

# Prosecuting Firearms Offenses

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# **Post-Heller Second Amendment Litigation: An Overview**

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Seven years have passed since the Supreme Court landmark holding that the Second Amendment protects an individual right rather than a militia-centered right. Though much was left unstated and undecided by the Supreme Court, the U.S. Courts of Appeals have largely adopted a systematic procedure for addressing Second Amendment claims, and have upheld most firearms restrictions against constitutional challenges.

## **I. Supreme Court guidance: *Heller* and *McDonald***

### **A. *District of Columbia v. Heller***

#### **Overview**

The question presented to the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), was a relatively narrow one: “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.” *Id.* at 573. The Court devoted significant space to deciding the legal issue that had divided the U.S. Courts of Appeals: whether the Second Amendment “protects only the right to possess and carry a firearm in connection with militia service,” or whether it “protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” *Id.* at 577. In opting for the latter interpretation, the Court focused on examining historical sources in an attempt to discern the manner in which the Amendment was interpreted from the Founding Era through the nineteenth century. *See, e.g., id.* at 581–82 (discussing the 18th-century meaning of certain words in the Second Amendment). In the course of its examination, the Court announced:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not . . . [t]hus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

*Id.* at 595 (emphasis in original). The Court also concluded that none of its precedents foreclosed the individual rights interpretation. *Id.* at 625.

Before turning to the specific question presented in what has come to be *Heller*’s most often-quoted language, the Court set forth a single paragraph explaining that there were limitations on the Amendment’s protection:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*

*Id.* at 626–27 (citing *State v. Chandler*, 5 La. Ann. 489, 489–90 (La. 1850); *Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846)) (emphasis added). A footnote to the concluding sentence stated: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26.

Finally, when it examined the District of Columbia law at issue, the Court explained why it could not survive: “The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.” *Id.* at 628. The Court emphasized that the law was unduly burdensome to the Second Amendment right, asserting that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. And some of those few have been struck down.” *Id.* at 629. In rejecting an argument presented by the District, the Court replaced its initial emphasis on historical understanding with a focus on contemporary public opinion:

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

*Id.*

The Court thus announced its holding:

[T]he District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

*Id.* at 635.

In its final paragraph, the Court stressed the limited scope of its decision:

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. . . . Undoubtedly some think that the Second Amendment is outmoded. . . . That is perhaps

debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

*Id.* at 636 (internal citation omitted).

### Questions left unanswered

Notably, *Heller* failed to provide lower courts with any significant guidance about how to adjudicate claims resulting from its holding that the Second Amendment protects an individual right. Though the Court emphasized the unusually burdensome nature of the D.C. law at issue, it declined to provide any framework for determining when a firearms regulation can be considered unconstitutionally burdensome. The Court also expressly “decline[d] to establish a level of scrutiny for evaluating Second Amendment restrictions,” such as rational-basis review, intermediate scrutiny, or strict scrutiny. *Id.* at 634. In a dissenting opinion, Justice Breyer pointedly noted this omission, and observed that the majority opinion had implicitly rejected strict scrutiny by “broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear.” *Id.* at 688 (Breyer, J., dissenting). However, Justice Breyer’s dissenting opinion did not propose one of the three traditional levels of constitutional scrutiny, but instead suggested that courts should employ “an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” *Id.* at 689 (Breyer, J., dissenting). The majority rejected this suggestion, explaining that it was unaware of any “enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” *Id.* at 634.

Justice Breyer’s dissenting opinion also opined that the District of Columbia law at issue would survive rational basis review. *Id.* at 687–88 (Breyer, J., dissenting). In a footnote, the majority opinion agreed with this characterization, but rejected rational-basis review as appropriate for examining Second Amendment claims. *Id.* at 628–29 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

### B. *McDonald v. City of Chicago*

Following *Heller*, a Chicago handgun prohibition was challenged under the Second Amendment, but the Seventh Circuit held that the Amendment had not been incorporated against the States. The Supreme Court reversed in *McDonald v. City of Chicago*, holding that “the Second Amendment right is fully applicable to the States.” *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion). The Court “repeat[ed] [the] assurances” it had made in *Heller* that its holding on the Second Amendment “did not cast doubt” on “longstanding regulatory measures,” such as prohibitions on the possession of firearms by felons and mentally-ill persons. *Id.* at 786. It also noted that, despite the “doomsday proclamations” by the City of Chicago, applying the Second Amendment right to the States “does not imperil every law regulating firearms.” *Id.*

Like *Heller*, *McDonald* did not prescribe a method by which lower courts were to evaluate Second Amendment claims. Additionally, the decision was badly fractured, consisting of a four-Justice plurality decision, authored by Justice Alito, and two single-Justice concurring opinions, authored by Justices Thomas and Scalia, in addition to two lengthy dissenting opinions. Perhaps for these reasons, lower courts have focused much more on *Heller* than *McDonald* in their analyses of Second Amendment claims.

## **II. Post-*Heller* challenges**

In the wake of the *Heller* decision, federal courts were confronted with many challenges to firearms restrictions. This article focuses on challenges to provisions of the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. (GCA), one of the two primary federal firearms statutes enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Relatively fewer decisions have involved Second Amendment challenges to the other primary federal firearms statute, the National Firearms Act of 1934, 26 U.S.C. § 5801 et seq. (NFA). The NFA defines “firearms” more narrowly than the GCA, and includes machineguns, short-barreled rifles and shotguns, and destructive devices. 26 U.S.C. § 5845(a) (2015). NFA-defined firearms have taxation, transfer, and registration requirements not applicable to handguns and long guns under the GCA. To date, courts since *Heller* have upheld the NFA provisions against Second Amendment challenges. *See, e.g.*, *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (“We agree with the reasoning of our sister circuits that machine guns are ‘dangerous and unusual weapons’ that are not protected by the Second Amendment.”); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (“[W]hatever the individual right to keep and bear arms might entail, it does not authorize an unlicensed individual to possess unregistered machine guns for personal use.”); *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009) (“Applying *Heller* to the facts of this case, we conclude that the pipe bombs at issue were not protected by the Second Amendment.”); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (“Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”).

These challenges can be loosely divided into two “waves” of litigation. The first wave of post-*Heller* challenges tended to be asserted in criminal cases, and frequently represented generalized challenges to the constitutionality of the GCA’s provisions. This wave of litigation resulted in the formation of a standard of review for Second Amendment challenges, and virtually all challenges have been rejected.

The second wave of post-*Heller* challenges is still ongoing. Such challenges tend to be brought in civil cases, and often represent narrower challenges, involving either relatively unusual fact patterns, particularly sympathetic plaintiffs, or both. Courts remain reluctant to overturn federal firearms prohibitions in response to such challenges, but this second wave of litigation has met with some successes by plaintiffs.

## **III. The first wave of Post-*Heller* litigation**

### **A. Adjudicating Second Amendment claims**

#### **Formulating the two-prong test: *Marzzarella***

The first task of federal courts confronting Second Amendment claims after *Heller* was to formulate a general method of adjudicating these claims. In light of the *Heller* majority’s rejection of rational-basis review, and the observation of Justice Breyer’s dissenting opinion that the majority had “approv[ed] a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear,” it is perhaps unsurprising that courts have opted for intermediate scrutiny, the only remaining traditional level of constitutional means-end scrutiny. The federal courts have also largely agreed that Second Amendment claims should be analyzed involving a two-pronged test, though the formulation of this test varies somewhat from Circuit to Circuit.

The two-pronged test was created by the Third Circuit in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), in which the appellant had been convicted for possessing a handgun with an obliterated serial number, in violation of 18 U.S.C. § 922(k). “As we read *Heller*,” the Third Circuit noted,

it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

*Id.* at 89 (internal citation omitted).

The court formulated the first prong by adapting a recent First Amendment decision, *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008), which “recognize[d] that the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected.” *Marzzarella*, 614 F.3d at 89 (citing *Stevens*, 533 F.3d at 233). However, in light of *Heller*’s failure to explain the scope of the Second Amendment right, determining whether particular conduct falls within or outside the scope of the Amendment’s guarantee is problematic, at best. Thus, in a move that would become typical for courts addressing Second Amendment claims, the Third Circuit stated that it could not be certain whether the firearms regulation at issue covered protected conduct, but would assume that it did so, and proceed to the next step. *See id.* at 95 (“[W]e cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms. . . . Assuming § 922(k) burdens *Marzzarella*’s Second Amendment rights, we evaluate the law under the appropriate standard of constitutional scrutiny.”).

Applying the second prong of its test, the Third Circuit rejected rational-basis review, citing *Heller*, and rejected strict scrutiny because “[t]he burden imposed by the law does not severely limit the possession of firearms.” *Id.* at 97. Electing to use intermediate scrutiny, the court determined that Section 922(k) passed constitutional muster. *See id.* at 101.

Variants of the *Marzzarella* two-prong test has been adopted by most Courts of Appeals. *See United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *NRA v. ATF*, 700 F.3d 185, 194–95 (5th Cir. 2012); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. Dist. of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Other Courts of Appeals have simply applied intermediate scrutiny to evaluate Second Amendment claims. *See Kwong v. Bloomberg*, 723 F.3d 160, 167–68 (2d Cir. 2013) (citing *Kwong v. Bloomberg*, 876 F.Supp.2d 246, 259 (S.D.N.Y. 2012)); *United States v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc); *but see Ezell v. City of Chicago*, 651 F.3d 684, 703–04, 708 (7th Cir. 2011) (purporting to adopt two-prong test, but applying “not quite strict scrutiny” at second step to strike down city firearms ordinance). Only the Eighth Circuit has not either adopted the two-prong *Marzzarella* test or proceeded to apply intermediate scrutiny to evaluate Second Amendment claims.

### **Applying the two-prong test**

Though the two-prong test has been adopted by most Circuits, the precise formulation varies. For example, the first step (whether the challenged law burdens conduct falling within the scope of the Second Amendment’s guarantee) can involve a historical analysis of whether the regulated conduct was understood to be within the scope of the right during the Framing Era. Thus, in *NRA*, the Fifth Circuit examined historical evidence at great length, *see NRA*, 700 F.3d at 200–03, before concluding that “burdening the conduct at issue—the ability of 18-to-20-year-olds to purchase handguns from [federal firearms licensees]—is consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment’s protection.” *Id.* at 203; *see also United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (“In this sense, the federal ban on juvenile possession of handguns is part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public.”). By contrast, the Seventh Circuit, sitting en banc, has stated that “[e]xclusions” from the Second Amendment right “need not mirror limits that

were on the books in 1791.” *Skoien*, 614 F.3d at 641. The first step might also involve examining whether the restriction at issue is one of the “presumptively lawful” regulations mentioned in *Heller*. See, e.g., *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011) (“[B]ecause *Heller* requires that we ‘presume,’ under most circumstances, that felon dispossession statutes regulate conduct which is unprotected by the Second Amendment, Barton’s facial challenge [to 18 U.S.C. § 922(g)(1)] must fail.”).

In most Second Amendment challenges, courts have preferred to assume that the regulated conduct at issue falls within the scope of the Amendment’s protection, and have proceeded to the second prong. See, e.g., *NRA*, 700 F.3d at 204 (“[W]e face institutional challenges in conducting a definitive review of the relevant historical record. Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two.”). This cautionary approach may owe much to the fact that *Heller* failed to explain precisely the nature of conduct that fell within the scope of the Amendment’s protection. It might also reflect the fact that applying constitutional means-end scrutiny is a process with which most federal courts are relatively familiar. Consequently, much of the focus in Second Amendment challenges has been in identifying and applying the proper standard of constitutional means-end review.

As noted above, the *Heller* majority strongly suggested that rational-basis review could not be used to evaluate Second Amendment claims. *Heller*, 554 U.S. at 628 n.27. On the other hand, Justice Breyer’s dissenting opinion noted the difficulties of reconciling a strict scrutiny standard with the majority’s list of presumptively-lawful gun regulations. *Id.* at 688. With these two choices in doubt, the vast majority of federal courts have applied the only remaining option: intermediate-scrutiny review.

The stated rationales for selecting intermediate scrutiny as the appropriate standard vary. For example, in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), the Fourth Circuit was confronted with a constitutional challenge to 18 U.S.C. § 922(g)(9). It began by observing that “in the analogous First Amendment context,” the choice of standard of review “depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *Id.* at 682. Then, emphasizing that the core right identified in *Heller* was “the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense,” the Court rejected strict scrutiny in favor of intermediate scrutiny as appropriate for a domestic-violence misdemeanor. *Id.* (emphasis in original).

Similarly, in addressing a challenge to the same provision, the Ninth Circuit, in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), stated that Section 922(g)(9) did not implicate the “core right” identified in *Heller* because it only regulated the conduct of persons with criminal convictions. *Id.* at 1138. It noted that the statute did place a “quite substantial” burden on domestic-violence misdemeanants, amounting to a “total prohibition” and a “lifetime ban.” *Id.* Nevertheless, the court observed that Section 922(g)(9) did exempt from its prohibition persons with “expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored.” *Id.* Consequently, finding that the burden imposed by the statute was “lightened by these exceptions,” it chose intermediate scrutiny as the applicable standard of review. *Id.*

Other courts have explained that the burden imposed dictated their choice of standard. Thus, in a case challenging the District of Columbia’s firearms registration laws, the D.C. Circuit, in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*), selected intermediate scrutiny because the registration laws “do not severely limit the possession of firearms” or prevent individuals from possessing a firearm in their home or elsewhere. *Id.* at 1257–58.

In other cases, the choice depended on whether the firearms regulation affected only conduct within the home. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), examined a (since-repealed) National Park Service regulation prohibiting the possession of a loaded gun in a motor vehicle within a national park area. The Fourth Circuit stated that “as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.” *Id.* at 470. And given the “privileged interpretative role” of historical meaning that the Fourth

Circuit ascribed to *Heller*, this “longstanding out-of the home/in-the-home distinction bears directly on the level of scrutiny applicable.” *Id.* Accordingly, while the Fourth Circuit “f[ound] the application of strict scrutiny important to protect the core right of the self-defense of a law-abiding citizen in his home,” it concluded that “a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home,” and evaluated the regulation under intermediate scrutiny. *Id.* at 471; *see also Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93–97 (2d Cir. 2012) (applying intermediate scrutiny to state law requiring “proper cause” for concealed-carry permit because the statute did not burden the “core” protection of self-defense in the home, and because tradition clearly indicates a substantial role for state regulation of carrying firearms in public).

On rare occasions, federal courts have selected a standard different from intermediate scrutiny. For example, a divided Ninth Circuit panel in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), struck down a “good cause” requirement for a concealed-carry license. The panel determined that the requirement amounted to a near-total prohibition on “bearing arms,” *Id.* at 1170, which it found to constitute part of the Second Amendment’s core right. *Id.* at 1156–67. Consequently, the panel held the requirement to be invalid per se, without applying means-end scrutiny. *Id.* at 1167–70; *see also Palmer v. Dist. of Columbia*, 59 F. Supp. 3d 173, 178–83 (D.D.C. 2014) (striking down District of Columbia’s near-total prohibition on carrying firearms in public as invalid per se). However, the status of per se invalidity may be in some doubt, given that the Ninth Circuit has agreed to rehear *Peruta*, and an appeal of the *Palmer* decision has been filed. Because the GCA does not have a “concealed carry” provision, the United States did not participate in *Kachalsky*, *Peruta*, or *Palmer*.

Additionally, a Seventh Circuit decision, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), created a fourth level of constitutional means-end scrutiny: “not-quite-strict scrutiny.” *Id.* at 708. The firearms regulation at issue was relatively unusual in nature. A Chicago ordinance required firing-range training as a prerequisite to lawful firearms ownership, but prohibited all firing ranges within the city of Chicago. In evaluating the ordinance, the Seventh Circuit focused on the fact that the plaintiffs were “law-abiding, responsible citizens” whose Second Amendment rights are entitled to “full solicitude.” *Id.* Additionally, the Court stressed the burden imposed by the ordinance, stating that it represented a “serious encroachment” on an “important corollary” to the “core right to possess firearms for self-defense.” *Id.* The Seventh Circuit thus stated that to defend the law would require a “more rigorous showing” than intermediate scrutiny, “if not quite ‘strict scrutiny.’ ” *Id.* To date, however, no other Circuit appears to have made use of this standard in evaluating firearms regulations.

In evaluating firearms statutes under intermediate scrutiny, courts have typically required evidence in the form of legislative findings and empirical studies. As an initial matter, however, courts have prefaced their evaluation with several caveats. For example, a repeated dictum is that, under intermediate scrutiny, the relevant question is whether the fit between the challenged firearms law and its asserted objective is “reasonable, not perfect.” *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010); *accord United States v. Carter*, 750 F.3d 462, 465 (4th Cir. 2014); *Schrader v. Holder*, 704 F.3d 980, 990 (D.C. Cir. 2013); *Marzzarella*, 614 F.3d at 98. Additionally, when reviewing the constitutionality of firearms statutes, courts are to give “substantial deference to the legislature’s predictive judgments.” *Drake v. Filko*, 724 F.3d 426, 436–37 (3d Cir. 2013); *accord Schrader*, 704 F.3d at 990; *Kachalsky*, 701 F.3d at 97; *NRA*, 700 F.3d at 210 n.21. And finally, even when applying heightened scrutiny, courts have allowed the government to carry its burden relying “solely on history, consensus and simple common sense.” *Dearth v. Lynch*, 791 F.3d 32, 45 (D.C. Cir. 2015) (Henderson, J., dissenting); *accord Drake*, 724 F.3d at 438; *Heller II*, 45 F. Supp. 3d 35, 48.

In *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), the Fourth Circuit looked to empirical evidence in determining whether 18 U.S.C. § 922(g)(9) satisfied intermediate scrutiny. The United States submitted a variety of social science studies, and the Fourth Circuit determined that these studies established that: (1) domestic violence is a serious problem in the United States, (2) the rate of recidivism among domestic violence misdemeanants is substantial, (3) the use of firearms in connection with

domestic violence is “all too common,” (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident, and (5) the use of firearms in connection with domestic violence often leads to injury or homicide. *Id.* at 167.

In other cases, courts have examined a combination of empirical evidence and legislative history in assessing whether a statute satisfies intermediate scrutiny. Thus, in *Chovan*, the Ninth Circuit examined legislative history showing that, in enacting Section 922(g)(9), Congress sought to reach persons who had demonstrated violence, but whose offenses did not fall within the scope of Section 922(g)(1). 735 F.3d at 1140. Additionally, based on empirical studies, it concluded that a high rate of domestic violence recidivism existed. *Id.* The court also took notice of congressional findings that many incidents of domestic violence involved the use of a firearm. *Id.* And finally, the Ninth Circuit observed, based on medical studies, that the use of firearms by domestic abusers was more likely to result in the victim’s death. *Id.* Thus, the court concluded, the government “met its burden to show that Section 922(g)(9) is substantially related to the important government interest of preventing domestic gun violence.” *Id.* at 1141; see *Skoenen*, 614 F.3d at 642 (“Both logic and data establish a substantial relation between § 922(g)(9)” and “preventing armed mayhem.”).

Similarly, in *NRA*, the Fifth Circuit evaluated whether 18 U.S.C. § 922(b)(1) satisfied intermediate scrutiny by looking to both empirical studies and legislative history. *NRA*, 700 F.3d at 207–11. The court observed that, in enacting the statute in question, “Congress sought to manage an important public safety problem: the ease with which young persons—including 18-to-20-year-olds—were getting their hands on handguns through FFLs.” *Id.* at 207. It pointed out that the legislative history indicated that Congress was particularly concerned both with the role of licensed dealers in the problem of violent crime and with the role played by handguns. *Id.* at 208. As for empirical evidence, the Fifth Circuit looked to FBI studies and firearms trace data showing that violent crime and firearms-related crimes were frequently committed by persons between the ages of 18 and 20. *Id.* at 209–10. Consequently, the court held that “Congress designed its scheme to solve a particular crime: violent crime associated with the trafficking of handguns from FFLs to young adults,” and that because this scheme “reasonably fits that objective, the ban at bar survives ‘intermediate’ scrutiny.’ ” *Id.* at 211.

## B. Specific challenges to federal firearms provisions

Following the Supreme Court’s decision in *Heller*, defendants in criminal cases began mounting Second Amendment challenges to convictions based on provisions of the GCA. Additionally, some civil plaintiffs brought suit to challenge GCA provisions, many of whom were represented or funded by organizations such as the Second Amendment Foundation and the National Rifle Association.

Many criminal cases focused on one of two GCA provisions: 18 U.S.C. § 922(g)(1), which prohibits firearms possession by a person previously convicted of a crime “punishable by imprisonment for a term exceeding one year,” and 18 U.S.C. § 922(g)(9), which prohibits firearms possession by a person previously convicted of a “misdemeanor crime of domestic violence.” The frequency with which these particular provisions were challenged is unsurprising, given the relatively large number of persons prosecuted each year under either provision, particularly section 922(g)(1). For example, in FY 2014, out of 6,405 cases filed with United States Attorneys’ offices for violations of the section 922(g) prohibitors, 5,736 involved subsections 922(g)(1) and (g)(9).

During this first wave of post-*Heller* cases, federal courts were virtually unanimous in upholding the constitutionality of federal firearms provisions. For example, Section 922(g)(1) has been upheld in every Circuit to have considered the issue, and has also been upheld as constitutional as applied in most Circuits. *United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam) (facial); *United States v. Moore*, 666 F.3d 313, 316–20 (4th Cir. 2012) (facial and as-applied); *United States v. Barton*, 633 F.3d 168, 170–75 (3d Cir. 2011) (facial and as-applied); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011) (facial and as-applied); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010) (facial and

as-applied); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (facial and as-applied); *United States v. Williams*, 616 F.3d 685, 691–94 (7th Cir. 2010) (as applied); *United States v. Vongxay*, 594 F.3d 1111, 1114–15 (9th Cir. 2010) (facial and as-applied); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (facial); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (facial and as-applied).

This first wave of litigation also upheld Section 922(g)(1) as applied to persons whose prior crimes were not violent in nature. See, e.g., *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (collecting cases upholding application of 922(g)(1) to non-violent felons). Section 922(g)(9) has been upheld as constitutional in every federal Circuit to have considered the issue after *Heller*. *United States v. Voisine*, 778 F.3d 176, 186 (1st Cir. 2015) (as applied); *United States v. Chovan*, 735 F.3d 1127, 1136–42 (9th Cir. 2013) (facial and as applied); *United States v. Booker*, 644 F.3d 12, 22–26 (1st Cir. 2011) (facial); *United States v. Staten*, 666 F.3d 154, 160–68 (4th Cir. 2011) (as applied); *United States v. Skoien*, 614 F.3d 638, 639–45 (7th Cir. 2010) (en banc) (facial and as applied); *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (facial); *In re United States*, 578 F.3d 1195, 1197–1200 (10th Cir. 2009) (facial).

Other provisions of 18 U.S.C. § 922(g) have also been upheld, including its prohibition on firearms possession by controlled-substance users, *United States v. Carter*, 750 F.3d 462, 463–70 (4th Cir. 2014); *United States v. May*, 538 F. App’x 465, 466 (5th Cir. 2013); *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (per curiam); *United States v. Seay*, 620 F.3d 919, 923–25 (8th Cir. 2010). The prohibition against persons unlawfully present in the United States has likewise been upheld. *United States v. Meza-Rodriguez*, WL 4939943, at \*7–8 (7th Cir. Aug. 20, 2015); *United States v. Carpio-Leon*, 701 F.3d 974, 976–82 (4th Cir. 2012); *United States v. Huitron-Guizar*, 675 F.3d 1164, 1165–70 (10th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437, 439–45 (5th Cir. 2011). Finally, prohibition against persons subject to domestic-violence protective orders has been upheld. *United States v. Mahin*, 668 F.3d 119, 122–28 (4th Cir. 2012); *United States v. Bena*, 664 F.3d 1180, 1182–86 (8th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010).

## IV. Second-wave litigation

The second wave of Second Amendment challenges has involved civil, rather than criminal, cases. Though most challenges to federal firearms statutes have been rejected, a few cases have determined that one or more of these statutes are unconstitutional. Ironically, the most success has occurred in challenges to statutes regulating conduct that *Heller* singled out as “presumptively lawful,” namely, “longstanding prohibitions on the possession of firearms by felons and the mentally ill.” *Heller*, 554 U.S. at 626–27 & n.26. Additionally, one district court has held unconstitutional the GCA’s provisions restricting the interstate purchase of handguns.

### A. As-applied challenges to 18 U.S.C. § 922(g)(1) by non-violent felons and by misdemeanants

A number of courts have recently ruled in favor of (or at least expressed sympathy for) civil plaintiffs challenging 18 U.S.C. § 922(g)(1), as applied to persons whose crimes were not inherently violent, or who committed crimes classified by the state of conviction as misdemeanors, and were committed several years earlier.

In *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), the plaintiff had been convicted 40 years earlier in Maryland for common law misdemeanor assault and battery, allegedly as the result of a fight with a member of a street gang. *Id.* at 983. At the time of the offense, the common law crimes of assault and battery in Maryland had no statutory penalty. *Id.* The plaintiff was fined \$100, and received no jail

time. *Id.* The Second Amendment Foundation filed suit, contending that Section 922(g)(1) did not apply to common law misdemeanants as a class. In the alternative, it claimed that applying Section 922(g)(1) to this class violated the Second Amendment. *Id.* at 986.

The plaintiff's statutory claim was based on the language of the GCA, which exempts from Section 922(g)(1)'s prohibition "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B) (2015). Plaintiff argued that under this statutory exemption, Section 922(g)(1) did not apply to common law offenses because they were not "punishable by" any particular statutory criteria. 704 F.3d at 985. The D.C. Circuit rejected this argument based on the nature of common law offenses, noting that many such crimes "involved quite violent behavior." *Id.* It explained further that the plaintiff's suggested interpretation of Section 921(a)(20)(B) ran contrary to the "commonsense meaning of the term 'punishable,' which refers to any punishment capable of being imposed, not necessarily a punishment specified by statute." *Id.* at 986.

As to the plaintiff's constitutional claim, the government argued that applying Section 922(g)(1) did not even implicate the Second Amendment's protections, as the plaintiff's prior criminal conviction disqualified him from the exercise of Second Amendment rights. *Id.* at 989; cf. *Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District [of Columbia] must permit him to register his handgun and must issue him a license to carry it in the home."). The D.C. Circuit did not expressly resolve this "Step 1" question, concluding instead that the firearms prohibition imposed on common law misdemeanants passed constitutional muster under intermediate scrutiny. *Id.* at 989–91.

However, in dicta, the D.C. Circuit expressed concern that the GCA permits the Attorney General of the United States to grant relief "from the disabilities imposed by Federal laws" with respect to firearms possession, despite a conviction under the GCA, if the person demonstrated that he or she "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest," 18 U.S.C. § 925(c) (2015). Congress, since 1992, has barred the use of federal funds to act on this provision, and it is, therefore, unavailable. *Schrader*, 704 F.3d at 982–83, 991–92; see *United States v. Bean*, 537 U.S. 71, 74–75 (2002).

The court emphasized that its ruling depended on the fact that the plaintiff had not properly raised a constitutional challenge to Section 922(g)(1) as applied to himself specifically, as opposed to all common law misdemeanants as a class. *Schrader*, 704 F.3d at 991. Otherwise, the D.C. Circuit pointedly noted, "Heller might well dictate a different outcome." *Id.* The court noted that because the plaintiff's offense had occurred over 40 years previously and "involved only a fistfight," and that the plaintiff had received no jail time, had served honorably in the United States Navy, and had allegedly had "no encounter with the law since" his conviction, it would have "hesitate[d] to find *Schrader* outside the class of 'law-abiding, responsible citizens' whose possession of firearms is, under *Heller*, protected by the Second amendment." *Id.* (quoting *Heller*, 554 U.S. at 635). The D.C. Circuit concluded that "[w]ithout the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a 'law-abiding, responsible citizen[ ]' entitled to 'use arms in defense of hearth and home.'" *Id.* at 992 (quoting *Heller*).

In 2011, the Third Circuit stated:

[t]o raise a successful as applied challenge, [a plaintiff] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

*Barton*, 633 F.3d at 174.

Following the D.C. Circuit’s decision in *Schrader*, two federal district courts in Pennsylvania ruled for plaintiffs raising just such as-applied challenges to Section 922(g)(1). In *Binderup v. Holder*, No. 13-cv-6750, 2014 WL 4764424 (E.D. Pa. Sept. 25, 2014), the plaintiff had been convicted in 1998 of corruption of a minor for having engaged in a sexual relationship with a 17-year-old employee. *Id.* at \*1, 4. At the time of the offense, the maximum punishment was up to five years’ imprisonment, although Pennsylvania classified the offense as a first-degree misdemeanor. *Id.* In a lengthy opinion, the district court concluded that the government had not demonstrated that the plaintiff “pose[d] an above-average threat of future firearm-related violent crime (or any violent crime, for that matter).” *Id.* at \*31. Consequently, the court held that Section 922(g)(1) violated the Second Amendment, as applied to the plaintiff. *Id.* The case has been appealed, and is presently pending before the Third Circuit Court of Appeals.

Shortly after *Binderup*, another district court in Pennsylvania struck down Section 922(g)(1) as applied to a particular person. *Suarez v. Holder*, 2015 WL 685889 (M.D. Pa. Feb. 18, 2015). The plaintiff in *Suarez* had been convicted in 1990 for carrying a handgun without a license, a misdemeanor in Maryland punishable by up to three years’ imprisonment. *Id.* at \*1. As in *Binderup*, the district court in *Suarez* determined that the plaintiff had succeeded in “establish[ing] that he is no more dangerous than a typical law-abiding citizen and poses no continuing threat to society.” *Id.* at \*10. Therefore, the court found that the plaintiff fell “outside the intended scope of § 922(g)(1) and [was] distinguishable from those historically barred from Second Amendment protections.” *Id.* *Suarez* has been appealed to the Third Circuit, and remains pending.

## **B. Challenges to 18 U.S.C. § 922(g)(4)**

Following *Heller*, two federal Courts of Appeals have expressed doubts about the constitutionality of 18 U.S.C. § 922(g)(4)—which prohibits firearms possession by persons “who [have] been adjudicated as a mental defective or who [have] been committed to a mental institution”—as applied in specific factual circumstances.

In *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012), the two plaintiffs had been involuntarily hospitalized under the State of Maine’s temporary emergency hospitalization procedure. *Id.* at 46. The state had developed two procedures for involuntary psychiatric hospitalization. At the time of the plaintiffs’ hospitalization, section 3863 of the Maine Code provided for temporary hospitalization (up to three days), following ex parte procedures, i.e., without an adversary proceeding. *Id.* By contrast, Section 3864, governing full-scale commitments, required a full adversary hearing, including the provision of counsel for the patient and a judicial determination by clear and convincing evidence that the patient was both mentally ill and posed a likelihood of serious harm. *Id.*

In a prior case, predating *Heller*, the First Circuit held, as a matter of statutory interpretation, that a temporary emergency hospitalization under Section 3863 qualified as a “commit[ment] to a mental institution” for purposes of 18 U.S.C. § (g)(4). *United States v. Chamberlain*, 159 F.3d 656, 665 (1st Cir. 1998). However, in *Rehlander*, the court concluded that *Heller* “add[ed] a constitutional component,” in that “the right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process.” *Rehlander*, 666 F.3d at 48. Rather than ruling Section 922(g)(4) unconstitutional as applied to the two plaintiffs, *Rehlander* invoked the constitutional-avoidance doctrine and interpreted Section 922(g)(4) as inapplicable to temporary hospitalizations under Section 3863 of the Maine Code. *Id.* at 49–50.

The First Circuit cautioned that its analysis would have been different if the GCA had “addressed ex parte hospitalizations and provided for a *temporary* suspension of the right to bear arms pending further proceedings.” *Id.* at 49 (emphasis in original). It also stated that its analysis might have differed if Section 922(g)(4) “permitted one temporarily hospitalized on an emergency basis to recover, on

reasonable terms, a suspended right to possess arms on a showing that he now no longer posed a risk of danger.” *Id.* The First Circuit noted that in the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008) (codified at 18 U.S.C. § 922 note), Congress authorized federal grants to assist states to improve the quality of information made available to federal databases, in exchange for a state’s certification that it has implemented a program under which persons may apply for relief from firearms disabilities imposed by 18 U.S.C. § 922(g)(4). *Rehlander*, 666 F.3d at 49. However, the court also observed, no such program existed in Maine. *Id.*

Two years later, a panel of the Sixth Circuit went much further than *Rehlander*. In *Tyler v. Holder*, 775 F.3d 308 (6th Cir. 2014), the plaintiff had been involuntarily hospitalized in Michigan as a suicide risk in 1986, following an adversary proceeding in which he had been represented by counsel. *Id.* at 313–14. He filed suit, alleging that Section 922(g)(4) violated the Second Amendment as applied to him, because no federal or state procedure allowed him to petition for relief from his inability to possess firearms. *Id.* at 315. The district court disagreed with the plaintiff, finding that intermediate scrutiny applied and did “not require the individualized assessment of dangerousness that Plaintiff requests.” *Tyler v. Holder*, 2013 WL 356851, at \*5 (W.D. Mich. Jan. 29, 2013). However, on appeal, the Sixth Circuit rejected the argument that *Heller*’s statement about “presumptively lawful” “prohibitions on the possession of firearms by . . . the mentally ill” resolved the issue of whether the Second Amendment’s protections extended to the plaintiff. *Heller*, 554 U.S. at 626–27 & n.26. It interpreted this statement as referring only to “the class of individuals presently mentally ill,” rather than “the class of individuals constituting those ever previously mentally institutionalized.” *Tyler*, 775 F.3d at 322. The court concluded that the government had not established that the latter class of persons fell outside the scope of the Second Amendment’s protections “as it was understood in 1791.” *Id.* Proceeding to the second step of the two-prong analysis, the Sixth Circuit rejected the analysis of virtually every other federal court, holding that the plaintiff’s constitutional challenge to Section 922(g)(4) should be evaluated under strict scrutiny rather than intermediate scrutiny. *Id.* at 322–30. However, the Sixth Circuit has vacated the panel decision in *Tyler*, and recently heard the case en banc.

The above as-applied challenges to Subsections 922(g)(1) and 922(g)(4) create a number of as-yet unresolved issues. Courts can be hesitant to uphold what may be lifelong prohibitions arising out of long ago, presumably not repeated, conduct. A felony conviction is no longer disabling if it has been “expunged, or set aside, or for which a person has been pardoned or has had civil rights restored” by the law of the convicting jurisdiction, unless such avenue of forgiveness expressly provides that the person may not possess or receive firearms. See 18 U.S.C. § 921(a)(20) (2015). However, neither (g)(1) nor (g)(4) has temporal limits; if Congress had believed the passage of time was sufficient to “undo” a prohibition, it could have so provided. Additionally, how much time has to pass in order for the prohibited person to be considered law-abiding? The courts have given no hint as to what the appropriate number of years may be. Is less than 20 years not enough time, but more than 20 years sufficient? Alternatively, should courts conduct an individualized determination? Thus far, the courts have not attempted to explain how individualized determinations of dangerousness, sufficient passage of time, etc. would work in practice. As the Third Circuit has admonished, “courts possess neither the resources to conduct the requisite investigations nor the expertise to predict accurately which felons may carry guns without threatening the public’s safety.” *Pontarelli v. United States Dep’t of Treasury*, 285 F.3d 216, 231 (3d Cir. 2002) (en banc); see also *Mullis v. United States*, 230 F.3d 215, 219–20 (6th Cir. 2000) (while district courts are “well equipped to make credibility judgments and factual determinations,” they are “without the tools necessary to conduct a systematic inquiry into [a plaintiff’s] background. [A plaintiff] will likely provide the district court only with contacts who will supply positive information . . . the court would only be able to conduct a very one sided inquiry.”).

### C. Challenges to 18 U.S.C. § 922(b)(3)

Following *Heller*, a number of courts have addressed Second Amendment challenges to 18 U.S.C. § 922(b)(3), which generally prohibits federal firearms licensees from selling handguns directly to any person who does not reside in the state in which the licensee's place of business is located. These challenges have all been brought by the Second Amendment Foundation. In *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), two District of Columbia residents brought suit under the Second Amendment, contending that they wished to acquire handguns in other states. The Fourth Circuit affirmed dismissal for lack of standing. *Id.* at 671–75. It explained that the two would-be buyers failed to demonstrate any injury-in-fact because the statute, on its face, regulates the conduct of firearms dealers, not buyers. *Id.* at 671–73. Moreover, the plaintiffs failed to establish that their alleged injury (a fee charged by a District of Columbia dealer for serving as intermediary seller of the desired handguns to the plaintiffs) was fairly traceable to the challenged statute. *Id.* at 673–75.

In another case brought in the District of Columbia Circuit, a U.S. citizen residing in Canada, and thus having no state of residence, challenged Section 922(b)(3) on the grounds that it prevented him from purchasing a firearm in the United States. Following a dismissal for lack of standing, the D.C. Circuit reversed and remanded for proceedings on the merits. *Dearth v. Holder*, 641 F.3d 499 (D.C. Cir. 2011). On remand, the district court entered summary judgment for the government. *Dearth v. Holder*, 893 F. Supp. 2d 59 (D.D.C. 2012). Because the challenged law did not “completely ban Dearth from possessing a firearm for self-defense and [did] not severely limit [his] possession of firearms,” the court chose to evaluate Section 922(b)(3) under intermediate scrutiny. *Id.* at 69. The court noted that because the plaintiff possessed firearms in Canada, he was “not left powerless to arm himself for self-protection, because he has the ability to bring his firearm from Canada with him when he visits the United States.” *Id.* at 71. Furthermore, the plaintiff “has the ability to borrow or rent a firearm for lawful sporting purposes and then also use that firearm for self-defense.” *Id.* Consequently, the district court held that Section 922(b)(3) did not violate the Second Amendment as applied to the plaintiff. *Id.* at 71–72. On appeal, the D.C. Circuit vacated and remanded, finding that entry of summary judgment was not warranted. *Dearth v. Lynch*, 791 F.3d 32 (D.C. Cir. 2015). In a badly-split decision, the court opined that “there are too many unanswered questions regarding Dearth’s particular situation,” and remanded for the parties to engage in discovery on particular issues. *Id.* at 33–35.

Finally, one district court in Texas has held that Section 922(b)(3) violates the Second Amendment. *Mance v. Holder*, 74 F. Supp. 3d 795 (N.D. Tex. 2015). The court found that because the statute regulated the conduct of “law-abiding, responsible citizens,” it would apply strict scrutiny. *Id.* at 806–07. Acknowledging that the government had identified a compelling interest in preventing crime committed with handguns, *id.* at 808, the court rejected the government’s reliance on findings made by Congress when it enacted the GCA in 1968. *Id.* at 809. Instead, it insisted that the government present “current figures” to show that the law was narrowly tailored to effect its purpose. *Id.* Because the court did not believe that the government had satisfied its burden under strict scrutiny, it held Section 922(b)(3) to be unconstitutional on its face and as applied to the plaintiffs. *Id.* at 809–12. The government has appealed the court’s decision to the Fifth Circuit.

Like the as-applied challenges to Subsections 922(g)(1) and (g)(4) discussed above, the challenges to Section 922(b)(3) highlight issues that will eventually need to be resolved. One of the most important issues for GCA purposes is whether the Second Amendment protects any right to acquire firearms. The GCA imposes conditions on the transfer and receipt of firearms by virtue of state regulations that differ, depending on the type of firearm and whether or not the transferor or transferee is licensed. These sections work in tandem and are not easily severed. See 18 U.S.C. §§ 922(a)(3), (a)(5), (a)(9), (b)(2), and (b)(3) (2015). While *Heller* specifically included “laws imposing conditions and qualifications on the commercial sale of arms” as “presumptively lawful,” the district court in *Mance* found such laws to be subject to strict scrutiny. Whether a right to acquire arms exists (and if so, its

scope) is not yet clear. *Compare United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (a law that “regulates the availability of firearms [for purchase] is not a substantial burden on the right to keep and bear arms if adequate alternatives remain”), *with Ezell*, 651 F.3d at 704 (the “right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use”).

## V. Conclusion

Since the Supreme Court’s landmark decisions in *Heller* and *McDonald*, courts have adjudicated a large number of challenges to federal firearms laws under the Second Amendment. These challenges can be roughly divided into two waves of litigation. The first wave of challenges largely consisted of criminal cases, and courts have tended to uphold the challenged statutes. The second wave of post-*Heller* Second Amendment challenges have mostly been brought in civil cases and, to date, the government’s record in defending against challenges has been mixed. Most courts have tended to uphold federal firearms statutes, but some have expressed concern with the scope or content of particular statutes, such as prohibitions on the possession of firearms by felons or persons previously committed for mental-health reasons. Still other courts have found challenges to these statutes meritorious. But this area of constitutional law is still in its infancy, and it is difficult at this juncture to hazard a guess as to the nature of future Second Amendment challenges or how courts will elect to decide them. ♦

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# **After *Johnson v. United States*: Consequences for the Armed Career Criminal Act, the Sentencing Guidelines, and 18 U.S.C. § 16(b)**

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## **I. Introduction**

One of the most important firearms statutes for federal prosecutors is the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), which created a mandatory minimum sentence of 15 years for a defendant who unlawfully ships, possesses, or receives a firearm in violation of 18 U.S.C. § 922(g), and who has three prior convictions for a “violent felony,” a “serious drug offense,” or a combination thereof. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the ACCA’s so-called residual clause, which defines a violent felony to include an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii), violates the Due Process Clause because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. Justice Scalia, writing for a six-member majority of the Court, reasoned that “the residual clause leaves grave uncertainty about *how* to estimate the risk posed by a crime,” and that it “leaves uncertainty about *how much* risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557–58 (emphasis added). The Court concluded that “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557. Therefore, courts can no longer rely on the residual clause to impose ACCA sentences, and previous court decisions which held that specific offenses qualified as ACCA predicate offenses under the residual clause are no longer applicable. *Id.* at 2563.

In striking down the ACCA’s residual clause, the Supreme Court overruled two of its previous residual clause decisions, *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 131 S. Ct. 2267 (2011). At the same time, the Court in *Johnson* emphasized that its decision “does not call into question application of the [Armed Career Criminal] Act to the [Act’s] four enumerated offenses, or to the remainder of the Act’s definition of a violent felony,” including an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” and a felony offense that “is burglary, arson, or extortion, [or] involves the use of explosives,” 18 U.S.C. § 924(e)(2)(B)(i)–(ii); *Johnson*, 135 S. Ct. at 2563.

The Supreme Court’s *Johnson* decision included concurrences in the judgment by Justices Thomas and Kennedy, and a provocative dissent by Justice Alito. Indeed, the decision raises at least as many questions as it answers. The most immediate questions for prosecutors are what does the Court’s decision mean for pending ACCA cases, and does *Johnson* apply retroactively? Indeed, to which defendants does the decision apply? A more far-reaching question is, what does *Johnson* suggest about void-for-vagueness challenges to the Sentencing Guideline’s residual clause in the career offender guideline? Will the

guidelines be subject to retroactive void-for-vagueness challenges? And finally, does *Johnson* portend challenges to the crime of violence definition in 18 U.S.C. § 16(b)? Even if these questions cannot be answered definitively, prosecutors need to be mindful of the potential consequences of the *Johnson* decision.

## II. The procedural background of *Johnson v. United States*

The case of Samuel James Johnson began in 2010, when the FBI was investigating Johnson's involvement in an organization known as the National Social Movement (the Movement). Johnson subsequently left that organization and founded the Aryan Liberation Movement, where he schemed to counterfeit United States currency to fund the Movement's activities. *United States v. Johnson*, 526 F. App'x. 708, 709 (8th Cir. 2013) (per curiam). According to reports, the FBI suspected that Johnson and his white supremacist organization were planning to commit acts of terrorism. During the investigation, he also disclosed to undercover agents that he had manufactured explosives and was planning to attack the Mexican consulate, "progressive bookstores," and "liberals." *Johnson*, 135 S. Ct. at 2556 (citing Revised Presentence Investigation in No. 0:12CR00104-001 (D. Minn.) ¶ 16, at 15).

In November of 2010, Johnson informed undercover FBI agents that he had manufactured napalm, silencers, and other explosives for the Aryan Liberation Movement. He also displayed his AK-47 rifle and a large cache of ammunition to an undercover officer. A few weeks later, he possessed a .22 caliber semi-automatic assault rifle and a .45 caliber semi-automatic handgun. Johnson was arrested in April of 2012 when he met with his probation officer. At the meeting, he admitted that he had obtained both an AK-47 rifle and a .22 caliber semi-automatic assault rifle. Johnson was subsequently charged in a six-count indictment with being an armed career criminal in possession of firearms and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He agreed to plead guilty and reserved the right to challenge the applicability of the ACCA. *Johnson*, 526 F. App'x. at 708–09.

Johnson's presentence investigation report identified three prior violent felonies for which he had been convicted: attempted simple robbery, simple robbery, and possession of a short-barreled shotgun during a drug sale. Johnson objected to all three felonies as predicates for application of the ACCA. He argued that the district court should use the categorical approach originally described in *United States v. Taylor*, 495 U.S. 575 (1990), to determine that attempted simple robbery was not a violent felony, because unbeknownst to the victim of that crime, the handgun involved in the offense was a BB gun. Johnson also argued that the ACCA was unconstitutionally vague. *Id.* at 709–10. The district court rejected the defendant's challenges and concluded that Johnson's three prior violent felony convictions qualified Johnson for a mandatory minimum sentence of 15 years, as provided by the ACA under 18 U.S.C. § 924(e). Johnson appealed his sentence to the Eighth Circuit Court of Appeals. *Id.* at 710–11.

The Eighth Circuit, in turn, concluded that each of Johnson's three prior violent felony convictions fell within the ambit of the ACCA, thereby subjecting him to the mandatory minimum sentence of 15 years' imprisonment. With regard to the possession of a short-barreled shotgun, the court cited its previous decision in *United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012), which applied the ACCA residual clause:

Possession of a short shotgun presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.

*Id.* at 711 (citing *Lillard*, 685 F.3d at 777).

The Eighth Circuit also rejected Johnson's void-for-vagueness attack on the constitutionality of the ACCA and affirmed the sentence and conviction in an unpublished per curiam opinion. In support of its

decision, the Eighth Circuit cited both *Sykes*, and *James*—the two decisions overruled by the High Court in its subsequent *Johnson* decision.

Defendant's petition for certiorari was granted on April 21, 2014. *Johnson v. United States*, 134 S. Ct. 1871 (2014). In his petitioner's brief, filed June 26, 2014, Johnson did not raise a constitutional void-for-vagueness challenge to the ACCA residual clause, nor did petitioner's counsel raise the issue during oral arguments before the Court in November of 2014. Rather, petitioner's counsel argued that mere possession of a short-barreled shotgun is not a violent felony under the ACCA, and, therefore, her client should not have received the mandatory minimum 15 year prison sentence. *See Brief for Petitioner at 8, Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13–7120); *Johnson v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/johnson-v-united-states-3/>. On January 9, 2015, the case was restored to the Supreme Court's calendar for re-argument scheduled for April 20, 2015. The parties were directed to file supplemental briefs, and to address an issue that neither had raised in their previous pleadings or arguments before the Court: whether the residual clause in the ACCA is unconstitutionally vague. The Supreme Court handed down its decision on June 26, 2015, near the end of the Court's term.

### **III. The *Johnson v. United States* decision**

#### **A. Justice Scalia's majority opinion**

Justice Scalia wrote the Court's opinion, and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court began its analysis by noting that federal law forbids certain individuals—such as convicted felons, persons committed to mental institutions, or drug abusers—to ship, possess, or receive firearms in violation of 18 U.S.C. § 922(g). The penalty for these offenses is up to 10 years' imprisonment, or, if the offender has three or more prior convictions for a "serious drug offense," or a "violent felony," or a combination thereof, a minimum of 15 years under the ACCA. *Johnson*, 135 S. Ct. at 2555; 18 U.S.C. §§ 924(a)(2),(e) (2015). Additionally, the Court noted that the ACCA defines a "violent felony" as:

any crime punishable by imprisonment for a term exceeding one year . . . that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another: or
- (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

*Johnson*, 135 S. Ct. at 2555–56 (citing 18 U.S.C. § 924(e)(2)(B) (emphasis in text)).

The italicized portion, also known as the ACCA residual clause, has been the subject of four Supreme Court cases since 2007, each attempting to discern its meaning. *See Chambers v. United States*, 555 U.S. 122, 128–30 (2012) (residual clause does not cover Illinois' offense of failure to report to a penal institution); *Sykes v. United States*, 131 S. Ct. 2267, 2277 (2011) (residual clause does cover Indiana's offense of vehicular flight from a law enforcement officer); *Begay v. United States*, 553 U.S. 137, 148 (2008) (residual clause does not cover New Mexico's offense of driving under the influence); *James v. United States*, 550 U.S. 192, 209, 214 (2007) (residual clause covers Florida's offense of attempted burglary). In both *James* and *Sykes*, Justice Scalia filed dissenting opinions. *See James*, 550 U.S. at 214 ("The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc"); *Sykes*, 131 S. Ct. at 2284 ("As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth ad hoc judgment that will sow further confusion. . . . We should admit that the ACCA's residual provision is a drafting failure and declare it void for vagueness"). In light of the Court's repeated efforts to clarify the application of the residual clause, and Justice Scalia's repeated criticisms of the residual clause's

language, it was hardly surprising that he wrote for the majority when the clause was ultimately declared unconstitutional.

Justice Scalia began his *Johnson* analysis by noting that the Fifth Amendment prohibition against vagueness in criminal statutes applies not only to statutes that define the elements of criminal offenses, but also to statutes that impose sentences. *Johnson*, 135 S. Ct. at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1970)). Difficulties with application of the ACCA residual clause stem, in part, from the abstract, as opposed to a fact-based, analysis used by the courts to determine whether a defendant's prior criminal convictions qualify as ACCA predicates. The Supreme Court previously held that the ACCA requires courts to use a framework known as the categorical approach when determining whether a prior offense "is burglary, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *United States v. Taylor*, 495 U.S. 575, 600 (1990); 18 U.S.C. 924(e)(2)(B)(ii) (2015). The categorical approach compels a court to assess whether a particular crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Johnson*, 135 S. Ct. at 2557 (quoting *United States v. Begay*, 553 U.S. 137, 141 (2008)).

As the *Johnson* majority made clear, there were persuasive reasons why the *Taylor* Court adopted the categorical approach—reasons that apply to both the residual clause and to the enumerated offenses of the ACCA. *Taylor* emphasized that the ACCA refers to three previous qualifying *convictions* of the defendant, and not to three previous qualifying *felony offenses*. The ACCA's emphasis on convictions indicates that Congress intended for sentencing courts to focus on the fact that a defendant had previously been convicted of crimes falling within certain categories, rather than the underlying criminal conduct that resulted in the convictions. The *Taylor* Court also stressed the impracticability of a sentencing court engaging in an analysis of long-ago criminal conduct, particularly in situations where a defendant may have entered guilty pleas for those prior offenses. Therefore, the *Taylor* Court concluded that the categorical approach was the only plausible interpretation of the ACCA. *Taylor*, 495 U.S. at 599–602. See *Johnson*, 135 S. Ct. at 2562.

Notwithstanding the compelling reasons for adopting the categorical approach cited by the *Taylor* Court, the ensuing analysis of the ACCA residual clause failed to pass Constitutional muster. According to the *Johnson* Court, two features of the residual clause render it unconstitutionally vague. First, the residual clause creates significant uncertainty as to how the "potential risk of physical injury to another" is to be evaluated. Application of the categorical approach necessitates "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Johnson*, 135 S. Ct. at 2577. What kind of felonious conduct does the "ordinary case" require? "[A]ssessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557–58. The Court emphasized that "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving explosives." *Id.* at 2558. The inclusion of burglary and extortion among the enumerated offenses seems to indicate that a crime may qualify under the residual clause even if the physical injury is remote in both space and time from the crime, and there is no indication in the statute how remote is *too* remote. *Id.* at 2559.

The second problematic feature of the ACCA residual clause is uncertainty as to *how much* risk is required for a crime to qualify as a violent felony. Once again, the difficulty of this assessment is exacerbated by the categorical analysis. The *Johnson* Court asked rhetorically, "[d]oes the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?" *Id.* at 2558.

After analyzing the problematic features emanating from the ACCA residual clause, the Supreme Court concluded that "the residual clause produces more unpredictability and arbitrariness than the Due

Process Clause tolerates.” *Id.* In support of this conclusion, the Court reprised its own efforts and the efforts of the lower federal courts to develop an analytical framework for ACCA residual clause issues:

It has been said that the life of the law is experience. Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but “their sum makes a task for us which at best could be only guesswork.” Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.

*Id.* at 2560 (citing *United States v. Evans*, 333 U.S. 483, 495 (1948)).

The majority made short work of the two remaining ancillary issues—the theory that a vague provision is constitutional if *some* of the conduct covered by its provisions is not, in fact, vague, and the import of *stare decisis*. Regarding the former, the majority rejected Justice Alito’s suggestion in his dissent that the Court should jettison the categorical approach for the ACCA residual clause, but otherwise retain the residual clause, since the clause is not unconstitutionally vague in all situations. The Court noted that the Government had not asked the Court to abandon the categorical approach. Furthermore, for the reasons discussed above, the Court concluded that the categorical approach is uniquely suited to the ACCA’s focus on “convictions” rather than on criminal conduct. *Id.* at 2561–62.

“[E]ven decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience.” *Id.* at 2562. The Supreme Court reviewed the application of the ACCA’s residual clause on four previous occasions, but *Johnson* was the first case in which the Court received briefing and heard argument about whether the residual clause was void for vagueness. Notwithstanding vigorous criticisms raised in Justice Alito’s dissent, the majority opinion in *Johnson* stressed that the doctrine of *stare decisis* enables the Court “to revisit an earlier decision where experience with its application reveals that it is unworkable.” *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). “Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause.” *Id.* The Court emphasized that although *stare decisis* is “a vital rule of judicial self-government,” it does not matter for its own sake. *Stare decisis* promotes “the evenhanded, predictable, and consistent development of legal principles.” *Id.* (citing *Payne*, 501 U.S. at 827). “Decisions under the residual clause have proved to be anything but evenhanded, predictable, and consistent.” *Id.* at 2563.

## B. Concurrences of Justices Kennedy and Thomas

Justices Kennedy and Thomas concurred in the judgment that Petitioner Johnson’s short-barreled shotgun did not qualify as a violent felony under the ACCA. They did not, however, join the majority in rendering the ACCA’s residual clause unconstitutional as void for vagueness, in violation of the Fifth Amendment. For the reasons stated in Justice Alito’s dissent, Justice Kennedy concluded that the residual clause was not void for vagueness under the categorical approach or a records-based approach (“real-world conduct interpretation”). *Id.* at 2563, 2578. Relying upon the assumption that the categorical approach should still control, Justice Kennedy also endorsed the reasoning of the first part of Justice Thomas’ concurrence. *Id.*

In the first part of Justice Thomas’ concurrence, he concluded that there was no need to reach the issue of the constitutionality of the residual clause because under conventional principles of interpretation and precedent, possession of a short-barreled shotgun is not a violent felony within the meaning of the ACCA residual clause. *Id.* The risk of violence associated with a short-barreled shot gun “arise[s] not from the act of possessing the weapon, but from using it. . . . [P]ossession of a short-barreled shotgun poses a threat *only* when an offender decides to engage in additional, voluntary conduct that is not included in the elements of the crime.” *Id.* at 2565–66 (emphasis in original).

The second and third parts of Justice Thomas' concurrence underscore his uneasiness with the modern void-for-vagueness doctrine. In sum, he notes that the vagueness doctrine "shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution." *Id.* at 2564. Indeed, Justice Thomas uses his *Johnson* concurrence to raise questions regarding whether the vagueness doctrine can be reconciled with what he believes is the original understanding of "due process of law." *Id.* at 2567–70. Prior to the end of the 19th century, vague penal statutes were addressed through a rule of strict construction, not a rule of constitutional law. *Id.* at 2567–69. It was not until 1914 that the Supreme Court nullified a law on vagueness grounds, relying on the Due Process Clause of the Fourteenth Amendment. *Id.* at 2570 (citing *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914) (tobacco company challenge to Kentucky's anti-trust laws)). According to Justice Thomas, since that time, the Supreme Court's application of its vagueness doctrine "has largely mirrored its application of substantive due process," and "it is . . . not clear that our vagueness doctrine can be reconciled with the original understanding of the term 'due process of law.'" *Johnson*, 135 S. Ct. at 2570, 2572.

He posited two ways of examining the vagueness doctrine. Either the doctrine rests on its original, historical justification, which requires that a law be sufficiently clear so as to provide notice of what is prohibited as a function of statutory construction, or the vagueness doctrine is founded upon the contemporary understanding of Constitutional Due Process, and laws can be nullified for being "constitutionally indeterminate." *Id.* at 2572–73. Justice Thomas found the latter line of reasoning "unsettling" because "[i]t has long been understood that one of the problems with holding a statute 'void for indefiniteness' . . . is that 'indefiniteness' is itself an indefinite concept." *Id.* at 2572 (quoting *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting)). This "difficult question" Justice Thomas agreed to "leave for another day." *Id.* at 2566.

Returning finally to the case before the Court, Justice Thomas advised that he has "no love for our residual clause jurisprudence," noting that "when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a 'violent felony' made our attempt to construe the residual clause an unnecessary exercise." *Id.* at 2573 (citing *James v. United States*, 550 U.S. at 231 (Thomas, J., dissenting) ("Apprendi. . . and its progeny prohibit judges from making a finding that raises a defendant's sentence beyond the sentence that could have been imposed by reference to facts found by the jury or admitted by the defendant.")) (internal citations omitted)). For Justice Thomas there is "no principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply." *Id.* Indeed, "[h]aving damaged the residual clause through . . . misguided jurisprudence," he concluded that the court has "no right to send this provision back to the Congress and ask for a new one." *Id.* Therefore, Justice Thomas declined to join the majority "in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct." *Id.*

### C. Justice Alito's dissent

Justice Alito began his dissent, with a hint of exasperation, noting that the Court is "tired" of the ACCA and especially the residual clause. "[B]rushing aside *stare decisis*," the *Johnson* Court majority concluded that the residual clause is unconstitutionally vague, even though it had rejected that very argument twice in the past eight years. *Id.* at 2573–74. Justice Alito criticized the majority for rejecting a reasonable construction of the residual clause that would avoid any vagueness issues, in favor of an alternative that declared a portion of a longstanding criminal statute unconstitutional. According to Justice Alito, "[t]he Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive." *Id.* at 2574. Moreover, "[t]here must be good reasons for overruling a precedent, and there is none here." *Id.* at 2575. After admonishing the "six Members of the Court [who] have thrown in the towel" for their refusal to resolve further residual clause issues upon which the

Circuits disagree, Justice Alito proceeded to examine whether the residual clause provides an “ascertainable standard” that is not unreasonably vague. *Id.* at 2576, 2577 n.1.

Justice Alito stressed that “the threshold for declaring a law void for vagueness is high.” *Id.* at 2576. There is a strong presumption that laws are valid and should not be invalidated simply because of difficulty in application. The bar against declaring sentencing provisions unconstitutional is even higher because the void-for-vagueness doctrine is intended to prevent innocent persons from running afoul of substantive criminal laws. That concern is less compelling with regard to sentencing provisions. *Id.* at 2577 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95, 498 (2008) (in a due process vagueness case, the Court will hold that a law is facially invalid “only if the enactment is impermissibly vague in all of its applications”)).

According to Justice Alito, the ACCA’s residual clause “unquestionably provides an ascertainable standard.” *Id.* The statute’s definition of a violent felony is neither confusing nor unusual, since numerous other federal and state courts use similar language. Justice Alito explained that the *Johnson* majority’s problem with the residual clause hinges on the Court’s judicially-created categorical approach, which requires application of the ACCA’s residual clause “serious potential risk” to an “idealized ordinary case of the crime.” *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 589–601 (1990)). Indeed, according to Justice Alito, “[t]he Court all but concedes that the residual clause would be constitutional if it applied to ‘real-world conduct.’” *Id.* at 2578.

The ACCA distinguishes between elements of an offense and conduct. Under § 924(e)(2)(B)(i), an offense qualifies as a “violent felony” if one of its “element[s]” involves “the use, attempted use, or threatened use of physical force against the person of another.” The residual clause, § 924(e)(2)(B)(ii), focuses on “conduct”—“conduct that presents a serious potential risk of physical injury to another.” The use of these two different terms—element and conduct—makes clear that “conduct” refers to things done during the commission of the offense, and “element[s]” refers to what is needed to establish the crime of conviction. Justice Alito concluded that the “real-world conduct interpretation” of the residual clause is reasonable and practical. *Id.* Nothing in the language of the statute suggests that the *Taylor* categorical approach is necessary for application of the ACCA residual clause. Indeed, “if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an ‘idealized ordinary case of the crime,’ then that is telling evidence that this [i.e. the categorical approach] is not what Congress intended. When another interpretation [a conduct-specific inquiry] is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?” *Id.* Another important argument in favor of a conduct-specific inquiry for residual clause predicate convictions, as opposed to the categorical approach, is that the burden of proof in the conduct-specific inquiry actually protects the defendant. Focusing on real-world conduct places the burden squarely on prosecutors to establish that prior convictions qualify for sentencing. Evidentiary deficiencies, inadequate record-keeping by prior court clerks and court administrative personnel, are no defense. See *id.* at 2580.

Justice Alito left for another day the question of whether a conduct-specific inquiry raises Sixth Amendment trial issues for the factfinder. *Id.* (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that Congress’ decision to treat recidivism, including the fact of deportation following conviction of an aggravated felony, merely as a sentencing factor upon an alien’s subsequent conviction of an illegal reentry offense, rather than as an element of that offense, did not violate due process or other constitutional limits on Congress’ power to define the elements of the offense)). He was clear, however, that given the opportunity, he would jettison the categorical approach in favor of an examination of “real-world conduct” under the residual clause, “and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant’s prior crimes involved conduct that presented a serious potential risk of injury to another. *Id.*

Even assuming that the categorical approach is the preferable method for analyzing the residual clause, Justice Alito concluded that the residual clause was not void for vagueness because the residual clause is not vague in *all* of its applications. *Id.* (citing *Hoffman Estates* at 494–95); *see also Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence maybe overcome in any specific case where reasonable persons would know that their conduct was at risk”). In both *James* and *Sykes*, the Court was willing to apply the residual clause to specific factual situations before the Court. In *Johnson*, however, the majority’s concerns about vagueness were paramount, and both previous residual clause decisions were overturned. *See id.* at 2563.

Having determined that the residual clause was not void for vagueness under a real-world, actual conduct analysis, or under the categorical approach, and having rejected out-of-hand the majority’s constitutional Due Process analysis of vagueness, Justice Alito examined whether the defendant’s conviction for possession of a sawed-off shotgun qualified as a violent felony under the ACCA’s residual clause. Under the categorical approach, Justice Alito reasoned that possession of the weapon satisfied the residual clause because sawed-off shotguns “are uniquely attractive to violent criminals” and possession of these weapons is “an inherently criminal act.” *Id.* at 2582. Under the actual conduct analysis, the facts of Johnson’s underlying offense would also satisfy the residual clause, because Johnson possessed the sawed-off shotgun while selling drugs, and “[d]rugs and guns are never a safe combination. *Id.* at 2584. This was not a case of mere possession: “the sawed-off nature of the gun,” combined with the crime’s location in a public parking lot, “significantly increased the chance that innocent bystanders might be caught up in the carnage.” *Id.* For all of these reasons, Justice Alito concluded that the majority’s decision to pronounce the residual clause’s demise was “confounding.” *Id.*

## IV. Consequences of the *Johnson* decision

### A. ACCA residual clause cases on direct appeal after *Johnson*

The Supreme Court’s holding that the residual clause of the ACCA is void for vagueness, in violation of the Due Process Clause of the Constitution, means that courts will no longer impose enhanced penalties based upon the residual clause of the ACCA. Case law that has held that specific offenses qualify as ACCA residual clause predicates will no longer have any application. *See, e.g., Sykes v. United States*, 131 S. Ct. 2267 (2011); *James v. United States*, 550 U.S. 192 (2007). The decision, however, “does not call into question” application of the Act’s definition of a violent felony, including the four enumerated offenses (“burglary, arson . . . extortion [or] involves use of explosives”) or felony offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” *Johnson*, 135 S. Ct. at 2563.

*Johnson* applies to all ACCA residual clause cases “pending on direct review or not yet final” as of June 26, 2015. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (new rule for conduct of criminal prosecutions is applied retroactively to all cases, federal or state, pending on direct review or not yet final). However, a defendant may still qualify as an armed career offender under the ACCA if he has additional qualifying convictions or if the challenged convictions qualify under a different provision, apart from the residual clause. For cases pending in the appellate courts where the defendant failed to raise a vagueness challenge below, the burden is plain error. The defendant will bear the burden of demonstrating that the *Johnson* error affected substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Henderson v. United States*, 133 S. Ct. 1121, 1126–27 (2013) (an error is “plain” within the meaning of the rule governing plain error review, even if the district court’s decision was clearly correct at the time when it was made, but subsequently becomes incorrect based on a change in the law). The defendant can satisfy his burden if he demonstrates a reasonable probability that his sentence would be different on remand. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81–82 (2004) (defendant who seeks reversal of his conviction following his guilty

plea on the grounds that the district court committed plain error must show a reasonable probability that, but for the plain error, he would not have entered the guilty plea).

## B. ACCA residual clause cases and collateral review

*Johnson* announced a new substantive rule of constitutional law that at least one appellate court has concluded applies retroactively to enhanced sentences based upon application of the ACCA residual clause. *See Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015). Defendants sentenced above the statutory maximum as a result of a *Johnson* error will be eligible for relief under 28 U.S.C. § 2255 within one year of imposition of the final sentence. In situations where a defendant files a second or successive § 2255 petition, having been previously sentenced above the non-ACCA statutory maximum as a result of a *Johnson* error, the defendant will be in a position to argue that *Johnson* represents a new constitutional rule that warrants certification. 28 U.S.C. § 2255(h)(2) (2015) (“A second or successive motion must be certified as provided . . . [where] a new rule of constitutional law, [is] made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”); *see Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion); *see also O’Dell v. Netherland*, 521 U.S. 151, 157 (1997) (*Teague* exception applies to “new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense”).

In *Price v. United States*, 2015 WL 4621024 (7th Cir. 2015), the petitioner sought authorization to file a successive collateral attack so that he could assert a claim relying on *Johnson*. Price was convicted at trial of possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and sentenced as an armed career offender under 18 U.S.C. § 924(e). His first collateral attack in 2009, pursuant to 28 U.S.C. §2255, was unsuccessful. The district court denied relief and the Seventh Circuit affirmed. *Price v. United States*, 434 F.3d App’x 550 (7th Cir. 2011). In his 2015 petition under 28 U.S.C. §2244(b)(3), Price, relying on *Johnson*, argued that the imposition of an enhanced sentence under the residual clause of the ACCA violated his Due Process rights because the residual clause was too vague to provide adequate notice. *Price*, 2015 WL 4621024 at 1. The government was invited to respond, and as the court noted, the government’s response did not cite 28 U.S.C. § 2244(b)(1), thereby waiving the argument that Price’s claim “was presented in a prior application and should be dismissed.” *Id.*

Under § 2255(h)(2), courts of appeal must deny authorization for a second or successive motion for collateral relief unless the petitioner’s claim relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The Seventh Circuit stated that the petitioner easily met three of the four requirements. First, *Johnson* announced a new rule of law, expressly overruling a line of Supreme Court cases, beginning with *Begay v. United States*, 553 U.S. 137 (2008). *See Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2103) (“[A] case announces a new rule of law if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”) (internal quotation marks omitted). Second, the decision in *Johnson* is based upon the Due Process Clause of the Fifth Amendment, and the new rule it announced is one of constitutional law. Third, the *Johnson* rule was previously unavailable to the petitioner when he filed his first collateral attack on his sentence. “Until *Johnson* was decided, any successive collateral attack would have been futile.” *Price*, 2015 WL 4621024 at 1.

The remaining question for the Seventh Circuit was whether *Johnson* applies retroactively to cases on collateral review. The Seventh Circuit looked to *Tyler v. Cain*, 533 U.S. 656, 662 (2001), which holds that under § 2244(b)(2)(A), the state prisoner corollary of § 2255 (h)(2), the retroactivity determination must be made by the Supreme Court, and “made” means “held.” Thus, the requirement is satisfied only if the Court has held that the new rule is retroactively applicable to cases on collateral review. *Id. See also Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013) (“The declaration of retroactivity must come from the Justices.”). The *Price* court emphasized that Justice O’Conner’s concurring opinion in *Tyler*, a rationale that was adopted by four of the dissenting justices, stated that the Supreme Court could make a rule retroactive “through multiple holdings that logically dictate the

retroactivity of the new rule.” *Price*, 2015 WL 4621024 at 2 (quoting *Tyler v. Cain*, 533 U.S. at 668 (O’Connor, J. concurring)), *see also* *Tyler* at 670–73 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). According to Justice O’Connor, “the holdings must *dictate* the conclusion.” *Id.* at 669. The Supreme Court makes “a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court’s holdings logically permit no other conclusion than that the rule is retroactive.” *Id.*

The Seventh Circuit in *Price* acknowledged that the Circuits have used different analyses when trying to ascertain whether a given Supreme Court decision should be applied retroactively. Several courts have adopted Justice O’Connor’s *Tyler* analysis for authorizations under § 2255(h)(2) and its state law corollary, § 2244(b)(2)(A). The Eleventh Circuit, for example, authorized a prisoner to pursue a second collateral attack under *Atkins v. Virginia*, 536 U.S. 304 (2002) (held: the Eighth Amendment prohibits imposition of a capital sentence on a mentally deficient defendant), because *Perry v. Lynaugh*, 492 U.S. 302 (1989), made *Atkins* retroactive. *Price*, 2015 WL 4621024 at 3. Other courts, however, have applied the *Tyler* analysis to deny authorization for a second or subsequent collateral review, looking to the *Teague* exceptions for new substantive rules or watershed procedural rules in order to ascertain if the Court has made the new rule announced in a subsequent decision retroactive by “logical necessity,” and these courts have concluded that the Supreme Court did not. *Id.* (citing *United States v. Redd*, 735 F.3d 88, 91 (2d Cir. 2013) (*Teague* did not make *Alleyne v. United States*, 133 S. Ct. 2151 (2013), retroactive) (per curiam); *In re Zambrano*, 433 F.3d 886, 887–89 (D.C. Cir. 2006) (*United States v. Booker*, 543 U.S. 220 (2005) was not retroactive); *Paulino v. United States*, 352 F. 3d 1056, 1058–59 (6th Cir. 2003) (*Richardson v. United States*, 526 U.S. 813 (1999) was not retroactive); *Cannon v. Mullen*, 297 F.3d 989, 993–94 (10 Cir. 2002) (*Ring v. Arizona*, 536 U.S. 813 (1999) was not retroactive); *In re Turner*, 267 F.3d 225, 228–30 (3d Cir. 2001) (*Apprendi v. New Jersey*, 530 U.S. 466 (2001) was not retroactive)).

The court in *Price* concluded that *Johnson* announced a substantive new rule when the Supreme Court decided that the ACCA residual clause was unconstitutionally vague. In other words, the Supreme Court prohibited “a certain category of punishment for a class of defendants because of their status.” 2015 WL 4621024 at 3 (quoting *Saffle v. Parks*, 494 U.S. 484, 494 (1990)). Thus, the *Price* court concluded, “[t]here is no escaping the logical conclusion that the court itself has made *Johnson* categorically retroactive to cases on collateral review.” The Seventh Circuit cautioned that its review of the petitioner’s substantive claim was necessarily “preliminary” and that it fell to the district court to examine petitioner’s claim in more detail. The Seventh Circuit noted, by way of example, that the petitioner might have other ACCA qualifying convictions that were not considered in the original sentencing hearing that could impact the petitioner’s ultimate sentence. *Price*, 2015 WL 4621024 at 3.

Within days of the *Price* decision, the Eleventh Circuit addressed the issue of whether *Johnson* applied retroactively to the residual clause of the career offender sentencing enhancement for collateral review purposes in the context of the sentencing guidelines. Expressly rejecting the Seventh Circuit’s analysis in *Price*, the Eleventh Circuit concluded that “[n]o combination of holdings of the Supreme Court ‘necessarily dictate’ that *Johnson* should be applied retroactively on collateral review.” *In re Rivero*, 2015 WL 4747749 at 2 (11th Cir. 2015). In sum, the Eleventh Circuit emphasized that *Johnson* was decided on direct review. The decision did not expressly hold that *Johnson* applies retroactively, and the Supreme Court has not since applied *Johnson* to a case on collateral review. *Id.* (citing *In re Anderson*, 396 F.3d 1336, 1339 (11th Cir. 2005) (“When the Supreme Court makes a rule retroactive for collateral-review purposes, it does so unequivocally, in the form of a holding.”)). Petitioner’s application for leave to file a second or successive collateral attack on his guidelines sentence was denied because *Johnson* did not establish a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *In re Rivero*, 2015 WL 4747749 at 1.

### C. Application of *Johnson* to the Sentencing Guidelines on direct appeal

The Supreme Court’s *Johnson* opinion does not discuss the consequences of the Court’s decision for the comparable provisions of the U.S. Sentencing Guidelines (guidelines), but the impact of the

*Johnson* decision is likely to be significant. As noted, *Johnson* held that the residual clause of the ACCA, which contains the definition of “violent felony,” is unconstitutionally vague in all its applications. The ACCA residual clause defines “violent felony” to include an offense that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii) (2015). This language is identical to the residual clause in the guidelines definition of the term “crime of violence” in U.S.S.G. § 4B1.2(a)(2) (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”). Furthermore, the identical “crime of violence” definition appears in several key provisions of the guidelines, including offense-level enhancements for firearms crimes and for the career offender guideline, which substantially increases the advisory range for recidivist drug and violent offenders. *See* U.S.S.G. §§ 4A1.2(p) (incorporating the career offender guideline definition of “crime of violence” for purposes of calculating criminal history under § 4A.1(e)). *See also* §2K2.1 comment n.1 (“crime of violence” has the same meaning given that term in § 4B1.2(a) and note 1 of commentary to § 4B1.2).

Courts have previously held that the ACCA’s residual clause and the guidelines’ residual clause should be interpreted the same way and have applied case law interpreting the two interchangeably. *See, e.g., United States v. Velazquez*, 777 F.3d 91, 94–98, 94 n.1 (1st Cir. 2015) (held: gross sexual assault of a child was categorically a “crime of violence,” as a predicate offense under the residual clause of the career offender guideline; noting that the First Circuit “has consistently equated” the term “crime of violence” as used in the career offender guideline with the ACCA term “violent felony”); *United States v. Travis*, 747 F.3d 1312, 1314–17, 1314 n.2 (11th Cir. 2014) (using the categorical approach to determine whether a prior conviction is a “crime of violence” under the residual clause of the sentencing guidelines and citing the now-overruled *James* and *Sykes* cases, both ACCA decisions, as controlling authority); *United States v. Boose*, 739 F.3d 1185, 1187 n.1 (8th Cir. 2014) (construing ACCA “violent felony” and career offender guidelines “crime of violence” as “interchangeable”); *United States v. Meeks*, 664 F.3d 1067, 1070–1072, 1070 n.1 (6th Cir. 2012) (determination of whether a conviction is a “violent felony” under the ACCA is analyzed the same way as whether a conviction is a “crime of violence” under the career offender guideline); *United States v. Griffin*, 652 F.3d 793, 802 (7th Cir. 2011) (same); *United States v. Willings*, 588 F.3d 56, 58 n.2 (1st Cir. 2009) (calling “violent felony” as used in the ACCA and “crime of violence” as used in the career offender guideline “nearly identical in meaning, so that decisions construing one term inform the construction of the other”). The Fifth Circuit has taken a somewhat different approach. In the Fifth Circuit, case law permits a conduct-based analysis to determine whether a prior conviction satisfies the career offender guidelines residual clause commentary authorizing courts to consider “the conduct set forth (i.e., expressly charged)” in the defendant’s count of conviction. *See* Guidelines § 4B1.2, comment note 1. *See also* *United States v. Jones*, 752 F.3d 1039, 1045–46 (5th Cir. 2014); *United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc).

As a result of the *Johnson* decision and the overruling of *James* and *Sykes*, the ACCA case law regarding violent felonies under the ACCA residual clause is no longer applicable to guidelines career offender cases. The question becomes: if the ACCA residual clause is void for vagueness and constitutionally infirm, what of the career offender guideline’s residual clause, which incorporates the same language? Does the career offender residual clause “produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates”? *Johnson*, 135 S. Ct. at 2558.

Prior to *Johnson*, three circuits had held that the guidelines were not subject to vagueness challenges. *See United States v. Tichenor*, 683 F.3d 358, 362–67 (7th Cir. 2012) (rejecting the argument that the career offender guideline is unconstitutionally vague due to its definition of “crime of violence”; holding that “the guidelines are not susceptible to attack under the vagueness doctrine” because the guidelines do not establish the illegality of any conduct and are only directives for sentencing); *United States v. Smith*, 73 F.3d 1414, 1417–1418 (6th Cir. 1996) (rejecting argument that crack cocaine guidelines penalties are unconstitutionally vague); *United States v. Wivell*, 893 F.3d 156, 159–60 (8th Cir. 1990) (challenge to the acceptance of responsibility provision of the guidelines as unconstitutionally

vague). But see *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (pre-*Booker* acknowledgement that the guidelines are subject to vagueness challenges, but rejecting defendant's vagueness challenge to USSG § 2F1.1(b)(6)(B)).

For at least two reasons, previous case law rejecting vagueness challenges is not controlling. First, is the reasoning of the *Johnson* opinion. The Court held that the vagueness doctrine applies equally to substantive and sentencing provisions, despite the fact that sentencing provisions do not establish the criminality of the underlying conduct. The indeterminacy of the ACCA residual clause "both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. If the ACCA residual clause produces "more unpredictability and arbitrariness than the Due Process Clause tolerates," *id.* at 2558, then presumably, identical language in the career offender guidelines residual clause fails to pass constitutional muster for the very same reasons.

The second reason that the *Johnson* void-for-vagueness reasoning almost certainly applies to the guidelines hearkens to the Supreme Court's recent decision and reasoning in *Peugh v. United States*, 133 S. Ct. 2072 (2013). In *Peugh*, the Court held that a retroactive guideline provision can violate the Ex Post Facto Clause. Justice Sotomayor, writing for the majority, stressed the importance of the guidelines in the sentencing process, notwithstanding that the guidelines are advisory. Indeed, "the Guidelines should be the starting point and the initial benchmark," *Id.* at 2080 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Sentencing courts are required to calculate the applicable guidelines range and to give due consideration to the guidelines before imposing a sentence. *Id.* at 2083–84. "Failure to calculate the correct guidelines range constitutes procedural error." *Id.* at 2081. "A retrospective increase in the guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation." *Id.* at 2084.

Both the due process analysis of *Johnson* and the ex post facto analysis of *Peugh* are focused on providing defendants with fair notice of the possible sentencing consequences emanating from a conviction at trial or a guilty plea. Given the Court's critical scrutiny in both instances, it is unlikely that the Court would, at some future date, apply a lower standard of scrutiny to exactly the same guidelines' language that it deemed "indeterminate" and void for vagueness in *Johnson*. Perhaps not surprisingly, the Sixth Circuit—one of the three circuits that previously rejected a vagueness challenge to the guidelines—recently issued per curiam decisions holding that a defendant sentenced under the guidelines career offender residual clause "deserves the same relief as *Johnson*: the vacating of his sentence." *United States v. Darden*, 605 F. App'x. 545 (6th Cir. 2015) (per curiam). See *United States v. Harbin*, 2015 WL 4393889 (6th Cir. 2015) (per curiam) (same).

Under this line of reasoning, *Johnson* then applies to all guideline provisions that contain "crime of violence" language identical to the ACCA residual clause. See § 4A1.1(e) (criminal history); § 4A1.2(p) (same); § 2K2.1 and comment note 1 (firearms); § 2K1.3 and comment note 2 (explosive materials); § 2S1.1 and comment note 1 (money laundering); § 5K2.17 and comment note 1 (semi-automatic firearms); and § 7B1.1(a)(1) and comment note 2 (probation and supervised release).

For the same reasons that the *Johnson* void-for-vagueness analysis applies only to the ACCA residual clause, *Johnson* applies only to the so-called residual clause of § 4B1.2(a)(2). The remainder of the career offender guidelines are constitutionally sound and still apply to a defendant who has prior felony convictions that qualify as a controlled substance offense; an offense that has "as an element the use, or attempted use, or threatened use of physical force against the person of another" as provided in § 4B1.2(a)(1); or an offense enumerated in § 4B1.2(a)(2) ("burglary of a dwelling, arson, or in extortion [or] involves use of explosives"), or enumerated in commentary note 1 of § 4B1.2. A defendant may qualify as a career offender based upon an offense enumerated in the commentary to § 4B1.2, even if the "crime of violence" appears to be defined by the career offender residual clause. See *Stinson v. United States*, 508 U.S. 36, 38, 45(1993) (guideline commentary "that interprets or explains a guideline is

authoritative unless it violates the Constitution or a federal statute” or is inconsistent with the guideline); *United States v. Keller*, 666 F.3d 103, 108 (3d Cir. 2011) (same).

*Johnson* does not impact other provisions of the guidelines where the application of the guideline depends upon an assessment of the defendant’s individualized conduct, because an individualized assessment of conduct does not require “the indeterminacy of the wide-ranging inquiry” that was criticized in *Johnson*, 135 S. Ct. at 2557. See § 2L1.1(b)(6) (alien smuggling; “[i]f the offense involved intentionally or recklessly creating a substantial risk of death or bodily injury to another person”); § 2L1.2 and note 1(B)(ii) (illegal reentry; enumerated crimes of violence). Finally, *Johnson* does not impact a prosecutor’s sentencing recommendations with regard to the appropriate sentence to be imposed in a particular case. Although prosecutors may not rely on the residual clause to calculate the guidelines range, prosecutors may take all criminal history into account, pursuant to 18 U.S.C. § 3553(a), when recommending a sentence to the court.

#### **D. Application of *Johnson* to the Sentencing Guideline cases on collateral review**

As noted above, the Eleventh Circuit has already considered whether *Johnson* applies retroactively to the residual clause of the career offender sentencing enhancement. *In re Rivero* addressed petitioner’s application for leave to file a successive collateral attack where the petitioner had originally been sentenced under the then-mandatory guidelines as a career offender. One of petitioner’s underlying prior convictions was attempted burglary, a “crime of violence” under the residual clause of § 4B1.2(a)(2). In *Rivero*, the Eleventh Circuit denied his application because the Eleventh Circuit concluded that *Johnson* does not apply retroactively to cases on collateral review. The Eleventh Circuit held that *Johnson* did not announce a new rule of constitutional law applicable to the residual clause of the career offender guidelines. Therefore, the petitioner had no legal remedy. *In re Rivero*, 2015 WL 4747749.

There are several important reasons why *Johnson* does not afford relief to defendants seeking to wage collateral attacks on their previously adjudicated guideline sentences. In the context of the guidelines, application of *Johnson* is procedural and not substantive in character. *Johnson* is a new, but not a watershed, procedural rule, and hence its application is not retroactive. See *Teague v. Lane*, 489 U.S. at 311 (rules of criminal procedure are usually not retroactive, except for: (1) substantive rules and (2) “watershed rules of criminal procedure” that are “implicit in the concept of ordered liberty.”). Application of the *Johnson* void-for-vagueness analysis to the guideline’s definition of “crime of violence” is a procedural, but not a “watershed” change, because the holding in *Johnson* does not expand or contract the applicable statutory sentencing range. The procedural change resulting from *Johnson* is limited to how courts will construe “crime of violence” and the residual career offender guideline prospectively.

Prior to *Johnson*, the ACCA residual clause exposed a defendant to an enhanced mandatory minimum sentence. Comparable language in the guidelines did not expose a defendant to a mandatory enhanced guideline range. This is an important distinction that separates the impact of *Johnson* on a mandatory minimum sentence from the impact of *Johnson* on a potential guideline enhancement.

Before *Johnson*, defendants with prior qualifying felony convictions under the ACCA residual clause received enhanced mandatory sentences. Hence, once the Supreme Court declared the ACCA residual clause unconstitutional as void for vagueness, those enhanced mandatory sentences were constitutionally invalid, and the resulting change in the substantive law applied retroactively. For the guidelines, however, the analysis is different, because under both the formerly mandatory and the currently advisory guidelines, courts have always retained discretion in varying degrees to impose sentences outside of the guidelines range. See *Gall v. United States*, 552 U.S. 38, 49–51 (2008) (sentencing courts have discretion to vary from the advisory guidelines); *Koon v. United States*, 518 U.S. 81, 98 (1996) (district courts retain their “traditional sentencing discretion” even under the formerly

mandatory guidelines). *See also* 18 U.S.C. § 3553(a) (2015) (courts are to impose a sentence that is “sufficient but not greater than necessary” to serve the statutory purposes of punishment).

#### **E. Application of *Johnson* to the definition of “crime of violence” in other sections of the Criminal Code**

As previously noted, the ACCA residual clause definition of a “violent felony” contains the same language as the guideline career offender residual clause definition of a “crime of violence,” and the *Johnson* void-for-vagueness analysis now applies to both. However, the *Johnson* analysis does *not* apply to the statutory definition of a “crime of violence” in 18 U.S.C. § 16, because the statutory definition is separate and distinct from the guidelines definition of a “crime of violence,” and by its terms, calls for a different analysis than either § 924(e)(2)(B)(ii) or § 4B1.2(a)(2).

Title 18 U.S.C. § 16 provides a statutory definition of a “crime of violence:”

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another;
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 16(b), or its language, is incorporated into other sections of Title 18 and Title 8. *See, e.g.*, 18 U.S.C. § 842(p) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction); 18 U.S.C. § 924(c)(3)(B) (use or carrying of a firearm in furtherance of a federal crime of violence); 18 U.S.C. § 1959(a) (violent crime in aid of racketeering); 18 U.S.C. § 3142(f)(1)(A) (release and detention of a defendant pending trial); 18 U.S.C. § 3181(b) (extradition); 18 U.S.C. § 5032 (juvenile transfer proceedings); 18 U.S.C. § 3663A9(c) (mandatory restitution to victims of certain crimes); 8 U.S.C. § 1101(a)(43) (definition of “aggravated felony” for immigration matters).

The Section 16(b) definition of “crime of violence,” while similar to the definition of “violent felony” appearing in § 924(e)(2)(B)(ii), contains important distinctions. Section 16(b) does not include the combined factors contained in the § 924(e)(2)(B)(ii) residual clause of the ACCA that led the *Johnson* Court to declare the residual clause void for vagueness. To begin, § 16(b) is structurally distinct from § 924(e)(2)(B)(ii); it does not list enumerated crimes in the definition of a crime of violence. This is important, because § 924(e)(2)(B)(ii) contains a definition of a crime of violence which lists disparate enumerated offenses—“burglary, arson, extortion, involves use of explosives”—culminating with an “otherwise” provision that introduces the residual clause of the ACCA. *Johnson* focused on the uncertainty created by the list of inherently violent and non-violent enumerated offenses preceding the residual clause in § 924(e)(2)(B)—“the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court’s task . . . goes beyond evaluating the chances that the physical acts that make up the crime will injure someone.” *Johnson*, 135 S. Ct. at 2557. As noted above, “the residual clause leaves grave uncertainty about *how* to estimate the risk posed by a crime.” *Id.* (emphasis added). Furthermore, “the residual clause leaves uncertainty about *how much* risk it takes for a crime to qualify as a violent felony.” *Id.* at 2558 (emphasis added). *Johnson* underscored the Court’s inability to develop a “principled and objective standard” to analyze residual clause cases. *Id.* at 2558–60.

By contrast, § 16(b) provides that, in order for a felony offense to come within the definition of a “crime of violence,” the offense must “by its nature” involve a “substantial risk that physical force against the person or property of another may be used *in the course of committing the offense*.<sup>1</sup>” (emphasis added). Thus, the statutory definition of a “crime of violence” makes clear that the substantial risk of physical force relates inextricably to the course of committing the offense, which is quite distinct from the attenuated potential risk of the ACCA residual clause criticized in *Johnson*. *See Leocal v. Ashcraft*, 543

U.S. 1, 7–8, 11 (2004) (removal proceeding; held: alien’s alcohol-related traffic conviction was not a “crime of violence” under § 16(b) and therefore was not an “aggravated felony” warranting deportation; requiring a higher mens rea than accidental or negligent conduct for a §16(b) crime of violence). *Accord Cole v. U.S. Attorney General*, 712 F.3d 517, 527–28 (11th Cir. 2013) (removal proceeding; alien’s state conviction for pointing a firearm at another person was a “crime of violence” within the meaning of §16(b), since the state “offense has as an element an intentional mens rea and thus satisfies *Leocal*’s intent requirement”).

## V. Conclusion

The appellate courts have already begun grappling with the consequences of *Johnson v. United States*. For prosecutors, the consequences will be significant and long-term. Even in cases where a court may have imposed an enhanced sentence based upon an erroneous ACCA or career offender determination in reliance upon the residual clause, a defendant may still be eligible for an enhanced sentence if he has additional qualifying convictions or if the challenged conviction qualifies under a different clause. In each case, an individualized assessment of the defendant’s criminal record will be necessary to ensure that the appropriate sentence is rendered.

The eventual long-term consequences of *Johnson* will also be influenced by decisions of the United States Sentencing Commission. On August, 7, 2015, the Commission voted to seek comment on proposed changes to the existing guideline definition of a “crime of violence.” The proposed changes were primarily intended to make the guideline conform with the *Johnson* decision. See *U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence* (Aug. 7, 2015), [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150807\\_Press\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150807_Press_Release.pdf). Consistent with the Supreme Court’s decision in *Johnson*, the proposal would eliminate the residual clause from the guideline definition of “crime of violence.” In addition, the guideline proposal would provide definitions for several enumerated crimes of violence. See *Proposed Amendments to Sentencing Guidelines (Preliminary)* (Aug. 7, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly -amendments /20150807-RFP-Amendments.pdf>.

A question still unanswered by *Johnson*, and a question that only the Supreme Court can answer, still hangs in the balance: in light of recent case law developments, how long will the categorical approach of *United States v. Taylor*, 495 U.S. 575 (1990) remain viable?

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# Domestic Violence Related Gun Prosecutions

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## I. Introduction

In April of 2015, in a small rural town in Eastern Utah, a man shot and killed his wife and then took his own life with the same gun. Due to the man's prior record of domestic violence, he was restricted from possessing a firearm pursuant to 18 U.S.C. § 922(g)(9). The fact that the man had illegally obtained a firearm remained unknown to law enforcement until the time of the murder-suicide. Tragically, similar domestic homicides occur frequently in Utah and in communities all throughout the United States.

Violence against women in the United States occurs all too often at the hands of a current or former spouse or partner. When domestic violence escalates to the level of homicide, the abusing hand is usually holding a gun. The Supreme Court has recognized that “[f]irearms and domestic strife are a potentially deadly combination nationwide.” *United States v. Hayes*, 555 U.S. 415, 427 (2009).

Congress has provided federal prosecutors the means to divest domestic abusers of firearms—the preferred killing tool within abusive American homes. Nearly 20 years ago, Congress recognized that the existing federal firearms restrictions were insufficient to dispossess perpetrators of domestic violence of their firearms. In an effort to protect victims of domestic violence, Congress passed the Lautenberg Amendment, codified in 18 U.S.C. § 922(g)(9). This provision amended the Federal Gun Control Act of 1968 by criminalizing the possession of firearms by individuals convicted of a misdemeanor crime of domestic violence. The bill passed with near unanimous support and plainly demonstrates Congressional recognition that “anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.” 142 Cong. Rec. S11877 (Sept. 30, 1997) (statement of Sen. Lautenberg).

The firearms restriction delineated in § 922(g)(9) is supported by empirical data that demonstrates that domestic violence abusers are at increased risk for committing future violence and that their access to firearms gravely increases the potential for serious physical harm within the home. For instance, domestic violence offenders that possess a firearm are more likely to threaten use of firearms against their intimate partners. Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, J. AM. MED. WOMEN'S ASS'N, 60, 62–68 (2005). Domestic abusers who possess guns also tend to inflict the most severe abuse on their partners. *Id.* Strong evidence links the presence of guns in a domestic violence situation with an increased probability of homicide. Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 824 (2000). A 2003 study found that access to firearms increased the risk of an intimate

partner homicide by more than five times when compared to situations without weapons. Jacquelyn C. Campbell et al., *Risk Factors For Femicide in Abusive Relationships: Results From A Multi-Site Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003). Nationally, more than two-thirds of spouse and ex-spouse homicide victims are killed with a firearm. ALEXIA COOPER AND ERICA L. SMITH, DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, 20 (2000).

Removing guns from the homes of convicted abusers will “materially alleviate the danger of intimate homicide.” *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011). For this reason, the goal of § 922(g)(9) in “preventing armed mayhem” is an “important governmental objective.” *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010). Federal prosecutors can advance Senator Lautenberg’s vision of reducing domestic gun crimes and save American lives by aggressively prosecuting armed perpetrators of domestic violence.

## II. So you want to charge § 922(g)(9)?

Consistent enforcement of § 922(g)(9) would undoubtedly go a long way toward curbing domestic violence homicides in this country, but the charge is rarely used compared to § 922(g)(1), which prohibits felons from possessing firearms. Given the abundant evidence showing that domestic violence misdemeanants are at least as dangerous as the average felon, one may wonder why we see this striking disparity. It seems more likely a product of expediency than judiciousness: prosecutors typically know what a felony conviction is, and are frequently called to prove such convictions in court. The statutory definition of a “misdemeanor crime of domestic violence,” however, has often been the subject of debate in appellate courts:

[T]he term “misdemeanor crime of domestic violence” means an offense that: (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A) (2015).

As federal prosecutors and courts have attempted to map a myriad of state domestic violence statutes onto this somewhat narrow definition, they have rarely found a one-to-one match. Even a defendant with a seemingly straightforward conviction for a misdemeanor domestic violence assault may turn out not to be restricted under § 922(g)(9), if the specific elements under which he was convicted do not match the federal definition. This can make the prospect of charging § 922(g)(9) somewhat daunting, which likely explains why prosecutors prefer to bring felony charges against an individual.

Thankfully, recent court decisions have significantly narrowed the issues attorneys must consider when prosecuting a § 922(g)(9) case. While some questions remain unresolved, prosecutors are more readily able to determine, with some certainty, when a prior domestic violence conviction will restrict an individual under federal law. The screening process will often require more legwork than the average firearms case, and close cases may still generate appellate litigation. However, we owe it to domestic violence victims to find ways to prosecute this dangerous crime.

### A. Domestic violence relationship

The definition of a “misdemeanor crime of domestic violence” in § 921(a)(33)(A) specifically defines the relationship the defendant must have to the victim in the prior case in order for the conviction

to restrict him under § 922(g)(9). The offense, as quoted above, must be “committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” Many states, however, use general assault statutes to prosecute domestic violence crimes, making it impossible to determine the relationship of the parties from the elements of the offense itself.

Courts that have considered this issue have uniformly held that the relationship between the parties need not be an element of the prior offense in order to qualify the prior conviction as a “misdemeanor crime of domestic violence.” *See United States v. Hayes*, 555 U.S. 415, 426 (2009); *see also United States v. Heckenliable*, 446 F.3d 1048, 1051–52 (10th Cir. 2006) (“[T]he use of the singular noun ‘element’ is indicative that the misdemeanor offense requires one element, namely, the use of force.”); *United States v. Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002); *United States v. Meade*, 175 F.3d 215, 218–19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

This is not to say that the relationship between the parties is irrelevant. In order to succeed under § 922(g)(9), the prosecution must prove that the prior conviction involved one of the listed relationships, “but the relationship need not be an element of the underlying statute.” *See United States v. Vinson*, 794 F.3d 418, 420–21 (4th Cir. 2015) (quoting *Hayes*, 555 U.S. at 426). This will be easily done in most cases, as even states that use a general assault statute for domestic violence cases require that an intimate relationship be shown in order to add the “domestic violence” moniker.

## B. Physical force

The only necessary element for a prior offense to qualify under § 922(g)(9), then, is “the use or attempted use of physical force, or the threatened use of a deadly weapon.” 18 U.S.C. § 921(a)(33)(A) (2015). But what qualifies as “physical force” for purposes of this section? Would a misdemeanor assault statute that penalizes causing injury necessarily require use of force as an element? What about a battery statute that referred only to offensive touching? Courts struggled over questions like these for years, but the recent Supreme Court decision in *United States v. Castleman* finally gave a clear answer: “Section 922(g)(9)’s ‘physical force’ requirement is satisfied by the degree of force that supports a common-law battery conviction—namely, offensive touching.” *United States v. Castleman*, 134 S.Ct. 1405, 1410 (2014).

Prior to the *Castleman* decision, some courts had held that misdemeanor assault statutes punishing causation of injury, but silent as to force, would not require using force “as an element,” because it is possible to cause injury through indirect means. The Court dismissed these arguments as facetious, noting that “[t]he common-law concept of ‘force’ encompasses even its indirect application, making it impossible to cause bodily injury without applying force in the common law sense.” *See id* at 1414. Therefore, any misdemeanor domestic violence statute requiring causation or attempted causation of injury would necessarily meet the “physical force” element of § 922(g)(9).

With those two clarifications, the Supreme Court has vastly simplified what was once the most complicated aspect of screening a misdemeanor domestic violence conviction for a § 922(g)(9) case. The Model Penal Code definition of assault (“purposely, knowingly, or recklessly causing bodily injury to another”) and the common law definition of battery (“harmful or offensive contact”) both meet the “physical force” element to qualify as a “misdemeanor crime of domestic violence” under § 922(g)(9). As many state codes are modeled after those sources, the *Castleman* decision should help attorneys successfully prosecute § 922(g)(9) cases.

## C. The “use” of physical force and the *mens rea* requirement

When the Supreme Court closes one door, it often opens another. In *Castleman*, the newly opened door has to do with the *mens rea* required to establish the “use” of physical force as an element in a prior

domestic violence conviction. The Supreme Court unequivocally held that “the knowing or intentional application of force is a ‘use’ of force” sufficient to establish a conviction for “misdemeanor crime of domestic violence” under § 922(g)(9). Therefore, any prior misdemeanor domestic violence conviction that requires intentionally or knowingly causing offensive contact or physical injury will likely suffice for a firearms restriction under § 922(g)(9).

A more complicated question arises, however, in statutes that allow misdemeanor domestic violence convictions for reckless conduct. This question came up in the *Castleman* case in the context of Tennessee’s domestic violence assault statute, which defined “assault” to include “[i]ntentionally, knowingly[,] or recklessly caus[ing] bodily injury to another[.]” See *Castleman*, 134 S.Ct. at 1413 (quoting TENN. CODE ANN. § 39-13-111(b)).

The facts of *Castleman* did not require the court to consider which *mens rea* was sufficient to qualify as a “use” of force in a misdemeanor domestic violence offense because documents from the underlying conviction showed that the use of force was intentional. Rather than simply leave this question open for a future case, however, the Supreme Court discussed the issue in dicta:

It does not appear that every type of assault defined by [Tennessee’s Assault statute] necessarily involves “the use or attempted use of physical force, or the threatened use of a deadly weapon. A threat under [Tennessee’s Assault statute] may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury under [the Assault statute] may not be a “use” of force.

*Castleman*, 134 S. Ct. at 1413–14 (emphasis added). The Court further expounded on the *mens rea* question in an important footnote:

We held in *Leocal* that “use” [of force] requires active employment rather than negligent or merely accidental conduct. Although *Leocal* reserved the question of whether a reckless application of force could constitute a “use” of force, the Courts of Appeals have almost uniformly held that recklessness is not sufficient.

*Id.* at 1414, n.8; see also *Leocal v. Ashcroft*, 543 U.S. 1, 9–13 (2004). The Court then offered a string cite full of circuit decisions that found reckless conduct insufficient to establish a “use” of force. See *Castleman*, 134 S. Ct. at 1414, n.8. The Court concluded its string cite, however, with “[b]ut see *United States v. Booker*, 644 F.3d 12, 19–20 (1st Cir. 2011) (noting that the First Circuit had not resolved the recklessness issue under *Leocal*, but declining to extend *Leocal*’s analysis to § 922(g)(9)).”

At first blush, the Supreme Court may seem to be signaling its intent to categorically bar reckless conduct from qualifying as a “use” of force under § 922(g)(9). Some District Courts addressing the issue after *Castleman* have taken this as a hint. See e.g. *United States v. Smith*, 41 F. Supp. 3d 350, 530 (N.D. Miss. 2014) (finding the government’s failure to show whether the defendant had intentionally or knowingly used force was fatal to its § 922(g)(9) charge). There is also a pre-*Castleman* ruling out of the Ninth Circuit holding that “crimes that involve the reckless use of force cannot be considered crimes of violence.” *United States v. Nobriga*, 474 F.3d 561, 565 (9th Cir. 2006). Like-minded courts will no doubt find ample justification in footnote 8 to extend these rulings post-*Castleman*.

The only Circuit Court to rule on footnote 8 post-*Castleman*, however, has found some room for disagreement. In *United States v. Voisine*, 778 F.3d 176 (1st Cir. 2015), cert. granted, No. 14-10154, 2015 WL 3614365 (U.S. Oct. 30, 2015), the First Circuit overruled a string of district court decisions in Maine that had held reckless conduct insufficient for a crime of domestic violence under § 922(g)(9) in the wake of *Castleman*’s famous footnote.

The First Circuit parsed the footnote very carefully and found little support for the idea that the Supreme Court had definitively spoken. First, “footnote 8 begins by describing the issue as an open question.” See *Voisine*, 778 F.3d at 181. Next, the footnote cites to *Leocal v. Ashcroft*, 543 U.S. 1, 13,

which held the “use of physical force” requires a *mens rea* “higher than negligence,” but had withheld judgment on the issue of recklessness. *See id.* Also, *Leocal*, and nearly all of the other cases cited in Footnote 8, were interpreting the term “physical force” in immigration or sentencing contexts unrelated to § 922(g)(9). In fact, the only case referred to in the footnote that specifically considered the recklessness question under § 922(g)(9), was *United States v. Booker*, in which the First Circuit found reckless imposition of physical force was sufficient to find a “misdemeanor crime of domestic violence.” *See Castleman*, 134 S. Ct. at 1414, n.8 (citing *United States v. Booker*, 644 F.3d 12, 19–20 (1st Cir. 2011)). The First Circuit concluded, “[W]e are aware of no case—including the cases in *Castleman* footnote 8—in conflict with *Booker*’s holding that a reckless misdemeanor assault satisfies § 922(g)(9)’s particular definition of a ‘misdemeanor crime of domestic violence.’ ” *Voisine*, 778 F.3d at 182.

The First Circuit then turned to question of recklessness, which it considered unresolved after *Castleman*, and noted the “particular purpose” of § 922(g)(9) was to “ensure that domestic abusers convicted of misdemeanors . . . are barred from possessing firearms.” *See id.* at 183. The court quoted Senator Lautenberg, who explained during a debate on § 922(g)(9) that the statute was intended to apply to “scenarios without clear intent, in which domestic arguments ‘get out of control’ . . . and one partner will commit assault ‘almost without knowing what he is doing.’ ” *Id.* (quoting 142 Cong. Rec. S10377 (Sept. 30, 1996) (statement of Sen. Lautenberg)). Therefore, “Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes,” including “those states that allow conviction with a *mens rea* of recklessness where recklessness is defined as including a degree of intentionality.” *See id.* The court found that Maine’s definition of recklessness, in particular, “includes an element of intentionality and specificity” because it requires a person to “consciously disregard a risk that [the person’s] conduct will cause [the result].” *See id.* at 206. Recklessness “includes a volitional, active decision, which necessarily involves a higher degree of intent than negligent or merely accidental conduct.” *Id.* at 184 (quoting *Leocal*, 543 U.S. at 9). “[Section] 922(g)(9) is meant to embrace those seemingly minor predicate acts, occurring sometimes in moments of passion, where the perpetrator consciously disregarded a risk in light of known circumstances.” *Id.* Therefore, the First Circuit concluded that “reckless assault in Maine is use of physical force within the meaning of misdemeanor crime of domestic violence.” *Id.*

The *Voisine* decision also benefits prosecutors located outside of Maine, as the dissent points out that Maine’s definition of recklessness is actually quite conventional and “materially indistinguishable from the definition of recklessness in the Model Penal Code.” *Id.* at 202. Indeed, many states define recklessness as consciously or deliberately disregarding a known risk. The logic used in *Voisine*, then, would seem to apply in jurisdictions that have the same or similar definitions of recklessness.

For now, this question remains unresolved everywhere except the First Circuit. Until a Circuit split necessitates a definitive ruling from the Supreme Court, federal prosecutors may freely charge § 922(g)(9) cases based on misdemeanor convictions that require only a reckless *mens rea*. If such charges generate appellate litigation, the *Booker*, *Voisine*, and *Castleman* decisions all emphasize that domestic violence offenses are different from other “crimes of violence” in the Federal code. Prosecutors should be able to articulate the special dangers of domestic violence to help convince appellate courts that including reckless uses of force is appropriate in the context of § 922(g)(9).

#### D. Divisible statutes, *Shephard* documents, and the modified categorical approach

In the wake of *Castleman*, the ideal state misdemeanor statute for purposes of § 922(g)(9) would prohibit the intentional infliction of injury or offensive contact on a person in a qualifying relationship, and nothing further. A person with a domestic violence conviction under such a statute would categorically be prohibited from possessing firearms under § 922(g)(9) and federal prosecutors could file any case where such a person later possessed a firearm, without doing any additional legwork. Of course, the consequence of such a narrow statute is that other types of assault may go unpunished. As states wish to prohibit multiple types of assault—and generally do not write up their criminal codes with federal

firearms restrictions in mind—most state statutes will be broader than the federal ideal. How can a prosecutor screening a § 922(g)(9) case determine whether a prior conviction qualifies, when the elements of the offense are broader than those included in the federal definition of “misdemeanor crime of domestic violence”?

The Court briefly addressed this issue in *Castleman*. As previously discussed, the Tennessee assault statute at issue in *Castleman* allowed convictions for intentionally or recklessly causing injury to another. *See United States v. Castleman*, 134 S. Ct. 405, 1413 (2014) (quoting Tenn. Code Ann. § 39–13–101(a)). It also provided alternative elements of assault if a person “intentionally or knowingly caused another to reasonably fear imminent bodily injury.” *Id.* Therefore, the Tennessee Assault statute, like most state statutes, is not a perfect match for the federal definition of a “misdemeanor crime of domestic violence.” The parties in *Castleman* agreed however, that the Tennessee statute was *divisible*. As such, the modified categorical approach laid out in *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013), could be used to determine whether specific records from the prior conviction could clarify the elements under which Mr. Castleman had been convicted. *See Castleman*, 134 S. Ct. at 1414. The indictment under which Mr. Castleman had pleaded guilty clearly stated he had “intentionally or knowingly caused bodily injury” to the mother of his child. *See id.* Therefore, the *Descamps* analysis was straightforward, and Mr. Castleman’s prior conviction was found to meet the federal elements of a misdemeanor crime of domestic violence.

Unfortunately, as most federal prosecutors can attest, applying the modified categorical approach is rarely this simple. Determining whether a state statute is divisible can be confusing, and even if it is divisible, it can be difficult to track down records that conclusively establish which form of the statute the defendant pleaded guilty to. Nonetheless, this is exactly the analysis we must go through in screening potential § 922(g)(9) cases.

Boiled down, a statute is divisible when it explicitly lists alternative elements or means of commission. With divisible statutes, it is the district court’s task to determine which offense was the basis of the defendant’s prior conviction. In order to do this, a court may consult the *Shepard* documents, which include the indictment, jury instructions, plea colloquy, and plea agreement.

In contrast, where a statute does not explicitly identify alternative means of committing the offense, but its broad wording encompasses alternative means of committing the offense, the statute is indivisible, and the court may look *only* to the statutory elements to determine whether the offense matches, or is narrower than, the federal elements at issue.

In a big victory for prosecutors, the Fourth Circuit recently ruled that North Carolina’s misdemeanor Assault and Battery statute was divisible, and that the “completed battery” form of the offense amounted to a misdemeanor crime of domestic violence under § 922(g)(9) and *Castleman*. *See United States v. Vinson*, 794 F.3d 418, 431 (4th Cir. 2015). The North Carolina Assault and Battery statute at issue in *Vinson* laid out multiple versions of the crime in different subsections. *See id.* at 421. To complicate matters further, the specific subsection under which the defendant pleaded guilty prohibited assaulting a female, but did not define the term “assault.” *See id.* The Fourth Circuit looked to North Carolina precedent and jury instructions and found that North Carolina essentially used three different definitions of assault in different types of cases. *See id.* at 428–29. Each definition required proof of a different set of elements requiring different jury instructions, so the court deemed the statute divisible. *See id.*

“General divisibility, however, is not enough; a [statute] is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the [crime] may be divided constitutes, *by its elements*, [a qualifying predicate offense].” *Id.* at 422, quoting *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013). *See also Descamps*, 133 S.Ct. at 2285. In North Carolina, one of the three accepted definitions of assault essentially amounted to a common law battery. *See Vinson*, 794 F.3d at 421. While prior Fourth Circuit decisions had held battery was not severe enough

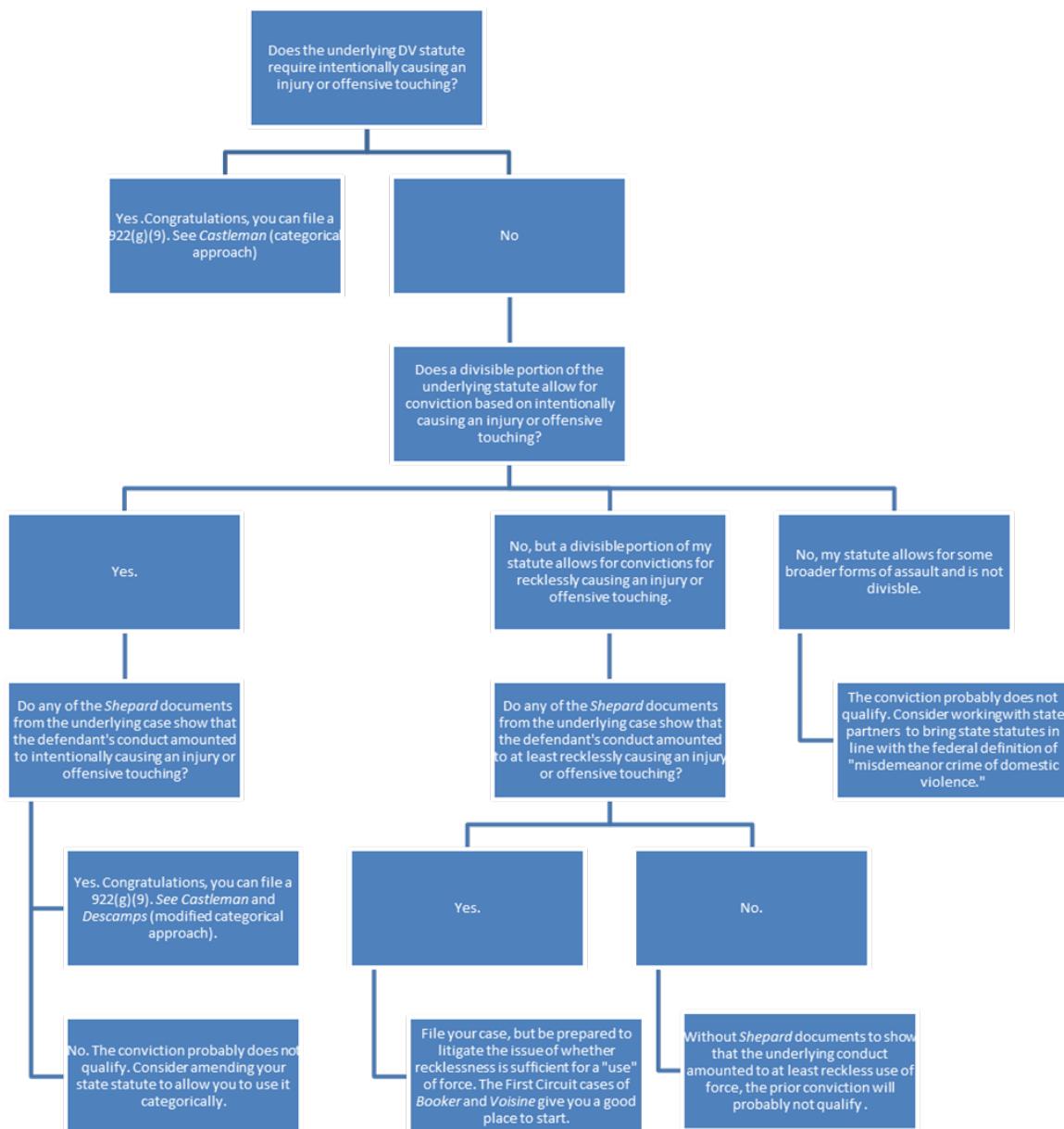
to qualify as a misdemeanor crime of domestic violence, the Fourth Circuit recognized that the Supreme Court explicitly held otherwise in *Castleman*. See *id.* at 422. Therefore, the statute was divisible and the modified categorical approach could be used to determine if the elements the defendant was convicted under amounted to at least common law battery. The charging document showed the defendant was charged with deliberately striking his girlfriend in the face, so the conviction was sufficient for a firearm restriction under § 922(g)(9). The *Vinson* case illustrates that it is possible to convince a court that a common law statute is divisible under *Descamps*. Even with a statute that did not expressly include different sets of elements for an offense, the court was able to find divisibility based on elements laid out in prior caselaw, jury instructions, and common law definitions of undefined terms. Prosecutors screening § 922(g)(9) cases should therefore be unafraid to aggressively argue for divisibility in close cases, whenever the *Shepard* documents and the caselaw and jury instructions can show that an appropriate set of elements were at issue in the prior conviction.

### **III. Conclusion**

In order to file a § 922(g)(9) case, prosecutors must show that the underlying conviction involved the use of force by an offender against a victim in a qualifying relationship. The qualifying relationship need not be a specific element of the underlying offense, but can be established by other means. The “use of force” means at least an offensive touching, and any causation of injury will qualify. One remaining wrinkle has to do with the *mens rea* required to show a “use” of force in the prior conviction. The only circuit court to rule on this issue post-*Castleman* held that reckless conduct is sufficient, but the issue has yet to be definitively resolved by the Supreme Court. In the meantime, prosecutors may freely file § 922(g)(9) cases based on convictions for reckless conduct and prepare to litigate the *mens rea* question on appeal. Finally, if any of these required elements cannot be shown categorically by the fact of conviction, in the right case prosecutors may argue the statute is divisible and use documents from the underlying case to show a qualifying set of elements were at issue.

Although the issues are narrowing, screening a § 922(g)(9) case will still require more thought and effort than the average firearms offense. The fight is worth it, as our continued efforts to keep firearms out of the hands of domestic violence offenders will help save lives. ♦♦

**Figure 1: Flowchart**



## ABOUT THE AUTHORS

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# Making Body Armor Provisions Bulletproof: Closing Loopholes for Dangerous Drug and Firearms Offenders

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The ongoing criminal proliferation of body armor, including bulletproof vests, poses a serious threat to law enforcement officers and community safety.

The federal statute at 18 U.S.C. § 931 limits possession of body armor, and the U.S. Sentencing Guidelines (Guidelines) apply enhanced sentences for “us[ing]” armor in connection with crimes of violence or drug-trafficking crimes. But the narrow scope of § 931 allows many dangerous individuals, such as convicted drug traffickers, to possess body armor. And although armored firearms possessors are a considerable public threat even if they have *not* committed a violent or drug-trafficking crime, the Guidelines do not permit enhanced sentencing for individuals who possess armor in connection with possessory firearms offenses under 18 U.S.C. § 922.

Two common sense proposals can plug these loopholes.

## I. The bane of body armor

Federal statute defines “body armor” as “any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.” 18 U.S.C. § 921(a)(35) (2015).

Body armor provides necessary protection for law enforcement officers. But armor in the hands of criminals is a menacing instrument. As noted in a current textbook, “If police officers are fired upon by a criminal wearing body armor, it can be very difficult for them to prevent danger to themselves and the public with return fire intended to stop the assailant. The challenges are enhanced by the spread of high-powered weapons that may leave police officers outgunned by criminals.” GEORGE F. COLE ET AL., THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 277 (13th ed. 2013). United States Attorney Peter Neronha (R.I.) has stated that one armed career criminal’s possession of a bulletproof vest “could have only one purpose—to cause as much harm as possible to others, while remaining in relative safety.” Press Release, U.S. Att’y’s Office, Dist. R.I., Armed Career Criminal Sentenced to 15 Years in Federal Prison (July 10, 2013), <http://www.justice.gov/usao/ri/news/2013/july2013/lee.html>.

One of the most infamous recent acts of domestic carnage involved body armor. James Holmes was clad in full black body armor when he entered an Aurora, Colorado, movie theater on July 20, 2012, and fatally shot 12 victims and wounded 70 others. Maria L. La Ganga, *James Holmes is spared from death penalty in Colorado theater rampage*, L.A. TIMES, Aug. 7, 2015, at 1. Astonishingly, some police arriving at the crime scene mistook Holmes for a fellow officer because he looked like he was uniformed in SWAT gear. Jessica Fender & John Ingold, *Testimony shows chaotic scene at Century Aurora 16*,

DENVER POST, Jan. 8, 2013, at 3A. A local jury found Holmes guilty of 165 counts of murder, attempted murder, and explosives offenses. On August 26, 2015, a state court judge sentenced Holmes to 12 consecutive life sentences, plus 3,318 years. Elizabeth Hernandez & John Ingold, *Judge imposes 12 life sentences plus 3,318 years on Aurora theater shooting gunman*, DENVER POST, Aug. 27, 2015, available at 2015 WLNR 25670869.

Another disturbing body armor incident occurred recently in Garland, Texas. On May 3, 2015, Elton Simpson and Nadir Soofi were wearing armor when they fired their assault rifles at a crowd attending a controversial exhibit depicting cartoons of the Prophet Muhammad. The shooters wounded a security guard, who survived. A savvy nearby police officer quickly returned fire and killed the shooters before they could do further harm. Tristan Hallman & Ray Leszcynski, *Police: Men killed in Garland shooting had assault rifles, body armor*, May 4, 2015, available at 2015 WLNR 13012018.

Prosecutions from across the U.S. Attorney community demonstrate the strong connection between firearms, drug-trafficking, and possessing body armor, and underscore the dangerousness of armored offenders:

- In the Northern District of Ohio, Richard Schmidt—previously convicted of manslaughter—pleaded guilty to two § 922(g) offenses, possession of body armor under 18 U.S.C. § 931, and trafficking in counterfeit goods. During the investigation, law enforcement seized 18 firearms, over 40,000 rounds of ammunition, and body armor that Schmidt had possessed. According to news reports, law enforcement agents also seized some of Schmidt’s writings demonstrating his intent to start a “race war” and assassinate individuals solely based on their race, religion, or ethnicity, though Schmidt’s defense lawyer denied Schmidt had those sinister motives. John Caniglia, *Toledo man was set for race war, prosecutor says*, CLEVELAND PLAIN DEALER, Nov. 24, 2013, at A5. On December 19, 2013, Schmidt was sentenced to 71 months in prison. Press Release, FBI, Toledo Man Sentenced to Nearly Six Years in Prison for Possession of Firearms, Ammunition, and Body Armor (Dec. 16, 2013), available at <https://www.fbi.gov/cleveland/press-releases/2013/toledo-man-sentenced-to-nearly-six-years-in-prison-for-possession-of-firearms-ammunition-and-body-armor>.
- In the District of Alaska, state troopers executed a felony-probation warrant for former athlete Brandon Moen. Incident to his arrest, they discovered a loaded Ruger .380 caliber semiautomatic pistol and \$2,599 in U.S. currency in Moen’s attire. The troopers later executed a search warrant of the vehicle in which Moen was arrested, and seized methamphetamine, syringes, hundreds of unused gram-sized baggies used for distributing narcotics, four grams of 99.4 percent pure heroin, a digital scale, a pistol magazine, ammunition, and a bulletproof vest. On April 11, 2013, Moen was sentenced to 96 months. Press Release, USAO-AK, Former marathon runner and Olympic hopeful sentenced to eight years in prison (Apr. 11, 2013), available at [http://www.justice.gov/usao/ak/news/2013/April\\_2013/Brandon%20Wayne%20Moen.html](http://www.justice.gov/usao/ak/news/2013/April_2013/Brandon%20Wayne%20Moen.html).
- In the District of New Mexico, a federal jury found Nathan Archuleta—a Tortilla Flats Sureño gang member who had a prior felony conviction for assaulting a police officer—guilty of narcotics and firearms offenses. The trial evidence established that in July 2009, Archuleta conspired with others to smuggle methamphetamine into the United States from Mexico by using women who concealed the drugs in their body cavities. On other occasions in 2009, Archuleta possessed methamphetamine with intent to distribute it. In the events leading to his arrest on November 5, 2009, Archuleta refused to pull over when a New Mexico State Police officer tried to stop him for a traffic violation. A chase ensued, and officers dispatched a “spike strip” that caused Archuleta to lose control of his car and crash. Upon his arrest, Archuleta possessed two loaded guns and was wearing body armor that had been stolen from the Central New Mexico Correctional Facility. On January 12, 2012, a federal judge sentenced Archuleta to 30 years in prison, plus an additional 18 months for a violation of supervised release in a prior federal case.

Press Release, USAO-NM, Gang Member from Farmington Sentenced to 30 Years for Federal Drug Trafficking and Firearm Conviction (Jan. 12, 2012), *available at* [http://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2012-01-12\\_archuleta\\_pr.pdf](http://www.justice.gov/sites/default/files/usao-nm/legacy/2013/04/15/2012-01-12_archuleta_pr.pdf).

- In the District of Connecticut, Vincent Nelson was a drug-trafficking member of a violent gang that controlled two Hartford neighborhoods. A search warrant executed at Nelson's residence yielded the seizure of three handguns, assorted ammunition, approximately 500 grams of crack cocaine, approximately 170 grams of cocaine, over \$45,000 cash, and body armor. Nelson pleaded guilty to one count of conspiracy to possess with intent to distribute crack cocaine and one count of possession of a firearm and ammunition by a convicted felon. On February 4, 2015, he was sentenced to 90 months in prison. Press Release, USAO-CT, Hartford Man Sentenced to More Than 7 Years in Prison for Drug Distribution, Illegal Gun Possession (Feb. 5, 2015), *available at* <http://www.justice.gov/usao-ct/pr/hartford-man-sentenced-more-7-years-prison-drug-distribution-illegal-gun-possession>.
- In the Northern District of Iowa, Ashkelon Barrett—a prior domestic violence convict—pleaded guilty to one count of unlawful possession of a firearm under 18 U.S.C. 922 § (g)(9) and distribution of methamphetamine. Barrett had attended two parties that resulted in violence. During the first party, on January 29, 2007, he wore a bulletproof vest, carried a loaded 9mm Glock, and supplied methamphetamine to his two friends. A fracas occurred, and he struck one friend in the head with the gun. The next day, Barrett attended another party that went awry, and shot at another friend's head. Following his arrest and guilty plea, the district court applied a four-level sentencing enhancement based on his “use” of the body armor while distributing methamphetamine at the first party, calculated his Guidelines range at 84-105 months, and varied upward to impose a 120-month sentence. Barrett appealed, claiming he did not use the armor, but “merely wore the vest as a party gag.” The Eighth Circuit found “meritless” Barrett’s claim that he wore the armor as “fashion statement,” and affirmed the 120-month sentence. *United States v. Barrett*, 552 F.3d 724, 725-26, 727 (8th Cir. 2009).
- In the Eastern District of Michigan, prior felon Michael Keller, who trafficked in heroin, powder and crack cocaine, and marijuana, pleaded guilty to gun and drug charges and admitted he had agreed to murder a federal witness. From 2007-09, he sold nine firearms, a live grenade, and body armor to an undercover federal agent. In June 2009, the agent informed Keller that a witness was prepared to testify against him before a grand jury. Keller ultimately agreed to kill the witness for \$800 and several cartons of cigarettes. On July 9, 2010, he was sentenced to 14 years in prison. Press Release, FBI, Detroit Man Sentenced to 14 Years’ Imprisonment on Gun, Drug Charges (July 9, 2010), *available at* <https://www.fbi.gov/detroit/press-releases/2010/de070910b.htm>.

Despite the exceedingly dangerous nature of armored criminals, federal provisions to prohibit and punish body armor offenders are weak. Without adequate legal tools, federal prosecutors are hamstrung to address this violent threat.

Two proposals—one to strengthen 18 U.S.C. § 931, the other to amend USSG § 2K2.1—could provide the proper statutory scope, deterrence effect, and adequate punishment to combat armored offenders.

## **II. Strengthening 18 U.S.C. § 931 to keep body armor out of drug traffickers’ hands and provide adequate punishment**

Purchasing, owning, and possessing body armor by violent felons violates § 931. This provision applies only to felons whose prior felony was a “crime of violence,” as defined by 18 U.S.C. § 16, or by a state offense whose elements would constitute a “crime of violence” under § 16. 18 U.S.C. § 931(a)(1)-(a)(2) (2015). Numerous cases nationwide establish that body armor is a tool of the drug-trafficking trade,

as demonstrated in the prosecutions of Moen, Archuleta, Nelson, and Keller, described above. But inexplicably, convicted drug traffickers without prior violent felonies cannot be prosecuted for buying, owning, or possessing armor under § 931.

This loophole can be fixed with a discreet amendment to extend § 931's prohibitions to individuals previously convicted of a "serious drug offense," as defined under the Armed Career Criminal Act at 18 U.S.C. § 924(e)(2)(A). This subsection defines a serious drug offense as either: (i) "an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law"; or (ii) "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law."

Amendment language could be added to § 931(a), as proposed in the italicized language below:

(a) In General.—Except as provided in subsection (b), it shall be unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is—

(1) a crime of violence (as defined in section 16);

(2) an offense under State law that would constitute a crime of violence under paragraph (1) if it occurred within the special maritime and territorial jurisdiction of the United States; or

(3) *a serious drug offense (as defined in section 924(e)(2)(A)).*

The affirmative defense under the existing § 931(b) could remain unchanged.

Another problem with § 931 is the paltry sentence provided for violating it. Under 18 U.S.C. § 924(a)(7), "Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both." Consequently, the sentencing guideline at USSG § 2K2.6(a), which applies to a § 931 violation, provides a base offense level of only 10. By raising the statutory maximum sentence to at least five years, with a commensurate sentencing Guidelines range, a prohibited armor possessor could be further deterred from possessing armor in the first instance, and receive a more potent punishment for violating the statute.

### **III. Amending USSG § 2K2.1 to enable just punishment for possessing armor in connection with § 922 offenses**

The advisory federal sentencing Guidelines could also be strengthened so armored firearms possessors are exposed to a tougher, more appropriate sentencing range. Amending USSG § 2K2.1 to provide a two-level enhancement for possessing body armor in connection with possessory firearms offenses would ably accomplish this purpose.

The current Guidelines provide various enhancements for using or possessing armor in connection with other offenses, but the existing Guidelines are too narrow. For example, under "Role in the Offense" calculations under USSG § 3B1.5, if a conviction for a "drug trafficking crime" (as defined by 18 U.S.C. § 924(c)(2)) or "crime of violence" (as defined by 18 U.S.C. § 16) involved the "use" of body armor, the range for those offenses is increased by up to four levels. The application notes explain that "'Use' does not mean mere possession (e.g., 'use' does not mean that the body armor was found in the trunk of the car but was not used actively as protection)." U.S. SENTENCING GUIDELINES MANUAL § 3B1.5 cmt. n.1 (2014). Thus, this increase applies only when the defendant is convicted of a requisite violent or drug-trafficking offense, and only when the defendant "used" —not merely possessed—the

armor in that offense. This guideline does not apply to possessory firearms offenses under 18 U.S.C. § 922—obviously dangerous offenses, but not qualifying crimes of violence or drug-trafficking offenses. Therefore, § 3B1.5 is insufficient; an armored firearms possessor is extremely dangerous regardless of whether he has used the armor in connection with a violent or drug-trafficking crime. In fact, Aurora theater killer James Holmes had no prior criminal record before his armored rampage. Erica Goode, Serge Kovaleski, Jack Healy & Dan Frosch, *Before Gunfire, Hints of ‘Bad News,’* N.Y. TIMES, Aug. 26, 2012, available at [http://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html?\\_r=0](http://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html?_r=0); Eileen Sullivan, *Lone gunman the bane of police: Until an assailant acts, his actions are generally legal and give no indications of intent,* ST. LOUIS POST DISPATCH, July 23, 2012, at A6.

Another guideline at USSG § 2K2.1(b)(6)(B) provides a four-level enhancement for a § 922 offense when the defendant has “used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.” U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) (2014). Arguably, this guideline could apply if the defendant possessed the firearm or ammunition in connection with a § 931 offense. But § 931 currently applies only to violent felons, and even if § 931 were amended to prohibit drug trafficking as well as violent felons, a § 922 offender would still need the requisite criminal history to qualify as a § 931 offender. Because a slew of dangerous, sometimes psychopathic individuals—such as domestic-violence misdemeanants, drug abusers, and mentally-ill individuals without prior felonies—could not be prosecuted for a § 931 offense, § 2K2.1(b)(6)(B) would not apply to them.

Further, even if the defendant *does* qualify as a § 931 offender, at least one court has refused to apply the § 2K2.1(b)(6)(B) enhancement on the basis that the defendant possessed a firearm in connection with a § 931 offense. In a case from the Southern District of West Virginia, the U.S. Marshals Service forcibly entered a defendant’s apartment to arrest him, and found him possessing multiple firearms, ammunition, and body armor. A prior felon, the defendant pleaded guilty to one § 922(g)(1) count. At sentencing, AUSAs from the USAO S.D.W.Va. argued that he should be subject to the four-level § 2K2.1(b)(6)(B) increase for possessing the firearm in connection with a § 931 offense, and that his offense level should be 27 (range of 87-108 months). The court disagreed, concluded the applicable level remained at 23 (57-71 months), and imposed a variance of 48 months. Had the proposed two-level enhancement for possessing armor in connection with the firearms offense applied to the defendant, his offense level would have been 25, with a Guidelines range of 70-87 months. That applicable range could have made it more difficult for the court to vary so far down to 48 months when imposing the sentence. Email from Steven Loew, AUSA, S.D.W.Va., to author (July 26, 2013) (on file with author).

These shortcomings in existing Guidelines call for an amendment providing a two-level body armor enhancement for possessory firearms crimes under § 2K2.1. This amendment would increase the sentencing range for firearms defendants who are convicted only for a possessory offense, and who do not have the requisite criminal history for charging § 931. Even where a defendant does have a prior violent felony and § 931 could be charged, the amendment would provide another express tool for charging or plea considerations, and increase the Guidelines range commensurate with the heightened risk posed by armor-possessing defendants. In addition, the amendment would apply more broadly to possession—and not only to use—of the armor.

The proposed language for the amendment could be inserted under the “Specific Offense Characteristics” at a new § 2K2.1(b)(8), and read:

- (8) If the defendant used or possessed body armor in connection with the offense, increase by 2 levels.

To prevent unfair “over enhancement,” an application note to the new guideline could provide that if the defendant receives an enhancement under USSG § 2K2.1(b)(6)(B) —for using or possessing any firearm or ammunition in connection with a § 931 offense, or possessing or transferring any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with a § 931 offense—the new enhancement would not apply. The new enhancement could also not apply if the defendant is subject to a two- or four-level adjustment under § 3B1.5 for using body armor in connection with a crime of violence or drug-trafficking crime.

One case from the District of Maine demonstrates how the proposed enhancement at new § 2K2.1(b)(8) could ensure that armored criminals receive just punishment. In November 2008, ATF agents executed a search warrant at prior felon David Widi’s home in Eliot, Maine, and discovered seven firearms, 2,773 rounds of ammunition, marijuana plants, and body armor. Because Widi’s prior felony was not a crime of violence, the U.S. Attorney’s office could not charge him under § 931 for possessing the body armor. A jury later found Widi guilty of violating § 922(g)(1). On October 13, 2010, the court sentenced Widi to the high end of his applicable sentencing range of 87-108 months. The court considered numerous factors, including Widi’s perjured testimony and his threats to a witness during the trial. A two-level body armor increase under the proposed § 2K2.1(b)(8) could have provided an even more potent range of 108-120 months for this notorious felon. Press Release, USAO-ME, Eliot Man Sentenced on Federal Firearms and Marijuana Charges (Oct. 14, 2010) (on file with author); Email from Darcie McElwee, AUSA, Me., to author (July 26, 2013) (on file with author).

## IV. Conclusion

Body armor in the hands of dangerous drug and firearms offenders threatens the safety of police officers and innocent civilians. By prohibiting drug trafficking convicts from possessing body armor and increasing the penalties under 18 U.S.C. § 931, and by providing an enhanced sentence for armored, unlawful gun possessors under USSG §2K2.1, lawmakers can make the statute’s prohibitions more meaningful, and ensure a just Guidelines range for a pernicious class of public menaces. These proposed amendments should not be controversial—and they can save lives. ♦♦

## ABOUT THE AUTHOR

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# Unfinished Lower Receivers

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Wal-Mart, the nation's largest seller of firearms, may be phasing out sales of AR-15-type rifles, but there are still plenty of ways to get one. One increasingly popular way is to make your own. Just as home improvement stores and Web sites have flooded the market to help the do-it-yourself homeowner, businesses are moving to help and profit from the do-it-yourself firearms enthusiast.

The key piece that any do-it-yourself firearm maker needs is the frame or receiver of the firearm, the heart of the completed, functional firearm that contains the hammer, firing mechanism, and bolt or breechblock. In fact, the lower receiver of an AR-15-type firearm is so important that it is, by itself, defined as a firearm under the Gun Control Act. As a firearm, a fully machined AR-15-type lower receiver is subject to all Gun Control Act requirements relating to manufacture and sale. But an AR-15-type lower receiver that has no machining of any kind in the fire-control cavity, and no drilling or indexing for the trigger, hammer, or selector pin, generally is not a firearm and would not be subject to Gun Control Act requirements relating to manufacture or sale.

Which side of that line a particular lower receiver product falls on determines the manner in which it can be sold and who can sell it. Relatedly, there are important distinctions between who can take the lower receiver product across that line and how the lower receiver product crosses that line. Furthermore, not all of the self-made complete, functional firearms will be legal, not all self-makers will be able to legally possess a firearm, and not all of the processes employed to complete the lower receiver will be legal. Unravelling and addressing these legal issues will be important for federal prosecutors in the coming years. If you are faced with such a case, reach out to your local U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) field office, and particularly to your local ATF Counsel—their assistance can be invaluable.

## I. Introduction to the AR-15

The AR-15-type rifle is the most common type of self-made firearm. A true "AR-15" is made by Colt Industries and is the civilian semi-automatic version of the M-16 machine gun used by the United States military. However, dozens of companies have made variants of the AR-15 under their own product names. Thus, throughout this article, I will refer to this type of firearm as an "AR-15-type."

**Figure 1:** The following photo is of a Bushmaster AR-15-type rifle:



Property of  
The Bureau of Alcohol, Tobacco, Firearms and Explosives

## **II. The legal background**

The common understanding of a “firearm” is similar to its definition in Title 18—that is, “any weapon [] which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C.A. § 921(a)(3)(A) (2015). A completed, functioning firearm is depicted in the photograph above. This completed, functioning firearm is made up of many components, including the lower receiver, the upper receiver, the barrel, and the buttstock. Within these components are dozens of other, smaller parts.

The key part, or heart, of any completed, functional firearm is the frame or receiver. It is “that part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” 27 C.F.R. § 478.11 (2014). In fact, the Gun Control Act includes such a “frame or receiver” in the definition of a firearm. 18 U.S.C.A. § 921(a)(3)(B) (2015). Thus, the frame or receiver of a firearm is, itself, a firearm and is subject to all rules and restrictions applicable to firearms, including the requirements of having manufacturer’s or importer’s markings and bearing a serial number. It may not be sold without a completed ATF Form 4473 or background check.

**Figure 2:** *The following photo shows an unfinished lower receiver:*



Individuals may generally sell and purchase every other part of the completed functional firearm, as depicted in Figure 1 above, without restriction. Thus, the key piece to self-building a firearm is the lower receiver.

## **III. The desire for a self-made firearm and the industry response**

Some firearms enthusiasts make their own firearms as a hobby. Others make firearms because they prefer that the guns not have serial numbers and, therefore, be untraceable. For others, especially felons or other prohibited persons, the desire is much more sinister.

To buy a completed lower receiver from a Federal Firearms Licensee, a purchaser must go through the same process as they would to purchase a completed, functioning firearm. Additionally, the lower receiver must be marked and serialized. This process is typically too time-intensive for many purchasers. Alternatively, an individual could buy raw aluminum and manufacture it to function as a

lower receiver. The latter option, however, is nearly impossible, even for the strongest firearms enthusiast or machinist.

Many sellers have formed a compromise between the two options by selling partially machined, or “80%,” lower receivers (it is important to note that “80% lower receiver” is industry jargon, and the ATF does not endorse or use the term or other similar terms). These types of firearms are “blanks” or castings of an AR-15-type lower receiver that are partially milled, as shown in the photo above.

Even though this item could never really be anything but an AR-15-type lower receiver, it is not yet a firearm because the fire-control cavity has not been machined.

**Figure 3:** *The following photo shows the difference in the fire-control cavity and other machining from left to right:*



#### IV. ATF’s response

Apart from the authority discussed in Section II, *supra*, there are no statutory or regulatory provisions that govern the classification of AR-15 type firearms. Instead, the ATF makes a case-by-case analysis based on a Technical Bulletin, and takes the general position that an AR-15-type blank is classified as a firearm when it has been indexed for, or machined in, the fire-control recess area.

This general approach is outlined in ATF Firearms Technology Branch Technical Bulletin 14-01, issued November 1, 2013. ATF states that “an AR-15 type receiver which has *no machining of any kind performed in the area of the trigger/hammer (fire-control) recess (or cavity)* might not be classified as a firearm.” (Emphasis in original). An unfinished receiver “could have all other machining operations performed” but “must be completely solid and un-machined in the fire-control recess/cavity area.”

For a determination whether a lower receiver product is, in fact, a firearm, a manufacturer submits a sample lower receiver to ATF’s Firearms Technology Branch in Martinsburg, West Virginia. The Firearms Technology Branch will examine the proposed lower receiver and make a determination. Basically, any modification, or even indexing of the fire control cavity, will cause the lower receiver to be determined to be a firearm. A company with a negative determination—that is, a determination that the sample is not a firearm—may sell the lower receiver free from the requirements of the Gun Control Act.

#### V. The process of finishing the lower receiver

Individuals can order partially completed AR-15 type lower receivers simply by entering the term “80% lower receiver” into a search engine and browsing among the many online firearms accessories dealers selling partially completed receivers. Once the purchaser makes sure that the dealer

has a negative determination letter from the ATF, for as little as \$35, he or she can order and receive a partially completed AR-15 type lower receiver. With a few other tools, the purchaser can self-complete the lower receiver.

Once the purchaser receives the partially completed AR-15 type lower receiver, he or she must excavate the fire-control cavity and drill the holes for the selector pin, the trigger pin, and the hammer pin. There are various ways to do this: at the more entry-level end of the spectrum, this can be done with a jig, a few drill bits, a couple of carbide end mills, a drill or drill press, eye protection, and cutting fluid or lubricant.

**Figure 4:** The following photo shows an unfinished lower receiver in a jig and ready to be machined:



Once the purchaser has the necessary tools, supplies, and lower receiver, he is ready to begin by drilling some small, shallow guide holes with a smaller drill bit, and then a series of other holes before clearing out more of the cavity with a larger drill bit. At this point, by putting drill to the fire-control cavity and altering the fire control cavity area in any way, the lower receiver is considered a “firearm,” even though this receiver could not actually expel a projectile by means of an explosive if combined with an upper receiver and other parts.

After the initial drilling of the fire-control cavity, the purchaser must turn the jig and lower receiver on its side and drill the selector, hammer, and trigger pin holes. The fire-control cavity is complete once the purchaser slowly and carefully mills the cavity with end mills.

**Figure 5:** The following photo shows a lower in that long, slow milling process:



By the end of the process, the purchaser has a completed lower receiver. At that point, he or she can order a lower receiver parts kit, an upper receiver, barrel, and other parts necessary to assemble a completed firearm that will expel a projectile by an explosive. All of these accessories are readily available, and the purchaser will not be required to go through a background check to self-complete a firearm. Additionally, the purchaser will not have been required to file an ATF Form 4473 or any other state forms or process, the quality and reliability of the firearm is completely unknown, and the firearm has no serial number or any other manufacturer's mark. It is completely untraceable, a "ghost gun," and perfectly legal under federal law.

## **VI. The business of self-made firearms**

While you can make your own firearm, it is illegal to engage in the business of making such firearms unless you have a license. 18 U.S.C.A. § 922(a)(1)(A) (2015). As applied to a manufacturer of firearms, the term "engaged in the business" means "a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured." *Id.* § 921(a)(21)(A). Clearly a group of people working together to mill out partially completed lower receivers into completed lower receivers and selling them are engaged in the business of manufacturing and dealing firearms. The lure of these firearms is strong in the firearms community, so ingenuity is applied to finding ways around the law.

One method of attempting to skirt the law is to hold "build parties." These commonly occur when people show up with their own partially completed lower receivers or purchase them on-site. The "customers" then bring their own tools or use tools provided by the "host," and follow the "host's" instructions and guidance to finish milling-out their lower receivers. ATF has determined that this practice constitutes engaging in the business of manufacturing firearms.

Other companies have sold the partially completed lower receivers and then "rented" time on their machining equipment to customers. ATF has determined this practice also constitutes engaging in the business of manufacturing firearms.

Other manufacturers have attempted creative work-arounds, including the "backfill" method and the "build around" method. The "backfill" method involves making a completely milled lower receiver and then filling in the fire control cavity with a "biscuit" of another material that the purchaser can more easily mill out. ATF has determined a lower receiver made in this way is a firearm because that "biscuit" indexes the fire-control cavity. The "build around" method begins with that biscuit of another material formed into the shape of the fire control cavity, with the rest of the lower receiver formed around it. ATF has determined that a lower receiver made in this way is also a firearm as, again, the biscuit indexes the fire control cavity.

## **VII. Conclusion**

Self-made firearms present a challenge to the continued regulation of firearms, and they are likely to become more prevalent. The manufacturing method described above is quickly becoming obsolete, replaced by a tabletop mill that can be purchased for about \$1,000 and can cheaply and easily be programmed to machine an AR-15-type lower receiver automatically. Additionally, as 3-D printing technology develops, self-made non-metallic polymer receivers will be possible.

All of these self-made firearms will be unserialized and untraceable. If one is recovered at a crime scene, there is likely no way to trace it, and a valuable law enforcement tool is thus lost. As the firearm is untraceable and unserialized, it is easier to make into a National Firearms Act weapon, such as a short-barrel rifle or a machine gun. With no background check required to purchase an unfinished lower

receiver, this presents an attractive avenue to a felon or other prohibited person to obtain a firearm “under the radar.” Furthermore, for federal prosecution purposes, determining the interstate nexus of such a firearm may well be impossible.

At the same time, it is completely legal for a law-abiding citizen to manufacture his or her own firearm. It is also lawful to later sell that firearm without a manufacturer’s mark or serial number, so long as it was originally made for personal use. Addressing the clear public safety challenges from these firearms while respecting the rights of law abiding citizens will be a challenge going forward. ♦

## ABOUT THE AUTHOR

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*The author thanks ATF Los Angeles Field Office Division Counsel, Paul Ware, for his assistance in preparing this article.*

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# ATF Crime Gun Intelligence Centers

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## I. Introduction

Modern technology is a crucial tool in fighting crime. The power of new technology to protect the public comes from using technology alongside, and in close coordination with, smart investigation techniques and old-fashioned shoe leather. The Denver Crime Gun Intelligence Center (CGIC) is achieving powerful law enforcement results by doing just that—uniting modern technology and dedicated investigators in a synchronized effort.

A recent case in Denver is a perfect illustration. At first blush, the defendant appeared to merit a routine and relatively lenient plea offer on his felon-in-possession firearm charge under 18 U.S.C. § 922(g)(1): his prior felony was non-violent, he had complied with the terms of his supervision, and he had accepted responsibility for illegal possession. Just before we offered a plea, however, U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agents at the Denver CGIC contacted us, and a very different picture emerged. CGIC’s use of technology, like shell-casing analysis and acoustic gunfire-

sensing technology, combined with meticulous firearm tracing and a thorough follow-up investigation, showed that during the two months the defendant had been on supervision, the firearm he possessed when arrested had been at the scene of at least nine gang shootings in Denver, four of which resulted in homicides. This revelation changed our plea position, and the defendant now faces 10 years in federal prison. Perhaps most importantly, witnesses to those Denver homicides now know that this “routine” defendant will be safely locked up for years, which may lead to further evidence in those pending investigations.

This kind of result shows how the CGIC model described in this article has a crime-fighting impact far beyond the confines of an initial charge or case, by connecting technology with on-the-ground investigation. As this illustration shows, we have reaped many rewards from the CGIC in Colorado:

- **Community Safety:** Thanks to the CGIC, we have been able to focus on the select violent individuals who are committing the most gun crime in their communities.
- **Community Relationships:** The CGIC’s targeted approach brings the greatest safety benefit to the community—and does so with the least disruption and tension possible for those communities.
- **Efficiency:** Our office is able to deploy its resources to prosecutions that have the greatest public safety impact, and to imprison those whose absence will most benefit the community.
- **Case Quality:** The CGIC employs ShotSpotter acoustic gunfire-sensing technology, NIBIN shell-casing analysis, gun tracing, and dedicated investigative follow-up as its core techniques. As a result, the cases that come to us from the CGIC have what jurors expect and what AUSAs love to present: real bad guys, ballistic experts, scientific proof, gun-shot audio, 404(b) evidence, and all kinds of corroboration that comes from thorough investigative follow-up.
- **Court Relationship:** The judges in our District are seeing that the gun cases we charge really matter to communities and are not just “stats” cases.

Through the partnership with the CGIC in the last two years, we have realized all these benefits. We have prosecuted almost 20 individuals associated with murders, multiple shooting incidents, and other violent crimes. Our partnership with the CGIC has also focused and increased our “straw purchase” charging, using firearms tracing to go after high-volume straw purchasers and the specific sellers from whom they get their guns.

Crucially, these successes are only possible because of the participation and collaboration of many dedicated law enforcement agencies. The CGIC is a broad partnership that resides at the Denver Police Department’s (DPD) state-of-the-art Denver Crime Lab, and includes the Denver, Aurora, and Lakewood Police Departments, the four Colorado District Attorneys’ offices with jurisdiction over Denver and the surrounding counties of Adams, Broomfield, Arapahoe, Douglas, and Jefferson, as well as the Colorado Bureau of Investigation, and, on the federal side, ATF and the United States Attorney’s Office for the District of Colorado (USAO). A “Project Safe Neighborhoods” grant recently enabled the CGIC to expand its efforts, with notable success. The CGIC’s federal, state, and local partnership is central to its success, and each of these agencies deserves our appreciation and thanks. By focusing our efforts on the worst, most violent offenders in the community, the CGIC is truly “smart on crime,” and we hope that this model will be adopted by USAOs throughout the country.

## **II. Crime Gun Intelligence Center model**

Due to the CGIC’s success in Denver, the ATF expanded the CGIC initiative to Southern Colorado to improve the way in which National Integrated Ballistic Information Network (NIBIN) hits

are investigated. The CGIC uses NIBIN technology, ShotSpotter, ATF Canines, Agents/Task Force officers, and ATF's firearms tracing program, to stop shooters and identify their source of crime guns before they can commit further criminal acts.

The objective of CGIC is to produce timely information based on NIBIN hits. Subsequently, this information can be utilized to focus the investigative efforts of its partners, including police, prosecutors, and forensics experts. For our prosecutorial partners, CGIC information provides the “bigger picture” of the cases we present for prosecution. Using CGIC data, we are able to develop, where appropriate, the basis for elevation of a felon in possession case to the federal level. While an individual may not normally meet the federal standard, CGIC information will, in some instances, demonstrate that the suspect was an active shooter in several unsolved crimes. It is this type of targeted investigation that is crucial in focusing ATF’s limited investigative resources.

One of the most important components of the CGIC initiative is NIBIN. NIBIN is an ATF-managed law enforcement tool used to match ballistic evidence, consisting of a national database containing digital images of spent bullets and cartridge cases found at crime scenes or test-fired from seized crime guns. It is a unique ballistic comparison system that allows technicians to digitize and automatically sort shell casing signatures. The ballistic match provides investigators with real-time leads. It is the only interstate automated ballistic imaging network in the United States, and is available to most major population centers through 150 sites located strategically around the country. Through searches locally, regionally, or nationally, NIBIN partners are able to discover links between firearms-related violent crimes more quickly—including links that would have never been identified without this technology.

The following items must be in place for a successful CGIC:

#### A. Timeliness is critical to success

The longer it takes to enter shell casings into the NIBIN system, the longer shootings go unsolved and shooters remain on the street. Under a real-time NIBIN mandate, the Denver CGIC enters all fired cartridge case evidence collected at crime scenes and test-fired cartridge cases from all auto-loading pistols recovered by partner agencies. The intent of the mandate is to complete the NIBIN process, including collection, entry, correlation, and confirmation of hits, within 24 to 72 hours following the collection of the cartridges. Timely entry into NIBIN has proven to be highly successful as a proactive lead-generating tool to link previously unknown shootings and identify active shooters currently on the streets.

The following arrest, made on the basis of CGIC real-time NIBIN data, offers an example of the system’s practical field application for the USAO:

*After a Denver man was arrested for possessing a firearm during a traffic stop, the firearm was test-fired and the casings linked to several shooting incidents. The suspect was initially arrested on a state charge of possession of a weapon by a previous offender. However, once the firearm recovered was test-fired into NIBIN, it was linked to an aggravated assault that occurred six hours earlier. The case was then elevated to federal prosecution where the suspect was sentenced to 49 months in prison, with the NIBIN evidence introduced at sentencing. Additionally, through firearms tracing, a co-conspirator was identified and charged with “straw purchasing” the firearm for the suspect. A straw purchase is a person who purports to be the actual buyer of the firearm when they are not. Without real-time NIBIN, the shooter may not have been identified and removed from the community as quickly.*

If this seems like simple police work, it is. Even five years ago, however, the full extent of the defendant’s activity would not have been known. The recovered pistol would not have been prioritized for

NIBIN entry in a felon in possession case, and the earlier aggravated assault would not have been entered in a timely manner. It is possible the defendant would have received probation or a 12-18 month sentence in the state system before any information about the firearms or previous shooting was ever known.

## **B. Building and managing an effective team**

ATF and the USAO brought together people at various levels from agencies critical to the investigation, prosecution, and prevention of gun-related crime in the Denver metropolitan area. The CGIC executive board meets once a quarter and is comprised of senior managers from the participating agencies. The board meets to set priorities, operational policies, and review performance. The CGIC executive board also makes recommendations for improvement, expansion, and identifies opportunities for funding.

From a tactical perspective, all prosecutorial partners are involved in the decision-making process regarding CGIC cases. Statistics show a majority of the CGIC cases end up in the state system, as there are sometimes no avenues for federal prosecution. In Denver, the Chief Deputy District Attorneys for all of our partner counties meet at the executive board and on other occasions to discuss the best venue for case prosecution. Since the ultimate goal of the CGIC is to remove shooters from the street by “any means necessary,” the way to achieve that can range from a state murder prosecution to a state or federal probation/parole violation.

Two other team resources contribute significant, added value to the CGIC initiative—two ATF Industry Operations Investigators (IOIs) and two NIBIN contractors. The ATF IOIs assist with the project in a number of ways, including NIBIN test-fire and NIBIN entry, comprehensive crime gun tracing, and analysis of the results. These lead to the identification of straw purchasers and at-risk gun dealers, the analysis of NIBIN hit data and their referral for investigative follow-up, and the referral of at-risk gun dealers for compliance inspections.

The NIBIN contractors facilitate NIBIN entries, assist in crime gun tracing, review crime reports related to NIBIN hits, and generate a matrix to indicate if further investigation is warranted. The contractors also build awareness of the initiative and provide training to state and local police on the CGIC initiative and the importance of NIBIN and crime gun tracing for all agencies. The contract employees are also responsible for tracking, documenting, and reporting successes directly to the crime laboratory director. The feedback loop is critical and helps bridge the gap between the forensic work done in the lab and the criminal investigation on the street.

## **C. Formal agreements and MOUs**

The CGIC partners operate under a formal memorandum of understanding (MOU). It provides direction on the day-to-day supervision and administrative control of personnel assigned to the CGIC, as well as guidance on the policies that must be followed. It also addresses the exchange of information between CGIC partners and certain confidentiality requirements. The MOU covers investigative methods and techniques and topics such as the standards of evidence handling, electronic surveillance protocols, de-confliction, jurisdiction and prosecutions, media releases, dispute resolution, liability, duration, and future modifications.

## **D. Protocols**

The CGIC has defined a number of protocols that are consistently applied within the region participating in the initiative. The first is comprehensive crime gun tracing. All crime gun recoveries are properly documented, and a trace is submitted to ATF through the eTrace system. DPD is extremely proactive in tracing firearms, with an average recovery to submission time of 48 hours. The trace results are not returned as quickly as NIBIN results, but the information from the traces can be equally important to investigators.

Firearms tracing can uncover further criminal activity concerning the purchaser, possessor, or the firearms dealer. For example, crime gun tracing expanded a tragic case, which garnered national media attention in March, 2013.

*A violent felon, who had just been released from prison, murdered a pizza delivery man with a 9mm pistol. After stealing the victim's delivery uniform, the shooter went to the residence of the Director of the Colorado Department of Corrections, pretending to deliver a pizza. When the Director came to the door, the felon shot and killed him. The felon then fled the state of Colorado and evaded law enforcement until he was stopped for a traffic violation in Texas. The offender continued his spree of violence by shooting a sheriff's deputy during the stop. The felon fled the scene, became the focus of a high-speed pursuit, and died following a shoot-out with law enforcement. The ATF crime gun trace revealed that the 9mm pistol was purchased only 15 days earlier by the shooter's girlfriend. The girlfriend was prosecuted for unlawfully purchasing the 9mm on behalf of her boyfriend and received a sentence of over two years in federal prison.*

The second protocol is compressive collection of crime gun intelligence. All crime gun data generated by NIBIN and eTrace is properly and uniformly collected, examined, and investigated by the CGIC partners. This process ensures that crime gun data is shared and visible to all CGIC stakeholders.

The following is a case example of how the CGIC collects and manages comprehensive crime gun data to stop violent criminals and those who arm them:

*In a suburb of Denver, police stopped a car for traffic violations. The driver, a convicted felon, had a loaded handgun in his waistband and was arrested for unlawful possession of a firearm. The NIBIN check pointed police to the fact that the firearm in question had been used in the commission of a murder the week before in a neighboring town. The crime gun trace revealed that the pistol had been purchased one month prior by a woman identified as the girlfriend of the driver. The woman admitted to purchasing and unlawfully diverting firearms to her convicted felon boyfriend and his criminal associates.*

What initially appeared to be a routine traffic stop in one jurisdiction quickly developed into the pursuit of a killer—and the person who armed him—in a neighboring jurisdiction. This incident demonstrates how CGIC partners, working to solve their own shootings, are dependent upon what other CGIC partners do with the gun and shell casings that they collect.

The third protocol is crime gun forensics. All fired-cartridge case evidence collected from all shooting scenes, and all test-fired cartridge cases from specified types of recovered crime guns, are documented and processed through NIBIN in a timely manner. The key here is that all evidence is entered. As part of compressive crime gun intelligence, you cannot prioritize entries. For the NIBIN to be successful, all specified firearms evidence must be placed into the system. The seemingly innocuous shell casings recovered from someone shooting in the air are just as important as the shell casings recovered at a homicide scene. NIBIN hits are assigned to a DPD detective and an ATF special agent for follow-up. These officers subsequently provide the information to the detectives assigned to the NIBIN-linked cases, along with offers of additional investigative assistance. Additional examinations, such as DNA and latent fingerprints, are conducted on a case-by-case basis.

The fourth protocol is relentless investigative follow-up. All actionable crime gun intelligence generated by the CGIC is disseminated to the CGIC partners and pursued according to the CGIC MOU, which requires the utilization of all available investigative and enforcement resources in conjunction with state and federal prosecutors to arrest, prosecute, and convict violent repeat offenders and other crime gun offenders. For example, prosecutors are leveraging information developed by the CGIC to support career

offender charges and enhanced penalties. In at least one case, they leveraged NIBIN hit data to charge the defendant under Colorado's Possession of a Weapon by a Previous Offender statute.

Finally, Crime Gun Intelligence Targeting must be a priority. This is the ultimate outcome of the CGIC—enabling the identification of active violent offenders, gun crime trends, gun crime hotspots (high density), at-risk gun shops, and illicit sources of crime guns. For example, serial shooters often escalate their level of violence over time. Patterns of gradual escalation are readily identifiable through the NIBIN links, indicating that the same gun was used in a series of crimes. In one 2011 case, a known gang member fired several rounds from a handgun outside a bar after a dispute with another patron. Approximately two months later, the same man fired shots inside a different bar under similar circumstances. A month later, he murdered a rival gang member in the parking lot of a third nightclub. With the NIBIN link between cases as evidence, the judge ruled that all three incidents would be charged under one case. This ruling was critical to the prosecution as it defeated the defendant's ability to claim self-defense. The gang member received a life sentence without the possibility of parole.

## **E. Performance measurement/continuous improvement**

The determinant of success for CGIC is being measured by the decrease in the number of shooting incidents, more effective deployment of resources, and increases in the number of prosecutions for crimes involving gun violence.

The CGIC remains in developmental mode and continues to evolve. CGIC executives conduct ongoing evaluations of other technologies that can assist in the CGIC process. As an example, beginning in the fall of 2014, ATF in Denver funded a one-year, three-square-mile deployment of ShotSpotter, an acoustic gunshot detection system, in an effort to enhance the existing technologies and CGIC's effectiveness. Thus far, shell casing recoveries associated with ShotSpotter alerts have resulted in 51 NIBIN hits and 23 arrests. Additionally, we have found that 67 percent of ShotSpotter alerts did not result in a 911 call from residents. This unreported 67 percent alerted by ShotSpotter technology has resulted in 24 additional NIBIN hits and 10 additional arrests. The City of Denver has agreed to fund ShotSpotter through 2016 and is in the process of obtaining funds to expand the coverage area. ShotSpotter has been an essential part of the crime gun intelligence package and is a crucial tool for obtaining ballistics evidence that may have previously been missed.

An overall statistical analysis of success is hard to quantify, as the CGIC has been fully operational for just over two years. The Denver CGIC team has, however, linked 60 shootings through NIBIN, resulting in 35 state arrests, 15 prosecutions for federal firearms violations, and 22 referrals to the joint criminal enforcement group for further investigation. In addition, the CGIC has generated 24 law enforcement officer safety bulletins involving shooting suspects and facilitated 8 parole revocations. The CGIC has also partnered with Johns Hopkins University, The Police Executive Research Forum, and the University of Colorado-Denver to study the effectiveness of the program.

## **III. Spreading the regional approach**

The CGIC model has already spread from Denver to Southern Colorado, and a similar partnership has been created with the ATF Colorado Springs Field Office, Colorado Bureau of Investigation crime lab, the Colorado Springs Police Department, the El Paso County Sheriff's Office, and the Pueblo Police Department. The partnership has already yielded successes, and additional agencies are in the process of being added to the task force.

Similar initiatives can be found in operation or in developmental stages in cities such as New York, Chicago, Los Angeles, Boston, Washington DC, Seattle, Baltimore, and New Orleans. As part of ATF's long-term strategic vision, we plan to continue on developing the CGIC model in every field division in the country. Like any major shift in approach, full-scale implementation will take time. Our

excellent partnerships with the Department of Justice and USAO's around the country will help to facilitate this change.

If you or anyone in your office has questions or would like further information on the CGIC initiative, please feel free to contact the Major Crimes Division of the USAO in Denver, Colorado. ♦

#### **ABOUT THE AUTHORS**

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## **Annie Get Your Gun . . . or Maybe Not?? Brady Background Checks: Saving Lives Through NICS and LIONS**

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As gun violence strikes day after day and devastates our country, our states, and our communities, U.S. Attorney's offices (USAOs) struggle with our limited role in curtailing or preventing this violence. While there is no magic bullet to prevent the mayhem, each tragedy inevitably involves an investigation into how the murderer obtained the firearm. Where and how was the gun obtained? Was the shooter a prohibited person? What can we do to prevent those who are intent on destruction from obtaining firearms? We know that it is illegal for prohibited persons to obtain firearms, but the tragedies at Virginia Tech in April 2006, and as recently as June 2015 in Charleston, South Carolina, provide stark examples

of a background check system that can only operate at peak accuracy and efficiency when it possesses accurate and complete documentation. Failure to provide that documentation can lead to fatal consequences.

This article will discuss the history behind the Brady background check system and its evolution. Even understanding the flaws and weaknesses in our nationwide background check system, it remains our best option to prevent prohibited persons from obtaining firearms. The extraction of records from all USAOs plays a vital role in supporting the important National Instant Criminal Background System (NICS) mission. Although USAOs correctly emphasize their role in holding criminals accountable for crimes committed, the ability to assist on the front-end of crime prevention is equally important.

## I. The Gun Control Act of 1968

Historically, to protect our communities, Congress has controlled the purchase/possession of firearms by prohibited persons. The Gun Control Act of 1968 both codified and significantly expanded the firearm statutory landscape. The express purpose of this legislation was to keep firearms out of the hands of criminals and others who are deemed too dangerous to have access to them. These statutes were designed to curb crime by keeping “firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.” S. Rep. No. 90-1097(1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113. Congress also made it unlawful for an individual to make false statements when acquiring a firearm. Federal law prohibits making material false statements or presenting false identification when purchasing, or attempting to purchase, a firearm from a licensed dealer. 18 U.S.C. § 922(a)(6) (2005).

The Supreme Court, in discussing § 922(a)(6), has recognized that this statute “was enacted as a means of providing adequate and truthful information about firearms transactions.” *Huddleston v. United States*, 415 U.S. 814, 825 (1974). Information drawn from records kept by dealers was a prime guarantee of the Act’s effectiveness in keeping “these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.” 114 Cong. Rec. 13219 (1968) (remarks of Sen. Tydings). Thus, any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty.

In addition, 18 U.S.C. §924(a)(1) prohibits making a knowing false statement with regard to information required to be kept by a Federal Firearms Licensee (FFL). All these statutes—18 U.S.C. §§ 922(g), 922(a)(6), and 924(a)(1)—address the same overarching problem: protecting our communities by keeping firearms out of the hands of prohibited persons.

## II. The Brady Handgun Prevention Act of 1993

On March 30, 1981, John Hinckley tried to impress actress Jodie Foster by attempting to assassinate then-President Ronald Reagan. While the assassination attempt failed, James Brady, President Reagan’s Press Secretary, was shot and remained permanently disabled until his death in 2014. It took many years and many votes, but the legislation that Brady and his wife championed was finally passed in 1993. The Brady Handgun Violence Prevention Act of 1993 (Brady) created the NICS, launched by the FBI on November 30, 1998. See Title 18 U.S.C. §922(t) (2015). Brady mandates that FFLs determine whether a prospective buyer is eligible to buy firearms or explosives. Prior to Brady, FFLs accepted, at face value, the statement of purchasers as to firearm eligibility. Brady removed this honor system and replaced it with a system requiring verification. The legislation resulted from Congressional concern with the widespread trafficking in firearms and the general availability of firearms to prohibited persons. To be sure, Brady is not a complete solution. Not only is it dependent on the fulsomeness of the records

available to NICS, but also it only applies to transfers conducted by FFLs. It does not cover gun shows or the secondary firearms market. In any event, it is a system that works as well as it can within its limitations.

The FBI established a protocol to implement Brady and administer NICS that is premised upon determining firearm eligibility. To begin, a potential purchaser completes the ATF Form 4473. The Form 4473 requests descriptive information on the purchaser and also requires that the purchaser answer truthfully questions relevant to eligibility. The FFL then contacts NICS, or other designated agencies, to ensure that the purchaser is authorized to obtain a firearm. Since fingerprints are not required, the search is based on name and other descriptive data provided on the Form 4473. NICS is located at the FBI's Criminal Justice Information Services (CJIS) Division in Clarksburg, West Virginia. NICS is a computerized system customarily available 17 hours a day, 7 days a week, including holidays (except Christmas). To complete the background check, NICS consults four separate databases: (1) the Interstate Identification Index (III), which contains individual criminal history records; (2) the National Crime Information Center (NCIC), which contains data on persons subject to protection orders, active criminal warrants, immigration violations, etc.; (3) the NICS Index, which contains records of firearm disqualification contributed by federal, state, local, and tribal agencies that are typically not available in III or NCIC; and (4) Department of Homeland Security's U.S. Immigration and Customs Enforcement database, which contains records searched by NICS for non-U.S. citizens attempting to receive firearms. Based on these database searches, NICS issues either an immediate DENY or PROCEED to the FFL.

If there is a "hit" in any of these searched databases, and NICS cannot immediately determine the person's status, NICS issues a DELAYED, and has three business days to determine firearm eligibility. If the case is not resolved after three business days, the FFL is legally authorized, but not required, to transfer the firearm to the prospective purchaser. If NICS receives prohibiting information after three business days, NICS will contact the FFL and change the transaction status from DELAYED to DENIED. If the firearm has already been transferred, NICS refers the case to ATF, which may seek to retrieve the firearm in order to ensure that the firearm is not in the hands of a prohibited person.

The volume and efficiency of firearm transactions processed by NICS is staggering. From its inception through the end of 2014, NICS has processed more than 202,000,000 transactions, resulting in denials of over 1.1 million transactions. In 2014, NICS had an immediate determination rate (DENY or PROCEED) of 91percent, with an average answer speed of fewer than two minutes. Also in 2014, NICS processed almost 21,000,000 transactions resulting in over 90,000 denials. The denials resulted from all the categories in 18 U.S.C. §§922(g) and (n). The majority of the denials (38,379) were for felony convictions. Other common reasons for denial were a prospective purchaser's fugitive status (17,400), prospective purchaser was an unlawful user of controlled substance (9,449), state prohibitors (6,661), misdemeanor crimes of domestic violence (6,190), prospective purchaser under indictment (4,956), prospective purchaser had an adjudicated mental health history (3,557), a domestic violence restraining order (2,650), and prospective purchaser was an illegal alien (1,421).

The NICS statistics underscore both the importance and success of the NICS operation. President Obama praised NICS in a January 16, 2013 memo to all federal agencies:

Since it became operational in 1998, the National Instant Criminal Background Check System (NICS) has been an essential tool in the effort to ensure that individuals who are prohibited under Federal or State law from possessing firearms do not acquire them from Federal Firearms Licensees (FFLs). The ability of the NICS to determine quickly and effectively whether an individual is prohibited from possessing or receiving a firearm depends on the completeness and accuracy of the information made available to it by Federal, State, and tribal authorities.

Press Release, White House Office of the Press Secretary, Presidential Memorandum—Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check

System (Jan. 16, 2013), <https://www.whitehouse.gov/the-press-office/2013/01/16/presidential-memorandum-improving-availability-relevant-executive-branch>.

### **III. The NICS Improvement Amendments Act of 2007**

The information gap identified by President Obama continues to challenge NICS and require national attention. Tragic examples persist of persons able to acquire firearms because important disqualifying records were not made available to NICS. The NICS Improvement Amendments Act of 2007 (NIAA), 18 U.S.C. §922 note, was enacted in the wake of the tragic April 2007 shooting at Virginia Tech, where the shooter was able to obtain a firearm because his disqualifying state mental health records were not made available to NICS. To address these gaps, NIAA was enacted in a bipartisan effort to strengthen the NICS by increasing both the quantity and quality of relevant records from federal, state, and tribal authorities accessible by the system. Among its requirements, the NIAA mandated that executive departments and agencies provide relevant information, including criminal history records, certain adjudications related to the mental health of a person, and other information, to databases accessible by the NICS. While progress has been made, and much time and effort has been devoted to this effort on the state, local, federal and tribal level, ensuring that NICS has access to complete disqualification records continues to remain a challenge. But there is uniform agreement that the accuracy and efficiency of NICS will only be enhanced, and result in improved public safety, when guns are kept out of the hands of persons who cannot lawfully possess them.

Since the passage of the NIAA, there have been substantial increases in the number of records made available to NICS. For example, the NICS 2012 Operations Report lists 8,323,931 active records in the NICS Index. This number jumped to 13,658,723 as of July 31, 2015. The more records available to NICS, the more complete the background check.

The NIAA also requires federal agencies to submit records to NICS that demonstrate a person's prohibited firearm status under §§922(g) or (n). The USAOs, through Executive Office for U.S. Attorneys (EOUSA) extractions from the Legal Information Office Network System (LIONS) and Case/View, have made available to NICS records of disqualification on all categories accessible through the case management system. As of August 2015, USAOs have submitted over 1,000,000 records to NICS that have resulted in over 2,000 denials. These statistics should make every USAO proud of our efforts to keep our communities safe.

In addition, the Department of Justice (DOJ) is launching an initial phase of the Tribal Access Program for National Crime Information to provide tribes with long-awaited access to the CJIS databases. As Deputy Attorney General Sally Quillian Yates noted in August 2015 when announcing this program: "Federal criminal databases hold critical information than can solve crimes, and keep police officers and communities safe. The Tribal Access Program is a step forward to providing tribes the access they need to protect their communities, keep guns from falling into the wrong hands, assist victims and prevent domestic and sexual violence." Press Release, Dep't of Justice, Department of Justice Announces Program to Enhance Tribal Access to National Crime Information Databases (Aug. 19, 2015), <http://www.justice.gov/opa/pr/department-justice-announces-program-enhance-tribal-access-national-crime-information>.

### **IV. January 2013 Presidential Gun Violence Reduction Executive Actions**

The tragic shooting in Newtown, Connecticut, in December 2012 emphasized the importance of ensuring that our communities are protected from ongoing gun violence by preventing and limiting prohibited persons from obtaining firearms. One month later, in January 2013, the President issued Now Is The Time, Gun Violence Reduction Executive Actions. The Plan, found at <https://www.whitehouse.gov/issues/preventing-gun-violence> included, among other things, a strengthening of the background

check system. Federal agencies were held “accountable for sharing reliable information with the background check system,” and The Plan required the issuance of a Presidential memorandum to improve the availability of relevant records. In March 2013, DOJ issued guidance to all federal agencies underscoring that “[t]he ability of the NICS to determine quickly and effectively whether an individual is prohibited from possessing or receiving a firearm depends on the completeness and accuracy of the information made available to it by federal, state and tribal authorities.” Presidential Memorandum, *supra*. The relevant records to be submitted correspond with the disqualifying categories under the Gun Control Act:

- Felons
- Fugitives from justice
- Persons unlawfully using or addicted to any controlled substance
- Persons adjudicated “mentally defective” or committed to a mental institution
- Illegal/unlawful aliens, and aliens admitted on a non-immigrant visa
- Persons dishonorably discharged from the military
- Citizen renunciates
- Persons subject to a domestic violence restraining order
- Persons convicted of a misdemeanor crime of domestic violence
- Persons under indictment

Ensuring that prohibited persons do not obtain firearms remains a top priority of the Department of Justice. EOUSA continues to update and improve our transmission of records from LIONS/CaseView to NICS. The USAOs and their designated NICS Points-of-Contact will continue to play an important role in providing timely, accurate, and complete data to NICS. Their continued diligence is essential to the success of this important program. Together we can and will save lives. ♦

## ABOUT THE AUTHOR

□ **Margaret S. Groban** is currently on detail to the Office of Legal and Victim Programs at the Executive Office for United States Attorneys in the Department of Justice. In this position, she provides policy guidance, training, and technical assistance within the Department of Justice and to United States Attorneys’ offices nationwide, on the federal firearm and domestic violence laws. She is the EOUSA point person for the USAO-NICS project. Prior to this position, Ms. Groban was an Assistant United States Attorney for the Southern District of New York for 10 years. ♦