

# A Definition Out of Reach: Clarifying Constructive Possession in Federal Sentencing Guideline 2D1.1(b)(1)

Ellen E. Cranberg\*

*ABSTRACT: The United States Sentencing Guidelines created a novel, more uniform calculation for sentencing federal criminal offenders. The complex system, however, is not without its flaws. Section 2D1.1(b)(1) of the Sentencing Guidelines provides for a two-level increase in the specific offense level if a dangerous weapon (including a firearm) is possessed in connection with a drug trafficking offense. “Possession” in this provision includes constructive possession. Federal Circuits differ greatly on the standard they use to define “constructive possession,” leading to disproportionate and unequal sentences across the country. A universal interpretation of constructive possession that requires the weapon to be both temporally and spatially proximate to the defendant and the drug activity fits most closely with what the Sentencing Commission intended the two-level increase to punish. The Sentencing Commission intended a higher sentence to punish the increased danger an offender creates in possessing a dangerous weapon with drug activity, and increased danger only arises from a dangerous weapon if the weapon is close enough to the offender for him or her to use it during the course of drug activity. Aligning the provision’s application with what the Sentencing Commission intended would create more proportionate, uniform punishment nationwide than the wide range of different interpretations used across the federal judiciary now.*

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\* J.D. Candidate, The University of Iowa College of Law, 2020; B.A., The University of Iowa College of Liberal Arts and Sciences, 2016. Many thanks to Professor Alison Guernsey for her infallible red pen, and to Delta Airlines for stranding her in an airport on a cold December night with nothing to read but this Note.

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## I. INTRODUCTION

The United States Federal Sentencing Guidelines (“Guidelines” or “Sentencing Guidelines”) reformed federal sentencing law to make

sentencing criminal defendants more uniform, just, and predictable. The Guidelines established a framework based on specific aspects of the defendant, the crime he or she committed, and the defendant's criminal history, to calculate a range of time the defendant should serve in prison.<sup>1</sup> This Note focuses specifically on Section 2D1.1(b)(1) of the Guidelines, which calls for a two-level increase in the defendant's specific offense level if the defendant was convicted of a controlled substance offense and possessed a dangerous weapon, including a firearm.<sup>2</sup> The Guidelines and the courts have permitted constructive possession of a dangerous weapon, rather than actual possession, to warrant this two-level increase.<sup>3</sup>

The standard to determine whether or not the defendant constructively possessed a weapon in this context, however, varies greatly across the Federal Circuits.<sup>4</sup> This Note does not debate the validity of an increased sentence for *all* instances of constructively possessing a dangerous weapon in connection with drug trafficking; rather, the varied interpretations of constructive possession across the country now too broadly encompass instances of possession that do not represent an "increased danger," and therefore misalign with what the Sentencing Commission intended Section 2D1.1(b)(1) to punish. Applying a provision of the Guidelines inconsistent with the Sentencing Commission's intent leads to disproportionate and inconsistent sentencing across the country.

This Note argues that the federal judiciary and the United States Sentencing Commission should adopt the strict temporal and spatial proximity standard in order to combat the problematic interpretations of Section 2D1.1(b)(1). In Part II, this Note provides background and context of sentencing reform and the Guidelines generally before narrowing in on Section 2D1.1(b)(1).<sup>5</sup> In Part III, this Note explores the different definitions of constructive possessions across different Federal Circuits. Part III also explains how constructive possession without temporal and spatial proximity contravenes the Sentencing Commission's intent because it permits Section 2D1.1(b)(1) to punish conduct<sup>6</sup> that did not represent an increased

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1. See U.S. SENTENCING GUIDELINES MANUAL § 5, introductory cmt. (U.S. SENTENCING COMM'N 2018). See generally *id.* § 5A (providing the Sentencing Table and Application Notes).

2. *Id.* § 2D1.1(b)(1) (U.S. SENTENCING COMM'N 2018).

3. OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, PRIMER: DRUG GUIDELINES 21 (2018), available at [https://www.uscc.gov/sites/default/files/pdf/training/primers/2018\\_Primer\\_Drugs.pdf](https://www.uscc.gov/sites/default/files/pdf/training/primers/2018_Primer_Drugs.pdf) [<https://perma.cc/Z9MG-4JTY>] (citing *United States v. Renteria-Saldana*, 755 F.3d 856, 859 (8th Cir. 2014); *United States v. Rea*, 621 F.3d 595, 606 (7th Cir. 2010)).

4. See *infra* Section III.A.

5. See *infra* Part II.

6. The term "conduct," when used to refer to what the court punishes a defendant for, refers specifically to the acts the defendant was convicted of and any relevant conduct the court may take into account at sentencing. OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, PRIMER: RELEVANT CONDUCT 2 (2018), available at [https://www.uscc.gov/sites/default/files/pdf/training/primers/2018\\_Primer\\_Relevant\\_Conduct.pdf](https://www.uscc.gov/sites/default/files/pdf/training/primers/2018_Primer_Relevant_Conduct.pdf) [<https://perma.cc/F5YD-XC9S>].

danger.<sup>7</sup> Part III then establishes that applying a provision inconsistent with the Sentencing Commission's intent has fashioned sentences that are disproportionate to the defendant's conduct and continues to create inconsistent sentences for similarly-situated defendants who have been convicted of similar crimes.<sup>8</sup> Proportionality and uniformity were two of the core goals that inspired and continue to guide sentencing reform today<sup>9</sup> and therefore an overbroad interpretation counters two major goals of both Congress and the Guidelines.

Finally, in Part IV, this Note proposes that the Tenth Circuit's temporal and spatial proximity interpretation of constructive possession should control to resolve these issues.<sup>10</sup> The Tenth Circuit's proximity standard dictates that a defendant constructively possesses a dangerous weapon, triggering the two-level increase, only if the weapon is both spatially and temporally proximate to both the underlying drug trafficking activity and the defendant.<sup>11</sup> The proximity standard would ensure Section 2D1.1(b)(1) would only apply in cases that presented an increased danger. The United States Sentencing Commission intended Section 2D1.1(b)(1) to only punish instances of constructive possession that represent an increased danger, and therefore the proximity standard would prevent the provision from punishing conduct Congress did not intend to fall under Section 2D1.1(b)(1).<sup>12</sup>

## II. HISTORY AND MECHANICS OF THE GUIDELINES

This Part explains the importance and history of the Sentencing Reform Act ("SRA"), the goals Congress charged the United States Sentencing Commission with, and the mechanics of how the Guidelines work in practice to show how a two-level increase affects a federal defendant. This Part then specifically defines Section 2D1.1(b)(1) and constructive possession to contextualize this Note's narrow issue. The first step in analyzing any provision of the Guidelines, however, is understanding the history and purposes of sentencing reform.

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For more information on what conduct a court may consider in determining a defendant's sentence, see generally *id.* (defining relevant conduct, detailing the range of relevant conduct that goes into determining the offense level, and describing whether conduct associated with a prior offense—charged, acquitted, or uncharged—can be included as relevant conduct).

7. See *infra* Sections III.A–B.

8. See *infra* Section III.C.

9. See discussion *infra* Section III.C (establishing that the SRA and legislated mandates of the Guidelines make proportionality and uniformity two goals of sentencing reform).

10. See *infra* Part IV.

11. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1186 (10th Cir. 2004).

12. See *infra* Part IV.

Concerned with rising rates of violent crime in the 1980s, President Reagan's "Morning in America" campaign<sup>13</sup> promised comprehensive crime control reform.<sup>14</sup> His administration delivered on that promise with the Comprehensive Crime Control Act of 1984 ("CCCA"): a multi-law campaign to improve many aspects of the federal criminal justice system.<sup>15</sup> The SRA was one of the pieces of legislation passed in this major overhaul.<sup>16</sup> The United States Sentencing Commission created the United States Federal Sentencing Guidelines as part of the SRA of 1984.<sup>17</sup>

#### A. THE SENTENCING REFORM ACT

Congress enacted Title II of the CCCA, the SRA, in the wake of concern with federal sentencing disparities among similarly situated defendants who had been convicted of similar crimes in different parts of the country.<sup>18</sup> As such, proportionality and uniformity set the stage for structuring sentencing reform. The statute set forth a new sentencing structure for all defendants convicted of federal crimes with very few exceptions.<sup>19</sup> The legislation established various statutory factors to consider in fashioning a sentence sufficient but not greater than necessary.<sup>20</sup> It also intended to promote certainty of punishment to better enforce crime control in general.<sup>21</sup> The SRA's specific goals to achieve proportionality and uniformity were to structure sentencing, bring certainty to administration of punishment, and increase penalties for certain specific offenses like drug and financial crimes.<sup>22</sup>

13. Michael Beschloss, *The Ad That Helped Reagan Sell Good Times to an Uncertain Nation*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/business/the-ad-that-helped-reagan-sell-good-times-to-an-uncertain-nation.html> [perma.cc/V9C8-4Y35].

14. Ronald Reagan, *Radio Address to the Nation on Proposed Crime Legislation*, UC SANTA BARBARA: AM. PRESIDENCY PROJECT (Feb. 18, 1984), <http://www.presidency.ucsb.edu/ws/index.php?pid=39541> [perma.cc/A9B3-K7WB] (providing a transcript of Ronald Reagan's proposal).

15. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. In addition to redefining federal sentencing, the CCCA also strengthened forfeiture provisions, streamlined law enforcement administration, increased penalties for controlled substance offenses, and reinstated the federal death penalty among other reforms.

16. *Id.* at 1987.

17. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2011), available at [https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC\\_Overview.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf) [<https://perma.cc/Q7NW-KSB7>] [hereinafter OVERVIEW].

18. *Id.*

19. See 18 U.S.C. § 3551(a) (2012) ("Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter . . ." (emphasis added)).

20. S. REP. NO. 98-225, at 74-81 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3257-64.

21. *Id.* at 65, as reprinted in 1984 U.S.C.C.A.N. 3182, 3248 ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform.").

22. *Id.* at 39, 255-56, 363-79.

The SRA enjoyed strong bipartisan support and was drafted largely by the Senate, passing the House without amendment.<sup>23</sup>

In addition to creating the Sentencing Commission, the SRA overhauled the entire structure of federal sentencing. It abolished the federal bail system and instituted an optional term of supervised release after incarceration.<sup>24</sup> The SRA allowed for a term of probation in some cases<sup>25</sup> but eliminated federal parole.<sup>26</sup> It also created a fine structure with statutory maximums for certain classes of felonies<sup>27</sup> and mandatory special assessment fees imposed for each count.<sup>28</sup> Finally, the SRA explicitly provided for “appellate review of [a] sentence[.]” imposed by the district court.<sup>29</sup> The most important provision of the SRA created the United States Sentencing Commission to establish the Sentencing Guidelines and a factor-based structure for sentencing courts.<sup>30</sup>

### B. THE UNITED STATES SENTENCING COMMISSION AND ITS AIMS

The role of the Sentencing Commission is: “(1) to establish sentencing policies and practices for the federal courts . . . [through published] guidelines . . . regarding the appropriate form and severity of punishment for [federal] offenders . . .”; (2) to advise the other branches of government on the establishment and enforcement of crime policy; and (3) to base their decisions and ongoing evaluations for federal crime and sentencing issues in research that they would collect and analyze in order to “serv[e] as an information resource for [all things crime and punishment for] Congress, the executive branch, . . . and the public” at large.<sup>31</sup> The United States Sentencing

23. U. S. SENTENCING COMM’N, SIMPLIFICATION DRAFT PAPER, *available at* <https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2> [<https://perma.cc/F56S-E7W9>].

24. 18 U.S.C. § 3583(a) (establishing a term of supervised release in the federal system).

25. *Id.* § 3561(a)(1)–(3) (allowing for a term of probation unless the offense is a Class A or B felony, the offense itself has expressly precluded probation, or the offender is simultaneously sentenced to an offense that is not a petty offense).

26. *See generally* Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1976, 1987–95 (providing edits to the relevant Code provisions to eliminate all instances of and references to “parole”).

27. *See* 18 U.S.C. § 3571(a) (“A defendant who has been found guilty of an offense may be sentenced to pay a fine.”). Fines apply to both convicted individuals and convicted organizations. *Id.* § 3571(b)–(c) (establishing maximum fines for individuals and organizations).

28. *See id.* § 3013 (establishing a mandatory “[s]pecial assessment” for every “person convicted of an offense” in federal court). Even indigent defendants are subject to the mandatory special assessment because the special assessment goes to the Crime Victims Fund. *Id.* (“The court *shall* assess on any person convicted of an offense in the United States.” (emphasis added)); 34 U.S.C. § 20101 (“There is created in the Treasury a separate account to be known as the Crime Victims Fund . . . . Except as limited by subsection (c), there shall be deposited in the Fund . . . all fines that are collected from persons convicted of offenses against the United States . . .”).

29. William W. Wilkins, Jr., *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429, 430 (1989).

30. *See* 28 U.S.C. § 991 (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission . . .”).

31. OVERVIEW, *supra* note 17, at 1.

Commission is unique in that though it is a “study” commission, which is usually delegated to “the executive branch, Congress established the U.S. Sentencing Commission as an . . . independent agency within the judicial branch” with an ongoing role in the “research and development” of federal criminal policy and sentencing that is still active today.<sup>32</sup>

Congress dictated that the United States Sentencing Commission’s first and foremost goal was to establish the United States Sentencing Guidelines.<sup>33</sup> The Guidelines are designed to reflect the four purposes of sentencing: “just punishment” (sometimes referred to as retribution), specific and general deterrence, isolation or incapacitation, and rehabilitation.<sup>34</sup> The Guidelines are also designed to promote certainty and fairness in punishment to combat the previous inconsistency in sentences for similar defendants committing similar crimes that troubled Congress so.<sup>35</sup> However, the Guidelines still require judicial decision-making to ensure sentences proportionately punish the defendant’s conduct.<sup>36</sup> The United States Sentencing Commission must continue to gauge the effects of the Guidelines and to recommend changes as appropriate to both the Guidelines themselves and to federal criminal policy generally.<sup>37</sup>

The SRA required sentencing courts to impose a sentence set forth within the Guidelines.<sup>38</sup> The decision to make the Guidelines mandatory and

32. *Id.* at 1, 3. Defendants immediately “challeng[ed] the constitutionality of the Sentencing Reform Act” under the separation of powers doctrine because it represented using Congressional authority to create a judiciary agency whose purpose is to assist in enforcing sentencing laws. *Id.* at 2; *see also* *Mistretta v. United States*, 488 U.S. 361, 370 (1989) (“*Mistretta* moved to have the promulgated Guidelines ruled unconstitutional on the grounds that the Sentencing Commission was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines.”). In an opinion combining multiple similar challenges to this provision, the United States Supreme Court granted *certiorari* to uphold the Commission’s establishment and ongoing role as constitutional. *Id.* at 371.

33. *See* 28 U.S.C. § 991(b)(1).

34. *See id.* § 991(b)(1)(A) (“The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. §] 3553(a)(2).”); *see also* 18 U.S.C. § 3553(a)(2) (establishing the four purposes of sentencing: “just punishment” (retribution), deterrence, isolation or incapacitation, and rehabilitation).

35. 28 U.S.C. § 991(b)(1)(B) (“[To] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account.”).

36. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 3 (U.S. SENTENCING COMM’N Nov. 1, 1990) (providing reasons the court may depart from the recommended sentence the Guidelines provide).

37. OVERVIEW, *supra* note 17, at 1.

38. 18 U.S.C. § 3553(b) (“[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) . . .”).

not advisory was hotly debated,<sup>39</sup> and eventually adopted over concerns that merely making the Guidelines voluntary would not eliminate sentencing disparities if courts did not adopt them uniformly.<sup>40</sup> Despite this intent, the United States Supreme Court held the Guidelines had to be advisory for constitutional purposes in *United States v. Booker*.<sup>41</sup> *Booker* expanded the holding of *Apprendi v. New Jersey*, a case establishing that any fact used to enhance a defendant's sentence beyond the statutory maximum was subject to the jury requirement of the Sixth Amendment and must be proved beyond a reasonable doubt.<sup>42</sup> In *Booker*, the Court held that the *Apprendi* principle applied to the Guidelines as a whole because "the Guidelines [in their entirety] have the [same] force and effect of laws."<sup>43</sup> Therefore, making the Guidelines mandatory would violate the Sixth Amendment because they often require the type of "judicial factfinding" at the sentencing stage that *Apprendi* held to be unconstitutional.<sup>44</sup> The Court severed the SRA and struck down all provisions of the SRA making the Guidelines mandatory as unconstitutional.<sup>45</sup>

In light of *United States v. Booker*, the Guidelines today are merely advisory, but a sentencing court is still required to consider them.<sup>46</sup> The following Section explains in detail how a court "considers" the Guidelines in practice.

### C. MECHANICS OF THE GUIDELINES AND SECTION 2D1.1(B)(1)

The United States Sentencing Commission's most important accomplishment, the United States Sentencing Guidelines, present a complicated framework to address the huge variety of problems and goals Congress charged it with. The Guidelines are essentially a chart system with the "offense level" on the vertical axis and the "criminal history category" of the defendant on the horizontal axis.<sup>47</sup>

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39. See Alan Dershowitz, *Let the Punishment*, N.Y. TIMES (Dec. 28, 1975), <https://www.nytimes.com/1975/12/28/archives/let-the-punishment-fit-the-crime-indeterminate-prison-sentences-a.html> [<https://perma.cc/8H8T-55EL>] (bemoaning the cons of mandatory sentencing including mandatory adherence to the Guidelines and mandatory minimum sentencing provisions).

40. See S. REP. NO. 98-225, at 79 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3262 (pointing to the poor record of states that had adopted voluntary guidelines).

41. See generally *United States v. Booker*, 543 U.S. 220 (2005) (holding the Guidelines to be advisory, and not mandatory).

42. See generally *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact used to extend a defendant's sentence beyond the statutory maximum must be proved by a jury beyond a reasonable doubt).

43. See *Booker*, 543 U.S. at 233-35.

44. *Id.* at 246-47.

45. *Id.* at 259 (Breyer, J., opinion in part).

46. *Id.* at 245 ("So modified, the federal sentencing statute, as amended, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." (citations omitted)).

47. See U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM'N 2018) (providing the sentencing table).



Sentencing Table (in Months of Imprisonment)<sup>48</sup>

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

48. *Id.*

### 1. Specific Offense Level

Specific offense levels are one of the two major components to properly calculate a defendant's Guideline range.<sup>49</sup> Specific offense levels are comprised of two parts: the base offense level and the specific offense characteristic adjustments.<sup>50</sup> The base offense level is the starting point for determining the severity of the sentence the defendant deserves based on the severity of the underlying offense.<sup>51</sup> The specific offense characteristic adjustments are increases or decreases to the base offense level that arise out of aspects of the defendant's crime, including the specific conduct or characteristics of the defendant.<sup>52</sup>

Specific offense characteristic adjustments represent common-sense reasons why similarly situated defendants who committed the same type of crime and start with the same base offense level should nonetheless have their offense levels adjusted. Examples of specific offense character adjustments include the number of firearms used,<sup>53</sup> the amount of money stolen,<sup>54</sup> the quantity and purity of drugs at issue,<sup>55</sup> the number of victims,<sup>56</sup> the age of the victims,<sup>57</sup> and whether the defendant had an aggravating or mitigating role in

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49. U.S. SENTENCING COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED 2 (2017), available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2017/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2017/Use_of_SOC_Guideline_Based.pdf) [<https://perma.cc/W9NQ-XgYC>] (showing that specific offense characteristics were applied to 100 percent of defendants sentenced under the Guidelines in 2017).

50. See generally U.S. SENTENCING GUIDELINES MANUAL § 2 (U.S. SENTENCING COMM'N 2018) (establishing the base offense levels and specific offense characteristics of various offenses).

51. The base offense level is generally subject to much less litigation than specific offense character adjustments, because the factual basis supporting which base offense level to apply is normally found in the statute the defendant was charged under in the indictment. Occasionally, the base offense level can change based on different facts even for defendants who are charged under the same statute, such as quantity and type of drug for which the defendant is responsible. See, e.g., *id.* (establishing different base offense levels for different quantity and purity of drugs involved, the defendant's prior history, and other relevant factors).

52. See generally *id.* § 2D1.1(a)–(d) (setting forth specific offense characteristic adjustments for drug trafficking offenses charged under 21 U.S.C. § 841(b) (2012) and 18 U.S.C. § 960(b) (2012)).

53. *Id.* § 2K2.1(b)(1).

54. *Id.* § 2B1.1(b)(1).

55. *Id.* § 2D1.1(c) (listing the Drug Quantity Table of weights and purities of certain controlled substances and which base offense levels they trigger).

56. *Id.* § 2B1.1(b)(2)(A)–(C).

57. See generally *id.* § 2A2.3(b)(1)(B) (detailing special offense characteristic adjustment if assault offense resulted in injury to a person under 16 years old); *id.* § 2A3.1(b)(2)(A)–(B) (setting forth special offense characteristic adjustments if sexual abuse offense was to a victim under 12 or 16 years old); *id.* § 2A3.4(b)(1)–(2) (setting forth special offense characteristic adjustments of abusive sexual contact).

a conspiracy.<sup>58</sup> Debating which levels apply for both the base offense level and the specific offense characteristic adjustments are questions of law, and therefore the defendant's specific offense level is often the main subject of litigation and appeal.<sup>59</sup>

By starting with a base offense level but adjusting for individual characteristics, this system fits two major goals of sentencing reform by fashioning sentences proportionate to the defendant's conduct,<sup>60</sup> while still achieving uniform, just sentences.<sup>61</sup> Implementing specific offense character adjustments allows a sentencing court to proportionately account for aggravating and mitigating factors that may make a defendant's behavior more or less harmful than that of a different defendant despite a similar charge, and adjust the punishment accordingly.

Consider the following fictional defendants: "Defendant A" and "Defendant B." Defendant A is a drug kingpin convicted of conspiracy to distribute narcotics, and in the process, recruited teenagers to his criminal enterprise, had a hand in organizing the entire scheme to sell drugs start to finish, and used violence to achieve these goals. Defendant B is a 15-year-old also convicted of conspiracy to distribute narcotics, but Defendant B's only role was to serve as a lookout during a single sale of these drugs. Despite identical charges and convictions, common sense dictates that Defendant A's conduct is more dangerous than Defendant B's, and therefore Defendant A should spend more time behind bars than Defendant B. Offense-specific adjustments allow for changes to the base offense level by taking into account these aggravating and mitigating factors, and therefore create sentences more proportionate to the harm the defendant caused.

Specific offense levels also increase uniformity in sentencing because all similarly situated defendants who have been convicted of similar crimes start with the same base level. This ensures that similarly situated defendants who have been convicted of similar crimes will end up around the same specific offense level, despite leaving room for specific offense character adjustments. As such, using base offense levels in the Guidelines promotes certainty and uniformity of punishment.

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58. *Id.* § 2D1.1 (b)(14)–(15). The age of victims most often applies to victims of sexual offenses. *Id.* § 2D1.1 (b)(14).

59. Beth A. Freeborn & Monica E. Hartmann, *Judicial Discretion and Sentencing Behavior: Did the Feeney Amendment Rein in District Judges?*, 7 J. EMPIRICAL LEGAL STUD. 355, 358 (2010); Wilkins, *supra* note 29, at 430.

60. 18 U.S.C. § 3553(a) (2012) ("The court shall impose a sentence sufficient, but not greater than necessary . . .").

61. Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, 10 SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 1, 2 (June 2001), available at <https://www.ncjrs.gov/pdffiles1/nij/186480.pdf> [<https://perma.cc/GF3T-BVE6>].

## 2. Criminal History Category

The criminal history of the defendant is more straightforward than the specific offense level because the sentencing judge follows the formula in Section 4 of the Guidelines.<sup>62</sup> The defendant is attributed “criminal history points” for criminal offenses sustained before the current conviction.<sup>63</sup> The points for each prior offense vary based on the potential sentence of the prior offenses, from three points for a prior offense that could be punished with a sentence of one year or more to one point for an offense that carried a potential punishment of up to one year in prison.<sup>64</sup> A certain number of “points” places the defendant in a “Criminal History Category.”<sup>65</sup> Differences in criminal history points can drastically impact the Guideline range imposed: A defendant with a criminal history category of VI (13 or more criminal history points) on average has a Guideline range double that of a defendant with a criminal history category of I (0–1 points) for the same offense level.<sup>66</sup>

The “criminal history category” aspect of the Guidelines fits the goal of proportionality: Defendants with prior convictions of more serious offenses show a proclivity towards recidivism and greater harm to the community. Therefore, these defendants deserve higher sentences than first-time offenders or repeat offenders with fewer or less serious convictions. Taking into account the defendant’s criminal history also creates certainty and uniformity of punishment because defendants who have prior criminal history will *per se* earn higher sentences than those who do not. Though the Guideline system may appear confusing at first blush, the gridded Guidelines in practice provide a predictably clear method for determining a range of months for the defendant’s sentence as shown below.

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62. See generally U.S. SENTENCING GUIDELINES MANUAL § 4A (U.S. SENTENCING COMM’N 2018) (establishing the method for calculating defendants’ criminal history points). Though this aspect of determining a defendant’s Guideline range is generally less controversial than the specific offense level, this is not necessarily true. See, e.g., *United States v. Ley*, 876 F.3d 103, 109 (3d Cir. 2017) (holding that a traffic stop followed by a summons did not constitute an intervening arrest for calculating criminal history points); *United States v. Rayford*, 434 F. App’x 721, 724 (10th Cir. 2011) (holding the trial court did not err in counting two offenses as separate convictions when they resulted from arrests on different days and carried different docket numbers); *United States v. Peltier*, 276 F.3d 1003, 1006–07 (8th Cir. 2002) (holding the trial court’s ruling that two of the defendants’ offenses were separated by intervening arrests was erroneous, but harmless because the defendant would have been a category six regardless of the error).

63. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt.

64. *Id.* § 4A1.1. Typically, prior felonies count for three points and prior misdemeanors count for one or two points, but the points are technically given for the potential sentence of the underlying offense rather than the felony/misdemeanor classification. *Id.* § 4A1.1 cmt. background.

65. *Id.* § 5A (showing the sentencing table in which the number of criminal history points required for each criminal history category are labeled across the top horizontal axis).

66. *Id.*

### 3. Applying the Guidelines—An Example

Say a defendant pled guilty to violating 18 U.S.C. § 922(g)(1) for taking a leading role in a scheme to traffic firearms with obliterated serial numbers. The defendant pled guilty to one count of possessing five firearms with obliterated serial numbers by a felon. The hypothetical defendant has sustained two felony convictions for crimes of violence that carried potential sentences of greater than one year and otherwise has no other criminal record.

In determining this defendant's sentence, the judge would start with the specific offense level. The first step in the specific offense level is establishing the base offense level. U.S.S.G. § 2K2.1(a)(2) calls for a base level of 24 "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense."<sup>67</sup> As the hypothetical defendant has sustained two felony convictions for crimes of violence, the judge would begin with the level 24. Then, the judge would consider any specific offense character adjustments that would aggravate or mitigate the base offense level. In the hypothetical defendant's case, the judge would add two levels to the base level because the defendant stipulated to possessing five firearms per U.S.S.G. § 2K2.1(b)(1)(A).<sup>68</sup> This brings the defendant's specific offense level to 26. The judge would also add four more levels for the obliterated serial numbers pursuant to U.S.S.G. § 2K2.1(b)(4)(B),<sup>69</sup> bringing the specific offense level to 30.

The judge would need to rule on whether or not the defendant's role in the scheme "was otherwise extensive" under U.S.S.G. § 3B1.1(a).<sup>70</sup> If the judge held the defendant's role was not "otherwise extensive," the judge would not apply the four-level increase,<sup>71</sup> leaving the offense level at 30. Finally, the judge would reduce the offense level by three for acceptance of responsibility in pleading guilty, and for notifying the Government in a timely manner of the defendant's intent to plead guilty under U.S.S.G. § 3E1.1.<sup>72</sup> This brings the defendant's final specific offense level to 27, completing the process for the vertical axis of the Guidelines.

The judge would then calculate the defendant's criminal record under Section 4 of the Guidelines to determine the defendant's criminal history category.<sup>73</sup> This defendant's criminal history earns three criminal history

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67. *Id.* § 2K2.1(a)(2).

68. *Id.* § 2K2.1(b)(1)(A).

69. *Id.* § 2K2.1(b)(4)(B).

70. *Id.* § 3B1.1(a).

71. *Id.*

72. *Id.* § 3E1.1.

73. *Id.* § 1B1.1(a)(6).

points for each of the convictions, totaling six points.<sup>74</sup> With six criminal history points, the defendant has a criminal history category of III.<sup>75</sup>

Finally, the judge would consult the sentencing table to determine that an offense level of 27 and a category III would yield a Guideline range of 87–108 months, or seven to nine years.<sup>76</sup> The judge is required to consider this calculation in sentencing the defendant, but could also either vary or depart upward or downward in the judge’s discretion and would issue a final sentence at defendant’s sentencing hearing.<sup>77</sup> The statutory maximum for 18 U.S.C. § 924(a)(2) is ten years,<sup>78</sup> and therefore the defendant could not be sentenced to imprisonment for a term greater than 120 months.

The example shows not only how the Guidelines work in practice, but also how big of an impact an increase or decrease in the defendant’s specific offense level can have on his or her resulting Guideline range. Adding two specific offense levels can add as much as 78 months, or six-and-a-half years, to a defendant’s Guideline range depending on the base offense level and the defendant’s criminal history category.<sup>79</sup> It is critical to a defendant’s liberty interest, therefore, that the law consistently interprets a specific provision of the Guidelines that affects even two offense levels, like Section 2D1.1(b)(1).

#### 4. U.S. Sentencing Guidelines Manual Section 2D1.1(b)(1) and Constructive Possession

This Note specifically addresses constructive possession in the context of Section 2D1.1(b)(1). Section 2D1.1 represents the base offense levels and specific offense characteristic adjustments for the unlawful manufacturing, importing, exporting, trafficking, or possession of a controlled substance under 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b).<sup>80</sup> Section 2D1.1(b) refers to specific offense characteristic adjustments.<sup>81</sup> Specifically, Section (b)(1) states “[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels.”<sup>82</sup> This is a fairly common specific offense adjustment; Section

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74. *Id.* § 4A1.1.

75. *Id.* § 5A.

76. *See id.*

77. *See* OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, PRIMER: DEPARTURES AND VARIANCES 41 (2018), available at [https://www.ussc.gov/sites/default/files/pdf/training/primers/2018\\_Primer\\_Departure\\_Variance.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_Departure_Variance.pdf) [<https://perma.cc/MNP7-9837>]. Departures and variances are ways within both the confines of the Guidelines and the statutory language of 18 U.S.C. § 3553 (2012) for a sentencing judge to adjust a defendant’s sentence outside of the calculated Guideline range. *See id.* at 1–2.

78. 18 U.S.C. § 924(a)(2) (2012).

79. U.S. SENTENCING GUIDELINES MANUAL § 5A. The table shows that a two-level increase from specific offense level 39 to 41 for a defendant with a criminal history category of one would increase his or her Guideline range from 262–327 months to 324–405 months. *Id.*

80. *Id.* § 2D1.1(a)–(b).

81. *Id.* § 2D1.1(b).

82. *Id.*

2D1.1(b)(1) was applied 2,855 times in 2017, constituting nearly 15 percent of sentencings done that year.<sup>83</sup>

“Possession” in this instance can be either actual or constructive.<sup>84</sup> Black’s Law Dictionary defines “constructive possession” as “[c]ontrol or dominion over a property without actual possession or custody of it. Also termed *effective possession*.”<sup>85</sup> The United States Supreme Court defines constructive possession as: “a person, though lacking such physical custody, still has the power and intent to exercise control over the object.”<sup>86</sup> Courts have also used the “dominion or control” test to define constructive possession; a person must knowingly “ha[ve] both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons.”<sup>87</sup> Constructive possession is essentially a way for a court to impute possession of an object, as opposed to a person actually possessing an object by holding it in their hand, storing it in their pocket, or otherwise having it attached to their body.<sup>88</sup> Examples of constructively possessing a dangerous weapon include having a key to a stash house where weapons are kept,<sup>89</sup> regularly working in a place where firearms are present,<sup>90</sup> or keeping a firearm in a vehicle parked in the driveway.<sup>91</sup>

### III. ANALYSIS

Though constructively possessing a dangerous weapon does warrant an increase under Section 2D1.1(b)(1), the different standards various Federal Circuits use to interpret when constructive possession triggers this provision has led courts to apply it inconsistently. This Part first examines the different standards federal courts use to determine when constructive possession falls under Section 2D1.1(b)(1), and then explains why overbroad interpretations of constructive possession are problematic.

83. U.S. SENTENCING COMM’N, *supra* note 49, at 29.

84. OFFICE OF GEN. COUNSEL, *supra* note 3, at 21.

85. *Possession*, BLACK’S LAW DICTIONARY (11th ed. 2014).

86. *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

87. *United States v. Booker*, 774 F.3d 928, 930 (8th Cir. 2014) (emphasis omitted).

88. *Possession*, *supra* note 85 (“The detention or use of a physical thing with the intent to hold it as one’s own.”).

89. *United States v. Herrera*, 446 F.3d 283, 287–88 (2d Cir. 2006) (holding the defendant constructively possessed dangerous weapons when the defendant was jointly responsible for a stash house where drugs, drug proceeds, and weapons were kept).

90. *United States v. Harris*, 230 F.3d 1054, 1057–58 (7th Cir. 2000) (considering whether a defendant constructively possessed a dangerous weapon because he worked in and around cooking, packaging and distributing drugs in multiple houses where firearms were hidden in secret compartments around the house and individuals who actually possessed firearms were often in and out of the house).

91. *United States v. Idowu*, 520 F.3d 790, 794 (7th Cir. 2008) (holding the defendant constructively possessed a firearm located in a trailer that doubled as an office parked in the defendant’s driveway).

A. THE VARYING STANDARDS OF INTERPRETING CONSTRUCTIVE POSSESSION

Compare the following cases: from the Sixth Circuit, *United States v. Darwich*; from the First Circuit, *United States v. McDowell*; from the Second Circuit, *United States v. Herrera*; from the Tenth Circuit, *United States v. Zavala-Rodriguez*; and finally, from the Eighth Circuit, *United States v. Lyman*.<sup>92</sup>

In the Sixth Circuit case, *Darwich*, the defendant was indicted for various drug crimes after the FBI determined his convenience store was a front for a marijuana distribution operation.<sup>93</sup> He was also charged with “use or carrying of a firearm in relation to . . . drug trafficking.”<sup>94</sup> During sentencing, the district court applied the two-level increase in specific offense level under Section 2D1.1(b)(1) because seven firearms were found in the defendant’s home.<sup>95</sup> No firearms were found on the storefront property, where the majority of the trafficking occurred.<sup>96</sup> The Sixth Circuit upheld the two-level increase because the defendant had not met his burden of showing that it was “clearly improbable” that the weapons were connected to the offense.<sup>97</sup> In so holding, the Sixth Circuit relied on evidence that the defendant had previously packaged some of the marijuana in his home.<sup>98</sup>

In *McDowell*, the First Circuit upheld the two-level enhancement for a defendant who was arrested attempting to retrieve drugs from an airport locker.<sup>99</sup> After McDowell’s arrest, the police found a gun in his vehicle parked in the lot outside the airport.<sup>100</sup> The court relied on the “clearly improbable” language of the Guidelines and did not establish any sort of temporal or proximity requirement between the defendant, the weapon, and the drug activity, similar to the Sixth Circuit.<sup>101</sup> So long as the defendant could not

92. See generally *Herrera*, 446 F.3d 283; *United States v. Zavala-Rodriguez*, 379 F.3d 1182 (10th Cir. 2004); *United States v. Darwich*, 337 F.3d 645 (6th Cir. 2003); *United States v. McDowell*, 918 F.2d 1004 (1st Cir. 1990); *United States v. Lyman*, 892 F.2d 751 (8th Cir. 1989) (showing the varying standards of interpreting constructive possession among the different circuits).

93. *Darwich*, 337 F.3d at 650.

94. *Id.*

95. *Id.* at 665.

96. *Id.*

97. *Id.* The “clearly improbable” standard is taken directly from the commentary to Section 2D1.1(b)(1). “The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.11(A) (U.S. SENTENCING COMM’N 2018).

98. *Darwich*, 337 F.3d at 665. Though the defendant and his associates had “bagged” some marijuana at his home where the firearms were kept at some point, without a temporal proximity analysis it is not clear whether or not the “bagging” in the defendant’s home occurred when the firearms were present and subsequently whether the firearms created an increased danger at the time of the drug activity. See *id.*

99. *United States v. McDowell*, 918 F.2d 1004, 1011 (1st Cir. 1990).

100. *Id.*

101. *Id.*



prove it was “clearly improbable” that the weapon was related to the drug activity, the First Circuit held the two-level increase applied.<sup>102</sup>

The Second Circuit upheld a two-level increase in the defendant’s specific offense level under Section 2D1.1(b)(1) in *United States v. Herrera* through a dominion and control test.<sup>103</sup> The court held that: “[A] defendant is subject to a two-level enhancement under [Section] 2D1.1(b)(1) for possession of a dangerous weapon if he [or she] ‘constructively possessed the weapon by having dominion . . . or control over the item itself, or dominion over the premises where the item [was] located.’”<sup>104</sup> The defendants regularly worked out of a stash house that also stored firearms, but were arrested in their homes where no firearms were found.<sup>105</sup> The court found that “there was substantial and uncontested evidence supporting” that the co-defendants “were jointly responsible for the stash houses and that each exercised personal dominion and control over the firearms in those locations.”<sup>106</sup> Therefore, the Second Circuit concluded that the two-level increase was justified under Section 2D1.1(b)(1).<sup>107</sup>

The Tenth Circuit in *Zavalza-Rodriguez*, on the other hand, set forth a proximity-based standard to establish constructive possession.<sup>108</sup> In *Zavalza-Rodriguez*, the defendant was convicted of possession of a controlled substance with intent to distribute.<sup>109</sup> The police arrested him “in the bedroom where [he] was lodging,” and found a firearm in that same bedroom.<sup>110</sup> The Tenth Circuit upheld the two-level increase under Section 2D1.1(b)(1) on the grounds “that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant.”<sup>111</sup>

The Eighth Circuit’s standard for constructive possession aligns with the Tenth Circuit’s. In *United States v. Lyman*, the Eighth Circuit found the two-level increase under Section 2D1.1(b)(1) was warranted when the police found the defendant’s drugs in one kitchen cabinet and a pistol in another adjacent kitchen cabinet. The court clarified in a footnote that, “[e]ach case turns on its specific facts. The key [to whether or not a defendant

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102. *Id.* See generally *Williams v. New York*, 337 U.S. 241 (1949) (noting it is important to recall that while the defendant bears no burden of proving innocence during the conviction phase of the trial, different evidentiary rules apply at sentencing and it is not improper to place some burden on the defendant).

103. *United States v. Herrera*, 446 F.3d 283, 287 (2d Cir. 2006).

104. *Id.* (third alteration in original) (quoting *United States v. Ortega*, 94 F.3d 764, 768 (2d Cir. 1996)).

105. *Id.* at 285.

106. *Id.* at 288.

107. *Id.* at 287–88.

108. *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1186–87 (10th Cir. 2004) (“Possession in the context of § 2D1.1(b)(1) is therefore possession by proximity—constructive possession.”).

109. *Id.* at 1184.

110. *Id.*

111. *Id.* at 1185 (quoting *United States v. Pompey*, 264 F.3d 1176, 1180 (10th Cir. 2001)).

constructively possessed a dangerous weapon] is always whether the *placement of the gun or guns suggests they would be quickly available for use in an emergency.*<sup>112</sup> The Eighth Circuit’s “quickly available” standard parallels the Tenth Circuit’s proximity standard because the word “quickly” implies the need for the weapon to be temporally proximate and the word “available” implies the need for the weapon to be spatially proximate. Though not as concise linguistically, the theory of the Eighth Circuit standard follows the Tenth Circuit standard.<sup>113</sup> For each standard, the question remains of whether they are consistent with the United States Sentencing Commission’s intention behind enacting Section 2D1.1(b)(1).

*B. STANDARDS OF CONSTRUCTIVE POSSESSION THAT DO NOT REQUIRE TEMPORAL AND SPATIAL PROXIMITY ARE INCONSISTENT WITH THE SENTENCING COMMISSION’S INTENT*

1. *The Sentencing Commission Intended Section 2D1.1(b)(1) to Only Punish Instances of Constructive Possession that Represent an Increased Danger*

The United States Sentencing Commission’s intent in enacting each provision is explicitly stated in both the original Guidelines themselves and in the commentary published with it.<sup>114</sup> The commentary under Section 2D1.1(b)(1) states, “[t]he enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”<sup>115</sup> Neither the language of the specific offense characteristic

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112. *United States v. Lyman*, 892 F.2d 751, 754 n.4 (8th Cir. 1989) (emphasis added).

113. Though “quickly available” expresses the same idea as “temporally and spatially proximate,” asking a jury to determine whether a weapon was temporally and spatially proximate to both the defendant and the drug trafficking activity allows for more fact-finding; the jury can use facts like the physical distance between the defendant and the weapon, or the length of time between the defendant’s involvement in the drug activity and access to the weapon, to determine whether or not these activities were proximate to one another. “Quickly available” does not permit such explicit fact-finding—the jury must determine for themselves whether they believe the weapon was “quickly available” under the circumstances using a vague, common sense understanding of “quickly” and “available.” For the purposes of argument, however, this Note identifies these standards interchangeably as viable options for a standard to interpret constructive possession because, despite their nuances, they each represent requiring spatial and temporal proximity.

114. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS i (1987) [hereinafter U.S. SENTENCING COMM’N SUPPLEMENTARY REPORT] (explaining that the commentary to the Guidelines should be included as part of the Guideline’s “Policy Statement” to comport with the legislative mandate that the Commission “stat[e] the reasons for the Commission’s recommendations” (quoting Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 2032)).

115. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.11 (A) (U.S. SENTENCING COMM’N 2018).

adjustment nor the commentary have ever been amended or have had an amendment proposed;<sup>116</sup> the exact phrasing of the Guideline and the commentary is as written in the original Guidelines.<sup>117</sup>

The word “present” in Section 2D1.1(b)(1) indicates that the United States Sentencing Commission intended there be an overlapping presence between the defendant and the weapon. There must also be a connection with the weapon and the drug activity,<sup>118</sup> shown with the “clearly improbable” carve-out the Sentencing Commission left in the provision.

## 2. Both the “Clearly Improbable” and “Dominion and Control” Tests are Inconsistent with the Sentencing Commission’s Intent

Federal Circuits that do not factor proximity into their constructive possession analysis operate inconsistently with the Sentencing Commission’s intent. The Sentencing Commission intended the increase in Section 2D1.1(b)(1) to reflect the “increased danger” of possessing a dangerous weapon while trafficking drugs,<sup>119</sup> but possessing a dangerous weapon can only create an increased danger when the defendant is close enough to the weapon to be able to use it.<sup>120</sup>

The “clearly improbable” standard in the First and Sixth Circuits violates the Sentencing Commission’s intention because the broad interpretation of this standard in case law would include the example the Sentencing Commission wrote into the commentary of what should *not* be considered a

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116. See *Amendments to the Guidelines Manual*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/guidelines/amendments> [<https://perma.cc/S74U-SAQ8>].

117. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.3 (U.S. SENTENCING COMM’N 1987), available at [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987\\_Guidelines\\_Manual\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf) [<https://perma.cc/Y2JP-E65Z>].

118. As a constitutional matter, the “drug activity” referenced here is limited to the drug activity the defendant was convicted of and any relevant conduct attributed to the defendant as a matter of law at the sentencing stage. See *supra* note 6 and accompanying text (explaining relevant conduct).

119. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.11(A) (U.S. SENTENCING COMM’N 2018) (“The enhancement . . . reflects the increased danger of violence when drug traffickers possess weapons.”).

120. The most dangerous gun in the world does not itself present an inherent threat; it would be useless sitting in the middle of an empty room even if it were fully loaded. A dangerous weapon only poses an increased danger when a person is close enough to the weapon in space and time to pull the trigger. Determining when a defendant is close enough to constructively possess a dangerous weapon is a question of fact that hinges on the type of weapon the defendant is charged with possessing. For example, a defendant could be miles away from a bomb, but were the detonator within the defendant’s reaching distance, a reasonable jury could find the defendant “possessed” the bomb. If the bomb were both temporally and spatially proximate to the drug activity, the defendant’s conduct would represent an increased danger warranting the two-level increase. Being close enough to use a handgun, however, so that the gun creates an increased danger in proximity to drug activity would require the defendant to be close enough to the gun to grab it.

proper application of Section (b)(1).<sup>121</sup> In the commentary to Section 2D1.1(b)(1), the United States Sentencing Commission included the limiting language that allows the defendant to present a defense that it was “clearly improbable” the dangerous weapon was related to the offense.<sup>122</sup> The commentary states, “[f]or example, the enhancement would not be applied if the defendant, arrested at the defendant’s residence, had an unloaded hunting rifle in the closet.”<sup>123</sup> However, the standards the Sixth Circuit used to apply the two-level increase in *Darwich* would include applying the increase in the explicit example the Guidelines proscribe. Though the *Darwich* standard literally uses the same “clearly improbable” language of the Guidelines, it is questionable that the Sixth Circuit applies the same language consistently with how the Sentencing Commission intended.

If the Sentencing Commission concedes that an unloaded hunting rifle in a closet is “clearly improbably” related to drug crime, it is difficult to imagine the very same Sentencing Commission would find weapons held on property miles from where the drug crime occurred not “clearly improbably” connected to the crime as the Sixth Circuit maintained in *Darwich*.<sup>124</sup>

Perhaps the Sentencing Commission’s clearly improbable analysis stemmed from the *unloaded* hunting rifle’s futility to create more danger. If that were the case, weapons far from the defendant’s drug activity would be equally futile.<sup>125</sup> If the operative fact in the Sentencing Commission’s example is instead that the weapon is a rifle specifically used for sport, the Sentencing Commission would then be leaving an out for defendants to only use weapons typically designed for sport in their drug crimes: an option the Sentencing Commission surely did not want to create.<sup>126</sup> Though using the same language, employing such a broad standard of how the Sixth Circuit interprets “clearly improbable” is incongruent with the Sentencing Commission’s interpretation of clearly improbable in the commentary to Section 2D1.1(b)(1).

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121. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.11(A).

122. *Id.* (“The enhancement should be applied if the weapon was present, *unless it is clearly improbable that the weapon was connected with the offense.*” (emphasis added)).

123. *Id.*

124. *See supra* note 98 and accompanying text (arguing that although the court in *Darwich* maintained some of the drug activity had occurred in the defendant’s home, it is unclear without a spatial and temporal proximity analysis if the drugs were around the weapons and the defendant simultaneously, and therefore a court could not conclusively determine whether or not the weapons presented an increased danger).

125. *See supra* note 6 and accompanying text.

126. Many dangerous weapons are designed for sport but can be used in a manner to create increased danger. For example, a 15-inch Jungle Master Hunting Knife is specifically advertised as “ideal for camping expeditions or survival training,” but it could also be used to further drug activity. *Jungle Master 15 Inch Hunting Knife*, AMAZON, <https://www.amazon.com/Jungle-Master-JM-001L-M3239-BRK/dp/Boo1CPM62W> [<https://perma.cc/JC25-KYF8>].

The dominion and control test could ostensibly qualify as a standard that ensures the defendant had sufficient control over the weapon to use it, and therefore ensure Section 2D1.1(b)(1) only applies for instances of increased danger. But, unfortunately, the Second Circuit’s “dominion and control” test also fails because it would similarly attribute Section 2D1.1(b)(1) to the example the Guidelines explicitly describe as *not* being constructive possession. In *United States v. Chavin*, the Second Circuit found Section 2D1.1(b)(1) applied to a defendant because he constructively possessed an unloaded pistol in the engine compartment,<sup>127</sup> relying on the “dominion or control” language of *Herrera*.<sup>128</sup> Both rationales the court relied on create a test that would overbroadly encompass conduct the Sentencing Commission did not intend Section 2D1.1(b)(1) to punish.

First, the Second Circuit found that the defendant had “dominion or control over the [weapon] itself.”<sup>129</sup> Though the facts in *Chavin* may represent an appropriate application of the dominion and control test’s language, the Second Circuit’s interpretation of this test would improperly encompass the example of constructive possession the Sentencing Commission explicitly noted would *not* be constructive possession. The pistol in *Chavin* was unloaded just like the hunting rifle example in the commentary to Section 2D1.1(b)(1). The defendant could also not readily access the unloaded pistol because it was stashed under a hood of a car, just as the hunting rifle was implied to be further from the user than for immediate access because the rifle was in a closet. Because the dominion and control test permitted constructive possession in a similar example to one the Sentencing Commission had determined was in fact *not* an appropriate use of Section 2D1.1(b)(1), this interpretation is inconsistent with the Sentencing Commission’s intent.

The Second Circuit’s second rationale for why *Chavin* constituted constructive possession poses a similar problem. The Second Circuit also addressed that, “[f]urther, as the driver of the vehicle, [the defendant] exercised control over the location where the weapon was found.”<sup>130</sup> Attributing possession to the defendant for anything found in the location the defendant “controlled” furthers the possibility that Section 2D1.1(b)(1) would apply to cases that do not represent an increased danger. “Control over the location” extends the physical area the test covers: from “dominion and control” over the object itself to “dominion and control” over a location. Following this logic, the vaster a physical area the “dominion and control” test expands to attribute possession of a dangerous weapon found within that field, the greater the likelihood the weapon found in that area did not sufficiently represent an increased danger to earn the two-level increase.

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127. *United States v. Chavin*, 613 F. App’x 80, 81 (2d Cir. 2015) (mem.).

128. *Id.* (citing *United States v. Herrera*, 446 F.3d 283, 287 (2d Cir. 2006)).

129. *Id.* (quoting *Herrera*, 446 F.3d at 287).

130. *Id.*

Additionally, “control over an area” in which a weapon is found does not create an increased danger—proximity to the weapon itself does. In other words, controlling a physical space is not dangerous—controlling a weapon is. The two facets of the Second Circuit’s “dominion and control” test may excessively include instances of constructive possession that do not represent an increased danger, and therefore the test does not comport with what the Sentencing Commission intended to punish with Section 2D1.1(b)(1).

*C. APPLYING INTERPRETATIONS OF CONSTRUCTIVE POSSESSION THAT ARE  
INCONSISTENT WITH WHAT THE SENTENCING COMMISSION INTENDED CREATES  
DISPROPORTIONATE AND INCONSISTENT PUNISHMENT*

Using a standard that causes a provision of the Guidelines to apply contrary to what the Sentencing Commission intended is problematic for two important reasons. First, interpreting Section 2D1.1(b)(1) to apply to cases that do not represent an increased danger could cause the sentence imposed to be disproportionate to the harm the defendant caused, as the two-level increase would create a higher sentence indiscriminately for defendants that did and did not create an increased danger. Second, applying a provision to cases the Sentencing Commission did not intend that provision to punish could potentially create inconsistency in sentencing for similarly situated defendants who have been convicted of similar crimes. As discussed previously, proportionality and uniformity in sentencing are two of the primary aims of sentencing reform. Therefore, a broad interpretation of constructive possession that does not include a proximity analysis flies in the face of two major purposes of sentencing reform.

1. Disproportionality in the Sentence Imposed

The interpretation of constructive possession without a proximity requirement violates proportionality. Without a proximity requirement, an equally harsh, increased sentence is imposed for instances of an increased *potential* for danger in cases where a dangerous weapon was not nearby, as in cases of an *actual* increased danger, when a drug trafficker maintains a dangerous weapon close enough to his or her person so that the weapon represents a threat. This is the precise reason the comments to the Guidelines explicitly attribute the two-level increase to reflect the increased danger of having a dangerous weapon while trafficking drugs; crime that presents an actual increased danger should be punished more harshly than crime that presents an increased potential for danger.

Yet, the Sixth and First Circuits’ broad interpretation of the “clearly probable” standard that do not require temporal or spatial proximity overbroadly include the presence of dangerous weapons in upstairs closets or locations that narcotics were formally kept, and leaves little room to clarify where and when the dangerous weapons were proximate to both the defendant and the drug activity. Instances in which the weapon was not close

in space and time to the drug activity and the defendant do not create the “increased danger” the Guidelines imagine. But under these interpretations, defendants still earn the same two-level increase and same longer sentence<sup>131</sup> as if the defendant had been wearing a pistol on her hip. Convicting a defendant of possessing a dangerous weapon typically does not merely add more time by increasing the length of a defendant’s sentence, but also results in collateral consequences that add more time. Defendants convicted with a weapons enhancement in sentencing can no longer earn the approximately one-year benefit off their sentence for successfully completing the Residential Drug Abuse Treatment Program (“RDAP”) offered through the Bureau of Prisons.<sup>132</sup>

## 2. Disproportionality in Cost

The monetary consequences of including constructive possession under the umbrella of Section 2D1.1(b)(1) inconsistently with the Sentencing Commission’s intent also represent its disproportionality. The Sentencing Commission was legislatively directed to estimate the impact of each Guideline on the prison population and the cost of imprisonment.<sup>133</sup> The longer sentence a defendant must serve with this enhancement, the more money the Bureau of Prisons must spend to incarcerate him or her. Additionally, if a defendant possesses a dangerous weapon, he or she is automatically subject to a greater curtailment of liberty and loss of privileges within the Federal Bureau of Prisons while serving time for his or her offense.<sup>134</sup> The fewer liberty privileges a defendant is afforded while serving

131. It is crucial to recall that the Guideline system nearly always imposes an increased recommended sentence for an increased base offense level; in other words, an increased base offense level nearly always translates to more recommended time. Based on the defendant’s criminal history points and the original base offense level, a two-level increase could increase a defendant’s recommended sentence by over six years. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM’N 2018).

132. AM. BAR ASS’N, RESIDENTIAL DRUG ABUSE PROGRAM (RDAP) 6, *available at* [https://www.americanbar.org/content/dam/aba/administrative/individual\\_rights/Ch%203-RDAP.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/individual_rights/Ch%203-RDAP.authcheckdam.pdf) [<https://perma.cc/94YM-3YB9>] (“Inmates with firearm convictions and inmates who have received a two-level adjustment in their drug guideline offense severity score for possession of a dangerous weapon (including a firearm) pursuant to Guideline Section 2D1.1(b)(1) are also ineligible for early release.”).

133. U.S. SENTENCING COMM’N SUPPLEMENTARY REPORT, *supra* note 114, at 53 (“Congress directed the Commission to estimate the impact of the [S]entencing [G]uidelines on future prison populations.”); *Prison & Sentencing Impact Assessments*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/research/data-reports/prison-sentencing-impact-assessments> [<https://perma.cc/2W6E-XL3D>].

134. U.S. DEPT OF JUSTICE, FED. BUREAU OF PRISONS, NO. P5162.05, CATEGORIZATION OF OFFENSES 8–10 (2009), *available at* [https://www.bop.gov/policy/progstat/5162\\_005.pdf](https://www.bop.gov/policy/progstat/5162_005.pdf) [<https://perma.cc/QMD5-KD8B>] (“[A]n inmate who was convicted of manufacturing drugs, and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain [Federal] Bureau [Of Prisons] program benefits.” (citation omitted)).

his or her sentence, the more resources—monetary, human, or otherwise—the Bureau of Prisons must use to incarcerate a defendant for supervision and safety.<sup>135</sup> Though these costs are certainly warranted to punish dangerous drug trafficking activity when the defendant keeps a weapon nearby, an overbroad application of possessing a dangerous weapon to instances where the weapon did not present an increased danger imposes additional, unjustifiable costs on the criminal justice system.

### 3. Inconsistency

Applying Section 2D1.1(b)(1) in a manner inconsistent with the Sentencing Commission's intent could also create disparate sentences for similarly situated defendants who have committed similar crimes across the country. Uniformity was one of the major goals of sentencing reform;<sup>136</sup> in fact, reports of disparate sentences for similarly situated defendants who have been convicted of similar crimes were one of the primary factors that pushed Congress to implement sentencing reform in the first place.<sup>137</sup> Specifically, Congress believed that the lack of uniformity stemmed from court officers being able to use too much discretion in sentencing without enough structure.<sup>138</sup> If courts apply Section 2D1.1(b)(1) inconsistently with how the Sentencing Commission intended the provision to structure punishment, ambiguity remains about when the provision is supposed to be triggered. Ambiguity leaves room for the inconsistency Congress tried to abandon by implementing a more structured system to begin with.<sup>139</sup> Therefore, interpreting Section 2D1.1(b)(1) to trigger the two-level increase for conduct the Sentencing Commission did not intend that provision to punish could lead to disparate sentencings and would counter two major goals and purposes of sentencing reform.

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135. See generally NATHAN JAMES, CONG. RESEARCH SERV., THE BUREAU OF PRISONS (BOP): OPERATIONS AND BUDGET (Mar. 4, 2014), available at <https://fas.org/sgp/crs/misc/R42486.pdf> [<https://perma.cc/QDS5-4JAA>] (discussing at length how inmates are classified at different security levels based in part on offense conduct and the procedures and consequences for offering privileges and removing privileges at each security level).

136. The increase in uniformity was not, however, to be achieved through sacrificing proportionality. The guidelines must authorize appropriately different sentences for criminal conduct of significantly different severity. 28 U.S.C. § 991(b)(1)(B) (2012); see also U.S. SENTENCING COMM'N SUPPLEMENTARY REPORT, *supra* note 114, at 19.

137. S. REP. NO. 98-225, at 65 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3248.

138. *Id.* at 38 n.128, as reprinted in 1984 U.S.C.C.A.N. 3182, 3221 (“Such [disparities] . . . are the result of the wide discretion granted to sentencing judges and the United States Parole Commission under current federal law.”).

139. The United States Supreme Court summarized Congress's efforts to increase uniformity in an 8–1 opinion that upheld Congress delegating the creation of the Guidelines to the Judiciary. *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (“[T]he indeterminate-sentencing system had two ‘unjustifi[ed]’ and ‘shameful’ consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders.” (second alteration in original) (citations omitted) (quoting S. REP. NO. 98-225, at 38, 65)).



## IV. REFORMING CONSTRUCTIVE POSSESSION IN SECTION 2D1.1(B)(1)

A. *BALANCING BETWEEN CLARITY/EASE OF ADMINISTRATION AND THOROUGH GUIDANCE*

The Sentencing Commission was well aware that the Guidelines must walk a fine line between being explicit enough to eliminate sentencing disparity among similarly situated defendants who have been convicted of similar crimes, and still maintaining enough flexibility for ease of administration and proportionality.<sup>140</sup> Thus, a common problem with reforming the Guidelines was the extent to which the Guidelines should dictate a standard to punish behavior. The Senate report accompanying the original Sentencing Guidelines the Sentencing Commission sent to Congress encapsulates this problem eloquently:

To use an extreme example, the [Sentencing] Commission ostensibly could have achieved perfect uniformity simply by specifying that every offender was to be sentenced to two years' imprisonment. Doing so, however, plainly would have destroyed proportionality. In addition, such guidelines likely would be ineffective because their unreasonableness would ensure that ways would be found to subvert them. Similarly, having only a few simple, general categories of crimes might make the guidelines uniform and easy to administer, but at the cost of lumping together offenses that are different in important respects. For example, a single category for robbery that lumped together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would have been far too simplistic to achieve just and effective sentences, especially given the narrowness of the permissible sentencing ranges.

A sentencing system tailored to fit every conceivable case, on the other hand, could become too complex and unworkable. Complexity can seriously compromise the certainty of punishment and its deterrent effect. The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the factors that create the subcategories will apply in unforeseen situations and interact in unforeseen ways, thus creating unfairness.<sup>141</sup>

The Sentencing Commission established that the federal criminal system required both individual justice: a sentence that was proportionate to the

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140. *United States v. Booker*, 543 U.S. 220, 264–65 (2005) (Breyer, J., opinion in part) (“These features . . . continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”).

141. U.S. SENTENCING COMM’N SUPPLEMENTARY REPORT, *supra* note 114, at 13.

individual's conduct and characteristics, and uniform justice: a fair system that dispenses equal sentences to similarly situated defendants who have been convicted of similar crimes.<sup>142</sup> As could be imagined, amending the Guidelines to maintain a just system presents a fair amount of complications. Yet, amendments are necessary to maintain the other aims of just sentencing and punishment.<sup>143</sup>

B. ADOPTING THE "PROXIMITY" STANDARD

The Guidelines and the Federal Circuits should adopt the Tenth Circuit's temporal and spatial proximity standard to define constructive possession in the context of Section 2D1.1(b)(1). This is the only standard that curtails the disproportionate and inconsistent application of the two-level increase for constructively possessing a dangerous weapon in connection to drug trafficking. The Tenth Circuit's proximity definition of constructively possessing a dangerous weapon is the best standard to fit the United States Sentencing Commission's intention because only a dangerous weapon that is both close physically and in time to both the crime and the defendant creates the "increased danger" the Sentencing Commission intended Section 2D1.1(b)(1) to punish more harshly. Adopting a standard that would better suit the Sentencing Commission's intention would improve proportionality and consistency in sentencing. Yet, whenever a change is proposed, one must also determine the cost of effecting a more stringent standard by asking whether the benefit this change offers is outweighed by the burden of further complicating the Guidelines.

Rectifying the Guidelines in this manner does not disrupt the balance the Guidelines walks between proportionality and ease of administration. Although adding a proximity standard to constructive possession does further complicate the Guidelines, the change does not attempt to sever actual or constructive possession, nor further drastically change the Guidelines' possessory scheme. Sentencing courts already determine whether or not the weapon was "clearly . . . connected with the offense" when the defendant raises this affirmative defense;<sup>144</sup> the proximity standard is another type of phrasing to make a similar, but narrower determination. Finally, as this is the standard the Tenth, Eighth, and Fifth Circuits already use,<sup>145</sup> other Circuits

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142. 28 U.S.C. § 991(b)(1)(B) (2012) ("[To avoid] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account . . .").

143. *Amendments to the Guidelines Manual*, *supra* note 116 (displaying the amendments to the Guidelines).

144. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.11(A) (U.S. SENTENCING COMM'N 2018).

145. See *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1183–84, 1188 (10th Cir. 2004) (holding a two-level increase was warranted under § 2D1.1(b)(1) when drug paraphernalia and a weapon were found in the same bedroom the defendant was arrested in); *United States v.*

and the Sentencing Commission already have persuasive authority<sup>146</sup> to judicially adopt this interpretation, or incorporate it into the commentary of the provision itself. Given that the proximity standard requires an analysis sentencing courts are already accustomed to, and that persuasive authority exists on how to interpret this understanding of constructive possession, changing the interpretation of Section 2D1.1(b)(1) through either case law or an amendment to the Guidelines themselves is reasonable to achieve the more proportionate and uniform application of Section 2D1.1(b)(1) a proximity standard would offer.

## V. CONCLUSION

The United States Sentencing Guidelines are an exceedingly complex system to impose both uniform and individual justice, and as a result, imperfections persist. But some imperfections must be eliminated to preserve the purposes of the Guidelines. Currently, some interpretations of constructive possession of a dangerous weapon in relation to drug trafficking to warrant a two-level increase in Section 2D1.1(b)(1) contravene the Sentencing Commission's intention in establishing this increase. These interpretations encompass cases that do not represent the "increased danger" the Sentencing Commission sought to punish. As a result, the interpretations inconsistent with the Sentencing Commission's intent could create disproportionate and inconsistent punishments for similarly situated defendants who have been convicted of similar crimes.

To solve this dilemma, the Guidelines and the Federal Circuits should adopt the Tenth Circuit standard that a defendant constructively possesses a dangerous weapon only if that weapon is close in time and space to the defendant and the drug trafficking. The proximity standard would limit this provision to applying only in cases that gave rise to the "increased danger" the Sentencing Commission intended Section 2D1.1(b)(1) to punish. Therefore, the proximity standard would create more proportionate sentences and ensure that the additional consequences of being convicted of having a dangerous weapon in federal court are justified. The proximity standard would also create more uniformity in applying this provision by aligning its interpretation with what the Sentencing Commission intended and eliminating ambiguity for when the provision applies. Additionally, the amendment would not drastically complicate the Guidelines further because sentencing courts already make similar determinations, and case law in other Federal Circuits exists to set an example. Overall, amending the

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Lyman, 892 F.2d 751, 751-52 (8th Cir. 1989) (holding a two-level increase was warranted when a firearm was found one kitchen cabinet over from drug paraphernalia); *United States v. Vasquez*, 874 F.2d 250, 251-52 (5th Cir. 1989) (overturning a two-level increase under § 2D1.1(b)(1) because the court found no showing that the drugs and guns were ever less than a few miles apart).

146. *Persuasive Authority*, BLACK'S LAW DICTIONARY (11th ed. 2014) ("Authority that carries some weight but is not binding on a court, often from a court in a different jurisdiction.").

understanding of constructive possession in Section 2D1.1(b)(1) to include a proximity analysis better suits the aim of sentencing reform in creating a just sentencing system.