COMMENTS

Firearm Enhancements under the Federal Sentencing Guidelines

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Imagine you are convicted of stealing a TV, a CD player, and a firearm from a pawnshop. Since the pawnshop is a licensed firearm dealer, your crime is a federal offense. Your sentence for that federal crime will be determined with reference to the United States Sentencing Guidelines (Guidelines), administrative guidelines that determine the sentences of convicted federal offenders. Your sentence will first be determined by the offense you were charged with—theft of the firearm. Your sentence may then be enhanced, or increased, for different characteristics of your offense. For example, your sentence could be enhanced under § 2K2.1(b)(5) of the Guidelines, which states that if you “used or possessed any firearm . . . in connection with another felony offense,” your sentence may be enhanced.

However, because the circuit courts are currently split on the meaning of this enhancement provision, your ultimate sentence for this federal crime will depend on the location and the laws of the state in which you were convicted. In the Fifth Circuit, your sentence would be enhanced by more than a year, because your federal charge is also a state law felony (specifically, burglary). In the Third, Sixth, or Sev-

1 The facts of this hypothetical are drawn from United States v Sanders, 162 F3d 396 (6th Cir 1998), and United States v Armstead, 114 F3d 504 (5th Cir 1997).
4 For a basic introduction to the Guidelines, see Lynn S. Branham, The Law of Sentencing, Corrections, and Prisoners' Rights in a Nutshell (West 2002). See also Part I for a detailed discussion of the Guidelines.
5 Specifically, you will be sentenced at a base offense level of twelve pursuant to USSG § 2K2.1(a)(7). For a discussion of base offense levels and criminal history categories, see Part I.B.
6 See USSG § 2K2.1(b)(5).
7 See Armstead, 114 F3d at 510–11 (enhancing defendants' sentences for possession of a stolen firearm in connection with the state law felony of burglary).
8 See United States v Fenton, 309 F3d 825, 828 (3d Cir 2002) (holding enhancement im-
enth Circuits, your sentence would not be enhanced for theft of the firearm, because a state law burglary charge arising out of the same conduct that supported your federal conviction would not constitute "another" offense meriting enhancement. In the Fourth and Eighth Circuits, the state law burglary of the firearm would constitute "another" felony, but your sentence would not be enhanced because you did not use the firearm "in connection with" the burglary. As a result of the circuit split, you would spend between twenty-seven and thirty-three months in jail if the crime were committed in the Fifth Circuit, but only between ten and twelve months if the crime were committed elsewhere.

The difference between the Fourth and Eighth Circuits on the one hand and the Third, Sixth, and Seventh Circuits on the other leads to a substantial sentencing disparity in more complicated crimes. For example, if subsequent to the burglary you illegally shot the firearm out the window of your getaway car, your sentence would be different in these circuits. In the Fourth and Eighth Circuits, an enhancement would not be appropriate because your use of the firearm was not "in connection with" your earlier burglary; the illegal discharge was an act independent of the charge offense. However, in the Third, Sixth, and Seventh Circuits, your sentence would be enhanced because the illegal discharge would constitute "another" felony independent from your earlier burglary.

Given the split between the circuits, the application of the § 2K2.1(b)(5) sentencing enhancement under the federal Guidelines will turn on the location of your offense. This split is especially troubling because the Guidelines were promulgated specifically to curtail disparate sentences. More than other laws, their overriding purpose

proper where "another" felony offense was for the state law felony of burglary and the charge offense was burglary under federal law).

9 See Sanders, 162 F3d at 400 (holding enhancement improper where "another felony offense" was a violation of a state felony offense for the same offense conduct underlying the federal charge).

10 See United States v Szakacs, 212 F3d 344, 350-51 (7th Cir 2000) (refusing to enhance defendants' sentences where the offense conduct underlying the federal burglary charge also qualified as a state law felony).

11 See United States v Blount, 337 F3d 404, 406-08 (4th Cir 2003) (holding enhancement improper because defendant did not use the firearm or evince any willingness to use it).

12 See United States v English, 329 F3d 615, 618-19 (8th Cir 2003) (finding that violation of Iowa felony law was "another felony offense" because the Iowa law had a "value element" not required by the federal felony law).

13 See USSG § 5A.

14 See Part II.B for a discussion of the implications of this split.

was to achieve uniformity for federal offenders anywhere in the federal court system. Uneven sentencing decreases the overall legitimacy of criminal law since it defies the principle that like cases should be treated alike. Thus, a single approach to § 2K2.1(b)(5) is necessary to achieve both the purpose and legitimacy of the Guidelines.

In addition to the problem of uniformity, there are substantive troubles with the current interpretations. None of the circuits has interpreted § 2K2.1(b)(5) according to its purpose and textual requirements without impermissibly double-counting the same offense for extra punishment or including state law crimes in violation of the Commerce Clause. In this Comment, using basic principles of textual interpretation, longstanding prohibitions on double-counting in criminal law, and recent developments in constitutional law, I propose a new interpretation of § 2K2.1(b)(5) that addresses the deficiencies of all positions in the current circuit split. In Part I, I provide background on the Sentencing Guidelines, including their origin, purpose, and operation. In Part II, I discuss the present split over the interpretation of § 2K2.1(b)(5) and identify the three different positions in that split. Finally, in Part III, I propose a new approach to the application of § 2K2.1(b)(5). By emphasizing the text and purpose of the firearm sentencing enhancement, and by drawing on the lessons of traditional criminal merger rules and recent constitutional law developments, courts can achieve a more accurate and useful set of rules for the application of § 2K2.1(b)(5).

I. THE UNITED STATES SENTENCING COMMISSION AND THE FEDERAL SENTENCING GUIDELINES

A. Background

The Sentencing Guidelines were developed and implemented in the mid-1980s by the United States Sentencing Commission (Commission), an independent agency created by Congress to promulgate sentencing rules. Prior to the establishment of the Commission, only applicable federal statutes limited judges in sentencing offenders. The Guidelines were created in order to reduce judicial discretion, to cre-
ate more uniform sentences for similarly situated offenders, and to promote honesty in sentencing.

One of the most important policy choices made by the Commission was whether sentences should be based only on the elements of the charge offense (such as the elements required to prove automobile theft) or on the offender's "relevant conduct" beyond the basic elements of the crime (such as threatening the owner with a gun while she is stopped at an intersection).

The Commission finally settled on a compromise of the two sentencing schemes and developed a modified real-offense system. This system makes "base" calculations based on the charge offense and the history of criminal convictions, but permits the inclusion of facts relating to offenses for which the defendant was neither convicted nor necessarily charged, all without any application of the rules of evidence or standards of proof. The justification for enhancing a defendant's sentence based on facts unrelated to the conviction is based on the traditional distinction between punishment and enhancement. The justification for considering unconvicted facts is to account for meaningful differences between offenders. However, the lower burden of proof and absence of evidentiary requirements greatly empowers the prosecutor to increase the offender's sentence and thus make it easy for a sentence to be enhanced.

Federal courts are bound to follow the Guidelines when sentencing persons convicted of federal crimes. Courts can only depart from the Guidelines if "aggravating or mitigating circumstances . . . not adequately taken into consideration by the Sentencing Commission" demand it. Indeed, recent laws further restrict the ability of federal judges to depart downward from the Guidelines by requiring de novo review of downward departures, and by requiring prosecutors to report all downward departures to the Attorney General.

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19 See USSG § 1A4(a).
20 See Breyer, 17 Hofstra L Rev at 11-12 (cited in note 15) (observing that the Commission achieved a compromise between "real offense" sentencing and "charge offense" sentencing by using mitigating and aggravating factors to adjust a base offense level).
21 See, for example, United States v Mobley, 956 F2d 450, 457 (3d Cir 1992) (stating that the defendant's argument "seeks to blur the distinction among a sentence, sentence enhancement, and definition of an offense").
22 See USSG § 1A2 ("[T]he Commission is established as a permanent agency to monitor sentencing practices in the federal courts."). See also Carolyn Barth, Note, Aggravated Assaults with Chairs versus Guns: Impermissible Applied Double Counting under the Sentencing Guidelines, 99 Mich L Rev 183, 184-85 (2000) ("[T]he guidelines bind federal courts to follow them when sentencing persons convicted of federal crimes.").
23 18 USC § 3553(b) (2000). This statute also provides that: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." Id.
24 See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) § 401, Pub L No 108-21, 117 Stat 650, amending 18 USC...
bar is set so high for departing from the Guidelines, courts must faithfully adhere to its provisions in virtually every criminal trial.25

B. Application of the Sentencing Guidelines

To fully comprehend the circuit split over § 2K2.1(b)(5), a basic understanding of how the Guidelines work is required. Consider again the hypothetical of the pawnshop burglar set out in the Introduction. Recall that while unarmed, the burglar steals a TV, a CD player, and a firearm from a pawnshop. The sentencing judge would first look up the statute of conviction in the statutory index for theft, which is USSG § 2B1.1. The Guidelines determine length of punishment through matching the offense level, ranging from zero to forty-three and found on the vertical axis, with criminal history, ranging from categories I–VI and found on the horizontal axis, of the Sentencing Table in Chapter 5. The “base offense level” for the offense of theft is six. However, the Guidelines also assign number values for the “specific offense characteristics” of the crime (that is, relevant conduct not included in the charge offense) found in Chapter 2 of the Guidelines.26 Because the value of the goods taken from the pawnshop probably does not exceed $5,000, the base offense level would not increase.27 The sentencing judge would next determine if any of the “adjustments” from Chapter 3 would apply to the offender. For example, if you were the organizer of the pawnshop theft and it involved five or more participants, your offense level would increase by four levels.28 Increasing the base level of six by four levels for the specific offense characteristics would put your offense level at ten.

The judge would also consider your criminal history by looking at your past conviction record. If you had one prior serious conviction, § 4A.1.1 would assign you three points and these points would determine the criminal history category in the Sentencing Table in Chapter 5. Having three points on your criminal history record puts you into category II. The judge would look at the Sentencing Table and find your criminal history on the horizontal axis and your offense level on the vertical axis. Where these two lines intersect is the presumptive

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25 Importantly, the Feeney Amendment further restricts the authority of federal judges to depart downward from the Guidelines by requiring de novo review by the court of appeals of a sentencing judge's application of the Guidelines to the facts. See id.
26 See USSG § 2K2.1(c)(1).
27 Note that § 2K2.1(b)(5) is a “specific offense characteristic,” and thus its application could substantially affect the thief's offense level, since it mandates raising the offense by the greater of an increase by four levels and an increase to level eighteen.
28 See USSG § 3B1.1(a).
range of time for which you will be punished.\textsuperscript{29} Because your offense level is at ten and your criminal history puts you into category II, your sentence would be in the range of eight to fourteen months.

Introducing specific offense characteristics is one way by which the Commission included relevant conduct in the sentencing scheme.\textsuperscript{30} The Guidelines “take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.”\textsuperscript{31} Using this system, an offender carrying a gun during a drug crime would receive a more severe sentence than someone committing the same drug crime without possession of a gun;\textsuperscript{32} no substantive firearm charge would be required to achieve this “relevant conduct” enhancement. Specific offense characteristics represent an integral part of the Guidelines’ “return...to an earlier philosophy that the punishment should fit the crime.”\textsuperscript{33}

C. The Importance of Enhancements

Under the Guidelines, sentences can be enhanced based on the circumstances surrounding the conviction offense, even if those circumstances are not crimes in and of themselves. For example, a defendant convicted of possessing dangerous weapons or materials while boarding an aircraft may have her sentence enhanced if the offense was committed with “reckless disregard for the safety of human life.”\textsuperscript{34} Because an offender with “reckless disregard for the safety of human life” may pose greater danger to the public than if the offender had regard for human life, the offender’s sentence is increased. This en-

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\item \textsuperscript{29} See United States Department of Justice, Criminal Division, \textit{Prosecutor's Handbook on Sentencing Guidelines} Ch II and Appendix A (DOJ 1987).
\item \textsuperscript{30} See \textit{United States v Manthei}, 913 F2d 1130, 1134 (5th Cir 1990), quoting USSG § 1A4(a). See also David Yellen, \textit{Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines}, 78 Minn L Rev 403 (1993) (describing the “real offense” aspects of the Guidelines, which entail basing the defendant’s sentence “not only upon the crimes for which the defendant has been convicted but also upon alleged crimes related to the offense of conviction, for which the defendant was not convicted”).
\item \textsuperscript{31} USSG § 1A4(a). See also USSG § 1B1.2 commentary (note 2) (discussing consideration of relevant conduct in determining sentences).
\item \textsuperscript{32} See, for example, USSG § 2D1.11(b)(1) (increasing the base offense level for possession of drugs by two levels if the offender carries a firearm).
\item \textsuperscript{33} \textit{United States v Mejia-Orosco}, 867 F2d 216, 218 (5th Cir 1989) (holding that a three-month upward departure from the Guidelines' maximum of seven months was not unreasonable), clarified, 868 F2d 807 (5th Cir 1989).
\item \textsuperscript{34} See USSG § 2K1.5(b)(1) (assigning a base offense level of nine to possession of dangerous weapons or materials aboard an aircraft, but increasing the base offense level by fifteen levels if possession was committed without regard for the safety of human life).
\end{itemize}
II. FEDERAL ENHANCEMENTS FOR FIREARMS USED “IN CONNECTION WITH ANOTHER FELONY OFFENSE”

In 1991, § 2K2.1(b)(5) was added to the Guidelines as part of several changes made to § 2K2 because of increased concern about firearms, violent crimes, and drug offenses. In relevant part, the enhancement provision states that:

If the defendant 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, increase [the base offense level] by 4 levels. If the resulting offense level is less than level 18, increase to level 18."

The commentary to § 2K2.1(b)(5) provides specific definitions for the terms “firearm” and “ammunition,” and defines the term “felony offense” as “any offense (federal, state or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.” The commentary itself does not provide any definition of the word “another.” The only stated limitation in the Guidelines over the meaning of “another” felony offense is the requirement that it be an offense other than an offense for the possession or trafficking of explosives or firearms, which are handled by separate enhancement provisions.

Importantly, § 2K2.1(b)(5) requires that if the resulting offense level after application of the enhancement is less than eighteen, it must be increased to that level. For example, for a relatively minor federal crime, such as mail fraud, the punishment level is tripled from

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35 Both § 2K1.5(b)(1) and § 2K2.1(b)(5) are located in Part K of the Guidelines entitled “Offenses Involving Public Safety.” All of the enhancements in this section are designed to increase public safety.
36 See United States v Condren, 18 F3d 1190, 1198 (5th Cir 1994) (stating that the unlawful use or possession of firearms represented “an ever increasing assault on public safety”).
37 USSG § 2K2.1(b)(5).
38 USSG § 2K2.1, commentary (note 1) (“Firearm’ includes (i) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.”).
39 USSG § 2K2.1, commentary (note 2) (“Ammunition’ includes ammunition or cartridge cases, primer, bullets, or [propellant] powder designed for use in any firearm.”).
40 USSG § 2K2.1, commentary (note 7).
41 USSG § 2K2.1, commentary (note 18).
level six to level eighteen." Thus, § 2K2.1(b)(5) is hardly an insignificant enhancement, for it can radically increase the amount of time served.

A. Three Interpretations of § 2K2.1(b)(5)

The circuits have not arrived at a uniform interpretation of § 2K2.1(b)(5). There are three distinct interpretations of the phrase "use of a firearm in connection with another felony offense." The Fifth Circuit articulates the "maximum federal authority" position, permitting enhancement whenever the offender possesses a firearm. The other two positions specifically address two operative elements in § 2K2.1(b)(5): the word "another" and the meaning of "in connection with." The Third, Sixth, and Seventh Circuits have put forth the "another" felony offense position by adopting a more limited interpretation of the meaning of "another" in § 2K2.1(b)(5). The Fourth and Eighth Circuits have taken the "in connection with" position by articulating a greater requirement for "in connection with."

1. A broad interpretation: the "maximum federal authority" position.

The Fifth Circuit essentially puts forth no test in determining what qualifies as "use of a firearm in connection with another felony offense" under the Guidelines. The Fifth Circuit permits sentencing enhancements where the other "felony offense" is merely the equivalent state felony. In United States v Armstead," the defendant pled guilty to stealing firearms from a licensed firearm dealer after he broke into a pawnshop and stole nineteen guns. The Fifth Circuit upheld enhancement of his conviction and found that the equivalent state law crime of burglary of a building satisfied the "another" felony offense standard under the Guidelines. While the court found that the conduct underlying the conviction offense and the enhancement offense were the same, it held that the state law crime of burglary still qualified as "another" felony offense since nothing in the Guidelines

42 USSG § 2K2.1(b)(5) could be used to enhance the sentence for a crime such as mail fraud. In Condren, 18 F3d at 1198, the court found that the firearm the defendant kept locked in a drawer was used "in connection with" his offense of drug possession because he could use the firearm to protect the drugs from theft. Likewise, a court could find that an offender possessed a firearm "in connection with" the crime of mail fraud because the firearm could be used to facilitate the crime or threaten other people. USSG § 2B1.1(a)(2) establishes a base offense level of six for mail or wire fraud.

43 See United States v Armstead, 114 F3d 504, 512–13 (5th Cir 1997) (holding that state law burglary constituted "another felony offense" under § 2B1.1(b)(5)). Consider Condren, 18 F3d at 1199 ("[E]nhancements may be based on any felony, including, as here, felony possession of a small amount of drugs.").

44 114 F3d 504 (5th Cir 1997).
suggested that contemporaneous crimes cannot be considered when
enhancing a sentence.45

In reaching that conclusion, the Fifth Circuit used § 2K2.1(b)(5)
as a jurisdictional hook to federalize state gun crimes. The court cited
Amendment 374 of the Guidelines for the proposition that “firearms
statutes often are used as a device to enable the federal court to exer-
cise jurisdiction over offenses that otherwise could be prosecuted only
under state law.”46 But as the Seventh Circuit stated in United States v
Szakacs,47 using enhancements to federalize state crimes “does not
necessarily require the double counting of offense conduct as both
federal and state crimes given the use of the word ‘another’ in the
guideline.”48 Thus the Fifth Circuit could disapprove of double-
counting and still use enhancements as a jurisdictional hook to bring
state law crimes into federal court, with the condition that the state
law crime be different from the federal conviction offense.

In addition to a broad interpretation of the term “another” felony
offense, the Fifth Circuit has also broadly interpreted the term “in
connection with.” In United States v Condren,49 police searched the
defendant’s home after obtaining a warrant based on a previous crack
cocaine sale. The police seized drug paraphernalia, 0.1 gram of crack
cocaine, marijuana, and a loaded .22 caliber revolver in a desk drawer.
The defendant pled guilty to possession of a firearm by a felon, and
the lower court enhanced his sentence on the basis of his possession of
the revolver in connection with the distribution of cocaine.50 The Fifth
Circuit upheld this enhancement because the revolver was in the same
location as the drugs, was fully loaded, and could be used in connection
with protecting the drugs.51 Armstead cited Condren for the
proposition that “subsequent possession of firearms satisfies the nexus
requirement for [enhancement under § 2K2.1(b)(5)] . . . because those
firearms were possessed and could have been used to facilitate the
crimes at issue.”52 Even though the firearm was never actually used by
the defendant and played no role in the distribution of the cocaine, the
Fifth Circuit was satisfied that a connection existed. Alternatively, the
court could have required that the defendant flash the firearm, or at
the very least be present, during the drug sale. Instead the court chose

45 Id at 513.
46 Id, quoting USSG Appendix C, Amend 374.
47 212 F3d 344 (7th Cir 2000).
48 Id at 350–51.
49 18 F3d 1190 (5th Cir 1994).
50 Id at 1191–92. Note that the sentence was enhanced based on conduct (drug possession)
for which the defendant was never convicted.
51 Id at 1197.
52 Armstead, 114 F3d at 512, citing Condren, 18 F3d at 1194–98.
a broad interpretation of “in connection with,” maximizing the federal government’s ability to enhance firearm offenses.

2. A limited interpretation: the “another” felony offense position.

The Third, Sixth, and Seventh Circuits have all held that “another” felony must involve a separation of time or a distinction in conduct between the underlying offense and the enhancement offense. In United States v Fenton, the defendant pled guilty to theft of firearms from a sporting goods store. At the time of the theft, the defendant was a convicted felon, so when he stole the firearms he became a felon in possession of a firearm in violation of 18 USC § 922(g). During sentencing, the lower court considered the sporting goods store burglary to constitute “another” felony offense and imposed the four-level enhancement to his punishment pursuant to § 2K2.1(b)(5). The Third Circuit struck down the enhancement and held that “another” felony offense cannot apply to the same felonious conduct for which the criminal defendant is being sentenced.

Similarly, in Szakacs, the Seventh Circuit expressed concern that if there were not such a time or conduct separation between state and federal offenses, enhancing the sentence would double-count the same conduct by applying the same factors to the enhancement that were already applied to the base-offense level during sentencing. In Szakacs, the defendants were convicted of conspiracy to steal firearms from a licensed firearm dealer, but the Seventh Circuit overturned the § 2K2.1(b)(5) enhancements of their offense levels. The prosecutor sought to justify the enhancement based on the equivalent state law crime of conspiracy to commit a burglary, but the court rejected the argument, holding that the state law crime was for all purposes identical to the conviction offense, and not truly “another” felony offense under the Guidelines. For the Seventh Circuit, the plain meaning of the Guidelines required a finding of separation of time between the offense of conviction and the other felony offense or a distinction of conduct because otherwise the word “another” would be superfluous. Permitting enhancement of contemporaneous offenses would permit

53 See United States v Fenton, 309 F3d 825, 827–28 (3d Cir 2002); United States v Sanders, 162 F3d 396, 400–02 (6th Cir 1998); Szakacs, 212 F3d at 351–52.
54 309 F3d 825 (3d Cir 2002).
55 See id.
56 Id at 827.
57 Id.
58 212 F3d at 344.
59 Id at 350–52.
60 Id at 352.
enhancement in almost every federal gun-theft case: the base offense would be the federal gun-theft conviction, and the enhancement offense would simply be the state law theft.

The Sixth Circuit used the same reasoning in United States v Sanders, where the defendant joined with co-conspirators to burglarize a pawnshop and steal firearms and electronics. The defendant was pulled over by a police officer who recovered seventy-three handguns and rifles, three black powder weapons, electronic equipment, and various burglary tools. Using reasoning similar to that of the Seventh Circuit in Szakacs, the Sixth Circuit refused to enhance the defendant’s sentence on the basis of an equivalent state crime. Notably, the courts in both Szakacs and Sanders rejected enhancement based on the interpretations of “another” felony offense rather than the “in connection with” requirement.


The Fourth and Eighth Circuits have held that the test for “another” felony is controlled by a seventy-year-old Supreme Court decision dealing with overlapping statutory provisions. In United States v English, the Eighth Circuit allowed enhancement for theft of a firearm based on a state burglary charge, noting that the Iowa burglary statute had a value requirement not present in the federal offense. In United States v Blount, the Fourth Circuit approved of the lower court’s enhancement of a burglary sentence because the state law theft of a firearm was distinct from the charge offense and thus satisfied the test put forth by the Supreme Court in 1932 in Blockburger v United States to determine whether conduct by the defendant should be regarded as constituting a single offense or multiple offenses. This search for an “additional element” required to prove “another” felony, even if the element is jurisdictional or relatively minor, stands in sharp contrast to the Third, Sixth, and Seventh Circuits’ more substantial re-

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61 162 F3d 396 (6th Cir 1998).
62 Id at 398.
63 See United States v Blount, 337 F3d 404, 407 (4th Cir 2003), citing Blockburger v United States, 284 US 299, 304 (1932) (holding that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”). The Eighth Circuit, while not specifically adopting the Blockburger test to apply § 2K2.1(b)(5), implicitly adopted that “additional element” test in United States v English, 329 F3d 615, 618 (8th Cir 2003).
64 329 F3d 615 (8th Cir 2003).
65 Id at 618.
66 337 F3d 404 (4th Cir 2003).
67 284 US 299 (1932).
requirement for separation in time and conduct between the two offenses.

However, in an apparent attempt to give meaning to the “in connection with” portion of § 2K2.1(b)(5), the Fourth Circuit has adopted an additional causal requirement for enhancement felonies: the “another” felony offered for enhancement must be furthered by or related to the use of a firearm. Accordingly, the Fourth Circuit in Blount reversed the enhancement for lack of use “in connection with” the original felony: the gun in that theft had been the object of the felony, not a tool in its commission.66

Applying this test, the Fifth and Eighth Circuits have held that the “in connection with” requirement is satisfied if the firearms are simply available for the defendant to use in commission of the felony (a sharp contrast to Blount, where the stolen gun was certainly available after the theft).67 In Condren, the Fifth Circuit upheld the application of § 2K2.1(b)(5) to a defendant found with a small amount of cocaine and marijuana in his apartment and a firearm locked in a separate drawer.68 Even though the defendant’s firearm was not found in a location suggesting “use” in drug distribution or possession, the court held that simple possession of the gun was enough to connect it to the possession of drugs, stating that the gun could have been used to protect the drugs. Under this test, as long as the firearm is possessed at the same time and in relatively close proximity to the occurrence of the felony, the “in connection with” requirement is satisfied.69

By raising the standard for the “in connection with” requirement of § 2K2.1(b)(5), the Fourth Circuit has moved away from the mere availability test used by the Fifth and Eighth Circuits, holding that “in connection with” demands a tighter nexus of proximity. This requires that the firearm “have some purpose or effect with respect to the other crime, and its presence or involvement cannot be the result of accident or coincidence.”70

66 See id at 410 (“[T]he ‘in connection with’ requirement, rather than the ‘another felony offense’ requirement, represents the primary limitation on the applicability of § 2K2.1(b)(5).”).
67 See Armstead, 114 F3d at 512 (“[G]iven its ordinary and natural meaning, we hold that Armsteads’ possession of firearms was ‘in connection with’ their state law burglary crime.”); Condren, 18 F3d at 1199 (holding that the requirement is satisfied “through the mere possession of firearms in connection with [a felony] . . . regardless of whether the weapons are used, and regardless of how, or why, they were obtained, or for what other reasons they are possessed”); English, 329 F3d at 617-18.
70 Condren, 18 F3d at 1192.
71 Id at 1197.
72 Blount, 337 F3d at 411 (holding that a gun must at least facilitate or have the potential of facilitating a drug-trafficking offense in order to satisfy the “in connection with” requirement), citing Smith v United States, 508 US 223, 238 (1993).
B. Problems with Existing Interpretations

All of the current interpretations of § 2K2.1(b)(5) are flawed in some way. The most fundamental problem with the existing circuit split is the lack of uniformity. Uniformity always serves rule of law values, and here it is especially important because Congress enacted the Guidelines in order to eliminate uneven sentencing. Since the enhancement can mean additional punishment, offenders who happen to commit crimes in Texas (part of the Fifth Circuit) would receive much longer sentences than identical criminals in Illinois (part of the Seventh Circuit). Additionally, because § 2K2.1(b)(5) requires enhancement of the offense level to a minimum of eighteen, uniformity in its interpretation is particularly important because enhancement can radically alter the baseline level at which the defendant is sentenced. This is precisely the sort of sentencing disparity that the Guidelines were designed to prevent. To provide a new uniform interpretation, three problems with the existing interpretations of § 2K2.1(b)(5) must be addressed.

1. Interpreting § 2K2.1(b)(5) according to its purpose and text.

The firearm enhancement at issue was motivated by a desire to avoid dangerous firearm violence. Many of the cases discussed above did not involve immediate threats of such violence. Most obviously, the theft of a firearm (but not its ammunition) by an otherwise unarmed felon poses no immediate risk of firearm violence. Admittedly, such a crime might increase the chance of future firearm violence if the firearm were later sold to violent criminals on the black market. However, it is the subsequent sale of the firearm to another criminal, and not its misappropriation by the sentenced criminal, that involves any threat of future violence. The sentencing enhancement was passed to combat violence itself, and not as a supply-side restriction on black-market firearms. By permitting enhancement of sentences when the offender's actions do not pose any immediate threat of firearm violence, the three existing interpretations do not advance the intended purpose of § 2K2.1(b)(5).

These positions also ignore the plain meaning of § 2K2.1(b)(5). Any interpretation of the firearm enhancement must start with the

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73 See Part I for a discussion of the factors motivating the creation of the Sentencing Commission and the Sentencing Guidelines.
74 Compare Armstead, 114 F3d at 504, with Szakacs, 212 F3d at 344.
75 See notes 15–16 and accompanying text.
76 See Part I.
77 See, for example, Fenton, 309 F3d at 826 (noting that the defendant stole rifles and shotguns from a sporting goods store).
plain meaning of the text because it is the most obvious point of legislative agreement.\footnote{See, for example, David A. Strauss, Why Plain Meaning?, 72 Notre Dame L Rev 1565, 1566 (1997) ("[A legislature’s] words are a convenient, easy way to get matters settled.").} All of the existing positions fail in some way to account for the ordinary meaning of the firearm enhancement. The "maximum federal authority" position has completely read the word "another" out of the enhancement.\footnote{See, for example, Armstead, 114 F3d at 513.} As the majority of circuits have already identified, it would be odd to interpret "another" as "the same," since the ordinary meaning of "another" is "not the same one." When "another" state or federal offense is comprised solely (or largely) of the same conduct giving rise to the conviction offense, the "maximum federal authority" position leads to absurd results.\footnote{Were a state to incorporate the identical language of the federal felon in possession law, district courts in those states would be forced to enhance federal sentences based on the identical state law. In turn, this would lead to disparate sentences determined by state law, which is exactly what the Guidelines were designed to prevent. These enhancements would serve no additional state or federal policy goals since they would not address particular elements of the crime, but simply increase the punishment of the exact same federal crime.} When "another" state or federal offense is comprised solely (or largely) of the same conduct giving rise to the conviction offense, the "maximum federal authority" position leads to absurd results.\footnote{Blockburger, 284 US at 304.} All of the existing positions fail in some way to account for the ordinary meaning of the firearm enhancement. The "maximum federal authority" position has completely read the word "another" out of the enhancement.\footnote{Note, however, that the Blockburger test captures the public safety concerns in many situations. For example, public safety concerns would be addressed by enhancing a federal sentence for illegal discharge of a firearm under a state statute against loud noises. Public safety is more at risk when the "loud noise" is made by a firearm rather than a barking dog; it induces more stress and can cause accidental harm.}

The problem with the "in connection with" position is that it interprets "another" felony offense too broadly. The Blockburger test mandates that, in order for a state law conviction to be used to enhance a federal sentence, the state and federal "provision[s] [must] require[] proof of a fact which the other does not."\footnote{Blockburger, 284 US at 304.} Returning to the pawnshop hypothetical laid out above, under the Blockburger test your federal conviction for theft could still be enhanced under a state statute making it illegal to steal personal property worth over $500. The prosecutor would have to prove that the value of the goods stolen from the pawnshop were worth over $500, and therefore the state provision requires an element of proof that the federal statute does not, satisfying the Blockburger test and allowing enhancement based on identical conduct. This application of the Blockburger test demonstrates the test’s overinclusiveness. The danger of stealing a firearm from a pawnshop does not increase because it (along with the TV and CD player) is valued at over $500. The public safety issues that motivate § 2K2.1(b)(5) are not addressed by the "in connection with" position’s use of the Blockburger test. While the Blockburger test may make conceptual sense, it allows the enhancement of sentences when there is no rationale for enhancing.\footnote{Note, however, that the Blockburger test captures the public safety concerns in many situations. For example, public safety concerns would be addressed by enhancing a federal sentence for illegal discharge of a firearm under a state statute against loud noises. Public safety is more at risk when the "loud noise" is made by a firearm rather than a barking dog; it induces more stress and can cause accidental harm.} Essentially, the "in connection
with" position duplicates the textual problems of the "maximum federal authority" position.

Still, while the "in connection with" position ignores important textual problems with an expansive definition of "another" felony offense, it correctly notes textual problems with ignoring the "in connection with" constraint in § 2K2.1(b)(5). The plain text of § 2K2.1(b)(5) requires that the "another" felony be "in connection with" the firearm. Under a plain language reading, that presents a significant limitation on the application of the enhancement, as the Fourth Circuit recognized in Blount. Therefore, both the "another" felony offense position and the "maximum federal authority" position wrongly ignore the plain meaning of the "in connection with" constraint of § 2K2.1(b)(5).

2. Multiple punishment doctrine.

If absolutely any available state or federal offense were encompassed by the Guidelines' reference to "another" offense, virtually every federal firearm conviction would be subject to the enhancement because there is almost always a state equivalent to the predicate federal felony. Consequently, the firearm enhancement would collapse into an automatic sentencing enhancement for all firearm convictions, rather than enhancing existing convictions for additional relevant conduct not included in the charge offense. The effect of this would be to double-count the same offense for extra punishment in contravention of traditional criminal law principles against multiple punishment.

The idea that no person should be punished twice for the same offense is a well-recognized principle of criminal law.\textsuperscript{83} In 1873, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment\textsuperscript{84} protects against multiple punishments for the same offense.\textsuperscript{85} The multiple punishment doctrine holds in part that a court can punish a defendant under multiple statutory provisions only if the legislature has authorized punishment under two or more statutes. The idea behind this is that legislatures define the scope of criminal punishments, and thus any punishment that is in excess is unconstitutional "multiple."\textsuperscript{86} The Supreme Court has stated that "[i]f a federal court exceeds its own authority by imposing multiple punishments not

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\textsuperscript{84} US Const Amend V (stating that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb").

\textsuperscript{85} See Ex parte Lange, 85 US (18 Wall) 163, 168 (1873) ("[N]o man can be twice lawfully punished for the same offense.").

\textsuperscript{86} See Ohio v Johnson, 467 US 493, 499 (1984) ("[U]nder the Double Jeopardy Clause whether punishments are ‘multiple’ is essentially [a question] of legislative intent.").
authorized by Congress, it violates . . . the constitutional principle of separation of powers.87

The applicability of the multiple punishment doctrine to sentencing determinations has a confusing history.88 The Supreme Court has clearly held that the Double Jeopardy Clause applies in the capital sentencing context.89 The Court limited this application by deciding in *Monge v California*90 that the double jeopardy clause applied exclusively to capital sentencing.91 While the Court’s decision in *Monge* would indicate that the multiple punishment doctrine has little bearing on § 2K2.1(b)(5), Justice Scalia’s dissent decried the further weakening of constitutional protections for defendants through sentencing enhancements.92 The Court’s more recent decision in *Apprendi v New Jersey*93 supports Justice Scalia’s argument in *Monge*, and has called into question the majority’s reasoning in that case. Indeed, in *Apprendi*, Justice Thomas argued that “every fact that was by law a basis for imposing or increasing punishment” was a matter of great constitutional concern.94 In light of recent developments, district courts should seriously consider constitutional challenges (including double jeopardy challenges) related to sentencing enhancements.

The admonitions of Justices Scalia and Thomas bear on the application of the multiple punishment doctrine to § 2K2.1(b)(5). By permitting the state equivalent of the underlying offense to qualify as “another” offense under the firearm enhancement, the “maximum federal authority” and “in connection with” positions are blind to the constitutional concerns created by multiple punishment. These positions permit enhancement where the conduct underlying the conviction offense and the enhancement offense is essentially the same. By reading out the word “another” in § 2K2.1(b)(5), these positions are flouting the intent of the Sentencing Commission. This interpretation, according to the multiple punishment doctrine, is in tension with the Fifth Amendment.

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91 Id at 728–29 (holding that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in a noncapital sentencing context).
92 Id at 738 (Scalia dissenting).
93 530 US 466, 490–91 (2000) (promulgating the bright line rule that “[o]ther than . . . prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).
94 Id at 512 (Thomas concurring) (emphasis added).

Federalism is an increasingly important principle for federal criminal law. The Supreme Court's decisions in *United States v Lopez* and *United States v Morrison* constrained the federal government's ability to criminalize or regulate certain behavior under the Commerce Clause of the Constitution. It follows that Congress cannot circumvent those affirmative constitutional limits on its power by making state crimes "relevant conduct" for sentencing purposes: Congress cannot delegate regulatory powers to the Sentencing Commission if Congress does not possess those regulatory powers itself. But the current system allows for just that—if state law prohibits possession of a firearm in school zones, the federal government's current Guidelines effectively make that conduct a federal, as well as a state, crime. This is exactly what the Supreme Court rejected in *Lopez*. Congress can only delegate powers that it itself has, so the term "another" should not be interpreted to include state law crimes that would not fall within federal authority; doing so would be an end-run around the limits of the Constitution's enumeration of powers.

This is not to say that conduct that qualifies as a state law offense can never give rise to federal sentencing enhancements. Congress, via the Sentencing Commission, can still criminalize and penalize conduct that is within the reach of the Constitution's enumeration of powers. Theft of a firearm might be criminalized by Congress under the Commerce Clause, since it involves "instrumentalities" of commerce. Nevertheless, not all crimes—even violent crimes—can be criminalized on a federal level. Nor does a mere possession of an "instrumentality" of commerce suffice; the gun must be changing owners or oth-

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95 514 US 549 (1995) (holding that the Gun-Free School Zones Act exceeds the authority of Congress to "regulate Commerce ... among the several States").
96 529 US 598 (2000) (finding that the Violence Against Women Act exceeds the federal government's Commerce Clause power because gender-motivated crimes of violence are not economic activity).
97 US Const Art I, § 8, cl 3.
99 See, for example, *Blount*, 337 F3d at 407–08 (allowing § 2K2.1(b)(5) to impose greater sentences if the charged conduct constitutes a state law offense with any jurisdictional or evidentiary requirements outside the federal offense).
100 See *Lopez*, 514 US at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").
101 In *Morrison*, the Court held that violence against women was not within the purview of the Commerce Clause, even though violence had an impact on commercial productivity. 529 US at 614–15.
erwise moving in commerce to be cognizable under the Commerce Clause.102

Under the recent federalism jurisprudence, the “maximum federal authority” view is wrong in counting state crimes as “another” felony offense since it permits the Sentencing Commission to do what the federal government cannot—regulate purely intrastate behavior. In this way, the “in connection with” position also fails to provide a sound interpretation since the test asks only whether additional evidence is needed for “another” felony to exist and does not exclude state law crimes beyond congressional control.

III. A NEW TEST FOR FEDERAL FIREARM ENHANCEMENTS

A new interpretation of § 2K2.1(b)(5) is necessary in order to account for the three problems with the existing interpretations described in Part II.B. This new interpretation would drastically reduce the number of sentences enhanced under § 2K2.1(b)(5). By accounting for these problems, however, the new interpretation would be more in keeping with the purpose and text of § 2K2.1(b)(5), the lessons of traditional criminal law, and recent interpretations of the Constitution.

A. Giving Meaning to the Text

Ordinary principles of textual interpretation prevent courts from ignoring the words used by the Sentencing Commission. The new interpretation of § 2K2.1(b)(5) would adopt the “another” felony offense position’s understanding of the word “another” and require that there be a separation in time between the underlying offense and the “another” offense. At the same time, the “in connection with” position correctly notes textual problems with ignoring the “in connection with” constraint in § 2K2.1(b)(5). To correctly interpret the text, courts must apply the enhancement provision only when a firearm is used “in connection with” (that is, in furtherance of) “another” felony (defined below as a non-merged federally enforceable felony).103 “Under this interpretation, a weapon is used or possessed in connection with another offense if the weapon facilitates or has a tendency to facilitate the offense.”104

102 In Lopez, the Court held that the mere possession of a firearm near a school was insufficient. 514 US at 562.

103 In Blount, the court described its precedent as treating “in connection with” as synonymous with “in relation to,” as that term is used in 18 USCA § 924(c).” 337 F3d at 411. Thus, the “in connection with” position requires some furtherance of the charge offense.

104 Id. See also Smith v United States, 508 US 223, 238 (1993) (“[T]he firearm must have some purpose or effect with respect to the ... crime; its presence or involvement cannot be the result of accident or coincidence.”); United States v Garner, 243 F3d 824, 828–29 (4th Cir 2001)
Beyond plain language, this focus on “in connection with” is also in line with the purposes of the enhancement. Read in context, § 2K2.1(b)(5) is in a section of the Guidelines devoted to public safety; indeed, the title of the section is “Public Safety Offenses.”

Clearly, this enhancement provision, like all enhancements in § 2K of the Guidelines, is designed to allot greater punishments to those criminals presenting an increased threat to public safety. This is the function of the “in connection with” requirement: it ensures that the firearm was actually used “in connection with” the crime and was not present coincidentally or accidentally.

B. Merger as a Canon of Avoidance

A number of states use merger requirements to address problems of multiple punishment. Merger is an important principle of criminal law because it avoids double-counting and keeps substantive limitations from collapsing into meaninglessness. For example, the merger doctrine is often seen in situations of conspiracy offenses forming part of “continuing criminal enterprises.” A majority of circuit courts have held that conspiracy is a lesser-included offense within continuing criminal enterprise and have therefore vacated convictions for conspiracy in order to avoid double-counting the same behavior.

Another example of the use of merger is the move by several states to limit the scope of the felony murder rule. The State of New York has long used the rule to preclude certain felonies, such as assault, from serving as the foundation for felony murder liability. In People v Huther, the defendant was acquitted of felony murder because the predicate felony was assault, and was thus part of, and merged into, the subsequent homicide. Merger rules are necessary to prevent impermissible double-counting; had the result in Huther been (holding that a weapon is used or possessed in connection with another offense if the weapon “facilitates or has a tendency to facilitate the [other] offense”).

105 See Part I.C for a discussion of sentencing enhancements involving public safety offenses.

106 See, for example, United States v Montanye, 962 F2d 1332, 1346–47 (8th Cir 1992); United States v David, 940 F2d 722, 738 (1st Cir 1991); United States v Jones, 918 F2d 909, 910–11 (11th Cir 1990) (per curiam); United States v Rivera, 900 F2d 1462, 1478 (10th Cir 1990); United States v Butler, 885 F2d 195, 201–02 (4th Cir 1989); United States v Schuster, 769 F2d 337, 344–45 (6th Cir 1985).

107 While not all states employ merger principles, a number of the nation’s largest states have adopted that position. See, for example, Tex Penal Code Ann § 19.02(b)(3) (Vernon 1989); People v Burroughs, 35 Cal 3d 824, 678 P2d 894 (1984); People v Huether, 184 NY 237, 77 NE 6 (1906).


109 184 NY 237, 77 NE 6 (1906).
different, every accidental or reckless homicide arising out of an attack could constitute felony murder, because the attack itself would support a conviction for felony murder and all lesser forms of negligent homicide, reckless manslaughter, or second-degree murder would collapse into full-blown first-degree felony murder.

Because multiple punishment presents an issue of constitutionality, merger is used as a way to avoid the double jeopardy problem. In *Ashwander v Tennessee Valley Authority*, Justice Brandeis famously commented:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.¹¹¹

The constitutionality of the liberal interpretation of “another” felony offense under § 2K2.1(b)(5) is questionable because of its multiple-punishment problems. The “maximum federal authority” and “in connection with” positions permit sentences to be enhanced even if the “another” felony offense is essentially the same conduct as that underlying the primary offense. Since the Guidelines are read according to the canons of statutory interpretation,¹¹² courts should apply merger principles in order to employ the canon of avoidance and alleviate constitutional issues.

Applying merger principles to the firearm enhancement could prevent impermissible double-counting by requiring that if the conduct is essentially the same, it is subsumed by the underlying offense. Merger law is an analytically cleaner way of preventing double-counting than the methods employed by the “another” felony offense position, which requires only that the conduct not be contemporaneous. By using the merger rule to limit the definition of “another” felony offense, sentencing enhancements under § 2K2.1(b)(5) could be limited to situations where enhancements would actually achieve the policy goals of reducing violence. More importantly, possible constitutional questions could be avoided by using merger to limit the potential for unconstitutional multiple punishments for the same offense.¹¹³ By using traditional merger principles to guide the application of

¹¹¹ Id at 348 (Brandeis concurring) (internal quotation marks omitted), quoting *Crowell v Benson*, 285 US 22, 62 (1931).
¹¹² *United States v Johnson*, 155 F3d 682, 683 (3d Cir 1998) (considering the plain language of the guideline, the legislative policy behind it, and its sequence within the Guidelines).
¹¹³ For a discussion of the constitutional implications of multiple punishments, see Part II.B.2.
§ 2K2.1(b)(5), courts would use longstanding principles of criminal law in a manner consistent with longstanding principles of constitutional avoidance.

C. Addressing Federalism Concerns

The solution to the federalism problem is simple. Subsequent to the Court’s decisions in *Lopez* and *Morrison*, lower courts must apply § 2K2.1(b)(5) enhancement only when “another” federally cognizable felony has been committed. That felony might currently be prohibited only by state law (like simple theft of a gun), but the enhancement should apply only if the felony considered “another” felony is one that Congress could permissibly have criminalized itself.114 When the criminal conduct is outside what Congress could permissibly criminalize after *Morrison* and *Lopez* (such as firing a gun at a state’s law enforcement officials, engaging in domestic violence, or committing other noncommercial acts of violence), the felony should not qualify as “another” felony for purposes of § 2K2.1(b)(5).115

**CONCLUSION**

Returning for the last time to the pawnshop hypothetical set forth at the beginning of this Comment, your sentence for theft of goods from a pawnshop would not be enhanced under the new test for § 2K2.1(b)(5). In order to enhance your punishment you must have committed “another” federally cognizable felony and the use of the firearm must have the potential to endanger public safety. Because your theft of the pawnshop firearm did not, and could not, put anyone at immediate risk, your sentence should be not be enhanced.

If the federal government’s firearm enhancements are to be applied in a uniform and principled manner, then a new interpretation of § 2K2.1(b)(5) is needed. The Fourth Circuit has highlighted the problems with the old interpretations in its recent decision in *Blount*. However, the Fourth Circuit failed to provide an interpretation that overcomes the constitutional difficulties and interpretive shortcomings of the other circuits. A new interpretation of § 2K2.1(b)(5) must be sensitive to the Constitution’s prohibitions on double-counting and the Supreme Court’s new Commerce Clause jurisprudence, and it must correspond to the text and purpose of the Guidelines. Courts must apply the § 2k2.1(b)(5) enhancement only when a firearm facili-

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114 For a discussion of the principle, see Part II.B.3.

115 Recent decisions construing *Lopez* and *Morrison* suggest additional limits on Congress’s power to criminalize firearm use. See, for example, *United States v Stewart*, 348 F3d 1132 (9th Cir 2003) (holding that Congress cannot prohibit the mere possession of homemade machine guns lacking any connection to interstate commerce).
tates or has a tendency to facilitate "another" federally cognizable felony that does not merge with the conviction offense.