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## Felon in Possession Sentencing Under the Federal Guidelines, Considering State Sentences

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## FELON IN POSSESSION SENTENCING UNDER THE FEDERAL GUIDELINES, CONSIDERING STATE SENTENCES

Kevin A. McDonald\*

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### **INTRODUCTION**

The number of unlawful weapons defendants appearing in federal court almost doubled between 2000 and 2005.<sup>1</sup> In addition, federal judges currently impose harsher sentences on felon in possession defendants.<sup>2</sup> This is a direct result of an increased involvement by

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<sup>1</sup> In 2000, the United States government filed weapons charges against 2810 individuals under 18 U.S.C. § 922(g), whereas in 2005 that number had grown to 5513. *See infra* Appendix I “Number of defendants in cases filed.” *See also Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/fjsrc/> (under “U.S. Criminal Code: Choose a Statistic” select “Number of defendants in cases filed”; then select year and choose “Select by chapter and section within U.S.C. Title 18”; select chapter “44-Firearms”; then select “18 922 G”; finally, select desired output format) (last visited Oct. 23, 2010).

<sup>2</sup> The mean prison term trended upwards between 2000 and 2008. The frequency of

federal law enforcement into areas of criminal law that were traditionally believed to be reserved for the states. This Note will analyze the relationship between the federal sentencing guidelines and the felon in possession statute, which forbids a convicted felon from possessing a firearm.<sup>3</sup>

The felon in possession law provides a particularly unique vehicle for federal prosecutions because the required felony may have been from a state court. Additionally, federal prosecutions often originate at the state level and are referred by local law enforcement for federal prosecution to capitalize on the harshness of federal sentencing guidelines. Given the nature of these prosecutions, many of which would likely have been pursued by local law enforcement, courts should be allowed, if not required, to consider the disparity between federal defendants and similarly situated state defendants.

This Note will begin in Section I with a brief discussion of the background of the felon in possession law contained in 18 U.S.C. § 922(g)(1), including its purpose for enactment and its elements. Section II will provide background information on the United States Sentencing Guidelines and examine particular sentencing considerations for felons in possession of firearms. Section III will discuss the increasing federalization of local crime through the Commerce Clause of the U.S. Constitution. Section IV will discuss the particular methods employed by the United States government in ferreting out gun possession by prohibited persons. Finally, Section V will examine the reasons for allowing federal courts to consider state sentences despite the guidelines' concern for eliminating federal sentencing disparities.

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defendants sentenced to life also increased during this time period, particularly since 2004. *See infra* charts titled "Defendants sentenced to life" and "Mean prison sentence in months." *See also Federal Criminal Case Processing Statistics, supra* note 1 (under "U.S. Criminal Code: Choose a Statistic" select "Mean prison or probation sentence, or fine amount, for defendants convicted"; then select year and choose "Select by chapter and section within U.S.C. Title 18"; select chapter "44-Firearms"; then select "18 922 G"; finally, select desired output format).

<sup>3</sup> 18 U.S.C. § 922(g) (2005) ("It shall be unlawful for any person (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

***I. BACKGROUND OF THE FELON IN POSSESSION LAW***

Writing about his undercover investigation into the Hell's Angels motorcycle gang, Bureau of Alcohol, Tobacco, Firearms and Explosives (hereinafter "ATF") agent Jay Dobyns referred to the felon in possession statute as "ATF's 'bread-and-butter' violation."<sup>4</sup> Agent Dobyns used this description to tell the other agents of his intention to "bust" a recently released man who "was rumored to be in possession of a used .38 Rossi."<sup>5</sup> While this is a widely accepted use of the statute,<sup>6</sup> it does not appear to be a use contemplated by the purported purpose of the enactment, which instead suggests the Act targets actual transactions in firearms and not solely their possession.<sup>7</sup>

The felon in possession statute<sup>8</sup> was part of a criminal justice system overhaul encapsulated by the Omnibus Crime Control and Safe Streets Act of 1968, which added "Chapter 44 - FIREARMS."<sup>9</sup> While there were early firearm regulations in place,<sup>10</sup> this was the first time possession of a weapon by a formerly convicted felon constituted a crime. The original statute stated:

[a]ny person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.<sup>11</sup>

The statute contained exemptions for licensed law enforcement

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<sup>4</sup> JAY DOBYNS & NILS JOHNSON-SHELTON, *NO ANGEL: MY HARROWING UNDERCOVER JOURNEY TO THE INNER CIRCLE OF THE HELLS ANGELS* 10 (2010).

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, EDMUND F. MCGARRELL ET AL., DEP'T OF JUSTICE, PROJECT SAFE NEIGHBORHOODS-A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT 178 (Apr. 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/226686.pdf>.

<sup>7</sup> *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 197, 225 (1968). *Contra* § 1201, 82 Stat. at 225 (finding and declaring weapon possession by prohibited persons a problem, but limiting incarceration to no longer than two years).

<sup>8</sup> 18 U.S.C. § 922(g)(1).

<sup>9</sup> Omnibus Crime Control and Safe Streets Act of 1968 § 902, 82 Stat. at 226.

<sup>10</sup> *See, e.g.*, National Firearms Act, Pub. L. No. 73-474, § 6, 48 Stat. 1236, 1238 (1968) (making it unlawful to receive or possess an unregistered or untaxed firearm).

<sup>11</sup> Omnibus Crime Control and Safe Streets Act of 1968 § 1202, 82 Stat. at 236.

officers<sup>12</sup> and those who have been pardoned by the President.<sup>13</sup> The reasons Congress provided for the prohibition of certain persons from carrying weapons were: (1) to alleviate the burden they placed on interstate commerce; (2) to eliminate the threat they posed to the President; (3) to eliminate any threat they posed to the first amendment; and (4) to eliminate any threat they posed to the government of the United States and the government of each state.<sup>14</sup> This section, dealing with prohibiting possession of firearms by certain individuals, was distinct from other sections dealing with illegal trade in firearms, which at the time solely composed 18 U.S.C. § 922.<sup>15</sup> At its original enactment, 18 U.S.C. § 922(g) prohibited the interstate transportation of stolen firearms and ammunition.<sup>16</sup>

In *Huddleston v. United States*,<sup>17</sup> the Court noted that Congress passed this legislation in order 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 . . .’” and to channel commerce in firearms “through federally licensed importers, manufacturers, and dealers in an attempt to halt mail-order and interstate consumer traffic in these weapons.”<sup>18</sup> This particular case, however, dealt not with the usual instance of a felon in possession of a firearm, but instead with a former felon who made false statements regarding his prior felony in order to recover his former weapon from a pawnshop in violation of another prohibition of 18 U.S.C. § 922.

Subsequently, the Gun Control Act of 1968 amended the Omnibus Crime Control and Safe Streets Act of 1968.<sup>19</sup> The felon in possession statute remained codified in Section 1202.<sup>20</sup> The only real change with respect to felon in possession law was the qualification of the term felon, which previously included “any offense punishable by

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<sup>12</sup> § 1203(1), 82 Stat. at 237.

<sup>13</sup> § 1203(2), 82 Stat. at 237.

<sup>14</sup> § 1201, 82 Stat. at 236.

<sup>15</sup> Compare Omnibus Crime Control and Safe Streets Act of 1968, § 902, 82 Stat. at 226 (prohibiting illegal trade in firearms), with § 1202, 82 Stat. at 236 (prohibiting possession of firearms by prohibited persons).

<sup>16</sup> Omnibus Crime Control and Safe Streets Act of 1968 § 922(g), 82 Stat. at 231.

<sup>17</sup> *Huddleston v. United States*, 415 U.S. 814 (1974).

<sup>18</sup> *Id.* at 824.

<sup>19</sup> Gun Control Act of 1968, Pub. L. No. 90-618, § 301(a), 82 Stat. 1213, 1237 (1968).

<sup>20</sup> § 301, 82 Stat. at 1236.

imprisonment for a term exceeding one year,”<sup>21</sup> to exclude “any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less.”<sup>22</sup>

In 1986, Congress again amended the felon in possession statute through the Firearms Owners’ Protection Act.<sup>23</sup> Unlike its predecessors, this Act purported to represent an amelioration of the perceived harshness of federal firearm regulation.<sup>24</sup> This amendment made major changes to the structure of the felon in possession law. First, it removed those who are under indictment for felonies from the purview of the statute.<sup>25</sup> Second, it eliminated Section 1201, which contained the original felon in possession statute.<sup>26</sup> Finally, it replaced the prior prohibitive language “to ship or transport any firearm or ammunition in interstate or foreign commerce” with “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”<sup>27</sup> In addition to the amendment to the substantive law, Congress also enacted a fifteen-year mandatory minimum sentence for those convicted under 18 U.S.C. § 922(g) who previously had been convicted of three or more robberies, burglaries, or a combination of the two.<sup>28</sup> Interestingly, the two-year statutory maximum protection contained in the predecessor felon in possession statute was not carried over to its new codification in 18 U.S.C. § 922(g).<sup>29</sup> In essence, the law prohibiting possession of a firearm by a felon moved from its own chapter to one concerned with the actual trade, distribution, and movement of illegal weapons.<sup>30</sup>

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<sup>21</sup> Omnibus Crime Control and Safe Streets Act of 1968 § 1202(c)(2), 82 Stat. at 236.

<sup>22</sup> Gun Control Act of 1968 § 301(b), 82 Stat. at 1236.

<sup>23</sup> Pub. L. No. 99-308, § 102, 100 Stat. 449, 451 (1986).

<sup>24</sup> § 1(b), 100 Stat. at 449.

<sup>25</sup> § 102(6)(A), 100 Stat. at 452.

<sup>26</sup> § 104(b), 100 Stat. at 459.

<sup>27</sup> § 102(6)(D), 100 Stat. at 452.

<sup>28</sup> § 104(a)(4), 100 Stat. at 458.

<sup>29</sup> Compare Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236 (1968), with Firearms Owner Protection Act § 104(a)(1), 100 Stat. at 456 (providing a five year statutory maximum subject to other limitations).

<sup>30</sup> See *United States v. Palozie*, 166 F.3d 502, 505 (2d Cir. 1999) (“The legislative history of the Firearm Owners’ Protection Act confirms what the drafting shows: the intent of Congress was to combine into one section Titles IV and VII of the Omnibus Crime

Today, the government need only prove three elements to convict a person under 18 U.S.C. § 922(g)(1). First, federal prosecutors must prove, beyond a reasonable doubt, that a court had previously convicted the criminal defendant<sup>31</sup> of a crime punishable by a term exceeding one year.<sup>32</sup> Whether or not the defendant actually received a sentence exceeding one year is irrelevant for the purposes of this statute.<sup>33</sup> The only inquiry is whether the prior conviction could have included a term of imprisonment exceeding one year, i.e., whether the statutory maximum was in excess of one year.<sup>34</sup> Even an imposed sentence of probation cannot save the defendant from coming under the scope of the statute.<sup>35</sup> The defendant may not challenge the validity of the conviction at the time of trial because “federal gun laws . . . focus not on reliability, but on the mere fact of conviction . . . in order to keep firearms away from potentially dangerous persons.”<sup>36</sup> The challenge must be made before the acquisition of a firearm.<sup>37</sup> Additionally, the Supreme Court previously held that even an expunged matter might serve as the predicate conviction.<sup>38</sup> However, Congress superseded this type of expansion three years later.<sup>39</sup>

The second element that the government must prove is that the

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Control and Safe Streets Act.”).

<sup>31</sup> The language “any court” refers to any domestic court. There previously existed a split among the circuits as to whether the term “any court” included courts outside the territorial control of the United States. The Supreme Court granted *certiorari* and resolved the question in the negative. *See Small v. United States*, 544 U.S. 385, 394 (2005).

<sup>32</sup> *United States v. Daniel*, 134 F.3d 1259, 1263 (6th Cir.), *cert. denied*, 525 U.S. 830 (1998).

<sup>33</sup> *Dickerson v. New Banner Inst.*, 460 U.S. 103, 113 (1983) (“It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of ‘a crime punishable by imprisonment for a term exceeding one year.’” (quoting 18 U.S.C. § 922(g) (2005)).

<sup>34</sup> For a greater analysis of this point, *see United States v. Currier*, 821 F.2d 52, 58-59 (1st Cir. 1987).

<sup>35</sup> *See United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006) (“[T]he fact that Defendant’s term of imprisonment was reduced by probation does not convert his violation of the statute into a misdemeanor.”).

<sup>36</sup> *Lewis v. United States*, 445 U.S. 55, 67 (1980).

<sup>37</sup> *Id.*

<sup>38</sup> *Dickerson*, 460 U.S. at 121 (“[A] rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement of Title IV.”).

<sup>39</sup> 18 U.S.C. § 921(a)(20) (2005). *See also United States v. Julian*, 974 F. Supp. 809, 815 (M.D. Pa. 1997) (“Three years after and in response to *Dickerson*, Congress amended Chapter 44 of Title 18.”).

defendant possessed the firearm and ammunition alleged in the indictment.<sup>40</sup> As part of this element, the government must prove that the defendant possessed the requisite mens rea of knowingly possessing the firearm.<sup>41</sup> The government may prove knowledge of possession by showing either actual or constructive possession.<sup>42</sup> Constructive possession is “the power and intention at a given time to exercise dominion and control over an object.”<sup>43</sup> Either constructive or actual possession can be proven by circumstantial evidence.<sup>44</sup>

The final element is that the possession affects interstate commerce.<sup>45</sup> Interpreting this jurisdictional element, courts have used an expansive definition of the Commerce Clause based on the Court’s instruction in *United States v. Lopez*<sup>46</sup> that eliminates any need to show the individual defendant’s possession “substantially” affects interstate commerce.<sup>47</sup> All that is needed is “a one-time past connection to interstate commerce . . . .”<sup>48</sup> It appears that the government need only prove that the firearm was manufactured in a state other than that in which it was found.<sup>49</sup>

## II. THE UNITED STATES SENTENCING GUIDELINES

This section will introduce the United States Sentencing Guidelines and seek to show how they impact sentences for felons in

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<sup>40</sup> *United States v. Daniel*, 134 F.3d 1259, 1263 (6th Cir.), *cert. denied*, 525 U.S. 830 (1998).

<sup>41</sup> *Id.*

<sup>42</sup> *United States v. Murphy*, 107 F.3d 1199, 1207 (6th Cir. 1997) (citing *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973)).

<sup>43</sup> *Murphy*, 107 F.3d at 1208 (quoting *Craven*, 478 F.2d at 1333).

<sup>44</sup> *Id.*

<sup>45</sup> *Daniel*, 134 F.3d at 1263.

<sup>46</sup> *United States v. Lopez*, 514 U.S. 549, 561 (1995).

<sup>47</sup> *See, e.g.*, *United States v. Quintana*, No. 00 Cr. 842, 2000 U.S. Dist. LEXIS 18192, at \*11 (S.D.N.Y. Dec. 18, 2000) (“Accordingly, Lopez’s third prong—requiring that the regulated activity ‘substantially affect’ interstate commerce—may be satisfied if there is a jurisdictional element in place which would ensure that any given act of possession only ‘affects’ interstate commerce.”).

<sup>48</sup> *United States v. Beasley*, 346 F.3d 930, 936 (9th Cir. 2003) (citing *United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988)).

<sup>49</sup> *See, e.g.*, *United States v. Younger*, 398 F.3d 1179, 1193 (9th Cir. 2005) (“The evidence in this case was undisputed that defendant’s guns were manufactured in Massachusetts and found in California. Consequently, the district court’s jury instruction was proper and the evidence sufficient . . . .”).

possession. The first subsection will provide general background on the United States Sentencing Guidelines. This will include their creation, their *raison d'être*, and their basic method for determining sentences. The final subsection will examine the specific impact these guidelines have on felon in possession law including an examination of sentence enhancements that are germane to most felon in possession offenses.

#### A. General Background

In the mid-1980s, Congress formed the United States Sentencing Commission (“the Commission”) in an effort to curb sentencing disparities and uncertainty.<sup>50</sup> This Commission developed numerous guidelines and policies set out in the United States Sentencing Guidelines Manual (“the Guidelines” or “the USSG”).<sup>51</sup> The Commission’s authority stemmed from the Sentencing Reform Act of 1984,<sup>52</sup> part of the Comprehensive Crime Control Act of 1984.<sup>53</sup> This act delegated broad powers to the Commission in its charge to “review and rationalize the federal sentencing process.”<sup>54</sup> The Commission’s authority today is rooted in 28 U.S.C. § 994(a).<sup>55</sup> The basic purpose of the guidelines was to further the four major principals of criminal justice: deterrence, incapacitation, just punishment, and rehabilitation.<sup>56</sup>

The Commission’s most important duty was to create offense behavior categories and offender characteristic categories.<sup>57</sup> The offense behavior categories look at the particulars of the crime, such as whether a weapon was used or how much money was taken.<sup>58</sup> Categories of offender characteristics are concerned with the individual being sentenced, usually the number of past crimes the individual committed and the seriousness of those crimes.<sup>59</sup> The Commission then created guideline ranges used to determine the “appropriate sentence for each

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<sup>50</sup> See Mark T. Doer, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 238 (2009).

<sup>51</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1-2 (2009).

<sup>52</sup> Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1987 (1984).

<sup>53</sup> Pub. L. No. 98-473, § 201, 98 Stat. 1976, 1976 (1984).

<sup>54</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

<sup>55</sup> *Id.* § 1A3.1.

<sup>56</sup> *Id.* § 1A1.2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.”<sup>60</sup> Congress’s goals in having the Commission create the Guidelines were threefold: (1) to achieve an honest and fair sentencing system without the need for parole boards; (2) to achieve reasonable sentence uniformity by making sure similar sentences were imposed upon similarly situated criminals committing similar offenses; and (3) to achieve proportionality in sentences based on the relative severity of the offense.<sup>61</sup> The Commission acknowledges tension between ensuring uniformity and ensuring proportionality.<sup>62</sup>

The Guidelines are based on the offenses charged by the government, but they also look to elements of the defendant’s real conduct during the crime for purposes of sentencing.<sup>63</sup> For example, under the Guidelines, two identical former felons committing identical bank robberies with a firearm should be sentenced within the same guideline range as one another.<sup>64</sup> This result should remain constant even if the government convicted one former felony under 18 U.S.C. § 922(g) felon in possession violation and the other under 18 U.S.C. § 2113(a) bank robbery violation, because the guidelines look not only to the charge elements of the crime but also to the defendant’s real conduct.<sup>65</sup>

The Commission initially determined the Guideline ranges by estimating “the average sentences served within each category under the pre-guidelines sentencing system[,]” taking into account the relative differences among those who served the sentences, and examining “the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources.”<sup>66</sup> There is evidence, however, that the Commission may have simply acquiesced to certain views of

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<sup>60</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

<sup>61</sup> *Id.* § 1A1.3.

<sup>62</sup> *Id.* See also *Rita v. United States*, 551 U.S. 338, 349 (2007) (“The Guidelines commentary explains how, despite considerable disagreement within the criminal justice community, the Commission has gone about writing Guidelines that it intends to embody these ends. It says, for example, that the goals of uniformity and proportionality often conflict. The commentary describes the difficulties involved in developing a practical sentencing system that sensibly reconciles the two ends.”).

<sup>63</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(a) (2009).

<sup>64</sup> See *United States v. Booker*, 543 U.S. 220, 253 (2005).

<sup>65</sup> See *id.*

<sup>66</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(g) (2009).

Congress in its determination of some of the guidelines.<sup>67</sup>

Originally, the Guidelines required the district courts to sentence in accordance with the Guidelines unless the individual defendant's situation required a departure from the guideline range.<sup>68</sup> In the case of a departure, the departing court had to specify atypical characteristics of the defendant or some other reason for the departure.<sup>69</sup> Regardless of whether the district court followed or departed from the guideline range, the United States Circuit Court for the circuit enveloping the district court had, as it still does, the power to review the sentence imposed below.<sup>70</sup>

The Guidelines remained mandatory, with the exception of departures, until 2005.<sup>71</sup> In *United States v. Booker*,<sup>72</sup> the United States Supreme Court determined that the mandatory nature of the Guidelines violated the Sixth Amendment in that as courts placed an increasing emphasis on facts used solely for the purpose of sentence enhancements, the role of the jury as fact-finder for the underlying crime became diminished.<sup>73</sup> In order to save the Guidelines, which the Court implied would still have value in examining the defendant's "real conduct,"<sup>74</sup> to minimize sentencing disparities for similarly situated defendants,<sup>75</sup> the Court severed two sections of the statute.<sup>76</sup> The first

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<sup>67</sup> See *Kimrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme."). See also K. Anthony Thomas, *Memorandum in Support of John Doe's Position on Sentencing*, 4 (2008), available at [http://www.fd.org/pdf\\_lib/2K2.1%20Sentmemo.pdf](http://www.fd.org/pdf_lib/2K2.1%20Sentmemo.pdf) ("In the wake of *Rita*, *Gall*, and *Kimrough*, courts around the country are scrutinizing once-inscrutable guidelines, finding that a perhaps—surprising number of them are not the result of empirical research and national experience, and imposing sentences that accord with their evaluation of the § 3553(a) factors overall.").

<sup>68</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

<sup>69</sup> See *id.* See also 18 U.S.C. § 3553(b) (2010); 18 U.S.C. § 3742 (2003).

<sup>70</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

<sup>71</sup> § 1A2.

<sup>72</sup> 543 U.S. 220 (2005).

<sup>73</sup> See *id.* at 236-237. The Court subsequently stated that, "[t]he Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." (emphasis in original). *Rita v. United States*, 551 U.S. 338, 352 (2007) (citing *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

<sup>74</sup> *United States v. Booker*, 543 U.S. 220, 252 (2005).

<sup>75</sup> *Id.* at 250-251.

<sup>76</sup> *Id.* at 259.

section severed was 18 U.S.C. § 3553(b)(1), which had made sentencing within the Guidelines mandatory. The other section severed was 18 U.S.C. § 3742(e), provided for de novo appellate review of departures from the Guidelines. The effect of these severances relegated the Guidelines to an advisory capacity.<sup>77</sup> In *United States v. Rita*,<sup>78</sup> the Court subsequently addressed the standard of review for a sentence imposed within the guideline range and adopted a rebuttable presumption of reasonableness.<sup>79</sup>

In the courtroom, the sentencing judge usually begins by considering the presentence report<sup>80</sup> and the interpretation it gives to the guidelines.<sup>81</sup> The judge may then hear arguments from the prosecution or defense as to why the Guidelines sentence is inapplicable to the particular defendant.<sup>82</sup> Under USSG § 5K2.0, either side may argue for a departure from the Guidelines' range because the particular defendant falls outside the scope to which the Commission meant the Guidelines to apply.<sup>83</sup> The sides may also argue that, based on *Booker*, the Court should vary the sentence because it would either not reflect the goals of sentencing contained in 18 U.S.C. § 3553(a) or be improper for some other reason.<sup>84</sup> The judge will then determine the sentence based on the calculated guideline range, any grounds for departures, and the sentencing objectives contained in 18 U.S.C. § 3553(a).<sup>85</sup>

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<sup>77</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2010) ("The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted." (referring to *Booker*, 543 U.S. at 264-65)). See also *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." (citing 18 USC § 3553 (a)(4), (5) (Supp. 2004))).

<sup>78</sup> 551 U.S. 338 (2007).

<sup>79</sup> *Id.* at 350-51.

<sup>80</sup> For the procedure mandated by statute upon the probation officer preparing the report, see 18 U.S.C. § 3552(a) (1990). See also FED. R. CRIM. P. 32 (providing the criminal procedural rule for sentencing a criminal defendant in federal court and specifically outlining what must be included in the presentence report).

<sup>81</sup> *Rita v. United States*, 551 U.S. 338, 351 (2007).

<sup>82</sup> *Id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

Section 3553(a) gives the factors that the sentencing court must consider in its imposition of a sentence.<sup>86</sup> The statute contains an initial limiting clause, providing that the sentence be sufficient but not greater than necessary to comply with the need for the sentence based on the sub-factors of subsection two (“the need for the sentence imposed”).<sup>87</sup> The first factor to be considered is “the nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>88</sup>

The next factor is the need for the sentence imposed.<sup>89</sup> The need for the sentence imposed ought to: (1) reflect the seriousness of the crime, promote respect for the law and provide just punishment; (2) provide adequate deterrence; (3) protect the public from any future crimes by the defendant; and (4) give the defendant any needed vocational or educational training.<sup>90</sup> The court will then consider the kinds of sentences available, the sentence established by the guidelines range, pertinent policy statements, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[,]” and finally any need for restitution.<sup>91</sup> While this analysis appears to consider the guidelines as only one distinct part of the sentencing process, some believe the overall process necessitates imposing the same sentence that would have been reached under the mandatory Guidelines, thus making the Guidelines more than “advisory” if not making them effectively mandatory.<sup>92</sup>

### *B. The Guidelines With Respect to Felon in Possession Law*

With respect to felon in possession law, the defendant’s prior convictions play a large part in driving up the guideline range.<sup>93</sup> Some

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<sup>86</sup> 18 U.S.C. § 3553(a) (2010).

<sup>87</sup> § 3553(a).

<sup>88</sup> § 3553(a)(1).

<sup>89</sup> § 3553(a)(2).

<sup>90</sup> § 3553(a)(2)(A)-(D).

<sup>91</sup> § 3553(a)(3)-(7).

<sup>92</sup> See Hon. Michael W. McConnell, U.S.C.J., *The Booker Mess*, 83 DENV. U. L. REV. 665, 682 (2006) (“In practical effect, the Guidelines continue to be the benchmark for responsible judging, with variances only for unusual cases. Moreover, and more speculatively, appellate review may coerce virtual Guidelines compliance in the ordinary run of cases.”)

<sup>93</sup> Lynn Adelman & Jon Deitrich, *Sixth Annual American Judicature Society Symposium Assessing the Values of Punishment: The State of Sentencing in the United States Criminal Justice System: Symposium Article: Improving the Guidelines through*

prior convictions are treated more severely than others; “[s]pecifically, prior convictions for crimes of violence or drug-trafficking offenses result in an enhanced offense level.”<sup>94</sup> Not only will previous crimes quickly raise the guideline range, but the Commission has also increased the rate at which those convictions will raise the guideline range.<sup>95</sup>

Due to concern that a large portion of the sentences for felony possession of a firearm were at the high end of the guideline range, the Sentencing Commission used one of its working groups to examine possible amendments.<sup>96</sup> The group concluded “that characteristics such as actual or intended use of the weapon, drug-related conduct, or possession of particularly deadly weapons accounted for such sentences.”<sup>97</sup> Despite the group finding “that there was no strong correlation between the existence of the types of prior convictions listed (firearm offenses, drug-related offenses, or convictions for crimes of violence) and the length of sentence imposed,” the Commission still raised the base offense level by twelve points for defendants previously convicted of two felony convictions for either violent crimes or crimes involving controlled dangerous substances.<sup>98</sup>

The Commission revised the guidelines in response to Congress’s enactment of the Armed Career Criminal Act.<sup>99</sup> The Commission reasoned that, in passing the Armed Career Criminal Act, Congress

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*Critical Evaluation: An Important New Role for District, 57 DRAKE L. REV. 575, 587 (2009)* (“For status offenses such as felon in possession of a firearm and unlawful reentry after deportation, the guideline range is largely driven by the nature of the defendant’s prior convictions.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 587-88

<sup>96</sup> Thomas, *supra* note 67, at 10. *See also* Adelman & Deitrich, *supra* note 93.

<sup>97</sup> Adelman & Deitrich, *supra* note 93, at 587. *See also* Thomas, *supra* note 67, at 10-11.

<sup>98</sup> Adelman & Deitrich, *supra* note 93, at 587-88. *See also* Thomas, *supra* note 67, at 10-11. *See generally, Fifteen Years of Guidelines Sentencing*, U.S. SENTENCING COMM’N, 67 (2004), available at [http://www.usc.gov/Research/Research\\_Projects/Miscellaneous/15\\_Year\\_Study/15\\_year\\_study\\_full.pdf](http://www.usc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf). (Perhaps most startling is the treatment of gun traffickers compared to those whose only crime is possession of a firearm: “For traffickers, the use of probation has been steadily reduced to about one-quarter of its preguidelines level, replaced by imprisonment and, to a lesser extent, intermediate sanctions. For illegal possessors, probation has been replaced almost completely by imprisonment.”)

<sup>99</sup> Adelman & Deitrich, *supra* note 93, at 588. *See also* Thomas, *supra* note 67, at 10-11.

“had determined that greater sentences were called for when the defendant had prior convictions for drugs or violence.”<sup>100</sup> This was done despite the Commission’s own research to the contrary.<sup>101</sup> Today, the average prison sentence has doubled from what it was in the pre-Guidelines era.<sup>102</sup>

There are numerous provisions of the Guidelines that call for additional sentence enhancements or even upward departures for the use or possession of a gun.<sup>103</sup> Section 5K2.6 of the Guidelines calls for an increased sentence above the guideline range if the defendant used or possessed a weapon or dangerous instrumentality during the commission of the offense,<sup>104</sup> presuming the sentencing judge finds the guideline range does not adequately take into account the degree of danger presented by the firearm.<sup>105</sup> At least one court has held that this departure could be used after the application of several sentencing enhancements pursuant to Section 2K2.1<sup>106</sup> of the Guidelines.<sup>107</sup>

Section 2K2.1 contains many enhancements that may apply to felons in possession of firearms. First, this section provides for calculation of the base offense level to be used in the guideline

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<sup>100</sup> Adelman & Deitrich, *supra* note 93, at 588. *See also* Thomas, *supra* note 67, at 10-11.

<sup>101</sup> *See* Adelman & Deitrich, *supra* note 93, at 587-88. *See also* Thomas, *supra* note 67, at 11.

<sup>102</sup> Adelman & Deitrich, *supra* note 93, at 588.

<sup>103</sup> *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.6 (2009); U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2009).

<sup>104</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.6 (2009) (“If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.”).

<sup>105</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2)-(3) (2009). The advisory note provides an example of a robbery that results in an injury to another. While injury to another is generally taken into account by the guidelines as part of a robbery with a specific enhancement depending on the extent, an upward departure may be warranted if the robber injured multiple people. *Id.*

<sup>106</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2009).

<sup>107</sup> *United States v. Hardy*, 99 F.3d 1242, 1248-50 (1st Cir. 1996) (holding that an upward departure for a felon in possession may be warranted based on the quantity of firearms and the inherent danger of those particular types of firearms despite the application of similar sentence enhancements under Section 2K2.1).

calculation.<sup>108</sup> For a felon in possession, the minimum base offense level is fourteen and the maximum is twenty-six.<sup>109</sup> If the offense involves a weapon identified in 26 U.S.C. § 5845(a)<sup>110</sup> or a semi-automatic firearm with a large capacity magazine the base offense level is twenty.<sup>111</sup> Similarly, if the defendant's former felony is for a crime of violence or a controlled dangerous substance (i.e., drug) offense, the base offense level is also twenty.<sup>112</sup> If both of the aforementioned are true, that the crime involved one of the specified weapons, and the defendant was formerly found guilty of a violent or drug offense, the base level becomes twenty-two.<sup>113</sup> Two convictions for either violent or controlled substance offenses leads to a base offense level of twenty-four,<sup>114</sup> and when combined with one of the specifically identified weapons, increases the base offense level to twenty-six.<sup>115</sup>

The next part of Section 2K2.1 deals with enhancements to the base offense levels.<sup>116</sup> If more than three weapons are possessed, the base offense level will increase depending on the precise number.<sup>117</sup> If the defendant possessed a destructive device, the base offense level will increase fifteen points for a rocket or missile, or two points for any other kind of destructive device.<sup>118</sup> A stolen firearm will increase the base offense level by two points,<sup>119</sup> and any destruction or alteration of the serial number on the firearm will increase the base offense level by four points.<sup>120</sup> While Section 2K2.1 limits the increases to a maximum offense level of twenty-nine<sup>121</sup> under these particular enhancements,<sup>122</sup>

<sup>108</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a) (2009).

<sup>109</sup> *Id.* § 2K2.1(a).

<sup>110</sup> This essentially applies to modified ("sawed-off") shotguns, modified rifles, machineguns, and any firearm with a silencer. 26 U.S.C. § 5845(a) (1986).

<sup>111</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(B) (2009).

<sup>112</sup> *Id.* § 2K2.1(a)(4)(A).

<sup>113</sup> *Id.* § 2K2.1(a)(3).

<sup>114</sup> *Id.* § 2K2.1(a)(2).

<sup>115</sup> *Id.* § 2K2.1(a)(1).

<sup>116</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b) (2009) ("Specific Offense Characteristics").

<sup>117</sup> See *id.* § 2K2.1(b)(1) (2009).

<sup>118</sup> See *id.* § 2K2.1(b)(3) (2009).

<sup>119</sup> See *id.* § 2K2.1(b)(4)(A) (2009).

<sup>120</sup> See *id.* § 2K2.1(b)(4)(B) (2009).

<sup>121</sup> Unless the fifteen-point increase applies from Section 2K2.1(b)(3), in this case, the offense level may rise above twenty-nine points. *Id.* § 2K2.1(b) (2009).

<sup>122</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b) (2009) ("The cumulative offense

other enhancements may apply to raise the offense level well-above twenty-nine.<sup>123</sup> Involvement in firearm trafficking raises the level by four,<sup>124</sup> as does possession in connection with another felony.<sup>125</sup>

There are also provisions that may apply to the felon in possession due to his previous felonious conduct. The first and most noticeable effect is on the defendant's criminal history category, which will necessarily be higher than a criminal history category of I (one). The defendant may also be given an upward departure on the basis of any previous conduct of which he was acquitted.<sup>126</sup>

### III. FEDERALIZATION OF STREET CRIME

In 2001, the federal government began a program known as "Project Safe Neighborhood" to enforce "the strict provisions of federal law, including no right to bail, long sentences with minimal good-time, and incarceration in the federal prison system."<sup>127</sup> The idea of "federalizing" traditionally state jurisdiction crimes is neither new nor unique to the felon in possession law.<sup>128</sup> The source of federal government authority in local crimes is based on the expansive, post-New Deal interpretation of the Commerce Clause.<sup>129</sup> In the case of the felon in possession law, there is a Constitutional requirement that the weapon travelled from one state to another, a de minimis standard.<sup>130</sup>

One consequence of the increased prosecution of traditionally state crimes is that the federal prison population has increased at a faster rate

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level determined from the application of subsections (b)(1) through (b)(4) may not exceed level 29, except if subsection (b)(3)(A) applies.").

<sup>123</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(5)-(7) (2009). See also U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(c) (2009).

<sup>124</sup> U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(5) (2009).

<sup>125</sup> *Id.* § 2K2.1(b)(6) (2009).

<sup>126</sup> *Id.* § 4A1.3(a)(2)(E) (2009). See also *United States v. Hardy*, 99 F.3d 1242, 1250-51 (1st Cir. 1996) ("U.S.S.G. § 4A1.3(e) . . . plainly encompasses charged conduct underlying vacated convictions."); *United States v. Guthrie*, 931 F.2d 564, 573 (9th Cir. 1991) ("The district courts are . . . free . . . to decide whether the conduct underlying the vacated conviction warrants an upward departure pursuant to Section 4A1.3 because it provides 'reliable information' regarding the defendant's criminal past.").

<sup>127</sup> MCGARRELL ET AL., *supra* note 6, at 178.

<sup>128</sup> Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1311 (1997).

<sup>129</sup> *Id.*

<sup>130</sup> See discussion *supra* Section I.

than the state prison population.<sup>131</sup> In the past fifteen years, the federal prison population has doubled.<sup>132</sup> Specifically pertaining to felons in possession, the number of unlawful weapons defendants appearing in court almost doubled from 2000 to 2005.<sup>133</sup> Not only is the number of defendants increasing, but the mean length of imposed sentences is also trending upwards.<sup>134</sup>

One potent example of the interaction among the felon in possession law, sentencing under the guidelines, and increasing federalization of state crime can be seen in Colorado's "Project Exile."<sup>135</sup> This was a pilot program for the national "Project Safe Neighborhood," but specifically mandated the zealous federal prosecution of weapons offenses.<sup>136</sup> The program provided for three new Assistant United States Attorneys who would exclusively handle Project Exile cases.<sup>137</sup> This campaign resulted in the prosecution of 191 people in Colorado, but 154 of those 191 people had committed no previous violent felony.<sup>138</sup> Of the remaining people, only seventeen had even possessed a firearm in their previous crimes and only four actually discharged the weapon.<sup>139</sup> James Allison, speaking for Colorado's United States Attorney's Office, takes the position that the felon in possession law is not only concerned with violence, but also is concerned with limiting access to firearms for those who have evinced bad judgment by way of past felonious conduct.<sup>140</sup> This bad judgment, the office argues, makes these people relatively more dangerous to society.<sup>141</sup> Mr. Allison purports that this view echoes Congress' concerns in enacting the felon in possession statute.<sup>142</sup> This

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<sup>131</sup> *Prison Count 2010: State Population Declines for the First Time in 38 Years*, PEW CTR. OF THE STATES, 1 (2010), available at [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=57653](http://www.pewcenteronthestates.org/report_detail.aspx?id=57653).

<sup>132</sup> *Id.*

<sup>133</sup> See *infra* Appendix I "Number of defendants in cases filed."

<sup>134</sup> See *infra* Appendix II "Mean prison sentence in months."

<sup>135</sup> David Holthouse, *Living in Exile: Federal Prisons Are Filling up with People Whose Only Crime Is the Possession of a Gun.*, WESTWORD (Mar. 21, 2002), available at <http://www.westword.com/content/printVersion/218375>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Holthouse, *supra* note 135.

<sup>142</sup> *Id.* ("And from my (James Allison's) observation, people who have felony convictions, whether they're forgery, writing bad checks, stealing or doing anything else

view, however, ignores any predetermination of the relative dangerousness of the individual based on their previous sentence.

The fact that felon in possession charges can be predicated upon past state level convictions adds a level of complexity to the analysis of the “dangerousness” of the felon in possession. The law states that any person convicted of a felony punishable by up to a year imprisonment, or a misdemeanor punishable by up to two years imprisonment, cannot possess a firearm.<sup>143</sup> This requirement may be overbroad in that it will “indiscriminately sweep up state convictions regardless of their manifestations of dangerousness.”<sup>144</sup> Additionally, notice may be wanting because the law states that, to serve as a predicate, the felony may have been punishable by up to a year in prison.<sup>145</sup> The law may leave individuals who obtained more lenient sentencing, especially those who were not sentenced to any term of imprisonment, unaware that they are subject to the law.<sup>146</sup>

Allowing federal convictions based on prior state convictions is also a problem because it ignores the lenity granted by the state court judge when determining whether or not someone is a felon for purposes of the statute.<sup>147</sup> One can reasonably infer that, in certain cases where the state court judge is lenient, the judge may have believed that the individual was not particularly dangerous to society. However, the state court’s prior determination of the relative dangerousness of the individual is disregarded for purposes of 18 U.S.C. § 922(g)(1).

#### **IV. CRIMINAL FORUM SHOPPING**

Due to the concurrent jurisdiction between the state and the federal government for these types of weapons violations, when a firearm

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that’s nonviolent, they have bad judgment. And I agree with Congress that if you’re going to limit the possession of firearms, let’s start with people who’ve been proven beyond a reasonable doubt to have exercised very poor judgment.”)

<sup>143</sup> 18 U.S.C. § 922(g)(1) (2005). *See also* Wayne A. Logan, *Creating a “Hydra in Government”*: *Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 80-82 (2006).

<sup>144</sup> Logan, *supra* note 143, at 80.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* For a brief analysis of the Second Amendment concerns this situation presents, *see* Douglas A. Berman, SENTENCING LAW AND POLICY BLOG (Aug. 5, 2010), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2010/08/seventh-circuit-rejects-as-applied-second-amendment-challenge-to-922g1-but-suggests-a-nonviolent-felo.html](http://sentencing.typepad.com/sentencing_law_and_policy/2010/08/seventh-circuit-rejects-as-applied-second-amendment-challenge-to-922g1-but-suggests-a-nonviolent-felo.html).

<sup>147</sup> Logan, *supra* note 143, at 81-82.

possessed by a former felon has traveled interstate, local law enforcement is able to refer the case for federal prosecution.<sup>148</sup> However, local prosecutors, because of the duplicitous nature of the federal criminal code, would have pursued many of these cases anyway.<sup>149</sup>

Additionally, in at least one jurisdiction in the Eastern District of Michigan, under Project Safe Neighborhood, the U.S. Attorney's Office will consult with local law enforcement and if the defendant meets a certain criteria the local prosecutor's office will offer the defendant a plea bargain at the state level with the consequence of federal prosecution for refusal.<sup>150</sup> This threat of federal prosecution allows the U.S. Attorney's Office to secure harsher plea bargains at the state level, thus accomplishing Congress's goals in securing harsher penalties under Section 922(g) without having to expend substantial federal resources.<sup>151</sup> While Congress purposely wrote the statute to be over-inclusive, with the understanding that U.S. Attorney's Office would exercise prosecutorial discretion, it seems unlikely that Congress contemplated this use.<sup>152</sup> Allowing law enforcement officers to determine whether to refer a case for federal prosecution reduces political accountability at the state level by allowing the state legislature to not incur the political cost of maintaining its own felon in possession statute.<sup>153</sup>

## V. ANALYSIS

Certain legal scholars have been critical of the federalization of street crime with respect to disparate sentencing at the state and federal levels.<sup>154</sup> In a state court, the defendant may receive a sentence that is

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<sup>148</sup> See Edward R. McGuire & William R. King, *Trends in the Policing Industry*, 593 ANNALS 15, 28 (2004).

<sup>149</sup> Daniel Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 BOUNDARY CHANGES CRIM. JUST. ORG. 81, 98 (Charles M. Friel, ed., 2000), available at [http://www.ncjrs.gov/criminal\\_justice2000/vol\\_2/02d2.pdf](http://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf).

<sup>150</sup> Melodee Henderson, *Case Digest Issue: Constitutional Law - Due Process - Federal Prosecution Following a Defendant's Rejection of a State Plea Offer Does Not Violate Due Process or Constitute Vindictive Prosecution*, 84 U. DET. MERCY L. REV. 1, 2 (2006).

<sup>151</sup> *Id.* See also *United States v. Gray*, 382 F. Supp. 2d 898, 907 (E.D. Mich. 2005) (holding that this type of practice does not constitute "vindictive prosecution" and denying dismissal of the indictment).

<sup>152</sup> See generally James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951 (1991).

<sup>153</sup> Richman, *supra* note 149, at 97.

<sup>154</sup> *Id.*

relatively mild when compared to a federal sentence for the same conduct.<sup>155</sup> The federal government's reliance on prior state offenses to establish criminal liability for a crime over which the state has concurrent jurisdiction is particularly disconcerting.<sup>156</sup> By imposing harsher sentences, the federal government substitutes its own judgment in penalizing local criminal conduct for the judgment of the state.<sup>157</sup>

Aberrational state-federal sentencing disparities based on the federalization of street-crime decreases political accountability.<sup>158</sup> By deciding to refer a case for federal prosecution, state law enforcement is essentially circumventing the law of the state in which the arrest occurred.<sup>159</sup> If the people of that state would have adopted the federal law with the accompanying guideline range, then the state legislature is able to escape the political costs of their enactments.<sup>160</sup> However, if the people of the state would not have adopted the legislation, then state law enforcement is essentially nullifying the preferences of the electorate.<sup>161</sup> In either scenario, securing harsher penalties under federal law obscures state-level accountability.<sup>162</sup> Furthermore, virtually every circuit has held that the district court need not consider the hypothetical state sentence for the crime, and that has exacerbated this obfuscation.<sup>163</sup>

However, the courts do differ in the extent to which they exclude consideration of sentences for similarly situated state defendants. Even post-*Booker*, some circuits take a "hard" approach by declaring irrelevant the potential state sentence a federal defendant would have faced.<sup>164</sup> Other circuits take a "soft" approach by declaring that it is not

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 104.

<sup>157</sup> Logan, *supra* note 143, at 95-96.

<sup>158</sup> Richman, *supra* note 149, at 97.

<sup>159</sup> *Id.* at 97, 102.

<sup>160</sup> *Id.* at 97.

<sup>161</sup> *Id.*

<sup>162</sup> *See generally id.*

<sup>163</sup> *See, e.g.,* United States v. Ringgold, 571 F.3d 948, 950-53 (9th Cir. 2009) ("We agree with those circuits to have reached the issue that a district court judge does not abuse his discretion in declining to consider under § 3553(a)(6) the sentence a defendant would have received for the same conduct in state court.")

<sup>164</sup> *See, e.g.,* United States v. Clark, 434 F.3d 684, 686 (4th Cir. 2006) (holding improper a district court sentence that, in light of the fact that the case was first brought in state court before being prosecuted federally, considered the corresponding state sentence); United States v. Malone, 503 F.3d 481, 486 (6th Cir. 2007) ("holding that it is impermissible for a district court to consider the defendant's likely state court sentence as a

error for a district court to refuse to consider the potential state sentence a federal defendant would have faced.<sup>165</sup> The reason for the circuit courts' universal refusal to consider the state-federal sentencing disparity, as mentioned above, is that Congress directed the Guidelines be created to provide federal sentencing uniformity.<sup>166</sup> This is among the Guidelines' purported goals.<sup>167</sup>

However, the technical and practical applications of the felon in possession law undermine this concern for federal sentencing uniformity. The felon in possession law is already closely tied to state substantive law and state law enforcement. As mentioned previously, felon in possession cases are often predicated on state offenses. They also often originate at the state level either with state law enforcement or, in some instances, in state court. These two aspects of the felon in possession law, along with their respective problems as referenced throughout this paper, destroy any chance of uniformity in the federal system in the first instance, and then carry those disparities forward to sentencing. For this reason, it seems naïve to urge uniformity in federal sentencing when the underlying convictions will, by statutory definition, be dependent upon disparate state law.

A preferable sentencing method would be to allow, if not require in some cases, the district courts to consider the state-federal sentencing disparity. The increase of felon in possession convictions due to the increased efforts of federal prosecutors through programs such as Project Safe Neighborhood, a program that demonstrably aimed its pilot

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factor in determining his federal sentence"); *United States v. Schmitt*, 495 F.3d 860, 863 (7th Cir. 2007) (explaining that it is impermissible to consider federal-state sentencing disparities when it would increase sentencing disparities among federal defendants); *United States v. Jeremiah*, 446 F.3d 805, 808 (8th Cir. 2006) ("The District Court was neither required nor permitted under § 3553(a)(6) to consider a potential federal/state sentencing disparity in imposing Jeremiah's sentence.").

<sup>165</sup> See, e.g., *United States v. Johnson*, 505 F.3d 120, 123-24 (2d Cir. 2007) (upholding the district court's refusal to consider the federal-state sentencing disparity where a felon in possession defendant faced 120 months in federal court, but would only have faced up to seven years (eighty-four months) in state court); *United States v. Branson*, 463 F.3d 1110, 1112 (10th Cir. 2006) (citing "hard approach" cases but limiting decision to declaring reasonable a refusal to consider federal-state sentencing disparities); *United States v. Dowdy*, 216 Fed. App'x. 178, 182 (3d Cir. 2007) (holding it is not error to decline to consider disparate sentences between coconspirators when one is prosecuted in state court and the other in federal court).

<sup>166</sup> *Dowdy*, 216 Fed. App'x. at 182.

<sup>167</sup> *Id.* See also discussion *supra* Section II.A.

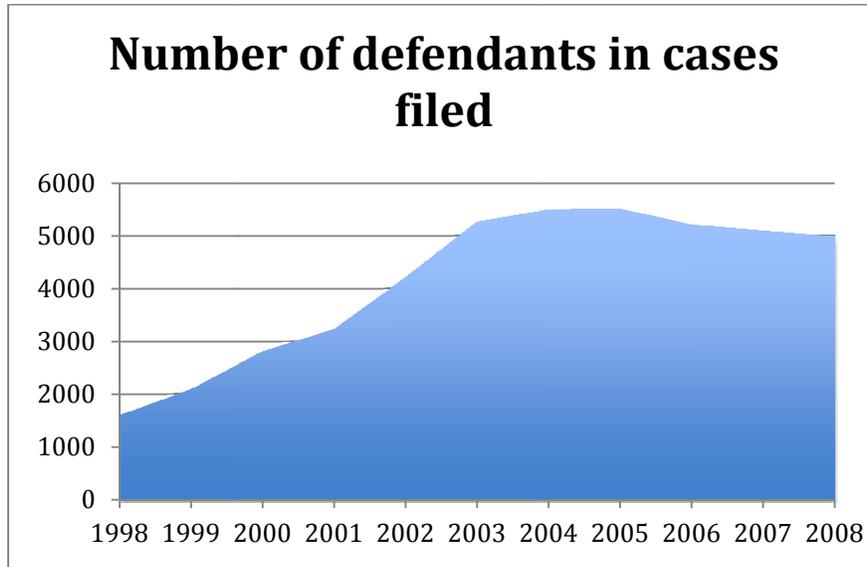
at people without any history of violence, creates fairness concerns. This is especially true when the federal government uses threat of federal indictment to affect harsher state-level plea bargains. Allowing the courts to consider the federal-state sentencing disparity would help to allay some of these problems and reign in an overly harsh system.

Additionally, allowing federal courts to consider state sentences could ease the tension between uniformity and proportionality in the Guidelines. If predicating criminal liability on state crimes lessens federal uniformity in the first instance, removing the concern altogether should provide for more proportionate sentences and thus achieve another of the Guidelines' goals. Tracking federal sentences to state sentences in this context could allow for greater recognition of the relative dangerousness of the defendant in that particular community because the state is less removed from the citizenry of that state than is the federal government. This would also force politicians to make real decisions on felon in possession penalties if they agree with the federal government that the penalties should be harsh. In other words, it would eliminate the negative effect on political accountability at the state level.

## ***VI. CONCLUSION***

In an era when prison overcrowding is a growing concern due to real economic limitations, it may be an unwise policy to use federal resources in pursuing essentially local crime. Tracking federal sentences for felon in possession offenses could help to stem the growth of the federal prison system. By removing one of the prosecutorial benefits of federal court, i.e., harsher sentences, federal prosecutors would likely pursue only the more serious offenses; the cost of prosecuting the lesser offenses may now outweigh the relative benefits. If state prosecutors do bring charges on the felon in possession offenses previously handled by the federal government, the impact on the prison system should be relatively less because there are significantly more state prisons on the aggregate than there are federal prisons. The relative increase in the prison population of the state should be less than the relative increase in the prison population of the federal government. This would focus prison and prosecutorial resources on the most dangerous offenders by taking away incentives to incarcerate people who may simply have evinced bad judgment in the past, but who are nonetheless not dangerous to others around them.

**VII. APPENDIX I**<sup>168</sup>



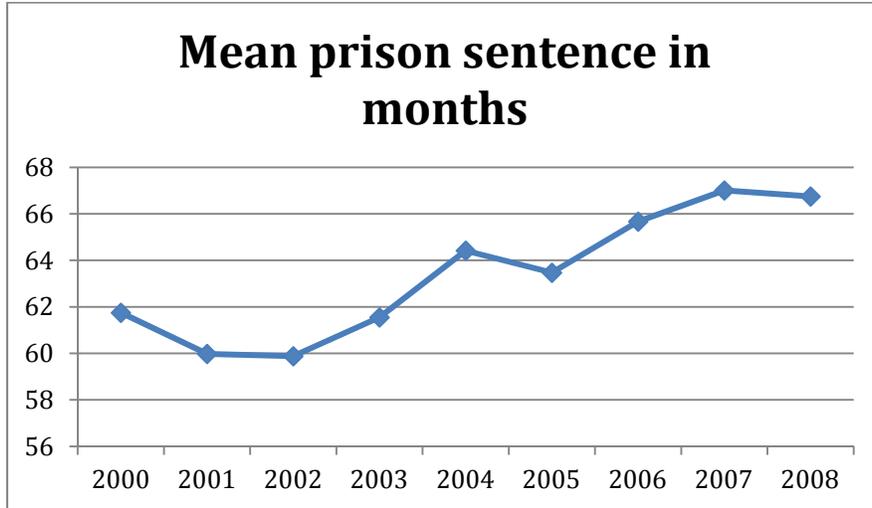
<sup>168</sup> *Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/fjsrc/> (under “U.S. Criminal Code: Choose a Statistic” select “Number of defendants in cases filed”; then select year and choose “Select by chapter and section within U.S.C. Title 18”; select chapter “44-Firearms”; then select “18 922 G”; finally, select desired output format) (last visited Oct. 23, 2010), data is on file with author in Microsoft Excel format.

2011

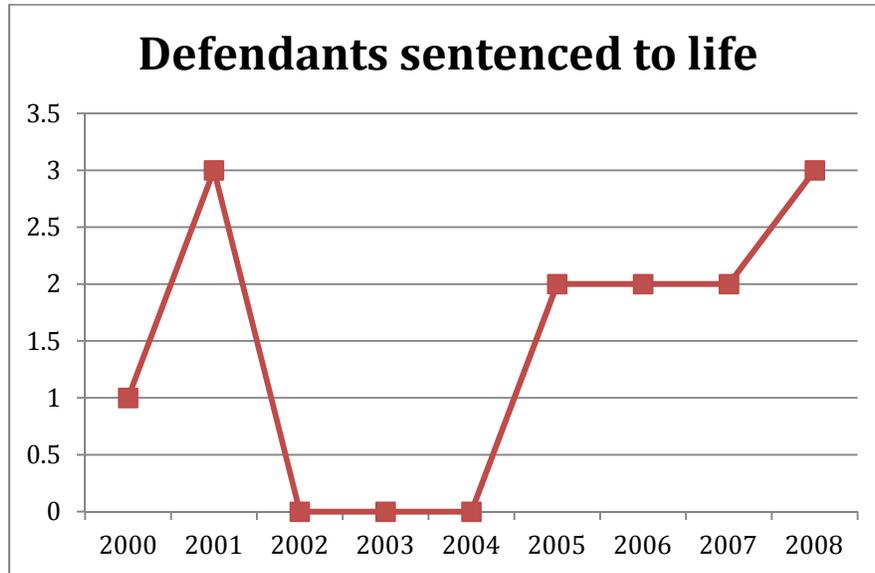
FELON IN POSSESSION SENTENCING

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VIII. APPENDIX II<sup>169</sup>



<sup>169</sup> See *Federal Criminal Case Processing Statistics*, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/fjsrc/> (under “U.S. Criminal Code: Choose a Statistic” select “Mean prison or probation sentence, or fine amount, for defendants convicted”; then select year and choose “Select by chapter and section within U.S.C. Title 18”; select chapter “44-Firearms”; then select “18 922 G”; finally, select desired output format) (last visited Oct. 23, 2010), data is on file with author in Microsoft Excel format.

**IX. APPENDIX III**<sup>170</sup>

<sup>170</sup> See *Federal Criminal Case Processing Statistics*, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/fjsrc/> (under “U.S. Criminal Code: Choose a Statistic” select “Mean prison or probation sentence, or fine amount, for defendants convicted”; then select year and choose “Select by chapter and section within U.S.C. Title 18”; select chapter “44-Firearms”; then select “18 922 G”; finally, select desired output format) (last visited Oct. 23, 2010), data is on file with author in Microsoft Excel format.