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March 9, 2006

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments to the Firearms Guideline, § 2K2.1

Dear Judge Hinojosa:

On behalf of the Federal Public and Community Defenders, we write to provide our comments on the proposed amendments to the firearms guideline, § 2K2.1.1

As of 2003, firearms offenders comprised approximately 10% of offenders sentenced in federal court, the fourth largest proportion of the federal docket.2 Average time served for illegal firearms trafficking and possession under 18 U.S.C. § 922(g) doubled from the guidelines' inception to 2002.3 From 2002 to the present, average sentence length for offenders sentenced under § 2K2.1 increased from 53 months to 58 months.4

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1 Thanks to Assistant Federal Defenders John Reichmuth and Richard Ely for their technical expertise and research. Thanks to Steve Jacobson, Brian Rademacher, John Rhodes, and Kristen Rogers for their practical and legal input.

2 The Commission has acknowledged that, to date, the Guidelines have been used to increase sentence severity, but that they *could be* used to reduce sentence severity for targeted offenses or offenders, and *could be* used to carry out its statutory duty to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g).2

3 U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform at 139 (2004).

4 U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Table 7 (average sentence length for firearms offenders receiving prison sentence increased from 71 to 75.8 months from 2002 to 2003) (2002-2003), http://www.ussc.gov/JUDPACK; U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table 13 (average sentence length for all firearms offenders

As of 2004, the Bureau of Prisons was 40% overcapacity,5 with over 188,000 inmates,6 at a cost to the taxpayers of over $4 billion a year.7 The Commission is required by statute to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,"8 to assure that the purposes of sentencing, including proportionate punishment, are met, and to avoid unwarranted disparity and inappropriate uniformity.9

Yet, most of the proposed amendments would raise penalties for less serious conduct. As set forth below, by following Congress' lead in the firearms area and relying on accurate information about firearms, the Commission can and should lower firearms sentences, or at least not indiscriminately raise them, and assure that any enhancements in this area are appropriately focused and narrowly drawn.

(A) § 921(a)(30)

The proposed amendment sets forth two options. Option One would replace a "firearm described in [the now-repealed] 18 U.S.C. § 921(a)(30)" with a "high-capacity, semiautomatic firearm" in the enhanced base offense levels set forth in § 2K2.1(a).10 Option Two would encourage upward departure if the offense involved a "high-capacity, semiautomatic firearm." Under either option, "high capacity, semiautomatic firearm" would be defined as a "semiautomatic firearm that has a magazine capacity of more than [15] cartridges," the same

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increased from 65.8 to 70 months from 2002 to 2003 (2002-2003), http://www.ussc.gov/JUDPACK; U.S. Sentencing Commission, Special Post-Booker Coding Project at 13-15 (average sentence length for offenders sentenced under § 2K2.1 increased from 53 to 58 months from 2002 to 2005) (Prepared Feb. 14, 2006), http://www.ussc.gov/Blakely/postBooker_021406.pdf.

5 U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004 at 7, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

6 http://www.bop.gov/news/quick.jsp#1.

7 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) ($22,632 per federal inmate in FY 2001), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt.

8 28 U.S.C. § 994(g).

9 28 U.S.C. § 991(b); 18 U.S.C. §3553(a)(2).

10 The enhanced base offense levels are 26 for any firearms offender with two prior felony convictions of a crime of violence or controlled substance offense, U.S.S.G. § 2K2.1(a)(1), 22 for any firearms offender with one such prior conviction, U.S.S.G. § 2K2.1(a)(3), 20 for possession by or transfer to a prohibited person, U.S.S.G. § 2K2.1(a)(4)(B), and 18 for any other firearms offense. U.S.S.G. § 2K2.1(a)(5).

definition as in § 5K2.17 (upward departure if possessed in connection with a crime of violence or controlled substance offense), except that the threshold magazine capacity in § 5K2.17 is "more than 10 cartridges."

The Commission seeks comment on (1) whether an alternative definition should be considered, (2) whether there are other categories of firearms that should form the basis for an enhanced base offense level or upward departure, and (3) whether the Commission should make similar changes to the definition of "high capacity, semiautomatic firearm" in § 5K2.17.

Congress allowed the semiautomatic assault weapons legislation to lapse because there was no empirical justification for it while it was in effect.11 The Commission has a non-controversial opportunity to simplify and lower penalties in what appears to be a small number of cases. Thus, the Commission should delete the references to the repealed legislation, and take no action unless and until a particular action is demonstrated to be necessary based on (1) analysis of sentencing data, and (2) research about the types of weapons it is considering for more severe punishment. In the meantime, courts can take into account under § 3553(a) in any case any heightened seriousness of the offense or need to protect the public flowing from the type of weapon. Further, upward departure is available for multiple "military type assault rifles," § 2K2.1, comment. (n.13), and for "high capacity, semiautomatic firearms" possessed "in connection with" a crime of violence or controlled substance offense, § 5K2.17.

As set forth in subsection (c), the proposed definition of "high capacity, semiautomatic weapon" would sweep in ordinary firearms with legitimate uses, including target shooting at Boy Scout camps, quite *unlike* the bombs, machine guns and sawed-off shotguns described in 26 U.S.C. § 5845, and also well beyond the firearms described in 18 U.S.C. § 921(a)(30) which Congress has repealed. If the Commission feels compelled to act in this amendment cycle for reasons that seem contrary to congressional intent and are not apparent in any reason offered in support of the amendment or in any data of which we are aware, it should provide for an upward

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11 A study mandated by Congress to be performed thirty months after enactment of the semiautomatic assault weapons ban concluded that, "[a]t best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never used in more than a fraction of all gun murders," and that there was no detectable reduction "in two types of gun murders that are thought to be closely associated with assault weapons, those with multiple victims in a single incident and those producing multiple bullet wounds per victim." See Roth, Koper, et. al, Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 at 2, 97 (March 13, 1997), http://www.urban.org/UploadedPDF/aw_final.pdf. Semiautomatic assault weapons are used in only 1-2% of crimes. See David B. Kopel, Rational Basis Analysis for "Assault Weapon" Prohibition, 20 J. Contemp. L. 381 (1994) (SAWs used in 1% of gun crime); U.S. Department of Justice, Bureau of Justice Statistics, Survey of State Prison Inmates 1991 (3/93) ("fewer than 1% of all violent inmates, were armed with a military-type weapon, such as an Uzi, AK-47, AR-15, or M-16"), http://www.ojp.usdoj.gov./bjs/pub/ascii/sospi91.txt; U.S. Department of Justice, Bureau of Justice Statistics, Firearm Use by Offenders (2/5/02) ("about 2% had a military-style semiautomatic gun or machine gun"), http://www.ojp.usdoj.gov./bjs/pub/ascii/fuo.txt.

departure for involvement of a semiautomatic assault weapon, as defined in former 18 U.S.C. § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3).

1. Consistent with congressional intent and the Commission's duty to revise guidelines based on data and research, the Commission should delete the reference to weapons described in 18 U.S.C. § 921(a)(30) and take no further action unless indicated by sentencing data and research regarding semiautomatic weapons.

The Violent Crime Control and Law Enforcement Act of 1994 ("the Act") became law on September 13, 1994. Subtitle A of Title XI of the Act, among other things, criminalized the manufacture, transfer or possession of a "semiautomatic assault weapon," 18 U.S.C. § 922(v)(1) (repealed September 13, 2004), defined in 18 U.S.C. § 921(a)(30) (repealed September 13, 2004) with numerous exemptions set forth in 18 U.S.C. § 922(v)(2)-(4) (repealed September 13, 2004), subject to a maximum penalty of five years, 18 U.S.C. § 924(a)(1)(B) (amended to delete § 922(v) September 13, 2004); enacted a ten-year mandatory minimum for a violation of § 924(c) with a "semiautomatic assault weapon," 18 U.S.C. § 924(c)(1)(B)(i) (repealed September 13, 2004); and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm," defined as "any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge." Pub. L. 103-322 § 110501 (repealed September 14, 2004).

In response to the congressional directive, the Commission provided for a potential upward departure in § 5K2.17 in recognition that any increased risk of harm from a "high capacity, semiautomatic firearm" would vary substantially with the inherent dangerousness of the weapon and the circumstances of the offense.12 Without a congressional directive, the Commission amended § 2K2.1 to subject "semiautomatic assault weapons" as defined in 18 U.S.C. § 921(a)(30) to the same enhanced base offense levels as the sawed-off firearms, machine guns, bombs and silencers described in 26 U.S.C. § 5845(a).13

By the terms of the Act, Subtitle A in its entirety was repealed effective September 13, 2004.14 Congress has taken no action to reinstate any of its provisions. Nonetheless, the Commission proposes to either maintain the enhancements or replace them with an upward departure, and in either case to vastly broaden the definition of the enhancing type of firearm. Compared to firearms offenses *not* involving a "semiautomatic firearm with a magazine capacity of more than 15 cartridges," Option One would increase sentences for offenders with prior drug

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12 U.S.S.G., App. C., amend. 531.

13 U.S.S.G., App. C., amend. 522.

14 Pub. L. 103-322 § 110105(2).

trafficking or crime of violence convictions by 20-25%, more than double sentences for most other offenders, and place offenders convicted of record-keeping offenses otherwise subject to probation in prison for more than two years. Taking two common offenses, Option One would more than double the sentence for a first time offender convicted of possession by or transfer to a prohibited person (from 15-21 months to 33-41 months),15 and more than double the sentence for a first time offender convicted of possession or transfer of a stolen firearm or one with an altered serial number (from 10-16 to 27-33 months).16 Further, the six-level reduction for sporting or collection purposes would be precluded for any offense involving a semiautomatic firearm with a magazine capacity of more than 15 cartridges. This reduction is not precluded for many such weapons now.

The only explanation offered for these substantial sentences is that "possession of certain weapons, particularly by a prohibited person, may still be considered an aggravating factor warranting an increase in the base offense level." This begs a number of questions: Which certain firearms warrant aggravating status? What is the rationale for doing so? Why does the proposal apply to all firearms offenses if the concern is possession by a prohibited person? Is the cost justified? When the Commission equalized penalties for semiautomatic assault weapons with bombs, machine guns and sawed-off shotguns in 1995, it estimated that this would increase the prison population by 82 inmates,17 which, at today's rates, would cost nearly $2 million annually.18 Pursuant to the Commission's duty to formulate guidelines that are "effective" in meeting the purposes of punishment and that minimize prison overcrowding,19 the Commission should answer these questions before taking any action.

a. The proposal is unsupported by published data.

Recently published data on the frequency of use of different base offense levels and specific offense characteristics does not separate enhancements for weapons described in 18 U.S.C. § 921(a)(30) from those for firearms described in 26 U.S.C. § 5845(a), or from

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15 18 U.S.C. § 922(d), (g).

16 18 U.S.C. § 922(j), (k).

17 U.S. Sentencing Commission, 1995 Annual Report at 149, http://www.ussc.gov/ANNRPT/1995/CH5_95.PDF.

18 FY 2004 Costs of Incarceration and Supervision, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html; U.S. Department of Justice, Bureau of Justice Statistics, State Prison Expenditures, 2001 1 (June 2004) ($22,632 per federal inmate in FY 2001), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt.

19 28 U.S.C. § 991(b)(1)(A), (2); § 994(g).

enhancements under § 2K2.1(a)(4)(A) that involved neither.20 Thus, at present, the frequency and circumstances of offenses involving weapons described in 18 U.S.C. § 921(a)(30) appears to be unknown. According to anecdotal reports from Defenders, the enhanced base offense levels are rarely if ever used for weapons described in 18 U.S.C. § 921(a)(30).

According to the Commission's Sourcebooks, the upward departure in § 5K2.17 for a "high capacity, semiautomatic firearm in connection with a crime of violence or controlled substance offense," in which the weapon is defined the same as in the proposed new definition for § 2K2.1 but with a lower threshold magazine capacity, has never been used.21

As explained in subsection (c) below, the proposed definition would sweep in numerous ordinary firearms with legitimate uses, unlike those described in 26 U.S.C. § 5845, and well beyond those Congress temporarily included in the now-repealed 18 U.S.C. § 921(a)(30). Thus, Option One would require unwarranted uniformity among dissimilarly situated offenders. Option 2 would invite upward departure when there is no apparent basis for it. The Commission should devote careful study to the attributes and common uses of whatever weapon it is considering for enhanced punishment.

b. The proposal is contrary to congressional intent.

All firearms potentially could be used as instruments of unlawful violence, but § 2K2.1 applies to firearms offenses, not crimes of violence. The offenses covered by § 2K2.1 are prophylactic in nature, i.e., to prevent violent crimes by prohibiting possession and transfers that would be legal but for the individual's criminal record, mental health or drug addiction background, or failure to comply with various licensing or record-keeping requirements.22 The question for purposes of *enhanced* punishment based on certain weapons is whether those certain weapons are largely used for violent purposes or have substantial legitimate uses.

Congress requires registration of any sawed-off shotgun or rifle, machine gun, silencer or bomb, and failure to register is a crime punishable by up to ten years.23 This reflects Congress' judgment that these devices have a very high likelihood of use for unlawfully violent purposes.24 Congress has never required blanket registration of semiautomatic firearms, not as

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20 Guideline Application Frequencies for Fiscal Year 2003 at 35, http://www.ussc.gov/GAF/03_guideline_application_frequency.htm.

21 U.S. Sentencing Commission Sourcebooks, Table 24 (1996-2003).

22 United States v. Lewis, 249 F.3d 793, 796-97 (8th Cir. 2001).

23 26 U.S.C. §§ 5841, 5845, 5862(d), 5871.

24 United States v. Serna, 435 F.3d 1046 (9th Cir. 2006); United States v. Brazeau, 237 F.3d 842, 845 (7th Cir. 2001); United States v. Jennings, 195 F.3d 795, 799 (5th Cir. 1999).

narrowly defined in 18 U.S.C. § 921(a)(30) much less as broadly defined in the Commission's proposal. This demonstrates Congress' recognition that, unlike machine guns, sawed-off shotguns, silencers and bombs, semiautomatic firearms have lawful uses, such as target shooting, hunting, defense of self, property or others, and as collectibles, and are less likely than sawed-off shotguns, machine guns and bombs to be used as instruments of unlawful violence. Even while the semiautomatic assault weapons legislation was in effect, any firearm lawfully possessed before its passage as well as over 650 semiautomatic weapons were exempt.25 Further, Congress indicated that when semiautomatic weapons *are* used for unlawful purposes, the offense is still less serious than an offense involving a machine gun, sawed-off shotgun or bomb, providing in § 924(c) for a thirty-year mandatory minimum for the latter, and a ten-year mandatory minimum for the former (now repealed). The Commission too has recognized that weapons described in 26 U.S.C. § 5845(a) are *sui generis*, having deemed mere possession of such a weapon, but no other kind of weapon, a "crime of violence" for career offender purposes.26

Congress has allowed all of the semiautomatic weapons provisions to lapse, finding them unnecessary and placing semiautomatic weapons on the same footing as any other firearm other than those described in 26 U.S.C. § 5845.27 It would be unwarranted for the Commission to continue to equate these weapons with those described in 26 U.S.C. § 5845, much less to broaden the category to include ordinary firearms with substantial legitimate uses.

c. The proposed definition would include even more ordinary firearms with substantial legitimate uses and with little risk of unlawful violence than did 18 U.S.C. § 921(a)(30) before it was repealed.

The Commission proposes to replace the references to § 921(a)(30) in the enhanced base offense levels in § 2K2.1 with a "firearm that is a high-capacity, semiautomatic firearm," defined

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25 18 U.S.C. § 922(v)(2)-(3).

26 U.S.S.G. § 4B1.2, comment. (n. 1).

27 As Judge Kozinski of the Ninth Circuit recently wrote:

> The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant's] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn't require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.

Serna, 435 F.3d at 1049.

as a "semiautomatic firearm that has a magazine capacity of more than 15 cartridges," or to create an upward departure in § 2K2.1 for offenses involving a firearm so defined. The definition is both artificial and exceedingly broad.

A "semiautomatic firearm that has a magazine capacity of more than 15 rounds" encompasses many weapons that have never been considered "assault weapons." Among others, it describes several standard-sized pistols not within the scope of former § 921(a)(30). These include the Glock 17,[28] the Beretta 92-SB,[29] the Heckler and Koch USP 9,[30] and the Smith and Wesson Sigma SW9F.[31] There is nothing remarkable about these guns; they were all commercially available self-defense handguns released by major manufacturers. They are not considered to be examples of "paramilitary design."[32] They are completely distinct in appearance from all of the weapons included within § 921(a)(30).

The proposed amendment would divide the category of full-sized 9 mm semi-automatics arbitrarily down the middle. It is extremely common for full-sized 9 mm handguns to have a magazine capacity at or near 15 rounds. Those sold with factory magazines holding greater than 15 rounds are mentioned above. Those with 15-round magazines are also extremely common, including, but not limited to, popular models like the Ruger P85,[33] Sig-Sauer P226,[34] Smith and Wesson 915,[35] Taurus PT-92,[36] Beretta 92F,[37] Glock 19,[38] and Springfield P9.[39] Since the proposed change would only affect guns with magazines holding more than 15 rounds, it would not affect these common guns, thereby creating an artificial, inexplicable distinction between virtually identical handguns.

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[28] 17 rounds. S.P. Fjestad, Blue Book of Gun Values (19th Ed.) 544 (hereinafter "Blue Book").

[29] 16 rounds. Id. at 206.

[30] 16 rounds. Id. at 579.

[31] 17 rounds. Id. at 1056.

[32] See id. at 631, referring to Intra-Tec Tec-9, a weapon included within § 921(a)(30), as of "paramilitary design."

[33] Id. at 1093.

[34] Id. at 1017.

[35] Id. at 1050.

[36] Id. at 1114.

[37] Id. at 207.

[38] Id. at 544.

[39] Id. at 1067.

No handgun of the type mentioned above was included in 18 U.S.C. § 921(a)(30). Guns included in the ban were marketed with larger magazine capacities. The Tec-9 came with a 32-round magazine.[40] The Tec-22, also of "paramilitary design," came standard with a 30-round magazine.[41] The Cobray/SWD M-11 was issued and sold with a 32-round magazine.[42] The Uzi pistol came with a 20-round magazine.[43] Nearly all of the firearms included in the former ban are based on military designs and have fully automatic analogues. They are essentially semiautomatic versions of submachine guns. Placing standard 9 mm handguns in that category and giving them the same enhanced base offense levels as machine guns would significantly broaden the guideline's scope.

A significant problem with the proposed definition is that many, indeed most, semiautomatic firearms do not have a magazine capacity inherent to them. Instead, *magazines* have a capacity, and a number of different magazines may fit any specific gun.[44] Would the proposal be interpreted to apply where a firearm is found without a magazine or with a magazine that holds 15 or fewer rounds? The government could argue that an SWD M-11 found without a magazine has a magazine capacity of more than 15 rounds, because there exists a factory-made magazine holding more than 15 rounds. But there also exist factory and after-market ten-round magazines for this gun. Read one way, enhanced base offense levels would hinge on what magazine a defendant was caught possessing. Read another way, the enhanced base offense levels would apply based on a firearm's ability to accept a greater-than-15 round magazine. Aftermarket high-capacity magazines are available for more than a dozen models,[45] so the enhanced base offense levels could be creatively applied to vastly more cases of firearm possession than ever before, including to firearms never actually outfitted with a 15+-round magazine.

The proposed definition would thus elevate any firearm that accepts a detachable box magazine to the status of a machine gun, sawed-off shotgun, or bomb. In contrast, 18 U.S.C. § 921(a)(30)(B) and (C) described semiautomatic rifles and pistols that accepted a detachable magazine *and* had at least two constant physical features (e.g., bayonet mount, pistol grip, flash suppressor, etc.). To illustrate, the Ruger 10/22 .22LR rifle is a semi-automatic firearm that

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[40] Id. at 633.

[41] *Id.* at 632.

[42] Id. at 971.

[43] Id. at 1150.

[44] See www.brownells.com (Well known shooting supply company offering high-capacity magazines for numerous firearms).

[45] Id.

shoots .22LR cartridges.[46] The .22LR cartridge is not a military round. It is commonly used for recreational target shooting and to teach marksmanship to new shooters and children, and is used at Boy Scout camp shooting ranges. Aftermarket twenty-five round magazines are available for this rifle to allow extended target shooting sessions without reloading.[47] Under the proposed definition, possession of this firearm would be treated the same as the possession of a machine gun, sawed-off shotgun, or bomb.

Similarly, magazine capacity for rifles varies widely; they may be 10, 12, 15, 20, 25, 30, or 40 rounds, to name only a few. Does the definition require that 15+ rounds be inserted in the rifle, present in the area of the rifle, or merely potentially used in the rifle even if no such rounds had ever been used in the rifle? The government could argue, and some judges would accept, that the definition encompasses all rifles and pistols that accept a detachable magazine, vastly expanding the application of the enhanced base offense levels without a reasoned justification. Increased litigation and inconsistency in application would result.

In sum, reacting to the lapse of the assault weapons ban by creating heightened base offense levels for an even broader range of weapons makes no sense.

If the Commission feels compelled to act at this time without more careful study and despite apparently contrary congressional intent, the Commission should, at most, provide for a discretionary upward departure for firearms offenses involving firearms described in former § 921(a)(30) and subject to the exemptions in former 18 U.S.C. § 922(v)(2) and (3). If so, the Commission should provide an application note stating that the statute has been repealed, explaining that conduct involving firearms previously identified in it may warrant an upward departure, and providing the text of the former statute. This would at least provide clear guidance as to when the upward departure may apply.

2. There is no other category of firearms that should form the basis of an enhanced base offense level or upward departure.

As explained above, Congress treats weapons described in 26 U.S.C. § 5845, and only those weapons, as requiring registration and deserving of increased penalties. The Commission should accept Congress' judgment in this regard. As Justice Breyer has advised, the Commission should not add further adjustments, but should "act forcefully to diminish significantly the number of offense characteristics attached to individual crimes," because the existing Guidelines already make distinctions without a difference and create a false façade of precision.48 Moreover, further adjustments seem particularly wasteful of judicial resources

[46] Blue Book at 1101.

[47] Id.

48 See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999).

now that the overarching sentencing mandate is to impose a sentence that is sufficient but not greater than necessary to achieve sentencing purposes, with the Guidelines "advisory" within that framework.

If the Commission has any particular weapons in mind, we would appreciate the opportunity to comment on them specifically.

3. The Commission should either delete § 5K2.17, revise the definition to focus on features more pertinent to dangerousness than magazine capacity, or at least increase the magazine capacity.

The Commission has asked for comment on whether it should make "similar changes" to the definition of "high capacity, semiautomatic firearm" in § 5K2.17. Since the legislation that prompted § 5K2.17 has been repealed, see Pub. L. 103-322 §§ 110501, 110105(2), and the departure appears never to have been used, the Commission should delete § 5K2.17. If retained, based on the information in section 1(c), infra, and further study, the definition should be revised to capture increased dangerousness. Failing that, the threshold magazine capacity should be increased to at least "more than 15 cartridges."

4. The Commission should promulgate a downward departure for inoperable firearms and firearms and ammunition with no intended use.

There is a difference relevant to the purposes of sentencing in § 3553(a)(2), which § 2K2.1 does not recognize, between possession of a loaded gun and possession of an unloaded gun, as well as between possession of an operable gun and possession of an inoperable gun. Further, there is unwarranted uniformity between the punishment for possession of a single bullet and that for possession of a loaded firearm. These disparities should be addressed in an application note inviting downward departure. C.f. U.S.S.G. § 2B5.1, comment. (n.4) (enhancement does not apply to "persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny"). We propose the following language:

> When the firearm involved was inoperable, or the firearm was unloaded and the defendant did not intend to load it in the future, a downward departure may be warranted. Similarly, possession of only a small amount of ammunition and no firearm, where the defendant did not intend to use the ammunition in the future, may justify downward departure.

(B) Trafficking SOC

1. The proposed amendment lacks any criteria that would limit the SOC to "firearms trafficking."

The proposed amendment would add a specific offense characteristic at § 2K2.1(b)(7) as

follows:

> (7) If the defendant engaged in trafficking of (A) [[2]-24] firearms, increase by [2][4] levels; or (B) [25 or more] firearms, increase by [6][8] levels.

The proposed corresponding application note 13 would state:

> (A) Definition of "Trafficking".—For purposes of subsection (b)(7), "trafficking" means transporting, transferring, or otherwise disposing of, [firearms][a firearm] to another individual, (i) [as consideration for anything of value][for pecuniary gain]; or (ii) as part of an ongoing unlawful scheme, even if nothing of value was exchanged.
>
> (B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

There is no description in the synopsis of what kind of activity this proposed specific offense characteristic is intended to cover, nor can one be discerned from the language of the proposal. We assume the Commission would want to confine this specific offense characteristic to offenses that involved engaging in the business of selling firearms, for monetary profit or a criminal purpose, consistent with commonsense understanding, legal definitions, and the nature of the cases subject to sentencing under § 2K2.1.

The essence of the definition of "illicit trafficking in firearms" is the "business or merchant nature" of the defendant's firearms conviction.[49] In the firearms chapter itself, Congress defined the concept of "in the business" as meaning one who "devotes time, attention, and labor ... as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution" of firearms or, alternatively, one who engages in the "regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism," specifically defined. See 18 U.S.C. § 921(a)(21)(A-F) & (a)(22). Using Congress' definitions in the firearms area is appropriate, while borrowing from entirely dissimilar areas like identity theft and counterfeit labels is a mis-match and not in keeping with congressional intent.[50]

Similarly, if the purpose is to focus on firearms trafficking, the only scheme that should be considered for enhancement is one involving the regular and repeated unlawful dealing in firearms for profit or a criminal purpose, i.e., an ongoing "firearms trafficking scheme." See U.S.S.G. § 2B1.11(b)(11) & comment. (n.10) (an increase for trafficking in stolen goods – the

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[49] Kuhali v. Reno, 266 F.3d 93, 107-08 (2d Cir. 2001) (analyzing the meaning of "illicit trafficking in firearms" under 8 U.S.C. § 1101(a)(43)).

50 Under other guidelines, trafficking connotes "for profit." See U.S.S.G. § 2L1.1(b)(1) & comment. (n.1); § 2L2.1(b)(1) & comment. (n.1) (immigration offenses, involving trafficking in persons).

"chop shop" enhancement – must be based on a scheme involving the offense at issue, i.e., the unlawful "organized scheme to steal vehicles or vehicle parts").[51]

As presently written, the proposal lacks any limiting criteria and thus would commonly apply to activity well beyond the scope of any commonsense understanding or legal definition of "firearms trafficking." For example, a licensed dealer in firearms who violates (with respect to two or more firearms) any one of a host of regulatory directives in 18 U.S.C. § 922, such as selling firearms to an adult who did not appear in person or submit a sworn statement as to his age, § 922(c), though the buyer is a lawful possessor planning to use the firearms for a lawful purpose, since dealers dispose of firearms for pecuniary gain. A legitimate common carrier that violates (with respect to two or more firearms) a regulatory directive, such as delivering firearms without obtaining a receipt from the recipient, § 922(f), though the recipient is a lawful possessor planning to use the firearms for a lawful purpose would be a firearms trafficker, as common carriers transport firearms for pecuniary gain.

Any individual who violated the law with respect to two or more firearms he bought for personal use and without any intent at the time to profit would be a firearms trafficker if he later disposed of them in exchange for money or something of value. This would include a lawful possessor who sells personal firearms to a relative, friend or neighbor he knows to be law-abiding but is a juvenile only days shy of turning 21 or was dishonorably discharged from the Armed Forces, or whom he knows has a drug problem or a prior conviction for misdemeanor domestic violence. See §§ 922(x)(1); 922(d)(3), (6), (9). It would include an individual who is an unlawful possessor but sells, trades, or pawns his personal firearms, acquired before he was a prohibited person, to a lawful possessor for rent money or to meet other financial needs, not unusual among the poor, or trades them for farm equipment, car parts, or other necessary items, quite common in rural America. See §922(g). This was the situation in United States v. VanLeer, 270 F.Supp.2d. 1318 (D. Utah 2003). VanLeer was a felon who, because he "was destitute and needed money for rent," took a gun he had purchased before he was a felon then later gave to a friend and sold it to a pawn shop, using his own name and fingerprints. Id. at 1319. These facts, and that he was divesting himself of the gun rather than keeping it, showed he was less culpable and less harmful than the typical felon-in-possession at which the statute was aimed. Id. at 1326-27. Under this proposal, if he had divested himself of two guns instead of one, he would be punished as a "firearms trafficker," a ludicrous result.

As demonstrated by these examples, it makes no meaningful difference whether "pecuniary gain" or "anything of value" is used. Moreover, if "pecuniary gain" were defined as elsewhere in the Guidelines, it is the same as "anything of value." See § 2B1.5, comment. (n.5(A)).

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51 As proposed below, the unlawful scheme should be confined to the transport, transfer or disposition of firearms to an individual whose possession, receipt, or use the defendant knows or has reason to know will be either (i) unlawful (consistent with Congress' rationale that a prohibited possessor is more likely to use the firearm in an illegal manner) or (ii) in connection with another felony offense.

Further, an individual who transferred firearms "even if nothing of value was exchanged" would be a "firearms trafficker" if done as part of *any* "ongoing unlawful scheme," regardless of its nature.

In addition, the proposal suffers from a serious double counting problem. The defendant should not receive, in addition to the additional 2 to 10 levels based on the number of guns involved under subsection (b)(1), another 2 to 8 levels for the number of guns involved under subsection (b)(7).

2. Defenders' Proposed Substitute

To avoid application to persons who simply are not "firearms traffickers," we suggest the following modification to the proposed amendment and accompanying application note, which relies on statutory language in the firearms area and avoids double counting:

The proposed amendment should be modified to read:

(7) If the defendant engaged in the business of trafficking in firearms, increase by 2 levels.

The proposed corresponding application note should be modified to read:

(13) Application of Subsection (b)(7).--

(A) Definition of "engaged in the business of trafficking." —For purposes of subsection (b)(7), "engaged in the business of trafficking" means a defendant who (1) engages in the regular and repetitive acquisition and transport, transfer or disposition of firearms, (2) has as his predominant objective in doing so (i) livelihood and profit, or (ii) criminal purposes or terrorism, and (3) knows or has reason to believe that the transport, transfer, or disposition (i) would be to another individual or individuals whose possession or receipt would be unlawful or (ii) would be used or possessed in connection with another felony offense.

"Livelihood and profit" is defined for purposes of subsection (b)(7) and this application note in the first sentence of 18 U.S.C. § 921(a)(22).

"Terrorism" is defined for purposes of subsection (b)(7) and this application note in 18 U.S.C. § 921(a)(22)(A)-(C).

(B) Use of the Term "Defendant".—Consistent with §1B1.3 (Relevant Conduct), the term "defendant" limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or

abetted, counseled, commanded, induced, procured, or willfully caused,

(C) An increase to the offense level under § 2K2.1(b)(7) is in addition to any increase to the offense level under § 2K2.1(b)(1) for the number of firearms involved in the offense.

(C) If an increase of 4 levels is made under § 2K2.1(b)(5), and § 2K2.1(b)(7) would otherwise apply because the defendant trafficked in firearms to another individual or individuals whose possession or receipt the defendant knew or had reason to believe would be used or possessed in connection with another felony offense, [do not apply § 2K2.1(b)(7)] [increase the offense level by 1 level rather than 2 levels under § 2K2.1(b)(7)].

3. Issues for Comment

1) As in our proposed Application Note 13(A), the definition of trafficking should be restricted to offenses in which the defendant knew or had reason to believe that the transfer would be to an individual whose possession or receipt would be unlawful. It should not include offenses in which the defendant was willfully blind to the fact that the transfer would be to an individual whose possession or receipt would be unlawful. Willful blindness is not the standard under § 2K2.1(b)(5), nor is it used in any other guideline in the Manual, for good reason. Many courts have cautioned against use of the willful blindness standard in criminal cases because it essentially holds defendants responsible for mere negligence, and entails a presumption of guilt. See United States v. Alston-Graves, 435 F.3d 331, 341 n.10-n.14 (D.C. Cir. 2006) (citing cases); United States v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005); United States v. de Francisco-Lopez, 939 F.2d 1405, 1411 (10th Cir. 1991). When combined with the elastic and exceedingly forgiving preponderance of the evidence standard that remains in § 6A1.3 (despite the likelihood of unconstitutionality under guidelines with "substantial weight"/a "presumption of reasonableness"), a willful blindness standard for firearms trafficking would result in intolerably unfair and unreliable enhancements.

2) The definition should not include merely receiving firearms from another individual. A trafficker is one who distributes an illegal product after first acquiring (i.e., receiving) it, not one who only receives it. One who simply receives without taking any further action with respect to the firearm, though he may be an unlawful possessor, is not a "firearms trafficker."

(C) Stolen Firearms/Altered or Obliterated Serial Numbers

The Commission proposes changing § 2K2.1(b)(4), which currently provides for a two-level enhancement for a firearm that either is stolen or has an altered or obliterated serial number regardless of knowledge or reason to believe, see comment. (n.16), to require the greater of a two-level enhancement for a stolen firearm or a four-level enhancement for an altered or obliterated serial number regardless of knowledge or reason to believe.

We object to the proposed increase, and instead recommend that the Commission either make no change to subsection (b)(4), or provide that the altered/obliterated serial number enhancement not be applied at all where the serial number is recovered. In either event, a *mens rea* requirement should be added in order to assure punishment *proportionate* to the defendant's culpability. See 18 U.S.C. § 3553(a)(2)(A).

The increased enhancement for an altered or obliterated serial number -- which, depending on the base offense level, other SOCs, and criminal history, would result in anywhere from six months to eight years additional time in prison at a cost to the taxpayers of approximately $23,000 per year -- is said to "reflect[] the difficulty in tracing firearms with altered or obliterated serial numbers."

The addition of any number of levels (two or four) in every case based on this rationale assumes that altered or obliterated serial numbers are unable to be restored. In fact, in many cases, they are restored by a simple laboratory procedure:

> Serial numbers are usually stamped on a metal frame or plate, with hard steel dies. These dies are applied with enough force to sink each digit into the metal. Restoration of obliterated serial numbers can *many times* be accomplished because the metal crystals under the stamped numbers are placed under a permanent strain. When a suitable etching agent is applied, the strained crystals will dissolve at a faster rate as compared to the unaltered metal, thus permitting the etched pattern to appear in the form of the original numbers. *If* the number is ground to a depth that removes the strained crystals, or if the area has been impressed with a different strain pattern, it is *usually* not possible to restore.

See Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm (emphasis supplied). According to anecdotal reports from Defenders, the number is recovered more often than not because the numbers are removed very superficially.

An altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable. An additional hour of routine laboratory work, whether to recover a serial number, to lift fingerprints from an object, or to determine the type or quantity of drugs, is not an additional harm to society warranting increased punishment.

We therefore recommend that the Commission make no increase in the adjustment for an altered or obliterated serial number, or revise subsection (b)(4) as follows:

> (4) If any firearm was stolen, or had an altered or obliterated serial number that was unable to be recovered, increase by two levels.

By way of explanation, the following could be added to Application Note 9:

> The adjustment under subsection (b)(4) for an altered or obliterated serial number seeks to address the harm of the firearm being rendered untraceable by the alteration or obliteration. Thus, for the adjustment in subsection (b)(4) to apply on the basis that the offense involved a firearm that had an altered or obliterated serial number, the serial number must have been unable to be recovered.

We also urge the Commission to delete application note 16, and to provide for a *mens rea* requirement for the adjustment in subsection (b)(4) to apply. The Commission is required to assure that the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are met. One of those purposes is "just punishment" in light of the "seriousness of the offense," a concept that entails personal culpability. When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment. When the same punishment is required for a person who does not know or have reason to believe that a firearm is stolen or has an obliterated serial number as one who does have knowledge or reason to know, this creates punishment that is disproportionate to the seriousness of the offense and unwarranted disparity. As the Commission has said, "Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." See Fifteen Year Report at 113 (emphasis in original).

We assume that the reason for not requiring any *mens rea* for this adjustment is that the government does not want to have to prove it. But the Commission was not instructed to assure that the government was relieved of any burden of proof as to facts that increase punishment to reflect increased seriousness of the offense. Moreover, the Commission's advice that the preponderance of the evidence standard meets due process requirements remains in § 6A1.3. While we believe this advice is wrong in light of the Apprendi to Booker line of cases and particularly in light of the Commission's instructions to the courts to give the Guidelines "substantial weight," see Letter from Federal Defenders Regarding Report on Federal Sentencing Since United States v. Booker at 18-21 (January 10, 2006), that is the standard most courts are applying. It is not too much to ask that the government prove the facts that put people in prison for months or years by a mere preponderance.

We therefore propose that Application Note 16 be deleted and that § 2K2.1(b)(4) be changed as follows:

> (4) (A) If the defendant knew or had reason to believe that any firearm was stolen, increase by 2 levels.
>
> (B) If the defendant knew or had reason to believe that any firearm had an altered or obliterated serial number, and the serial number was unable to be recovered, increase by 2 levels.

(D) "In Connection With" in Burglary and Drug Offenses (and other offenses)

The proposed amendment provides that subsections (b)(5) and (c)(1) of § 2K2.1 apply if the firearm "facilitated, or had the potential of facilitating, another felony offense or another offense, respectively."

We generally support the adoption of the "facilitation" test. A substantial majority of courts have concluded that the firearm must "facilitate" the other felony offense. These courts treat the "in connection with" language as coterminous with the "in relation to" language in § 924(c)(1),52 as interpreted by the Supreme Court in Smith v. United States, infra. See United States v. Blount, 337 F.3d 404 (4th Cir. 2003); United States v. DeJesus, 347 F.3d 500 (3d Cir. 2003); United States v. Brown, 314 F.3d 1216, 1222 (10th Cir. 2003); United States v. Letts, 264 F.3d 787, 791 (8th Cir. 2001); United States v. Spurgeon, 117 F.3d 641 (2d Cir. 1997); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996); United States v. Thompson, 32 F.3d 1, 7 (1st Cir. 1994); United States v. Routon, 25 F.3d 815 (9th Cir. 1994).

The Eleventh Circuit has rejected the facilitation test and interpreted the "in connection with" language more broadly. United States v. Rhind, 289 F.3d 690, 694 (11th Cir. 2002). The Fifth Circuit did the same, United States v. Condren, 18 F.3d 1190, 1195-96 (5th Cir. 1994), then limited that approach to drug cases, United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995), then made clear that there was no "*ipso facto* nexus rule between firearms and illicit drugs every time a defendant who is convicted of the abuse of one has some relationship with the other, no matter how attenuated." United States v. Mitchell, 166 F.3d 748, 753-56 (5th Cir. 1999). In any event, some of these cases (and some earlier cases in the Eighth Circuit as well) appear to treat the "in connection with" language as interchangeable with the standard in § 2D1.1(b)(1) and its commentary. This is inappropriate. First, § 2D1.1(b)(1) requires only that a weapon "was possessed" with no "in connection with" or "in relation to" requirement; its commentary states that it does not apply only if it is "clearly improbable that the weapon was connected with the offense."53 Second, § 2K2.1(b)(5) and (c)(1) reference and cross-reference offenses other than drug offenses. Thus, the policy underlying the commentary accompanying § 2D1.1(b)(1), i.e., an "increased danger of violence when drug traffickers possess weapons,"54 is inapplicable in many cases to which § 2K2.1(b)(5) and (c)(1) apply. Third, the § 2K2.1(b)(5) and (c)(1)

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52 Section 924(c)(1) prohibits the use of a firearm during and "in relation to" the commission of a drug trafficking or violent crime.

53 Section 2D1.1(b)(1) provides for a 2-level upward adjustment "[i]f a dangerous weapon (including a firearm) was possessed" in a drug manufacturing, importing, exporting, or trafficking offense. Application note 3 to § 2D1.1 provides: "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet."

54 U.S.S.G. § 2D1.1, comment. (n.3).

adjustments are more substantial than the § 2D1.1(b)(1) adjustment, i.e., four levels or a cross-reference compared to two levels, and thus should require more culpable conduct. Fourth, some courts have interpreted U.S.S.G. § 2D1.1, comment. (n.3), to place the burden on the defendant to disprove a connection between the drugs and the firearm. See United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); Contra United States v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994). We believe that this is an incorrect and unconstitutional interpretation in any case, but an additional danger of equating "in connection with" in § 2K2.1 with "mere possession unless a connection is clearly improbable" in § 2D1.1, comment. (n.3) is that the burden would be shifted to the defendant to disprove the even more substantial adjustments under § 2K2.1(b)(5) and (c)(1).

While we generally support adoption of a facilitation test, we believe the phrase "had the potential of facilitating" requires a narrowing clarification, because a firearm always "has the potential of facilitating" another offense. The language comes from Smith v. United States, 508 U.S. 223 (1993) (quoted below), in which the Supreme Court articulated the facilitation test, but the Court made clear in Smith that "potential of facilitating" does not include mere possession or presence of a firearm during another offense, even a drug trafficking offense. Id. at 238. While clarification is needed, the cases are highly fact specific, such that examples may only confuse matters. A simple statement that "mere possession or presence of a firearm is not enough to establish a 'potential of facilitating'" should be adequate.

The proposed amendment also addresses a circuit split regarding "whether the presence of a firearm by mere coincidence during the course of a burglary or drug offense 'facilitated or had the potential of facilitating' another offense."

Both Option One (applicable to all "other felony offenses" or "other offenses") and Option Two's Application Note 14(C) (applicable to other offenses that are drug offenses) are inconsistent with the facilitation test. In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court interpreted the phrase "in relation to" as follows:

> The phrase "in relation to" thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he "in relation to" language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm's presence is coincidental or entirely unrelated to the crime. Instead, the gun at least must facilitate, or have the potential of facilitating, the drug trafficking offense.

Id. at 238 (internal citations and quotation marks omitted). In short, the facilitation test excludes both mere coincidence and mere possession or presence even when the other offense is a drug trafficking offense. Further, a firearm cannot be coincidentally present, and at the same time facilitate or potentially facilitate another offense. Thus, the Commission cannot adopt Option

One or Option Two's Note 14(C) consistent with the facilitation test.

Option Two's Note 14(C) has further problems. Even if one accepts that "the mere presence" of a firearm presents a heightened risk of violence in connection with drug *trafficking*, it sweeps too broadly. First, subsection (b)(5) is not limited to drug trafficking. "Another felony offense" for purposes of subsection (b)(5) is any federal, state or local offense punishable by more than one year. Simple drug possession is punishable by more than one year in many states. Thus, subsection (b)(5) would add four levels to the sentences of drug *users* who possess firearms for reasons unrelated to the drugs. See § 2D1.1, comment. (n.3) ("enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons"; compare § 2D2.1 (no gun enhancement for simple possession). Second, the note is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense.

Option Three is the only option that is consistent with the facilitation test and with the purposes underlying § 2K2.1(b)(5) and (c)(1). Sections 2K2.1(b)(5) and (c)(1) were created in response to a concern about the *increased* risk of violence when firearms are used or possessed during commission of another offense. See United States v. McDonald, 165 F.3d 1032, 1037 (6th Cir. 1999). Because there is no *increased* risk of violence when a firearm's presence is merely coincidental, see Smith, supra, § 2K2.1(b)(5) and (c)(1) should apply only when there is evidence that the firearm was not merely coincidentally present, but was used, possessed or intended to be used or possessed to facilitate the other offense.

Finally, the last sentence of Option Two's Application Note 14(B) should be added to Option Three after the second sentence, amended with the language in bold as follows: "However, if the defendant subsequently **uses or possesses the firearm in connection with another felony offense (under subsection (b)(5)) or another offense (under subsection (c)(1))** that is separate and distinct from the initial taking of the firearm, subsection (b)(5) or subsection (c)(1) **may** apply."

(E) Lesser Harms and Felon in Possession

This proposal would prohibit a downward departure under § 5K2.11 (Lesser Harms) "in any case in which a defendant is convicted under 18 U.S.C. § 922(g), even if the possession of a firearm were brief or existed because the defendant was disposing, or attempting to dispose of, a firearm." No explanation is given for this proposal, but we understand that it was proposed by the Department of Justice based on a single case, United States v. VanLeer, 270 F. Supp.2d 1318 (D. Utah 2003), about which the Department is unhappy.

In VanLeer, Judge Cassell relied on § 5K2.11 to grant a four-level downward departure in a felon-in-possession case. The facts were as follows:

> VanLeer has a history of non-violent criminal offenses, all apparently stemming from his use of illegal drugs. On September 10, 2002, VanLeer was released

> from prison after serving time connected with a forgery charge. Several weeks after his release, he met a friend who was in possession of a shotgun that VanLeer had purchased and owned before acquiring a felony conviction. As VanLeer was destitute and needed money for rent, he took the firearm-a Ted Williams 12 gauge shotgun-to a local pawn shop and sold it. During this transaction on October 1, 2002, VanLeer gave his correct name, address, and an inked fingerprint to verify his identity as owner of the firearm to the pawn shop clerk. On November 5, 2002, an investigator from the Salt Lake City Police Department conducted a record check and determined that VanLeer was a previously convicted felon. This led to the filing of a one-count indictment, charging felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Id. at 1319. Finding that VanLeer's conduct -- briefly possessing the gun so that he could dispose of it to obtain money for rent, giving his own name and fingerprints -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death -- and was less harmful and less culpable than a felon continuing to possess a gun, Judge Cassell departed by four levels and sentenced Mr. VanLeer to 18 months in prison. Id. at 1326-27.

This proposal is indefensible for several reasons. First, it would fly in the face of Booker for the Commission to prohibit departure based on a factor that is plainly relevant to the statutory mandate to impose a sentence minimally sufficient to achieve the purposes of sentencing, and would represent a move by the Commission to reinstate mandatory guidelines. Second, judges who blindly adhere to the Guidelines despite Booker would not depart or vary in any felon-in-possession case, unnecessarily using prison space in the already overcrowded Bureau of Prisons and wasting tax dollars. Third, other judges would impose a sentence below the guideline range for the reasons prohibited by this proposal, citing the lesser seriousness of the offense, see § 3553(a)(2)(A). This would result in different treatment in different courts, with the latter approach *required* by the governing law. See 18 U.S.C. § 3553(a). Fourth, such a move would marginalize and foster disrespect for the Guidelines. Before Booker, the Commission prohibited or restricted consideration of many offender characteristics and offense circumstances that were relevant to the purposes of sentencing.55 To continue in that vein after Booker is contrary to the statute that now governs sentencing. As Justice Breyer said at the Guidelines' inception and again recently, the Commission was intended to learn from judicial departures.56 The

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55 Without any congressional directive to do so, the Commission prohibited consideration of drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, and post-sentencing rehabilitation on re-sentencing, and strictly limited consideration of age, mental and emotional conditions, physical condition or appearance, and military, civic, charitable or public service, and good works.

56 Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988); Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, *30 (Jan./Feb. 1999).

Commission should not begin anew to eliminate departures, especially based on the Department of Justice's unhappiness with a plainly justified result.

(F) "Brandished" or "Otherwise Used"

The proposed amendment addresses a circuit conflict regarding whether waiving a firearm or pointing it at a specific person constitutes "brandishing" or "otherwise using." This normally comes up in the robbery guideline, where there is a several tiered system of increases for threats and weapons in § 2B3.1(b)(2). Currently, the three tiers for firearms are a 7 level increase for discharge, a 6 level increase for "otherwise used," and a 5 level increase for "brandish" or possess.

The interpretive difficulty has been in deciding where to draw the line between "brandishing" and "otherwise used" on the continuum of factual possibilities. This has been made particularly difficult by the definition of "otherwise used," which merely states that it is less than discharging, but "more than brandishing, displaying or possessing." § 1B1.1, App. Note 1(I).

The typical scenario in which this issue comes up is a bank robbery where the defendant waves a firearm about or points the firearm at a specific bank employee. A majority of courts have held that "pointing a weapon at a specific person or group of people in a manner that is explicitly threatening is sufficient to make out 'otherwise use' of that weapon." United States v. Orr, 312 F.3d 141, 145 (3d Cir. 2002); see also United States v. LaFortune, 192 F.3d 157 (1st Cir. 1999); United States v. Nguyen, 190 F.3d 656 (5th Cir. 1999); United States v. Warren, 279 F.3d 561 (7th Cir. 2002); United States v. Fuller, 99 F.3d 926 (9th Cir. 1996); United States v. Rucker, 178 F.3d 1369 (10th Cir. 1999). These courts do not require that the defendant physically contact the victim or victims with the firearm or dangerous weapon for the "otherwise use" adjustment to apply. Some courts have made clear that explicit threats need not be verbal for the conduct to qualify as "otherwise use." See, e.g., Nguyen, 190 F.3d at 661; Orr, 312 F.3d at 145.

A minority position holds that "the pointing of [a] weapon in a threatening manner, even when coupled with a verbal threat, constitutes 'brandishing,' rather than 'other use' of the weapon." United States v. Matthews, 20 F.3d 538, 554 (2d Cir. 1994). At the time of the Matthews case, the definition of brandishing specifically stated that brandishing meant "that the weapon was pointed or waved about, or displayed in a threatening manner." § 1B1.1, App. Note 1(C). Since Matthews, the Commission amended the definition of brandishing, excising the language about pointing or waving a firearm and using a new definition imported from 18 U.S.C. § 924(c), which emphasizes situations where the firearm is not seen at all, or only partially visible, so long as its presence is made known in order to intimidate. The reason for the amendment evinces no intention that the deletion of the language about pointing, waving or displaying in a threatening manner to alter the meaning of brandishing or to move those fact patterns to "otherwise used." See U.S.S.G. App. C, amend. 601.

A middle ground has been struck by other courts by not applying the "otherwise used" enhancement when a firearm was pointed at a person with orders to open the register, but no other threats were made. United States v. Gonzales, 40 F.3d 735 (5th Cir.), cert. denied, 514 U.S. 1074 (1995); United States v. Moerman, 233 F.3d 279 (6th Cir. 2000). These decisions emphasize that a broader interpretation of "otherwise used" would subsume all brandishing cases and make that intermediate increase meaningless.

Option 1 of the proposed amendment "combines brandished and otherwise used with respect to firearms under the theory that the same risk of harm, and the same fear, exists whether a firearm is generally waved about or specifically pointed at a particular individual." It effectively broadens the definition of "otherwise used" to include what has classically been described as "brandishing" (pointing or waving the firearm).57 It then moves brandishing to the same 6 level increase as otherwise used in the robbery and extortionate threat guidelines.

Option 1 is inappropriate for several reasons. Under this proposal, a defendant who allows a firearm to be seen in a holster during a robbery will be punished the same as one who waves a firearm about in a threatening manner, and the same as a defendant who strikes a bank employee with a firearm or holds a firearm to the head of a bank employee during a robbery. The latter examples present both a greater risk of harm to, and a greater fear by, the targeted employee(s). This option simply collapses any attempt to have a continuum and appropriately graded penalties when a firearm is involved. If the Commission chooses to expand the definition of "otherwise used" to clearly encompass general pointing and waving in order to address the circuit conflict, then brandishing should be left at a level 5 increase. It should be noted that the only brandishing cases remaining would be those in which the firearm was not taken out and used other than to make its presence known.

Option 1 also calls for comment as to whether, if the Commission chooses this approach, it should make similar changes in other guidelines with weapon increases. The other guidelines at issue do not have the same set of increases as §§2B3.1 and 2B3.2. Rather, they treat dangerous weapons and firearms the same and only deal with 3, 4, and 5 level increases. Therefore, the same solution would not work. More important, the same observation would apply to the collapsing of the graded responses to a continuum of behavior. Moving all "brandishing" cases to the "otherwise used" level punishes a wide range of less culpable behavior more harshly than necessary. Therefore, this solution should not be applied to other guidelines.

Option 2A is unsatisfactory because, while it purports to distinguish between "otherwise

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57 "Brandish" is defined by Merriam-Webster as:

1 : to shake or wave (as a weapon) menacingly
2 : to exhibit in an ostentatious or aggressive manner

http://www.m-w.com/dictionary/brandish.

using" and "brandishing," it blurs the distinction by including "implicit threats" in the definition of "otherwise used," while including "generally point[ing] or wav[ing a firearm] in a threatening manner" in the definition of "brandished." It appears that rather than solve the circuit conflict, these definitions will perpetuate it. As one court has concluded, "When a robber points a gun, or what appears to be a gun, at a robbery victim or bystander, that gesture is inherently threatening . . . [W]e should not have to point out, for it is tautological, that there can be no 'display of the gun in a threatening manner' . . . without an implicit threat." Matthews, 20 F.3d at 554. Thus, it appears that the same actions are covered by both definitions. This will likely generate extensive litigation and additional circuit splits rather than solving the problem.

We urge the Commission to adopt Option 2B. Defining "otherwise used" to require physical contact (or attempted physical contact) with the victim creates a bright-line rule that would reduce litigation. It also incrementally increases punishment for more culpable offenders. It accords with a common sense definition of brandishing, which includes showing and pointing a firearm, but leaves room for greater punishment for those who do more than that.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

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