

**Federal Public and Community Defenders
Comment on Firearms Offenses (Proposal 3)**

March 14, 2023

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This comment explains Defenders' position on firearms issues not addressed in prior written testimony (attached), responds to specific questions raised by the Commission at the hearing on March 7, 2023, and addresses proposals advanced by the Department of Justice (DOJ) and other stakeholders in their submissions and testimony.

As explained in our written testimony, at the hearing, and in this comment, Defenders take the following positions on each Part of the proposed Firearms Offenses amendment¹:

- **Part A**: Defenders oppose changes proposed in Options 1 & 2 and urge the Commission to study firearms offenses carefully before increasing penalties in USSG §2K2.1. If the Commission nonetheless proceeds, Defenders favor the narrower changes proposed in Option 1. Defenders encourage the Commission to account for mitigating factors by following the language Congress provided in the BSCA directive. And, in light of racial disparities and inaccuracies in gang databases, we urge the Commission to implement the crime-affiliation enhancement cautiously.
- **Part B**: Defenders encourage the Commission to add a mens rea requirement to §2K2.1(b)(4) and oppose adding privately made firearms (PMFs) to the enhancement. In addition, the Commission should reject DOJ's request for a rebuttable presumption of mens rea in §2K2.1(b)(4).
- **Part C**: Defenders oppose any unstudied expansions to §2K2.1 and urge the Commission to carefully review each of the five issues it identifies in this part before increasing the punitiveness of the gun guideline.

¹ The proposed Firearms Offenses amendment is a three-part proposal. Part A proffers two potential responses to the Bipartisan Safer Communities Act ("BSCA"): Option 1 would add references to new sections 932 and 933 of Title 18 and revise the firearms trafficking enhancement at §2K2.1(b)(5); Option 2 would restructure base offense level provisions across §2K2.1 for a wide range of firearms offenses. Part B seeks comment on whether a mens rea standard should be added to the strict-liability §2K2.1(b)(4) enhancement and whether privately manufactured firearms ("ghost guns") should be added to the list of characteristics that trigger the enhancement. Finally, Part C provides five additional issues for Comment. *See* 2023 Proposed Amendments, 88 Fed. Reg. 7180, 7190–98, 2023 WL 1438480 (Feb. 2, 2023) ("2023 Proposed Amendments").

I. PART A: Implementing the Bipartisan Safer Communities Act (“BSCA”)

A. Answers to the Commission’s questions at the recent hearing establish that it should not promulgate a reactive, across-the-board increase to the severity of the firearm guidelines.

At the March 2023 hearing on Firearms Offenses, the Commissioners identified several areas of particular interest. This section briefly addresses those questions.

1. What should the Commission study before implementing the Congressional directive?

At the hearing, there was significant discussion of the need for additional study and data relating to firearms offenses. Defenders appreciate the Commission’s interest in what potential research could inform its implementation of the BSCA directive² and strongly recommend it undertake a careful review. That review should examine at least the following issues:

- the Commission should collect data about how the new BSCA statutes, §§ 932 and 933, are utilized. Many districts have yet to see new prosecutions under these statutes, and there is no public sentencing data yet available;
- the Commission should review relevant Commission and other data and research to understand the significant race, gender, and ethnic disparities in arrest, prosecution, and sentencing of federal firearm offenses. A special coding project could help better differentiate disparities that arise prior to and during sentencing;
- the Commission should undertake special study of straw purchasers without significant criminal histories, in order to identify the most common mitigating factors in such cases; and

² The Bipartisan Safer Communities Act, Pub. L. 117-159 § 12004(1)(a)(5) (2022).

- the Commission should assess how it can mitigate the well-documented problems with inaccuracies and racial profiling in gang identification tools, like databases.

Defenders understand that the Commission is obligated to respond to the directive in BSCA. But that directive does not include a timeline, affording the Commission the opportunity to tread cautiously. The Commission could use the information it obtains from its review to tailor changes to §2K2.1 to recommend sentences sufficient, but not greater than necessary to serve the statutory purposes of sentencing. Taking care to do this could avoid further entrenching the pernicious racial disparities already embedded in the firearms guideline. If such tailoring is not possible, and implementation of the directive would be inconsistent with the Commission’s obligation to “carry out an effective, humane, and rational sentencing policy,”³ the Commission could advise Congress about the need for changes to the statute.⁴

2. What does prior Commission research tell us about people who are sentenced under §2K2.1?

The Commission’s past research does not provide insight into the issues listed above. Nor does it tell us about the impact of sentence length on recidivism. To date, the Commission’s firearms recidivism research has been inconclusive as to the impact of sentence length on recidivism. The Commission’s 2021 firearms recidivism report found that “the data did not show a clear relationship between sentence length and recidivism.”⁵

³ 28 U.S.C. § 995(a)(20).

⁴ *See id.*

⁵ USSC, *Recidivism of Federal Firearms Offenders Released in 2010* 30 (2021), <https://bit.ly/3ZZpGiQ>. Note that “firearms offenses” includes a broader class of offenses beyond §2K2.1. While Defenders have hesitations about the methodology used in many Commission recidivism reports, *see* Tina Woehr & Allison Bruning, *Limitations of the Commission’s ‘Length of Incarceration and Recidivism’ Report* 35 Fed. Sent’g Reporter 43–46 (Oct. 2022), <https://bit.ly/3ZEB02y>, the 2021 Firearms Recidivism report found that specifically for §2K2.1 cases, the group with the *shortest* imprisonment lengths (<24 months) actually had a *lower* rearrest rate than groups with sentences between 24 to 59 months, 60 to 119 months, and 120 months or more. *Id.* at 42. This held true for both the prohibited class and prohibited weapon groups.

Similarly, in 2019, the Commission concluded that the association between sentence length and rate of recidivism among both firearms and non-firearms offenders was not clear.⁶

During the hearing, several Commissioners asked whether longer sentences would at least protect the community by taking dangerous people off the street. The answer is no. Low-level gun possessors, traffickers and straw purchasers are fungible.⁷ And incapacitation has been shown to have negative public-safety consequences and criminogenic effects. Scholar and former USSC Commissioner Rachel Barkow has explained that “any incapacitation benefit that we get while someone is incarcerated has to be weighed against the likelihood that the person might be a greater danger to society when he or she comes back out because the longer that person spends in prison, the more likely it is that his or her reentry will be a bumpy one.”⁸ As Congress acknowledged when it passed the First Step Act, “the vast majority of federal prisoners will one day be released from BOP custody,” and

⁶ USSC, *Recidivism Among Federal Firearms Offenders* 21 (2019), <https://bit.ly/426q5Sr>. For firearms offenses, this report found that the rearrest rate was actually lower (64%) for people sentenced to the shortest terms of imprisonment (<24 months) compared to a rearrest rate of 74% for those who were sentenced to before 24–59 months and a rearrest rate of 72% for those sentenced to between 60–119 months. For those receiving a sentence of ≥120 months, the rearrest rate did drop to 56%, but the report noted that “[l]onger sentences result in older ages at release, which may be one factor contributing to the lower recidivism rate for this group.” *Id.* at 21. And as was true in 2021, the Commission found that specifically for §2K2.1 cases, for both the prohibited-class and prohibited-weapons groups, the rearrest rates appear to be the lowest for those receiving the lowest sentences (up to 24 months), and rise with sentence length, with the highest rearrest rates appearing in the group receiving the highest sentences (120 months or more). *Id.* at 32.

⁷ See Brady United Against Gun Violence, *Comments on Consideration of Possible Amendments to § 2K2.1* 3 (Oct. 17, 2022) (“Those individuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not.”) (“Brady Comment”); see also Carrie Johnson, *Lawmakers Rip Gun-Tracking Effort In Mexico*, NPR (June 24, 2011), <https://n.pr/3LfVPYu> (quoting former prosecutor’s assessment that “when you’re talking about straw buyers, or straw purchasers, you’re talking about people who are very fungible You can arrest and charge and convict a hundred straw buyers and you’re not going to have an impact on the organization, you’re not going to help public safety.”).

⁸ Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* 46 (2019).

it is in “the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]”⁹ Avoiding unnecessary incarceration is a critical part of meeting this goal.

3. Does BSCA require the Commission to raise penalties across §2K2.1?

No. DOJ has advanced two arguments in favor of a global increase in penalties across §2K2.1. Neither is persuasive.

Proportionality. DOJ argues that principles of proportionality require across-the-board increases in §2K2.1. Not so.¹⁰

First, DOJ argues that, without a global increase, prohibited gun possessors will get lower sentences than straw purchasers.¹¹ This outcome is unlikely. The vast majority of prohibited-person offenses are predicated on a prior felony conviction, with over half of individuals sentenced under §2K2.1 having a criminal history category IV, V, or VI.¹² This reality, in addition to the multiple ways that the gun guideline counts criminal history, makes it unlikely that gun-possessors would be punished less harshly than straw purchasers under Option 1.

DOJ also urges the Commission to treat straw purchasers and prohibited persons alike, as it did before BSCA’s enactment. But BSCA specifically rejects such an approach. Gun-safety advocates who were involved with Congress’s enactment of BSCA have testified that Congress

⁹ H.R. Rep. No. 115-699, at 22 (2018).

¹⁰ See Statement of Michael Carter on Proposed Firearms Amendments 24–26, <https://bit.ly/42kouIO> (“Statement of Michael Carter-Firearms”).

¹¹ See Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sentencing Comm’n 3 (Feb. 27, 2023) (“DOJ Written Testimony for March 2023 Hearings”) (“[U]nder Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun.”).

¹² USSC, *What Do Federal Firearms Offenses Really Look Like?* 19 (2022), <https://tinyurl.com/6jsusejv> (“2022 Firearms Report”). During fiscal year 2021, most people sentenced under §2K2.1 who were prohibited from possessing a firearm were prohibited because of a prior felony conviction (79.0%). *Id.* at 24.

“deliberately sought to shift federal enforcement further upstream in the illegal trafficking pipeline.”¹³

For this reason, the Commission should reject DOJ’s suggestion that §2K2.1(b)(5), as revised in Option 1, be further amended to apply to any prohibited person who receives weapons through a straw-purchasing or trafficking arrangement.¹⁴ As courts have recognized and we discuss below, the nature of prohibited-possession offenses requires, in general, that the accused has participated in the illicit-firearms market.¹⁵ DOJ’s proposed amendment would contravene Congressional intent by causing §2K2.1(b)(5) to potentially apply in nearly all prohibited-person offenses.

Similarly, DOJ’s argument that the Commission should increase existing base offense levels (BOLs) for 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A)—the statutory provisions used to prosecute straw purchasers before BSCA—is not persuasive. Those statutes have historically been used to prosecute low-level individuals, not the upstream firearms traffickers Congress targeted in BSCA.¹⁶ Indeed, Congress specifically created new sections 932 and 933 to target those traffickers because it was dissatisfied with the limitations of the straw-purchasing offenses on the books.¹⁷ BSCA does not require an increase in the BOLs applicable to §§ 922(a)(6) and 924(a)(1)(A).

¹³ Statement of Rob Wilcox, Legal Director, Everytown for Gun Safety, on behalf of the Zimroth Center/NYU Law Working Group before the U.S. Sentencing Comm’n for March 2023 Firearms Offenses Hearing 1 (Mar. 7, 2023), <https://bityl.co/HazK> (“Zimroth Statement”).

¹⁴ See DOJ Written Testimony for March 2023 Hearings, *supra* note 11, at 3–4.

¹⁵ See *infra* at Part II(A)(3).

¹⁶ See Hearing at 2:38:08–2:29:27 (Testimony of Rob Wilcox, Legal Director, Everytown for Gun Safety) (testifying that the elements of these statutes necessarily focus on individual acts, rather than organizations and upstream distributors); see also Comment from The Peter L. Zimroth Ctr. on the Admin. of Crim. L., *Re: Proposed Priorities for the 2022-23 Amendment Cycle* 14-15 (Oct. 17, 2022) (“Zimroth Comment”), <https://tinyurl.com/yw95dthx>; Federal Defenders, *Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2014* 41-42 (Jul. 15, 2013).

¹⁷ See Hearing at 2:28:08–2:29:27 (Testimony of Rob Wilcox).

Directive. In its submission, DOJ leans heavily on the “sufficient to deter” language in the BSCA directive to argue in favor of global increases to §2K2.1’s BOLs, including a 4-level increase to straw-purchasing penalties.

But this approach would read the “sufficient to deter” language out of context. Indeed, Senators Booker and Murphy wrote to the Commission in December to explicitly caution against interpreting the “sufficient to deter” language “more broadly than intended.” They explained:

We are aware that the Department of Justice has relied on the ‘sufficient to deter’ language to recommend that the Commission adopt a four-level increased base offense level for a variety of offenses. We urge the Commission to reject that approach here. Such a recommendation would be contrary to the intent of the BSCA which *seeks to hold accountable those most culpable in the firearm trafficking chain*, and it would ignore the Commission’s role and process—to review data and devise evidence-based sentencing policies that ‘reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.’¹⁸

Nevertheless, in its February 27, 2023, submission and in its testimony to the Commission, DOJ doubles down on its October recommendation, again relying heavily on an out-of-context reading of the “sufficient to deter” language to urge a four-level BOL increase for straw purchasing.¹⁹ Such an increase, they explain, would take non-custodial sentences off the table and ensure imprisonment for all straw purchasers.

But the “sufficient to deter” language does not appear in isolation. It is included in the first clause of a sentence that also instructs the Commission to consider

¹⁸ Letter from Sens. Cory Booker & Christopher Murphy to Hon. Carlton W. Reeves, Chair, United States Sentencing Comm’n 1 (Dec. 5, 2022), <https://tinyurl.com/n9s52veb> (“Booker & Murphy Letter”) (citations omitted) (emphasis added).

¹⁹ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 5.

an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities *and* reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.²⁰

Congress has thus directed the Commission to balance deterrence and mitigation in amending the firearms guideline. According to Congress’s directive, the Commission’s amendments should reflect both the need for deterrence and the general reality that many straw purchasers have significantly mitigating backgrounds. DOJ’s myopic focus on the “sufficient to deter” clause would disrupt the careful balance Congress wants reflected in the BOL for straw purchasing itself, preventing the guidelines from distinguishing between the most culpable straw purchasers and the lowest-level individuals with the most fungible roles.

B. The Commission should expand the reduction for mitigating factors.

Defenders urge the Commission to refrain from amending §2K2.1 until it has completed a careful review and study. Other commentators and two lead architects of BSCA agree.²¹ However, if the Commission chooses to move forward, it should broaden its proposed mitigating-factors amendment to better track the plain language of the BSCA directive.

As a general principle, and to counter the “one-way upward ratchet” of the guidelines, the Commission should prioritize giving courts the tools to decrease sentences when doing so is just.²² Congress recognized the need to consider mitigating factors carefully in many straw purchasing cases, and included in the BSCA a directive to “reflect the intent of Congress that straw

²⁰ BSCA § 12004(1)(a)(5) (emphasis added).

²¹ See Booker & Murphy Letter, *supra* note 18 at 1; Testimony of Marlo P. Cadeddu, Fifth Circuit Representative, Practitioners’ Advisory Group 3 (Mar. 7, 2023), <https://bit.ly.co/Hazr> (“PAG Testimony”).

²² Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319 (2005).

purchasers without significant criminal histories receive sentences that . . . reflect the defendant’s role and culpability, and *any* coercion, domestic violence survivor history, or *other mitigating factors*.”²³

In their December letter, Senators Booker and Murphy urged the Commission to “interpret[] the instruction to consider ‘other mitigating factors’ broadly.”²⁴ They warned that failure to do so could result in excessive sentences and “disproportionately impact low-income people and people of color.”²⁵ A coalition of gun-safety researchers, policymakers, lawyers, and advocates have also urged the Commission to apply this aspect of the directive broadly, in order to address “past racial disparities in sentences and to ensure that these disparities do not persist going forward.”²⁶

Notwithstanding these powerful statements in support of a robust mitigating-role reduction, the Commission proposes to implement this directive narrowly, by adding a new subsection to §2K2.1 that would authorize a small one- to two-level reduction under limited circumstances. This crabbed approach would undermine Congressional intent and fail to implement the plain language of the directive.

Most problematically, the proposal omits the directive’s catch-all instruction to consider “any . . . other mitigating factors” and introduces limitations that do not align with the broad categories identified in the BSCA. These harms are compounded by the Commission’s proposal to make

²³ BSCA § 12004(a)(1) (emphases added).

²⁴ Booker & Murphy Letter, *supra* note 18 at 2; *see also* Letter from Sen. Christopher Murphy to Hon. Merrick Garland, Att’y Gen., Regarding DOJ’s Implementation of BSCA 3 (Sept. 12, 2022), <https://bit.ly/3SSmnaD> (“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. The drafters of the BSCA included an explicit directive to the United States Sentencing Commission to consider mitigating factors when developing sentencing guidelines to ensure that there are less severe criminal consequences for individuals who have been coerced to participate in a gun trafficking scheme, are themselves victims of domestic abuse, or have a limited role or culpability.”).

²⁵ Booker & Murphy Letter, *supra* note 18 at 2.

²⁶ Zimroth Statement, *supra* note 13 at 10.

the criteria conjunctive, to delete the lone departure provision in §2K2.1, and to limit the scope of the reduction to no more than two levels.

This approach is wrong-headed. The Commission should not omit the catch-all language from the BSCA. Nor should it hem in the mitigating-factors directive with limitations found nowhere in the statutory text. Further, the Commission should not compound the harms of its upward-ratchet response to the BSCA by deleting §2K2.1's sole departure provision.²⁷ Instead, it should expand that departure to ensure that it reflects Congressional intent to "broadly" incorporate consideration of mitigating factors at straw-purchaser sentencings.²⁸

1. The proposed reduction should be increased.

The BSCA does not quantify the extent of reduction that a person presenting mitigating circumstances should receive, yet both proposals to amend §2K2.1 would create a specific offense characteristic for just a 1- or 2-level reduction. This proposal is much smaller than the substantial increases the Commission proposes to address aggravating factors (between two and four levels for people with certain criminal affiliations).

Defenders agree that a new specific offense characteristic is the appropriate mechanism to fulfill this directive but urge the Commission to adopt a greater reduction.²⁹ A 1- to 2- level reduction would be inadequate to perform the crucial function of "avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories" as Congress intended.³⁰ And, as gun-safety advocates have explained, "the Commission should make mitigation broadly available, both to address past racial disparities in sentences and to ensure that these disparities do not persist going forward."³¹

²⁷ See USSG, *List of Departure Provisions* (indicating that §2K2.1 cmt. n.15 is the sole downward departure in §2K2.1).

²⁸ Booker & Murphy Letter, *supra* note 18 at 2.

²⁹ Cf. PAG Testimony, *supra* note 21 at 4.

³⁰ Booker & Murphy Letter, *supra* note 18 at 2.

³¹ Zimroth Statement, *supra* note 13 at 10.

2. Any mitigating-factors reduction should adopt BSCA’s plain-language requirement to consider “any . . . other mitigating factors.”

Consistent with Senators Booker and Murphy’s explanation that Congress intended to equip courts with significant discretion to craft sentences that reflect a range of mitigating factors, BSCA requires the consideration of “any . . . other mitigating factors.”³² Yet the Commission’s proposed reduction fails to reflect this language entirely. The Commission should remedy this omission by adding this language to its proposed reduction.

Additionally, we encourage the Commission to retain, but amend, Application Note 15, §2K2.1’s sole departure provision.³³ Application Note 15 should be retained because it includes two offenses that do not completely overlap with those designated by the Commission as “straw purchasing” offenses—§§ 922(a)(6) and 924(a)(1)(A). These criminal provisions can encompass people who deserve consideration for a downward departure. Take, for example, a person who is threatened, and purchases a firearm for protection, but lists an outdated address on the ATF Form 4473. They could qualify for the departure in Application Note 15 as currently written. But because this individual did not commit a straw purchase or trafficking offense, they would not be eligible for the proposed reductions provided in Option 1 at subsection (b)(9) and in Option 2 at (b)(10).

Application Note 15 is also an additional vehicle for ensuring that §2K2.1 fully reflects Congressional intent to provide appropriate sentences for people who present compelling mitigation, which could complement Defenders’ preferred approach of a mitigating-factors reduction. To accomplish this, the Commission should amend Application Note 15 to direct courts to consider a downward departure to a non-custodial sentence in cases where warranted by “other . . . mitigating factors.” This would keep with Congressional intent to equip courts with significant discretion to respond to mitigating factors in this context.

³² BSCA § 12004(a)(1).

³³ See USSG, *List of Departure Provisions*.

3. The proposed limiting criteria should be broadened.

The language of BSCA instructs the Commission to consider a broad range of mitigating circumstances. Instead of tracking this language, however, the Commission proposes general motive-, compensation-, and culpability-based limitations on the availability of this reduction, which appear nowhere in BSCA's text. It also proposes to proscribe the reduction's applicability by making the criteria conjunctive. The Commission has asked if these limiting criteria should be changed or framed differently and if the criteria should be disjunctive. The answer to both questions is yes.

a. The Commission should adopt the language of the directive instead of unduly restricting the availability of the mitigating-factors reduction.

The Commission proposes three limiting criteria for the proposed reduction, each substantially narrower than the language in the directive to which they appear to correspond.

Motive. The BSCA directive instructs the Commission to account for straw purchasers who have endured “*any . . . coercion*” or experienced “*any domestic violence survivor history. . .*”³⁴ The Commission's proposal, however, limits the availability of its reduction to people “motivated by an intimate or familial relationship or by threats or fear to commit the offense.” This proposal ignores “domestic violence survivor history” entirely. And it reduces coercion to “threats or fear,” when—particularly in the domestic-violence context—coercion extends more broadly to encompass other forms of structural control and manipulation. Instead of placing a restrictive gloss on BSCA's mitigating-factors directive, the Commission should revert to the statutory language.

Compensation. BSCA says nothing about limiting consideration of mitigating factors to people who receive “little or no compensation from the offense.” Nonetheless, the Commission proposes to include this restriction in the new reduction. This proposal ignores the complex pathways of domestic violence and the ways in which compensation can be part and parcel of a cycle of abuse, which commonly involves the abuser “alternat[ing] between

³⁴ BSCA § 12004(a)(1) (emphases added).

violent, abusive and apologetic behavior.”³⁵ Again, the Commission should simply track the BSCA’s statutory directive.

“*Role and Culpability.*” Congress directed the Commission to also consider the “defendant’s role and culpability.”³⁶ The Commission proposes implementing this directive by limiting the reduction to those who “had minimal knowledge of the scope and structure of the enterprise” or minimal knowledge “that the firearm would be used or possessed in connection with further criminal activity.” These restrictions do not adequately capture the factors a court must examine to conduct the holistic examination of a person’s “role and culpability” required by BSCA.

In addition, the proposal to limit eligibility to people with “minimal knowledge” that the firearm would be “used or possessed in connection with further criminal activity” could lead to absurd results. Many straw purchasing offenses (and some of the Commission’s proposals) require proof that the defendant engaged in straw purchasing while “knowing or having reasonable cause to believe” that the firearm would be possessed in connection with further criminal activity.³⁷ If the Commission limits the mitigating-factors reduction to exclude people with “minimal knowledge . . . that the firearm would be used or possessed in connection with further criminal activity,” then virtually every single person convicted of a straw-purchasing offense based on knowledge (likely the vast majority) would be excluded from the reduction—by virtue of the conviction itself. And even for those few people convicted based only on “reasonable cause to believe,” the “minimal knowledge” element would overwhelmingly exclude them from the reduction. There is scant logical—and even less practical—room to say that

³⁵ Zlatka Rakovec-Felser, *Domestic violence and abuse in intimate relationship from public health perspective*, 2 Health Psych. Rsch. 1821, 1821 (2014), <https://bit.ly/co/HTdH>.

³⁶ BSCA § 12004(a)(1).

³⁷ See, e.g., 18 U.S.C. § 932(b) (to be guilty of straw purchasing, a person must know or have reasonable cause to believe that firearm would be possessed by a prohibited person, used in connection with a wide range of different potential offenses, or transferred to a prohibited person or someone intending to engage in criminal conduct); see also 18 U.S.C. §§ 933(a) (trafficking in firearms can be established through proof of reasonable cause to believe), 922(d)(10) (can be proved through reasonable cause to believe), 924(h) (same). Option 1’s proposed §2K2.1(b)(5)(B)(i)(II) and (C)(i)(III) present this same issue.

someone can have “reasonable cause to believe” a firearm will be used in connection with criminal activity but lack “minimal knowledge” of that same fact.

More fundamentally, this proposal will lead to arbitrary and unjustifiable policy outcomes. A battered domestic partner who purchases a firearm for their abuser out of fear is at the core of whom Congress intended to receive the new reduction—yet the minimal-knowledge proposal would exclude that person if they knew the firearm would be used in connection with further criminal activity. The minimal knowledge proposal is simply not the right demarcation point to capture and reflect Congress’s intent.

Instead of inventing hyper-technical gradations between mental states and otherwise diluting consideration of mitigating factors, the Commission should simply track BSCA’s statutory text in implementing the reduction; it should not introduce new limitations.

b. A conjunctive approach would contravene Congressional intent.

The Commission seeks comment on whether the limiting factors it has proposed should be promulgated conjunctively (such that a person needs to satisfy each of them to be eligible for the mitigating-factors reduction) or disjunctively (such that as long as a person satisfies at least one factor, they would be eligible for the reduction). The factors should be promulgated disjunctively. Requiring a straw purchaser to meet each limiting criteria would be inconsistent with the language of BSCA. We agree with gun-safety advocates that “[n]othing in this directive suggests that a straw purchaser must meet all these factors before they can qualify for a reduction. In fact, bundling these exceptions together undermines Congress’s clear directive.”³⁸

DOJ urges a conjunctive approach, arguing that the alternative would lead to absurd results because a “defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in an organization, so long as he received only minimal financial

³⁸ Zimroth Statement, *supra* note 13 at 9.

compensation.”³⁹ But this hypothetical does not illustrate the folly of a disjunctive approach. Instead, it shows why relying on specific criteria—like monetary compensation alone—to approximate “role and culpability” is a flawed approach. By equipping courts with the discretion to conduct the holistic, fact-based review that Congress mandated, DOJ’s “absurd result” would be avoided.

C. The criminal-affiliation enhancement should be narrow.

In BSCA, Congress instructed the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18 . . . 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.”⁴⁰

Because of pernicious and well-known problems associated with gang designations, the Commission should carefully study social-science research, empirical evidence, and sentencing data before adding a criminal-affiliation enhancement to §2K2.1. And, when it moves forward, the Commission should interpret Congress’s directive as narrowly as possible. It should require the government to prove any such affiliation by clear and convincing evidence and also limit the potential increase to one level.

1. Gang affiliation is often based on inaccurate information and is not a reliable proxy for culpability.

The problems with law enforcement methods for documenting criminal affiliation have been widely recognized, and counsel in favor of great caution in implementing the BSCA criminal-affiliation directive.

First, these methods are unreliable. Law enforcement uses broad criteria for identifying a person as a gang member.⁴¹ Often, these criteria amount to little more than mere “suspicion or association,” as opposed to firm

³⁹ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6.

⁴⁰ BSCA § 12004(a)(1).

⁴¹ See Youth Just. Coal., *Tracked and Trapped: Youth of Color, Gang Databases, and Gang Injunctions* 5–6, 8 (2012), <https://bit.ly/Hb0z>.

evidence of active gang membership.⁴² These criteria are poor indicators of current gang involvement.⁴³ The essentially unbridled discretion law enforcement has to identify individuals as gang members has caused gang databases and other designation lists to be riddled with mistakes.⁴⁴ In addition, some gang databases are poorly maintained or monitored, meaning people are added based on irrelevant evidence⁴⁵ or remain in the database past the federally regulated time for data validation.⁴⁶

Gun-safety experts agree that records reflecting “gang membership and affiliation with a gang often rest on unreliable data,”⁴⁷ and “law enforcement’s identification of gang affiliation is often significantly overinclusive.”⁴⁸ There is “no universal definition of who gets counted as a

⁴² Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, Pac. Standard (Mar. 15, 2018), <https://bityl.co/Hb10>.

⁴³ James A. Densley & David C. Pyrooz, *The Matrix in Context: Taking Stock of Police Gang Databases in London and Beyond*, 20 Youth Just. 11, 17 (2020) (“[T]he fact that ‘police and partner agencies’ are listed as examples of intelligence sources for the Matrix, however, gives rise to suspicion that it is built on subjective opinion and circular logic alone—not exactly the types of procedures that inspire confidence in its validity.”).

⁴⁴ See, e.g., Felton, *supra* note 42 (giving an example where the same person was documented by separate police officers as a member of two rival gangs based solely on the geographic location where each officer happened to have stopped him); Maxine Bernstein, *Portland police to halt, purge all gang designations*, The Oregonian (Sept. 8, 2017), <https://bit.ly/3En8Grg> (noting that “gang designations” “serve[] as lifelong barriers for those who have,” in actuality, “shunned the gang lifestyle”).

⁴⁵ Cal. State Auditor, Rep. No. 2015-130, *The CalGang criminal intelligence system 2* (2016), <https://bityl.co/Hb1A> (“[A] person in CalGang [was included] for allegedly admitting during his booking into county jail that he was a gang member and for being ‘arrested for an offense consistent with gang activity.’ However, the supporting files revealed that this person stated during his booking interview that he was *not* a member of a gang and that he preferred to be housed in the general jail population. Further, his arrest was for resisting arrest, an offense that has no apparent connection to gang activity.”).

⁴⁶ Tex. State Auditor, Rep. No. 22-039, *An Audit Report on The Department of Public Safety’s Texas Gang Intelligence Database 5* (2022), <https://bityl.co/Hb1B>.

⁴⁷ Zimroth Comment, *supra* note 16 at 10.

⁴⁸ Brady Comment, *supra* note 7 at 4.

‘gang member’ versus someone who is ‘associated with’ but not in a gang,”⁴⁹ and gang-designation practices can vary wildly across districts.⁵⁰ As a result, most gang databases are deeply flawed.

Second, gang databases are riddled with egregious racial bias and disparities.⁵¹ The numbers are consistently shocking. In Boston, 90% of so-called documented gang members are Black or Latino.⁵² In Los Angeles, that number recently stood at 86%.⁵³ In Portland, Oregon, 81% of those in the gang database “were part of a racial or ethnic minority.”⁵⁴ Even when historically white gangs are reported, many of its members are people of color,⁵⁵ and typically white supremacist groups are not included in such databases.⁵⁶

⁴⁹ Zimroth Comment, *supra* note 16 at 10. (Noting that Immigrations and Customs Enforcement (“ICE”) designates a person as a gang member if they “meet at least two criteria from a list that includes ‘having gang tattoos,’ ‘frequenting an area notorious for gangs,’ and ‘wearing gang apparel.’”).

⁵⁰ *Id.*

⁵¹ Only 1.1% of NYPD’s gang database is white. Nick Pinto, *NYPD added nearly 2,500 new people to its gang database in the last year*, The Intercept (June 28, 2019), <https://bitly.co/Hb1O>. California’s gang database is nearly 20% Black people and 66% Latino. See Youth Just. Coal., *supra* note 41 at 8.

⁵² Philip Marcelo, *Gang database made up mostly of young black, Latino men*, AP News (Jul. 30, 2019), <https://bitly.co/Hb1K>.

⁵³ Youth Just. Coal., *supra* note 41 at 8.

⁵⁴ Bernstein, *supra* note 44.

⁵⁵ UIC Policing in Chi. Rsch. Grp., *Expansive and Focused Surveillance: New Findings on Chicago’s Gang Database 1* (June 2018), <https://bitly.co/Hb1b> (“Although between 11% and 27% of self-identified gang members are estimated to be White, and White gang members report levels of criminal offending equal to those of their non-White counterparts, a powerful racial stereotype associates gang membership with Latinx and especially Black boys and young men.”); Marie Pryor, *et al.*, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 Ann. Rev. L. & Soc. Sci. 343, 347 (2020).

⁵⁶ UIC Policing in Chi. Rsch. Grp., *supra* note 54 at 5 (“[O]nly 23 people [in Chicago’s gang database] are listed as members of white supremacist organizations.”); Pinto, *supra* note 51 (the Proud Boys were not included in the NYPD gang database); see Zimroth Comment, *supra* note 16 at 11.

Finally, gang participation alone is “not a reliable identifier of culpability.”⁵⁷ Brady United has explained that “[a]dolescents who grow up in areas with heavy gang activity often have little choice in whether they interact with gangs on a daily basis.”⁵⁸ “Despite popular myths that paint every gang member with the same violent brush and assert that there is no escaping a gang, membership is remarkably porous, and most social scientists describe varied levels of involvement with gangs, with a majority of gang members quitting soon after joining a gang and others aging out of gangs.”⁵⁹ In particular, researchers distinguish between “core members” and “fringe members.”⁶⁰ It is not mere participation that predicts criminality—it is the *degree* of the person’s participation that matters. The Commission should examine this research, hear from experts on gang involvement, and ideally report to Congress on its findings before promulgating this enhancement. If the Commission decides to move ahead with an enhancement now, at a minimum, it should very narrowly construe “affiliation” with a gang, so that it reaches only those individuals with deep ties to a gang—the sort of person who Congress would have been picturing when it enacted the BSCA.

2. The proposed criminal-affiliation enhancement improperly sweeps beyond the specifically enumerated statutes in the BSCA directive.

The BSCA directive specifies that the criminal-affiliation enhancement should apply in cases involving a “conviction under section 932 or 933 of title 18.”⁶¹ Despite this plain language, each option the Commission proposes would go significantly beyond the directive by deeming people with other convictions or specific offense characteristics eligible for the enhancement.⁶²

⁵⁷ Brady Comment, *supra* note 7 at 5.

⁵⁸ *Id.* (citation omitted).

⁵⁹ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 St. Thomas L. Rev. 620, 644 (2011) (citations omitted).

⁶⁰ *Id.* at 647.

⁶¹ BSCA § 12004(a)(1).

⁶² Option 1 would tie eligibility for criminal-affiliation enhancement to either (1) receiving an enhancement under §2K2.1(b)(5); or (2) being convicted under 18 U.S.C. §§ 922(d), 932, or 933; or (3) being convicted under 18 U.S.C. §§ 922(a)(6) or

When Congress intended other aspects of the BSCA’s directive to apply more broadly, it said so. For example, the first sentence, which instructs the Commission to increase certain penalties, refers to “persons convicted of an offense under section 932 or 933 of title 18 . . . *and other offenses applicable to the straw purchases and trafficking of firearms.*”⁶³ The next sentence, which governs the Commission’s consideration of mitigating factors, refers broadly to “straw purchasers.” But the final sentence, which includes the criminal-affiliation enhancement, refers *only* to sections 932 or 933. The different language used in each part of the directive shows that Congress did not intend for this enhancement to be applied as expansively as the Commission now proposes. Therefore, the Commission should revise Subpart A to refer to only sections 932 and 933.

3. The Commission should require the government to prove criminal affiliation by clear and convincing evidence and bar reliance on gang databases alone to prove criminal affiliation.

If the Commission proceeds with the criminal-affiliation enhancement, it should include guidance that: (1) requires the government to meet a clear-and-convincing standard to establish criminal affiliation at sentencing, and (2) instructs that presence on a gang database alone is not sufficient to establish criminal affiliation.

First, the Due Process Clause of the Fifth Amendment accords the right to be sentenced on the basis of accurate information.⁶⁴ A sentencing

924(a)(1)(A) and having committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to another person. Option 2 would tie eligibility to cases where proposed subsection (b)(9) does not apply and the person is convicted under 18 U.S.C. §§ 922(d), 924(h), 924(k), 932, or 933.

⁶³ BSCA § 12004(a)(1) (emphasis added).

⁶⁴ *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (person has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (person has a right under the Due Process Clause not to be sentenced based on “misinformation” or facts that are “materially untrue”) (citation omitted); *see also United States v. Juwa*, 508 F.3d 694, 700–701 (2d Cir. 2007) (recognizing “distinct limits” to a judge’s discretion at sentencing, including “a defendant’s due process right to be sentenced based on accurate information”); *United States v. Safirstein*, 827 F.2d 1380, 1385

court violates a person's right to due process when it makes "unfounded assumptions or groundless inferences" in imposing sentence.⁶⁵ Given the severe racial bias and inaccuracies that plague gang databases and law enforcement efforts to ascertain affiliation, the Commission should require a heightened standard of proof to ensure that individuals are sentenced using reliable and accurate information.

Second, the Commission should also recognize the widespread problems with allegations of criminal affiliation, particularly with respect to gang databases, by instructing courts that "information derived from gang databases do not have sufficient indicia of reliability to alone support imposition of the criminal-affiliation enhancement."

II. PART B: Mens Rea and Privately Manufactured Firearms

A. The Commission should add a mens rea requirement to §2K2.1(b)(4).

Section 2K1.1(b)(4) provides that if a firearm has an altered or obliterated serial number, a four-level increase applies; and if it is stolen, a two-level increase applies. Since 1993, the Guidelines have instructed judges that these are strict liability enhancements: they "appl[y] regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."⁶⁶

The Commission seeks comment on whether it should add a mens rea to the enhancements in §2K2.1(b)(4). Defenders strongly urge the Commission to make this change. There are four reasons why a scienter requirement should be added to §2K2.1(b)(4). First, adding mens rea to §2K2.1(b)(4) would conform this provision to the "fundamental legal tradition that blameworthiness hinges upon a culpable state of mind" and further the Commission's duty to establish policies that ensure fair and certain

(9th Cir. 1987) ("[T]he Fifth Amendment guarantee of due process protects the defendant from consideration of improper or inaccurate information" at sentencing.); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (It is procedural error for a court "to choose a sentence based on clearly erroneous facts[.]").

⁶⁵ See *Safirstein*, 827 F.2d at 1385.

⁶⁶ See USSG §2K2.1 cmt. n.8(B).

sentencing.⁶⁷ It would also assure punishment proportionate to the individual’s culpability.⁶⁸ Second, it would restrict the application of an enhancement that has resulted in significant racial disparities.⁶⁹ Third, the strict-liability enhancement serves no legitimate purpose of punishment. And fourth, the Commission has never articulated an empirical or policy rationale to support the current (b)(4) enhancement.

1. The Importance of Mens Rea.

Last year, the Supreme Court reiterated that, as a general matter, “wrongdoing must be conscious to be criminal.”⁷⁰ It is “universal and persistent in mature systems of criminal law” that a person must possess a culpable mens rea, or “scienter,” to be held criminally responsible for her acts.⁷¹ Mens rea requirements advance this principle by helping to “separate those who understand the wrongful nature of their act from those who do not.”⁷²

The Court has recently—since the Commission last had a quorum—clarified that the “longstanding presumption” of mens rea applies to firearms offenses, even where Congress has failed to specify any scienter requirement. In *Rehaif v. United States* (2019), the Court overturned every single Court of Appeals to conclude that the felon-in-possession statute, 18 U.S.C. § 922(g), requires the government to prove knowledge of each essential element (aside from jurisdiction).⁷³ In doing so, the Court explained that the presumption of mens rea applies in the vast majority of cases and should be excused only where statutory provisions are part of a “regulatory” or “public welfare”

⁶⁷ *United States v. Handy*, 570 F. Supp. 2d 437, 440 (E.D.N.Y. 2008), disapproved of on other grounds by *United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010).

⁶⁸ 18 U.S.C. § 3553(a)(2)(A).

⁶⁹ See *infra* at Part II(A)(2).

⁷⁰ *Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)).

⁷¹ *Id.* at 2376–77 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

⁷² *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72–73 n.3 (1994)).

⁷³ See *id.* at 2201 (Alito, J., dissenting) (noting that Court’s decision overturned “every single Court of Appeals”).

program, and “carry only minor penalties.”⁷⁴ This exception does not apply here. The four- and two-level enhancements included in § 2K2.1(b)(4) are not part of a regulatory or public welfare program.⁷⁵ Nor are they minor. To the contrary, they ratchet up the already high applicable penalties at stake in firearms prosecution.

DOJ has said that it “understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement,”⁷⁶ but it inexplicably asks the Commission to shift the burden of proof to the defense. That burden, DOJ proposes, should require the convicted individual to prove that “he or she did not know, *and had no reason to believe*, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number.”⁷⁷

The Commission should reject this request. The problem with strict liability enhancements is not that they don’t give defendants a theoretical possibility to rebut the enhancement’s application; the problem, as the Supreme Court has repeatedly emphasized, is that they relieve the government of its burden to establish culpability—of which scienter is a crucial element. DOJ’s proposal is inconsistent with the basic principle that the government bears the burden to support an enhanced punishment. Moreover, as Commissioner Gleeson highlighted in his questioning during the March 2023 hearing, placing the burden of proof on the defense could pressure individuals to waive their Fifth Amendment right to remain silent. And, if a person in this position were to testify, and their testimony were deemed incredible, it could trigger higher sentences through denial of acceptance-of-responsibility points and application of the obstruction enhancement.

For similar reasons, the Commission should also reject DOJ’s suggestion to dilute the *mens rea* requirement by marrying its proposed rebuttable presumption with a “reason to believe” standard. As DOJ argues later in its same submission, the “reason to believe” standard is unwieldy,

⁷⁴ *Id.* at 2197 (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)).

⁷⁵ *See id.* (explaining that criminal firearms statutes “are not part of a regulatory or public welfare program”).

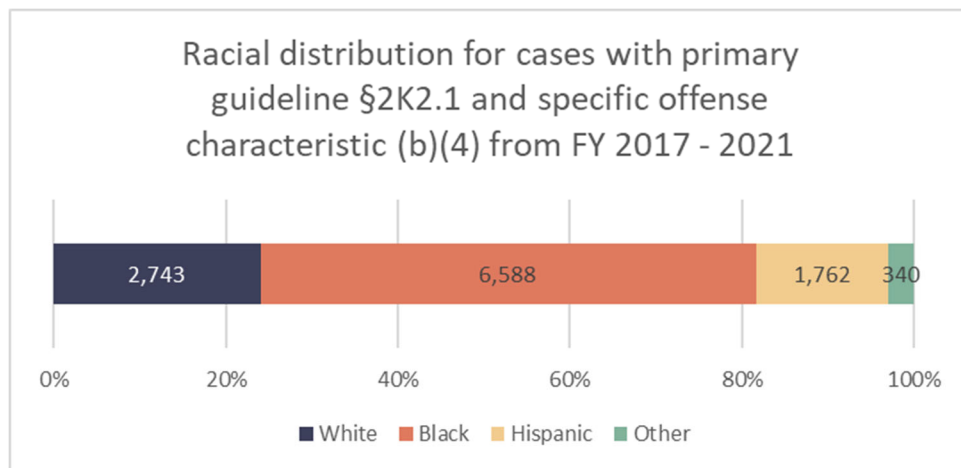
⁷⁶ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7 (emphasis added).

⁷⁷ *Id.*

and can result in inconsistent interpretations.⁷⁸ That standard would become even more unwieldy in the context of a rebuttable presumption. Together, the rebuttable presumption and reason-to-believe standard would become an exception to swallow the rule, erasing any potential benefit that might be gained by adding a scienter requirement to §2K2.1(b)(4).

2. The §2K2.1(b)(4) strict-liability enhancements disparately impact Black people.

In our written testimony, Defenders explained that Black people are disproportionately overrepresented in firearms prosecution and sentencing.⁷⁹ This is also true specifically with respect to the (b)(4) enhancement. And further, the data show that Black people who receive the (b)(4) enhancement are subjected to longer sentences than their white counterparts.



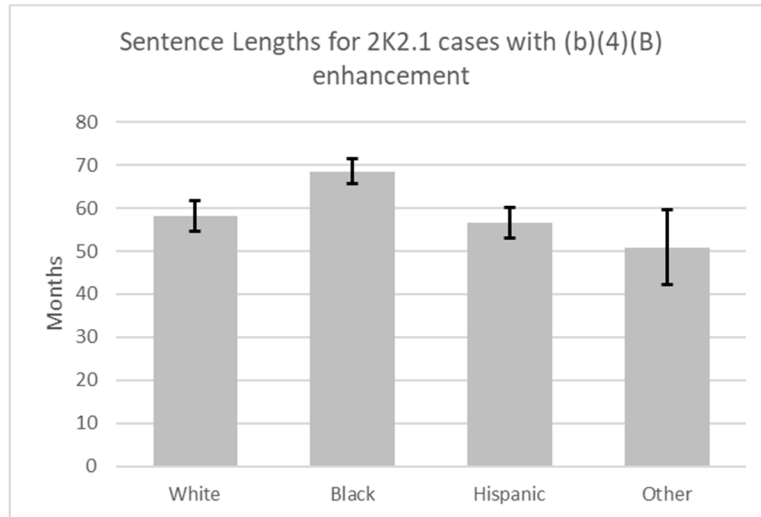
From fiscal years 2017 through 2021, the (b)(4) enhancement applied in roughly 32% of all §2K2.1 cases.⁸⁰ Over half of individuals who received a (b)(4) enhancement (58%) were Black, and roughly 50% of individuals who received a (b)(4)(B) enhancement for AOSNs were Black. The mean sentence length for Black individuals who received the (b)(4) enhancement was 69

⁷⁸ See DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 51.

⁷⁹ Statement of Michael Carter-Firearms, *supra* note 10 at 6–12.

⁸⁰ The data used for these analyses were extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2017 to 2021, which are available at <https://bitly.co/HBGG>.

months imprisonment, compared to 58 months imprisonment for white individuals who received the enhancement.⁸¹



Adding a mens rea requirement would be one step towards narrowing this enhancement's general application and reducing disparities.

3. The strict-liability standard for (b)(4) does not serve a legitimate purpose of sentencing.

As it stands, §2K2.1(b)(4) cannot serve any sentencing purpose.⁸² Starting first with stolen firearms: “Because this enhancement does not require the defendant to know or have reasonable cause to believe that the firearm he possessed was stolen, it does not provide deterrence since a person cannot be deterred from doing what he or she does not know is being done.”⁸³ And because this enhancement “lacks a requirement of scienter,” it cannot provide just punishment either.⁸⁴

This same logic applies to firearms with an obliterated or altered serial number. The government asserts that the “fact that a gun has a missing,

⁸¹ *Id.*

⁸² The government concedes that it “may not be . . . readily apparent that a gun is stolen.” DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

⁸³ *Handy*, 570 F. Supp. 2d at 480.

⁸⁴ *Id.*

altered, or obliterated serial number is generally readily apparent.”⁸⁵ Not so. In fact, it is often difficult to tell that a serial number has been removed or obliterated.⁸⁶

Not only does the §2K2.1(b)(4) strict-liability enhancement serve no purpose of punishment, it often constitutes double punishment for the same conduct—that is, the illegal possession of a gun. In *United States v. Faison*, Judge Hazel explained that for individuals convicted of being a felon in possession of a firearm, “there is no legal avenue by which that person could have purchased a firearm,” and therefore “every felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun. That is true whether the gun reached him through a straw purchase, an illegal transfer from a lawful owner, or by the acquisition of a stolen gun.”⁸⁷

Punishment roulette serves no purpose of sentencing. Adding a mens rea requirement would go far to meaningfully distinguish the culpability of prohibited persons who possess firearms.

4. The Commission has never provided a policy reason or rationale to justify the lack of scienter in §2K2.1(b)(4).

The Commission has never provided a well-grounded, empirical reason for dispensing with the presumption of mens rea for §2K2.1(b)(4),⁸⁸ and the history of this enhancement shows that it has lacked an empirical basis from

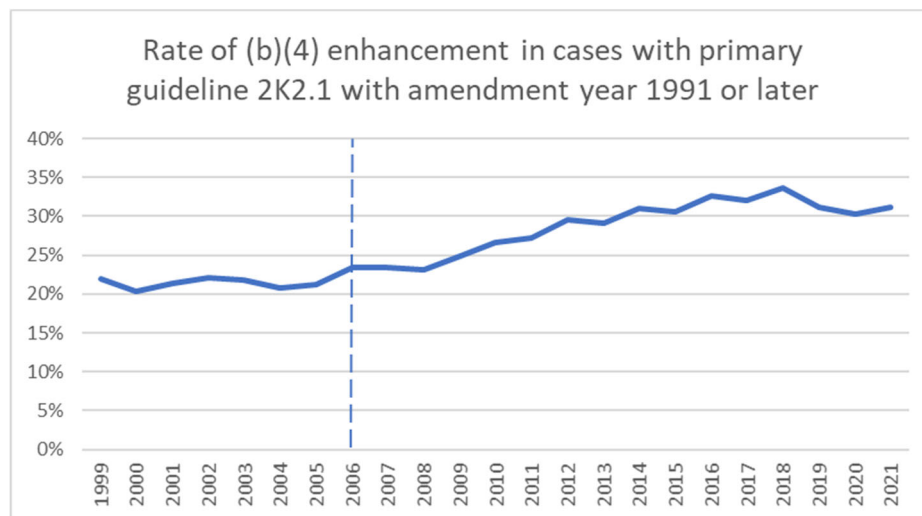
⁸⁵ DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 7.

⁸⁶ See, e.g., *United States v. Frett*, 492 F. Supp. 3d 446, 448 (D.V.I. 2020) (granting a motion for a judgment of acquittal in a 922(k) case where the government failed to prove that the accused knew the firearm was obliterated); *United States v. Johnson*, 381 F. 3d 506, 510 (5th Cir. 2004) (evidence insufficient to show knowledge of obliterated serial number where accused did not own the gun, physically possessed it for only brief intervals, and physical evidence of obliteration was limited to “silvery scratches” on the gun’s action slide); *United States v. Haile*, 685 F.3d 1211, 1221 (11th Cir. 2012) (evidence insufficient to show knowledge of obliteration where government proved only constructive possession, and put forth no evidence that accused possessed the gun for any significant length of time).

⁸⁷ *United States v. Faison*, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020).

⁸⁸ See, e.g., USSG App. C, Amend. 478 (Nov. 1, 1993) (“[T]his amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.”).

the start. In fact, in 1987, §2K2.1 commentary noted the lack of data sufficient to determine the effect of a stolen firearm on sentences.⁸⁹ Yet over time the enhancement continued to ratchet upward. In 1989, it increased from 1 level to 2 levels across the board.⁹⁰ In 2006, at DOJ's prompting, it doubled from 2 levels to 4 levels in any case involving a firearm with an altered or obliterated serial number.⁹¹ While DOJ requested the serial-number increase to "provide stronger deterrence and better reflect the harm of these offenses,"⁹² since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value.



⁸⁹ See USSG § 2K2.1, cmt. background (1989) ("Available data are not sufficient to determine the effect a stolen firearm has on the average sentence."). In 1987, the Commission appeared to believe that a stolen-firearm enhancement might serve as a proxy for firearms that are used "in the commission of crimes." *Id.* Whatever the merits of this speculation in 1987, there is no longer any need for a stolen-firearm proxy for firearms possessed in connection with the commission of another crime; §2K2.1 now directly provides an enhancement for this circumstance. See USSG §2K2.1(b)(6)(B).

⁹⁰ See USSG App C., Amend. 189, Reason for Amendment (Nov. 1, 1989) (stating the reasoning is "to better reflect the seriousness of this conduct").

⁹¹ See USSG App. C., Amend. 691 (Nov. 1, 2006); DOJ's Comments on U.S. Sentencing Comm'n Proposed Priorities 3 (Aug. 15, 2005), <https://bit.ly/3l3AUns> ("DOJ's 2005 Comments"), <https://bit.ly/3l3AUns>.

⁹² DOJ's 2005 Comments at 3.

DOJ also argued in 2006 that “the intentional obliteration or alteration of a serial number” is a “clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully.”⁹³ Yet Commission data does not seem to support this proposition either. From Fiscal Years 2017 through 2021, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4)(B) and (b)(6)(B), which covers use or possession “in connection with another felony offense.”⁹⁴ And during the same period, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4) and (b)(5), which covers trafficking in firearms.⁹⁵

Finally, sentences in cases involving application of the (b)(4) enhancement do not reflect the need for an additional increase, with the vast majority of such cases sentenced in the past five fiscal years falling either within or below the advisory guideline range.⁹⁶ Thus, the past ratcheting upward of the enhancement did not serve to deter this conduct and does not track the views of today’s sentencing judges.

B. The Commission should not unreasonably elevate sentences in cases involving privately made firearms.

The Commission proposes to address cases involving privately made firearms (PMFs)⁹⁷ by amending § 2K2.1(b)(4)(B) to instruct that cases

⁹³ DOJ Letter to the U.S. Sentencing Comm’n Regarding 2006 Proposed Guidelines Amendments 8 (March 28, 2006), <https://bit.ly.co/Hdxx>.

⁹⁴ From FY 2017–2021 and amendment year 2006 or later, 653 cases had enhancements for both (b)(4)(B) and (b)(6)(B), after excluding 3 cases that were coded as having (b)(4)(B) and (b)(6)(B) enhancement values of zero or negative levels. This is out of a total of 36,173 §2K2.1 cases.

⁹⁵ From FY 2017–2021 and amendment year 2006 or later, 582 cases had enhancements for both (b)(4) and (b)(5). This is out of a total of 36,173 §2K2.1 cases.

⁹⁶ USSC, Individual Offender Datafiles, *supra* note 80. 41.4% of §2K2.1 cases receiving the (b)(4)(A) enhancement were sentenced below guideline range, while 52.6% of §2K2.1 cases receiving the (b)(4)(B) enhancement were sentenced below guideline range during fiscal years 2017–2021. The Commission also reported that in fiscal year 2021, 46% of cases of prohibited persons sentenced under §2K2.1 involving the conduct at issue in (b)(4) received sentences below their advisory guideline range. *See* 2022 Firearms Report, *supra* note 12 at 27 fig. 20.

⁹⁷ The term “ghost guns” is vague, thus we use the ATF-preferred term PMF. ATF, *What is a privately made firearm (PMF)?* (July 22, 2022), <https://bit.ly.co/Hb2s>.

involving firearms that are “not otherwise marked with a serial number” warrant the 4-level enhancement.

We object to this proposed amendment and—consistent with our opposition to other increases to §2K2.1—instead recommend that the Commission gather data on these offenses before reflexively expanding the reach of (b)(4). If the Commission still chooses to act, we recommend that it add no additional enhancement to subsection (b)(4); or, at a minimum, provide for a lesser, more tailored enhancement requiring that the PMFs were manufactured “in connection with” the offense. In either event, as discussed above, a mens rea requirement should be added to (b)(4) in order to assure punishment proportionate to the individual’s culpability.⁹⁸

1. An enhancement for PMFs would not serve a legitimate purpose of sentencing.

The proposed PMF enhancement serves no legitimate sentencing purpose. Specific offense characteristics are intended to single out some aspect of a criminal offense that makes the crime more or less dangerous or the individual more or less culpable. Flawed as it is, §2K2.1(b)(4) at least tries to follow this basic precept: it singles out for extra punishment the extra layer of illegality associated with possessing a stolen firearm or a firearm with an altered or obliterated serial number.

By contrast, adding PMFs to §2K2.1(b)(4)(B) will further unmoor the enhancement from basic principles of punishment. Unlike the other forms of conduct described in §2K2.1(b)(4), there is no illegality associated with PMFs—they are federally *legal*. Nor is a PMF inherently more dangerous than other legally available firearms. It follows, therefore, that the guidelines should not treat possession of a PMF similar to the otherwise illegal conduct at issue in (b)(4), particularly without requiring a culpable mental state or nexus to the offense.

Importantly, §2K2.1 already provides for a menu of special-offense-characteristic enhancements that fully encompass any risk that a PMF might pose in a discrete case. For uniquely destructive PMFs, there are enhancements at §2K2.1(b)(1) and (b)(3). For PMFs used in connection with

⁹⁸ 18 U.S.C. § 3553(a)(2)(A).

otherwise illegal conduct, there is (b)(4), (b)(5), (b)(6), and (b)(7). The only characteristic that all PMFs share in common is that they make it difficult for the government to trace serial numbers. But the guidelines should not be in the business of inflicting retribution for conduct—legal in itself—that creates a bureaucratic difficulty.

a. PMFs are not illegal under federal law.

The proposed enhancement errs by treating possession of a PMF and possession of a firearm with an altered or obliterated serial number as equivalent conduct. The current enhancements in (b)(4) encompass conduct that (if done knowingly) could be a separate felony offense, regardless of whether the possessor is a prohibited person.⁹⁹ But PMFs are not subject to the same federal legal prohibitions. Non-prohibited, unlicensed persons can make or possess PMFs for their personal use under federal law.¹⁰⁰

Indeed, PMF manufacturing by hobbyists and private citizens dates back to the founding of this country.¹⁰¹ Serial numbers, on the other hand, do not. “[S]erial numbers arose only with the advent of the mass production of firearms,” and the prohibition on possession of firearms with altered or obliterated serial numbers is even more recent.¹⁰² A prohibited possessor with a PMF—who has committed one federal offense—is not similar to a prohibited person whose possession of a firearm constitutes at least two

⁹⁹ 18 U.S.C. § 922(i), (k), (j); *id.* § 5861(g), (h), (i).

¹⁰⁰ Neither the new ATF final rule nor the Gun Control Act imposes a marking or recordkeeping requirement on unlicensed persons making PMFs who are not engaged in a business or activity requiring a license. *See* Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24715 (Apr. 26, 2022) (“Of course, private makers must abide by the Undetectable Firearms Act, 18 U.S.C. 922(p); NFA requirements; and any applicable State and local laws that govern privately made firearms.”).

¹⁰¹ *Stop Gun Violence—Ghost Guns: Hearing Before the S. Subcomm. on the Const. of the S. Comm. on the Judiciary* (May 11, 2021) (statement of Ashley Hlebinsky at 5), <https://bit.ly/424czyC> (“In the American colonies alone, it is estimated that around 2,500 to 3,000 gunmakers were making guns. While these gunmakers were able to make firearms from scratch (carving wood, forging barrels, engraving metal, etc.), many ordered parts to assemble the guns even back then.”) (“Hlebinsky Testimony”).

¹⁰² *United States v. Price*, ---F. Supp. 3d---, 2022 WL 6968457, at *5 (S.D.W. Va. Oct. 12, 2022) (finding § 922(k) unconstitutional) (citations omitted); *see also id.* at 6.

potential federal offenses.¹⁰³ The proposed PMF enhancement thus fails to pick out uniquely culpable conduct for a proportionately harsher sanction.

b. PMFs are not inherently more dangerous than serialized firearms.

The vast majority of cases sentenced under §2K2.1 involve a prohibited person in possession of a firearm convicted under 18 U.S.C. § 922(g), which is a status offense.¹⁰⁴ The act of possessing the firearm by the prohibited person is the offense, full stop. The fact that the firearm lacks a serial number alone does not increase the dangerous nature of the firearm. Nor is there evidence that PMFs are inherently more destructive than commercially manufactured firearms. In fact, as the Government itself recently admitted, the commercial requirement that a serial number be placed on a firearm does not impact the use or functioning of a weapon in any way.¹⁰⁵ DOJ now claims that there is a “proliferation of crimes” involving PMFs. But §2K2.1 already has a separate specific offense characteristic for precisely that scenario, covering usage “in connection with another felony offense.”¹⁰⁶ Likewise, the guideline has a specific offense characteristic to encompass trafficking. The fact that a firearm was privately made does not, on its own, make the firearm more dangerous.

¹⁰³ 28 U.S.C. § 991(b).

¹⁰⁴ 2022 Firearms Report, *supra* note 12 at 4 (“The vast majority of the offenders sentenced under §2K2.1 were convicted under 18 U.S.C. § 922(g).”).

¹⁰⁵ *Price*, 2022 WL 6968457, at *6 (“In fact, as the Government points out, the *commercial* requirement that a serial number be placed on a firearm ‘does not impair the use or functioning of a weapon in any way.’”). Other courts considering Second Amendment challenges to § 922(k)’s prohibition on possession of a firearm with an obliterated serial number have noted that serialization does not change the core function of the firearm. *See United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (noting “the presence of a serial number does not impair the use or functioning of a weapon in any way. . . . [A] person is just as capable of defending himself with a marked firearm as with an unmarked firearm.”); *United States v. Holton*, ---F. Supp. 3d ---, 2022 WL 16701935, at *4 (N.D. Tex. Nov. 3, 2022) (“[F]irearms of similar make and model are essentially fungible”).

¹⁰⁶ USSG §2K2.1(b)(6)(B).

c. The difficulty in tracing PMFs does not implicate a legitimate purpose of sentencing.

DOJ bases its request to increase sentences for PMFs on the assertion that these firearms are “extremely difficult to trace.”¹⁰⁷ The difficulty that the lack of serialization can create for government investigations is not a legitimate purpose of sentencing under § 3553(a)(2).

As the Practitioners’ Advisory Group noted as far back as 2006, the difficulty in tracing guns without serial numbers “does not have any relationship with the federal crime of being a felon-in-possession, or federal gun-possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection.”¹⁰⁸ This is particularly true for the vast majority of §2K2.1 offenses; a prohibited person cannot possess any firearm—serialized or not.

What’s more, firearms experts disagree on the value of firearms tracing.¹⁰⁹ As the ATF itself explains, “[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired

¹⁰⁷ DOJ Letter to the U.S. Sentencing Comm’n Regarding 2023 Proposed Priorities 6 (Sept. 12, 2022), <https://bit.ly/co/Hb3H>.

¹⁰⁸ Practitioner’s Advisory Group Comment on Omnibus Proposals for 2006 Amendment Cycle 9 (Mar. 15, 2006). As Defenders argued in 2006, DOJ now concedes that “ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis.” DOJ Written Testimony for March 2023 Hearings, *supra* note 11 at 6; *see also* Federal Defenders Comment on Proposed Amendments to the Firearms Guideline 16 (Mar. 9, 2006) (noting that serial numbers can frequently be “restored by a simple laboratory procedure”).

¹⁰⁹ *See* Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 U.C.L.A. L. Rev. 1233, 1271 (2009) (“Experts have repeatedly concluded that the guns traced by ATF are not a representative sample of crime guns, and cannot provide a reliable picture of the modes of acquisition most frequently used by criminals or the paths of distribution that crime guns most often follow.”); Hlebinsky Testimony, *supra* note 101 at 8 (“It is certainly easier to purchase an already made firearm that will definitely function, and file the serial number off to use in criminal activity rather than assembling a purchased parts kit Therefore, the idea that a serial number and markings are the be all to end all in tracing crime is simply not accurate and many other factors are utilized when trying to track down a criminal.”).

for use in crime.”¹¹⁰ Moreover, a recent ATF report sheds light on the many reasons that firearms cannot be traced, and PMFs do not even appear in this table. Failure to provide complete information tops the list, and a sizeable number of “crime guns” are actually traced back to a “government entity, law enforcement agency, or military.”¹¹¹

Table OFT-05: Reasons Crime Guns are Not Traced to a Purchaser, 2017 – 2021

Trace Completion Status	Number	Percent
Incomplete / Invalid Firearm Information Provided	137,765	7.2%
FFL Acquisition and Disposition Record Missing	95,395	5.0%
Pre-1968 Firearm Manufacture / Too Old to Trace	65,945	3.4%
Obliterated Serial Number	48,601	2.5%
Traced to Government Entity, Law Enforcement Agency, or Military	25,904	1.3%
Other	66,106	3.4%
Total	439,716	

As ATF notes, PMFs present an “emerging issue.”¹¹² And a recent Commission report found that 44% of individuals sentenced under §2K2.1 in fiscal year 2021 were arrested following a targeted investigation conducted by law enforcement after receiving allegations of a crime, with another 28% arrested as part of a routine police patrol.¹¹³ Neither scenario is likely to involve a firearm trace that led to the arrest.

The Commission also states that it has “heard from commenters that the very purpose of PMFs is to avoid the tracking and tracing systems associated with a firearm’s serial number.”¹¹⁴ This is simply untrue. The manufacture of PMFs by private citizens has been legal since the founding of

¹¹⁰ ATF, *Firearms Trace Data: Arizona—2021* (Sept. 15, 2022), <https://bit.ly.co/Hb3Z>.

¹¹¹ Percentages are out of total gun traces; ATF was able to determine the purchaser in 77% of requested crime gun traces. 2(3) ATF, *National Firearms Commerce and Trafficking Assessment: Crime Guns Recovered and Traced within the United States and its Territories* 5 (Feb. 2, 2023), <https://bit.ly.co/Hb3a> (“Law enforcement agencies recovered and submitted 37,980 suspected privately made firearms (PMFs) to ATF for tracing between 2017 and 2021. . . . In September 2020, ATF issued guidance to all eTrace users explaining how to identify and trace PMFs.”).

¹¹² *Id.*

¹¹³ 2022 Firearms Report, *supra* note 12 at 32–33.

¹¹⁴ 2023 Proposed Amendments, 88 Fed. Reg. 7180 at 7197.

this country and predates the invention of serialization.¹¹⁵ Federal law allows individuals to make PMFs for personal use and in fact prohibits a national registry of most modern firearms.¹¹⁶

2. The Commission should gather data before expanding §2K2.1(b)(4) penalties.

The Commission should not repeat mistakes of the past by ratcheting up penalties in response to headlines without carefully gathering and considering relevant data.¹¹⁷ And while DOJ's comments and media coverage on PMFs invoke the specter of homemade firearms being used for crimes,¹¹⁸ such a serious 4-level enhancement should not be added to the guideline without an empirical basis.¹¹⁹ While the Commission notes that it has heard from commenters that PMFs "increasingly are associated with violent crime," there is no public Commission data on offenses involving PMFs. And the ATF final rule regarding PMFs, which took effect in August 2022, will result in a steep drop in sales of unserialized 80% complete firearms kits.¹²⁰ Before it

¹¹⁵ Hlebinsky Testimony, *supra* note 101 at 5–8.

¹¹⁶ 18 U.S.C. § 926(a).

¹¹⁷ Bowman, *supra* note 22 at 1319 ("To an ever-increasing degree, the power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice.").

¹¹⁸ Despite the flurry of media attention to unserialized firearms, mass shootings most often involve legally obtained weapons. See Glen Thrush, *What Do Most Mass Shooters Have in Common? They Bought Their Guns Legally*, N.Y. Times (May 16, 2022) (77% of mass shooters from 1966 to 2019 purchased weapons used legally).

¹¹⁹ Where Guidelines are not based on empirical evidence or on the Commission's research and expertise, the Guideline ranges for those crimes are a less reliable appraisal of a fair sentence. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

¹²⁰ The ATF recently adopted a new final rule updating the definition of "frame and receiver," which sweeps so called 80% complete weapons kits into the definition and aims to ensure serialization and recordkeeping of firearms manufactured, imported, acquired, and disposed by federal firearms licensees. See 87 Fed. Reg. at 24652.

acts, the Commission should use its power to “systematically . . . collect . . . the data” on federal offenses involving PMFs.¹²¹

Finally, DOJ argues that ATF’s recent “frame and receiver” rule amendment means that PMF “kits are now considered firearms under federal law” and the definition of “firearm” should be updated so that they trigger additional enhancements. Defenders disagree. First, for the reasons stated above, these firearms are not more inherently dangerous due to lack of serialization. Second, the ATF’s regulatory decision will result in a steep drop in sales of PMF kits and also seed litigation—the Commission should not act before the impact and lawfulness of the ATF’s new regulation has been adequately tested.¹²² Third, we have no data on the prevalence of such kits in federal offenses. Given the new ATF regulations, the Commission should pause and gather data before making any changes to the guideline.

III. PART C: Other Changes to §2K2.1

What we’ve emphasized elsewhere applies equally to Part C: Defenders strenuously oppose any and all unstudied increase in the sentencing ranges called for by §2K2.1.

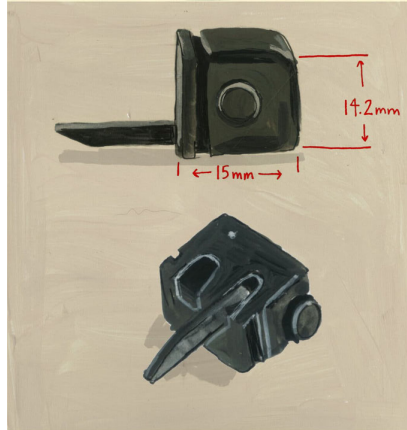
We elaborate further on only one aspect of Part C: Issue for Comment No. 4. During the March 2023 hearing, Commissioner Wong asked whether an expansion in the definition of “firearms” might mean that a firearm with certain aftermarket parts affixed to it could constitute two firearms instead of one.

This question raises just one of many problems with amending the definition of “firearms” in Application Note 1 of §2K2.1 to include devices which are “firearms” under § 5845(a) but not § 921. First, as Commissioner Wong’s question reflects, this amendment would cause §2K2.1 to apply in bizarre and counterintuitive ways, diminishing its influence. Second, DOJ’s

¹²¹ 28 U.S.C. § 995(a)(13).

¹²² It is not settled that such kits are considered “firearms” under federal law, given ongoing litigation and at least one partially granted preliminary injunction. *See* Order Granting Prelim. Inj., *VanDerStok v. Garland*, 4:22-cv-00691, ECF No. 89 (N.D. Tex. Oct. 1, 2022); *see also* *Cargill v. Garland*, 57 F. 4th 447, 450–51 (5th Cir. 2023) (en banc) (finding ATF lacked authority to amend regulations to include bump stocks in the definition of machinegun).

requested expansion of the “firearms” definition also lacks a sufficient empirical underpinning. Third, it would create unwarranted disparity. DOJ points to “Glock switches” which are aftermarket parts, most commonly a small block-shaped object about the length of a Lego brick:



These switches do nothing unless inserted into an actual firearm. Treating possession of an aftermarket part such as a machinegun part or silencer the same as possession of an actual “firearm” within the meaning of 18 U.S.C. § 921(a)(3) would create unwarranted disparity, and as Commissioner Wong’s question at the hearing highlighted, could result in the double counting of a part and the actual firearm itself.¹²³ In addition, it could compound preexisting racial disparity in machinegun prosecutions; 65% of individuals sentenced from Fiscal Years 2017 to 2021 in cases with at least one count of conviction under § 922(o) were Hispanic.¹²⁴

Instead of finding ways to add complexity to the guideline to account for outlier conduct, the Commission should focus on empirically based changes to §2K2.1 that better calibrate the guideline to § 3553(a)’s mandate.

¹²³ “The term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.” 18 U.S.C. § 921(a)(3).

¹²⁴ USSC, Individual Offender Datafiles, *supra* note 80.

**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

March 7, 2023

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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.”).

³² E. 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.

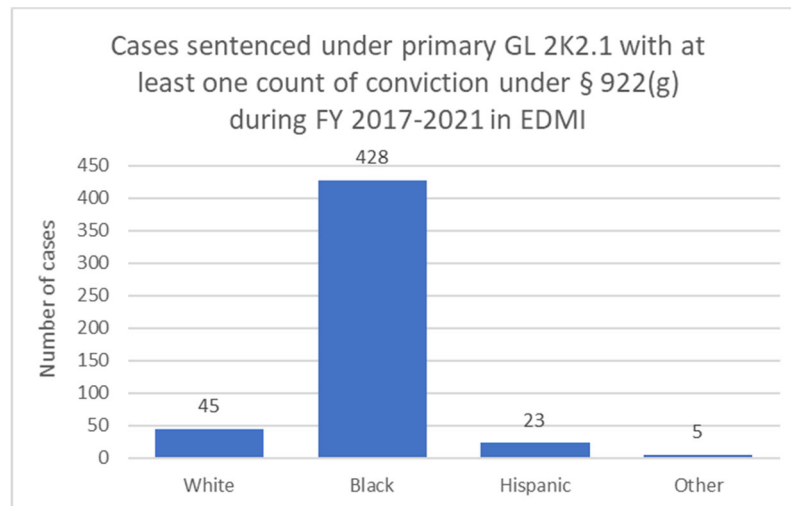
⁴³ Patton, *supra* note 22 at 1023.

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).