

*Serna*, 309 F.3d 859, 864 (5th Cir. 2002) (unlawful possession of a sawed-off shotgun constitutes conduct that, by its nature, poses a serious potential risk of injury to another and is therefore a crime of violence under § 4B1.2(a)); *United States v. Johnson*, 246 F.3d 330 (4th Cir. 2001) (possession of a sawed-off shotgun always creates a serious risk of physical injury to another person and therefore is a crime of violence for career offender purposes); *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir. 2001) (sawed-off shotguns are inherently dangerous and the possession of such a firearm is a crime of violence); see also *United States v. Fortes*, 141 F.3d 1 (1st Cir. 1998) (possession of a sawed-off shotgun is a “violent felony” for purposes of 18 U.S.C. § 924(e) (the Armed Career Criminal Act)). An important distinguishing factor for these courts’ holdings is that “most weapons do not have to be registered—only those weapons that Congress found to be inherently dangerous” must be registered. *Brazeau* at 845. “If the weapon is not so labeled, mere possession by a felon is not a crime of violence.” *Id.* Indeed, at the time the Commission amended § 4B1.2 to exclude the offense of felon in possession from the definition of “crime of violence”, it was only concerned with felons possessing ordinary handguns and rifles and did not address more serious firearms.

The proposed amendment addresses the issue by adopting a categorical rule that possession of a firearm described in 26 U.S.C. 5845(a) is a crime of violence. (Besides sawed-off shotguns, section 5845(a) includes silencers, machine guns, and destructive devices). This part of the proposed amendment addresses the case in which the court has to determine whether a prior offense (state or federal) for possessing a sawed-off shot gun (or other section 5845(a) weapon) qualifies as a crime of violence, as for example, in determining the appropriate base offense level in § 2K2.1. The proposed amendment also modifies the rule that excludes felon in possession offenses from the definition of “crime of violence” to except from that rule possession of firearms that are of the type described in 26 U.S.C. 5845(a).

(G) Generally updates Chapter Six (Sentencing Procedures and Plea Agreements), and in particular, incorporates amendments made to Rules 11 and 32 of the Federal Rules of Criminal Procedure, effective December 1, 2002. Those amendments made some substantive changes but mostly reorganized Rules 11 and 32 as part of

a general restyling of the Federal Rules of Criminal Procedure to make the rules more easily understood and to make style and terminology consistent throughout the rules. This proposed amendment reflects relevant substantive amendments and stylistic changes (including redesignations).

While much of the proposed amendment of Chapter Six is stylistic and conforming, the more significant aspects of the proposal can be summarized as follows:

- Amends § 6A1.2 (Disclosure of Presentence Report; Issues in Dispute) to set out the specific procedural requirements governing the disclosure of the presentence report and any issues in dispute as required by Rule 32. Currently, § 6A1.2 provides that the court should adopt procedures for the timely disclosure of the presentence report, the resolution of disputed issues prior to the sentencing hearing, and the identification of any unresolved issues. Rule 32 was amended in 1997 to provide particular procedural deadlines and requirements for the disclosure of the presentence report and issues in dispute and, in December 2002, those deadlines and requirements were reorganized to read more easily. This proposed amendment reflects those changes.

- Moves Application Note 1 of § 6A1.2, regarding a requirement that the court provide notice of departure, to its own policy statement. The Commission added the application note in 1997 in light of *Burns v. United States*, 501 U.S. 129, 138–39 (1991), in which the Court held that, before a sentencing court may depart upward on a ground not previously identified in the presentence report, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a departure. The Court also stated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departed either upward or downward. Proposed policy statement § 6A1.4 (Notice of Possible Departure) reflects the substantive amendment that added subsection (h) to Rule 32 specifically to incorporate the *Burns* holding.

- Deletes outdated commentary regarding pre-guidelines procedures.

- Fully incorporates into § 6B1.3 the procedure set forth in Rule 11(c)(5) that the court must follow when the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C).

Please note that the PROTECT Act amendments, effective October 27, 2003,

updated the references to Rule 11 in § 6B1.2.

(H) Makes conforming amendments to various guideline provisions and commentary in light of PROTECT Act departure amendments promulgated at the October meeting.

(I) Corrects error in the examples provided in Application Note 3(B)(iii) of § 5G1.2 (Sentencing on Multiple Counts of Conviction).

(J) Provides an issue for comment regarding an apparent double-counting issue in cases in which (i) the defendant is convicted of 18 U.S.C. 922(g) (felon in possession), (ii) is an armed career criminal under § 4B1.4, and (iii) is convicted of an 18 U.S.C. 924(c) (use of a firearm during a drug trafficking offense or crime of violence).

*Proposed Amendment:*

*(A) Clarifying Application of § 2B1.1(b)(7)(C)*

Section 2B1.1(b)(7) is amended by inserting “(A)” before “the offense”; by striking “involved (A)” and inserting “involved (i)”; by striking “(B)” and inserting “(ii)”; by striking “(C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D)” and inserting “(iii)”; and by striking the comma after “education” and inserting “; or (B) the defendant violated a prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 6 in subdivision (B) by inserting “(i)” after “Subsection (b)(7)(A)” each place it appears; by striking subdivision (C) in its entirety; and by redesignating subdivision (D) as subdivision (C).

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 6 in subdivision (C), as redesignated by this amendment; by striking “subsection (b)(7)(D)” and inserting “subsection (b)(7)(A)(iii)”; and by inserting after subdivision (C), as redesignated by this amendment, the following:

“(D) Offenses Committed in Contravention of Prior Judicial Order.— Subsection (b)(7)(B) provides an enhancement if the defendant commits an offense in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is