

One Gun Too Many: Double-Counting the Same Offense in Iowa

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*ABSTRACT: The average Iowan would be shocked to learn that the commission of a firearm possession crime in Iowa would expose them to the risk of being sent to federal prison for a time period 25 percent longer than that of a citizen of a neighboring state. This Note argues that the Eighth Circuit’s ruling in *United States v. Walker* was an erroneous interpretation of the U.S. Sentencing Guidelines and that governmental action should be taken in one of three major arenas—judicial, administrative, or legislative—to remedy the resulting sentencing disparities. Ultimately, this would be one step towards returning fairness and justice to similarly situated defendants in the federal criminal system.*

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I. INTRODUCTION

Why should two people, separated only by state boundaries, who commit identically unlawful conduct, face vastly different federal prison terms under the U.S. Sentencing Guidelines? As originally intended, they should not, but that is what is happening in Iowa in comparison to the rest of the states in the Eighth Circuit Court of Appeals. This unequal treatment, which has been occurring since at least 2014,¹ runs counter to the high ideals the Sentencing Guidelines were intended to promote—fairness and a reduction in disparate sentences.²

The Eighth Circuit Court of Appeals' own record,³ coupled with the information collected and analyzed by the U.S. Sentencing Commission ("Commission"),⁴ demonstrates a clear discrepancy between defendants sentenced for firearm possession offenses in Iowa federal courts and those sentenced elsewhere in the Eighth Circuit's seven-state jurisdiction. The underlying reason for this disparate impact is two-pronged: (1) Iowa has a deadly weapons law that predates the Guidelines, criminalizes a broader range of conduct, and imposes an accompanying sentence longer than any of the other six states in the circuit,⁵ and (2) the Eighth Circuit has narrowly

1. See *United States v. Walker*, 771 F.3d 449, 451–52 (8th Cir. 2014).

2. See Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 HOFSTRA L. REV. 799, 800 (2018) ("Ultimately, the Guidelines were developed because we wanted . . . greater fairness (I note '-er' not '-est'), not perfect fairness, but increased fairness where people would be treated more alike.").

3. See cases cited *infra* note 97.

4. See 28 U.S.C. § 995(a)(12), (14)–(15) (2012) (requiring the Commission to "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices," to "collect systematically and disseminate information concerning sentences actually imposed," and to "publish data concerning the sentencing process").

5. IOWA CODE § 724.4(1) (2020). This statute remains essentially unaltered since 1976. 1976 Iowa Acts 549; see also *infra* note 104 and accompanying text. The seven states that make up

interpreted a Sentencing Guideline exclusion intended to prevent the double-counting of essentially the same unlawful conduct.⁶

This Note argues why the Eighth Circuit's holding in *United States v. Walker*⁷ has resulted in unjust and disparate sentencing outcomes and suggests a few potential remedies. Part II of this Note describes the origins of the Sentencing Guidelines, as well as the evolution of the specific sentencing Guideline that is in question in this Note—section 2K2.1(b)(6)(B). It then discusses the disparate impact that this provision has on defendants charged in Iowa in comparison to defendants committing the like federal offense in a different state within the Eighth Circuit's jurisdiction. Next, Part III provides several reasons as to why a disparate sentencing regime harms not only the individual defendants, but also diminishes the overall effectiveness of the federal criminal justice system. Finally, Part IV proposes five independent solutions to remedy this ongoing problem.

II. THE HISTORY AND IMPACT OF THE SENTENCING GUIDELINES

In order to identify a root cause of one repetitious disparate sentencing outcome within the federal criminal justice system, this Part reviews the interaction between the relevant Guideline provisions and state laws. This Part begins with an example of how the Northern District of Iowa court would apply section 2K2.1(b)(6)(B) in a hypothetical criminal case.⁸ Section II.B then describes the initial purpose, broad history, and the statutory amendment process of the Guidelines. Next, Section II.C details the specific history and development of sentencing guideline section 2K2.1(b)(6)(B), the guideline which lies at the core of this Note. Section II.D provides a similar detailed review of Iowa Code section 724.4, the Iowa criminal statute whose interaction with section 2K2.1(b)(6)(B) is at issue. Section II.E provides an overview of similar criminal statutes in other Eighth Circuit states. Finally, Section II.F uses real-world examples to explore this interaction and the effect it has on sentencing length.

A. THE SENTENCING OF JOHN DOE

In 2012, John Doe, a resident of southern Iowa, suffered a nervous breakdown from job-related stress. During this tough time period, he threatened to commit suicide on multiple occasions and could not control his emotions. Based on the request of his family, an Iowa judge ordered that Doe be involuntarily committed to a local mental health treatment facility. Doe, through therapy and medication, was released after approximately one

the Eighth Circuit are: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

6. *Walker*, 771 F.3d at 452–53.

7. *Id.*

8. *See infra* Section II.A.

month. Because Doe had been involuntarily committed to a mental institution, he was forbidden by federal law from possessing a firearm.⁹

In early 2018, six years after his first mental health emergency, John Doe again fell into a dark, depressive, suicidal state. On February 2, 2018, his wife called 911 to report that he had left the house armed with several weapons, intending to “drive somewhere and then kill himself.” The City of Dubuque Police Department identified and then stopped Doe’s vehicle at an intersection within city limits. Doe was in fact armed with a hunting rifle and, after a tense, hours-long standoff, surrendered to the police.

Five months later, Doe, as part of a plea bargain, pled guilty to the federal crime of possession of a firearm by a prohibited person.¹⁰ Part of the plea offered by the United States was that Doe would accept a four-level increase to his potential sentence because in addition to his federal firearm possession offense, Doe had also committed the Iowa state crime of possessing a weapon within city limits.¹¹ Prior to his arrest, Doe had no prior criminal history. Furthermore, he accepted responsibility for his actions on February 2, 2018. The sentencing judge, with assistance from the U.S. Probation Officer utilized the U.S. Sentencing Guidelines (“Guidelines”) to establish the recommended term of Doe’s incarceration.

First, the judge looked to Chapter Two–Offense Conduct of the Guidelines to find Doe’s crime.¹² His crime fell within Part K–Offenses Involving Public Safety.¹³ Specifically, Doe’s possession of a firearm as a prohibited person fell under Section 2K2.1–Unlawful Possession of Firearms or Ammunition.¹⁴ Because Doe had no prior criminal history and was in possession of a hunting rifle, his “Base Offense Level” was 14.¹⁵

Next, the judge looked to the “Specific Offense Characteristic” for anything that might enhance Doe’s offense-level.¹⁶ Section 2K2.1 (b) (6) (B)

9. 18 U.S.C. § 922(g) (2012) (“It shall be unlawful for any person . . . who has been committed to a mental institution . . . [to] possess . . . any firearm or ammunition . . .”).

10. *Id.*

11. IOWA CODE § 724.4(1) (2020) (“[A] person who[,] . . . within the limits of any city, goes armed with . . . any loaded firearm of any kind . . . commits an aggravated misdemeanor.”). Under Iowa law, an aggravated misdemeanor is punishable by up to two years in prison. IOWA CODE § 903.1(2) (2018).

12. U.S. SENTENCING GUIDELINES MANUAL ch. 2 (U.S. SENTENCING COMM’N 2016).

13. *Id.* ch. 2, pt. K.

14. *Id.* § 2K2.1.

15. *Id.* § 2K2.1(a)(6). The Base Offense Level is “[t]he starting point for determination of the guideline range under the guidelines in Chapter Two. Each offense-specific guideline states a starting point on the severity scale. The final offense level may increase or decrease from the starting point, depending on additional factors.” *Glossary of Federal Sentencing-Related Terms*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/education/glossary> [<https://perma.cc/6CSN-YYU2>].

16. Specific Offense Characteristics are enumerated within each offense category and are “[a]ggravating or mitigating factors in the guidelines in Chapter Two that, provided the court finds by a preponderance of evidence that they exist, either increase or decrease the offense severity level.” *Id.*

states that “[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense,” the judge should add four levels to the “Base Offense Level.”¹⁷ The sentencing judge identified the Iowa state law of possession within city limits as a qualifying felony offense and added four levels to Doe’s base offense, raising it to 18. Turning to Chapter 3 of the Guidelines, the court then deducted two levels because Doe accepted responsibility¹⁸ which resulted in a final offense level of 16. Because Doe had no criminal history, he was in Criminal History Category I.¹⁹ The sentencing judge cross-referenced Doe’s offense level with his Criminal History Category, finding a range of 21–27 months.²⁰ Ultimately, the judge sentenced Doe to 27 months in federal prison.

Had John Doe committed the same federal offense in Minnesota, the presiding judge would be unable to apply the four-level increase of section 2K2.1(b)(6)(B).²¹ As a result, Doe would have an offense level of 12—much lower than what he received in Iowa—ultimately resulting in a sentencing range of 10–16 months,²² 60 percent of the term he was sentenced to in Iowa. With an example of this sentencing disparity in mind, it is important to understand how this anecdote is an anathema to the purpose and development of the Sentencing Guidelines; Section II.B provides that background.

*B. FEDERAL SENTENCING GUIDELINES AS A RESPONSE TO JUDICIAL
SENTENCING DISPARITY*

In 1984, Congress passed the Sentencing Reform Act of 1984²³ (“SRA”) as part of the Comprehensive Crime Control Act of 1984.²⁴ The Acts’ two sponsors were young Democratic Senator Ted Kennedy and senior Republican Senator Strom Thurmond.²⁵ The pair made for an odd couple—Senator Kennedy arguing for equity in sentencing and Senator Thurmond seeking stronger mandatory minimums.²⁶ With the bill’s passage, however,

17. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B).

18. *Id.* § 3E1.1 (U.S. SENTENCING COMM’N 2018).

19. *See id.* ch. 5, pt. A (providing the Sentencing Table).

20. *See id.*

21. *See* discussion *infra* Section II.F.

22. *See* discussion *infra* Section II.F.

23. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

24. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

25. *See* Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 806 (2018).

26. *Id.* (pointing out that Senator “Kennedy sought to reduce the number and extent of disparities” while Senator “Thurmond wanted enhanced punishments”).

Senator Kennedy was able to achieve his goal of reducing the disparities in sentencing within the federal criminal court system.²⁷

Prior to the SRA's enactment, a federal district court judge had almost boundless discretion to apply whatever sentence he or she felt appropriate, so long as the sentence fell within the broad statutory requirements established by Congress.²⁸ As one could imagine, the disparate outcomes would be comical in their extremes—with potential sentences ranging from probation to 25 years—if the negative consequences of such disparities were not worthy of so much solemnity.²⁹

The SRA also created the U.S. Sentencing Commission, “an independent commission in the judicial branch” for the purpose of “establish[ing] sentencing policies and practices for the Federal criminal justice system.”³⁰ The Commission's guiding principles, as codified by the SRA, were promoting fairness and avoiding disparities in sentencing decisions.³¹ In 1987, the Commission published the Guidelines.³² In its introduction, the Commission explicitly referenced Congress' intent that the purpose of the Guidelines was to reduce sentencing disparity. The Guidelines created “categories of offense behavior and offender characteristics,” and, using those categories, the sentencing judge was mandated to “select a sentence from within the guideline range” found in the “sentencing table.”³³

Although the Guidelines were initially mandatory, in 2005, the Supreme Court in *United States v. Booker* held that mandatory application of the

27. Breyer, *supra* note 2, at 799.

28. See Kendall C. Burman, Comment, *Firearm Enhancements Under the Federal Sentencing Guidelines*, 71 U. CHI. L. REV. 1055, 1057 (2004) (“Prior to the establishment of the Commission, only applicable federal statutes limited judges in sentencing offenders.”).

29. See Newman, *supra* note 25, at 805 (highlighting the magnitude of judicial discretion through a personal anecdote of a sentencing wherein he could have “impose[d] a sentence as high as twenty-five years and as low as probation” (citing Act of June 25, 1948, ch. 645, 62 Stat. 796 (codified as amended at 18 U.S.C. § 2113(d) (2012))); see also MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) (stating that the judicial discretion was “almost wholly unchecked” and “terrifying and intolerable for a society that professes devotion to the rule of law”). Senator Kennedy would later refer to Judge Frankel as “the father of sentencing reform.” 128 CONG. REC. 26,503 (1982) (statement of Sen. Kennedy).

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1987, 2017–18 (codified as amended at 28 U.S.C. § 991(a)–(b) (2012)).

31. See 28 U.S.C. § 991(b)(1)(B) (2012) (“The purposes of the United States Sentencing Commission are 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 . . .”).

32. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENTENCING COMM'N 1987) (reviewing in the introduction a brief history of the development of the Guidelines and highlighting as a congressional goal a uniformity “in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders”).

33. *Id.* § 1A1.2.

Guidelines was unconstitutional.³⁴ However, the Court's decision did not eliminate the Guidelines, because it also held that the Guidelines were "advisory."³⁵ In addition to the Supreme Court's action in *Booker*, Congress retains the authority to alter the Guidelines. However, the preponderance of changes to the Guidelines are the work of the Commission through a formalized amendment process.³⁶

A district judge determines the sentencing range by first calculating a numerical value for "the base offense level."³⁷ She then adjusts this level up or down by applying any appropriate alterations or adjustments based on additional instructions from the Guidelines, providing "the offense level."³⁸ Separately, she, with the aid of the U.S. Probation Office, calculates a value for the defendant's criminal history category.³⁹ The intersection of these two values—Offense Level and Criminal History Category—on the Sentencing Table provide the advised sentencing range in months of imprisonment.⁴⁰

The current Guidelines have eight chapters.⁴¹ However, the only chapter this Note focuses on is Chapter Two—Offense Conduct. The following chapters relate to other methods of increasing or decreasing the length of sentence based on criminal history as well as other mitigating or enhancing factors.⁴²

34. See *United States v. Booker*, 543 U.S. 220, 244 (2005) (Stevens, J., opinion of the court) (holding that the Sixth Amendment's right to trial by jury precluded a judge from enhancing a sentence based on facts not determined beyond a reasonable doubt, despite the fact that the judge was mandated by statute to apply the enhancement). The provision most at odds with the Constitution was 18 U.S.C. § 3553(b)(1) from the federal sentencing statute. *Id.* at 245 (Breyer, J., separate opinion of the court).

35. *Id.* Ultimately, the Court saved constitutionality of the Guidelines by excising the offending provisions. *Id.*

36. U.S. SENTENCING COMM'N, RULES OF PRACTICE AND PROCEDURE 5 (2016), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf [<https://perma.cc/H372-CYXK>] ("The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p).").

37. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(2) (U.S. SENTENCING COMM'N 2016). See generally *id.* § 1B1.1 (detailing the eight-step process the sentencing judge shall follow in order).

38. See *id.* § 1B1.1(a)(3)–(7).

39. See *id.* § 1B1.1(a)(6).

40. *Id.* § 1B1.1(a)(7).

41. As originally published, the Guidelines consisted of seven chapters, however, in the 1991 version of the Guidelines, a chapter on the sentencing of organizations was added. See U.S. SENTENCING GUIDELINES MANUAL vi (U.S. SENTENCING COMM'N 1991).

42. See generally U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2016) (highlighting material following Chapter Two that focuses on methods of increasing or decreasing sentence length based on various factors).

Using the 2016 Guidelines as the exemplar, Chapter Two–Offense Conduct consists of 18 parts arranged by broad criminal subject, e.g., “Part A–Offenses Against the Person,” “Part B–Basic Economic Offenses,” and “Part K–Offenses Involving Public Safety.”⁴³ Chapter Two, Part K–Offenses Involving Public Safety is the focus of this Note.

C. WHAT IS SECTION 2K2.1(B)(6)(B)?

Chapter Two, Part K of the Guidelines encompasses those offenses that involve public safety, covering explosives, arson, firearms, and mailing injurious articles.⁴⁴ Sub-part 2K2.1, titled “Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition,” covers a further subdivision of firearms.⁴⁵ Within this sub-part, section (a) identifies the base offense level; section (b) identifies any special-offense characteristics that might warrant an increase or decrease in the base offense level; and section (c) directs the sentencing judge to other provisions within the Guidelines as appropriate.⁴⁶ One special-offense characteristic is in subsection 2K2.1(b)(6)(B):

(6) If the defendant—

...

(B) used or possessed any firearm or ammunition in connection with *another felony offense*, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with *another felony offense*,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.⁴⁷

The language of section 2K2.1(b)(6)(B) was added to the Guidelines in 1991 as part of a larger change to section 2K2 in response to an increased concern about the role of firearms in violent crime and drug offenses.⁴⁸ This language has not been changed since 1991.⁴⁹ Significantly, a defendant subject to the subsection will have at least four levels added to his or her offense level.

43. *Id.* ch. 2.

44. *Id.* ch. 2, pt. K.

45. *Id.* § 2K2.1.

46. *Id.*

47. *Id.* § 2K2.1(b)(6)(B) (emphasis added).

48. Burman, *supra* note 28, at 1061.

49. See U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(5) (U.S. SENTENCING COMM’N 1991). Prior to 1991, if a defendant used a firearm in connection with another offense, the sentencing judge was to apply whichever offense level was greater. See *id.* § 2K2.1(c)(2) (U.S. SENTENCING COMM’N 1990). Subsection 2K2.1(b)(6)(B) was initially enumerated as (b)(5) until 2006 when it was re-enumerated as § 2K2.1(b)(6), and then in the 2011 Guidelines it was re-labeled as § 2K2.1(b)(6)(B). See *id.* § 2K2.1(b)(5) (U.S. SENTENCING COMM’N 1991); *id.*

What has more recently changed, however, is the definition of “another felony offense,” or more precisely, the exception as to what qualifies as “another felony offense.” In the 2016 Guidelines, the section 2K2.1 Commentary Application Note 14(C) defines “[a]nother felony offense” as “any federal, state, or local offense, other than *the* explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.”⁵⁰ Just ten years earlier, the commentary stated that “‘another felony offense’ . . . refer[s] to offenses other than explosives or firearms possession or trafficking offenses.”⁵¹ Significantly, when this change occurred during the 2006 amendment cycle, the Commission cautioned the public to “[p]lease note that the proposed definition[] of ‘another felony offense’ . . . [is] not new—the proposed language is a technical reworking.”⁵² As will be shown, this “non-change” had a significant role in recent sentencing disparities.

D. IOWA WEAPON LAWS: IOWA CODE SECTION 724.4

As is apparent by the operative language of section 2K2.1(b)(6)(B), the special-offense requirement requires “another felony offense” to invoke the four-level increase. The Guidelines state that the felony offense can be “any federal, state, or local offense . . . punishable by imprisonment for a term exceeding one year.”⁵³ One such state offense that is often used by federal prosecutors and U.S. Probation Officers, and endorsed by judges, to enhance a punishment is Iowa Code section 724.4, a law pertaining to the criminalization of certain firearm activities.⁵⁴

In 1976, the Iowa state legislature enacted a law “relating to a complete revision of the substantive criminal laws,”⁵⁵ a portion of which regulated offensive weapons.⁵⁶ Of significance, this Act reduced the punishment for violating the deadly weapons ordinance from a felony to an aggravated misdemeanor.⁵⁷ However, it also increased the situations in which a person could run afoul of the statute by including a “within the limits of any city”

§ 2K2.1(b)(6) (U.S. SENTENCING COMM’N 2006); *id.* § 2K2.1(b)(6)(B) (U.S. SENTENCING COMM’N 2011).

50. *Id.* § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM’N 2016) (emphasis added).

51. *Id.* § 2K2.1 cmt. n.15 (U.S. SENTENCING COMM’N 2005).

52. Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4782, 4790 (Jan. 27, 2006).

53. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM’N 2016).

54. *See* cases cited *infra* note 97 (cataloguing 18 separate instances in which a defendant was given a § 2K2.1(b)(6)(B) four-level enhancement with the other felony offense being an alleged violation of Iowa Code section 724.4).

55. 1976 Iowa Acts 549.

56. *Id.* at 575, § 2404 (codified at IOWA CODE § 724 (2020)).

57. *Id.*

clause.⁵⁸ The statutory code is now found in Chapter 724 of the Iowa Code.⁵⁹ The category of offensive weapons includes, through a generalized definition, firearms.⁶⁰ The most recently amended section 724.4 still reflects the language of 1976, and provides that:

Except as otherwise provided in this section, a person who goes armed with a dangerous weapon *concealed on or about the person*, or who, *within the limits of any city*, goes armed with a pistol or revolver, or *any loaded firearm of any kind*, whether concealed or not, or who *knowingly carries or transports in a vehicle a pistol or revolver*, commits an aggravated misdemeanor.⁶¹

This statute criminalizes three distinct acts that a person within the state of Iowa might commit: (1) carrying a dangerous weapon in a concealed manner; (2) carrying either an unloaded pistol or revolver, or *any* loaded firearm within the limits of any city; and (3) knowingly carrying or transporting a pistol or revolver within a vehicle.⁶² This provision of the criminal code defines this offense as “an aggravated misdemeanor.”⁶³ Under Iowa law, the maximum punishment for an aggravated misdemeanor is “imprisonment not to exceed two years.”⁶⁴ The breadth of this statute is narrowed somewhat by the action of 11 statutory exceptions.⁶⁵ However, Circuit Judge Grasz, joined by Circuit Judge Melloy, from the Eighth Circuit Court of Appeals, has noted that it is almost impossible for an individual with a firearm not to be in violation of this law.⁶⁶

Because this statute is so broad, it is a perfect foil to satisfy an implication proposed by the 1987 Guidelines’ firearms offense, that “[t]he firearm statutes often are used as a device to enable the federal court to exercise

58. IOWA CODE § 724.4(1) (2020).

59. *Id.* ch. 724.

60. *Id.* § 724.1(1)(b) (“Any weapon other than a shotgun or muzzle loading rifle, cannon, pistol, revolver or musket, which fires or can be made to fire a projectile by the explosion of a propellant charge, which has a barrel or tube with the bore of more than six-tenths of an inch in diameter, or the ammunition or projectile therefor, but not including antique weapons kept for display or lawful shooting.”).

61. *Id.* § 724.4(1) (emphasis added).

62. Although the statute is broad enough to encompass many types of “offensive weapons,” *see id.* § 724.1, the focus of this Note is on acts involving firearms, and therefore, there will be no discussion of knives, bombs, firearm parts, antique/collectors’ items, or signaling devices, *see id.* § 724.1(1)(c)–(2)(c).

63. *Id.* § 724.4(1).

64. *Id.* § 903.1(2).

65. *Id.* § 724.4(4)(a)–(k). The largest of these is exception (a) which excludes possession of a firearm so long as the armed person is “in the person’s own dwelling or place of business, or on land owned, possessed, or rented by the person.” *Id.* § 724.4(4)(a).

66. *See United States v. Stuckey*, 729 F. App’x 494, 495 (8th Cir. 2018) (Grasz, J., concurring) (“Yet, the reality is that most felons in possession of a firearm will inevitably violate one of [the Statute’s three] requirements.”).

jurisdiction over offenses that otherwise could be prosecuted only under state law.⁶⁷ This original purpose of allowing federal jurisdiction over state offenses may have made sense in the theoretical, e.g., bringing to bear the greater resources of the federal law enforcement agencies or likely resulting in a longer federal prison sentence than would be adjudged in a state court due to the harsher federal criminal sentencing statutes. The Eighth Circuit's practical application of expanding federal jurisdiction over state crimes appears, however, to be contrary to original proponents' and drafters' intent of decreasing sentencing disparity when they initially developed the Guidelines in 1987.⁶⁸

Further harm arises when one recognizes that although Iowa classifies a violation of Iowa Code section 724.4 as an "aggravated misdemeanor," because of the "earned time" statute, a state prisoner sentenced to a two-year term will serve no more than 332 days.⁶⁹ This term of incarceration is clearly less than the one-year requirement of section 2K2.1(b)(6)(B).⁷⁰

E. HOW HAS THE EIGHTH CIRCUIT APPLIED SECTION 2K2.1(B)(6)(B)?

The special-offense characteristic section 2K2.1(b)(6)(B) was fundamentally altered following the 2006 amendment.⁷¹ Because, ultimately, a sentencing decision necessarily deeply alters an individual's life, this Section begins with a single case. On June 13, 2013, Michael Walker was detained by the Des Moines Police Department, in Des Moines, Iowa, on suspicion of

67. See U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. background (U.S. SENTENCING COMM'N 1987) ("For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. Such prosecutions result in high sentences because of the true nature of the underlying conduct."). This intended beneficial result, however, seemingly fades away when it is nearly impossible to commit the federal crime without simultaneously committing the state crime. Compare 18 U.S.C. § 922(g)(1) (2012) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . ."), with IOWA CODE § 724.4(1) ("[A] person who goes armed with a . . . concealed . . . [firearm], . . . or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries . . . in a vehicle a [firearm], commits an aggravated misdemeanor.").

68. See Breyer, *supra* note 2, at 800 (recounting that the original purpose of the Guidelines was to reduce disparity among similarly situated criminals); Newman, *supra* note 25, at 812–13.

69. IOWA CODE § 903A.2; IOWA DEP'T OF CORR., SUMMARY OF REDUCTION IN SENTENCE CALCULATIONS: EARNED TIME, available at <https://www.legis.iowa.gov/docs/publications/SD/13980.pdf> [<https://perma.cc/85ZR-HGGB>] (discussing the data about sentence reductions under IOWA CODE § 903A.2).

70. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM'N 2016).

71. See *id.* (U.S. SENTENCING COMM'N 2006) (excluding the underlying offense from the definition of "another felony offense" by restricting that definition to only offenses "other than the explosive or firearms possession or trafficking offense" (emphasis added)).

having participated in a shooting.⁷² Witnesses had reported hearing several shots and then seeing two males flee the scene in an SUV.⁷³ The arresting officers discovered a black Glock .40 caliber pistol in the seatback pouch of the SUV Walker was riding in.⁷⁴ On October 24, 2013, Walker pleaded guilty to one count of being a felon in possession of a firearm and ammunition, a violation of both 18 U.S.C. §§ 922(g)(1) and 924(a).⁷⁵

At Walker's sentencing, because he had either used a firearm at the shooting or, at least, was possessing the firearm while in the SUV based on Iowa Code section 724.4, the sentencing judge applied the section 2K2.1(b)(6)(B) enhancement and sentenced Walker to 44 months in federal prison.⁷⁶ The Eighth Circuit affirmed the district judge's ruling, relying on its earlier decision in *United States v. Jackson*.⁷⁷ In *Jackson*, the Eighth Circuit construed the "amended" language defining "another felony offense" narrowly, explaining that

the plain language of § 2K2.1(b)(6) casts a broad net. . . . Application note 14(C) narrows the scope only slightly, by defining "another felony offense" to exclude "the explosive or firearms possession or trafficking offense." . . . The phrase "the . . . firearms possession . . . offense" in application note 14(C) most plainly refers to the underlying offense of conviction—in [this] case, possession of a firearm by a felon. Thus, the plain language of application note 14(C) excludes only the underlying firearms possession offense of conviction from the definition of "another felony offense."⁷⁸

The Eighth Circuit's reasoning in *Jackson*, and its affirmation in *Walker*, makes it likely that the court either was unaware of, or did not heed, the Commission's warning that the definition of "another felony offense" was not substantively changed.⁷⁹

This supposition is enhanced by reviewing the language of the *Jackson* opinion that the *Walker* court omitted. In *Jackson*, the court found it important that the "amended" definition of "another felony offense" was drafted so as to "not exclude 'any,' 'an,' or 'a' firearms possession offense" but instead only

72. Appellant's Brief at 2–3, *United States v. Walker*, 771 F.3d 449 (8th Cir. 2014) (No. 14-1752), 2014 WL 1569081, at *2–3.

73. *Id.*

74. *Id.* at *3.

75. *Id.* at *2.

76. *Walker*, 771 F.3d at 450–51.

77. *Id.* at 452–53 (citing *United States v. Jackson*, 633 F.3d 703, 705–06 (8th Cir. 2011)).

78. *Jackson*, 633 F.3d at 705–06.

79. See Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4782, 4790 (Jan. 27, 2006) ("Please note that the proposed definition[] of 'another felony offense' . . . [is] not new—the proposed language is a technical reworking of current Application Notes 4, 11, and 15.").

“to exclude ‘the explosive or firearms possession’” offense.⁸⁰ Ultimately, the four-level enhancement of section 2K2.1(b)(6)(B) resulted in Walker being sentenced to approximately 12 more months in federal prison than if he had been sentenced without the four-level increase; in other words, roughly 33 percent more than had he not had the enhancement applied.⁸¹ This approximate one-year extension of the sentence accords with the 1987 Guidelines statement that a six-level increase will generally double the length of a sentence, irrespective of offense level.⁸² As one can surely foresee, the state offense that was used to enhance Walker’s sentence was Iowa Code section 724.4(1).⁸³

Although *United States v. Walker* is the case from which its disparate progeny have sprung, Walker, the defendant, is not the most sympathetic criminal. After all, at roughly 1:00 a.m. he was spotted by a neighbor firing several shots into a residential neighborhood and then, after fleeing the scene, was arrested minutes later nearby.⁸⁴

A much more compassionate case is that of Marvin Hicks.⁸⁵ On August 1, 2011, Hicks was a passenger in a car that was pulled over “by the [city] police in Cedar Rapids, Iowa.”⁸⁶ Hicks “[had] a prior felony conviction for delivery of crack cocaine” and was barred from possessing a firearm.⁸⁷ Yet, on that day, he did have a firearm—“a loaded .38 caliber revolver.”⁸⁸ Likely in an effort to avoid arrest, “Hicks tossed [the firearm] to the back seat passengers, but the police found [it] under the left rear seat.”⁸⁹ “Hicks was charged with and pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).”⁹⁰ At his sentencing hearing, the district court applied section 2K2.1(b)(6)(B) and calculated that the Guidelines advised a sentencing range of 70 to 87 months.⁹¹ Judge Reade, Chief Judge for the Northern District of Iowa, sentenced Hicks to 70 months in federal

80. *Jackson*, 633 F.3d at 705–06. The court in *Jackson* then cited precedent that “[t]he word ‘the’ is a definite article commonly employed to refer to something specific.” *Id.* at 706 (citing *United States v. I.L.*, 614 F.3d 817, 821 (8th Cir. 2010)).

81. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM’N 2018) (identifying the sentencing table and showing that a four-level decrease from a mid-range sentence of 44 months would likely result in a sentence of 27–33 months).

82. *Id.* ch. 1, pt. A (U.S. SENTENCING COMM’N 1987).

83. *United States v. Walker*, 771 F.3d 449, 452 (8th Cir. 2014).

84. *Id.* at 450.

85. *United States v. Hicks*, 668 F. App’x 683, 684 (8th Cir. 2016) (per curiam).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* More accurately, § 924(a)(2) is the penalty provision for a defendant who is found guilty of committing § 922(g), felon in possession, with the punishment to be a term of imprisonment not to exceed ten years. 18 U.S.C. § 924(a)(2) (2012).

91. *Hicks*, 668 F. App’x at 684.

prison.⁹² On appeal, Hicks argued that, although he understood that *Walker* controlled, “*Walker* was wrongly decided and ‘will result in a lot of double-punishing of the act of possession in Iowa cases.’”⁹³ The three-judge panel affirmed the district court sentencing decision by noting “our panel is bound by the controlling decision in *Walker*.”⁹⁴ This case is not the only instance where the panel’s handcuffed and defeated tone appears, gloomily whacking every appellate mole with its *Walker* hammer.⁹⁵

Anecdotes of individual injustices make for readability, but as Justice Breyer stated, the goal of the Guidelines was not fairest but fairer,⁹⁶ and to judge how uneven the sentences are, one needs larger data sets. There are at least 19 Eighth Circuit cases on appeal from criminal proceedings in the two federal districts of Iowa since the 2014 *Walker* ruling where the defendant was seeking relief from a sentencing decision.⁹⁷ In 18 of those cases, a section

92. *Id.* at 684 & n.1.

93. *Id.* at 685.

94. *Id.*

95. *See, e.g.*, United States v. Stuckey, 729 F. App’x 494, 495 (8th Cir. 2018) (Grasz, J., concurring) (concurring in the judgment affirming the district court’s imposed sentence but only because the court is bound by *Walker*’s precedent); United States v. Boots, 816 F.3d 971, 975 (8th Cir. 2016) (Melloy, J., concurring) (same); United States v. Sanford, 813 F.3d 708, 715 (8th Cir. 2016) (Bye, J., concurring) (same).

96. Breyer, *supra* note 2, at 800.

97. *See Stuckey*, 729 F. App’x at 495 (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) due to the precedent of *Walker*); United States v. Pete, 723 F. App’x 381, 383 (8th Cir. 2018) (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) when defendant was caught in possession of a firearm within city limits); United States v. Jones, 718 F. App’x 443, 445–46 (8th Cir. 2017) (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) when defendant was convicted in state court for carrying weapons); United States v. Saul, 701 F. App’x 541, 542 (8th Cir. 2017) (per curiam) (affirming Judge Strand’s application of section 2K2.1(b)(6)(B) when the defendant was found to be in possession of a firearm); United States v. Jackson, 701 F. App’x 528, 528–29 (8th Cir. 2017) (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) against a defendant who was in possession of a firearm while a prohibited person); United States v. Charter, 697 F. App’x 879, 879–80 (8th Cir. 2017) (per curiam) (affirming Judge Gritzner’s application of section 2K2.1(b)(6)(B) to a defendant convicted of being a felon in possession of a firearm); United States v. Hughes, 694 F. App’x 463, 465 (8th Cir. 2017) (per curiam) (finding that section 2K2.1(b)(6)(B) would have been appropriately applied had it been necessary to support the sentence imposed); United States v. Maldonado, 864 F.3d 893, 901–02 (8th Cir. 2017) (affirming Judge Strand’s application of section 2K2.1(b)(6)(B) when the defendant was a felon in possession of a firearm while driving in a car); United States v. Thigpen, 848 F.3d 841, 846–47 (8th Cir. 2017) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) when the defendant was a felon in possession of a firearm within a city limit); United States v. Parrow, 844 F.3d 801, 803–04 (8th Cir. 2016) (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) for a felon in possession of a firearm); *Hicks*, 668 F. App’x at 684–85 (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) to a prior felon who was stopped while driving with a revolver in the car); United States v. Davis, 667 F. App’x 584, 585–86 (8th Cir. 2016) (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) to a defendant who was a felon in possession of a firearm, increasing his sentencing range from 51–63 months to 77–96 months); United States v. Gilson, 654 F. App’x 247, 249 (8th Cir. 2016) (per curiam) (recognizing the court was bound by its *Walker* precedent and affirming Judge

2K2.1(b)(6)(B) four-level increase for connection “with another felony” was applied by the district court judge, and the Eighth Circuit affirmed every decision.⁹⁸ An alternative lens to view the staggering impact that the interaction of Guideline special-offense characteristic section 2K2.1(b)(6)(B) has with state law can be shown through filtering the output of legal reporters. For example, a simplistic Westlaw search for all instances of Eighth Circuit decisions since November 2014 (when *Walker* was decided) containing the phrase “2K2.1(b)(6)(B)” yields 79 cases.⁹⁹ Of those 79 cases, two cases are from South Dakota, one is from North Dakota, five are from Minnesota, 21 are from Missouri, three are from Arkansas, and 47 are from Iowa—nearly 60 percent.¹⁰⁰ To put this overwhelming percentage into perspective, between fiscal years 2014 and 2017, Iowa’s two federal districts oversaw just 16 percent of all criminal cases filed in the Eighth Circuit.¹⁰¹

Why does section 2K2.1(b)(6)(B) interact so poorly with Iowa Code section 724.4? The results above lend to three distinct hypotheses regarding what is at play beneath the surface: (1) the federal district judges of Iowa are pro-incarceration, anti-defendant, and are able to hide behind their broad discretion;¹⁰² (2) the federal public defenders have latched on to what they

Reade’s application of section 2K2.1(b)(6)(B) to a felon in possession while in a car); *United States v. Davis*, 825 F.3d 359, 364 (8th Cir. 2016) (finding that Judge Reade did not err in applying the section 2K2.1(b)(6)(B) four-level enhancement when the defendant was a felon in possession of a firearm in a vehicle; although, ultimately vacating the defendant’s sentence on other grounds); *United States v. Walker*, 653 F. App’x 851, 852 (8th Cir. 2016) (per curiam) (affirming Judge Jarvey’s application of section 2K2.1(b)(6)(B) to a felon in possession of a firearm and acknowledging the controlling nature of *Walker*); *United States v. Terrell*, 822 F.3d 467, 469 (8th Cir. 2016) (affirming Judge Gritzner’s application of section 2K2.1(b)(6)(B) to defendant who was a felon in possession of a firearm while in a vehicle; although, ultimately vacating the defendant’s sentence on other grounds); *United States v. Barbee*, 641 F. App’x 671, 672–73 (8th Cir. 2016) (per curiam) (affirming Judge Reade’s appropriate application of section 2K2.1(b)(6)(B) under the precedent of *Walker*); *Boots*, 816 F.3d at 974–75 (per curiam) (affirming Judge Reade’s application of section 2K2.1(b)(6)(B) to the defendant and upholding *Walker*); *Sanford*, 813 F.3d at 714 (per curiam) (determining that it did not need to reach the question of whether section 2K2.1(b)(6)(B) was appropriately applied because it would have been harmless error had it not been appropriately applied).

98. The sole exception is *United States v. Sanford*, where the Eighth Circuit determined that it need not decide whether the section 2K2.1(b)(6)(B) enhancement was proper “because any error would be harmless.” *Sanford*, 813 F.3d at 714.

99. Search Results for 2K2.1(b)(6)(B), WESTLAW, <https://www.westlaw.com> (search starting point field for “2K2.1(b)(6)(B)” and click “All State & Federal” and choose “8th Circuit” from dropdown and click search; click “Date” on the left side of the webpage and choose “All dates after”; type “11/01/2014” and click “done.”).

100. *Id.*

101. See generally U.S. COURTS, U.S. DISTRICT COURTS—CRIMINAL CASES FILED, BY DISTRICT (INCLUDING TRANSFERS) (2017), available at http://www.uscourts.gov/sites/default/files/data_tables/jff_5_2_0930.2017.pdf [<https://perma.cc/RUA5-ANDD>] (providing total number of criminal cases filed by district for each fiscal year from 2013 to 2017).

102. See *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009) (“The district court has wide latitude to weigh the [18 U.S.C.] § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence.”).

perceive as an inequitable test established by *Walker* and are appealing every section 2K2.1(b)(6)(B) enhancement in hopes of an en banc hearing on *Walker*,¹⁰³ or (3) the interaction of an exceptionally narrow interpretation of the exclusionary definition of section 2K2.1(b)(6)(B) and the accompanying Application Note 14(C) coupled with a state firearm law that is unusually expansive in its scope and harsh in the sentences imposed has created the perfect storm of “semi-automatic” sentencing enhancements. To answer this question, it is important to know more about the other Eighth Circuit states. Unlike in the majority of the states within the Eighth Circuit, the state offense of mere firearm possession in Iowa is punishable by a term greater than one year.¹⁰⁴

F. FIREARM LAWS AMONGST THE OTHER EIGHTH CIRCUIT STATES

One potential source of the marked disparity in application of section 2K2.1(b)(6)(B) can be seen in comparing the state law possession of firearms regimes in each state within the Eighth Circuit. The seven states of the circuit can be split into two major groups: states where firearm offenses (aside from possession by a prohibited person) are punishable by more than one year (Iowa) and states where the maximum term of incarceration is less than one year (Arkansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota).

Under Missouri law, a prior convicted felon, a person “currently adjudged mentally incompetent,” or a person in a “habitually . . . intoxicated or drugged condition” is barred from possessing a firearm and is guilty of a felony if so convicted.¹⁰⁵ Missouri additionally prohibits firearms in a multitude of locations,¹⁰⁶ but none so broadly sweeping as Iowa’s “within the limits of any city.”¹⁰⁷ Where Missouri’s Criminal Code regarding firearm possession is most similar to the Iowa Code is the sentence imposed for unlawful possession of a firearm by a prohibited person. In Missouri, wrongful

103. This Note will not explore more theoretical reasons, such as a higher rate of firearm ownership will cause a higher rate of firearm-related felonies.

104. Compare IOWA CODE § 724.4(1) (2020) (“[A] person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.”), with *id.* § 903.1(2) (“When a person is convicted of an aggravated misdemeanor . . . the maximum penalty shall be imprisonment not to exceed two years.”).

105. See MO. REV. STAT. § 571.070 (2016) (categorizing this crime of firearm possession as a Class D felony).

106. See *id.* § 571.030 (making it a crime to possess, *inter alia*, a firearm at locations enumerated elsewhere in the code). Example locations include a police station, correctional institution, courthouse, school and church grounds, and a meeting location of a local governmental body. See *id.* § 571.107 (identifying locations that a person with a valid concealed carry permit is not authorized to carry).

107. IOWA CODE § 724.4(1).

possession is a Class D felony, punishable by a “term . . . not to exceed seven years.”¹⁰⁸ However, the preponderance of unlawful use of a firearm offenses are misdemeanors, punishable by no more than one year in jail.¹⁰⁹ Because this punishment is less than one year, Application Note 14(C) of section 2K2.1(b)(6)(B) likely does not apply to a Missouri defendant under the rule in *Walker*.¹¹⁰

Under Arkansas criminal law, it is unlawful for either a convicted felon, a person who is “mentally ill,” or a person who has been involuntarily committed to a mental institution to carry a firearm in any capacity, i.e., regardless of location.¹¹¹ Furthermore, it is unlawful to carry “an instrument of crime,” including a firearm, “with a purpose to employ it criminally.”¹¹² The defendant convicted of either of these offenses, however, is guilty of potentially only a Class A misdemeanor.¹¹³ Under Arkansas law, a Class A misdemeanor is only punishable up to one year in prison.¹¹⁴ The Guidelines’ special-offense characteristic section 2K2.1(b)(6)(B) expressly defines an appropriate underlying crime as punishable by incarceration for greater than one year.¹¹⁵ Thus, the controlling precedent of *Walker* would not apply to an individual in Arkansas convicted of a federal firearm offense subject to the provisions of section 2K2.1(b)(6)(B).¹¹⁶

108. MO. REV. STAT. § 558.011.

109. *See id.* § 571.030.

110. *See, e.g.,* United States v. Long, 563 F. App’x 498, 499–500 (8th Cir. 2014) (per curiam) (holding that the exclusionary clause of § 2K2.1(b)(6)(B) Application Note 14(C) did not apply when the federal offense of 18 U.S.C. § 922(g), felon in possession of a firearm, had a different element than the underlying additive state crime of possession of a firearm by an intoxicated person, MO. REV. STAT. § 571.0730.5). The court relied on *United States v. Jackson* (the precursor to *Walker*) to find that “[b]ecause the Missouri offense is not Long’s underlying offense of conviction, the enhancement properly applies to the Missouri offense.” *Id.* at 500.

111. ARK. CODE ANN. § 5-73-103(a) (2019).

112. *Id.* § 5-73-102(a).

113. *Id.* §§ 5-73-102(b), 5-73-103(c)(3).

114. *Id.* § 5-4-401(b)(1) (“For a Class A misdemeanor, the sentence shall not exceed one (1) year.”).

115. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM’N 2016) (outlining the offense as “punishable by imprisonment for a term exceeding one year”).

116. Further, even under the Eighth Circuit’s current *Walker* standard, in a hypothetical Arkansas case similar in facts to that of Marvin Hicks, the sentencing decision would be distinguishable from *Walker*. *See supra* Section I.E. Instead, the sentencing court would need to recognize that the federal offense of a felon in possession encompasses the same elements as the Arkansas Code. *Compare* 18 U.S.C. § 922(g) (2012) (“It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . .”), with ARK. CODE ANN. § 5-73-103(a)(1) (“[N]o person shall possess or own any firearm who has been[] . . . [c]onvicted of a felony.”). The basis for the court distinguishing between identical elements of a state and federal offense and merely similar elements can be found in *United States v. Lindquist*, 421 F.3d 751, 756 (8th Cir. 2005), *abrogated on other grounds by* United States v. Houston, 920 F.3d 1168 (8th Cir. 2019). There, the court held that “[i]t would be unreasonable, and hence presumably contrary to the Commission’s intent, to allow the ‘additional felony’ to be an offense that the

Minnesota's criminal firearm laws parallel those of Arkansas. In Minnesota, it is unlawful for a convicted felon or a person with known mental illnesses or who has been involuntarily committed to a mental institution to possess a firearm.¹¹⁷ Additionally, it is unlawful to possess in a public place a pistol, either open or concealed on the person or in a vehicle, without an issued permit.¹¹⁸ The similarity to Arkansas also extends to the potential punishment—the aforementioned offenses are all gross misdemeanors under Minnesota law, and cannot result in incarceration for a term greater than one year.¹¹⁹ Thus, again section 2K2.1(b)(6)(B) would not apply to a Minnesota defendant who has committed the least culpable level of behavior to find oneself guilty of a corresponding state firearm offense.¹²⁰

In Nebraska, it is a Class I misdemeanor for a person to carry “concealed on or about . . . [a] person,” among other deadly weapons, a handgun.¹²¹ A Class I misdemeanor is only punishable for a term up to one year.¹²² Additionally, if it is a Class ID felony, it is punishable by up to 50 years in prison¹²³ for a convicted felon to possess a firearm.¹²⁴ Significantly for the purposes of this Note, the elements of the Nebraska felony are precisely those of the federal felon in possession statute, and thus the exclusionary clause in

defendant has to commit, in every case, in order to commit the underlying offense.” *Id.* (quoting *United States v. English*, 329 F.3d 615, 618 (8th Cir. 2003)). A similar situation would arise in this Arkansas hypothetical, meaning there would be no distinguishing between the required elements of the federal crime of unlawful possession of a firearm by a prohibited person and the Arkansas crime of possession of a firearm by convicted felon, mentally ill, or a previously involuntarily committed to a mental institution person. Thus, the state crime would in fact be “the” firearms possession offense as delineated by the *Walker* court, and the four-level sentencing enhancement could not be invoked. This barring of the provision would stay in effect even though the hypothetical Arkansas Hicks would be potentially subject to a Class D felony under Arkansas law. *See* ARK. CODE ANN. § 5-73-103(c)(2) (“A person who violates this section [barring possession of a firearm] commits a Class D felony if he or she has been previously convicted of a felony . . .”).

117. MINN. STAT. § 624.713 subdiv. 1 (2019). Both an individual who has been previously convicted of a crime punishable by imprisonment for a term exceeding one year and someone suffering from mental illness are guilty of a gross misdemeanor if convicted for unlawful possession under this provision. *Id.* § 624.713 subdivs. 1(3), (10)(i), 2(c). If, however, the individual has a prior conviction for a crime of violence, then a future possession offense under this statute would be a felony offense. *Id.* § 624.713 subdiv. 2(b).

118. *Id.* § 624.714 subdiv. 1a.

119. *See id.* § 609.02 (defining “[g]ross misdemeanor” as “any crime which is not a felony or misdemeanor” and defining a “[f]elony” as “a crime for which a sentence of imprisonment for more than one year may be imposed”).

120. *See supra* text accompanying notes 115–16.

121. NEB. REV. STAT. ANN. § 28-1202 (LexisNexis 2019).

122. *Id.* § 28-106(1).

123. *Id.* § 28-105(1) (prescribing that the mandatory minimum term of incarceration is three years, with a maximum term of 50 years).

124. *Id.* § 28-1206. This section also includes fugitives from justice, as well as persons who are the subject of a domestic violence protection order. *Id.*

Application Note 14(C) prevents the four-level increase to the offense level.¹²⁵ Therefore, the Nebraska crime of possession of a firearm could not be used to enhance the federal firearm possession offense. Instead, the government would have to rely on a separate Nebraska offense, but the concealed carry offense is only a misdemeanor punishable by no more than one year, so section 2K2.1(b)(6)(B) could not apply.¹²⁶

South Dakota's criminal code regarding firearms was similar to Nebraska's structure in two ways. First, in South Dakota, it was a Class 1 misdemeanor to possess a concealed firearm on or about the person or concealed within a vehicle;¹²⁷ this offense was punishable by a maximum of one year in jail.¹²⁸ Second, it is a felony, punishable for a term more than one year,¹²⁹ for a person to possess a firearm after a prior felony conviction.¹³⁰ One area of difference is that South Dakota criminalizes the act of concealing a firearm with intent to commit a felony.¹³¹

Ultimately, the intersection of section 2K2.1(b)(6)(B) and South Dakota's criminal law is also similar to the section's intersection with Nebraska's criminal law; crimes other than the identical federal-to-state felon in possession offenses are only punishable as a misdemeanor subject to a maximum sentence of one year, and therefore do not meet the section 2K2.1(b)(6)(B) requirement of "another felony offense."¹³²

125. Compare 18 U.S.C. § 922(g) (2012) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . ."), with NEB. REV. STAT. ANN. § 28-1206 ("A person commits the offense of possession of a deadly weapon by a prohibited person if he . . . [p]ossesses a firearm . . . and he . . . [h]as previously been convicted of a felony . . . in any court in the United States [or] the several states Possession of a deadly weapon which is a firearm by a prohibited person is a Class ID felony [punishable for a term of no less than three years]."). "[I]t would be unreasonable, and hence presumably contrary to the Commission's intent, to allow the 'additional felony' to be an offense that the defendant has to commit, in every case, in order to commit the underlying offense." *United States v. English*, 329 F.3d 615, 618 (8th Cir. 2003).

126. See U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM'N 2016) (explaining that the underlying offense must be punishable by a term greater than one year to qualify as "[a]nother felony offense").

127. S.D. CODIFIED LAWS § 22-14-9 (2017), *repealed by* 2019 S.D. Sess. Laws ch. 113, § 1 (possessing a firearm, either concealed or in a vehicle, is no longer, conduct in and of itself, a misdemeanor in South Dakota). The repeal of this law further exacerbates the dissimilar punishment for the same offense between an individual Iowan or South Dakotan that is the heart of this Note.

128. *Id.* § 22-6-2 (2018).

129. *Id.* § 22-6-1 (identifying a range of incarceration term lengths for several classes of felonies with the minimum term being up to "two years imprisonment in the state penitentiary").

130. *Id.* §§ 22-14-15 to -15.2.

131. *Id.* § 22-14-8.

132. See U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM'N 2016) (explaining that the underlying offense must be punishable by a term greater than one year to qualify as "[a]nother felony offense").

Finally, North Dakota criminalizes the possession of a firearm by a previously convicted felon, or a person who has previously been committed to a mental institution.¹³³ The prior felon in possession is punishable with another felony conviction, whereas the individual who has been institutionalized faces a Class A misdemeanor charge.¹³⁴ Further, the State regulates when and where a person may carry a handgun¹³⁵ or a concealed firearm,¹³⁶ including within a vehicle,¹³⁷ and a failure to abide by the law is punishable as a Class A misdemeanor.¹³⁸ North Dakota defines a Class A misdemeanor as punishable by up to 360 days of imprisonment.¹³⁹ The result is that section 2K2.1 (b) (6) (B) can likely not be applied to a person in North Dakota facing a federal firearm possession charge.¹⁴⁰

Thus far, the existent laws and small quantity of published opinions cited above are no more than possible indicators of disparate treatment of Iowa defendants without any clear evidence of categorically different treatment of similarly situated defendants. Fortunately, the Sentencing Commission is required by law to maintain a trove of data concerning the implementation of the Guidelines.¹⁴¹ While a detailed statistical analysis of disproportionate sentencing outcomes for defendants charged with federal firearm felonies in the state of Iowa is beyond the scope of this Note, it remains a promising area of research for future scholars.

III. WHY ARE DISPARATE SENTENCING OUTCOMES A PROBLEM?

The problems identified in this Note are not merely academic or theoretical, these are actual lives being affected based almost entirely on arbitrary state boundaries and an overly narrow interpretation of the law. Because the results of this confluence are palpable, the resulting disparate sentences impact the validity and credibility of the federal judiciary. The question this Part asks is almost rhetorical in its simplicity. The entire purpose of the Guidelines was to promote fairness and reduce sentencing disparities¹⁴² that arose during a time when the

133. N.D. CENT. CODE § 62.1-02-01 (2020).

134. *Id.* The felony charge carries a maximum sentence of up to five years. *Id.* § 12.1-32-01.

135. *Id.* § 62.1-03-01.

136. *Id.* § 62.1-04-02.

137. *Id.* § 62.1-04-01.

138. *Id.* § 62.1-04-05.

139. *Id.* § 12.1-32-01.

140. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM'N 2016) (explaining that the underlying offense must be punishable by a term greater than one year to qualify as “[a]nother felony offense”).

141. *See* 28 U.S.C. § 995(a)(12), (14)–(15) (2012) (requiring the Commission to “serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices,” to “collect systematically and disseminate information concerning sentences actually imposed,” and to “publish data concerning the sentencing process”).

142. *See supra* note 2 and accompanying text.

sentencing judge had almost complete and irrevocable control over the sentencing process.¹⁴³ Section III.A identifies several problems that disparate sentences have on individuals. Then, Section III.B discusses the problems that disparate sentencing present to the nation and its institutions.

A. THE IMPACT OF DISPARATE SENTENCES ON INDIVIDUALS

The rule of *Walker* comes at a great cost to the individual; his penalty is more severe than that of others, “which unjustly deprives [the] individual[] of [his] liberty.”¹⁴⁴ One justification for an increased sentence is the penological theory of deterrence. In fact, as mandated by the SRA, deterrence is one factor that the Commission had to consider when establishing the Guidelines.¹⁴⁵ However, there is scant evidence to support a theory that increased severity of sentencing will act as a greater deterrent.¹⁴⁶ Furthermore, when a person is unaware that a crime for which he or she has not been charged, nor will need to be charged, will be used against him or her at sentencing, how can that person know of or consider that possible enhanced punishment prior to committing an offense?¹⁴⁷

B. THE IMPACT OF DISPARATE SENTENCES ON GOVERNMENT AND CITIZENS

As referenced in Section II.C, section 2K2.1(b)(6)(B) was originally conceived to address those cases where “[t]he firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law.”¹⁴⁸ For example, a gas station robbery committed by a felon in possession would be prosecutable in a federal court, saving the state on not only the cost of the prosecution but also the

143. See *supra* notes 28–29 and accompanying text.

144. Letter from Marjorie A. Meyers, Fed. Pub. Def., S. Dist. of Tex., to Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n app. at 29 (Mar. 18, 2014), available at <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20140326/public-comment-FPD.pdf> [<https://perma.cc/6FVS-7BZA>].

145. 28 U.S.C. § 994(c)(6) (2012) (listing “the deterrent effect a particular sentence may have on the commission of the offense by others” as a consideration for the Commission).

146. See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (concluding, after review of a body of studies, that there is little to no correlation between a person’s perceived severity of punishment and its deterrent effect).

147. See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 182–83 (2003) (analyzing various studies which report that the majority of criminals do not consider legal consequences when planning crimes); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 4–7 (1999) (standing for the proposition that a lengthy sentence does not provide significant deterrence because most would-be criminals do not consider or are unaware of the potential punishment, but instead focus on the likelihood of being caught); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003) (“The social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices.”).

148. See *supra* text accompanying note 67.

long-term incarceration of the thief.¹⁴⁹ Although potentially beneficial to a state looking to save tax dollars, such an intrusion by the federal government raises significant concerns, or even threats, over comity and federalism.¹⁵⁰

Furthermore, federal taxpayers nationwide bear the brunt of the extended sentences handed down under *Walker*, essentially subsidizing the cost of a state crime.¹⁵¹ In March 2013, the Director of the Bureau of Prisons, at a public hearing before the Commission testified “that ‘[t]he most direct and immediate way to reduce prison expenditures is to reduce the total number of inmates incarcerated or the number of years to which they are sentenced.’”¹⁵² In Fiscal Year 2015, each federal inmate incarcerated annually required more than \$29,000 in federal tax dollars to sustain.¹⁵³ These direct costs do not account for the indirect costs associated with the creation of briefs arguing for and against the four-level increase by trial attorneys, unnecessary appellate work by federal defenders,¹⁵⁴ and the inefficient allocation of limited Eighth Circuit judges opining on endlessly repetitive appeals while bound by *Walker* precedent.¹⁵⁵

IV. WHAT ARE POSSIBLE SOLUTIONS TO THE PROBLEM OF DOUBLE-COUNTING FIREARM POSSESSION CRIMES IN IOWA?

In light of the negative results stemming from *Walker* discussed in Part III, this Part of the Note proposes five solutions, organized from “easiest” to implement to “most difficult” or at least “most improbable.” Section IV.A recommends that the sentencing judges themselves take action to prevent this disparate treatment.

149. See *supra* text accompanying note 67.

150. *Remarks Before the U.S. Sentencing Comm’n Public Hearing on the Felon in Possession Guideline 5-6* (2014) (statement of Alan DuBois) [hereinafter DuBois], available at https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/Testimony_1_DuBois.pdf [<https://perma.cc/SU5N-3EFE>].

151. A subsidy which non-citizens of Iowa cannot influence through their vote in Iowa to alter the offending criminal statute.

152. Letter from Marjorie A. Meyers, Fed. Pub. Def., S. Dist. of Tex., to Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 3 (July 15, 2013), available at https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-comment/20130801/Public_Comment_FPD_Proposed_Priorities.pdf [<https://perma.cc/K8FN-36QS>] (quoting Charles Samuels, Dir., Bureau of Prisons, Public Hearing Before the U.S. Sentencing Comm’n (Mar. 2013)).

153. THOMAS R. KANE, FED. BUREAU OF PRISONS, FEDERAL PRISON SYSTEM PER CAPITA COSTS FY 2015 (2016), available at https://www.bop.gov/foia/fy15_per_capita_costs.pdf [<https://perma.cc/ZEY6-F3BR>].

154. See *United States v. Hicks*, 668 F. App’x 683, 685 (8th Cir. 2016) (per curiam) (recognizing that *Walker* is controlling precedent, yet the defendant still appealed in hopes of an eventual en banc rehearing).

155. See *United States v. Stuckey*, 729 F. App’x 494, 495 (8th Cir. 2018) (Grasz, J., concurring) (per curiam) (noting that his desire to revisit *Walker* was also “expressed by Judge Melloy and Judge Bye in prior cases dealing with this issue”); see also *United States v. Boots*, 816 F.3d 971, 976 (8th Cir. 2016) (Melloy, J., concurring) (per curiam) (asking the court to reexamine *Walker*); *United States v. Sanford*, 813 F.3d 708, 715–18 (8th Cir. 2016) (Bye, J., concurring) (per curiam) (stating that *Walker* was wrongly decided and should be overturned).

Section IV.B proposes administrative action by the Sentencing Commission. Section IV.C proposes judicial action by the Eighth Circuit Court of Appeals, to right a wrong of its own doing. Section IV.D continues the judicial thrust, arguing that the Supreme Court should step in and rule on the existing circuit split on this Sentencing Guideline provision. Finally, Section IV.E makes the argument that, in the absence of federal governmental action, Iowa has the power to change its criminal laws to ensure its citizens are no longer treated unfairly by the federal criminal justice systems as compared to neighboring state citizens.

A. ACTION BY THE DISTRICT COURT SENTENCING JUDGE

The simplest solution is for the sentencing judge to stop adding a four-level increase to a defendant when the government seeks to add the special-offense characteristic of section 2K2.1(b)(6)(B) to the base-offense level.¹⁵⁶ Post-*Booker*, the Guidelines are no longer mandatory, thus legitimizing a sentencing judge's discretion.¹⁵⁷ Although *Booker* rendered the Guidelines advisory in nature only, the Supreme Court was explicit in its holding that the sentencing judge should still consider the Guidelines and only alter the sentence adjudged in consonance with "other statutory concerns."¹⁵⁸ One such statutory concern is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."¹⁵⁹ The statutory language does not limit the defendants to only those within the jurisdiction of the sentencing judge, but instead states simply "found guilty of similar conduct."¹⁶⁰ Section II.F makes it clear that individuals committing similar conduct in states other than Iowa, yet still within the Eighth Circuit, are receiving more lenient sentences. Iowa district court judges should consider this factor when sentencing criminals within Iowa.

Supporting this rationale is the standard of review governing the sentencing judge's decision. Here, again, *Booker* provides the answer—the standard of review of a sentencing decision is one of reasonableness.¹⁶¹ "In other words, . . . appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a)."¹⁶² Pursuant to § 3553(a), the sentencing court must consider several factors in creating a sufficient sentence, one of which is "to provide just

156. This Note takes no position on the role of the United States Attorney's decision to seek the four-level increase.

157. *United States v. Booker*, 543 U.S. 220, 245–46 (2005) ("So modified, the [SRA] 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)).

158. *Id.*

159. 18 U.S.C. § 3553(a)(6) (2012).

160. *Id.*

161. *Booker*, 543 U.S. at 261.

162. *Id.* (quoting 18 U.S.C. § 3742(e)(3) (1994), *invalidated by Booker*, 543 U.S. at 220). The 1994 edition of 18 U.S.C. § 3742(e)(3) was one portion of those elements of the SRA that were held unconstitutional and was excised from the SRA by the Supreme Court in *Booker. Id.* at 259–60.

punishment for the offense.”¹⁶³ Here, “just” should be read to include the ideals of Senator Kennedy and Justice Breyer: promoting fairness and reducing sentencing disparities.¹⁶⁴ When the identical actions of two persons, one in Iowa, the other not, result in two different sentences solely through the application of a special-offense category, the “justness” of the Iowa sentence must be called into question. This rationale is buttressed by another factor discussed in the immediately preceding paragraph: whether a sentencing decision will cause unwarranted disparities among similarly situated defendants.¹⁶⁵

Ultimately, the advisory discretion of *Booker* coupled with the heightened standard of review of “unreasonableness” empower the sentencing judge to cease applying the section 2K2.1(b)(6)(B) special-offense characteristic when doing so would disproportionately impact a defendant in an Iowa federal courthouse, as compared to a neighboring state’s federal courthouse.

B. ACTION BY THE SENTENCING COMMISSION

The U.S. Sentencing Commission should clarify the scope of section 2K2.1(b)(6)(B) and its application note to explain that the (6)(B) special-offense category does not advise application of a four-level increase when the underlying crime is a firearm possession felony. Pursuant to the SRA, the Commission has two options. One, it can modify or amend the Guidelines.¹⁶⁶ In order to modify or amend the Guidelines, it would need to seek public comment on proposed amendments and then make a proposal to Congress no later than May 1 of the following year.¹⁶⁷ Congress could then approve or deny the proposals, or take no action, in which case the proposed amendment clarifying the application of section 2K2.1(b)(6)(B) would go into effect on November 1 of that year.¹⁶⁸ Two, it can provide a “general policy statement[] regarding application of” section 2K2.1(b)(6)(B).¹⁶⁹ Not only can the Commission review, but it also “shall review and revise, in consideration of comments and data coming to its attention”¹⁷⁰ to achieve the dual purposes of “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.”¹⁷¹

The Commission should amend Application Note 14(C)’s definition of “another felony offense” to read as follows:

163. 18 U.S.C. § 3553(a)(2)(A). The sentencing court must also consider other factors, such as the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, . . . to afford adequate deterrence to criminal conduct; [and] to protect the public.” *Id.* § 3553(a)(2)(A)–(C).

164. *See supra* Section II.B.

165. 18 U.S.C. § 3553(a)(6).

166. 28 U.S.C. § 994(p) (2012).

167. U.S. SENTENCING COMM’N, *supra* note 36, at 5.

168. *Id.* at 5–6.

169. 28 U.S.C. § 994(a)(2).

170. *Id.* § 994(o).

171. *Id.* § 994(f).

“Another felony offense,” for purposes of subsection (b) (6), means any federal, state, or local offense, other than ~~the~~ explosives or firearms possession or trafficking offenses, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

This recommended definition carries over the intent of the pre-2005 Guidelines, which the Commission iterated were not intended to be substantively changed by the alteration in the 2006 Guidelines,¹⁷² while still referencing that all three levels of law-making authority apply to the defendant.

The Commission has already sought feedback on section 2K2.1 in recent years.¹⁷³ In 2014, Alan DuBois, on behalf of the Federal Public and Community Defenders, provided feedback specifically on the changed language of Application Note 14(C).¹⁷⁴ Recapping the history of the application notes accompanying section 2K2.1(b)(6)(B) and its precursor section 2K2.1(b)(5), DuBois pointed out three significant factors that have caused confusion amongst the circuit courts: (1) prior to the 2006 amendment, courts consistently “interpreted the definition of ‘another felony offense’ to categorically exclude *any* other firearms possession or trafficking offenses, not just the one charged,”¹⁷⁵ however, after the amendment courts then reinterpreted the exclusion “to no longer exclude all explosive[] or firearms possession or trafficking offenses;”¹⁷⁶ (2) the reasons justifying the amendment made no mention of this altered definition of “another felony offense;”¹⁷⁷ and (3) the Commission provided no empirical evidence to support the expansion of firearm possession offenses.¹⁷⁸ Ultimately, the Federal Public and Community Defenders are likely current in their belief that the Commission committed a clerical error in 2006.

By November 2021, the Commission could end 14 years of confusion and disparate sentencing surrounding section 2K2.1(b)(6)(B). First, the Commission could immediately issue policy guidance pursuant to § 994(a)(2) as to the appropriate application of Specific Offense Characteristic (b)(6)(B). By May 1, 2021 the altered language could be provided to Congress for approval as a

172. Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4782, 4790 (Jan. 27, 2006) (“Please note that the proposed definitions of ‘another felony offense’ and ‘another offense’ . . . [is] not new—the proposed language is a technical reworking of current Application Notes 4, 11, and 15.”).

173. Sentencing Guidelines for United States Courts, 81 Fed. Reg. 2295, 2299 (Jan. 15, 2016); Sentencing Guidelines for United States Courts, 79 Fed. Reg. 3280, 3293–95 (Jan. 17, 2014).

174. DuBois, *supra* note 150, at 14–17.

175. *Id.* at 15 (citing United States v. Valenzuela, 495 F.3d 1127, 1133–34 (9th Cir. 2007); United States v. Harper, 466 F.3d 634, 650 (8th Cir. 2006); United States v. Lloyd, 361 F.3d 197, 201 (3d Cir. 2004); United States v. Garnett, 243 F.3d 824, 827 (4th Cir. 2001)).

176. *Id.* (quoting United States v. Juarez, 626 F.3d 246, 255 (5th Cir. 2010)).

177. *Id.* at 16 (citing U.S. SENTENCING GUIDELINES MANUAL supp. to app. C, amend. 691 (U.S. SENTENCING COMM’N 2006)).

178. *Id.*

proposed amendment to the Guidelines. Were Congress to acquiesce, the proposed amendment would go into effect on November 1, 2021. Clarification of which felonies do and do not apply under section 2K2.1 (b) (6) (B) would allow the Eighth Circuit to properly meet the Commission's intent of fairness in sentencing across the circuit.

C. JUDICIAL ACTION BY THE EIGHTH CIRCUIT

In the absence of action by the Commission, the Eighth Circuit could overrule its earlier ruling in *Walker*. Procedurally, to overrule current precedent, the Eighth Circuit would need to grant a rehearing en banc.¹⁷⁹ There have been, however, no shortage of appeals from the defense bar seeking such a reexamination of *Walker*.¹⁸⁰ In overruling *Walker*, the court could move forward in a two-step process.

First, as justification for its reversal, the Eighth Circuit could rest its decision on an intent to return to the purpose of the Guidelines—to reduce disparate sentencing.¹⁸¹ In doing so, the Eighth Circuit would need to explicitly recognize that the Commission did not intend¹⁸² to substantively narrow the exclusionary clause of Application Note 14(C) when it altered the language from “offenses other than explosives or firearms possession or trafficking offenses”¹⁸³ to “*the* explosive or firearms possession or trafficking offense.”¹⁸⁴

Next, the court should either establish a new test or embrace an existing test from within the circuit to apply to section 2K2.1 (b) (6) (B). As to a new test, some judges on the circuit have already authored one potential standard, that section 2K2.1 (b) (6) (B) should not be applied when the underlying offense is so “inextricably entwined” with the charged offense that to commit one is to commit the other.¹⁸⁵ Circuit Judge Bye supports similar language, arguing in a concurrence that the double-counting of offenses “does not further the purpose of the ‘other felony’ enhancement, and . . . find[ing] it hard to believe the Sentencing Commission would have intended such a result either.”¹⁸⁶ Less narrow

179. *United States v. Stuckey*, 729 F. App'x. 494, 495 (8th Cir. 2018) (per curiam); *see also United States v. Anwar*, 880 F.3d 958, 971 (8th Cir. 2018) (“Only the en banc court has [the] authority to overrule a prior panel opinion, whether in the same case or in a different case.” (alteration in original) (internal quotation marks omitted)).

180. *See supra* text accompanying note 97.

181. *See Newman, supra* note 25, at 805.

182. Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4782, 4790 (Jan. 27, 2006).

183. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.15 (U.S. SENTENCING COMM'N 2005).

184. *Id.* § 2K2.1 cmt. n.14(C) (U.S. SENTENCING COMM'N 2016) (emphasis added).

185. *See United States v. Stuckey*, 729 F. App'x 494, 496 (8th Cir. 2018) (Grasz, J., concurring) (per curiam) (“In [Judge Grasz’s] view, the sentence enhancement set forth in USSG § 2K2.1 (b) (6) (B) should not be available in circumstances such as this, where Stuckey’s act of possessing the firearm in violation of federal law is inextricably entwined with his act of possessing a firearm within city limits in violation of Iowa law.”).

186. *United States v. Sanford*, 813 F.3d 708, 718 (8th Cir. 2016) (Bye, J., concurring) (per curiam).

than the identical element requirement that *Walker* stands for, this test would still ensure a workable standard for evaluating underlying offenses while recognizing that it would be illogical that, under *Walker*, the only offense that could be excluded under Application Note 14(C) would be the federal firearm possession offense.

D. JUDICIAL ACTION BY THE SUPREME COURT

An obvious option is that the Supreme Court could grant certiorari to a future appeal on this issue. The Supreme Court has previously denied certiorari at least five times since the Eighth Circuit decided *Jackson* in 2011.¹⁸⁷ Were the Supreme Court to grant certiorari, it could either answer the narrow question of whether a state criminal offense such as Iowa Code section 724.4 is excluded under Application Note 14(C), or it could answer broader questions regarding the scope of section 2K2.1(b)(6)(B) itself. Were it to tackle a broader question it would be resolving an existing circuit split between the Fifth and Eighth Circuits—which apply a very narrow interpretation of the exclusionary provision¹⁸⁸—and the Third, Fourth, Sixth, Seventh, and Eleventh Circuits—which have generally held that the court should apply the “relevant conduct” provisions of the Guidelines to determine if the other offense counts as “another felony offense.”¹⁸⁹

E. IOWA LEGISLATIVE ACTION TO AMEND IOWA CODE SECTION 724.4

Iowa Code section 724.4 was adopted, and, for all intents and purposes, last amended in 1976.¹⁹⁰ Thus, this criminal statute existed long before the Guidelines arrived in 1987.¹⁹¹ The state clearly has a vested interest in enforcing its laws in order to maintain the peace and safeguard its citizens. However, it also has a duty to ensure the fair and just application of the law to its citizens and residents. The legislature should conduct fact-finding as to the total number of defendants

187. *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 702 (2018); *United States v. Boots*, 816 F.3d 971 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 209 (2016); *United States v. Sanford*, 813 F.3d 708 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 260 (2016); *United States v. Walker*, 771 F.3d 449 (8th Cir. 2014), *cert. denied*, 575 U.S. 906 (2015); *United States v. Jackson*, 633 F.3d 703 (8th Cir. 2011), *cert. denied*, 563 U.S. 1027 (2011).

188. *Walker*, 771 F.3d at 451–52; *United States v. Brummett*, 355 F.3d 343, 345 (5th Cir. 2003) (per curiam).

189. *United States v. Horton*, 693 F.3d 463, 473, 478–79 (4th Cir. 2012) (standing generally for the proposition that the relevant conduct of both the underlying offense and the charged offense must be sufficiently connected to apply section 2K2.1(b)(6)(B) or section 2K2.1(c)(1)); *see also* *United States v. Kulick*, 629 F.3d 165, 170–71 (3d Cir. 2010) (same); *United States v. Williams*, 431 F.3d 767, 771–73 (11th Cir. 2005) (per curiam) (same); *United States v. Settle*, 414 F.3d 629, 632 (6th Cir. 2005) (same); *United States v. Jones*, 313 F.3d 1019, 1023 & n.3 (7th Cir. 2002) (same). It is beyond the scope of this Note to discuss in great detail either section 2K2.1(c)(1) or section 1B1.3—the “relevant conduct” section of the Guidelines—however, this broader question is more likely to warrant a grant of certiorari from the Supreme Court than the narrow Iowa-centric issue.

190. 1976 Iowa Acts 575, § 2404; IOWA CODE § 724.4 (2020).

191. *See supra* note 32 and accompanying text.

negatively affected by the federal court's application of the rule in *Walker* to Iowa Code section 724.4.¹⁹² This data should be compared to individuals residing outside of the state engaging in precisely the same behavior, but only facing a prison sentence that is two-thirds that of the Iowan.

The Iowa Legislature should amend Iowa Code section 724.4(1) to read as follows:

Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits ~~an aggravated~~ a serious misdemeanor.¹⁹³

This simple change from an aggravated misdemeanor to a serious misdemeanor would lower the maximum incarceration length to no more than one year¹⁹⁴ thereby nullifying any efforts by federal prosecutors or the judiciary from leveraging a state firearm offense into the sentencing calculations of an Iowa defendant.

V. CONCLUSION

Since 2014, the Eighth Circuit has developed and allowed a sentencing practice to exist that discriminates against Iowa defendants compared to the rest of the circuit's geographic jurisdiction. The improper application of a four-level increase in the sentencing calculation at the district court level and the subsequent affirmation by the court of appeals directly results in the average inmate sentenced under section 2K2.1(b)(6)(B) in Iowa to be sentenced to a term of imprisonment that is approximately 25 percent longer than a similarly situated citizen of a neighboring state. The resultant sentencing disparities are directly contrary to the SRA's original purpose.

The remedy is quite simple and requires the effort of only one of five different governmental bodies taking action to rectify this injustice. First, sentencing judges could exercise their *Booker*-authorized discretion to not add the government-proffered four-level increase. Second, the Commission could either publish policy guidance on how it intended for the special-offense category to be applied, or it could use its authorized processes to formerly amend the section 2K2 guideline to remove the inference of approving double-counting of literally distinct but similar

192. Social scientists have previously investigated other forms of disparate sentencings, most notably the exceptionally important research into the systemic biases against African American defendants. See generally William Rhodes et al., *Federal Sentencing Disparity: 2005–2012* (Bureau of Justice Statistics, Working Paper No. 2015:01, 2015), available at <https://www.bjs.gov/content/pub/pdf/fsdo512.pdf> [<https://perma.cc/M4YP-E58F>] (examining patterns of sentencing disparity among white and black defendants).

193. See IOWA CODE § 724.4(1).

194. *Id.* § 903.1(1)(b).

possession offenses. Third, the Eighth Circuit could hear an Iowa section 2K2.1(b)(6)(B) appeal en banc and overturn *United States v. Walker*. Fourth, the Supreme Court could grant certiorari to an Iowa appeal that was denied an en banc rehearing and not only overturn existing, but improper, Eighth Circuit precedent (*Walker*), but also resolve the existing circuit split amongst the courts of appeal. Finally, in the absence of any action at the federal level, the State of Iowa could recognize the unjust results of the confluence of Iowa Code and federal law and legislatively amend the Iowa Criminal Code to reduce the sentence term for unlawful firearm possession to not more than one year. Any one of these options is sufficient to addressing existing sentencing disparities within the Eighth Circuit and would be one step closer to Justice Breyer's goal of increased fairness.