the offense level under Chapters Two and Three; the career offender guideline if applicable (because the career offender guideline does not apply to possession of a firearm, it can only apply if the client was also convicted of an offense to which the career offender guideline applies, *e.g.*, drug trafficking); 34 if the client possessed the firearm or ammunition in connection with a "crime of violence" or "controlled substance offense" as defined in the career offender guideline; or 33. *Id*., § 4B1.4(b). The criminal history category is the greatest of the criminal history category under Chapter Four; category VI if the client possessed the firearm or ammunition in connection with a "crime of violence" or "controlled substance offense" as defined in the career offender guideline; or category IV. *Id*., § 4B1.4(c).

The guideline range may be lower today if the Commission subsequently promulgated an ameliorating amendment that would apply in calculating the guideline range. *See* Ameliorating Amendments to U.S. Sentencing Guidelines. The guideline range may be lower if a prior offense that made the client a "career offender" under § 4B1.4(b)(2), or a concurrent offense previously counted under § 4B1.4(b)(3)(A) or (c)(2), is no longer as a "crime of violence" or a "controlled substance offense" under current law. *See* How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today.

3. Unfair Severity/Unfair Disparity

A traditional ground for sentence commutation, though not one of the required criteria, is unfair disparity. Unfair disparity generally results from unfair severity. You can bolster your case for commutation with the Sentencing Commission's findings in this regard, if it fits with the case.

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[6] If any court proceeding is pending, such as a habeas petition or a § 3582(c)(2) motion, let the prosecutor know you are contacting the judge, and let the judge know you have informed the prosecutor. Otherwise, although clemency is separate from pending litigation and not necessarily adversarial, the judge or prosecutor might regard it as an ex parte contact, or it may at least cause the judge discomfort. In considering whether to contact the judge, *pro bono* lawyers who do not know the judge should check with the local Federal Defender regarding what may be the best approach – telephone call, letter, email, or not at all.

[7] There was no guideline addressing ACCA cases before § 4B1.4 was added in 1990. App. C, Amend. 355 (Nov. 1, 1990).

"The statutory definitions of 'violent felony' and 'serious drug offense' . . . may contribute to inconsistent application" because "[t]hose statutory definitions depend, in part, on the varying statutory maximum penalties for offenses provided by the states." U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice* System, at 362-63 (Oct. 2011).[8]

"The definition of 'violent felony' and 'serious drug offense' require only that the prior offense be punishable by a maximum term of more than one year or at least ten years of imprisonment, respectively. As a result, the Armed Career Criminal Act's mandatory minimum penalty can apply to offenders who served no or minimal terms of imprisonment for their predicate offenses, further increasing the potential for inconsistent application insofar as the penalty may be viewed as excessively severe in those cases." *Id*. Here, the Commission is recognizing that the ACCA is sometimes avoided, though it technically applies, when "viewed as excessively severe."

As to racial disparity: "Black offenders constitute the majority of offenders who qualify for the Armed Career Criminal Act's 15-year mandatory minimum penalty (63.7%) and of offenders who remain subject to its mandatory minimum penalty at sentencing (63.9%). . . . To the extent the mandatory minimum penalties for firearm offenses are unduly severe, these effects fall on Black offenders to a greater degree than on offenders in other racial groups." *Id*. at 363. "[D]emographic differences in the application of mandatory minimum penalties for firearms offenses create perceptions of unfairness and unwarranted disparity." *Id*. at 364.

D. 18 U.S.C. § 924(c)

1. Was the Client a Non-Violent Offender?

As noted in Part I, it is up to the prosecutor whether and how to charge violations of 18 U.S.C. § 924(c). In drug cases, prosecutors have a choice between a § 924(c) charge with a stiff mandatory minimum or the 2-level guideline increase. They also have the discretion whether or not to "stack" multiple § 924(c) violations, with each subsequent violation subject to a consecutive 25-year minimum sentence. This power has frequently been used, not to punish or incapacitate violent offenders, but to punish non-violent offenders for exercising their right to trial or to decline to cooperate. Until recently, this was official DOJ policy.[9]

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[8] Available at http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[9] In a memorandum issued to federal prosecutors on September 22, 2003, Attorney General Ashcroft directed them "to charge and to pursue the most serious, readily provable offense," defined as the offense generating the "most substantial sentence." *See* Memorandum from John Ashcroft, Att'y Gen. of the United States, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *reprinted in* 16 FED. SENT'G REP. 129, 130 (2003). Further, "[t]he use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as …the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. … In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that

You may have a client who was convicted under 18 U.S.C. § 924(c) of possessing a firearm in furtherance of, or of using or carrying a firearm during and in relation to, a drug trafficking crime or a crime of violence, whose conduct was non-violent. Until the Supreme Court decided *Watson v. United States*, 552 U.S. 74 (2007), a person could be convicted of "using" a firearm during and in relation to a drug trafficking crime by trading drugs for a gun. In many § 924(c) cases, the defendant did not use the firearm at all, but simply possessed it, perhaps in a closet, in the attic, or in the trunk of a car, or was merely present when a confederate possessed or used a firearm, or was not even present when a confederate possessed or used a firearm. Many defendants were convicted based on someone else's use or possession of a firearm, present or not, under a conspiracy or aiding and abetting theory.

For example, the judge was required to sentence Weldon Angelos, a twenty-four-year-old first offender, marijuana dealer, and music executive with two young children, to a consecutive mandatory minimum term of 55 years based on the prosecutor's choice to "stack" § 924(c) charges. The charges were based on Angelos' possession (not display or use) of a gun during two small marijuana deals, and his possession of guns in his home. The prosecutor offered to recommend a sentence of 15 years if Angelos would plead guilty to one § 924(c) count. When Angelos "had the temerity to decline," the prosecutor filed superseding indictments adding four additional § 924(c) counts. Angelos went to trial, and was convicted of three § 924(c) counts. The judge found the sentence to be "unjust, cruel, and even irrational," but had no choice but to impose it.[10]

Mary Beth Looney, a 53-year-old woman with serious health problems and no prior convictions or arrests, was sentenced to 45 years, 40 of which were mandatory (30 for two "stacked" § 924(c)s, 10 for drug trafficking), for selling drugs with her husband and having guns in the house. The prosecutor offered her 15 years for a guilty plea, but "stacked" two § 924(c) charges when she opted for trial. The Fifth Circuit said that "there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house," that the prosecutor could have charged only one § 924(c) count, thus avoiding the consecutive 25-year mandatory minimum, or he could have sought a two-level enhancement under the guidelines, but "the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence."[11] Ms. Looney's co-defendant, who was prosecuted in an adjoining district, received a 37-month guideline sentence.

Marion Hungerford, a mentally ill 52-year-old woman, with no prior convictions, had raised four children, and led a law-abiding life until her husband of 26 years left her because of her deteriorating mental condition. With no money or employment prospects, she began living with another man. To

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the defendant … will have no incentive to plead guilty. … Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but *only* in the context of a negotiated plea agreement." *Id*. at 131 (emphasis in original).

[10] *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004).

[11] *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

obtain money for basic living expenses, he robbed several stores. No one was hurt and the total loss was less than $10,000. Ms. Hungerford never touched a gun and took no active part in the robberies. Due to her mental illness, she held a fixed belief that she was innocent, and therefore declined the prosecutor's offer of a plea bargain in exchange for her testimony against the actual robber. She was sentenced to over 159 years in prison: 155 years based on the prosecutor's choice to stack seven § 924(c) counts, and 57 months for the underlying robberies under the guidelines. The robber received a sentence of 32 years in exchange for his testimony against Ms. Hungerford. Ninth Circuit Judge Reinhardt described Ms. Hungerford's sentence as "irrational, inhumane, and absurd," and "immensely cruel, if not barbaric."[12]

Percy Dillon was convicted of using a firearm during and in relation to a drug trafficking crime, for which he received a mandatory consecutive 60-month sentence under § 924(c). He was, however, never accused of using, carrying or possessing the gun and was neither present nor implicated in the incident described in the presentence report involving the gun. Rather, a co-defendant used a gun at the direction of another co-defendant to threaten a third party into providing information they wanted. Dillon was not present during or otherwise involved in the incident. He was convicted of the § 924(c) under a theory of co-conspirator vicarious liability under *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) (co-conspirator may be vicariously liable for a substantive offense committed by another coconspirator if it was "done in furtherance of the conspiracy," and was "reasonably foreseen as a necessary or natural consequence of the unlawful agreement").[13]

You may encounter a case involving a very long sentence under § 924(c) that would be a strong case for clemency based on statements by the judge, evidence of disparity, good conduct in prison, and other factors, but the offender's conduct is fairly characterized as violent. *See, e.g., United States v. Holloway*, 2014 WL 1942923 (E.D.N.Y. May 14, 2014). In such a case, you may file a petition directly with the OPA, or the client may proceed *pro se* or with the assistance of another lawyer.

2. Would the Sentence Be Lower if Imposed Today?

a. Change in DOJ Charging Policy

Under the Attorney General's current charging policies, which are summarized in the Appendix, the prosecutor may not charge any § 924(c) count, or would not charge multiple § 924(c)s.

On May 19, 2010, Attorney General Holder issued a memorandum to all federal prosecutors regarding "Department Policy on Charging and Sentencing," stating that "In all cases, the charges should fairly reflect the defendant's criminal conduct," and that "Charges should not be filed simply to exert leverage to induce a plea."[14] In language that reflects a shift from previous DOJ charging policy

[12] *United States v. Hungerford*, 465 F.3d 1113, 1118-23 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment).

[13] The government acknowledged that Dillon was not present and was convicted under a *Pinkerton* theory. *See United States v. Dillon*, Case No. 93-cr-84 (W.D. Pa.), Docket # 143, Government's Response to Motion to Review Sentence at 6-7.

that required § 924(c) enhancements to be charged whenever available and allowing such charges to be foregone only if the defendant entered into a plea agreement on the prosecutor's terms, *see* footnote 9, *supra*, the Holder policy states that "due consideration should be given to the defendant's substantial assistance in an investigation or prosecution" in deciding "whether to seek a statutory enhancement" in the first place.[15] Unlike prior DOJ policy, the Holder policy does not require or authorize the use of § 924(c)s as a threat to induce a guilty plea or cooperation, or as punishment for declining to do so.

This language was incorporated into the U.S. Attorneys Manual,[16] which further states that "Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea)."[17]

At a hearing before the Sentencing Commission on May 18, 2010, the witness testifying for the Department of Justice said that "certainly it is well known that there are criticisms and concerns about the stacking of 924(c)s, particularly in a scenario where you have an individual who is charged with multiple 924(c) counts in the same indictment."[18] As an example, "where you have an individual who goes out on a spree and robs three banks and is now looking at life as a result of that, that might not necessarily be the most appropriate use of the sentencing structure."[19] All the more so if the defendant engaged in three drug deals.

The Attorney General has not issued a policy dealing specifically with § 924(c) enhancements. However, these enhancements are similar to § 851 enhancements available to prosecutors in drug cases, in that they can result in extreme sentences for conduct that does not warrant it, and have been subject to abuse. In a case that would meet the criteria for not charging a § 851 enhancement under Attorney General Holder's charging policy for drug cases, you can argue by analogy to that policy that if the client were prosecuted today, the prosecutor would not charge a § 924(c), or would not stack multiple § 924(c)s. *See* Appendix.

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[14] *See* Memorandum to all Federal Prosecutors from Eric H. Holder, Jr., Attorney General, Department Policy on Charging and Sentencing at 2 (May 19, 2010).

[15] *Id.*

[16] U.S. Attorneys Manual, § 9-27.300.

[17] *Id.*, § 9-27.320.

[18] *See* U.S. Sent'g Comm'n, Public Hearing, May 27, 2010, at 59-60 (testimony of Sally Quillian Yates), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Hearing_Transcript.pdf.

[19] *Id.* at 60.

If you are going to argue that one or more § 924(c) enhancements would not be charged today, try to obtain an understanding with the prosecutor that s/he will support commutation when asked, and you may want to ask the sentencing judge for a letter.[20] Contemporaneous statements by the sentencing judge or the court of appeals would be particularly helpful.

b. *Rosemond v. United States*, 133 S. Ct. 1240 (2014)

If the client was convicted of violating § 924(c) under an aiding and abetting theory, *see* 18 U.S.C. § 2, it may be that he could not be convicted today under the Supreme Court's recent decision in *Rosemond v. United States*, 133 S. Ct. 1240 (2014). There, the Court held that a person is not guilty of aiding and abetting a § 924(c) offense if s/he did not "actively participate[] in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry [or possess] a gun during the crime's commission." *Id*. at 1243. The defendant must "decide[] to join in the criminal venture, and share in its benefits, with full awareness … that the plan calls not just for a drug sale, but for an armed one." *Id*. at 1249. The "defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun." *Id*. at 1249. Advance knowledge "means knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Id.* at 1249-50.

The jury instructions given in *Rosemond* were erroneous because they failed to require that Rosemond knew in advance that one of his cohorts would be armed. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine when Rosemond obtained the requisite knowledge—*i.e.,* to decide whether Rosemond knew about the gun in sufficient time to withdraw from the crime. *Id.* at 1251-1252.

If the client was convicted under § 924(c) on an aiding and abetting theory, and he did not actively participate in the underlying offense with advance knowledge that a confederate would use or carry a firearm, he could not be convicted today under *Rosemond*. If the client was convicted by a jury, look at the jury instructions. If the client pled guilty, look at the plea colloquy and any agreed statement of facts in a plea agreement to determine whether s/he pled guilty to the requisite elements under *Rosemond*.

[20] In considering whether to contact the judge, proceed with caution. If you do not know the judge, check with the local Federal Defender regarding what may be the best approach – telephone call, letter, email, or not at all. If any legal matter is pending, such as a habeas petition or a § 3582(c)(2) motion, you should let the prosecutor know that you are contacting the judge, and let the judge know that you have informed the prosecutor. Otherwise, although clemency is not a court proceeding, is a separate matter, and is not strictly adversarial, it might be considered an ex parte contact or may at least make the judge uncomfortable.

Even if the defendant was not charged under the aiding and abetting statute, 18 U.S.C. § 2, if the record does not establish the defendant himself/herself carried/used the gun, the conviction may still have been predicated on an aiding and abetting theory. Aiding and abetting is implied in every federal indictment for a substantive offense. *See, e.g.*, *United States v. Frorup*, 963 F.2d 41, 42 (3d Cir. 1992); *United States v. Armstrong*, 909 F.2d 1238 (9th Cir. 1990).

c. *Alleyne v. United States*, 133 S. Ct. 2151 (2013)

See Would the Supreme Court's Decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013) Lead to a Lower Sentence Today?

3. Unfair Severity/Unfair Disparity

A traditional ground for sentence commutation, though not one of the required criteria, is unfair disparity. Unfair disparity generally results from unfair severity. You can bolster your case for commutation with the Sentencing Commission's findings in this regard, if it fits with the case.

Regarding racial disparity: Analysis of 1995 data found that Black defendants accounted for 48% of offenders who qualified for a charge under § 924(c), but 56% of those who were charged with a § 924(c) and 64% of those who convicted of a § 924(c). U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing* at 90 (Nov. 2004).[21]

Black offenders were "subject to the mandatory minimum penalty at sentencing, and were convicted of multiple counts of an offense under section 924(c), at higher rates than offenders with other demographic characteristics." U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice* System, at 274 (Oct. 2011).[22] In fiscal year 2010, 20% of offenders subject to § 924(c) were White, and 55.7% were Black. Of those convicted of multiple counts, 15.1% were White and 61.0% were Black. *Id*. There are notable demographic differences in the application of mandatory minimum penalties for firearm offenses. Black offenders constitute the majority of offenders convicted of an offense under section 924(c) (55.9%) and the majority of offenders who remain subject to its mandatory minimum penalties at sentencing (55.7%). Black offenders constitute an even greater proportion (61.0%) of offenders convicted of multiple counts of an offense under section 924(c). By contrast, White and Hispanic offenders constitute only 15.1 and 21.2 percent of offenders convicted of multiple counts of an offense under section 924(c), respectively." "The effects of these demographic differences are two-fold. First, to the extent the mandatory minimum penalties for firearm offenses are unduly severe, these effects fall on Black offenders to a greater degree than on offenders in other racial groups. Second, as in drug offenses, demographic differences in the application of mandatory minimum penalties for firearm offenses create perceptions of unfairness and unwarranted disparity." *Id*. at 363-64.

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[21] Available at http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/fifteen-years-guidelines-sentencing.

[22] Available at http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

Regarding geographic disparity: "Cases involving convictions of multiple section 924(c) counts were more geographically concentrated than cases involving a conviction of an offense under 924(c) as a whole. In fiscal year 2010, the ten districts that reported the highest number of cases involving multiple convictions of section 924(c) accounted for 62.7 percent of all such cases." *Id*. at 289. "The severity of the mandatory minimum penalties for violating section 924(c), particularly the penalties for committing multiple violations of section 924(c), has produced inconsistencies in the application of the penalties among judicial districts. The Commission's sentencing data show that cases involving multiple violations of section 924(c) are concentrated in only a few districts. The Commission has identified no evidence that those offenses occur more frequently in those districts than in others, and the Commission therefore believes that this geographic concentration is attributable to inconsistencies in the charging of multiple violations of section 924(c). Accordingly, in the context of multiple violations of section 924(c), offenders who commit similar offenses are treated differently — resulting in dramatically different sentencing outcomes — based largely on the judicial district in which they are charged." *Id*. at 361-62.

Recommendations for firearms offenses: "In light of these findings and observations, the Commission recommends that Congress consider amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) to ameliorate the problems associated with mandatory minimum penalties for firearm offenses. Congress could do so in a number of ways." First, "Congress should consider amending the mandatory minimum penalties established at section 924(c), particularly the penalties for 'second or subsequent' violations of the statute, to lesser terms. Section 924(c), for example, requires a 25-year mandatory minimum penalty for offenders convicted of a 'second or subsequent' violation of the statute. Reducing the length of the mandatory minimum penalty would reduce the risk of excessive severity, permit the guidelines to better account for the variety of mitigating and aggravating factors that may be present in the particular case, and mitigate the inconsistencies in application produced by the severity of the existing mandatory minimum penalties." Second, "Congress should consider amending section 924(c) so that the increased mandatory minimum penalties for a 'second or subsequent' offense apply only to prior convictions. In those circumstances, the mandatory minimum penalties for multiple violations of section 924(c) charged in the same indictment would continue to apply consecutively, but would require significantly shorter sentences for offenders who do not have a prior conviction under section 924(c). This would reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c), and ameliorate some of the demographic impacts resulting from stacking." Third, "Congress should consider amending section 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently. Congress has recently used this approach in enacting the offense of aggravated identity theft and the accompanying mandatory penalty at 18 U.S.C. § 1028A. This limited discretion would provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment." *Id*. at 364.

See also Statement of Chair, U.S. Sentencing Commission, for Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" Before the Committee on the Judiciary, United States Senate, Sept. 18, 2013 at 3-4, 11-12.[23]

[23] Available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20131126-Letter-Senate-Judiciary-Committee.pdf.

APPENDIX - Attorney General Holder's Charging Policies

Prosecutors "should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets *each*" of four criteria:

- "relevant conduct" does not involve violence, credible threat of violence, possession of a weapon, trafficking drugs to or with minors, death or serious bodily injury
- not an organizer, leader, manager, or supervisor of others within a criminal organization
- does not have "*significant* ties" to "*large-scale* drug trafficking organizations, gangs, or cartels"
- does not have a "significant criminal history," "normally evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions."[24] Three or more points "may not be significant if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent low-level drug activity."[25]

Prosecutors "should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions[,] . . . consider[ing]" six factors [need not meet *each* of these criteria – it's a totality of the circumstances test]:

- Whether D "was an organizer, leader, manager or supervisor of others within a criminal organization"
- Whether "the *defendant* was involved in the use or threat of violence in connection with the offense" [*not* relevant conduct]
- "The nature of the defendant's criminal history, including any prior history of *violent* conduct or *recent* prior convictions for *serious* offenses"
- "Whether the defendant has *significant* ties to *large-scale* drug trafficking organizations, gangs, or cartels"
- "Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants"
- "Other case-specific aggravating or mitigating factors."[26]

The defendant is not required to plead guilty or cooperate in order to be charged fairly. Rather, the defendant need only "meet[] the above criteria."[27] For defendants "charged but not yet convicted," "prosecutors should apply the new policy and pursue an appropriate disposition consistent with the

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[24] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 2 (Aug. 12, 2013) [Holder Memo, Aug. 12, 2013].

[25] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 1 (Aug. 29, 2013) [Holder Memo, Aug. 29, 2013].

[26] Holder Memo, Aug. 12, 2013, at 3.

[27] *Id*. at 2 ("Timing and Plea Agreements").

policy's section, 'Timing and Plea Agreements.'" For defendants who already pled guilty or were convicted by a jury but have not yet been sentenced, prosecutors are "encouraged" to "consider" withdrawing § 851s.[28]

"Charges should not be filed simply to exert leverage to induce a plea."[29] "Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea)."[30]

[28] Holder Memo, Aug. 29, 2013, at 1-2.

[29] Memorandum to all Federal Prosecutors from Eric H. Holder, Jr., Attorney General, Department Policy on Charging and Sentencing at 2 (May 19, 2010); U.S. Attorneys Manual, § 9-27.300.

[30] U.S. Attorneys Manual, § 9-27.320.