

**Before the United States Sentencing Commission
Public Hearing on Firearms Offenses**

Statement of Michael Carter,
Federal Public Defender for the Eastern District of Michigan
on Behalf of the Federal Public and Community Defenders

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Hon. Chair Reeves, Vice-Chairs, and Commissioners: My name is Michael Carter, and I am the Federal Public Defender for the Eastern District of Michigan. I am also a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for inviting me to testify on the proposed amendments to USSG §2K2.1.¹

I. Introduction

As a federal public defender, and a lifelong resident of Michigan who was born in Detroit, I fear that the Commission’s proposed changes to §2K2.1 would not make us safer,² and would exacerbate the unwarranted racial disparities that have long dominated federal gun-enforcement policies and sentencing.³ In my city and in my profession, I have witnessed the devastation caused both by gun violence and by law-enforcement practices that target Black people and our communities.

Today, I urge the Commission to give any changes to §2K2.1 the careful study and deliberation they deserve. Chairman Reeves, I was grateful for your pledge, at the Commission’s October 28, 2022 meeting, to “operate in a deliberative, empirically based, and inclusive manner,”⁴ and to “leave an even more improved federal sentencing guideline system for the next set of Commissioners.”⁵ Consistent with that pledge, and the Commission’s role as an independent, expert body, it should collect, study, and publish more data

¹ See 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190-7198, 2023 WL 1438480 (Feb. 2, 2023) (“2023 Proposed Amendments”).

² See *infra* at 12-16.

³ See *infra* at 6-12.

⁴ Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sentencing Comm’n 4 (Oct. 28, 2022), <https://tinyurl.com/567hfjsm>.

⁵ *Id.*

and other information about the sufficiency of current penalties for firearms offenses, before acting.⁶

Defenders understand that the Commission is obligated to respond to the directive in the Bipartisan Safer Communities Act of 2022 (“BSCA”) to review and amend the guidelines.⁷ But that directive does not include a timeline, and there is ample reason to tread cautiously.⁸ In December 2022, two of the BSCA’s principal leaders, Senators Chris Murphy and Cory Booker, wrote to the Commission to warn that: “[W]e believe that [the BSCA] can and will save lives. But to achieve that outcome, it is essential that the implementation of the law avoids the mistakes of the past.”⁹ They implored the Commission to “approach amending §2K2.1 with full awareness of the inequities that may result from any misguided sentencing policy” and “to give special consideration to the primary purposes of the BSCA and to the consequences which the Commission’s guidelines may have for communities of color.”¹⁰ Failure to heed the Senators’ warning would, as a coalition of gun violence researchers, policymakers, and lawyers have warned, risk misapplying the BSCA in a manner that would “increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence.”¹¹

Today, I will explain why the Commission should study the need for, and potential ramifications of, increased penalties in §2K2.1 before

⁶ See Defender Comment on the Commission’s Proposed Policy Priorities 4-9 (Oct. 17, 2022) (“Defender October Comment”).

⁷ See Pub. L. No. 117-159 § 12004(1)(a)(5) (2022) (“BSCA”).

⁸ See Defender October Comment, *supra* note 6 at 6.

⁹ Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm’n at 1 (Dec. 5, 2022), <https://tinyurl.com/n9s52veb> (“Booker & Murphy Letter”); see also Letter from Sen. Christopher Murphy to Att’y Gen. Merrick Garland, Sept. 12, 2022, at 3, <https://tinyurl.com/4xzu29et> (“As the Department implements these new criminal provisions, it is incumbent on Department leadership to ensure that these new tools and power do not come at the expense of historically over-policed and over-prosecuted communities.”).

¹⁰ Booker & Murphy Letter, *supra* note 9 at 1–2.

¹¹ See Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* at 1 (Oct. 17, 2022) (“Zimroth Comment”), <https://tinyurl.com/yw95dthx>.

implementing the BSCA's directive.¹² Alternatively, if the Commission chooses to implement the directive this amendment cycle, it should do so as narrowly as possible. There are two reasons why. First, past practice and national experience demonstrate that enhancements to the firearms guidelines would disparately impact Black people and their communities. Second, the history of §2K2.1 reflects numerous upward ratchets lacking empirical study or basis, which the Commission should not repeat now.

II. The BSCA and the proposed amendments to §2K2.1

Less than one year ago, in the wake of a spate of mass shootings, Congress enacted the BSCA.¹³ The BSCA's purpose, according to Senators Booker and Murphy, was to “end the flow of illegal guns into communities and reduce gun violence.”¹⁴ Among other things, the BSCA created new statutory provisions covering straw purchasers and gun traffickers, at 18 U.S.C. §§ 932 and 933. It increased the statutory maximum penalties for four statutes—18 U.S.C §§ 922(d), 922(g), 924(h), and 924(k)—from 10 to 15 years (which is also the statutory maximum for newly created sections 932 and 933).¹⁵

¹² See BSCA at 136 Stat. 1328.

¹³ *Id.*; see also Kyana Givens, Michael Carter & Laura Abelson, *Federal Time*, Inquest (Aug. 11, 2022), <https://tinyurl.com/33ddcbyu> (“*Federal Time*”) (discussing the BSCA's enactment).

¹⁴ Booker & Murphy letter, *supra* note 9; see also Zimroth Comment, *supra* note 11 at 2-4. There's good reason to question whether the BSCA's increased penalties for illegal firearms acquisition and possession will effectively reduce gun violence. Indeed, the vast majority of U.S. mass shootings involve legally purchased firearms. See Glenn Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, NY Times (May 16, 2022), <https://tinyurl.com/3a7jtdhp>; Michael Sisak, *22 mass shootings. 374 dead. Here's where the guns came from*, AP (May 27, 2022), <https://tinyurl.com/4ry3yvwr> (Uvalde, Buffalo, and El Paso shooters legally purchased firearms); Lee Hedgepeth, *After Alabama church shooting, prosecutor names suspected gunman*, AL News (June 17, 2022), <https://tinyurl.com/cw97rnev> (shooter was federally licensed firearms dealer); Minyvonne Burke, et. al., *Tulsa gunman bought AR-15-style rifle hours before using it to kill his former doctor, 3 others*, NBC News (June 2, 2022), <https://tinyurl.com/mwrts3ff> (shooter legally purchased firearm).

¹⁵ See BSCA §§ 12001, 12002, 12004, 12005.

The BSCA also directed the Commission to “review and amend” the firearms guidelines and policy statements to: (1) ensure that people convicted of offenses under the “new sections 932 and 933 of title 18 and other offenses applicable to straw purchases and trafficking of firearms, are subject to increased penalties in comparison to those currently provided”; (2) reflect the intent of Congress that a person convicted of a §§ 932 or 933 offense who is “affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual”; and (3) reflect the intent of Congress that “straw purchasers without significant criminal histories receive sentences that are sufficient to deter . . . and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history or other mitigating factors.”¹⁶ In contrast to past directives to the Commission, the BSCA did not contain a timeline for implementation,¹⁷ and also required the Commission to *review* any amendment.¹⁸

Eight short months after the BSCA was enacted, the Commission has proposed sweeping changes to the firearms guideline. The proposed amendments are organized into three parts: Part A presents two options that would amend §2K2.1 to respond to each part of the BSCA directive. Part B proposes changes to address concerns about firearms that are not marked with serial numbers. And Part C provides issues for comment on possible further revisions to §2K2.1. Today, I will focus my testimony on the proposed Part A changes to §2K2.1 that would either increase penalties for straw purchasing and firearms trafficking (Option 1) *or* increase penalties more broadly across the guideline (Option 2). Defenders will address the proposed criminal affiliations and mitigating circumstances adjustments in Part A, as

¹⁶ *Id.*

¹⁷ *See, e.g.,* Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269 § 3(d) (2013) (requiring the Commission to complete its “consideration and review” “not later than 180 days after” the Act’s enactment); Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 § 401(m) (2003) (requiring implementation of directive within 180 days of enactment of the Act).

¹⁸ *See* BSCA § 12004(a)(5) (emphasis added).

well as Parts B and C of the proposed amendment, in our written comments submitted on a later date.¹⁹

Option 1 adds references to the new statutes created by the BSCA into §2K2.1 and amends the 4-level firearms trafficking enhancement at §2K2.1(b)(5) to make it a tiered enhancement that applies to straw purchasing and trafficking. It provides for either a 1- or 2-level increase at subsections (b)(5)(A) and (B), and a 5- or 6-level increase at subsection (b)(5)(C). Option 2—which would apply a 1- or 2-level base offense level (BOL) increase for offenses under the two new statutes and for offenses under §§ 922(d), 922(g), 924(h), and 924(k)—appears to respond to a comment submitted by the Deputy Attorney General (DAG) on October 17, 2022. The DAG asked the Commission to “undertake a broader review of Section 2K2.1 at the same time it reviews the guideline to implement the BSCA,” and proposed general increases to guideline ranges across §2K2.1.²⁰ Although Option 2 does not reflect all of the DAG’s requested changes, it would implement changes that are more expansive and punitive than those required by the BSCA’s directive, raising many §2K2.1 BOLs.

III. Past practice and national experience demonstrate that sweeping firearm guideline enhancements would disproportionately impact communities of color, with little to no improvement to public safety.

Sweeping and empirically unsupported increases to §2K2.1’s penalties would not make our communities safer.²¹ Instead, these changes would

¹⁹ As we will explain in those comments, with respect to the remainder of Part A, Defenders have concerns about the proposed criminal affiliations enhancement and we will suggest removing some of the limiting criteria from the proposed mitigated role reduction. With respect to Part B, Defenders strongly support the addition of a *mens rea* requirement to §2K2.1(b)(4) and oppose the proposed enhancement for privately made firearms in §2K2.1(b)(4)(B). With respect to Part C, we urge the Commission to reject any additional proposed amendments that would further ratchet up punishment under §2K2.1.

²⁰ Comment from the Office of the Deputy Att’y Gen. at 3 & App. A (Oct. 17, 2022).

²¹ See *Federal Time*, *supra* note 13 (discussing severe race disparities in federal firearms prosecutions and convictions); Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2176 (2016) (applying the drug war’s critical rubric to gun possession highlights similar pathologies and speaks to broader flaws in the

exacerbate the unwarranted racial disparities that have long dominated federal gun enforcement policies and sentencing.²² Against the backdrop of these historical trends, the Commission must tread cautiously in implementing the BSCA's directive, and, consistent with its obligation to establish fair sentencing policies and practices that meet the purposes of 18 U.S.C. § 3553(a)(2),²³ it must use every tool available to redress these harms.

A. Racial Disparities

The changes Option 2 proposes to §2K2.1, much like the felon-in-possession statute, are facially race-neutral. Yet they would be certain to disproportionately impact and harm Black people.²⁴ There are two primary reasons why: *first*, Black people are arrested, prosecuted, and convicted of higher rates of felony offenses in comparison to white people,²⁵ and *second*,

structure of the criminal legal system); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1346 (2005) ("Increasing penalties is almost always perceived as conferring political benefit. Thus, there is no governor on the gradual upward ratchet of harsher penalties made attractive by politics . . .").

²² See, e.g., David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L. J. 1011, 1021-25 (2020) (examining racial disparities in federal gun possession prosecutions arising from law enforcement practices that target communities of color). And as the DOJ itself recently argued, American disarmament laws historically targeted enslaved Black individuals as a group perceived to be "dangerous." Supp. Br. for the Appellee United States at 22-23, *U.S. v. Rahimi*, 21-11001 (5th Cir. Aug. 9, 2022) ("Several colonies (or states) also passed statutes disarming classes of people deemed to be threats, including those unwilling to take an oath of allegiance (to the crown and later the states), slaves, and native Americans.").

²³ 28 U.S.C. § 994(g).

²⁴ See Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 164 (2018) ("[S]ince the first colonists set foot on the New World, firearm and weapon control laws were enacted to suppress the enslaved and free Black populations.") (citing Michael Waldman, *The Second Amendment: A Biography* 8 (2014)); see also Cornel West, Foreword to Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* X (2010) ("In fact, the very discourse of colorblindness . . . has left America blind to the New Jim Crow.").

²⁵ See Shreefter, *supra* note 24 at 157; see also ACLU & The Sent'g Project, *Racial Disparities in Sentencing in the United States* 1 (July 14, 2022),

federal firearms enforcement initiatives like “Project Safe Neighborhoods” have exacerbated the generally disparate enforcement of criminal laws by disproportionately targeting and harming people of color and their communities.²⁶ There is ample reason to fear that the BSCA’s broad expansion of firearms crimes and penalties will be used to similar effect. Although the BSCA’s supporters intended it to focus on straw purchases and gun trafficking,²⁷ the DAG’s request that the Commission ratchet up offense levels across §2K2.1 shows that it will seize the opportunity to expand prosecutions and punishment for all types of gun offenses, including simple possession by a prohibited person.²⁸

Overincarceration. At the threshold, the racial disparities in federal firearms enforcement and convictions reflect centuries of unequal and racially disproportionate crime control.²⁹ “From arrest to sentencing, racial and ethnic disparities are a defining characteristic of our country’s criminal legal system.”³⁰ “Since 1850, when the first prison statistics were published,

<https://tinyurl.com/362tn8au> (Black individuals in America are incarcerated at a rate five times higher than white individuals).

²⁶ See Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315-17 (2007) (recognizing that federal gun enforcement initiatives like “Project Safe Neighborhoods” have historically focused efforts in predominantly Black, urban communities and collecting statistics provided in litigation showing that the vast majority of persons prosecuted in select districts under Project Safe Neighborhoods were Black); Patton, *supra* note 22 at 1021-25 (examining racial disparities); Humera Lodhi, *There’s A Large Racial Disparity in Federal Gun Prosecutions in Missouri, Data Shows*, The Kansas City Star (updated July 1, 2022), <https://www.kansascity.com/news/state/missouri/gun-violence-missouri/article258304878.html> (reporting racial disparities in both federal gun convictions and sentence lengths and recognizing that “[l]aws focused on felons are ‘racially coded language’. . . because people of color are more likely to come in contact with police, more likely to be arrested, and more likely to be labeled a felon than white people”).

²⁷ See Zimroth Comment, *supra* note 11 at 2-4; Brady United Against Gun Violence, *Re: Comments on Consideration of Possible Amendments to § 2K2.1* at 1 (Oct. 17, 2022) (urging holistic view).

²⁸ DAG Comment, *supra* note 20 at 3 & App. A.

²⁹ See Shreefter, *supra* note 24 at 158-59.

³⁰ Mike Wessler, *Updated charts provide insights on racial disparities, correctional control, jail suicides, and more*, Prison Policy (May 19, 2022), <https://tinyurl.com/2p943b9z>; see also Alexander, *supra* note 24 (arguing that mass

it has been evident that Blacks are overrepresented in state and federal prisons.”³¹ This inequitable enforcement regime has shaped the American criminal justice system: In 2020, the Bureau of Justice Statistics found that Black Americans are imprisoned in state and federal prisons at a rate that is over five times the rate of white Americans.³²

This imbalance is replicated in federal firearms sentencing, the vast majority of which involve a prohibited person in possession of a firearm conviction under 18 U.S.C. § 922(g).³³ The Commission’s 2022 report on firearms offenses found that over half of the individuals convicted of offenses sentenced under §2K2.1 in fiscal year 2021 were Black.³⁴ And Commission data shows that for felon-in-possession offenses, in particular, 56% of the individuals sentenced that fiscal year were Black.³⁵

incarceration is a perpetuation of American’s dark legacy of slavery and segregation); Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Inst. of Just. at 1 (May 2018), <https://tinyurl.com/3zev58dd> (“Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated.”).

³¹ Shreefter, *supra* note 24 at 158; *see also* Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 Tex. L. Rev. 1787, 1791–92 (2006) (“Shortly following emancipation, by 1880, the black-white disparity ratio in per capita imprisonment was nearly three to one” and in the “120 years following 1880, black-white disproportionalities in prison rates have grown steadily worse.”).

³²E. Ann Carson, U.S. Dep’t of Just., Off. of Just. Programs, Bureau of Just. Stats., *Prisoners in 2019* 10 (2020), <https://tinyurl.com/4sswe6xd>.

³³ USSC, *What Do Federal Firearms Offenses Really Look Like?* 4 (July 2022), <https://tinyurl.com/6jsusejv> (“The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).”) (Firearms Report).

³⁴ *Id.* at 10 tbl.1 (reporting that in fiscal year 2021, a majority of individuals sentenced under §2K2.1 (after “excluding offenders sentenced under the career offender guideline, Armed Career Criminal Act, and offenders convicted solely of an offense under 18 U.S.C. § 924(c) and certain other cases”) were Black (54.5%) and U.S. citizens (96.1%)).

³⁵ USSC, *Quick Facts: Felon in Possession of a Firearm Fiscal Year 2021* (2022), <https://tinyurl.com/5ykh2z5u>. Studies have also found similar racial disparities in state firearms convictions. For example, a 2021 study found that over two-thirds of convictions involving a firearm in Illinois were for mere possession offenses, and that Black men, particularly in Cook County, were disproportionately convicted. David E. Olson, *et al.*, Loyola Univ. Chi., Ctr. for Crim. Just. Rsch, Pol’y, and Prac.,

Enforcement. “F[el]on-in-possession laws are embedded in a broader range of decisions about criminal law and its enforcement.”³⁶ In particular, the failed “War on Drugs” is “deeply intertwined” with the criminal regulation of gun possession.³⁷ For example, “drug convictions often serve as predicates for a range of felon-in-possession gun crimes, and policing of guns and drugs are often closely tied.”³⁸ As I have written elsewhere, the racialized policing practices that became popular during the 1980s and continue today—including stop-and-frisks and traffic stops—mean that “too often, whether you are deemed a ‘prohibited person’ depends on your skin color and zip code, not the threat you pose to the community.”³⁹ Indeed, in its recent Firearms Report, the Commission studied a sample of firearms convictions and found that a significant number of the sample—27.5%—originated from “traffic stop[s] or routine patrol[s].”⁴⁰ Within that group, the Commission found astonishing racial disparities: “Black firearms offenders represented a higher share of arrests following law enforcement conducting a routine street

Sentences Imposed on Those Convicted of Felony Illegal Possession of a Firearm in Illinois at 1-2 (July 2021), <https://tinyurl.com/5n7cfhkk>.

³⁶ Levin, *supra* note 21 at 2197.

³⁷ *Id.* at 2177; see Schreefter, *supra* note 24 at 174 (“[T]he ‘War on Drugs’ shaped today’s reality of the disparate enforcement of federal firearm offenses by significantly increasing the number of Black people with felony convictions.”).

³⁸ Levin, *supra* note 21 at 2177 (summarizing study findings that “for weapons offenses, the arrest rates for African Americans is five times higher than the rate for whites and three times higher than the rate for Hispanics” in New York City).

³⁹ *Federal Time*, *supra* note 13; see also B. Keith Payne & Julian M. Rucker, *Explaining the Spatial Patterning of Racial Disparities in Traffic Stops Requires a Structural Perspective: Further Reflections on Stelter et al. (2022) and Ekstrom et al.* 33(4) Psych. Sci. 666–68 (2022), <https://tinyurl.com/uphmvder> (“Recent studies have made clear that Black drivers in the United States are more likely to be stopped by police than White drivers and that the size of the disparity varies widely from one place to another.”); Daniel Webster, *et al.*, *Reducing Violence and Building Trust: Data to Guide Enforcement of Gun Laws in Baltimore*, Johns Hopkins Ctr. for Gun Pol’y and Rsch. at 16 (Jun. 4, 2020), <https://tinyurl.com/4k8xaxfx> (“BPD’s gun law enforcement strategy has historically prioritized stop-and-search practices with insufficient training and oversight to prevent racial profiling.”).

⁴⁰ See *What Do Federal Firearms Offenses Really Look Like?*, *supra* note 33 at 32.

patrol (73.0%) and traffic stops (66.9%) compared to the overall percentage of Black firearms offenders in the sample.”⁴¹

Federal firearms enforcement patterns have exacerbated these disparities. Over the last two decades, federal firearms prosecutions have proliferated under charging policies and taskforces implemented by the Department of Justice (DOJ). Most prominently, Project Safe Neighborhoods, launched by President George W. Bush in 2001, increased firearm prosecutions nationwide. The federal government hired hundreds of new prosecutors and law enforcement agents to bring federal prosecutions for gun crimes—largely simple possession—that would have otherwise proceeded in state courts for the express purpose of imposing more severe prison sentences.⁴²

Critics have concluded that Project Safe Neighborhoods “specifically targets communities of color for punishment above and beyond what would already be significant punishment in state court.”⁴³ More than half of all Black individuals in the United States live in just 30 cities, all of which have been targeted as part of Project Safe Neighborhoods.⁴⁴ In those cities, the people who are prosecuted for firearms offenses are overwhelmingly Black. In 2007, Professor Bonita Gardner reported that in my district, the Eastern District of Michigan, “almost ninety percent of those prosecuted under Project Safe Neighborhoods [were] African American.”⁴⁵ Many of these federal cases

⁴¹ *Id.* at 33.

⁴² Gardner, *supra* note 26 at 312 (Throughout Project Safe Neighborhoods’ existence, the overwhelming majority of its gun prosecutions have focused on felon-in-possession charges.). Federal prosecutors have focused on simple possession charges despite the existence of “twenty major federal gun crimes—including gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterating serial numbers, and lying on the background check form.” Patton, *supra* note 22 at 1022.

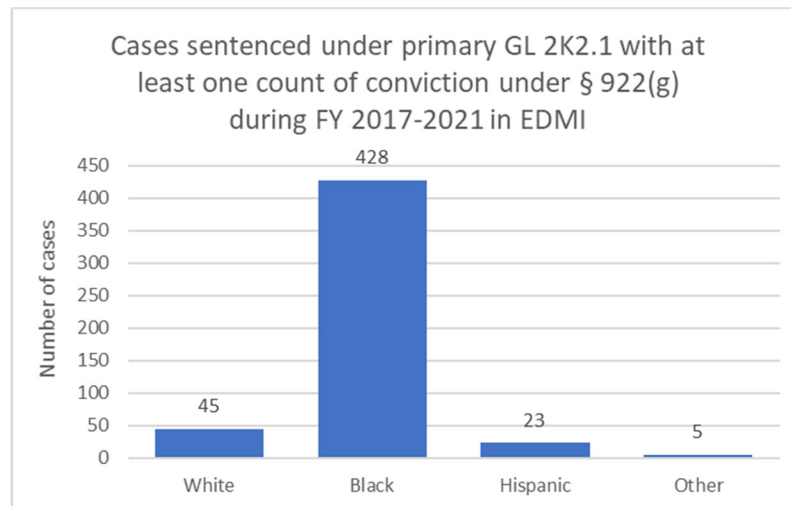
⁴³ Patton, *supra* note 22 at 1023.

⁴⁴ Gardner, *Separate and Unequal*, *supra* note 26 at 316.

⁴⁵ *Id.* at 313-17 (citing *Hubbard v. United States*, No. Crim. 04-80321, 2006 WL 1374047, at *2 (E.D. Mich. May 17, 2006)) (Of the 61 defendants prosecuted under the program represented by the local FPD, “54 were African-American, 2 were Native American, 3 were Hispanic or Latino, and 2 were Caucasian.”). Likewise, in the Southern District of New York, “testimony show[ed] that more than eighty percent of defendants prosecuted under [Project Exile] were African American.” And

are picked up from ongoing state prosecutions. When prosecutors choose to bring federal charges, with their longer and determinate sentences and mandatory minimums, they can coerce guilty pleas. Even the threat of federal prosecution can deter an individual in state court from exercising her constitutional right to proceed to trial.⁴⁶

In the Eastern District of Michigan, the pattern has held steady since Dr. Gardner published her report: during the fiscal years of 2017 to 2021, 85% of people sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g) were Black.⁴⁷ Compared to all other races, in my district, Black individuals are 5.9 times more likely to be sentenced with at least one § 922(g) conviction and under §2K2.1 than non-Black individuals.⁴⁸



in the Southern District of Ohio, “more than ninety percent” of known cases of individuals prosecuted under the program were Black. *Id.* at 317.

⁴⁶ See Patton, *supra* note 22 at 1025 (“Although the vast majority of criminal cases, and therefore the vast source of mass incarceration, come from state systems, the federal prosecutions impact those systems tremendously by providing state prosecutors greater power to negotiate tougher pleas.”).

⁴⁷ The data for these analyses were extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2017 to 2021. The Commission’s “Individual Offender Datafiles” are publicly available for download on its website. USSC, *Commission Datafiles*, <https://tinyurl.com/4j32hwha>. By comparison, nationwide, from fiscal year 2017 to 2021, 56% of individuals sentenced under primary guideline §2K2.1 with at least one § 922(g) charge were Black. *Id.*

⁴⁸ This calculation represents relative risk.

B. Public Safety

In October, a coalition of gun violence prevention researchers, policymakers, lawyers, and advocates explained to the Commission that firearm violence in the United States is a racial justice crisis.⁴⁹ I am grateful to these groups for emphasizing this too-often ignored reality. As the coalition explained: “Gun violence does not impact Americans equally: Black people are twice as likely as White people to die from gun violence and 14 times more likely to be wounded, while Black children and teens are 14 times more likely to die from gun violence than their White counterparts.”⁵⁰ These disparities “do not arise from cultural deficiencies, a greater propensity toward violence, or moral decay.”⁵¹ Rather, they reflect a preference for incarceration over intervention and for abandonment rather than aid.⁵² Our approach to gun violence in Black communities—racially-targeted police enforcement—has exacerbated problems at enormous social and monetary costs.

“The impact of gun violence on the lives of [people of color] is devastating, but so too is the over-reliance on a heavily-punitive criminal legal system to address violence.”⁵³ These strategies are predicated on the assumption that the prospect of harsh, determinate sentences will deter

⁴⁹ Zimroth Comment, *supra* note 11 at 12.

⁵⁰ *Id.* (gathering sources).

⁵¹ *Id.*

⁵² See Brady United, *Gun Violence is a Racial Justice Issue*, <https://tinyurl.com/yccvm7ee> (last accessed Feb. 26, 2023) (“Black people are not inherently more violent. . . . White men, for instance, commit the majority of mass shootings. . . . public policy has made it so that Black people are more likely to face conditions that facilitate gun violence.”).

⁵³ Educational Fund to Stop Gun Violence, DC Justice Lab, Cities United, March for Our lives, Community Justice Action Fund, Consortium for Risk-Based Firearm Policy, and Johns Hopkins Center for Gun Violence Prevention and Policy, *Racial Equity Framework for Gun Violence Prevention* at 4 (2022), <https://tinyurl.com/4j2f44fs>; see also Robert Weiss, *Rethinking Prison for Non-Violent Gun Possession*, 112 J. Crim. L. & Criminology 665, 668 (2022) (citing James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* 35 (2017)) (noting “[L]ow-income and Black Americans experience both criminal justice over-enforcement (mass incarceration, disparate arrest rates, police abuses) and under-enforcement (unabated gun violence, low homicide closure rates, etc.”)).

conduct.⁵⁴ But years after deploying strategies based on that unproven assumption, it remains just that: an assumption. And it is an assumption that ignores the relative consensus in empirical research that enhanced penalties for simple gun-possession offenses do not effectively reduce violence.⁵⁵

What could explain this? For one thing, it is consistent with the reality that the general deterrence benefit of “severe prison terms, specifically, is quite limited.”⁵⁶ As the DOJ’s National Institute of Justice has explained, “increasing the severity of punishment does little to deter crime”—“[t]he certainty of being caught is a vastly more powerful deterrent.”⁵⁷ A recent Johns Hopkins University study that examined gun violence in Baltimore, Maryland, concluded that “increasing the certainty that violators experience consequences for committing gun crime is more important and cost-effective in reducing crime than increasing the length of sentences.”⁵⁸

⁵⁴ See Patton, *supra* note 22 at 1018 (“The U.S. Attorney for the Eastern District of Virginia, Helen Fahey, explained the advantages of federal prosecutions: lower likelihood of bail, harsher sentences, and a federal prison system that meant serving time in a distant location (hence the name ‘Exile’).”).

⁵⁵ See e.g., Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. Pa. L. Rev. 637, 694 (Feb. 2022) (“The research is clear that imposing increasingly harsh sentences is not an effective way to reduce gun crime.”) (gathering sources); see also Matthew Makarios & Travis C. Pratt, *The Effectiveness of Policies and Programs that Attempt to Reduce Firearm Violence: A Meta-Analysis*, 58 Crime & Delinquency 222, at 236 (2012) (finding a “weak” relationship between enhanced prison terms and gun violence); see also Weiss, *supra* note 53 at 686 (arguing for importance of using public health tools and discussing “substantial literature that considers gun violence a public health problem”).

⁵⁶ Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) (“The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.”).

⁵⁷ U.S. Dep’t of Just., Nat’l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), <https://tinyurl.com/54tshyyj>.

⁵⁸ Webster, *supra* note 39 at 4; see also Weiss, *supra* note 53 at 675 (“Evidence of a connection between putting people in prison for gun possession and increased public safety is weak.”).

And to the extent that any minimal deterrent effect might exist, it comes at significant human and fiscal costs.⁵⁹ Incarceration is not only expensive, it often “does not prevent reoffending and has a criminogenic effect on those who are imprisoned.”⁶⁰ That is because imprisonment severs ties to family and community, disrupts housing stability, and diminishes employment options on release.⁶¹ As the Vera Institute has explained, “incarceration is an expensive way to achieve little public safety.”⁶²

Another reason that prosecutions for felon-in-possession offenses alone cannot effectively make communities safer is that a prior felony conviction is a poor proxy for dangerousness.⁶³ Law enforcement officers often claim that Project Safe Neighborhoods and other firearm taskforce prosecutions focus on “violent” people,⁶⁴ but there is little apparent pattern to who is prosecuted

⁵⁹ Webster, *supra* note 39 at 24 (gathering sources).

⁶⁰ *Id.*

⁶¹ See generally Martin H. Pritikin, *Is Prison Increasing Crime*, 2008 Wis. L. Rev. 1049, 1054-72 (cataloging eighteen criminogenic effects of incarceration); Lynne M. Vieraitis, Tomislav V. Kovandzic, & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Pub. Pol’y 589, 614-16 (2007); see also USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including: contact with more serious “offenders”, disruption of legal employment, and weakening of family ties).

⁶² Don Stemen, *For the Record: The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Evidence Brief at 2 (Jul. 2017), <https://tinyurl.com/ycyzkurs>.

⁶³ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 721 (2007) (noting that “many felonies are not violent in the least, raising no particular suspicion that the convict is a threat to public safety. Perjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies do not indicate a propensity for dangerousness. . . . Yet, despite this overinclusiveness, felon possession bans are consistently, and without exception, deemed reasonable measures of promoting public safety”); see also *Kanter v. Barr*, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting) (explaining § 922(g)(1) “also encompasses those who have committed any nonviolent felony or qualifying state-law misdemeanor—and that is an immense and diverse category. It includes everything from Kanter’s offense, mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses.”), *abrogated by New York State Rifle & Pistol Association, Inc v. Bruen*, 142 S. Ct. 2111 (2022).

⁶⁴ See Daniel Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369, 375, 391 (2001) (summarizing promises

federally for firearm possession, beyond racial disparities. In my experience, felony convictions (defined as “a crime[s] punishable by imprisonment for a term exceeding one year”) can include minor, local offenses such as possession of drugs in small quantities, certain driving offenses, and petty theft, which may include stealing food from a grocery store. Option 2’s changes to §2K2.1 would allow prosecutors to cast an even wider net and risk amplifying these existing disparities.

IV. The history of §2K2.1 reflects numerous, unstudied upward ratchets that should not be repeated for “proportionality” reasons.

In addition to Option 2’s likely disproportionate and harmful impact on communities of color, the history and evolution of the firearms guideline counsels against this sweeping response to the BSCA’s directive. Section 2K2.1’s history reflects many hastily promulgated upward adjustments that were not preceded by careful study and review. In fact, numerous commentators have suggested that the firearms guidelines should be *decreased, not heightened*.⁶⁵

by Project Safe Neighborhoods initiatives to “target the most prolific violent offenders,” and “crack down on violent gun criminals”).

⁶⁵ See, e.g., Statement of Barry J. Portman Before the U.S. Sentencing Comm’n, Washington, D.C., at 25 (Mar. 5, 1991) (“Portman 1991 Statement”) (“The data indicate that, under the November 1, 1989 version of §2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) – suggesting that the offense levels under the guideline are too high.”); Statement of Paul D. Borman Before the U.S. Sentencing Comm’n, Washington, D.C., at 13 (Mar. 5, 1991) (Borman 1991 Statement) (“The report accompanying this guideline suggests that [the] majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. . . .”); Defenders’ Annual Letter to the U.S. Sentencing Comm’n, at 3 (Mar. 9, 2006) (arguing that the Commission should eliminate the enhanced base offense levels for semiautomatic firearms capable of accepting large capacity magazines after the repeal of the assault weapons and large capacity magazine bans that prompted these heightened offense levels); Testimony of Richard A. Hertling Before the U.S. Sentencing Comm’n, Washington, D.C., at 11 (Mar. 15, 2006) (“The Department favors the upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*.”); Testimony of Kyle Welch Before the U.S. Sentencing Comm’n, Washington, D.C., at 3 (Mar. 17, 2011)

While the BSCA does not require the Commission to increase penalties for offenses other than straw purchasing and drug trafficking, the Commission seeks comment on “whether having higher penalties for straw purchasers than prohibited persons”—as Option 1 would provide—“raises proportionality concerns.”⁶⁶ Linking the prohibited persons sentencing range to that of an arbitrarily inflated straw purchasing enhancement is not good sentencing policy. The Commission’s greater concern should be the proportionality of punishment to the conduct being punished. Option 2’s punishment enhancements are greater than necessary.

A. History of §2K2.1

The history of amendments to 2K2.1 is a story of repeat, non-evidence-based, one-way ratchets. This historic failure to adopt a deliberative process that “begins with, and builds upon, empirical data,”⁶⁷ would be greatly exacerbated by any further across-the-board upward expansions just eight short months after the BSCA was enacted.

Soon after promulgating its original guidelines, the “Commission undertook several major revisions [which] resulted in significant severity increases over historic levels.”⁶⁸ Over the course of those revisions, the firearms guidelines have been amended to increase penalties in a variety of ways no less than ten times.⁶⁹ Most of these increases have been in response

(“Welch 2011 Testimony”) (stating that the straw purchaser enhancements being considered in 2011 were not supported by the Commission’s own empirical data and arguing that “[t]hese data suggest the guideline ranges for these offenses are too high, not too low”).

⁶⁶ 2023 Proposed Amendments, at 7196.

⁶⁷ See USSG ch. 1, pt. A, at 5.

⁶⁸ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 66 (2004) (“*Fifteen Years of Guideline Sentencing*”).

⁶⁹ See USSG, App. C, Amends. 189 (Nov. 1, 1989), 333 (Nov. 1, 1990), 374 (Nov. 1, 1991), 478 (Nov. 1, 1993), 522 (Nov. 1, 1995), 531 (Nov. 1, 1995), 578 (Nov. 1, 1998), 631 (Nov. 1, 2001), 691 (Nov. 1, 2006), 753 (Nov. 1, 2011).

to DOJ and federal law enforcement requests,⁷⁰ congressional directives,⁷¹ statutory minimum and maximum penalty increases,⁷² or some combination

⁷⁰ See, e.g., Letter of Stephen A. Saltzburg, Deputy Attorney General, on Behalf of the Dept. of Justice to Judge William Wilkins, Chair, U.S. Sentencing Comm'n, at 35, Washington, D.C. (Apr. 14, 1989) (requesting increased base offense levels across firearms guidelines "to at least 16 for any firearms offense subject to a 10-year maximum penalty"); USSG App. C., Amend. 631, Reason for Amendment (Nov. 1, 2001) (explaining that the increases in punishment for an offense involving three or more firearms "responds to a recommendation from the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in §2K2.1"); DOJ Comments on the Sentencing Commission's Proposed Priorities (Aug. 15, 2005) (recommending new SOC for firearms trafficking and an increase in the SOC for altered or obliterated serial numbers); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sent'g Comm'n, at 9 (June 28, 2010) (requesting additional enhancements).

⁷¹ The 1995 Amendments were in response to a provision in the Violent Crime Control Law Enforcement Act of 1994, Pub. L. No. 103-322 § 110501, 108 Stat. 1796 (Sept. 13, 1994), which directed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence . . . or a drug trafficking crime . . . if a semiautomatic firearm is involved." In addition to adding an upward departure, the Commission increased the base offense levels for firearms capable of accepting a large capacity magazine to make them commensurate with the levels for possession of machine guns, silencers, destructive devices, and other National Firearms Act weapons. Notably, *the enhancement applied even when the firearm was not connected to a crime of violence or drug trafficking offense*. Thus, the amendment was broader than the congressional directive. See USSG App. C., Amends. 522, 531 (Nov. 1, 1995). The 1998 Amendment 578 was enacted in response to "a *proposed directive* contained in juvenile justice legislation approved by the Senate Judiciary Committee early in 1997." 63 Fed. Reg. 602, 1998 WL 1699 (Jan. 6, 1998) (1998 Notice of Proposed Amendments) (emphasis added); see also *United States v. Bennett*, No. 8:07CR235, 2008 WL 2276940, at *4 (D. Neb. May 30, 2008) (explaining that the "guidelines that establish the base offense levels for weapons crimes were . . . promulgated in large part pursuant to Congressional directive").

⁷² For example, in 1989 the Commission raised the BOL for most conduct covered by the original 2K2.1, including 18 U.S.C. § 922(g) offenses, from 9 to 12 in response to the Anti-Drug Abuse Act of 1988, which raised the statutory maximum for conduct covered by the guideline from five to ten years. See USSG, App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1991, the Commission implemented graduated base offense level increases across 2K2.1 based on the existence of certain qualifying prior convictions. Compare USSG §2K2.1 (1991) with *id.* §§2K2.1, 2K2.2, 2K2.3 (1990). These enhancements were in response to a study of the firearms guidelines by the Commission's 1990 Firearms and Explosive Materials Working Group. See USSC, *Firearms and Explosive Materials Working Group*

of these factors. Most did not involve extensive empirical studies and review.⁷³ The Commission offered little or no explanation for some of its decisions.⁷⁴ Commentators such as the Federal Defenders,⁷⁵ the National

Report (1990) (“*Working Group Report*”). However, the working group’s recommendations were largely based not on national data and experience, but on Congress’s increasing of statutory maximum and mandatory minimum penalties for prohibited persons with certain types of prior convictions under 18 U.S.C. § 924(e) (Armed Career Criminal Act). *See id.* at 18-21.

⁷³ The one exception may be the 1991 amendments which were prompted by the working group study mentioned above. *See Working Group Report, id.* But, as explained *infra*, at 21-22, the working group’s recommendations for reformation of the guidelines were not supported by its findings.

⁷⁴ For instance, the Commission’s only explanation for the 1989 increases to offense levels (from 9 to 12 for many offenses, 8 to 12 for certain categories of straw purchasers, and 12 to 16 for certain categories of weapons) and specific offense characteristics (for trafficking in multiple firearms, and for stolen weapons or obliterated serial numbers) was “to better reflect the seriousness of this conduct” and to account for statutory increases. USSG App. C., Amend. 189, Reason for Amendment (Nov. 1, 1989). In 1990, the Commission increased the base offense levels for possession, receipt, and transport of National Firearms Act weapons from 16 to 18. *See* USSG, App. C., Amend. 333 (Nov. 1, 1990). The only reason provided was “to better reflect the seriousness of the conduct covered.” *Id.*, Reason for Amendment. In 1993, the Commission amended the commentary to §2K2.1 to provide for strict liability “under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number.” 57 Fed. Reg. 62832, 62838, 1992 WL 386965 (Dec. 31, 1992) (“Notice of 1993 Proposed Amendments”). The Commission’s notice of proposed amendment was completely devoid of reasoning. And the Commission’s “Reason for Amendment” was equally opaque, simply referring to the amendment as “clarif[ying].” USSG, App. C., Amend. 478, Reason for Amendment, (Nov. 1, 1993); *cf. United States v. Handy*, 570 F. Supp. 2d 437, 453 (E.D.N.Y. 2008) (“None of [the firearm guideline amendments] have altered the two-level enhancement for a stolen firearm, nor have they provided any indication of why the Commission believes that the enhancement is appropriate despite the lack of knowledge that the firearm involved was stolen.”).

⁷⁵ *See e.g.* Comments of the Federal Defenders on the 1989 Proposed Guidelines Amendments and Other Aspects of Guideline Sentencing 30, Washington, D.C. (Apr. 7, 1989); Portman 1991 Statement, *supra* note 65 at 4-5, 21-25; Letter from Jon M. Sands on Behalf of the Federal Public and Community Defenders to the U.S. Sent’g Comm’n 3, Washington, D.C., at 3 (Mar. 9, 2006) (“Sands 2006 Letter”); Testimony of Jon Sands on Behalf of the Federal Public and Community Defenders Before the U.S. Sentencing Comm’n, Washington, D.C., at 1-2 (Mar. 18, 2009) (“Sands 2009 Testimony”); Welch 2011 Testimony, *supra* note 65 at 2-3.

Association of Criminal Defense Lawyers,⁷⁶ the American Bar Association,⁷⁷ and the Practitioner's Advisory Group⁷⁸ have criticized the Commission for proposing and implementing penalty increases without sufficient empirical review of the need for the enhancements, and offering perfunctory, generalized reasons for the enhancements.

The original 1987 firearms guidelines, which were based on the Commission's study of past practices, set lower BOLs and far fewer specific offense characteristic (SOC) enhancements than today.⁷⁹ Unlike the current version, BOLs were not increased based on certain prior convictions.⁸⁰ Nor did the Commission set out alternative BOLs based on a firearm's features, as it does today.⁸¹ Indeed, the Commission stressed the difficulty of distinguishing levels of culpability based on a firearm's features.⁸²

But in 1991, the Commission restructured the firearms guidelines completely, consolidating three different sections into one new §2K2.1.⁸³ The revised BOLs "[were] linked to the statute of conviction," were enhanced

⁷⁶ Statement of Benson Weintraub, National Association of Criminal Defense Lawyers, Before the U.S. Sentencing Comm'n, Washington, D.C., at 2-3 (Mar. 15, 1990).

⁷⁷ Statement of Samuel J. Buffone, Chairperson, U.S. Sentencing Commission Committee Criminal Justice Section, Before the U.S. Sentencing Comm'n, Washington, D.C., at 3-6 (Mar. 15, 1990).

⁷⁸ Letter from Fred W. Bennett on Behalf of the Practitioners' Advisory Group (PAG) to U.S. Sentencing Comm'n, Washington, D.C., at 17 (Mar. 9, 1998); Letter from Greg Smith on Behalf of the PAG to U.S. Sentencing Comm'n, Washington, D.C., at 9-15 (March 15, 2006).

⁷⁹ Compare USSG §2K2.1, §2K2.2, §2K2.3 (1987) with §2K2.1 (2021) (In 1987, the conduct now contained solely in §2K2.1 was included in §2K2.1, §2K2.2, and §2K2.3). In 1987, the §2K2.1 BOL was 9. While there was a one-level enhancement if the firearm was stolen or had an altered or obliterated serial number in 1987, *see id.* §2K2.1(b)(1) (1987), the commentary noted the lack of data sufficient to determine the effect of a stolen firearm on pre-guidelines sentences. *See* USSG §2K2.1, comment. background (1987).

⁸⁰ *See* USSG §2K2.1, §2K2.2, §2K2.3 (1987).

⁸¹ *See id.*

⁸² *See id.* §2K2.1, comment. background (1987) ("Some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm.").

⁸³ *See* USSG §2K2.1 (1991).

significantly based on the existence of qualifying prior convictions, and were not based on data and national experience.⁸⁴ These changes were prompted by a report issued by the Commission's Firearms and Explosive Materials Working Group ("the Working Group"), a staff project that looked at data, case files, appellate decisions, and comments from law enforcement, including from the Bureau of Alcohol, Tobacco, and Firearms ("ATF").⁸⁵ The Working Group recommended enhancing BOLs across §2K2.1 based on the existence of qualifying priors.⁸⁶

The Working Group studied prior firearms sentencing decisions and determined that the offense characteristics impacting sentencing length "includ[ed] actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection purposes, drug-related conduct, [and possession of] N.F.A. firearms [and] destructive devices."⁸⁷ Indeed, most upward departures occurred where the individual had recently used the weapon, or intended to use the weapon, to commit another crime.⁸⁸ Significantly, *the existence of prior convictions was not in the Working Group's list of reasons for upward departures*. In fact, the Working Group determined that sentence length "does not seem strongly correlated with the existence of prior firearms or drug-related offenses or convictions for crimes of violence."⁸⁹ Of the cases studied, convicted persons who had committed prior offenses related to firearms, drugs, or crimes of violence "were sentenced to an average of 14 (fourteen) months, slightly lower than the fifteen-month average for all cases combined."⁹⁰ And while possession of a firearm for personal protection was cited by judges as a reason

⁸⁴ See *Fifteen Years of Guideline Sentencing*, *supra* note 68 at 66.

⁸⁵ See *Working Group Report*, *supra* note 72.

⁸⁶ See *id.* at 18-22.

⁸⁷ *Id.* at 10; see also *id.* App. D: Memorandum from Vince Ventimiglia to Commissioner Carnes, Rich Murphy, Firearms Working Group Re: Review of Case File Summaries for Firearms Guideline §2K2.1 (1989) 8-14 (Nov. 9, 1990) ("App. D").

⁸⁸ See *id.* at 11.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 10.

for imposing reduced sentences, the Working Group proposed no such adjustment.⁹¹

The Working Group's recommendation to enhance and restructure penalties across §2K2.1 was tied to legislative increases of statutory maximum and mandatory minimum penalties for prohibited persons and persons with certain types of prior convictions.⁹² For example, the Working Group noted that the Armed Career Criminal Act (ACCA) provided for a fifteen-year mandatory minimum for unlawful firearm possession where the individual had three specified prior convictions;⁹³ it therefore recommended an increased sentence for an individual with two qualifying felonies to increase "proportionality."⁹⁴ But the fifteen-year mandatory sentence was not based on Commission expertise: Commission data reflected no need for proportionality with this draconian mandatory minimum, and the drug felonies the Commission chose to trigger the enhancements were broader than those that triggered the ACCA.⁹⁵

Unsurprisingly, the 1991 amendments led to significant increases in prison sentences. In cases sentenced under primary guideline §2K2.1 with at least one count of conviction under § 922(g), the mean length of imprisonment leapt from 48.4 months in 1991 to 70.2 months in 1992.⁹⁶

In 1995, the Commission again made drastic changes to §2K2.1 via Amendment 522. A year earlier, Congress had enacted the Violent Crime

⁹¹ *See id.* at 10.

⁹² *See id.* at 19-21, 29-32. The Working Group's recommendations were predicated upon other factors unrelated to empirical research and the statutory purposes of sentencing as well. For instance, it noted the purported reluctance of federal prosecutors to expend resources on firearms offenses "in light of the relatively low penalties under the guidelines." *Id.* at 32.

⁹³ *See* 18 U.S.C. § 924(e).

⁹⁴ *See Working Group Report* at 18-23, App. D, *supra* note 87 at 10.

⁹⁵ *Compare* USSG §4B1.2(b) *with* 18 U.S.C. § 924(e)(2)(A).

⁹⁶ Data calculated from the annual datasets for fiscal years 1991 and 1992 available in the series created by the United States Sentencing Commission titled Monitoring of Federal Criminal Sentences, 1987-1998 (ICPSR 9317), and hosted by the Inter-university Consortium for Political and Social Research, <https://tinyurl.com/53wztrdf>

Control Law Enforcement Act of 1994,⁹⁷ which created several new firearms offenses (banning assault weapons and large capacity magazines).⁹⁸ The new law directed the Commission to “amend its sentencing guidelines to provide an appropriate enhancement of punishment for [a crime of violence or a drug trafficking crime] if a semiautomatic firearm is involved.”⁹⁹ Aside from this directive, which applied only to crimes of violence and drug trafficking, Congress required no action relating to this new offense.

But the Commission responded more broadly than required by the directive. It increased the offense levels for possession of certain semiautomatic firearms capable of accepting large capacity magazines to make them commensurate with the offense levels for possession of machine guns and other National Firearms Act weapons (18 U.S.C. § 5845) in §2K2.1(a)(1) [level 26], (a)(3) [level 22], (a)(4) [level 20], and (a)(5) [level 18],¹⁰⁰ and applied the enhancements even when the firearm was not connected to a crime of violence or drug trafficking offense.¹⁰¹ The Commission offered no explanation for this amendment or its decision to enhance penalties beyond the narrower dictates of the directive.¹⁰² The assault weapon and large capacity magazine bans expired in 2004 (and have never been reinstated by Congress) but the Commission has not taken action to remove these enhancements.¹⁰³ A 1997 Urban Institute study mandated by Congress concluded that the bans had little impact on murder rates.¹⁰⁴ Yet even in the face of the 2004 sunset, Urban Institute report, and 2006 public comment—from both Defenders and the DOJ—urging the Commission to

⁹⁷ Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994).

⁹⁸ *Id.*, Tit. XI, Subtitle A; see also *Fifteen Years of Guidelines Sentencing*, *supra* note 68 at 66.

⁹⁹ Pub. L. No. 103-322 § 110501.

¹⁰⁰ See USSG §2K2.1 (1995).

¹⁰¹ See USSG, App. C., Amend. 522 (Nov. 1, 1995).

¹⁰² See *id.*

¹⁰³ See Pub. L. No. 103-322 § 110501(2) (indicating the amendments made by this subtitle are repealed effective ten years after the date of their enactment).

¹⁰⁴ Roth Kroper, et al., Urban Institute, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994*, at 2 (Mar. 13, 1997), <https://tinyurl.com/jnmes9h4>; see also Pub. L. No. 103-22, § 110104 (mandating this study).

remove the large capacity magazine BOL enhancements,¹⁰⁵ these enhancements remain in place (and were broadened) at §2K2.1(a)(1), (a)(3), and (a)(4).¹⁰⁶

In 2011, DOJ requested, and the Commission implemented, enhancements to §2K2.1 for straw purchasers and for offenses involving firearms and ammunition transported or intended to be transported out of the United States.¹⁰⁷ Much like today, the 2011 proposed amendments to §2K2.1 were in reaction to highly publicized, high-profile instances of gun violence sparking political debate.¹⁰⁸ DOJ's testimony during that amendment cycle highlighted high-profile examples of drug cartel violence in Mexico and U.S. cities bordering Mexico.¹⁰⁹ Defenders pointed to the border district data, showing that the sentences for straw purchasers ("overwhelmingly first time, non-violent offenders for whom prison should be 'generally' inappropriate" under § 994(j)) should not be increased.¹¹⁰ We feared that the Commission's proposals were "not narrowly tailored to carry out the purposes of sentencing and [brought] with them significant risk of

¹⁰⁵ See Hertling 2006 Testimony, *supra* note 65 at 3; Sands 2006 Letter, *supra* note 75 at 3-10.

¹⁰⁶ See USSG §2K2.1 (Nov. 1, 2021). When the bans were repealed, the Commission replaced the statutory references to the repealed laws with the phrase "semiautomatic firearm capable of accepting a large capacity magazine." USSG App. C., Amend 691, Reason for Amendment (Nov. 1, 2006). This had the effect of broadening the reach of these enhanced BOLs beyond the magazines covered by the large capacity magazine ban when it was in effect. The Commission gave no reason for retaining and broadening the enhanced BOLs other than to point out that district courts were *increasingly not applying them* after the repeal of § 921(a)(30) (which would normally counsel toward jettisoning—not keeping—them). See Sands 2006 Letter, *supra* note 75 at 6-8.

¹⁰⁷ See USSG App. C. Amend. 753 (Nov. 1, 2011); *see also* Defenders' Annual Letter to the Sentencing Commission, at 43 (July 15, 2013); Letter from Jonathon Wroblewski, DOJ Office of Policy and Legislation, to Chief Judge William K. Sessions, III, Chair, U.S. Sentencing Comm'n, at 9 (June 28, 2010); Statement of Laura E. Duffy, United States Attorney for the Southern District of California, Before the U.S. Sentencing Comm'n, Washington, D.C. (Mar. 17, 2011) ("Duffy 2011 Statement").

¹⁰⁸ See Welch 2011 Testimony, *supra* note 65.

¹⁰⁹ See Duffy 2011 Statement, *supra* note 107 at 2-15.

¹¹⁰ Defenders' Annual Letter to the Sentencing Commission, at 8 (Aug. 18, 2010); *see also* Welch 2011 Testimony, *supra* note 65 at 3.

incarcerating low-level, first-time offenders for a length of time that is not only greater than necessary, but detrimental to public safety.”¹¹¹
Nonetheless, the Commission complied with DOJ’s request once again.¹¹²

These examples demonstrate §2K2.1’s history of unstudied one-way ratchets. They also show that §2K2.1 does not need further increases. While both options of Part A of the Commission’s proposed amendment represent a problematic continuation of this trend, Option 2 is far worse because it implements more expansive and punitive reforms than required by the BSCA directive, raising many of the BOLs that have already been dramatically increased in previous years with little or no empirical support. Rather than implementing sweeping changes to §2K2.1 less than one year after the directive, the Commission should embrace its characteristic institutional role and unique expertise by treading cautiously until an exhaustive study can be completed.

B. Proportionality

Calls for “proportionality” between straw purchasers and prohibited persons do not justify increasing the base offense levels across §2K2.1 as Option 2 proposes. We have a simple response to the Commission’s question of “whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns”¹¹³: *you don’t fix something that’s broken by breaking it more*. Option 2 would compound the many problems of an already flawed guideline by implementing changes that sweep beyond the BSCA directive. Calls to anchor the prohibited person calculations to a straw purchasing enhancement motivated, not by careful study and the purposes of sentencing, but by Congress, ring hollow when the anchor itself is irrational and arbitrarily inflated.

Linking sentencing guideline ranges to statutory maximum punishments is not reasoned sentencing policy. The Commission was created to independently assess the need for the sentencing ranges it establishes to meet the purposes of sentencing and avoid unwarranted disparities and

¹¹¹ Welch 2011 Testimony, *supra* note 65 at 2.

¹¹² USSG §2K2.1(a)(6)(C) (Nov. 1, 2011). *Compare id.* with §2K2.1(a)(6) (Nov. 1, 2006).

¹¹³ 2023 Proposed Amendments at 7196.

unwarranted similarities.¹¹⁴ It was not created to mirror acts of Congress. Indeed, over 30 years ago the Supreme Court upheld the constitutionality of the Sentencing Commission in the face of a separation-of-powers challenge on the principle that judicial representation on the Commission would “ensure[] that judicial experience and expertise [would] inform the promulgation of rules for the exercise of the Judicial Branch’s own business—that of passing sentence on every criminal defendant.”¹¹⁵ But an upward ratchet linked to statutory amendment does not reflect judicial experience and expertise—oftentimes, it reflects just the opposite. Thus, “[i]nstead of reflexively keying sentences to arbitrary statutory norms, the Commission should use its data and other expert research at its disposal to create guidelines that further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).”¹¹⁶

As Defenders underscored in 1991, the statutory maximum sets the most severe punishment “for the most aggravated form of the offense.”¹¹⁷ An increased maximum reflects a Congressional decision to treat the most aggravated form of the offense more severely, “but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely.”¹¹⁸ This holds true today. And the Commission need not divine what Congress may have been signaling by raising the statutory maximums for straw purchasing and prohibited persons offenses to 15 years. In its directive to the Commission, Congress explicitly stated that it intended for straw purchasers and gun traffickers to be subject to higher penalties. If it wanted the same for prohibited persons, it would have said so.

Furthermore, pre-BSCA sentencing data show that judges do not see the need for higher penalties in most of these cases. The Commission’s firearms report shows that, for cases sentenced under §2K2.1 in fiscal year 2021, sentencing judges gave within-range sentences in 50% of cases, and varied downward in 36% of cases, compared to fiscal year 2007, when 71% of such cases were sentenced within-range, and only 11% received downward

¹¹⁴ 28 U.S.C. § 991.

¹¹⁵ *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

¹¹⁶ Sands 2009 Testimony, *supra* note 75 at 2.

¹¹⁷ Portman 1991 Statement, *supra* note 65 at 4.

¹¹⁸ *Id.*

variances.¹¹⁹ Given the information currently available to it, the Commission should conclude that §2K2.1's current BOLs are more than adequate. For these reasons, if the Commission amends §2K2.1 in response to the BSCA now, it should implement Option 1, and should do so in the narrowest possible way to mitigate the harm of such an increase to communities of color. It should implement a 1-level enhancement in the proposed subsections (b)(5)(A) and (B), and a 5-level enhancement in the proposed subsection (b)(5)(C). These increases are less drastic than their alternative counterparts.

When the Commission increased guideline ranges for homicide and assault in 2004, Judge Sessions noted: “[T]he Commission looks to individual enhancements that might require an increase.”¹²⁰ But “nobody seems to consider the big picture, or the cumulative effect of all the little decisions that the Commission makes.”¹²¹ “[A]s a result, the penalties seem to continually grow based on apparently legitimate reasons. If one looks to the overall system, which is not known to be particularly lenient, it is continuously becoming more severe.”¹²² Recognizing that penalties get ratcheted up through the continual interaction of new legislation and the Commission’s concern with proportionality, Judge Sessions emphasized the Commission’s duty to “make independent judgments, and that it reflect upon its ultimate goal.”¹²³ The Commission has made numerous “little [and big] decisions” about the firearms guidelines over the years that have had an immense “big picture” impact on sentencing ranges. As we asked over ten years ago, we request that the Commission “resist [further] actions that seem mathematically rationale in their incremental application but have the overall impact of increasing (yet again) the overall sentencing range.”¹²⁴

¹¹⁹ *What do Federal Firearms Offenses Really Look Like?*, *supra* note 33 at 16 fig. 8.

¹²⁰ Sands 2009 Testimony, *supra* note 75 at 2 (quoting USSC, *Minutes of the March 19, 2004 Public Meeting*, at 5).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

V. Conclusion

The history, experiences, and data I have compiled here today counsel against any further increase to §2K2.1 during this amendment cycle, especially the across-the-board increases in Option 2. The Commission should not abandon its characteristic institutional role and expertise, and should collect, study, and publish data and other information about the sufficiency of current penalties for firearms offenses.

As Defenders have previously warned: “[e]xperience teaches us [that] high profile tragedies may lead to hastily made but long-lasting policy decisions that can have detrimental effects.”¹²⁵ Today is no different. This amendment cycle could be a turning point and opportunity for change. Or it could be a repeat of past injustices that have led many to lament that the war on guns is the new war on drugs. The stakes could not be higher, and I urge the Commission to proceed deliberatively and with caution.

¹²⁵ Welch 2011 Testimony, *supra* note 65 at 1 (noting that 18 U.S.C. § 924(c) was enacted after the shooting death of Martin Luther King, Jr. and amended after the assassination of Robert F. Kennedy, and the punitive crack penalties set forth in the Anti-Drug Abuse Act of 1986 followed the overdose death of famous basketball player, Len Bias).