DRUGS, GUNS, AND ALIENS

A Survey of the Most Common Crimes
in Federal Court

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I. INTRODUCTION

This outline surveys federal crimes involving drugs, guns and aliens. Why? Because these are the types of cases that federal prosecutors choose to be their bread and butter in federal court. The outline surveys the elements of proof for these common crimes, with attention to identifying the facts most consequential to good or bad outcomes. Hopefully, the paper will provide a quick reference guide and help lawyers appointed to defend persons accused of these crimes.

II. DRUGS

A. COMMON DRUG CRIMES

1. Conspiracy: 21 USC § 846

a. Elements of Proof. To prove a drug conspiracy, the government must show: (1) that an agreement existed between two or more people to violate narcotics laws; (2) that the defendant knew of the conspiracy and intended to join it; and (3) that the defendant voluntarily participated in the conspiracy. United States v. Inocencio, 40 F.3d 716, 725 (5th Cir. 1994); United States v. Fierro, 38 F.3d 761, 768 (5th Cir.) cert. denied, 115 S.Ct. 1431 (1994). Drug quantity and type, when alleged in the indictment to increase the statutory range, whether minimum or maximum, create a fourth element that must be proven beyond a reasonable doubt. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000); United States v. Turner, 319 F.3d 716 (5th Cir.) cert. denied, 123 S.Ct. 1939 (2003) (discussing difference between drug quantity finding necessary for guilt versus sentencing); United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) (applying Apprendi to drug cases); Alleyne v. United States, 133 S.Ct. 2151 (2013)(extending Apprendi to facts that trigger mandatory minimums). In drug conspiracy, two separate findings are required. The first - drug quantity and type - must be proven with respect to the "overall conspiracy." Fifth Circuit Pattern Jury Instructions No. 2.97 (2019); See, Turner, supra (taped phone conversations about potential drug transactions that did not materialize supported inference that conspiracy involved at least five kilograms of cocaine). United States v. Hayes, 342 F.3d 385 (5th Cir. 2003) (evidence failed to support finding that defendant was guilty of conspiracy to distribute in excess of 50 grams of crack cocaine as no evidence proved ongoing conspiracy between brothers so as to connect separate drug sales to charged conspiracy); United States v. Daniels, 723 F.3d 562 (5th Cir. 2014)(evidence failed to support conviction for 5 kilogram cocaine conspiracy where only 1.535 kilograms of cocaine was purchased or seized did not reach threshold and evidence failed to establish that other amounts were delivered or purchased). Second, the government must prove that the defendant "knew or reasonably should have known that the scope of the conspiracy involved at least the type and amount of drug necessary to establish a mandatory minimum. Fifth Circuit Pattern Jury Instructions No. 2.97 (2019); United States v. Haines, 803 F.3d 713, 741-42 (5th Cir. 2015); United States v. Benitez, 800 F.3d 243, 250 (5th Cir. 2015); United States v. Koss, 812 F.3d 460, 465 n.3 (5th Cir. 2016). Thus, "the operative inquiry is whether a reasonable jury could find, beyond a reasonable doubt that [the defendant] knew or reasonably should have known" that the conspiracy involved at least the type and quantity of drug required for the enhanced penalty range. United States v. Staggers, 961 F.3d 745, 762 (5th Cir. 2020) (evidence sufficient to establish defendant's conspiracy involved at least 1 kilo of heroin where 520 grams seized from stash house, another 461 grams found in codefendants home, and defendant and codefendant used code words, "gator meat" and "alligators" to

discuss ongoing heroin sales, and defendants discussion with other about price of 1 kilo of heroin).

Insufficient evidence to prove drug quantity only affects the penalty range and does not undermine the conspiracy conviction. Daniels, 723 F.3d at 572. If there is a fact dispute as to whether the amount is above or below a baseline, you may wish to submit the higher amount in as to the "overall" element, accompanied by an instruction regarding lesser included offenses. Fifth Circuit Pattern Jury Instruction No. 1.35 (2019). Alternatively, the court may submit a special interrogatory asking the jury to indicate the total amount of controlled substance it believes the government proved beyond a reasonable doubt. *See* United States v. Arnold, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory). The jury's finding as to the "overall" conspiracy establishes the minimum and maximum statutory range. United States v. Hinojosa, 749 F.3d 407, 412-13 (5th Cir. 2014)(jury must find a fact that triggers a mandatory minimum penalty or enhances the maximum penalty, but *Alleyne* did not imply that traditional fact-finding on relevant conduct, to the extent it increased discretionary sentencing range for district judge under the guidelines, must be made by jurors).

If multiple objects of the conspiracy are charged in the indictment, the jury need not unanimously agree on the object of the conspiracy to convict, though the type of controlled substance will affect sentencing. United States v. Patino-Prado, 533 F.3d 304 (5th Cir. 2008). Unanimous agreement will, however, be required to establish the mandatory minimum under Apprendi.

To satisfy the intent element for a conviction for conspiracy with intent to distribute a specified controlled substance, the government is required to prove only that the defendant knowingly participated in a conspiracy involving a controlled substance, so long as the defendant directly or personally participated in the drug transaction underlying the conspiracy charge. United States v. Andino, 627 F.3d 41 (2d Cir. 2010) (defendant who retrieved package of drugs addressed to him and transported it to another building directly participated in underlying conspiracy). In contrast, where the defendant *does not* directly or personally take part in the drug transactions underlying the conspiracy, the government must prove that the drug quantity and type were reasonably foreseeable to the defendant. Id. United States v. Culbertson, 670 F.3d 183 (2d Cir. 2012) (defendant who recruited drug courier arrested with heroin and cocaine did not directly or personally take part in drug transaction rendering factual basis inadequate to support 5 kilos of cocaine where defendant only admitted knowing about 3 kilos of cocaine); United States v. Adams, 448 F.3d 492, 499-500 (2d Cir. 2006)(defendant who only allocated he participated in conspiracy to transport marihuana failed to admit involvement in cocaine conspiracy rendering factual basis inadequate).

Drug quantities attributable to a defendant for relevant conduct purposes need only be proven by a preponderance of the evidence at sentencing where the drug amount does not trigger a statutory maximum or minimum. Turner, 319 F.3d at 723; United States v. Benitez, 809 F.3d 243, 250 (5th Cir. 2015).

Proof of an overt act is not required to establish a violation of the drug conspiracy statute. United States v. Shabani, 115 S.Ct. 382 (1994).

Among the factors to be considered in determining whether the defendant is guilty of a drug conspiracy are: concert of action, presence among or association with conspirators, and evasive

and erratic behavior; however, mere presence or association alone cannot suffice to establish that a person has voluntarily joined a drug conspiracy. United States v. Tenorio, 360 F.3d 491 (5th Cir. 2004) (evidence sufficient to show that persons who took possession of drug laden RV were guilty of conspiracy, including heat runs, false statements to police about prior actions in connection with RV, and implausible denials of observed events). United States v. Bermea, 30 F.3d 1539 (5th Cir.) cert. denied, 115 S.Ct. 1825 (1994); United States v. Menesses, 962 F.2d 420 (5th Cir. 1992). Courts say knowledge will not be lightly inferred. United States v. Rosas-Fuentes, 970 F.2d 1379 (5th Cir. 1992) (nervousness of passenger, as well as implausible explanation for purpose of trip through checkpoint, insufficient to sustain conspiracy conviction); United States v. Gardea-Carrasco, 830 F.2d 41, 45 (5th Cir. 1987) (reversing conviction of defendant who loaded suitcases containing marijuana onto an airplane but was not privy to conversations concerning the conspiracy or the contents of the suit cases); United States v. Jackson, 700 F.2d 181, 185-86 (5th Cir.) cert. denied, 104 S.Ct. 139 (1983) (reversing conviction of defendant who was present when the conspirators were exchanging money for drugs because evidence was insufficient to show either defendant's presence when the conspiracy was discussed or his knowledge of the nature or purpose of the meeting, or even that a large amount of money was present....). Circumstantial evidence of the agreement and the involvement of others may be established at even though only a single defendant is charged and convicted of the offense. See United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir.) cert. denied, 123 S.Ct. 869 (2003) (large quantity and value of marihuana, as well as apparent difficulty of secreting drugs in tires, supported inference that defendant acted pursuant to an agreement to violate the narcotics laws). The Double Jeopardy Clause allows defendants to be convicted and sentenced for both conspiracy and an attempt to deal in the same drugs. United States v. Crowder, 588 F.3d 929 (7th Cir. 2009).

b. Pinkerton Liability and Withdrawal. Pinkerton liability holds a conspirator responsible for offenses committed by fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of or as a natural consequence of the conspiracy. United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990). To support vicarious liability under *Pinkerton*, the jury must be properly instructed in this regard. Id. United States v. Thomas, 348 F.3d 78 (5th Cir. 2003) (charge properly given and correctly stated the law); United States v. Polk, 56 F.3d 613, 619 (5th Cir. 1995).

A defendant is presumed to continue involvement in a conspiracy unless the defendant makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose. United States v. Puig-Infante, 19 F.3d 929, 945 (5th Cir. 1994). Withdrawal ends a defendant's liability for post-withdrawal crimes of co-conspirators though a defendant remains guilty of conspiracy. Smith v. United States, 133 S.Ct. 714 (2013). Withdrawal also starts the time running on when a defendant must be prosecuted, providing a statutory of limitations defense if the withdrawal occurs beyond the statute-of-limitations period. Id. To withdraw, the defendant bears the burden of showing that he acted inconsistent with the object of the conspiracy and communicated this in a way that was reasonably calculated to reach the coconspirators. Puig-Infante, 19 F.3d at 945. As Justice Scalia wrote in Smith,

"Having joined forces to achieve collectively more evil than he could accomplish alone, [the defendant] tied his fate to that of the group. His individual change of heart (assuming it occurred) could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved. It is his withdrawal that must be active, and it was his burden to show that." Smith, 133 S.Ct. at 721.

c. The Agreement. The illegal agreement lies at the heart of a conspiracy. Often an array of substantive illegal acts are carried out in furtherance of the overall scheme or agreement. United States v. Pressley, 469 F.3d 63, 66 (2d Cir. 2007). Because a conspiracy is a single, unified crime, its violation can involve an aggregation of numerous subsidiary transactions. Id. Hence, an agreement that includes numerous drug deals can translate into a higher statutory penalty range. Id.

The element of agreement is not satisfied by showing a mere buyer-seller relationship between the alleged coconspirators. See, United States v. Scroggins, 379 F.3d 233, 263 (5th Cir. 2004); United States v. Brown, 726 F.3d 993 (7th Cir. 2013)(discussing issues related to buyer-seller jury charge and its use as a defense to conspiracy); United States v. Goines, 988 F.2d 750 (7th Cir.) cert. denied, 114 S.Ct. 241 (1993); United States v. Smith, 34 F.3d 514 (7th Cir. 1994). Moreover, merely helping a willing drug buyer locate a willing drug seller is insufficient to establish a conspiracy. See United States v. Tyler, 758 F.2d 66 (2d Cir. 1985); United States v. Lennick, 18 F.3d 814, 819 (9th Cir.) cert. denied, 115 S.Ct. 162 (1994) (proof of sales of drugs is not proof of agreement). But see, United States v. Moody, 564 F.3d 754 (5th Cir. 2009) (holding that knowingly directing customers to drug dealer was enough to support aiding and abetting and conspiracy conviction, cooperating co-conspirator testified defendant was member of conspiracy, and defendant accepted money for steering undercover officer to drug dealer). The underlying basis for the buyer-seller defense is the proposition that a single, ordinary act which, by definition, requires two or more participants, is not conspiratorial. United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir.) cert. denied, 493 U.S. 832 (1989). That is, a buyer's agreement to buy and a seller's to sell to the buyer cannot be the conspiracy to distribute, for it has no separate criminal object. United States v. Parker, 554 F.3d 230 (2d Cir. 2009) (quoting, United States v. Wexler, 522 F.3d 194, 208 (2d Cir. 2008). This also protects mere recipients of drugs from being treated with the same severity as those who sell the drugs. Id. While an isolated sale will not suffice, more sales may. An ongoing pattern of drug transactions can meet the agreement element. Compare, United States v. Turner,319 F.3d 716 (5th Cir.) cert. denied, 123 S.Ct.1939 (2003) (taped phone conversations of numerous requests for cocaine provided sufficient proof of illegal agreement and participation in it); with, United States v. Hayes, 342 F.3d 385 (5th Cir. 2003) (jury finding that drug distribution defendant was connected to his brothers second sale to informant, thus aggregating sales to in excess of 50 grams, was not supported by evidence as there was no evidence that brothers had an ongoing conspiracy). Such an ongoing relationship shows that the transferor and transferee share an intent that further transfers occur, which is critical to proving the existence of a conspiracy between both. United States v. Hawkins, 547 F.3d 66 (2d Cir. 2008). Drawing a line between a single, large conspiracy (or agreement) and several smaller conspiracies can be vexing. Some courts look to whether the proof shows that

the defendants intended to act together for their shared mutual benefit within the scope of the charged conspiracy. United States v. Caldwell, 589 F.3d 1323 (10th Cir. 2009). Such inter-dependence may be shown through a shared economic stake in the outcome of a drug deal. Id. Sharing a common supplier may not be enough to establish the interdependence necessary to prove that a conspiracy existed among all the parties. Id. See also, United States v. Pressler, 256 F.3d 144 (3d Cir. 2001). The Fifth Circuit does not require a buyer/seller instruction so long as the instruction given by the trial court accurately reflects the law of conspiracy. United States v. Asibor, 109 F.3d 1023, 1034-35 (5th Cir. 1997). Providing drugs on credit can suffice to establish a conspiracy between the two actors. United States v. Hamilton, 587 F.3d 1199, 1210-11 (10th Cir. 2009). In United States v. Long, 748 F.3d 322 (7th Cir. 2014), the court gave little weight to a cooperating defendant's testimony for the government that two of the charged co-conspirators were really customers and not members of the drug distribution conspiracy, noting that the "legal definition of a conspirator is not the same as a street definition." In Long, because the defendants enjoyed an ongoing wholesale relationship and benefitted from reduced prices, the relationship was deemed conspiratorial. The issue can be complicated and placing decisive importance on a single fact may oversimplify the analysis. The Seventh Circuit issued a new jury instruction in 2012 advancing a totality of circumstances approach to aid jurors in drawing the line between an agreement to enter into a drug distribution conspiracy and an agreement to enter in a mere buyer seller relationship. United States v. Brown, 726 F.3d 993 (7th Cir. 2013). The instruction uses open ended phrases to encourage a totality of circumstances, case-specific analysis regarding the various factors to be considered. Finally, a conspiracy is not proven by mere, albeit intimate, association. Familial relationship, like mere knowing presence, alone, will not establish participation in a conspiracy; however, when combined with other circumstantial evidence, it may be enough. United States v. Broussard, 80 F.3d 1025, 1031 (5th Cir.) cert. denied, 117 S.Ct. 264 (1996).

2. Possession with Intent to Distribute: 21 USC § 841

a. Elements of Proof. To prove possession with intent to distribute drugs, the government must show beyond a reasonable doubt the defendant knowingly possessed a controlled substance, constructively or actually, and that he knowingly intended to distribute it. United States v. Moreno-Hinojosa, 804 F.2d 845, 847 (5th Cir. 1986). To prove aiding and abetting, the government is required to show that the defendant (1) associated with a criminal venture; (2) purposely participated in that venture; and (3) acted in such a way as to make the venture successful. United States v. Quiroz-Hernandez, 48 F.3d 858, 871 (5th Cir. 1995); United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir.) cert. denied, 115 S.Ct. 2014 (1995); United States v. Moody, 564 F.3d 754 (5th Cir. 2009) (knowingly directing customers to drug dealer was enough to support conviction). One may "attempt" to aid and abet the possession of a controlled substance. United States v. Partida, 385 F.3d 546 (5th Cir. 2004) (conviction of corrupt police officers paid by informant to escort vehicle that contained fake drugs upheld as attempt). Drug quantity and type provide a fourth element when the statutory range is affected. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) (this fourth element is discussed in the penalty section of the outline.); United States v. Doggett, 230 F.3d 160 (5th Cir.

2000) (applying Apprendi to drug cases); Alleyne v. United States, 133 S.Ct. 2151 (2013) (mandatory minimums). A fact dispute regarding drug type and quantity may require a lesser included offense instruction or a special interrogatory that calls for the jury to write in the total drug type and amount. United States v. Gonzalez, 841 F.3d 339, 353-54 (5th Cir. 2016): United States v. Arnold, 416 F.3d 349-356 (5th Cir. 2005) (approving use of special interrogatory). The government is not required to prove that a defendant had knowledge of the particular quantity and type of drug underlying the offense. United States v. Gamez-Gonzalez, 319 F.3d 695 (5th Cir) cert. denied, 123 S.Ct. 2241 (2003) (rejecting that Apprendi required proof of knowledge of drug type and quantity).

b. Association/Participation. A person associates with a criminal venture if he shares the principal actor's criminal intent, and a person participates in the crime if he acts in an affirmative manner designed to aid in the venture. Jaramillo, 42 F.3d at 923. The defendant must act to advance the venture. United States v. Penaloza-Duarte, 473 F.3d 575 (5th Cir. 2006) (reversing conviction of passenger who, though admitting knowledge of methamphetamine in vehicle, claimed he was working undercover and did not want to divulge undercover role to arresting officer in presence of driver). Proof to establish a defendant aided and abetted a drug transaction often overlaps with proof that a defendant joined a conspiracy. See Quiroz-Hernandez, 48 F.3d at 871. Both crimes require the defendant to knowingly and intentionally join a criminal venture whose purpose is to distribute narcotics. United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995)(evidence failed to prove aiding and abetting possession where defendants beeper contained phone numbers to codefendants motel room and pager, defendant was found in possession of 11.8 grams of cocaine [personal use], and only other evidence was a nine-year old prior conviction for possession, even though agent opined that defendant was overseer of ongoing delivery of 40 kilograms of cocaine). Awareness of the drug's existence and location is not enough unless the defendant intended to possess them. United States v. Vasquez-Chan, 978 F.2d 546 (9th Cir. 1992) (house-keeper of stash house not guilty); United States v. Jenkins, 90 F.3d 814 (3d Cir. 1996) (insufficient where defendant was recent guest dressed in boxers next to table with scales).

c. Possession. Possession is proven through demonstration of ownership or dominion or control over either the substance in question or the premises where they were found; the government must link the accused to the contraband. United States v. Benbrook, 40 F.3d 88 (5th Cir. 1994); United States v. Brown, 3 F.3d 673 (3d Cir.) cert. denied, 114 S.Ct. 615 (1993) (although evidence showed defendant lived at house and had some control over house and knew of drugs presence, it failed to support inference that she had dominion and control over the drugs); United States v. Glasgow, 658 F.2d 1036 (5th Cir. 1981) (failure to prove ownership, dominion, or control over plane or home, even though defendant's personal papers found in residence where marihuana recovered). United States v. Hernandez-Bautista, 293 F.3d 845 (5th Cir. 2002) (evidence insufficient to support conviction for aiding and abetting possession of marihuana that was found stashed by border patrol agents three miles away from where defendants were arrested, given difficulty for defendants to have traversed rough terrain separating them from drugs, red marks on defendants backs were as consistent with marks that would have been left from similar bag in their

possession that did not contain marihuana, and footprints near marihuana, though similar to defendants shoes, were common). Similarly, in cases involving passengers of motor vehicles, the government must establish the passenger's power to control the drugs or the vehicle in which the drugs are concealed. United States v. Rosas-Fuentes, 970 F.2d 1379, 1382 (5th Cir. 1992); United States v. Moreno-Hinojosa, 804 F.2d 845 (5th Cir. 1986) (truck passengers conviction reversed even though defendant had $200 in cash and misrepresented relationship to driver after arrest because no evidence connected passenger to marihuana); United States v. MacPherson, 664 F.2d 69 (5th Cir. 1981)(conviction of passenger on board vessel carrying marihuana reversed).

d. Knowledge. The knowledge element requires proof that the defendant was aware he possessed a controlled substance, not that he knew the type or quantity of controlled substance possessed. United States v. Gamez-Gonzalez, 319 F.3d 695 (5th Cir.) cert. denied, 123 S.Ct. 2241 (2003). Apprendi left this well-established interpretation of the intent element intact. Id.

When the substance is an "analogue," the knowledge requirement is met if the defendant knew that the substance was controlled under the Controlled Substance Act or the Analogue Act, even if he did not know its identity. McFadden v. United States, 135 S. Ct. 2298 (2015). The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "controlled substance analogue." Id.

Ordinarily, knowledge of the existence of drugs may be inferred from control over the location in which they are found. United States v. Moreno, 185 F.3d 465, 471 (5th Cir. 1999).

Suspicious circumstances do not necessarily establish that a defendant knew a controlled substance was the object of the criminal transaction. See e.g., United States v. Cartwright, 359 F.3d 281 (3d Cir. 2004) (government failed to prove that defendant who appeared to be acting as a lookout during drug deal knew that deal involved drugs, even though defendant was seen conversing with one of the drug dealers prior to a transaction, possessed a firearm, a cell phone, and a two-way text messaging device identical to the sellers); United States v. Cruz, 363 F.3d 187 (2d Cir. 2004) (even though defendant knew some crime was being committed, evidence failed to establish defendant's knowledge of drug deal, where he was hired to assault drug dealers enemy, then was asked to watch someone's back when drug deal was to take place); United States v. Salmon, 944 F.2d 1106 (3d Cir.) cert. denied, 112 S. Ct. 1213 (1991) (even though defendant performed surveillance, spoke to codefendants, possessed surveillance equipment upon arrest, no evidence presented to show that defendant knew controlled substance was involved); United States v. Stewart, 145 F.3d 273 (5th Cir. 1998) (evidence failed to support finding of defendants knowing participation in driving companions possession with intent to distribute cocaine, even though defendant driver was nervous and police found two handguns under front seat, where nervousness did not exceed that expected during roadside encounter, vehicle did not belong to driver, guns were not in plain view, drugs were in companion's underwear, and taped conversation between defendant and companion in back seat of patrol car was ambiguous).

When the drugs are secreted in a hidden compartment, courts require additional circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge. United States v. Ortega Reyna, 148 F.3d 540, 544 (5th Cir. 1998). The Fifth Circuit requires this additional evidence

because it is at least a fair assumption that a third party might have concealed the controlled substance in the [compartment, luggage, vehicle...] with the intent to use the unwitting defendant as the carrier in a smuggling enterprise." Id. quoting, United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990)).

In addition, the Fifth Circuit jury charge explains that when drugs are hidden in a vehicle, "The government may not rely only upon the defendant's ownership and control of the vehicle to prove the defendant knew that he [she] possessed a controlled substance. While these are factors you may consider, the government must prove that there is other evidence indicating the defendant's guilty knowledge of a controlled substance hidden in the vehicle. Fifth Circuit Pattern Jury Charge 2019, No. 1.33 (Note). This instruction follows United States v. Pennington, 20 F.3d 593, 598 (5th Cir. 1994). High anxiety and unusually suspicious circumstances may provide the proof. United States v. Martinez-Lugo, 411 F.3d 597 (5th Cir. 2005) (evidence sufficient where 772 kilos of marihuana found hidden in tires of truck driven across Texas/Mexico border, driver looked scared and shocked, was nervous earlier when he acquired insurance for truck, possessed $800 at arrest, gave false documentation to insurance provider, and had altered vehicle's appearance to make it seem to belong to a reputable business).

The high value of drugs possessed can provide circumstantial evidence of knowledge, as a jury may infer that such expensive cargo would not be entrusted to a stranger in a drug trafficking scheme. United States v. Villareal, 324 F.3d 319 (5th Cir. 2003). The knowledge element must connect to drug trafficking. United States v. Cartwright, 359 F.3d 281 (3d Cir. 2004) (too much left to be inferred to prove that defendant who appeared to be acting as a lookout for a drug deal knew the deal involved drugs, even though he possessed a firearm, a cell phone, and a two-way text messaging device identical to the sellers); United States v. Cruz, 363 F.3d 187 (2d Cir. 2004) (not enough proof that defendant knew transaction involved drugs even though defendant was hired to watch someone's back and fact/expert witness testified term was slang for being a lookout in drug deal). In United States v. Reveles, 190 F.3d 678 (5th Cir. 1999) the court found the evidence insufficient to establish that the defendant knew that drug-filled boxes he delivered for his brother to a shipping company contained marijuana. The court found compelling that 1) the shipment bore the defendant's name, address, and phone number, 2) the shipment bore no outward indication that it contained marijuana, 3) the defendant did not avoid the presence of customs officials and their drug dogs, 4) no evidence was presented to show that the defendant knew his brother, a codefendant, was involved in drug trafficking, 5) the defendant gave a complete statement concerning his involvement in the brother's business, and 6) the brother only paid the defendant $50 per delivery, "a sum clearly lacking in disproportion to the task at hand....Reveles, 190 F.3d at 686. The Reveles court found unconvincing the government's argument that the suspicious in which the defendant handled the deliveries was sufficient to establish guilty knowledge. ["S]uspicion even if focused on narcotics -- is not enough; it does not tie [the defendant] to knowledge that drugs were involved beyond a reasonable doubt." Id. At 688. The Reveles court noted that the suspicious shipments could easily have involved other contraband goods, such as illegally-imported ceramics...."

Some of the cases cited above, Reveles, Ortega-Reyna, Penaloza-Duarte, and Stewart, now bear Westlaw's red flag of abrogation as a result of United States v.

Vargas-Ocampo, 747 F.3d 299 (5th Cir. 2014) (en banc), cert. denied, 135 S.Ct. 170 (2014). In Vargas-Ocampo, the Fifth Circuit decided it would no longer apply the "equipoise rule" when examining the sufficiency of evidence supporting a criminal conviction. The "equipoise rule" stated that "when the evidence is essentially in balance, a reasonable jury must entertain a reasonable doubt." In Vargas-Ocampo, the Fifth Circuit found the rule unhelpful to applying the Supreme Court standard for sufficiency of evidence review set forth in Jackson v. Virginia, 99 S.Ct. 2781 (1979). The well-established Jackson standard, of which the "equipoise rule" was a formulation, called for appellate courts to affirm convictions "if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id., at 2789 (emphasis in original). The Fifth Circuit's rejection of the equipoise rule formulation does not diminish its utility as a guide to trial preparation, cross examination, and closing argument. Defense counsel can use the rule and its simple teaching to argue that the presumption of innocence prevails where competing reasonable inferences balance out and therefore fail to prove guilt beyond a reasonable doubt. Whether the equipoise rule's disappearance in Vargas-Ocampo will impact on the precedential value of Reveles, Ortega-Reyna, Penaloza-Duarte, and Stewart remains to be seen. Would those cases have been decided differently without the equipoise rule formulation of reasonable doubt?

e. Distribution. Sharing drugs with another may constitute distribution. United States v. Washington, 41 F.3d 917 (4th Cir. 1994). Possession of a quantity of narcotics that is so large that it could not be used by the possessor alone supports a conclusion that the drugs were possessed for distribution. United States v. Mendoza, 722 F.2d 96, 103 (5th Cir. 1983). Conversely, possession of small amounts of controlled substance will not sustain a conviction for possession with intent to distribute. Turner v. United States, 396 U.S. 398, 423 (1970) (small quantity of cocaine which could be for the defendants personal use as well as for sale does not support inference of distribution); United States v. Hunt, 129 F.3d 739 (5th Cir. 1997) (just 7.998 grams of cocaine base was insufficient to prove drugs possessed for distribution); United States v. Skipper, 74 F.3d 608 (5th Cir. 1996) (5th Cir. 1996) (as a matter of law, mere possession of 2.89 grams of crack cocaine insufficient to prove intent, despite testimony indicating that amount could suggest drug dealing, because it was not clearly inconsistent with personal use). The government must elicit testimony that the quantity of drugs possessed was consistent with an intent to distribute the drug or risk an affirmance of a trial court's verdict of acquittal. United States v. Igbinosun, 528 F.3d 387 (5th Cir. 2008) (58 pellets of heroin in body carrier).

3. Communication Facility (Phone Count): 21 USC § 843 (b)

a. Elements of Proof. The popular name for this charge is a phone count because telephones frequently serve as the communication facility involved. To prove a violation of § 843 (b), the government must show (1) knowing or intentional (2) use of a communication facility any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication" (see § 843 (b))] (3) to facilitate the commission of a drug offense. United States v. Rey, 641 F.2d 222, 224 n. 6 (5th Cir.) cert. denied, 454 U.S. 861

(1981).

b. Facilitation. The facilitation element is established by showing that the phone call satisfied the common meaning of facilitate - that is, "to make easier or less difficult, or to assist or aid." United States v. Gonzalez-Rodriguez, 966 F.2d 918, 921 (5th Cir. 1992)(quoting, United States v. Phillips, 664 F.2d 971, 1032 (5th Cir. Unit B 1981) cert. denied, 457 U.S. 1136 (1982), superceded on other grounds). It is enough if the phone call facilitates the defendant's or another's possession or distribution of drugs. Id. Directing a co-conspirator to act in furtherance of the conspiracy satisfies this element. United States v. Townsend, 924 F.2d 1385, 1414 (7th Cir. 1991) (husband telling wife to "separate everything" to prepare for drug sales). Even providing assurances about the security of a drug stash being guarded by underlings has been held to be sufficient. Phillips, 664 F.2d at 1032. Though broadly construed, the facilitation element does not include using a phone to ascertain the status of a drug transaction. United States v. Rivera, 775 F.2d 1559, 1562 (11th Cir.) cert. denied, 475 U.S. 1051 (1986). In Gonzalez-Rodriguez, supra, the Fifth Circuit concluded that informing another coconspirator about the arrest of another and the seizure of drugs, without more, did not constitute facilitation. Whether the defendant placed the call or received it makes no difference under the statute. United States v. Davis, 929 F.2d 554, 559 (10th Cir. 1991).

c. The Underlying Offense. The underlying offense need only be proven by a preponderance of evidence, even though not separately charged. United States v. Rey, 641 F.2d 222, 224 n. 6 (5th Cir.) cert. denied, 454 U.S. 861 (1981). The underlying offense must be a felony, so if the phone is used to obtain drugs for personal use the statute is not violated. United States v. Baggett, 890 F.2d 1095, 1097 (10th Cir. 1989).

d. Charge Bargaining. In cases where the government may have proof problems or desire the defendant's cooperation in exchange for a reduced charge, phone counts provide a useful way to limit exposure. The maximum penalty, regardless of the type or amount of drug involved, is four years custody, and only one year of supervised release. If the defendant has a prior *federal* drug conviction and the government serves an information prior to plea, pursuant to § 851, the maximum penalty is eight years custody. Section 2D1.6 of the guidelines fixes punishment at the same level as drug distribution or conspiracy offenses. Thus, frequently, a defendant who is sentenced for a phone count will receive the four-year statutory maximum because the applicable guideline range cannot exceed the statutory maximum. U.S.S.G. § 5G1.1 (a). This assumes, of course, only one phone count conviction. Each use of a phone is a separate violation of law and multiple convictions would expand the maximum punishment available to the sentencing judge, permitting the court to order consecutive sentences as necessary to achieve the total guideline punishment. U.S.S.G. § 5G1.2(d). If § 5G1.1 (a) nullifies the § 3E1.1 adjustment for acceptance of responsibility because even with the offense level reduction the guideline range still exceeds the statutory maximum, a downward departure is permissible to effect a reduction in the defendant's sentence for pleading guilty. United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995) (reversing case because judge mistakenly believed a downward departure was impermissible).

4. Simple Possession: 21 USC § 844

a. Elements of Proof. The

offense of simple possession, a misdemeanor, requires the government to prove only that the defendant knowingly or intentionally possessed a controlled substance. The penalty for violating this law is imprisonment for up to one year. If the controlled substance is flunitrazepam, the maximum punishment is three years imprisonment. A prior drug conviction, whether felony or misdemeanor, however, will trigger a minimum 15-day jail sentence and double the maximum punishment to two years. Two or more prior drug convictions will result in a 90-day minimum jail sentence and a three-year maximum term of confinement. The Fair Sentencing Act of 2010 did away with the 5-year minimum sentence that applied to simple possession of at least 5 grams of crack cocaine.

b. Lesser Included Offense: Simple Possession. Simple possession under § 844(a) is a lesser included offense of § 841 (a)(1) when the intent to distribute is lacking. United States v. Hunt, 129 F.3d 739 (5th Cir. 1997). For example, in United States v. Lucien, 61 F.3d 366 (5th Cir. 1995), the Fifth Circuit found reversible error in the trial court's failure to submit the lesser charge of simple possession. The facts in Lucien showed: 16.48 grams of cocaine base found in apartment in which defendant and another were found, officer's testimony indicated that while such amount was distributable, it was not so large that it could not be for personal use, presence of plastic bag and foil wrappers in apartment was not inconsistent with possession for personal use, the $1,227 in cash found in apartment could have been earned other than from selling cocaine base, and defendant could have had numerous reasons for keeping the three guns found in the apartment. But see, United States v. Puckett, 404 F.3d 589 (7th Cir. 2005) (proper to refuse charge where defendant possessed 63 grams of powder cocaine and failed to present any direct evidence that he was a cocaine user). This issue may come up in meth cases, where the substance possessed, though meeting the statutory definition of "a mixture or substance" containing methamphetamine, is not consumable in its recovered form. United States v. Gentry, 555 F.3d 659 (8th Cir. 2009) (defendant entitled to simple possession instruction where meth was in toxic liquid solution in a pickle jar). Simple possession is not, however, a lesser included offense to conspiracy to possess with intent to distribute, 21 U.S.C. § 846, or distribution, 21 U.S.C. § 841. See United States v. Colon, 268 F.3d 367 (6th Cir. 2001); United States v. Horn, 946 F.2d 738 (10th Cir. 1991); United States v. Gore, 154 F.3d 34 (2d Cir. 1998) (noting that distribution statute can be violated without possession of drugs, such as arranging for transfer of drugs, or negotiating price).

c. Special Probation. A person found guilty of violating 21 U.S.C. § 844, who has not, prior to the commission of the offense, been convicted of a controlled substance crime (either State or Federal), and has not before been the subject of special probation under 18 U.S.C. § 3607, may be placed on probation for a term not exceeding a year without the court entering "a judgment of conviction." See 18 U.S.C. § 3607(a). At any time before expiration of the term of probation, the court may dismiss the proceedings and discharge the person from probation. The records of this type of disposition are "non-public" and are maintained by the Department of Justice solely to determine if the person qualifies for this type of disposition. Moreover, if the person subject to this disposition was less than 21 years old at the time of the offense, "the court shall enter an expungement order upon the application of such person." The effect of this order is to "restore such person ... to the status he occupied before such arrest." The person can deny the arrest

associated with the drug charge without fear of committing perjury or false swearing. 18 U.S.C. § 3607(c).

5. Importation of Controlled Substances: 21 USC § 952(a)

a. Elements of Proof. This offense requires the government to prove that (1) the defendant intentionally brought a quantity of controlled substance into the United States from a place outside the United States; (2) that the defendant knew the substance he was bringing was a controlled substance; and (3) that the defendant knew the substance would enter the United States. United States v. Crooks, 83 F.3d 103, 106 (5th Cir. 1996); United States v. Casilla, 20 F.3d 600, 603 (5th Cir. 1994) cert. denied, 513 U.S. 892 (1994).

b. Importation. The importation element sets this crime apart. It is satisfied upon a showing that the defendant knowingly entered the United States with the drugs, regardless of whether the United States was the final or intended point of distribution. United States v. Ojebode, 957 F.2d 1218 (5th Cir.) cert. denied, 507 U.S. 923 (1993). While evidence may be sufficient to show conspiracy and possession with intent to distribute, it may still remain insufficient concerning proof of intent to bring drugs into the United States. See, e.g., United States v. Paul, 142 F.3d 836 (5th Cir. 1998).

6. Distribution or Manufacture of Drugs Near a School: 21 USC § 860

a. Elements of Proof. The government must prove that the defendant violated §841(a) by (1) distributing, manufacturing, or possessing with intent to distribute, (2) a controlled substance, (3) within one thousand feet of (4) the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility. Evidence must be presented to establish the qualifying characteristics of the real property at issue. United States v. Alvarez, 451 F.3d 320 (5th Cir. 2006) (DEA agent's testimony that residence where drug trafficking occurred was within 1000 feet of city park failed to show that park qualified as a playground as Congress defined term). A conviction under this statute doubles the penalties. It results in (1) twice the maximum punishment authorized for violating the underlying drug statute, (2) at least twice any term of supervised release, (3) a fine of up to twice that which would have been authorized, and (4) a one year minimum term of imprisonment. Because this offense does not appear on the list of safety valve eligible crimes, see USSG § 5C1.2 (a), it does not allow for a reduced sentence under the safety-valve provision of the sentencing guidelines. United States v. Phillips, 382 F.3d 489 (5th Cir. 2004).

b. Substantive Offense Not Penalty Enhancer. In United States v. Chandler, 125 F.3d 892 (5th Cir. 1997), the Fifth Circuit held that 21 U.S.C. § 860 was a separate substantive offense, rather than merely a sentencing enhancer of § 841(a)(1); United States v. Scott, 987 F.2d 261, 266 (5th Cir. 1993) (holding § 841(a) to be lesser offense included within § 860) Moreover, a defendant convicted under § 841(a)(1) cannot be sentenced under the schoolyard sentencing guideline, U.S.S.G. § 2D1.2, which provides for a 2-level increase. Chandler, 125 F.3d at 898.

7. Use of a Juvenile to Commit a Drug Trafficking Offense: 21 USC § 861

a. Elements of Proof. To establish the commission of this offense, the government must show that an adult, at least eighteen years of age, (1) knowingly and intentionally (2) employed, hired, used, persuaded induced, enticed or coerced, (3) a person younger than 18 years of age, (4) to violate federal drug laws or (5) avoid apprehension for such a violation. The law is also violated if an adult receives a controlled substance from a person younger than 18 years of age, other than an immediate family member. First offenders are punished by being subjected to twice the maximum punishment otherwise authorized for a first offense and face a minimum one year term of imprisonment. 21 U.S.C. § 861(b).

b. Knowing Use of a Juvenile. The government must prove that the defendant sought to hire or employ the juvenile. United States v. Lombardi, 138 F.3d 559 (5th Cir. 1998). It is not enough, even under a theory of aiding and abetting, that an accomplice employed the juvenile. Id. at 562. In Lombardi, the Fifth Circuit reversed the defendant's conviction because insufficient evidence demonstrated the defendant's knowledge about a juvenile's assisting a codefendant wrapping marihuana at a stash house. Id. In United States v. Alarcon, 261 F.3d 416 (5th Cir. 2001), the Fifth Circuit found evidence of the defendant's use of a juvenile lacking, where drugs were found in a vehicle that contained minor children, even though the government presented expert testimony that drug smugglers use minors to try to avoid detection by appearing to be a family, and the explanation given by the driver when arrested was not plausible. The Alarcon court reversed only the conviction of the defendant who did not put on a case-in-chief. Id. at 422-423. The remaining defendants did present a defense, with conflicting explanations for the child's presence. Id. By doing so, the court found that the defendants filled the evidentiary gap and enabled the jury to conclude that the intent element was satisfied. Id. This offense does not qualify for "safety valve" punishment below a mandatory minimum sentence. See U.S.S.G. § 5C1.2(a).

Like the schoolyard distribution statute, this offense falls outside the reach of the safety valve guideline, USSG § 5C1.2 (a).

8. Misprision of Felony: 18 USC § 4

a. Elements of Proof. Rooted in the common law, which recognized a citizen's duty to raise a "hue and cry" and report a felony to authorities, Branzburg v. Hayes, 408 U.S. 665, 696 (1972), misprision of felony was codified by Congress in 1909 and now, years later, serves as a useful plea bargaining alternative to more serious drug charges. This is because the statutory maximum punishment for misprision is only three years. To prove the offense, the government must establish the following elements: (1) the defendant had knowledge that a felony was committed; (2) the defendant failed to notify authorities of the felony; and (3) the defendant took an affirmative step to conceal the felony. United States v. Adams, 961 F.2d 505 (5th Cir. 1992); United States v. Warters, 885 F.2d 1266 (5th Cir. 1989).

b. Act of Concealment. Satisfying the third element, proof of a positive act of concealment, may be problematic when trying to arrange a plea to a reduced charge. See, e.g., Adams, 961 F.2d at 506 (criminal information which failed to allege specific facts of concealment was not adequate to sustain guilty plea, though error harmless in light of facts set

forth in PSR which showed that defendant shielded drug trafficker's true ownership of house bought with drug proceeds by making payments for house in her name). Courts held evidence of concealment sufficient in the following cases: United States v. Davila, 698 F.2d 715 (5th Cir. 1983) (defendant agreed to hold money that was to be used to pay off a perjurer); United States v. Hodges, 566 F.2d 674 (9th Cir. 1977) (defendant lied to authorities about whereabouts of child kidnap victim); United States v. Stuard, 566 F.2d 1 (6th Cir. 1977) (defendant lied to authorities about location where whiskey was stolen from truck which diverted suspicion from thief); United States v. Gravitt, 590 F.2d 123 (5th Cir. 1979) (defendant drove robbers to stash site where they recovered loot and clothing worn during crime); United States v. King, 402 F.2d 694 (9th Cir. 1968) (defendant possessed money stolen during a bank robbery).

c. Charge Bargaining. Like a phone count, misprision of a felony offers a helpful plea alternative to a conviction for a felony drug crime. In addition to lowering the statutory maximum punishment to three years, the misprision guideline, § 2X4.1, provides that the base offense level be 9 levels lower than the offense level for the underlying crime, but in no event less than 4 or more than 19. This added benefit, however, does not foreclose an upward departure where the defendant is deemed guilty of the underlying crime. Warters, 885 F.2d at 1275. This is because misprision is not normally committed by one of the perpetrators of the underlying offense. Id. In fact, at common law, one could not be guilty of misprision "if he was accountable for the [underlying] felony as either a principal or accessory before the fact." Id. (quoting, 2 LaFave & Scott, *Substantive Criminal Law*, § 6.9 (b) at 175. A successful prosecution for misprision that targets one guilty of the underlying offense is almost impossible because of the defense that the failure to make known the crime was an exercise of the Fifth Amendment right to remain silent. Id. Even though this defense will be waived by a guilty plea, Davila, 698 F.2d at 719, its availability to defendants was used by the Fifth Circuit in Warters as support for finding that a defendant's factual guilt of the concealed crime constituted an aggravating circumstance not accounted by the Guidelines. Id. Notwithstanding the risk of upward departure, the reward of a reduced statutory maximum will almost always make such a plea offer beneficial.

B. PENALTY PROVISIONS

1. Drug Quantity and Type: Apprendi v. New Jersey & Alleyne v. United States

Penalty ranges in federal drug cases are fixed by reference to the type and quantity of drugs. In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. See United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) (under Apprendi, drug quantity is element that must be alleged, proven and/or admitted, to set statutory maximum). The same holds true for facts that increase the mandatory minimum. Alleyne v. United States, 133 S. Ct. 2151 (2013). Influencing a favorable drug quantity finding plays a critical role in providing effective representation to a client. See United States v. Scroggins, 379 F.3d 233 (5th Cir. 2004) (witnesses inconsistent and contradictory testimonies about drug amounts involved required district court to explain rationale in the record for why one version, over another version, was relied upon to fix penalty). Apprendi violations occur only if the operative drug facts increase the penalty for

a crime beyond the statutory maximum sentence for the crime alleged in the indictment. United States v. Meshak, 225 F.3d 556 (5th Cir. 2000) (remanding defendant's life sentences). Such facts must be proven to the jury and treated as essential elements of the offense, to be proven beyond a reasonable doubt. Meshak, 225 F.3d at 577-78. The drug quantity need not be alleged with detail. An indictment that alleges a drug quantity range, as opposed to a precise amount of drugs, is sufficient to satisfy Apprendi. United States v. DeLeon, 247 F.3d 593 (5th Cir. 2001). Even indictments that are silent as to drug quantity are not fundamentally defective. United States v. Salazar-Flores, 238 F.3d 672 (5th Cir. 2001). An indictment's silence about drug quantity caps the punishment available upon conviction for whatever would be the maximum punishment for possessing the smallest drug quantity cognizable for that drug. Doggett, 230 F.3d at 165. The Apprendi analysis extends to the identity of the controlled substance. United States v. Barbosa, 271 F.3d 438, 454 (3d Cir. 2001); Horton v. United States, 244 F.3d 546, 552 (7th Cir. 2001); United States v. Robinson, 250 F.3d 527, 529 (7th Cir. 2001). Drug identity therefore converts to an element when its changing nature results in a sentence beyond the otherwise relevant statutory maximum. Barbosa, 271 F.3d at 457. It bears noting that drug identity would not be an element in those cases where the sentence imposed is below the lowest "catch-all" maximum of one year found in § 841(b)(3), which covers unspecified amounts of Schedule V controlled substances. Id. Apprendi does not apply retroactively to cases that had become final when it was decided. United States v. Brown, 305 F.3d 304 (5th Cir. 2002) (holding that because Apprendi was not a "watershed" new rule that improved accuracy of determining guilt/innocence, it did not meet the Teague exception to retroactivity bar).

Apprendi was extended to mandatory minimums in Alleyne, which overruled United States v. Harris, 122 S.Ct. 2405 (2002) (fact of "brandishing" a firearm which triggers a 7-year minimum sentence under 18 U.S.C. § 924(c) could be found by judge under preponderance of evidence standard without violating defendant's constitutional rights). As Alleyne was an extension of the Apprendi doctrine, courts have been applying the same analysis and standards to Alleyne errors as have been applied to Apprendi errors. United States v. Delgado-Marrero, 744 F.3d 167, 185 (1st Cir. 2014). Alleyne's new rule applies retroactively to all cases pending on direct review or not yet final. Id. (citing, Griffith v. Kentucky, 107 S. Ct. 708 (1987)). Juries must be instructed and find that the offense involved a drug that exceeded a particular quantity beyond a reasonable doubt to trigger the corresponding mandatory minimum sentence. Id. at 186. It makes no difference that the statutory minimum falls within the range of punishment that would otherwise be available under the guidelines. Id. Apprendi and Alleyne therefore make drug quantity an element for purposes of aggravating penalties under §§ 841 (b)(1)(A) and 841 (b)(1)(B), but not an element necessary for conviction for the "core" offenses under §§ 841 (a) and 846. Id. Alleyne thus draws a line between "core" crimes and "aggravated crimes." United States v. Daniels, 723 F.3d 562 (5th Cir. 2013) (holding evidence insufficient to support conviction for five-kilogram cocaine conspiracy and remanding for re-sentencing under lower statutory minimum). Successful challenges based on Alleyne deficiency therefore generally only entitle a defendant to resentencing under the default penalty provision. Id. Where a general verdict is returned in a conspiracy case involving two drugs, the "shorter maximum sentence should be used." United States v. Dale, 178 F.3d 429 (6th Cir. 1999). See also, United States v. Taylor, 210 F.3d 311 (5th Cir. 2000) (error, if any, resulting from government's failure to allege drug quantity in indictment did not rise to level of plain error).

The factual resume produced at a defendant's guilty plea hearing may be used to fix the drug quantity, regardless of the

quantity of drugs seized. United States v. Arnold, 148 F.3d 515 (5th Cir. 1998) (citing, United States v. Miller, 910 F.2d 1321 (6th Cir.) cert. denied, 111 S. Ct. 980 (1991)); United States v. Pressley, 469 F.3d 63 (2d Cir. 2007) (defendant's admission during guilty plea that over 11 year period he engaged in street level sales that aggregated over one kilo of heroin sustained § 841(b)(1)(A) penalty range); United States v. Randall, 595 Fed. Appx. 454 (5th Cir. 2015) (unpublished) (defendant's admission at plea hearing that conspiracy involved more than 5 kilograms of cocaine barred his claim, raised for first time in motion to withdraw guilty plea, that he could only be sentenced for amount attributed to him individually).

2. Relevant Conduct

Even though sentencing guidelines are advisory they remain a vital part of the federal sentencing process and thus require defense counsel to be adept at their application. A correctly calculated Guideline range provides the "initial benchmark" from which reasonableness review of a federal sentence will be measured. Gall v. United States, 128 S.Ct. 586, 596 (2007). In drug cases, the relevant conduct guideline, § 1B1.3, channels the drug quantity/type determination, § 2D1.1 (c), which in turn fixes the base offense level in drug cases. It allows the sentencing range to be based on drugs that exist beyond those alleged in a count of conviction.

In determining a defendant's drug quantity under § 1B1.3, the sentencing court must consider:

> (1)(A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of jointly undertaken criminal activity ... all reasonably foreseeable acts or omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses [that would be grouped, such as drug offense] all acts and omissions described [above] that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm that resulted from such acts and omissions; and
>
> (4) any other information specified in the applicable guideline. USSG § 1B1.3 (a) (emphasis added).

Amendments to § 1B1.3(a)(1)(B) that went into effect November 1, 2015, restructured it to create a clearer, three-step process for determining whether a defendant should be held accountable for the conduct of others. Revised § 1B1.3(a)(1)(B) provides that in the case of "jointly undertaken criminal activity," the defendant is responsible for the acts and omissions of others that were –

- within the scope of the jointly undertaken criminal activity;
- in furtherance of that criminal activity; and
- reasonably foreseeable in connection with that criminal activity.

The defendant's conduct must meet all three criteria. Id. comment. (n.3(A)). The Commission stresses that acts "that were not within the scope of the agreement," are not considered even if they were "known or reasonably foreseeable" to the defendant. Id. comment. (n.3(B)). The commentary offers examples to illustrate this principle. By clarifying the limits of relevant conduct the Commission sought to prevent the continued misapplication of its rule. Cases interpreting the prior version of § 1B1.3(a)(1)(B) remain instructive. The change clarified rather than altered the Guideline.

A conspiracy need not be charged for a

defendant to be held responsible for all "reasonably foreseeable acts" of others in furtherance of jointly undertaken activity. USSG § 1B1.3, cmt. n.2; United States v. Aguilera-Zapata, 901 F.2d 1209, 1213 (5th Cir. 1990). Relevant conduct liability is more narrow than federal conspiracy liability under Pinkerton. USSG § 1B1.3, cmt. n. 1,2; United States v. Puma, 937 F.2d 151 (5th Cir. 1991). Pinkerton liability extends to any substantive offense committed by a coconspirator in furtherance of the conspiracy regardless of whether the defendant participated in the substantive offense or even knew of it. Pinkerton v. United States, 328 U.S. 640, 646-67 (1946). Yet to be held accountable under § 1B1.3 for drug quantities distributed by others, the government must establish both that the conduct was reasonably foreseeable and that it was within the scope of the defendant's specific jointly undertaken activity. United States v. Evbuomwan, 922 F.2d 70, 74 (5th Cir. 1993); United States v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993). The focus thus is on acts, reasonably foreseeable to the defendant, even though committed by others, that furthered a criminal activity that the defendant had agreed to undertake jointly with those others. United States v. Davison, 761 F.3d 683 (7th Cir. 2014).

The scope of accountability will vary for each defendant involved in jointly undertaken activity. To be clear, the criminal activity that a defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, must be tailored to fit each defendant. USSG 1B1.3, cmt. n. 2. For example, in United States v. Smith, 13 F.3d 860 (5th Cir. 1994), the Fifth Circuit affirmed the district court's determination that Smith was responsible for 5.9 grams of crack where there was evidence that she agreed to jointly participate in drug sales with others and this amount was reasonably foreseeable to her. 13 F.3d at 864-865. Yet the evidence showed that the scope of the jointly undertaken activity by Smith's codefendant, Phillips, was for only 2 grams. Id. at 866-68. The commentary to the relevant conduct guideline provides many helpful examples of how the Sentencing Commission intends for it to apply in drug cases.

Relevant conduct is forward looking. Accordingly, the guideline does not hold a defendant responsible for conduct that occurred before the defendant joined the conspiracy, as such conduct cannot be considered foreseeable. USSG § 1B1.3 cmt. n.2; United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994). In an unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability, an upward departure may be warranted. USSG § 1B1.3, cmt. n.2.

Where a defendant is incarcerated while a conspiracy continues, the incarcerated defendant will not be held accountable for the conspiracy's unlawful acts unless the government can establish that the defendant committed an overt act in furtherance of the conspiracy during or after his incarceration. United States v. Puig-Infante, 19 F.3d 929, 944-45 (5th Cir. 1994). See also, United States v. Gentry, 941 F.3d 767 (5th Cir. 2019) (reversing district court drug finding that included drugs distributed while defendant incarcerated, which contradicted cooperators statement that defendant sold her drugs during this period- drug quantity finding lacked indicia of reliability).

A defendant can terminate liability by establishing withdrawal from the conspiracy. United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000).

Guideline 1B1.3(a)(2) allows courts to include drug amounts that were possessed for distribution or distributed as part of "the same course of conduct or common scheme or plan as the offense of conviction." The Commission explains that offenses "that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree or ongoing series of offenses." USSG § 1B1.3 cmt. n. 9. The Commission recommends

that the court consider the similarity of offenses, regularity (repetitions) and the time interval. Id. When one fact is absent, "a stronger presence of at least one of the other factors is required." Id. Compare, United States v. Booker, 334 F.3d 406, 414 (5th Cir. 2003) (marihuana and cocaine transactions not part of same scheme); United States v. Wall, 180 F.3d 641 (5th Cir. 1999) (insufficient connection with drug deals four years later); United States v. Miller, 179 F.3d 961 (5th Cir. 1999) (insufficient connection with drug deals more than two years earlier); United States v. Maxwell, 334 F.3d 1006, 1010-13 (11th Cir. 1994) (insufficient connection between drug deals); United States v. Ortiz, 613 F.3d 550 (5th Cir. 2010)(cocaine in suitcase in bedroom not part of common scheme or plan or same course of conduct as marijuana found in same apartment), with United States v. Hinojosa, 484 F.3d 337 (5th Cir.), cert. denied, 128 S. Ct. 212 (2007) (similar modus operandi and purpose though 4 years apart); United States v. Nava, 957 F.3d 581 (5th Cir. 2020)(although not part of same scheme, meth seized from pick up truck could have been plausibly viewed as same course of conduct as cocaine trafficking– noting trial court could have gone the other way and been affirmed).

Post arrest admissions about drug amounts trafficked in the past can be relied upon at sentencing to establish drug quantities for relevant conduct. United States v. Barfield, 941 F.3d 757 (5th Cir. 2019). To rebut this, the defendant must both object to the reliability of the information and introduce information to rebut it. Id. An equitable argument may still be raised that had the defendant asked for counsel a proffer agreement would have been obtained to keep the admissions from being used to increase the guideline range. See, USSG § 1B1.8 (a)(prohibiting use of self-incriminating information from being used if defendant agrees to cooperate and government agrees not to use information).

Courts and probation officers often misapply the "common scheme or plan or same course of conduct" prong of relevant conduct so counsel must be watchful. Many cautionary tales arise from the caselaw.

For example, in United States v. Rhine, 583 F.3d 878 (5th Cir. 2009), a defendant arrested with 1.89 grams of crack following a routine traffic stop was later held accountable at sentencing for at least 4.5 kilograms of crack. The probation officer used information taken from a cooperator a year and a half earlier that identified Rhine as a supplier of crack and powder cocaine into what was known as the "Fish Bowl," a high crime neighborhood in Fort Worth that was the focus of a large-scale federal investigation. Rhine was never charged in that case because informants were unable to make a drug buy from him. The district court overruled Rhine's objection, which took Rhine's guideline range from 30 to 37 months to 292-360 months, and sentenced Rhine to 360 months. On appeal, the Fifth Circuit reversed, and the opinion provides good guidance to understanding what "common scheme or plan" and "same course of conduct" mean in § 1B1.3 (a)(2) in the drug trafficking context. The court observed that no evidence tied the Fish Bowl conspiracy to the 1.89 grams Rhine possessed. Neither were the two offenses "part of a common scheme or plan, as there were no common participants, common modus operandi, nor common purpose. The court observed that a motivation to make a profit from distributing drugs is by itself insufficient "to connect the offenses as separate parts of a common scheme or plan." Neither were the offenses connected under the "same course of conduct" prong. This refers to "the degree of similarity of the offense, the regularity (repetitions) of the offenses, and the time interval between the offenses." The Fish Bowl drug trafficking occurred 17 months earlier. No evidence showed recurring drug trafficking by Rhine during this period. The court refused to accept the government's contention that the absence of evidence was solely the result of the informant being locked up. The court rejected the argument that Rhine was obliged to prove the negative fact of not dealing in drugs; instead, the government bore the burden to prove the positive fact of his drug dealing activity. Also, the two

offenses, the court observed, varied substantially - in quantities of distribution, methods, participants, nature of transactions, and defendant's role. Neither was their evidence that the cocaine came from a common source. The correct guideline range therefore was 30 to 37 months. But Rhine's victory was short-lived. On remand, at re-sentencing, the court varied upward to a sentence of 120 months imprisonment on the drug case, reasoning that Rhine's past involvement with the drug trafficking organization made the higher sentence appropriate. The sentence was affirmed. United States v. Rhine, 637 F.3d 525 (5th Cir. 2011).

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity will be used to determine the offense level unless the defendant "establishes" that "he did not intend" to provide or purchase the drug quantity or "was not reasonably capable of providing or producing" the amount. U.S.S.G. § 2D1.1, comment. (n. 5). The defendant bears the burden of persuasion on excluding such drug amounts. United States v. Davis, 478 F.3d 266 (5th Cir. 2007) (PSR's finding that defendant did not intend to provide agreed amount of crack cocaine excluded amount from sentencing). Once a defendant establishes that he lacked the intent to produce or purchase the additional quantity, whether the defendant is capable of producing or providing the additional quantity is irrelevant and the additional drugs must be excluded from the calculation. Id.

Courts have held that drugs possessed for personal use in a possession with intent to distribute case are not relevant conduct to drugs possessed for distribution. Jansen v. United States, 369 F.3d 237 (3d Cir. 2004) (defense counsel's failure to argue at sentencing that drugs found in defendant's pants were for personal use, and could not be considered in calculating drug quantity, constituted deficient performance); United States v. Williams, 247 F.3d 353 (2d Cir. 2001) (case remanded for further findings where defendant, drug addict, caught with 68.7 grams of crack cocaine, contended that 19 grams was for personal use, notwithstanding jury verdict convicting defendant of possessing in excess of 50 grams of crack cocaine for distribution). This approach reasons that personal use drugs are not possessed as part of the "same course of conduct or common scheme or plan" as drugs possessed for distribution. Id. See also, United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993); United States v. Wyss, 147 F.3d 631 (7th Cir. 1998). The Second Circuit in Williams rejected the apparent contrary view in the Eleventh Circuit, United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996), on the ground that Antonietti involved an additional charge of conspiracy. "Where ... there is no conspiracy at issue, the act of setting aside narcotics for personal consumption is not only not a part of a scheme or plan to distribute these drugs, it is actually exclusive of any plan to distribute them." Williams, 247 F.3d at 358; see also, United States v. Page, 232 F.3d 536, 542 (6th Cir. 2001) (drugs obtained by defendant from supplier for personal use were properly included by the court in determining the quantity of drugs that the defendant knew were distributed by the conspiracy); United States v. Fraser, 243 F.3d 473, 475-76 (8th Cir. 2001) (remanded for recalculation of amounts that were for personal use and must be excluded); United States v. Asch, 207 F.3d 1238, 1243-46 (10th Cir. 2000) (exclude personal use drugs from conspiracy offense penalty); United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1493-96 (9th Cir. 1994) (same, for possession with intent to distribute offense). The Fifth Circuit held in United States v. Clark, 389 F.3d 141 (5th Cir. 2004) that a district court could properly consider drug amounts intended for personal use when calculating the base offense level for a defendant convicted of participating in a drug conspiracy. Clark was a conspiracy case, not a possession with intent to distribute case. See, United States v. Rangel, 108 Fed. Appx. 162 (5th Cir. 2004) (unpublished) (noting circuit split on whether drugs obtained for personal use may be considered in determining guideline

sentence for distribution conviction, yet declining to reach issue on plain error review). The argument remains viable for defendants charged with possession with intent to distribute. Excluding drugs possessed for personal use in a possession with intent to distribute case can result in lowering that statutory range of punishment.

The Fifth Circuit views marihuana stalks, the remains of a harvested plant, the same as a "marihuana plant" so as to trigger the 10 year minimum sentence for an offense involving 1,000 or more plants. United States v. Fitch, 137 F.3d 277 (5th Cir. 1998).

Guidelines do not have the final word in drug sentencing. Two Supreme Court decision, Kimbrough v. United States, 128 S.Ct. 490 (2007) and Gall v. United States, 128 S.Ct. 586 (2007), affirmed a sentencing judge's discretion to go lower than the sentence recommended by the drug quantity table. Kimbrough held that a judge was free to deviate from the 100 to 1 crack/powder ratio. Gall affirmed a sentence of probation for a defendant who had voluntarily withdrawn from a conspiracy to distribute ecstasy and led a law-abiding life years before being charged with the crime.

The meth guideline often yields an excessive sentence when it involves "ice." Courts have found the meth guideline deeply flawed so they don't follow its recommended range. See, United States v. Goodman, 556 F. Supp. 2d 1002 (D. Neb. 2008); United States v. Hubel, 625 F.Supp 2d. 845 (D. Neb. 2008); United States v. Hayes, 948 F. Supp. 2d 1009 (N.D. Iowa 2013); United States v. Ibarra-Sandoval, 265 F. Supp. 1249 (D. N.M. 2017); United States v. Hartle, 2007 WL 2608221 (D. Idaho 2017); United States v. Nawana, 2018 WL 2021350 (N.D. Iowa 2018). Sentencing Commission statistics show that 70% of meth offenders are sentenced below the guideline range. Sentencing Commission "Quick Facts," at http:/www.ussc.gov/sitres/default/files/pdf/research-and-publications/quick facts/MethamphetamineFY17.pdf. The Commission assumes the purity of a controlled substance to be probative of a defendant's role and position in the chain of distribution because as substances pass down the chain of distribution the dealer dilutes it. USSG § 2D1.1, cmt. n. 27 (c). But courts have found this view to be "divorced from reality" and wrong. Ibarra-Sandoval, 265 F. Supp. 3d at 1255; Hartle, supra, at p. 3; Nawana, supra, at 6. The reason why its wrong is because most meth seized at all distribution levels is remarkably pure. Id. That is, purity provides a false proxy for culpability. Be alert to this issue and seek variances where "ice" sets the guideline range.

3. Statutory Minimums

Statutory minimums trump the sentencing guidelines. The controlled substance act establishes minimum sentences of 5, 10, 20 years, and Life, imprisonment, for possessing substantial quantities of a variety of drugs that contain "a detectable amount" of heroin, cocaine, cocaine base, phencyclidine (PCP), lysergic acid (LSD), methamphetamine, and marihuana. 21 U.S.C. § 841(b), 960(b)(1). In Alleyne v. United States, 133 S.Ct. 2151 (2103), the Supreme Court extended Apprendi to facts, in this case drug type and quantity, that trigger mandatory minimum sentences. A district court may impose a sentence below a statutory minimum for a drug crime only if (1) the government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant's substantial assistance to the government; or (2) the defendant meets the "safety valve" criteria set forth in 18 U.S.C. § 3553(f); a district court may not depart below a statutory mandatory minimum sentence unless one of these two conditions is met. United States v. Phillips, 382 F.3d 489 (5th Cir. 2004) (reversing departure below mandatory minimum in "schoolyard" offense under 21 U.S.C. 860, because safety valve excluded from such offenses). Enhanced penalties are triggered where death or serious bodily injury from the use of

the drugs occurred, or if the person has prior drug convictions, or if the offense occurred near a school. A drug death enhancement in most cases will require proof that the user would not have died but for the use of the drugs. Burrage v.United States, 134 S.Ct. 881 (2014).

Under both statutory and guideline provisions, the punishment is determined by the total net weight of the controlled substance, including any "mixture or substance containing a detectable amount" of the drug at issue. 18 U.S.C. § 841(b)(1). See, Chapman v. United States, 111 S.Ct. 1919 (1991) (penalty based on weight of LSD and carrier medium, blotter paper). The Guidelines exclude from "mixture or substance" materials "that must be separated from the controlled substance before the controlled substance can be used." U.S.S.G. § 2D1.1, comment. (n. 1). The commentary to § 2D1.1 provides examples of materials that do not combine with controlled substances for drug weight: "the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance." Id. This method follows the Chapman "market-oriented" approach which rests liability upon the amount to be distributed and consumed. Applying this method to methamphetamine and precursor chemicals can be tricky and may require expert testimony. United States v. Striklin, 290 F.3d 748 (5th Cir. 2002) (counsel ineffective because he failed to object to the quantity of P2P that was used to compute his sentence, noting it was "a cumbersome task to determine the proper sentence"); United States v. Mimms, 43 F.3d 217 (5th Cir. 1995) (district court committed clear error when it misinterpreted expert's findings on percentage of controlled substance in chemicals used to manufacture methamphetamine). In the Fifth Circuit, the "market-oriented" approach does not apply to methamphetamine cases. Thus, in United States v. Treft, 447 F.3d 421 (5th Cir. 2006), the total weight of liquid containing trace amounts of methamphetamine was used to set the statutory minimum penalty. See also, United States v. Gentry, 555 F.3d 659 (8th Cir. 2009) (full weight of toxic liquid in pickle jar used for purposes of § 841 but reversing for failure to give instruction on lesser included offense of simple possession). Consequently, defendants may be held liable for the entire weight of a toxic byproduct of the manufacturing process that is not ingestible or marketable so long as it contains any amount of methamphetamine. Other circuits disagree with this approach. See, United States v. Steward, 361 F.3d 373 (7th Cir. 2004) (only 2.4 grams of actual methamphetamine in 825 gram solution should have been counted in determining drug quantity under 10-year minimum drug statute).

The substantially stiffer mandatory minimum penalty for possessing cocaine base verses an equivalent amount of cocaine makes it necessary for the government to establish which of the two types of cocaine was possessed. The problem is that chemically, "cocaine" and "cocaine base" mean the same thing, United States v. Brisbane, 367 F.3d 910, 911 (D.C. Cir.) cert. denied, 125 S.Ct. 342 (2004), which creates an ambiguity. The majority of cocaine base prosecutions involve crack. The Guidelines define "cocaine base" as meaning only crack, whereas the statute does not define "cocaine base." Problems arise in cases where the cocaine base involved is not "crack," that is, cocaine that is typically smoked. The Fifth Circuit reads "cocaine base" to include all base forms of cocaine, not just "crack." United States v. Butler, 988 F.2d 537, 542-43 (5th Cir. 1993). See also, United States v. Barbosa, 271 F.3d 438, 461-67 (3d Cir. 2001) (same); United States v. Jackson, 968 F.2d 158, 161-163 (2d Cir. 1992) (same); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992) (same). Other circuits interpret the statute differently, finding that "cocaine base" for purposes of determining the statutory minimum sentence, refers only to "crack." See United States v. Edwards, 397 F.3d 570 (7th Cir. 2005) (listing circuits). If non-crack serves to trigger a higher statutory

penalty, counsel must object to preserve the issue for Supreme Court review.

Courts have held that drugs possessed for personal use in a possession with intent to distribute case are not relevant conduct to drugs possessed for distribution. Jansen v. United States, 369 F.3d 237 (3d Cir. 2004) (defense counsel's failure to argue at sentencing that drugs found in defendant's pants were for personal use, and could not be considered in calculating drug quantity, constituted deficient performance); United States v. Williams, 247 F.3d 353 (2d Cir. 2001) (case remanded for further findings where defendant, drug addict, caught with 68.7 grams of crack cocaine, contended that 19 grams was for personal use, notwithstanding jury verdict convicting defendant of possessing in excess of 50 grams of crack cocaine for distribution). This approach reasons that personal use drugs are not possessed as part of the "same course of conduct or common scheme or plan" as drugs possessed for distribution. Id. See also, United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993); United States v. Wyss, 147 F.3d 631 (7th Cir. 1998). The Second Circuit in Williams rejected the apparent contrary view in the Eleventh Circuit, United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996), on the ground that Antonietti involved an additional charge of conspiracy. "Where ... there is no conspiracy at issue, the act of setting aside narcotics for personal consumption is not only not a part of a scheme or plan to distribute these drugs, it is actually exclusive of any plan to distribute them." Williams, 247 F.3d at 358; see also, United States v. Page, 232 F.3d 536, 542 (6th Cir. 2001) (drugs obtained by defendant from supplier for personal use were properly included by the court in determining the quantity of drugs that the defendant knew were distributed by the conspiracy); United States v. Fraser, 243 F.3d 473, 475-76 (8th Cir. 2001) (remanded for recalculation of amounts that were for personal use and must be excluded); United States v. Asch, 207 F.3d 1238, 1243-46 (10th Cir. 2000) (exclude personal use drugs from conspiracy offense penalty); United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1493-96 (9th Cir. 1994)(same, for possession with intent to distribute offense). The Fifth Circuit held in United States v . Clark, 389 F.3d 141 (5th Cir. 2004) that a district court could properly consider drug amounts intended for personal use when calculating the base offense level for a defendant convicted of participating in a drug conspiracy. Clark was a conspiracy case, not a possession with intent to distribute case. The argument remains available for defendants charged with possession with intent to distribute. Keeping drugs possessed for personal use off the penalty scale may take a mandatory minimum off the table.

The Fifth Circuit views marihuana stalks, the remains of a harvested plant, the same as a "marihuana plant" so as to trigger the 10 year minimum sentence for an offense involving 1,000 or more plants. United States v. Fitch, 137 F.3d 277 (5th Cir. 1998).

4. Safety Valve

The safety valve, 18 U.S.C. § 3553(f), authorizes court to sentence based on the applicable guideline level, without regard to any mandatory minimum. Section 402 of the First Step Act (FSA) of 2018, effective after December 21, 2018, made the safety valve more accessible to defendants with a criminal history. Now a defendant can have up to four criminal history points, rather than only one. One-point offenses no longer count towards the safety valve calculus. Three-point offenses disqualify a defendant, as do two-point "violent" offenses. A "violent offense" is defined by 18 USC § 16 (a), as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The FSA amendment prohibits disclosures of offense conduct from enhancing the sentence unless the disclosure relates to a "violent offense." It now reaches maritime drug crimes: 46 USC §§ 70503-06. The safety valve applies if the defendant 1) does not have more than four criminal history points, 2) did not use violence, threaten violence, or possess a firearm or

other dangerous weapon in connection with the offense, 3) the offense did not result in death or bodily injury, 4) the defendant was not an organizer or engaged in a continuing criminal enterprise, and 5) the defendant truthfully provides to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan. U.S.S.G. § 5C1.2. Booker's holding that the guidelines were no longer mandatory left intact these statutory criteria for doing away with a mandatory minimum sentence. United States v. Barrero, 425 F.3d 154 (2d Cir. 2005) (safety valve requirements mandatory and cannot be dodged by judicial finding that criminal history overstated and defendant more properly category I offender). United States v. Jasso, 634 F.3d 305 (5th Cir. 2011) (same).

After Booker, courts must continue to apply the relief that the safety valve affords defendants from unduly harsh mandatory minimums. United States v. Cardenas-Juarez, 469 F.3d 1331 (9th Cir. 2006). The safety valve lists offenses to which it applies: 21 U.S.C. §§ 841, 844, 960, or 963. U.S.S.G. § 5C1.2 (a). Offenses that do not appear on the list are not covered by the safety valve. United States v. Phillips, 382 F.3d 489 (5th Cir. 2004) (reversing departure below mandatory minimum for violation of "schoolyard" drug statute, 21 U.S.C. § 860). For those defendant's facing a mandatory minimum of at least five years, the safety valve does not permit a reduction to an offense level of less than 17. U.S. v. Keresztury, 293 F.3d 750 (5th Cir. 2002) (even though guidelines established base level 12, defendant who faced statutory minimum 10-year sentence could not qualify for less than level 17 under the safety valve). The safety valve empowers courts to sentence below the statutory minimum sentence without a government motion. United States v. Flanagan, 87 F.3d 121, 124-25 (5th Cir. 1995). Once safety valve is awarded, the court has authority to grant a further sentence reduction below the statutory minimum, as permissible by law. United States v. Lopez, 264 F.3d 527 (5th Cir. 2001).

To qualify for safety valve under subpart (5), the defendant must give truthful information concerning the offense and related conduct to the government. United States v. Rodriguez, 60 F.3d 193 (5th Cir.) cert. denied, 516 U.S. 1000 (1995). The FSA amendment protects a defendant from having this information used to enhance his sentence unless the disclosure relates to a a "violent offense." Before this change, prudent defense counsel needed to secure a written proffer agreement which protected the defendant under the terms of USSG § 1B1.8 from having information provided during the meeting from being used to raise the guideline range. United States v. Gonzalez, 309 F.3d 882 (5th Cir. 2002) (holding government breached plea agreement by arguing that defendant was a leader, a finding that operated to defeat safety valve, with information given by defendant during debriefing under proffer letter).

Safety valve requires that the defendant provide the government with the truthful information before the sentencing hearing commences. United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). Once the sentencing hearing is underway, no further information can be provided by the defendant to the government to qualify for the reduction. Id.; but see, United States v. Madrigal, 327 F.3d 738 (8th Cir. 2003) (continuance of sentencing hearing did not deprive sentencing court of power to apply safety valve under circumstances of case). A drug defendant who lied during his initial debriefing remains eligible for a safety valve reduction if he eventually comes clean before the sentencing hearing. United States v. Mejia-Pimentel, 477 F.3d 1100 (9th Cir. 2007); United States v. Schreiber, 191 F.3d 103 (2d Cir. 1999).

As a best practice, counsel should determine in advance of the sentencing hearing whether there is any dispute about the safety valve reduction. If so, the sentencing hearing needs to be continued to allow for further debriefings. Often the only question to resolve is whether the defendant truthfully debriefed. Generally, sentencing

courts will side with the government's assessment. Agents may opine that the defendant is minimizing his role or withholding information. Defense counsel must make sure that the government's assertions are grounded on reality. See, e.g., United States v. Miller, 179 F.3d 961, 968 (5th Cir. 1999) (reversing trial court for disallowing reduction based on speculative assumptions about defendant's wherewithal in drug crime).

The safety valve reduction applies under circumstances where to some it may appear off limits. For example, putting the government to trial and losing acceptance of responsibility does not disqualify a defendant from safety valve. United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996). While defendants who possess firearms or dangerous weapons cannot qualify, this exclusion does not apply where a codefendant possessed the weapon. United States v. Wilson, 105 F.3d 219, 222 (5th Cir. 1997). Similarly, a sentencing court's finding via relevant conduct that a defendant's drug sentence should adjusted because a weapon "was possessed" does not bar a finding that a sentence reduction is available under the safety valve. United States v. Zavalza-Rodriguez, 379 F.3d 1182 (10th Cir. 2004). Constructive possession of a weapon is nonetheless "possession" and will bar the safety valve reduction. United States v. Matias, 465 F.3d 169 (5th Cir. 2006). In United States v. Ruiz, 621 F.3d 390 (5th Cir. 2010), a case where a police officer agreed to guard a fictional load of cocaine, the Fifth Circuit found that the § 2D1.1 weapons adjustment barred the safety valve from applying. Ruiz cited Matias on its way to disagreeing with Zavalza-Rodriguez, yet failed to mention Wilson.

Regardless of the poorly reasoned Ruiz decision, both provisions can apply because the textual analysis is different for either adjustment. Ruiz does not bar the safety valve adjustment where a codefendant possesses a weapon or the weapon bears no connection to the offense. To be clear, the drug guideline firearms adjustment requires mere proximity to a weapon whereas the safety valve bar requires active possession of the weapon by the defendant. Importantly, as Zavalza-Rodriguez points out, relevant conduct liability is irrelevant to whether a defendant possessed a firearm so as bar the safety valve adjustment. See also, United States v. Carillo-Ayala, 713 F.3d 82 (11th Cir. 2013) (rejecting that relevant conduct applies to safety valve determination as it pertains to weapons possession). Note 4 in the Commentary to § 5C1.2, the safety valve guideline, explains that the term "defendant" means "accountability of the defendant for his own conduct and conduct that he aided, abetted, counseled, commanded, induced, procured, or willfully caused."

Because the safety valve reduction is an adjustment under the Guidelines, it is non-discretionary once its criteria have been found to be satisfied, and not a discretionary departure. United States v. Myers, 106 F.3d 936 (10th Cir.), cert. denied, 117 S. Ct. 2446 (1997).

5. Multiple Object Conspiracies

In Edwards v. United States, 118 S. Ct. 1475 (1998) the Supreme Court held that where a jury returns a general verdict on an indictment charging multiple objects of a conspiracy concerning different types of drugs, the guidelines give the judge, not the jury, the job of determining drug types as well as drug amounts. If multiple objects are charged in the indictment, the jury need not unanimously agree on the object to convict, though the type of controlled substance will control the sentencing. United States v. Patino-Prado, 533 F.3d 304 (5th Cir. 2008). After Alleyne, juries are required to find beyond a reasonable doubt any drug quantity and type that triggers a mandatory minimum sentence for a particular defendant, as to the conspiracy as a whole that was known or reasonably foreseeable to the defendant.

6. Statutory Enhancements

The First Step Act of 2018 changed the way enhancements work in drug cases.

A defendant with a previous "serious drug felony" or "serious violent felony" may have the applicable mandatory minimum sentence increased should the government elect to file the appropriate notice of intent to seek enhanced penalties. 21 U.S.C. §§ 841 (b) & 851. Statutory enhancements were unaffected by Booker. United States v. Cannon, 429 F.3d 1158 (7th Cir. 2005) (new discretion did not authorize sentencing judge to ignore qualifying predicate crimes on basis that they overstate the defendant's criminal past).

The statute allows enhancement predicated upon any conviction for a "serious drug felony" or "serious violent felony."

A person charged under 21 USC 841 (b)(1)(A) with one prior final conviction for a "serious drug felony" or "serious violent felony" raises the range from 10 to Life to 15 years to life. If two prior final convictions then the range is increased to 25 years to life.

If charged under 21 USC 841 (b)(1)(B), a qualifying prior conviction raises the statutory range from 5-40 years to 10 years to Life.

The two prior offenses must occur sequentially, rather than simultaneously, in order be treated as separate convictions. See United States v. Barr, 130 F.3d 711 (5th Cir. 1997) cert. denied, 118 S.Ct. 1398 (1998).

"Serious drug felony" means an "offense described in section 924 (e)(2) of Title 18 for which (A) the offender served a term of imprisonment of more than 12 months, and (B) the offender []" was released "within 15 years of the commencement of the instant offense." 21 USC § 802 (57). Section 924 (e)(2) defines "serious drug felony" as "(i) an offense under [21 USC § 801 et seq., 21 USC § 951 et. seq., or chapter 705 of title 46] for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in [21 USC § 802]), for which a maximum term of imprisonment of ten years or more is prescribed by law."

"The term 'serious violent felony' means (A) an offense described in section 3559 (c)(2) of Title 18 for which the offender served a term of more than 12 months; and (B) any offense that would be a felony violation section 113 of Title 18, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months." 21 USC § 802 (58).

Section 3559 (c)(2)(F) defines the term "serious violent felony" to mean (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit rape [defined in 3559 (c)(2)(A)]; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping [defined in 3559 (c)(2)(E)] aircraft piracy (as defined in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118)[subject to 3559 (c)(3)(A)]; carjacking (as described in section 2119); extortion [defined in 3559 (c)(2)(C)]; arson [defined in 3559 (c)(2)(B) and subject to 3559 (c)(3)(B)]; firearms use [defined in 3559 (c)(2)(D)]; firearms possession (as described in section 924 (c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another [subject to 3559 (c)(3)(A)].

Section 3559 (c)(3)(A) & (B) disqualifies certain robbery and arson crimes where the defendant can establish "by clear and convincing evidence" listed mitigating facts, such as the absence of a dangerous weapon or firearm in a robbery, or no threat to human life in an arson. Some circuits have held that the categorical approach does not apply to the

disqualifying circumstances the defendant must prove under section 3559 (c)(3). United States v. Mackovich, 209 F.3d 1227, 1240 (10th Cir. 2000); Gray v. United States, 622 Fed. Appx. 788, 793 (11th Cir. 2015) (unpub).

Section 113 of Title 18 covers assaults within maritime and territorial jurisdiction and defines six "felony violations." See, 18 USC § 113 (a)(1)-(3), (6)-(8).

Only final convictions may be used for enhancement, which has been interpreted to mean that the conviction is no longer subject to direct appeal. United States v. Puig-Infante, 19 F.3d 929, 947 (5th Cir.) cert. denied, 513 U.S. 864 (1994). Thus, in Puig-Infante, the Fifth Circuit held that to qualify as a predicate conviction, the government was required to prove that the defendant committed an overt act as part of the federal conspiracy after the state conviction became final. Id. at 947-48; see also, United States v. Hass, 150 F.3d 443 (5th Cir. 1998) (reversing life sentence for drug convictions because the defendant's prior Texas drug convictions were not final (i.e., the time for appeal had not run) at the time of the enhanced offense). Prior convictions for conduct in furtherance of a conspiracy can be used to enhance the statutory penalty for a later arrest under the same conspiracy. United States v. Moody, 564 F.3d 754 (5th Cir. 2009).

The term "conviction" is broadly interpreted and federal not state law governs the term. United States v. Cisneros, 112 F.3d 1272, 1280 (5th Cir. 1997). Whether a juvenile adjudication qualifies as a "conviction" will turn on the finality of the adjudication and whether the juvenile was tried as an adult. United States v. Sampson, 385 F.3d 183 (2d Cir. 2004).

The First Step Act did not change the procedure needed for enhancement. To successfully enhance a defendant, the government must still strictly comply with the procedural requirements set forth in 21 U.S.C. §851. United States v. Noland, 495 F.2d 529, 533 (5th Cir.) cert. denied, 419 U.S. 966 (1974). Written notice of the intent to enhance must be provided before the jury selection, United States v. Weaver, 905 F.2d 1466, 1481 (11th Cir. 1990), cert. denied,498 U.S. 1091 (1991), or the guilty plea. United States v. Levay, 76 F.3d 671 (5th Cir. 1996). Handing to defense counsel a notice of penalty enhancement shortly before the defendant's entry of a guilty plea qualifies as timely. United States v. County, 377 F.3d 486 (5th Cir. 2004). The statutory requirements must be followed and cannot be overcome through other filings by the government. United States v. Dodson, 288 F.3d 153 (5th Cir. 2002). The circuits are split on whether these statutory requirements can be waived or forfeited through counsel's actions. In Dodson, the Fifth Circuit held that by counsel having agreed to the enhanced penalty range during plea proceedings, counsel forfeited the defendant's right to complain about the enhancement. The Eleventh Circuit, on the other hand, considers the matter to be jurisdictional and therefore not subject to waiver. Harris v. United States, 149 F.3d 1304 (11th Cir. 1998).

After conviction but before pronouncement of sentence, § 851(b) requires the court to ask the defendant whether he admits or denies his prior convictions and instruct the defendant that should he wish to challenge the conviction he must do so before sentencing or be prohibited from challenging it later. A court's failure to engage in the enhancement colloquy will be harmless error if the defendant fails to comply with the procedures set forth in § 851(c) to challenge the prior conviction. United States v. Thomas, 348 F.3d 78, 85-88 (5th Cir. 2003). The statute bars defendants from challenging prior convictions unless they occurred within five years of sentencing. 21 U.S.C. § 851(e).

7. Denial of Federal Benefits

In addition to incarceration, federal drug laws provide for the denial of federal benefits to any individual who is convicted of any federal or state offense involving the distribution or simple possession of a controlled substance. 21 U.S.C. § 862(a) &

(b). The statute defines federal benefits as the "issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States." 21 U.S.C. § 862(d)(1)(A). It does not include any "retirement, welfare, Social Security, health, disability, veteran's benefit, public housing, or other similar benefit for which payments or services are required for eligibility." 21 U.S.C. § 862 (d)(1)(B). With the exception of an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. § 862(a)(1) (for distribution offenses) and (b)(1) (for possession offenses), is at the court's discretion. A person convicted of a third or subsequent drug distribution offense is required to have permanent denial of benefits. 21 U.S.C. § 862(a)(1)(c). A conviction for possession with intent to distribute does not constitute an "offense consisting of the distribution of a controlled substance" for purposes of the permanent denial statute. United States v. Jacobs, 579 F.3d 1198 (10th Cir. 2009). In any case, the court has discretion to suspend the period of disability if the individual completes a supervised drug rehabilitation program or makes "a good faith effort" to enter such a program but is refused admission for reasons beyond his control. 21 U.S.C. § 862(c). Persons who cooperate or testify for the government in the prosecution of a federal or state offense are not covered by this penalty. 21 U.S.C. §862 (e).

8. Exclusion and Removal

For non-citizens, exclusion and removal from the United States is an integral part of the penalty for persons convicted of controlled substance offenses. Consequently, to provide effective assistance of counsel as guaranteed by the Sixth Amendment, a lawyer must inform a client whether his plea to a controlled substance offense carries a risk of deportation. Padilla v. Kentucky, 130 S.Ct. 1472 (2010). Various factors, that may or may not be negotiable, will determine whether a non-citizen can avoid removal or seek permission for lawful reentry to the United States. See 8 U.S.C. § 1227(a)(2)(B) (providing for deportation of aliens convicted of controlled substance offense, other than possession of less than 30 grams of marihuana for one's own personal use); 8 U.S.C. § 1227(a)(2)(A)(iii) (alien convicted of aggravated felony deportable); 8 U.S.C. § 1101 (a)(43)(B) (defining "aggravated felony" under INA to include "illicit trafficking in a controlled substance"); 8 U.S.C. § 1182 (listing excludable aliens); 8 U.S.C. § 1182(a)(2)(c) (excluding controlled substance traffickers from United States); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (excluding any alien convicted of, or who admits committing acts that constitute essential elements of any law relating to a controlled substance). Title 8, section 1182 (a)(2)(A)(ii), excepts from exclusion persons who commit only one drug crime if the crime was committed when the alien was under 18 years of age and the alien was released from confinement more than 5 years before applying for admission to the U.S., or, drug offenses for which the maximum penalty possible did not exceed one year imprisonment, and if convicted, the term of imprisonment did not exceed 6 months. In rare cases, counsel may obtain an agreement from the federal prosecutor that his alien client will not be deported. Whether such an agreement is entitled to respect remains the subject of litigation and a split in the circuits that have addressed the issue. Compare, San Pedro v. United States, 79 F.3d 1065 (11th Cir.) cert. denied, 117 S.Ct. 431 (1996) (federal prosecutors lack authority to make such a promise and thus the agreement is unenforceable); United States v. Igbonwa, 120 F.3d 437 (3d Cir. 1997) (same) with, Thomas v. INS, 35 F.3d 1332 (9th Cir. 1994) (INS bound by cooperation agreement not to seek deportation of convicted felon even though AUSA lacked express authority to bind the INS to the agreement as AUSA possessed implied actual authority to bind the

"government," and thus the INS); Margalli-Olvera v. INS, 43 F.3d 345 (8th Cir. 1994) (extending holding in Thomas, AUSA possesses authority to bind all government agencies to plea agreements by virtue of 28 U.S.C. § 547, statute which authorized U.S. attorneys "to prosecute for all offenses against the United States"). The Fifth Circuit has not ruled on this issue.

III. FIREARMS

A. COMMON FIREARMS CRIMES

1. Felon in Possession: 18 USC § 22(g)(1)

a. Elements of Proof. To obtain a conviction, the government must prove that the defendant: (1) a convicted felon; (2) knowingly possessed a firearm (3) in or affecting interstate commerce. United States v. Ybarra, 70 F.3d 362 (5th Cir. 1995), cert. denied, 116 S.Ct. 1582 (1996). In Rehaif v. United States, 139 S.Ct. 2191 (2019), the Supreme Court held it was also necessary for the government to prove that the defendant knew he was a felon, that is, that he had "been convicted in a court of a crime punishable by imprisonment for a term in excess of one year." Fifth Circuit Pattern Jury Instruction, 2.43D (2019).

b. Possession. The government can prove possession by showing that a defendant exercised either direct physical control of a thing (actual possession) or "dominion or control" over the thing itself or the area in which it was found (constructive possession). United States v. Jones, 484 F.3d 783 (5th Cir. 2007); United States v. Fields, 72 F.3d 1200, 1212 (5th Cir. 1996), cert. denied, 117 S.Ct. 48 (1996). The statute "covers possession in every form" but "does not prohibit a felon from owning a firearm." Henderson v. United States, 135 S.Ct. 1780 (2015) (court-ordered transfer of a felon's lawfully owned firearm to a third party not barred by § 922(g) if the court is satisfied that the recipient will not give the felon control over the firearm, so that he could either use them or direct their use). Absent actual possession, the evidence will be deemed sufficient if there is at least a "plausible inference that the defendant had knowledge of and access to the weapon." Id.; United States v. Prudhome, 13 F.3d 147, 149 (5th Cir. 1994), cert. denied, 511 U.S. 1097 (1994) (evidence sufficient as defendant was driving, the gun was located directly under his seat, and he had matching ammunition in a waist pouch). Where two or more persons jointly occupy a residence, there must be evidence in addition to the joint occupancy that demonstrates a nexus between the defendant and the firearm. United States v. Mergerson, 4 F.3d 337, 349 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994). This also holds true where multiple persons occupy a vehicle from which a firearm was thrown. United States v. Hooks, 551 F.3d 1205 (10th Cir. 2009) (evidence failed to connect defendant to Uzi found by side of road after police chase where he was passenger, along with two others, in pickup being chased). That is, evidence of mere accessibility to the firearm, without proof of dominion or control over it, will not support a finding of constructive possession of the firearm. United States v. Whitfield, 629 F.2d 136, 143 (D.C. Cir. 1980).

c. Knowledge. The type of possession at issue, constructive or actual, will determine the type of evidence of knowledge that will be relevant to this issue. Jones, 484 F.3d at 788. Constructive possession cases frequently give rise to the issue of knowledge and intent. The government must offer evidence to prove that the defendant (1) knew the thing was present, and (2) intended to exercise dominion and control over it. Id. In contrast, in actual possession cases, the government must prove the defendant's awareness that (1) he physically possesses the thing, and (2) the thing he possesses is contraband. Id. This distinction is crucial to deciding evidentiary issues, such as whether prior bad act evidence of possessing other firearms will be admissible. Jones, 484 F.3d at 790 (holding it was error for trial court to

admit evidence of defendant's prior felon in possession conviction where possession scenario was of actual possession and intent was not placed at issue).

The government must also prove that a defendant knew he or she belonged to the relevant category of persons barred from possessing a firearm. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019). The Rehaif knowledge element applies to cases on direct appeal. United States v. Lavalais, No. 19-30161 (5th Cir. May 22, 2020). Because "convicted felons typically know they're convicted felons" the Fifth Circuit observed in Lavalais that it will "be rare for a defendant to be able to show plain error with regard to his guilty plea on that basis." Indeed, to satisfy plain error review of a guilty plea a defendant must show that but for "erroneous advice" he would not have pled guilty. United States v. Hicks, No. 18-11352 (5th Cir. May 8, 2020). There is a circuit split on this issue. The Fourth Circuit held in United States v. Gary, 954 F.3d 194, 207-208 (4th Cir. 2020) that failure to show knowledge of conviction status constituted structural error that could lead to reversal without a showing of prejudice. A jury may infer beyond a reasonable doubt that a defendant knew he was a convicted felon from the defendant's stipulation of the existence of a prior felony conviction, "absent evidence of ignorance." United States v. Staggers, No. 18-31213 (5th Cir. June 9, 2020).

The government need not prove a defendant's knowledge of the interstate commerce nexus, United States v. Privett, 68 F.3d 101, 104 (5th Cir. 1995), cert. denied, 116 S.Ct. 1862 (1996), nor prove a defendant's knowledge of his prohibited status. United States v. Dancy, 861 F.2d 77 (5th Cir. 1988); see also, United States v. Schmitt, 748 F.2d 249 (5th Cir. 1984) cert. denied, 471 U.S. 1104 (1985) (construing predecessor statute, § 922(h) as not requiring knowledge). However, if the theory of liability is that the defendant aided and abetted a felon in possession, the government must prove that the defendant knew or had reasonable cause to believe that the person who the defendant aided and abetted in possessing the firearm was a prohibited person. United States v. Murray, 988 F.2d 518, 521 (5th Cir. 1993).

d. Firearm. The firearms covered by the statute are defined in § 921. The most frequently applied definition for firearm is found in § 921(a)(3), which defines a firearm as "any weapon (including a starter gun) which will or is designed or may readily be converted to expel a projectile by the action of an explosive," or "the frame or receiver of any such weapon." An inoperable firearm qualifies. United States v. Perez, 897 F.2d 751, 754 (5th Cir. 1990), cert. denied, 498 U.S. 865 (1990). Even one an ATF expert opines to be inoperable because of "significant damage, missing/broken parts, and extensive corrosion." United States v. Dotson, 712 F.3d 369 (7th Cir. 2013) (posing example of gun transformed to cigarette lighter as perhaps not qualifying).

Possession of multiple firearms gives rise to only one conviction under § 922(g) as the unit of prosecution is "based on the status of the offender and not the number of guns possessed." United States v. Berry, 977 F.2d 915, 919 (5th Cir. 1992). Firearms or ammunition possessed at different times and places do give rise to separate units of prosecution, even though the crimes may be closely related. United States v. Goodine, 400 F.3d 202 (4th Cir. 2005) (retrial did not violate double jeopardy where jury acquitted defendant of possessing firearm at one location and deadlocked on bullet allegedly possessed by defendant at another location). For the same reason, the simultaneous possession of ammunition is not a distinct unit of prosecution. Id.; see also, Ball v. United States, 470 U.S. 856 (1985)(though government could seek multi-count indictment alleging possession and receipt of same weapon through same act, defendant could not be twice convicted or sentenced). The particular identity of the firearm possessed is not essential to a conviction. United States v. Guidry, 406

F.3d 314 (5th Cir. 2005) (evidence that firearm possessed by felon was a .380 caliber pistol, while indictment charged a 9 mm Kurz, not fatal variance from charges in indictment). The firearm or ammunition allegedly possessed must be possessed "in and affecting commerce." United States v. Chambers, 408 F.3d 237 (5th Cir. 2005) (reversed acquittal order entered where district court constructively amended indictment when it instructed the jury that it could convict if it found that the *component parts* of ammunition allegedly possessed by the defendant had moved in interstate commerce, where the indictment charged that the assembled ammunition was possessed "in and affecting commerce" and there was no evidence to support this element as alleged).

Possession of one firearm, if the firearm possessed contains characteristics that violate federal laws with differing elements, may result in multiple convictions and consecutive sentences, without violating the Double Jeopardy Clause. See, United States v. Mansolo, 129 F.3d 749 (5th Cir. 1997) (possession of stolen firearm that bore an obliterated serial number violated different statutes and allowed for consecutive sentences to be imposed). But multiple punishments may not be imposed for possessing a single firearm where solely because of the offender's status, more than one subsection of § 922 (g) was violated. United States v. Munoz-Romo, 989 F.2d 757 (5th Cir. 1993) (reversing multiple punishments for illegal alien who was also convicted felon who possessed one firearm); United States v. Richardson, 439 F.3d 421 (8th Cir. 2006) (en banc) (one allowable unit of prosecution for being felon and drug user in possession of firearm).

e. Felon Status. Section 922 (g)(1) of Title 18, prohibits anyone from possessing a firearm "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." The phrase, "in any court" does *not* include foreign convictions. Small v. United States, 125 S.Ct. 175 (2005). "Crime punishable by imprisonment for a term exceeding one year" does *not* include "(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(20). To determine if a conviction falls within the business practice exclusion, courts distinguish between offenses under Title 18, which deals with crimes and criminal procedure, and offenses under Title 15, which involve commerce and trade. United States v. Schultz, 586 F.3d 526 (7th Cir. 2009) (felony conviction under 18 U.S.C. § 1029(a)(7) for trafficking in counterfeit cell phones was not excluded). Courts have also looked to whether the crime has as an element an effect on competition or consumers. United States v. Stanko, 491 F.3d 408 (8th Cir. 2007).

The firearm disability depends upon the available length of imprisonment, not the label attached to the offense. Crimes labeled "misdemeanors" that are punishable by more than two years will prohibit firearms possession. The term "punishable by imprisonment for a term exceeding one year" may include crimes such as first offender state jail felonies, which could not immediately result in incarceration, so long as eventually the necessary period of incarceration could be served. United States v. Murillo, 422 F.3d 1152 (9th Cir. 2005) (state statute, not guideline, determined if crime was "punishable" by term exceeding one year). But the question turns on how the particular state law operates. United States v. Hill, 512 F.3d 1277 (10th Cir. 2008) (conviction was not "punishable" by more than a year because under Kansas state guidelines such a lengthy sentence was not available without violating Apprendi). In United States v. Simmons, 649 F.3d 237 (4th Cir. 2011)(en banc), the Fourth Circuit held that a prior North Carolina conviction was not a felony

for purposes of a § 841 enhancement because the particular defendant in that case could not have been sentenced to more than one year's imprisonment, even though a hypothetical defendant with a worse criminal history could have faced more time. The Simmons court relied upon Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010), a case where the Supreme Court held that a defendant's second Texas offense of simple drug possession was not an "aggravated felony" where the second conviction was not based on the fact of the prior conviction, a predicate necessary for the sentence to exceed one year. Several states have sentencing schemes that give rise to this issue, including MN, OR, TN, WA, AK, AZ, CA, CO, IN, NJ, NM, OH, AR, DE, MD, RI, UT, VA, MI, PA. A discussion of how these state sentencing schemes operate may be found at www.vera.org/sites/default/files/resources/downloads/PPR82004.pdf. This issue can be complicated, but merits investigation anytime the government relies upon a conviction for a crime punishable by an indeterminate length.

Convictions for state felony offenses that a state legislature later reclassifies as misdemeanors will result in a "felony" conviction if the reclassification was not made retroactive by the legislature. United States v. Schmidt, 487 F.3d 253 (5th Cir. 2007) (1985 Texas burglary of motor vehicle conviction was for felony even though in 1994 Texas modified violation to a Class A misdemeanor given retroactivity clause's exclusion of past offenses from reach of change). The state conviction need not trigger a state firearms disability to serve as a predicate for a federal conviction under § 922(g)(1). United States v. Nix, 438 F.3d 1284 (11th Cir. 2006). The government can prove the defendant's status as a convicted felon either through documentary proof or live testimony. Under Old Chief v. United States, 117 S.Ct. 644 (1997), however, the prosecution must accept a defendant's offer to stipulate to this element of the offense. If the defendant refuses to stipulate, then the government may offer evidence of the name and nature of his prior offense. United States v. Barfield, 527 F.2d 858, 860-62 & n. 5 (5th Cir. 1976).

f. Restoration of Civil Rights. A previous conviction does not serve as a predicate for a substantive violation of § 922(g) or an enhanced sentence under § 924(e) if the offender's civil rights have been restored, unless such ... restoration ... expressly provides that the person may not ... possess ... firearms. 18 U.S.C. § 921(a)(20). This section is commonly referred to as the "unless clause." The Fifth Circuit takes a two-step approach to determine whether the "unless clause" of § 921(a)(20) permits ex-felons to possess firearms. United States v. Chenowith, 459 F.3d 635 (5th Cir. 2006); United States v. Thomas, 991 F.2d 206 (5th Cir. 1993). First, the court asks whether "the state which obtained the underlying conviction revives essentially all civil rights of convicted felons, whether affirmatively with an individualized certification or passively with automatic reinstatement." Id. at 213. Three fundamental civil rights must be restored: 1) the right to vote; 2) the right to seek and hold public office; and 3) the right to serve on a jury. United States v. Maines, 20 F.3d 1102, 1104 (10th Cir. 1994) (cited in United States v. Huff, 370 F.3d 454, 461 (5th Cir. 2004)). Second, the court "determine[s] whether the defendant was nevertheless expressly deprived of the right to possess a firearm by some provision of the restoration law or procedure of the state of the underlying conviction." Id.; United States v. Richardson, 168 F.3d 836 (5th Cir. 1999) (Louisiana first offender pardon which restored all civil rights with exception of right to possess firearm, a right to be restored in 10 years, failed test). Restoration of both "essentially all" civil rights and the absence of an express firearm prohibition removes the conviction from the scope of § 922(g) and § 924(e). United States v. Gallaher, 275 F.3d 784, 791 (9th Cir. 2001).

In Caron v. United States, 118 S.Ct. 2007 (1998) the Supreme Court interpreted the "unless clause" to mean that if the state

imposed any limit on a felon's possession of firearms then no firearms could be legally possessed by the felon. That is to say, the restoration of the right to possess firearms must be complete and unlimited. Caron involved a Massachusetts law that permitted felons whose civil rights were restored to possess rifles but not to carry handguns. The defendant possessed only rifles, legal for him to possess under Massachusetts law. Caron held that under federal law, the state weapons limitation banned the defendant from possessing any firearms at all, even rifles, under federal law.

Only the convicting state or jurisdiction has the power to undo a conviction and restore the right to possess firearms. Beecham v. United States, 114 S.Ct. 1669 (1994); United States v. Thomas, 991 F.2d 206, 214-5 (5th Cir. 1993), cert. denied, 510 U.S. 1014 (1993). Once the right to bear firearms is fully restored by the convicting state, later changes in the law that impair the ex-felon's right to possess a firearm are not relevant. United States v. Osborne, 262 F.3d 486 (5th Cir. 2001). Thus, in Osborne, the fact that Illinois, the state of conviction, later made it unlawful for the defendant to possess a firearm in that state was irrelevant under federal law. See also, United States v. Haynes, 961 F.2d 50, 53 (4th Cir. 1992) (analyzing only law in place at time defendant's civil rights were restored); United States v. Traxel, 914 F.2d 119, 124 (8th Cir. 1990) (same); United States v. Cardwell, 967 F.2d 1349, 1350-51 (9th Cir. 1992) (plain meaning of use of present tense is that courts must determine effect of restoration of civil rights at time granted and not consider whether civil rights were later limited or expanded); United States v. Norman, 129 F.3d 1393, 1397 (10th Cir. 1997) (same). But see, Melvin v. United States, 78 F.3d 327 (7th Cir. 1996) (holding that a state may take away a restored felon's right to possess a firearm, making possession unlawful under both state and federal law). State laws that permit a felon to possess a firearm do not operate to permit a felon to possess a firearm under federal law. United States v. Thomas, 991 F.2d 206 (5th Cir. 1993); United States v. Huff, 370 F.3d 454 (5th Cir. 2004) (same). In United States v. Daugherty, 264 F.3d 513 (5th Cir. 2001), the Fifth Circuit analyzed the "unless clause" together with the Texas probation statute and upheld a conviction where the defendant had served his period of probation, and the state court simply ordered that "the Defendant is discharged from probation." Id. 264 F.3d at 514 n. 1. The court found that the defendant's rights "were passively revived by operation of law, not by individualized certification," Id. 264 F.3d at 516, yet concluded, based on a review of federal and Texas precedent that, for purposes of § 922(g)(1), the defendant "remained convicted even after successfully completing probation." Id. To reach its decision, the court reasoned that Texas law did not explain whether successful completion of probation supervision renders one no longer convicted, Id. at 515, and pointed to Supreme Court precedent that treated ex-probationers as convicted. Id. (*citing* Dickerson v. New Banner Inst., 103 S.Ct. 986 (1983); see also, United States v. Padia, 584 F.2d 85, 86 (5th Cir. 1978)(affirming conviction of ex-probationer/felon for receiving firearm). Different facts produced a different result in United States v. Fix, 264 F.2d 532 (5th Cir. 2001), where the defendant, after completing a Texas probation for arson, filed a successful motion to set aside his sentence of probation, grant a new trial, and to dismiss the matter. Because the order discharging Fix from probation also granted a new trial and dismissed the matter, the Fifth Circuit held that Fix was no longer a convicted felon prohibited from possessing a firearm under federal law. The Fix case may be an anomaly, inasmuch as article 40.08 of the Texas Code of Criminal Procedure, in effect at the time of Fix's dismissal, was repealed in 1986. See also, United States v. Huff, 370 F.3d 454 (5th Cir. 2004)(felon who discharged Texas parole failed to show that any civil rights were restored under Texas law). In United States v. Chenowith, 459 F.3d 635 (5th Cir. 2006), the Fifth Circuit found that a defendant's

civil rights were restored affirmatively by certificate, rather than by operation of law, and because such certificate did not *expressly prohibit* the defendants possessing firearms, the defendant was not subject to prosecution under § 922 (g). Chenowith involved an Ohio conviction. The exemption contained in § 920(a)(20) for the restoration of civil rights does not cover the case of an offender who retained civil rights at all times, and whose legal status, post-conviction, remained in all respects unaffected by any state dispensation. Logan v. United States, 128 S.Ct.475 (2007). Thus, in Logan, the defendant's prior misdemeanor battery convictions failed to qualify under the ACCA's civil rights restored exemption as the defendant's civil rights remained unaffected post-conviction. Be aware, therefore, that seemingly minor convictions, such as those labeled misdemeanors, may later play a major role in both prohibiting a person from possessing a firearm and dramatically enhancing the person's punishment.

Each state has its own unique set of rules on restoration of civil rights for felons. In, Texas, as a general rule, a pardon will be required for full restoration of civil rights. Many other states (including Louisiana), automatically restore felons civil rights after certain periods of time from when the defendants completed their sentence (typically five years). Many such states also do not limit ex-felon's rights to possess firearms. A common exception in many states that restore ex-felon's rights to possess firearms are persons convicted of violent or drug felonies, who have a more difficult time getting their rights to possess firearms restored. In felon-in-possession cases, particularly ones involving an out-of-state prior felony conviction, one should check to see if the defendant's civil rights (including his right to possess firearms) were restored under state law at some point prior to the alleged unlawful possession of the firearm. One excellent source for this research can be found on line in the Restoration of Rights Project at https://ccresources.org/state-restoration-profiles (last visited 8/13/2020). The website contains a state by state review of loss and restoration of civil/firearms rights. It also includes information regarding state laws covering pardon policy and practice and expunction of records. Such research may also require phone calls to the board of pardons and parole (or similarly-named agency) of the state at issue. If the defendant received a certificate or official letter restoring his civil rights when he was discharged from his sentence, such a document will suffice as a matter of law, so long as it did not expressly limit his rights regarding firearms. See, e.g., United States v. Gallaher, 275 F.3d 784, 791 (9th Cir. 2001); United States v. Erwin, 902 F.2d 510, 512-13 (7th Cir. 1990).

While 18 U.S.C. § 925(c) authorizes the removal of federal firearms disabilities that result from felony convictions, Congress refuses to appropriate funds to allow the ATF to process applications for the removal of firearms disabilities. In United States v. Bean, 123 S.Ct. 584 (2002), the Supreme Court held that an actual denial of relief from firearms disabilities was a necessary prerequisite to judicial review. The ATF's failure to process applications thus operates to keep federal courts from acting to restore a person's civil rights.

g. Interstate Commerce. Typically, the interstate commerce element is shown with proof that the gun was manufactured in another state. United States v. Pierson, 139 F.3d 501 (5th Cir. 1998); United States v. Harper, 802 F.2d 115 (5th Cir. 1986). The indictment must allege and the evidence must establish that the ammunition or firearm possessed was possessed "in and affecting commerce. United States v. Chambers, 408 F.3d 237 (5th Cir. 2005) (reversed and judgment of acquittal entered where evidence at trial showed component parts of ammunition, not ammunition itself, the article described in the indictment, was possessed "in an affecting commerce"). The government often uses the expert testimony of ATF agents to

prove this. Id.; United States v. Wallace, 889 F.2d 580 (5th Cir. 1989) (gun markings, though hearsay, may be relied upon by expert under Fed. R. Evid. 702 and 703 to formulate opinion concerning weapon's origin). However, the introduction of BATF trace forms (Form 7520.5) as a business record has been rejected by courts if the way such forms were completed does not meet the necessary evidentiary foundations. See United States v. Davis, 571 F.2d 1354 (5th Cir. 1978)(Fed. R. Evid 803 (6) did not allow for admission of ATF Form 5720.4 to show origin of gun's manufacture); United States v. Houser, 746 F.2d 55 (D.C. Cir. 1984) (same); cf., United States. v. Johnson, 722 F.2d 407 (8th Cir. 1983) (relevancy objection failed to preserve hearsay complaint on appeal concerning manufacturer records mailed to ATF, noting that serial number report portion of exhibit admissible under Fed. R. Evid. 803 (8) as official record, but portion of exhibit certifying that gun was manufactured in Florida and mailed to California should have been stricken as hearsay if proper objection was made); United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985) (affirming admission of ATF trace form under Fed. R. Evid. 803(24), residual hearsay exception, given advance notice to defense counsel of government's intent to introduce exhibit at trial, and rejecting Sixth Amendment Confrontation Clause challenge to admission of exhibit). The admissibility of such testimonial evidence under the residual hearsay exception is now highly doubtful after Crawford v. Washington, 541 U.S. 36 (2004), which held that the Sixth Amendment's Confrontation Clause forbade the introduction of such evidence, unless the declarant testified at trial or the right to confrontation was otherwise honored. Other methods of proof include showing that the defendant, found in one state, had bought the gun in another state, United States v. Lehmann, 613 F.2d 130 (5th Cir. 1980), and that the inscription on the gun indicated a foreign origin. United States. v. Alvarez, 972 F.2d 1000, 1004 (9th Cir. 1992), cert. denied, 507 U.S. 977 (1993). It is not necessary for the government to show that the defendant moved the weapon in interstate commerce. U.S. v. Wallace, 889 F.2d 580, 583 (5th Cir. 1989), cert. denied, 497 U.S. 1006 (1990).

h. Second Amendment. In District of Columbia v. Heller, 128 S.Ct. 2783 (2008), the Supreme Court held that the Second Amendment protected an individual right to bear firearms unconnected with service in a militia, for self-defense. Nonetheless, the Court made clear that this right to bear arms was not unlimited, and that its opinion should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms." See also, McDonald v. Chicago, 130 S.Ct. 3020 (2010)(Fourteenth Amendment incorporated the Second Amendment right recognized in Heller, extending right to bear arms to states). The Second and Ninth Circuit held that Heller's list of presumptively lawful regulations was not dicta. United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115, (9th Cir. 2010). Other courts of appeal, though, having characterized the language regarding presumptively lawful regulations as dicta, have used the language to reaffirm the constitutionality of § 922(g)(1). United States v. Scoggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009)(Tymkovich, J., concurring); United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010)(en banc). One may nevertheless assert the Second Amendment right to bear arms in other firearms prosecutions where the government's interest in disarming the citizen is not so clear as when the government disarms a convicted felon. Also, these precedents do not bar an as-applied challenge, which would require the defendant to present facts about himself/herself that distinguish his/her circumstances from those of persons

historically barred from Second Amendment protections. United States v. Barton, 633 F.3d 168 (3d Cir. 2011). For example, a felon convicted of a minor, non-violent crime might show that he is not more dangerous than a typical law-abiding citizen. Id. Similarly, a felon whose conviction was decades old could convince a court that he had a constitutional right to keep and bear arms. Id. The North Carolina Supreme Court did just that in Britt v. State, 681 S.E.2d 320 (N.C. 2009), finding that a felon convicted in 1979 of one count of possession of a controlled substance with intent to distribute had a constitutional right to keep and bear arms as that right was understood under the North Carolina Constitution. Id. at 323.

2. Possession of Firearm By an Unlawful User or Addict of Controlled Substance:18 U.S.C. § 922(g)(3)

This law prohibits any person who is "an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

"[A]n unlawful user" was left undefined in the statute so the term's meaning has been left for courts to construe. Courts agree that proof of continuity or prolonged drug use, that is, more than occasional use of a drug, is necessary to show one is an "unlawful user." See, United States v. Jackson, 280 F.3d 403 (4th Cir. 2002). In United States v. Herrera, 289 F.3d 311 (5th Cir. 2002), the Fifth Circuit weighed in, holding that an unlawful user required proof that a defendant's use of drugs just fell short of addiction. Id. at 323. But the panel opinion was overruled by the en banc court in United States v. Herrera, 313 F.3d 882 (5th Cir. 2002). Herrera II did not reach the meaning of unlawful user as the en banc court found that because the defense objected to the sufficiency of evidence as to the "addicted to" alternative it procedurally defaulted the complaint on the "unlawful user" prong. Applying plain error review, the court found no "miscarriage of justice" resulted from the conviction that demanded correction, as the defendant admitted using marihuana and cocaine for years, and to possessing a firearm during two years of the pertinent period. This record therefore was "not devoid of evidence" to support the conviction. Herrera, 313 F.3d at 885. In any event, the government in Herrera II conceded in its supplemental brief en banc and at oral argument that a defendant's drug use "would have to be with regularity and over an extended period of time to be an "unlawful user" for § 922(g)(3) purposes. Id. at 885.

In United States v. Patterson, 431 F.3d 832 (5th Cir.) cert. denied, 126 S.Ct. 2043 (2005), the Fifth Circuit rejected a due process vagueness challenge to the "unlawful user" prong and found that an ordinary person would conclude that the defendant actions established him to be an unlawful user. The defendant admitted that he regularly used marijuana and would have difficulty complying with a release condition that required him not to use marijuana, and a urine specimen taken one week later tested positive for the drug. Police also found plastic bags containing marijuana, a metal canister that held rolling papers, a lighter, two pipes, marijuana residue in the pipes, and "High Times" magazine. Buckets outside the home contained live marihuana plants. The jury in Patterson was instructed on the meaning of "unlawful user" in the same way as was the jury in Herrera: "the term means one who uses narcotics so frequently and in such quantities as to lose the power of self-control and thereby pose a danger to the public morals, health, safety, or welfare. An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm was possessed." The Patterson court held this definition to be

erroneous but found the error harmless because the defendant suffered no injustice as he would have been convicted even if the jury had been correctly charged. The Patterson court pointed to the second sentence of the instruction as properly guiding the jury. See also, United States v. Mack, 343 F.3d 929 (8th Cir.) cert. denied, 124 S.Ct. 1524 (2004) (evidence sufficient to show defendant was an unlawful user of marijuana during the time he possessed firearm, officer who arrested defendant claimed he smelled marijuana, defendant had only a small amount of marijuana on his person, consistent with personal use, firearms were found in car, and during separate incident a month before the arrest, the defendant confronted a witness about the theft of marijuana and became angry and fired gun in the air).

The lesson to be learned from Herrera II goes beyond the meaning of unlawful user; that is, keep sufficiency of evidence objections general – object at the close of the government's case that the evidence is insufficient as to each and every element. Herrera II illustrates that specificity will narrow appellate review to the particular ground asserted and cause default on other grounds not specified in the objection.

3. Possession of Firearm By a Person under Protective Order: 18 USC § 922(g)(8)

a. Elements of Proof. This statute makes it unlawful for a person to possess a firearm who is under a protective court order that was issued after a hearing. To qualify, the protective order must: 1) be issued "after a hearing of which such person received actual notice, and at which such person had an opportunity to participate, 18 USC § 922(g)(8)(A); 2) restrain the person from "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child," 18 USC § 922 (g)(8)(B); and 3) "include[] a finding that such person represents a credible threat to the physical safety of such intimate partner or child ... or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury....." 18 USC § 922 (g)(8)(C)(ii). The protective order must contain explicit terms substantially similar in meaning to the language set out in (8)(C)(ii). United States v. Dubose, 598 F.3d 726, 730-731 (11th Cir. 2010) (order expressly prohibited defendant "from intimidating, threatening, hurting, [or] harassing" his intimate partner); United States v. Bostic, 168 F.3d 718, 722 (4th Cir. 1999) (order directed defendant to "refrain from abusing" his intimate partner). The order does not need to track the statutory language. United States v. Dubose, 598 F.3d 726 (11th Cir. 2010) (order's language restraining Dubose from "hurting" his wife and children fell within parameters of statute that required order to prohibit defendant from "the use, attempted use, or threatened use of physical force" against family members). In United States v. McGinnis, 956 F.3d 747 (5th Cir. 2020), the Fifth Circuit followed Dubose and Bostic, took a "common sense" approach and found that a protective order prohibiting acts involving "physical force" satisfied the statute's requirements.

In some cases, the language in the protective order will be inadequate. An order that merely requires "no contact" does not prohibit such activity and will not disarm the person under federal law. United States v. Sanchez, 639 F.3d 1201 (9th Cir. 2011).

Defendants are not entitled to collaterally attack the validity of, or process leading to the issuance of the order. United States v. Dubose, 598 F.3d 726 (11th Cir. 2012); United States v. Hicks, 389 F.3d 514 (5th Cir. 2004). A defendant must attack and invalidate the order *before* possessing the firearm. Id. The necessary *mens rea* does not require knowledge that one is violating

the law, but merely knowledge of the legally relevant facts. United States v. Emerson, 270 F.3d 203, 215-217 (5th Cir. 2001) cert. denied, 122 S.Ct. 2362 (2002). Thus, in United States v. Henry, 288 F.3d 657 (5th Cir. 2002), the court found that an indictment's failure to specifically allege that the defendant knew it was against the law to possess a firearm while under a state court protective order did not render the indictment fundamentally defective. Henry also held that the indictment's failure to allege the required mental state, "knowingly", did not render it fundamentally defective because the facts set forth in the indictment, that the defendant possessed a firearm at the time when he was subject to a court order issued after a hearing – of which he received actual notice and an opportunity to participate – and the court order restrained the defendant from harassing, stalking, or threatening Michelle Henry, ... or their children, or engaging in other conduct that would place Michelle Henry or her children in reasonable fear of bodily injury ...., … "fairly imported the knowledge requirement" in the statute.

In United States v. Spruill, 292 F.3d 207 (5th Cir. 2002), the court interpreted the statute's after a hearing requirement and held that a protective order issued under Texas's "agreed order" family law provision was insufficient to satisfy the "after a hearing" requirement. The Spruill court was troubled by the absence of hearing date setting, or of any hearing, that the parties never appeared before a judge, and that the defendant/husband was not represented by counsel. That the husband could have requested a hearing while discussing the agreed order prior to signing it did not alter the outcome. Spruill construed the hearing requirement narrowly, mindful of the constitutional implications that a broader construction would have upon the federal-state balance. That is, a broader construction could unnecessarily test the statute's constitutionality.

This is not to say that agreed orders cannot serve as the basis for a § 922(g)(8) prosecution. United States v. Banks, 339 F.3d 267 (5th Cir. 2003). What is required is that there be a hearing set, that the defendant receive notice of the hearing, that he appear, that a judge be present and provide the parties with the opportunity to present evidence. A defendant cannot escape federal prosecution by consenting to an agreed order. Id. The Spruill court was troubled because the defendant did not have counsel, was illiterate, and no hearing was set.

b. Second Amendment. As was noted above, in District of Columbia v. Heller, 128 S.Ct. 2783 (2008), the Supreme Court explicitly held that the Second Amendment protected an individual right to bear firearms unconnected with service in a militia. Nonetheless, the Court made clear that this right to bear arms was not unlimited, and that its opinion should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms."

In United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), decided before Heller, the Fifth Circuit held the statute did not violate the Second Amendment right to bear arms. This was groundbreaking because for the first time the court recognized the Second Amendment conferred an individual right to possess firearms.

After Heller, the Fifth Circuit revisited the Second Amendment issue in United States v. McGinnis, 956 F.3d 747 (5th Cir. 2020). It employed a two-step inquiry: 1) does the conduct prohibited at issue fall within the scope of the Second Amendment right; if so, 2) applying the appropriate level of scrutiny, is the law constitutional.

McGinnis determined that intermediate scrutiny applied, as the law at issue applied to a "discrete class of individuals and critically, the discrete class

was comprised of individuals who, after an actual hearing with prior notice and an opportunity to participate, had been found by a state court to pose a real threat or danger of injury to the protected party, so the discrete group was no comprised of responsible citizens protected by the Second Amendment." McGinnis, 956 F.3d at 758. Because the law was reasonably adapted to important government interests in reducing domestic gun abuse, resting as it did on a link between domestic abuse, recidivism and gun violence, it was constitutional.

4. Possession of Firearm by Person convicted of Misdemeanor Crime of Domestic Violence:18 USC § 922(g)(9)

The statute makes it unlawful for one "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence."

It provides that the offense must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim...."

In United States v. Castleman, 134 S.Ct. 1405 (2014), the Supreme Court held that the "physical force" required to satisfy the definition of "misdemeanor crime of domestic violence" was the degree of force that supported a common-law battery conviction – namely, offensive touching. Castleman recognized the apparent conflict with Johnson v. United States, 130 S.Ct. 1265 (2010), which construed the "force clause" in the Armed Career Criminal Act (ACCA) to require violent force. Castleman reconciled Johnson by pointing out that Congress had a different kind of force in mind when it enacted the ACCA and intended for the statute to be interpreted in the unique context of domestic violence cases to reach a broader type of case often used to prosecute domestic abusers, like misdemeanor assault. Castleman mended a split among the circuits.

Courts look to the statute (not the underlying conduct) upon which the predicate conviction was based, to determine whether the elements meet the test, employing the categorical approach. United States v. White, 258 F.3d 374 (5th Cir. 2001). In White, the Fifth Circuit held that convictions under Texas law proscribing reckless conduct and terroristic threats did not qualify as predicate convictions for domestic violence, even though the reckless conduct predicate stated that the defendant pointed a firearm at his spouse, and the terroristic threat predicate offense stated that the defendant threatened to kill his former spouse. White found that neither offense, upon review of the statutory elements, contained the necessary element of "attempted use of physical force, or threatened use of a deadly weapon" regardless of the manner and means alleged in the charging document. See also, United States v. Howell, 531 F.3d 621 (8th Cir. 2008)(holding that statute that criminalized reckless "conduct which creates a grave risk of death or serious physical injury to another" was a catchall provision that applied to a wide range of factual situations including those that did not always or ordinarily require a completed use of physical force, conviction therefore did not qualify).

These decisions did not turn on the meaning of "physical force" and may remain viable post Castleman. But see, United States v. Voisine, 778 F.3d 176 (1st Cir. 2015)(applying Castleman to hold that even though state statutes allowed conviction based on a recklessness *mens rea*, defendant was convicted of "misdemeanor crime of domestic violence," as reckless assault qualifies as the "use of physical force" within the statute's meaning). The Maine assault statute interpreted in Voisine was identical to the Texas assault statute.

In United States v. Hayes, 129 S.Ct. 1079 (2009), the Supreme Court resolved a

circuit split and held that the domestic relationship did not need to be a "defining element" of the predicate conviction, although it needed to be established beyond a reasonable doubt.

The phrase "cohabit as a spouse" and "similarly situated to a spouse" contained in § 921(a)(33)(A) are not defined in the statute. A "live-in girlfriend" meets the test, inasmuch as such a term implies sexual relations. Shelton, 325 F.3d at 562. As does a person with whom one has engaged in a long-term extra-marital affair. United States v. Schoenauer, 354 F.3d 969 (8th Cir. 2004) judgment vacated, case remanded on other grounds, 125 S.Ct. 1050 (2005)(also rejecting due process vagueness challenge, based on defendant's contention that two lawyers advised him misdemeanor assault conviction involving secretary would not disqualify him from possessing firearm under federal law).

Section 922(g)(9), post Rehaif, requires the government to prove that the defendant knew he belonged to this prohibited class of persons. United States v. Triggs, 963 F.3d 710 (2020). Given the legal complexities inherent in this determination as discussed above, it will be harder for the government to prove such knowledge. Conversely, it will be easier for defendants to "plausibly argue" that they would not have pled guilty had they known that the government had to prove this knowledge element, the prejudice showing needed to withdraw a guilty plea. Triggs, 963 F.3d at 712.

Federal law does not consider persons to have been convicted of a "misdemeanor crime of domestic violence" unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case..." 18 U.S.C. § 921 (a)(33)(B). Courts addressing the question of whether counsel was provided or waived view the issue as a matter of law, rather than as a matter to be decided by a jury as an element of the crime. United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003) (§ 921(a)(33) sets forth legal test for judge not jury to determine); United States v. Hartsock, 347 F.3d 1, 7 (1st Cir. 2003) (holding absence of waiver is an affirmative defense); United States v. Akins, 276 F.3d 1141, 1145 (9th Cir. 2002) (same). The Hartsock court held that the defendant bears the burden of production and persuasion on this issue. Id. In considering whether a defendant knowingly and intelligently waived counsel for purposes of § 922(g)(9) and § 921(a)(33)(B)(I), courts generally apply the same principle when analyzing waiver of counsel under the Sixth Amendment. United States v. Pfeifer, 371 F.3d 430 (8th Cir. 2004). While the waiver must be "knowing, voluntary, and intelligent," Iowa v. Tovar, 124 S.Ct. 1379 (2004), it does not require that the defendant be told that the conviction could affect his future ability to possess a firearm. Bethurum, 343 F.3d at 718 (holding that ability to possess firearm is collateral matter, so defendant need not be warned about such a consequence in connection with giving up the right to counsel). The lack of a firearm prohibition warning in makes proving knowledge of prohibited status even harder.

Interestingly, § 922(g)(9) contains its own restoration-of-rights exemption. 18 U.S.C. § 921(a)(33)(B)(ii). Some states take away a person's civil rights if they have been convicted of domestic violence, others do not. Someone who has never lost his civil rights cannot have them "restored" for purposes of a restoration-of-rights exemption. Logan v. United States, 128 S.Ct. 475 (2007). That is, one cannot have replaced what was never taken away. Therefore, a person convicted of a domestic violence crime may not possess firearms under federal law unless the state took their civil rights away as a result of the conviction and later restored them.

In United States v. Skoien, 614 F.3d 638 (7th Cir. 2010), the Seventh Circuits looked at this ban on gun possession by domestic abusers and found it did not violate their Second Amendment right to armed self-defense as set forth in Heller, on the basis that "logic and data" demonstrate "a substantial relation between § 922(g)(9) and [an important governmental] objective); See also, United States v. White, 593 F.3d

1199 (11th Cir. 2010) (affirming constitutionality of ban); United States v. Booker, 644 F.3d 12 (1st Cir. 2011)(same); United States v. Staten, 666 F.3d 154 (4th Cir. 2011)(applying intermediate scrutiny and upholding ban).

5. Possession of Firearm by an Alien Illegally or Unlawfully in the United States: 18 USC § 922(g)(5)

This statute makes it illegal for a person to possess a firearm while being an alien "illegally or unlawfully in the United States." The words "illegally" and "unlawfully" are not defined in the statute. Whether an alien qualifies as a prohibited person under this subsection depends on whether the alien has been granted lawful status to remain in the United States at the time the firearm was possessed. In Rehaif v. United States, 139 S.Ct. 2191 (2019), the Supreme Court held that the government was required to prove the alien knew he was "illegally" or "unlawfully" in the United States.

The status of lawful status decides the lawfulness of a firearm's possession. An alien who has applied for but has not yet been granted lawful status to be in the United States violates the law by possessing a firearm. For example, in United States v. Flores, 404 F.3d 320 (5th Cir. 2005) the Fifth Circuit held that a defendant who has an application pending to obtain "temporary protected status" was still a prohibited person, even though he had received temporary treatment benefits as a result of his application. It reached a different conclusion where the alien was granted "temporary protected status" and held, applying the rule of lenity, that it could not say with certainty that Congress intended to criminalize the possession of firearms by such aliens. United States v. Orellana, 405 F.3d 360 (5th Cir. 2005). That is, an alien's presence became lawful for purposes of the firearms statute once TPS status was conferred upon the alien. Id. See also, United States v. Lucio, 428 F.3d 519 (5th Cir. 2005) (work authorization and stay of removal order pending decision by immigration court on residency application did not make alien's presence in U.S. lawful so as to allow alien to possess firearm); United States v. Elrawy, 448 F.3 309 (5th Cir. 2006) (applying Lucio, alien who acquired unlawful or illegal status by overstaying visa maintains such illegal status until his application for adjustment of status is approved).

In all cases, the government must establish that the alien "entered" the United States. United States v. Lopez-Perera, 438 F.3d 932 (9th Cir. 2006) (alien who was detained by border personnel as he attempted to cross into United States after leaving secondary clearance area without clearance never "entered" so as to violate law by possessing firearm found in vehicle "in the United States" because alien was never "free from official restraint").

Aliens unlawfully in the United States do not enjoy a right under the Second Amendment to possess firearms. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir.) cert. denied, 132 S.Ct. 1969 (2012). The Fifth Circuit found in Portillo-Munoz that illegal aliens were not in the class of "the people" referred to in the Second Amendment.

6. Receipt of Firearm by Person under Indictment: 18 USC § 922(n)

This statute prohibits a person "under indictment for a crime punishable by imprisonment for a term exceeding one year" to "ship" or "transport in interstate or foreign commerce any firearm or ammunition" or "receive any firearm" that has been "shipped or transported in interstate or foreign commerce." The term "indictment is defined in 18 U.S.C. § 921(a)(14) and "includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted."

The crime becomes complete when the person acquires the firearm while under indictment. Subsequently quashing the indictment will not serve to retroactively vacate criminal liability under the statute.

Unites States v. Chambers, 922 F.3d 228 (5th Cir. 1991).

What it means to be "under indictment" is not defined in the statute and decided by interpreting state law. United States v. Chapman, 7 F.3d 66 (5th Cir. 1993). State laws vary and defendants may be unaware of their status.

The Fifth Circuit decided the question of whether being under Texas felony deferred adjudication was tantamount to being "under indictment" in United States v. Valentine, 401 F.3d 609 (5th Cir. 2005). The court found that because the Texas's deferred adjudication scheme left a defendant with a "pending charge while on probation, he was "under indictment" during the term of probation. Id. The 8th Circuit reached the opposite outcome in United States v. Hill, 210 F.3d 881, 883-84 (8th Cir. 2000) applying Missouri's suspended sentencing scheme. The court in Hill held that because the purpose of indictment was to give notice of the charges, and this function was extinguished after a guilty plea, the defendant was no longer "under indictment" once he pled guilty.

One may therefore be under indictment while on deferred adjudication in Texas, but not be "under indictment" while on deferred adjudication in Missouri. The Valentine court accounted for the different result by referring to decisions construing the Texas deferred adjudication statute which found that deferred adjudication left a charge pending against the defendant.

Although § 922(n) does not contain a *mens rea* requirement, the relevant sentencing provision, § 924 (a)(1)(D) requires that a violation be committed willfully. The term "willfully" requires that a defendant acted with knowledge that his or her conduct was unlawful. Dixon v. United States, 126 S. Ct. 2437, 2441 (2006)(citing, Bryan v. United States, 118 S. Ct. 1939 (1998)). It does not require the government to prove that the defendant knew why his or her conduct was illegal, or that the defendant knew what particular law he or she violated. United States v. Lipp, 533 Fed. Appx. 418 (5th Cir. 2013)(unpublished). Evidence showing the defendant lied about his conduct, or gave shifting explanations about the gun's ownership, may be enough to support a conviction. Id.

The statutory maximum penalty for violating this law is 5 years. 18 U.S.C. § 924 (a)(1)(D).

7. Carry or Use of Firearm During Violent or Drug Crimes: 18 USC § 924(c)

a. Elements of Proof. Section 924(c), of Title 18, requires a consecutive sentence of "*not less than* five years" for "any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." It also punishes anyone "who, in furtherance of any such crime, *possesses* a firearm" to a minimum five-year sentence. These constitute two ways of violating § 924(c) and are separate and distinct offenses. United States v. Combs, 369 F.3d 925, 330-33 (6th Cir. 2004). Indictments that charge both violations in one count violate the rule against duplicity. United States v. Savoires, 430 F.3d 376 (6th Cir. 2005).

Other acts with firearms carry higher statutory minimums. If a firearm is *brandished*, the mandatory minimum sentence increases to seven years, and if the firearm is *discharged*, the mandatory minimum sentence goes up to ten years. The term "brandish" means "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. § 924 (c)(4). Discharge, unlike brandish, requires no intent, and an accidental discharge of a firearm will suffice to support the ten year minimum. Dean v. United States, 129 S.Ct. 1849 (2009).

Facts that trigger the minimum penalty, such as brandishing or discharge of a weapon are elements of the offense and must be charged and proven to a jury beyond a reasonable doubt. Alleyne v.

United States, 133 S.Ct. 2151 (2013) (overruling Harris v. United States, 122 S.Ct. 2406 (2002)). Accidental discharges fall within the reach of the statute. Regardless of whether the firearm was used, carried, possessed, brandished, or discharged, § 924(c) requires such acts to be "during and in relation to" a crime of violence or drug trafficking crime.

Section 924(c) also provides for additional mandatory minimum penalties for listed types of firearms or accessories. A 10-year minimum applies if the weapon possessed is a "short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon." 18 USC § 924 (c)(1)(B)(i). A 30-year minimum applies if the weapon is a "machinegun or a destructive device, or equipped with a firearm silencer or muffler." 18 USC § 924 (c)(1)(B)(ii). See, United States v. O'Brien, 130 S.Ct. 2169 (2010) (fact that a firearm was a machinegun was an element to be proved to the jury beyond a reasonable doubt). Strict liability applies and the government need not prove a defendant knew the gun was a machine gun. United States v. Burrell, 692 F.3d 500 (D.C. Cir. 2012). The law's silence concerning the maximum penalty available implicitly authorizes a life sentence. United States v. Sias, 227 F.3d 244 (5th Cir. 2000); United States v. Fields, 923 F.2d (5th Cir. 1991); United States v. Brame, 997 F.2d 1426 (11th Cir. 1993).

To prove aiding and abetting a § 924 (c) offense under 18 U.S.C. § 2, the government must prove that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a participant would use or carry a gun during the crime's commission. Rosemond v. United States, 134 S.Ct. 1240 (2014). In Rosemond, the jury instruction erred because it failed to require the jury to find that the defendant knew in advance that someone would be armed. The Rosemond court said that advance knowledge meant knowledge obtained in time for the defendant to have a reasonable opportunity to withdraw from participation. It was not enough for the jury instruction to require the jury to find that the defendant knew his cohort used a firearm. The charge should have further inquired as to when the defendant acquired knowledge of the firearm. This was necessary to set apart the predicate crime from the broader firearm crime. By requiring proof of advance knowledge, the defendant would have the opportunity to walk away from the more serious crime.

As with the "felon in possession" statute, an inoperable gun is still a firearm under 924(c). United States v. Coburn, 876 F.2d 372 (5th Cir. 1989). Such dysfunctionality, however, could weigh against a finding that the firearm was possessed in connection with an underlying crime if inoperable. A defendant charged with this offense need not have knowledge that the use or carrying of the firearm is illegal; he only must have knowledge of the manner of the gun's use, or knowledge of the facts constituting the offense. United States v. Wilson, 884 F.2d 174 (5th Cir. 1989). If the indictment alleges a conspiracy, then a co-conspirator may be held liable for another co-conspirator's acts constituting a violation of 924 (c) under Pinkerton v. United States, 328 U.S. 640 (1946), even though the co-conspirator lacks knowledge of the violation. United States v. Raborn, 872 F.2d 589, 596 (5th Cir. 1989).

b. The Underlying Crime. "[A]ny "crime of violence or drug trafficking crime" qualifies as a predicate offense. Sections 924(c)(2) and (3) define these terms. A "drug trafficking crime" means "any felony punishable under the Controlled Substance Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." The underlying "drug trafficking crime" must be *federal*. A "crime of violence" means a felony offense that "has as an element the use of physical force against the person or property of another." 18 USC § 924 (c)(3)(A). The residual clause definition of crime of violence in § 924 (c)(3)(B) - a crime "that by its nature, involves a substantial risk that physical force against

the person or property of another may be used in the course of committing the offense" – was struck down as unconstitutionally vague in United States v. Davis, 139 S. Ct. 2319 (2019).

The categorical approach determines whether a crime fits the elements definition. In United States v. Carreon, No. 16-11239 (5th Cir. May 6, 2020) the Fifth Circuit granted a § 2255 petition finding that kidnapping lacked force as an element and could only fit under the no longer valid residual clause. See also, United States v. Dixon, 799 F. App'x 308 (5th Cir. 2020) (authorizing successor § 2255 petition that asserted kidnapping predicate lacked force element). Courts look to the elements of the offense, not the underlying conduct.

The statute does not require that the defendant be convicted of the underlying crime. United States v. Munoz-Fabela, 896 F.2d 908, 910-11 (5th Cir.) cert. denied, 498 U.S. 824 (1990)(drug charge contained in indictment was dismissed). It is the "fact of the offense, and not a conviction, that is needed to establish the required predicate." Id. Moreover, acquittal of the predicate offense does not preclude conviction under § 924 (c)(1) when there is ample evidence showing that a reasonable jury could have found the defendant guilty of the predicate offense. United States v. Ruiz, 986 F.2d 905, 911 (5th Cir.), cert. denied, 510 U.S. 848 (1993). Yet insufficient evidence as a matter of law with respect to the underlying crime will not support a § 924(c) conviction. United States v. Harris, 420 F.3d 467 (5th Cir. 2005) (reversal of carjacking conviction for insufficient evidence required reversal of § 924(c) conviction); United States v. Burton, 324 F.3d 768 (5th Cir. 2003) (same).

Usually the predicate "crime of violence" or "drug trafficking crime" will be charged in a separate count of the indictment. If so, the trial court will instruct the jury as a matter of law that the predicate offense is either a violent or drug offense after examining the appropriate state or federal statute. United States v. Credit, 95 F.3d 362 (5th Cir. 1996), cert. denied, 117 S.Ct. 1008 (1997).

c. Use. In Bailey v. United States, 516 U.S. 137 (1995), the Supreme Court held that to show "use" required evidence sufficient to show "active employment" of the firearm by the defendant." 516 U.S. at 145. The Court rejected the lower court's definition of use, as that definition was "virtually synonymous with 'possession'." Id. Proof of mere proximity and accessibility is not sufficient, although if the defendant had the firearm with him during the crime that fact would be sufficient under the "carrying" prong. Id. at 145. Many types of "use" of the firearm will sustain a conviction, such as "brandishing, displaying, or firing the firearm," Id., at 508, and trading the gun for drugs. Smith v. United States, 508 U.S. 223 (1993). The reverse of Smith, that is, accepting a firearm in payment for drugs, does not constitute "use" of the firearm under § 924 (c). United States v. Watson, 128 S.Ct. 579 (2007). It is not enough for guns and drugs to be found together. United States v. Dickey, 102 F.3d 157 (5th Cir. 1996)(guns in house where crack found not sufficient); United States v. Brown, 102 F.3d 1390 (5th Cir. 1996), cert. denied, 117 S.Ct. 1455 (1997) (guns and crack in safe insufficient); United States v. Garcia, 86 F.3d 394 (5th Cir. 1996), cert. denied, 117 S.Ct. 752 (1997)(lookout with gun in waistband insufficient). These facts may satisfy the possession element under the present version of §924(c).

The Bailey decision was fully retroactive. United States v. Fike, 82 F.3d 1315 (5th Cir. 1996), cert. denied, 117 S.Ct. 241 (1996). A defendant's guilty plea may be vacated under Bailey if he can show actual innocence of the charges. Bousley v. United States, 118 S.Ct. 1604 (1998).

d. "**Carry.**" "Carry" is defined as transporting or having within reach a firearm during and in relation to the predicate crime. United States v. Hall, 110 F.3d 1155 (5th Cir. 1997); United States v. Rivas, 85 F.3d 193, 195 (5th Cir.), cert. denied, 117 S.Ct. 593 (1996) (carry

requires showing that defendant transported firearm or that firearm was within reach). Transportation of the firearm in a locked glove compartment is sufficient to establish carrying. Muscarello v. United States, 118 S.Ct. 1911 (1998). When a vehicle is not involved, the gun must be moved in some fashion and be within reach. United States v. Wainuskis, 138 F.3d 183 (5th Cir. 1998)(affirming conviction for gun under mattress); United States v. Logan, 135 F.3d 353, 356 (5th Cir. 1998)(gun in jacket in back seat of automobile); United States v. Ramos-Rodriguez, 136 F.3d 465 (5th Cir. 1998)(in non-vehicle context carrying involves some dominion or control that is more than mere possession and requires a showing that firearm was in reach during commission of the predicate offense); see also, United States v. McPhail, 112 F.3d 197 (5th Cir. 1997)("carry" conviction reversed because defendant and drugs found in house while gun found in parked vehicle in drive-way and no evidence to show that vehicle moved); United States v. Wilson, 77 F.3d 105, 110 (5th Cir. 1996)(mere presence of guns in house where drug money stored and counted insufficient). While accepting a firearm in simultaneous payment for drugs may not constitute "use," it may support a conviction under the "carry" prong because upon receiving the gun the defendant carries it away with him. United States v. Benitez, 809 F.3d 243, 248 (5th Cir. 2015).

e. "In Relation To." In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court construed the phrase "in relation to" and held "that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." In Smith, the conviction under 924(c) stood where the defendant traded firearms for drugs. In United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998), the court held that a gun found in the defendant's wife's purse was not sufficiently related to the drug offense to satisfy the element. In Schmalzried, there was evidence that the defendant was part of a drug conspiracy whose members admitted that they relied on guns to protect their wares. The gun was placed in the wife's purse inside the couple's home before manufacturing methamphetamine in the kitchen. The majority pointed out that there was no evidence as to where the gun had been located before the defendant carried it or where the purse was when the defendant placed the gun inside. The majority chastised the defense for not recognizing the need for proof of a nexus between both the gun and the drug offense and the carrying of the gun. See also, United States v. Gobert, 139 F.3d 436 (5th Cir. 1998) (vacating conviction because the factual basis for the guilty plea stated only that the gun was in the defendant's vehicle and established no nexus between the gun and the drug offense); United States v. Mitchell, 166 F.3d 748, 756 (5th Cir. 1999) (discussing the necessary "nexus" between firearm and drug crime in the analogous, though different, circumstance of applying a sentencing guideline adjustment for possessing gun "in connection" with a drug felony).

f. "In Furtherance of Any Such Crime Possesses a Firearm." Possession of a firearm must be "in furtherance" of a crime of violence or a drug trafficking crime to be liable under § 924(c). In United States v. Ceballos-Torres, 218 F.3d 409, as amended on denial of rehearing and rehearing en banc, 226 F.3d 651 (5th Cir. 2000), the court defined "in furtherance" to mean more than the "mere presence" of the firearm; the firearm's possession must "further, advance, or help forward" the offense that is being conducted. Id. at 414. Guiding factors include: the type of drug activity taking place, the accessibility of the firearm, the type of firearm, whether it was stolen, the status of the possession (legal or illegal), whether the firearm was loaded, its proximity to drugs or drug profits, and the time and circumstances under which the gun was found. Id. These factors are supposed to help separate different types of firearm possession.

Not all possession of firearms furthers drug trafficking. The Ceballos-

Torres court cited two examples: 1) unloaded antiques mounted on a drug dealer's wall, and 2) guns used for target practice or hunting, kept locked and inaccessible. Id. at 415. The gun in Ceballos-Torres, a loaded 9mm Glock, found lying on top of the defendant's bedroom, met the "in furtherance" element, as police also found in the apartment a large sum of money, 569.8 grams of cocaine, and empty kilo wrappers. See also, United States v. Rose, 587 F.3d 695 (5th Cir. 2009)(loaded .38 under convicted felon's seat, who also had crack cocaine in his lap); United States v. Timmons, 283 F.3d 1246 (11th Cir. 2002)(two loaded semiautomatic handguns in plain view on top of a stove in a room where crack cocaine and cash was hidden possessed "in furtherance"); United States v. Yanez-Sosa, 513 F.3d 194 (5th Cir. 2008) (loaded guns found near bulk of drugs and defendant was an illegal alien). But if an unloaded gun is locked away in a safe, in an apartment where drugs and ammunition [not matching the gun] are found, the "in furtherance" element may not be satisfied. United States v. Palmer, 456 F.3d 484 (5th Cir. 2006). On plain error review, the Fifth Circuit found that trading drugs for guns qualified as "possession in furtherance" of a drug trafficking offense. United States v. Sterling, 555 F.3d 452 (5th Cir. 2009) (not reaching issue of whether trade must be contemporaneous with drug transfer as review was for plain error).

g. Multiplicity/Duplicity/Double Jeopardy. Multiple firearms do not support multiple convictions based on the same underlying conduct, even if one firearm is a normal one and another has a silencer. U.S. v. Buchanan, 70 F.3d 818, 830 (5th Cir. 1995), cert. denied, 116 S.Ct. 1340 (1996). Similarly, convictions for conspiracy to distribute narcotics and possession of the same narcotics will not support separate 924 (c) convictions where identical underlying conduct forms the basis of conviction. United States v. Privette, 947 F.2d 1259 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992); United States v. Cureton, 739 F.3d 1032 (7th Cir. 2014) (extortion and ransom request made simultaneously using firearm did not support multiple 924 (c) convictions). If multiple firearms having varying features are involved in a single criminal transaction, it may be necessary to submit a special verdict to the jury so that the firearm for which the jury found a 924(c) conviction will be clear and unanimous. United States v. Melvin, 27 F.3d 710, 714-5 (1st Cir. 1994).

Additionally, separate convictions cannot be based upon the use and carrying of a weapon during the same felony, "when the 'carrying' and 'using' arise out of the same factual occurrence." United States v. Odum, 625 F.2d 626, 629-30 (5th Cir. 1980). The Fifth Circuit has held that cumulative sentences for convictions for both a 924 (c) violation and an 18 U.S.C. 2119 (carjacking) violation based on identical facts does not violate double jeopardy. United States v. Singleton, 16 F.3d 1419 (5th Cir. 1994), cert. denied, 116 S.Ct. 324 (1995).

Multiple predicate offenses do not authorize multiple convictions for the single use of a single firearm. United States v. Phipps, 319 F.3d 177 (5th Cir. 2003). That is, the use of a single firearm or destructive device on a single occasion, during and in relation to multiple predicate offenses, can sustain only a single § 924(c) conviction. United States v. Walters, 351 F.3d 159 (5th Cir. 2003) (reversing life sentence based on "second or subsequent conviction" where both convictions stemmed from defendant's delivery of a single bomb on a single occasion that exploded and harmed federal officer and damaged a federal building).

8. Exporting Firearms Without A License: 22 USC § 2778(c)

a. Elements of Proof. To convict a defendant under this statute, the government must prove that the defendant: (1) exported or attempted to export articles; (2) that were listed on the United States Munitions List (USML) at the time of export; (3) without obtaining a license or

written approval from the State Department; (4) acting "willfully," that is, that the defendant knew such license [approval] was required for the export of the articles and intended to violate the law by exporting them without the license or approval. See, U.S. Fifth Cir. Dist. Judges Assn., Pattern Jury Instructions - Criminal Cases, No. 2.101 (West 2019) ("Pattern Jury Instructions"); United States v. Covarrubias, 94 F.3d 172 (5th Cir. 1996), United States v. Davis, 583 F.2d 190 (5th Cir. 1978). Whether an item qualifies as an item listed on the USML is an element of the offense and it violates the Sixth Amendment to not instruct the jury to make a finding in this regard. United States v. Wu, 711 F.3d 1 (1st Cir. 2013)(rejecting vagueness challenge, the court nonetheless reversed trial judge's failure to instruct jury whether particular items, in this case "phase shifters," which were technologically complex microchips, appeared on the USML).

b. Specific Intent Requirement. This is a specific intent crime requiring the government to prove that the defendant acted with knowledge that he was violating the licensing requirements. Thus, ignorance of the law is a defense and it is insufficient to show that the defendant was aware of the general unlawfulness of his conduct. United States v. Hernandez, 662 F.2d 289 (5th Cir. 1981) (guns hidden under hood of car at bridge into Mexico, though evidence of awareness of general unlawfulness of conduct, not sufficient to prove specific intent to violate known legal duty). But elaborate efforts to conceal weapons, together with statements to officers indicating knowledge that their export was illegal while denying an intent to declare them, with proof of a defendant's likely familiarity with border signs detailing the licensing requirements, will be sufficient to prove the specific intent element. United States v. Covarrubias, 94 F.3d 172 (5th Cir. 1996). Not all firearms or related items appear on the U.S. Munitions List. For example, a shotgun (not combat type) or shotgun shells are not prohibited for export, though perhaps illegal to import under Mexican law. Proof of specific intent is required because the items covered by the Munitions List are spelled out in ever-changing administrative regulations and include some items not generally known to be controlled by the government. Davis, 583 F.2d at 192-5. Proof that the defendant negligently failed to investigate these regulations does not sufficiently prove the requisite mens rea. United States v. Adames, 878 F.2d 1374, 1376 (11th Cir. 1989). A defendant must be put on notice of the necessity for obtaining and the possibility of obtaining such a license. See United States v. Markovic, 911 F.2d 613 (11th Cir. 1990) (Yugoslavian seaman who did not speak English could not be convicted of attempt to export defense articles because warnings of illegality of transaction were posted at border on signs written in English). To notify the public about the licensing requirements for the export of firearms, the U.S. Customs Service has posted signs at border crossings into Mexico that warn persons that it is illegal to export guns without a license. These signs, however, if in English, should not be relied upon to impute knowledge to a monolingual Spanish speaker. See Markovic, 911 F.2d at 615.

The Fifth Circuit continues to require this stricter scienter requirement after Bryan v. United States, 118 S.Ct. 1939 (1998). Bryan held, in a prosecution for selling firearms without a license, that the statute's "willfulness" element required only proof that the defendant knew his conduct was unlawful, not that he was aware of the licensing requirements. Although Bryan does not require strict scienter for offenses under the Firearms Owners' Protection Act, the Fifth Circuit recognizes that an offense under 22 USC § 2778 violates a "technical statute" thus requiring proof of specific intent. Fifth Circuit Pattern Jury Instruction, No. 2101, Notes (2019).

The Bryan court distinguished cases in which it has required specific knowledge of statutory provisions, saying they involved transactions that "presented

the danger of ensnaring individuals engaged in apparently innocent conduct."

The circuits remain split on the level of knowledge that a defendant must have regarding the illegality of his actions. See, United States v. Roth, F. Supp.2d 796 (E.D. Tenn. 2009)(cataloguing all circuits). In United States v. Roth, 628 F.3d 827 (6th Cir. 2011), the Sixth Circuit held that "willfulness" in § 2278 (c) meant what the Supreme Court found "willfulness" meant in Bryan, that is, knowledge that the underlying action was unlawful. See also, United States v. Bishop, 740 F.3d 927 (4th Cir. 2014) (applying Bryan to hold that the export statute required proof "only of general knowledge of illegality" and not proof that the defendant was aware of the statute's licensing requirement).

9. Dealing in Firearms Without a License: 18 U.S.C. § 922(a)(1)(A)

This law makes it unlawful for any person except a licensed dealer to engage in the business of dealing in firearms. The term "engaged in the business," as applied to a dealer in firearms, means "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business, through the repetitive purchase and resale of firearms" but does not include "a person who makes occasional sales... for the enhancement of a personal collection or for a hobby...." 18 U.S.C. § 921(a)(21). The adequacy of a defense instruction concerning the hobby exception was addressed in United States v. Palmieri, 21 F.3d 1265 (3d Cir. 1994). The required intent is that the defendant acted "willfully." 18 U.S.C. § 924(a)(1)(D). In Bryan v. United States, 118 S. Ct. 1939 (1998), the Supreme Court held that proof of "willfulness" was satisfied upon a showing that the defendant knew his conduct was unlawful, that is, that the defendant acted with "an evil meaning mind." Id. at 1947. The defendant in Bryan used "straw purchasers" of firearms, filed off the gun's serial numbers, and resold the guns on the streets of Brooklyn to street corner drug dealers. The government was not required to show that the defendant was aware of the law's licensing requirements. The penalty for violating this law is up to 5 years in prison. 18 U.S.C. § 924(a)(2).

10. Possession of Firearm with Removed, Altered, or Obliterated Serial Number: 18 USC § 922 (k)

The government must prove that a defendant: 1) knowingly possessed a firearm, and 2) knew that the serial number was removed, altered, or obliterated, in order to obtain a conviction under this section. United States v. Hooker, 997 U.S. 67, 72 (5th Cir. 1993); accord United States v. Abernathy, 83 F.3d 17 (1st Cir. 1996). The serial number does not need to be unreadable to violate the statute. In United States v. Adams, 305 F.3d 30 (1st Cir. 2002), the defendant was convicted of possessing a firearm with an "altered" number after he admitted that he attempted to scratch it out. The First Circuit affirmed a jury instruction that defined "to alter" as "to make some change in the appearance of the serial number" because the plain language of the statute required "any change that makes the serial number appreciably more difficult to discern." Id. at 30, 34. See also, United States v. Perez, 585 F.3d 880 (5th Cir. 2009)(photograph of firearm which showed that "somebody ... tried to file off the serial number" was enough to sustain finding that serial number was "altered" for purposes of guideline adjustment).

The government still must establish that the defendant knew of the alteration. In United States v. Johnson, 381 F.3d 506 (5th Cir. 2005) the Fifth Circuit found the evidence insufficient to support the conviction, even though the evidence may have shown that the defendant observed scratches on the receiver of the gun when he handed it to another person. The court found that "generalized suspicion" that the serial number may have been tampered with was a "far cry from specific knowledge of actual obliteration." Id.

The penalty for violating this

subsection is not more than five years custody. 18 USC § 924 (a)(1)(B). It thus serves to provide a useful charge bargain alternative to a guilty plea under 18 USC § 922 (g), which carries a ten-year maximum sentence, or if enhanced under § 924 (e), carries between 15 years to Life imprisonment.

11. False Statement to Firearms Dealer: 18 USC § 922(a)(6)

Title 18, United States Code, Section 922(a)(6) and its penalty provision, 924(a)(2), make it a crime for anyone to make a false statement to a firearms dealer in order to buy a firearm. The government must prove 1) that the defendant made a false statement while acquiring a firearm from a licensed dealer, 2) that the defendant knew the statement was false, and 3) that the statement was intended or was likely to deceive about a material fact. Abramski v. United States, 134 S.Ct. 2259 (2014).

To be material, the false statement need not impact on the lawfulness of the sale. Id. A straw buyer who lies about the identity of the true buyer violates the law even though the true buyer was eligible to own a firearm. Id. The false statement must be made "knowingly." United States v. Bowling, 770 F.3d 1168 (7th Cir. 2014)(reversible error for trial court to exclude evidence relevant to defendant's possible mistake of fact defense). So a defendant who was unaware of his status as a "convicted felon" or of being "under indictment" may use his mistake as a defense. The plain language of § 922(a)(6) permits the Government to carry its burden of proof with respect to the third element in either of two ways. It may prove that a defendant's statement was intended to deceive the dealer or that the statement was likely to deceive the dealer. See, United States v. Harrelson, 705 F.2d 733, 736 (5th Cir.1983) (noting that § 922(a)(6) is a disjunctive statute). The "intended to deceive" prong focuses on the subjective mental state of the defendant, so the defendant must have intended deception of the dealer in order for the Government to obtain a conviction under this prong. United States v. Brebner, 951 F.2d 1017, 1028 (9th Cir.1991). Under the "likely to deceive" prong, the intent of the defendant to deceive the dealer is irrelevant; this clause focuses on the statement itself and whether it was likely to cause deception of the dealer. The indictment controls what deception the government must prove. United States v. Guerrero, 234 F.3d 259 (5th Cir. 2000). If the indictment does not allege that the statement was *intended* to deceive the firearms dealer, the government must prove that the statement was *likely* to deceive the dealer. Id.; see also United States v. Adams, 778 F.2d 1117, 1124-25 (5th Cir. 1985) (holding that because indictment alleged defendant lied about his name, it was reversible error for the court to allow evidence of, and charge the jury on, the defendant's misrepresentations as to his address); United States v. Robles-Vertiz, 155 F.3d 725, 728 (5th Cir. 1998) (government may not obtain indictment alleging certain material facts of crime then seek a conviction based upon a different set of facts). One may consider a challenge to the government's proof with regard to whether the person with whom the defendant dealt was a "licensed dealer." See United States v. Billue, 994 F.2d 1562, 1569 (11th Cir. 1993) (noting that pawn shop clerk who made representations to defendant was not the "licensed firearm dealer" in context of reviewing availability of entrapment by estoppel defense). The fact that a dealer processes the form and accepts a deposit is enough to establish that the statement deceived the dealer. Guerrero, 234 F.3d at 262. The maximum penalty for a violation of this law is 10 years imprisonment. 18 U.S.C. § 924 (a)(2).

12. Unlawful Sale or Disposition of Firearm: 18 USC § 922(d)

This law criminalizes knowingly selling or otherwise disposing of a firearm to a prohibited person (e.g., a convicted felon) when the seller knows or has reasonable cause to believe that such a person is a member of a prohibited category of persons. See, United States v. Murray, 988 F.2d 518, 521 (5th Cir. 1993)(discussing quantum of proof relating to sellers knowledge of buyers prohibited status). A principle's knowledge concerning the prohibited status of the firearm's recipient cannot supply the necessary mental state to a party to the crime. Id. That is, one person's knowledge is not imputed, without evidence, to another party. Thus, the Murray court held the evidence insufficient to show that the defendant knew that his associate was selling the firearm to a felon. Upon conviction, a defendant faces a maximum punishment of 10 years imprisonment. 18 U.S.C. § 924 (a)(2).

13. Receiving or Possessing Unregistered Firearms: 26 USC § 5861(d)

Title 26, United States Code, Section 5861 (d), makes it a crime for anyone knowingly to possess certain kinds of unregistered firearms. The firearms are defined by 26 U.S.C. § 5845 and include: (1) a shotgun having a barrel length less than 18 inches, (2) a weapon made from a shot-gun if the overall length was modified to less than 26 inches; (3) a rifle having a barrel less than 16 inches in length; (4) a rifle modified to an overall length of less than 26 inches; (5) a machine gun; (6) a silencer; and (8) a destructive device. The law requires no specific intent or knowledge that a firearm is unregistered. United States v. Greed, 401 U.S. 601 (1971), rehearing denied, 403 U.S. 912 (1971). The government must prove, however, that the defendant knew of the features or characteristics of the firearm that are within the definition at 26 U.S.C. § 5845. Staples v. United States, 511 U.S. 600 (1994); United States v. Reyna, 130 F.3d 104 (5th Cir. 1997); United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989)(en banc)(reversing previous circuit law of United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973) cert. denied, 414 U.S. 836 (1973). The jury must be instructed that it must find the defendant knew what he possessed. United States v. Mains, 33 F.3d 1222, 1229 (10th Cir. 1994); United States v. Edwards, 90 F.3d 199 (7th Cir. 1996). It is not necessary for the government to establish that the defendant specifically knew that the weapon was a "firearm" defined in the National Firearms Act, if the characteristics of the weapon itself, e.g., a sawed of shotgun, make the weapon "quasi-suspect." United States v. Barr, 32 F.3d 1320 (8th Cir. 1994). One is criminally responsible, even if the act of registering the firearm is impossible to do. United States v. Thomas, 15 F.3d 381 (5th Cir. 1994) cert. denied, 115 S.Ct. 1798 (1995). The government must prove that the firearm at issue can be operated or readily restored to operating condition. See, United States v. Woods, 560 F.2d 660 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

B. SELECTED PENALTY PROVISIONS

1. Armed Career Criminals: 18 USC § 924 (e).

a. Elements of Enhancement. The Armed Career Criminal Act (ACCA) provides for a penalty enhancer, not a separate crime; attendant 6th Amendment rights to indictment and trial by jury do not apply. United States v. Santiago, 268 F.3d 151 (2d Cir. 2001) (whether prior convictions were for offenses committed on different occasions, as required under § 924 (e), was properly left for trial judge, falling squarely under the "prior conviction" exception of Apprendi); United States v. Stone, 306 F.3d 241 (5th Cir. 2002) (jury finding not required for enhancement under Apprendi).

Importantly, the government

need not allege the predicate prior offenses or cite to the statute in the indictment in order to trigger its application at sentencing. United States v. Tracy, 36 F.3d 187 (1st Cir. 1994); United States v. Alvarez, 972 F.2d 1000, 1006 (9th Cir.1992) (rejecting argument that "district court erred in considering three prior convictions not listed in the indictment, and for which the government did not file [a] written notice of intention to use prior to trial") cert. denied, 113 S.Ct. 1427 (1993); United States v. Williams, 950 F.3d 328 (5th Cir. 2020)(§924 (e) need not be cited in indictment under plain language of statute)

Section 924(e) applies to persons convicted under 18 U.S.C. § 922(g) who have suffered three previous convictions for a "violent felony" or a "serious drug offense" committed on occasions different than one another. To enhance a sentence under § 924(e) the trial court must have before it either 1) proper copies of the statutes under which the defendant was previously convicted or 2) the indictment and the jury instructions under which the defendant was previously convicted. United States v. Martinez-Cortez, 988 F.2d 1408, 1412 (5th Cir. 1993) (statement in PSR was inadequate proof of prior burglary offered to enhance sentence but sentencing court's error was not plain error).

Once the government establishes the fact of a prior conviction, the defendant must prove the invalidity of the conviction by a preponderance of the evidence. United States v. Barlow, 17 F.3d 85 (5th Cir. 1994).

The categorical approach applies to see if the prior conviction qualifies as either a serious drug offense or a violent felony. Mathis v. United States,136 S. Ct. 2243, 2248 (2016). The categorical approach compares statutory elements without regard to the underlying facts or charged conduct. Id.; Taylor v. United States, 110 S.Ct. 2143 (1990) (Missouri qualified as generic "burglary). The statutory elements, not the underlying facts, decide the question. "Elements' are the 'constituent parts' of a crime's legal definition – the thins the 'prosecution must prove to sustain a conviction." Mathis, 136 S. Ct. at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). "[T]he prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." Id. at 2247. The "generic offense" is "the offense as commonly understood," provided in the ACCA. Id. "[I]f the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA [predicate] – even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." Id. at 2248.

Divisible statutes complicate the analysis. Such statutes may be violated in ways that do and do not meet the definition-hence the term "divisible." Descamps v. United States, 133 S.Ct. 2276 (2013). A "divisible statute" sets out one or more of the elements of the offense in the alternative. For example, a statute that sets out that a burglary involves entry into a building *or* a vehicle *or* a boat would be divisible. If the statute is divisible, the "modified categorical approach" pares the statute to the section that was violated. Paring elements down may be done with a jury charge or indictment. Id.

Courts cannot apply the modified categorical approach to statutes that are indivisible. Indivisible statutes do not set forth the elements in the alternative and cannot be divided up into violations that do and do not meet the definition. Id.

An example of an indivisible statute can be seen in Descamps. In Descamps, the Supreme Court found that California's burglary statute defined burglary more broadly than generic burglary as it did not require an unlawful entry, a defining feature of "burglary," as an element or alternative element. To be clear, California "burglary" was not a "burglary" under the ACCA because a finding of an "unlawful entry" was not required for conviction.

Additionally, when a court interprets the statute, it will be guided by the state or federal law as it existed at the time of the conviction. The Supreme Court has held

that "[t]he only way to answer the[e] backward-looking question" of whether a defendant's prior conviction is a qualifying predicate under the ACCA "is to consult the law that applied at the time of conviction." McNeill v. United States, 131 S. Ct. 2218 (2011); United States v. Vickers, ___ F.3d __, 2020 WL 4218304 (5th Cir., 7/23/20)(refusing to apply precedent from 2007, which overruled 20 years of precedent to hold that 1977 felony murder conviction did not require a culpable mental state as needed for violent felony to qualify under force clause).

In guilty plea cases, the sentencing court is limited to considering the statutory definition of the crime, the charging document, the written plea agreement, the transcript of the plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented when paring down the statute. Shepard v. United States, 125 S.Ct. 1254 (2005). Police reports or complaint applications do not supply an adequate basis to determine the character of the conviction. Id.

b. Serious Drug Offense. Under the ACCA, a "serious drug offense" can be predicated upon either a federal or state drug trafficking conviction. The definitions for each type of conviction vary. A federal conviction must be for an "offense under the Controlled Substances Act ... for which a maximum term of ten years or more is prescribed by law. 18 U.S.C. § 924 (e)(2)(A). A state conviction must be for a felony "involving the manufacture, distribution, or possession with intent to distribute of a controlled substance, for which the penalty upon conviction is ten years or more."

In Shular v. United States, 140 S. Ct. 779 (2020), the Court used a different categorical methodology to determine whether a Florida drug conviction qualified as a serious drug felony than used to determine a violent felony. Relying upon the text of the definition, Shuler held that instead of comparing elements to generic offenses, courts were required to determine whether the offense's elements necessarily entailed one of the types of conduct identified in § 924 (e)(2)(A)(ii). The Court distinguished the violent felony definition as focused upon elements rather than conduct. That is, Congress chose in the ACCA to punish all offenders who engaged in specified conduct, rather than all who committed certain generic offenses. The Florida statute at issue in Shuler did not require the state to prove a defendant knew the substance was illicit, although the defendant could raise unawareness as an affirmative defense, which would require a finding of knowledge. Given the conduct-based approach, this elemental deficiency was inconsequential. In United States v. Prentiss, 956 F.3d 295 (5th Cir. 2020), the Fifth Circuit applied Shuler to a Texas conviction for possession with intent to distribute a controlled substance and found it qualified as a serious drug offense.

The ACCA test for a "serious drug offense" is broader than the Sentencing Guidelines test for a "controlled substance offense," terms which if met lead to enhanced penalties. See, United States v. Vicker, 540 F.3d 356 (5th Cir. 2008) (not error to treat Texas delivery conviction as serious drug offense even though same conviction may not qualify under Guidelines to enhance sentence). The word "involving," a broad term, brings many drug convictions within the statute's reach. For example, "attempted possession" of a controlled substance qualifies. United States v. Winbush, 407 F.3d 703 (5th Cir. 2005) (Louisiana conviction for attempted possession). As does conspiracy to commit a drug offense. United States v. McKenney, 450 F.3d 39 (1st Cir. 2006) (citing Winbush and the "closely analogous crime of 'attempt'"). The conviction must still require an element of drug trafficking, regardless of the how the statute is labeled. United States v. Brandon, 247 F.3d 186 (4th Cir. 2001) (concluding state conviction for possessing 28 grams or more of cocaine was not "serious drug offense" notwithstanding fact that law denoted crime as "trafficking" offense, because amount of cocaine alleged was consistent with personal use).

The ten-year penalty threshold

can be met by reference to potential sentence enhancements that, though available at the time of conviction, were not pursued against the defendant. United States v. Rodriquez, 128 S.Ct. 1783 (2008). This means that the penalty range is gauged by a potential punishment range, not an actually realized punishment range. Moreover, subsequent changes in the law that reduce the statutory maximum to below the threshold amount will not alter whether the conviction meets the "serious drug offense" definition. McNeill v. United States, 131 S. Ct. 2218 (2011). Federal courts focus on the sentence that was available at the time the sentence was imposed. Id.; see also, United States v.Hinojosa, 349 F.3d 200 (5th Cir. 2003)(although Texas lowered statutory maximum from 99 years to two, the change was not made retroactive and conviction still qualified).

c. Violent Felony. Section 924(e)(2)(B) of Title 18 defines the phrase "violent felony" as "[a]ny crime punishable for a term exceeding one year, or act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable for such term if committed by an adult that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

In Johnson v. United States, 135 S.Ct. 2551 (2015), the Supreme Court held that the residual clause to the definition ("otherwise involves conduct…") violated the Constitution's guarantee of due process as the phrase was too vague to apply with rational consistency. This means that to qualify the conviction must satisfy the "force" elements test or fit as an enumerated crime.

"Punishable" means that the penalty range available for the conviction exceeded one year, even if the court exercised discretion under an alternative sentencing scheme and sentenced the defendant to a sentence of imprisonment of one year or less. United States v. Miles, 749 F.3d 485 (2d Cir.) cert. denied, 135 S.Ct. 381 (2014)(New York 3d degree robbery conviction qualified as violent felony); United States v. Kerr, 737 F.3d 33 (4th Cir. 2013)(sentencing court's exercise of discretion to impose lesser term of imprisonment does not change the nature of the conviction).

"Juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment" exceeding a year, that also includes either the "force" elements or fits the enumerated crimes, will qualify as a violent felony. 18 USC § 924 (e) (2)(B). The categorical approach requires that the elements of conviction include the use of a firearm, knife, or destructive device. In United States v. Flores, 922 F.3d 681 (5th Cir. 2019) the Fifth Circuit held that a juvenile aggravated assault with a firearm conviction did not count as a violent felony because the Texas aggravated assault statute did not categorically require the use or carrying of a firearm, knife, or destructive device. Allegations in the indictment, under the categorical approach, could not replace the need for elements to match.

Juvenile convictions may raise due process issues if procedural safeguards were lacking. United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001) (holding juvenile adjudication that did not provide for jury trial right could not serve as prior conviction to enhance sentence under Apprendi). But see, United States v. Smalley, 294 F.3d 1030 (8th Cir. 2003)(defendant's juvenile adjudications properly "prior convictions" under ACCA even though procedural protections differed from adult convictions); United States v. Burge, 407 F.3d 1183 (11th Cir. 2005) (same); United States v. Jones, 332 F.3d 688 (3d Cir. 2003) (same).

The force elements clause in subpart (i) treats as violent felonies those crimes that have as an essential element the "use, attempted use, or threatened use of physical force against the person of another." 18

U.S.C. § 924 (e)(2)(B)(i). "Force" means "violent force – *i.e.*, force capable of causing physical pain or injury to another person." Johnson v. United States, 130 S. Ct. 1265 (2010). In Stokeling v. United States, 139 S. Ct. 544 (2019) the Supreme Court held that force "sufficient to overcome a victim's resistance" qualified.

A crime does not meet this requirement unless its elements require force. United States v. Stapleton, 440 F.3d 700 (5th Cir. 2006)(conviction of La. crime of false imprisonment while armed with a dangerous weapon failed force test, but met the now invalidated residual clause test); United States v. Montgomery, 402 F.3d 482, 486 (5th Cir. 2005)(holding Texas retaliation conviction was not violent felony as it proscribe range of conduct that covered more crimes than those resulting from the direction of physical force against another's person); United States v. Carreon, No. 16-11239 (5th Cir. May 6, 2020)(federal kidnapping did not require use of force so not a crime of violence predicate for § 924 (c) purposes); United States v. Young, 809 Fed. Appx 203 (5th Cir. 2020)(Louisana conviction for aggravated assault with a firearm could be violated by negligent conduct and thus did not qualify as violent felony).

Section 16 (a) of Title 18, which sets forth the federal definition for a crime of violence, tracks the force elements clause language, so decisions interpreting that statute provide guidance. In Leocal v. Ashcroft, 125 S.Ct. 377 (2004), the Supreme Court held that a conviction for causing bodily injury while driving intoxicated did not qualify as "use of force" under § 16 (a) because a conviction could be achieved with proof of negligent rather than intentional conduct. Many circuits have applied Leocal's distinction between accidental or negligent conduct and intentional conduct in the force clause analysis. See, United States v. Simmons, 917 F.3d 312, 321 (4th Cir. 2019), as amended (Mar. 6, 2019)(concluding that any of the forms of North Carolina assault may be established with negligence and therefore lack the requisite "use" of force under Leocal."); United States v. Bong, 913 F.3d 1252, 1260-61 (10th Cir. 2019)(noting that "[t]he term 'use,' as employed in the ACCA's [force] clause, requires active employment rather than negligent or merely accidental conduct [under Leocal]; United States v. Vasquez-Gonzalez, 901 F.3d 1060, 1066-67 (9th Cir. 2018)(noting that Leocal held that § 16 (a) covers crimes with a higher level of intent than negligence or accident).

A reckless state of mind was found to be enough to show "use" of force in United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc). Reyes-Contreras overruled a long line of cases. Reyes-Contreras held there to be no distinction between direct or indirect force. Both direct force (using destructive violent force against someone) and indirect force (causing bodily injury through action that are not themselves violent) constitutes "physical force." Reyes-Contreras 910 F.3d at 181-182. Reyes-Contreras also held that causing injury necessarily involved the use of physical force. Id. at 183-184. Moreover, Reyes-Contreras overruled cases that previously required bodily contact to show physical force, finding now that a risk of injury was enough to implicate force.

After Reyes-Contreras, an offense satisfies the force clause "if the proscribed conduct (1) is committed intentionally, knowingly, or recklessly; and (2) employs a force capable of causing physical pain or injury; (3) against the person of another." Id. at 185. Reyes-Contreras fundamentally changed the crime of violence analysis in elements clause cases, taking what the opinion described to be a "more realistic approach" that "comports with reason and common sense." Reyes-Contreras, 910 F.3d at 186.

What follows are examples of crimes that fit the elements clause definition of subpart (i). United States v. Williams, 950 F.3d 328 (5th Cir. 2020)(Mississippi robbery conviction that required placing someone "in fear of imminent injury" qualified); United States v. James, 950 F.3d 289 (5th

Cir. 2020)(Louisiana armed robbery qualified as it required "use of force in overcoming the will or resistance of victim"); Stokeling v. United States, 139 S.Ct. 544 (2019)(Florida robbery qualified as force needed be sufficient to "overcome a victim's resistance); United States v. Griffin, 946 F.3d 173 (5th Cir. 2020)(Mississippi aggravated assault, a divisible statute, qualified as it required at minimum recklessly "causing bodily injury"); United States v. Torres, 923 F.3d 420 (5th Cir. 2019)(modified categorical approach used to find Texas conviction for aggravated assault family violence, a knowing threat to another of imminent bodily injury is the same as knowingly threatening to employ a force capable of causing physical pain or injury); United States v. Burris, 908 F.3d 152 (5th Cir. 2019)(Texas robbery by injury conviction categorically required the use of physical force, and robbery by threat required the attempted use or threatened use of physical force); United States v. Butler, 949 F.3d 230 (5th Cir. 2020) (federal bank robbery in violation of 18 USC § 2113 (a), a divisible statute defining bank robbery and bank burglary, qualified under robbery prong as it required taking bank property by force and intimidation). United States v. Vickers, 2020 WL 4218304 (5th Cir. 7/23/20)(1977 Texas felony murder qualified as statute required at least reckless intent, though as interpreted in 2007 not to require culpable state of mind may not qualify to post 2007 convictions).

The ACCA also enumerates crimes as violent felonies in subpart (ii) - "burglary, arson, or extortion, or [crimes that] involve [] the use of explosives…. To qualify, the crime must be a generic fit.

The most common enumerated violent felony is "burglary." In Taylor, the Supreme Court decided that "burglary" for purposes of the ACCA was "any crime having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599, 110 S. Ct. at 2158. In United States v. Stitt, 139 S. Ct. 399 (2018), the Supreme Court held that a Tennessee statute that applied to vehicles or structures designed or adapted for overnight accommodation by persons qualified as generic burglary. Moreover, in Quarles v. United States, 139 S.Ct. 1872 (2019), the Supreme Court held that generic burglary occurs "if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure." Stitt and Quarles analyzed a burglary statute like Texas's. To be sure, a Texas burglary conviction qualifies as a violent felony. United States v. Herrold, 941 F.3d 173 (5th Cir. 2019) (en banc).

Other state burglary statutes do not qualify as generic burglary. In Descamps, cited above, the Supreme Court held that a California burglary, as a matter of law, cannot qualify as a violent felony under the ACCA because it did not require an unprivileged entry. Similarly, because Michigan burglary does not require proof of an unprivileged entry it cannot qualify as a violent felony. See, United States v. Throneburg, 921 F.2d 654 (6th Cir. 1990)(violation of Mich.Comp.Laws § 750.111 (1979) does not require unprivileged entry).

Some state burglary statutes make it unlawful to enter non-structures. Counsel must determine if they are divisible statutes to determine if the modified categorical approach can be used to qualify the conviction as for generic burglary. See, United States v. Jones, 743 F.3d 826 (11th Cir. 2014)(under plain error review, conviction for violating Alabama's third degree burglary statute, Ala. Code § 13A-7-7, could not qualify as violent felony as statute was non-generic and indivisible, allowing conviction for breaking into non-structures); United States v. Howard, 742 F.3d 1334 (11th Cir. 2014)(same). "Breaking and entering" statutes may be tantamount to "burglary" and a conviction may thus qualify as one for a violent felony. United States v. Thompson, 588 F.3d 197 (4th Cir. 2009).

d. On Occasions Different. The different occasion inquiry by necessity must delve into the facts underlying the

convictions rather than the categorical nature of the convictions themselves. Alleyne, which extended the Apprendi doctrine to mandatory minimum sentences, did not alter the Almendarez-Torres rule, which makes an exception from Apprendi "the fact of a prior conviction." United States v. Blair, 734 F.3d 218 (3d Cir. 2013). (The parties in Alleyne did not contest the "vitality" of Almendarez-Torres so the Court expressly declined to alter the way it has been applied to remove prior convictions. Alleyne, 133 S.Ct. at 2160.)

Yet the Almendarez-Torres exception as used in this context extends beyond the mere fact of a prior conviction. Nonetheless, the fact of crimes on different occasions has been found by courts to be inherent in the record of the prior conviction. United States v. Thompson, 421 F.3d 278 (4th Cir. 2005). Courts have rejected the argument that the fact of separate occurrence qualifies as an element which under the Sixth Amendment must be found beyond a reasonable doubt by a jury. United States v. White, 465 F.3d 250 (5th Cir.) cert. denied, 127 S.Ct. 1167 (2006).

Shepard approved documents are used to make this finding, including: "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." United States v. Fuller, 453 F.3d 274 (5th Cir. 2006) (quoting, Shepard v. United States, 125 S.Ct. 1254 (2005)). Courts may also rely on a defendant's characterization of his prior convictions, as felonies, or as being for separate offenses. United States v. Jenkins, 487 F.3d 279 (5th Cir. 2007). To determine whether the predicate convictions occurred on different occasions, the Fifth Circuit calls for an examination of the underlying conduct, not the date of conviction or how the offenses were charged. United States v Kimball, 15 F.3d 54, 56 (5th Cir. 1994), cert. denied, 513 U.S. 999 (1994).

"Convictions occur on occasions different from on another 'if each of the prior convictions arose out of a *separate and distinct criminal* episode.'" United States v. Letterlough, 63 F.3d 332, 334 (4th Cir. 1995)(quoting, United States v. Hudspeth, 42 F.3d 1015, 1019 (7th Cir. 1994) (en banc) (collecting cases) (emphasis in original) (citations omitted), cert. denied, 115 S. Ct. 252 (1995). The Fifth Circuit frames the inquiry as "whether the crimes occurred simultaneously or sequentially." United States v. Ressler, 54 F.3d 257, 259 (5th Cir. 1995) (adopting test in United States v. Hudspeth, 42 F.3d 1015 (7th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 2252 (1995)). This test asks if the first crime was concluded before the second crime began. As noted in United States v. Pope, 132 F.3d 684, 692 (11th Cir. 1998), the courts of appeal are "virtually unanimous" in stating that "the 'successful' completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA." Id.

The government bears the burden of showing the crimes occurred on different occasions. Some ambiguity or possible overlap due to the "on or about" date alleged does not make the crimes concurrent. United States v. Bookman, 263 Fed. Appx. 398 (5th Cir. 2008). In contrast, other types of information may be inadequate to establish different occurrences of crime. For example, in United States v. Fuller, 453 F.3d 274 (5th Cir. 2006), the defendant testified that he and an accomplice broke into two trailers at the same time. The district court found that Fuller was not credible and that the burglaries occurred, at least, minutes apart. On appeal, Fuller argued that nothing supported the district court's determination that the burglaries occurred on different occasions. The Shepard approved documents only listed Fuller as the

defendant. Because under Texas law a jury could have convicted Fuller under the law of parties the Fifth Circuit held that it could not determine as a matter of law that the burglaries occurred on different occasions, and the evidence was insufficient to sustain the enhancement. Fuller, 453 F.3d at 279-280. See also, United States v. Young, 809 Fed. Appx. 203 (5th Cir. 2020) (indictments allegation that drug sales occurred on same date insufficient to establish that they occurred on different occasions).

The Fifth Circuit has put the onus on the defendant in unpublished opinions to rebut the government's separateness showing. See, Young, 809 Fed. Appx. at 211 (listing cases). In Young, however, the Fifth Circuit observed that this "burden shifting approach" in a post-Shepard context was "no longer tenable." Id., citing, Kirkland v. United States, 687 F.3d 878, 888-95 (7th Cir. 2012). See also, United States v. Barbour, 750 F.3d 535, 543-46 (6th Cir. 2014) ("We are convinced that placing the burden on the government [for the purpose of a separate-offense inquiry] is the view shared by all our sister circuits that have addressed the issue[.]" (collecting cases).

Courts recognize many factors to determine when one or more convictions constitute a separate and distinct criminal episode under the ACCA. These include: (1) common geographic location; United States v.McElyea, 158 F.3d 1016, 1021 (9th Cir. 1999) (two burglaries occurred on same occasion as identical crime took place at same location, a strip mall, where defendant and accomplice broke into store then chopped hole in wall between store they entered and adjoining store, removing items from both); (2) shared identity of crime; United States v. Thomas, 211 F.3d 316, 321 (6th Cir. 2000) (sexual assault of two women occurred on same occasion as crime started when men entered vehicle they occupied and ended when they exited same vehicle); (3) presence of multiple victims; United States v. Ressler, 54 F.3d 257, 260 (5th Cir. 1995) (breaking into home then assaulting neighbor during flight constituted different occasions); (4) multiple criminal objectives; United States v. Hamell, 3 F.3d 1187, 1191 (8th Cir. 1993) (finding defendant's motivation for perpetrating two assaults – stabbing one person as a result of an argument, and then, 25 minutes later, shooting another who called police – to be relevant consideration).

The convictions must be "prior" convictions. The conviction must occur before the felon in possession violation, not simply prior to conviction or sentencing for that violation. United States v. Richardson, 166 F.3d 1360 (11th Cir. 1999); United States v. Talley, 16 F.3d 972 (8th Cir. 1994); United States v. Balascsak, 873 F.2d 673, 679 (3d Cir. 1989).

e. Attacking Prior Convictions. As with the felon status element under §922(g), the prior convictions under this section can be challenged if they have been expunged or set aside, if the defendant has been pardoned, or if his civil rights have been restored by the convicting jurisdiction. 18 U.S.C. § 921(a)(20). Convictions cannot be challenged on the ground that they are too ancient. United States v. Blankenship, 923 F.2d 1110 (5th Cir. 1991), cert. denied, 500 U.S. 954 (1991).

Priors convictions are virtually impossible to invalidate. In Custis v. United States, 114 S.Ct. 1732 (1994), the Supreme Court held that, except for convictions obtained in complete derogation of the Sixth Amendment right to counsel, prior convictions may not be attacked in a sentencing proceeding in which they are used to enhance a federal defendant's sentence under the ACCA. Custis held that the ACCA did not authorize challenges to predicate priors and that the Constitution did not require such challenges. The Custis court, near the end of its opinion, wrote: "We recognize, however ... that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his

state sentence in Maryland [where they were obtained] or through federal habeas review. (Citation omitted) If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application." Custis, 114 S.Ct. at 1749.

The sequel to Custis occurred in Daniels v. United States, 121 S.Ct. 1578 (2001). In Daniels, the defendant was sentenced under the ACCA and unsuccessfully appealed his sentence. After losing on direct appeal, the defendant filed a § 2255 petition in which he alleged that his convictions were unconstitutional. He argued that the guilty pleas underlying them were not knowing and voluntary and that one of the convictions was tainted by ineffective assistance of counsel. The Supreme Court, extending the "interest in finality" rationale of Custis, held that: (1) with the sole exception of convictions obtained in violation of the right to counsel, a motion to vacate, set aside, or correct sentence filed under 28 U.S.C. §§ 2254 or 2255 is not the appropriate vehicle for determining whether a conviction later used to enhance a federal sentence under ACCA was unconstitutionally obtained, and (2) if a prior conviction used to enhance a federal sentence under the ACCA is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available or because the defendant did so unsuccessfully, then the defendant is without recourse and may not collaterally attack his prior conviction through a federal habeas motion to vacate, set aside, or correct the sentence. Id.; see also, United States v. Clark, 284 F.3d 563 (5th Cir. 2002) (exception not available to a prisoner who never attempted any attack on his state convictions until four years after his federal sentence was imposed, where basis for attack was insufficiency of evidence, a claim that was "necessarily knowable" to the defendant).

Statutory deadlines must be met to attack prior convictions. The one-year limitations period for filing a § 2255 motion begins to run when the petitioner receives notice of the order vacating the prior state conviction that was used to enhance the federal sentence, but the petitioner must employ due diligence in state court after entry of the judgment in the federal case in which the sentence was enhanced to be timely. See, Johnson v. United States, 125 S.Ct. 1571 (2005) (§ 2255 motion untimely because petitioner failed to show due diligence in state court by waiting 3 years to seek relief after entry of federal judgment).

2. Carry or Use of Firearm During Violent or Drug Crimes: 18 USC § 924(c)

a. Minimum Sentence Requirement. Section 924(c) requires a consecutive sentence of "*not less than* five years" for "any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." The law punishes anyone "who, in furtherance of any such crime, *possesses* a firearm" to a minimum five-year sentence. § If a firearm is *brandished*, the mandatory minimum sentence increases to seven years, and if the firearm is *discharged*, the mandatory minimum sentence goes up to ten years.

Minimum penalties also vary depending on the type of firearm involved. 18 U.S.C. § 924(c)(1)(B). A ten-year minimum results if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon. The minimum sentence jumps to 30 years if the item possessed is a machine gun or a destructive device or is equipped with a firearm silencer or firearm muffler. 18 U.S.C. § 924(c)(1)(B)(ii).

The facts necessary to establish the mandatory minimum must be charged and proven to a jury beyond a reasonable doubt. Alleyne v. United States, 133 S. Ct. 2151 (2013); United States v.

Obrien, 130 S. Ct. 2169 (2010) (use of a machine gun was an element of the offense). The statute's silence concerning the maximum penalty available implicitly authorizes a life sentence. United States v. Sias, 227 F.3d 244 (5th Cir. 2000); United States v. Fields, 923 F.2d (5th Cir. 1991); United States v. Brame, 997 F.2d 1426 (11th Cir. 1993).

b. Consecutive Sentence Requirement. The statute compels a consecutive sentence "except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law...." 18 U.S.C. § 924 (c)(1)(A). The statute prohibits probation. 18 USC § 924 (c)(1)(D)(i). It also bars running any sentence concurrently with another sentence. 18 USC § 924 (c)(1)(D)(ii).

The Supreme Court construed this exception very narrowly in Abbot v. United States, 131 S.Ct. 18 (2010). The Supreme Court held that defendants were subject to consecutive sentences for possessing firearms in furtherance of drug trafficking despite higher minimum sentences for separate counts of drug offenses that were not proscribed by § 924 (c). That is, § 924 (c) sentences run consecutive to all other sentences except greater mandatory minimums imposed under § 924(c). The consecutive sentence requirement applies to state as well as federal prison terms. United States v. Gonzalez, 117 S. Ct. 1032 (1997).

Courts remain free to shorten the sentences for none § 924 (c) predicate counts to avoid unnecessarily long terms of imprisonment. Dean v. United States, 137 S. Ct. 1170 (2017). Dean found this approach consistent with the "parsimony principle" in the sentencing factors statute that gives the broad command that instructs courts to "impose a sentence sufficient but not greater than necessary, to comply with" the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. See, 18 USC § 3553 (a).

c. Repeat or Multiple Violations. Effective December 21, 2018, the First Step Act (FSA) made major changes to the way courts punish repeat § 924 (c) violations. The FSA did not make these changes retroactive. United States v. Gomez, 960 F.3d 173 (5th Cir. 2020). Therefore, the reforms to § 924 (c) apply to persons sentence on or after December 21, 2018, and does not help those on direct appeal. Id.

In the case of a violation of § 924 (c) that occurs after a prior conviction for § 924 (c) became final, the term of imprisonment shall be not less than 25 years. 18 USC § 924 (c)(1)(C)(i). This jumps to life if the firearm involved is a machinegun or a destructive device or is equipped with a silencer or muffler. 18 USC § 924 (c)(1)(ii). The person must be a true "repeat offender" with a prior final § 924 (c) conviction to get the 25-year or life statutory minimum. Gone are the days of consecutive 25-year sentences from multiple § 924 (c) convictions arising out of a single jury trial.

Multiple § 924 (c) convictions simply require consecutive sentences be imposed for each one. 18 USC § 924 (c)(1)(D)(ii). For example, if a defendant is charged and convicted of three 924 (c)s in the same case, a minimum sentence of (5+5+5) 15 years will be required.

The use of a single firearm or destructive device on a single occasion, during and in relation to multiple predicate offenses, supports only a single § 924(c) conviction. United States v. Walters, 351 F.3d 159 (5th Cir. 2003) (reversing life sentence based on "second or subsequent conviction" where both convictions stemmed from defendant's delivery of a single bomb on a single occasion that exploded and harmed federal officer and damaged a federal building). See also, United States v. Phipps, 319 F.3d 177 (5th Cir. 2003) (conviction for carjacking and kidnapping arising from single use of firearm to abduct woman could only support one § 924 (c) conviction – "language allows for only as many counts as there are uses of the firearm").

IV. IMMIGRATION

A. COMMON IMMIGRATION OFFENSES

1. Illegal Reentry After Removal: 8 U.S.C. § 1326(a)

a. Elements of Proof. To obtain a conviction, the government must prove that: (1) the defendant was an alien at the time alleged in the indictment; (2) the defendant had previously been arrested and removed from the U.S. (or denied admission, excluded or removed or has departed the U.S. while an order of exclusion, deportation, or removal is outstanding); (3) the defendant thereafter entered into, attempted to enter into, or was found in the U.S.; (4) the defendant had not received the consent of the Attorney General of the United States or his successor, the Department of Homeland Security, to apply for readmission to the United States since the time of the defendant's previous deportation. United States v. Flores-Peraza, 58 F.3d 164 (5th Cir. 1995); United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996) (illegal reentry is "continuing" offense until defendant is "found" by INS). In United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007), the Supreme Court held that an indictment alleging attempted illegal reentry need not specifically allege an overt act or another component part of the offense. It was sufficient to allege "attempt" coupled with the specified time and place of the attempted reentry.

b. Alienage. A child born outside the United States may nevertheless be a citizen by law by virtue of their parent's birth or naturalization. 8 U.S.C. §§ 1431; 8 C.F.R. § 320. Citizenship is a defense. A person who has derived U.S. citizenship, is not guilty of a crime under § 1325 because alienage is an element of the offense. United States v. Gomez-Orozco, 188 F.3d 422 (7th Cir. 1999) (proper to permit defendant to withdraw guilty plea once it became apparent that person may have derived citizenship). The laws in effect at the time the child was born control. Contradictory evidence about a defendant's alienage remains a matter properly left for a jury to decide. United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005). An alien's immigration file (A-file) may contain information that conflicts with the derivative citizenship claim which was provided by other family members. Those hearsay statements do not necessarily fall within the public-records exception to the Confrontation Clause's restrictions on the admission of testimonial hear-say. United States v. Marguet-Pillado, 560 F.3d 1078 (9th Cir. 2009) (error to admit statements made by defendant's father in application for permanent residence filed on behalf of defendant, who was 5 at the time, where father asserted that defendant was born in Mexico and was a citizen of that country). Moreover, the A-file may contain sworn statements that contradict the derivative citizenship claim. Introduction of such affidavits may run afoul of the Confrontation Clause of the 6th amendment. United States v. Duron-Caldera, 737 F.3d 988 (5th Cir. 2013)(government failed to meet burden to show that sworn affidavit of defendant's maternal grandmother was non-testimonial and thus Confrontation Clause barred its introduction in defendant's illegal reentry prosecution – despite government's contention that affidavit was created with primary purpose of providing evidence for immigration rather than criminal proceeding, and was not made for the purpose of accusing the defendant of illegal reentry). Failure to investigate a valid derivative citizenship claim is ineffective assistance of counsel. United States v. Juarez, 672 F.3d 381 (5th Cir. 2012).

The government may seek to prove foreign alienage through the introduction of the Form I-213. This is "an official record routinely prepared by an [immigration] agent as a summary of information obtained at the time of the initial processing of an individual suspected of being an alien unlawfully present in the

United States." Bauge v. INS, 7 F.3d 1540, 1543 n. 2 (10th Cir. 1993). The form contains a record of the alien's conversation with the ICE agent, and contains the aliens name, address, immigration status, circumstances of the individuals apprehension, and any substantive comments the individual may make. Gonzalez-Reyes v. Holder, 313 F. App'x 690, 692 (5th Cir. 2009)(unpublished)(citing Bauge, 7 F.3d at 1543 n.2). The Form I-213 documents each encounter with the alien. Aliens with multiple encounters will have multiple I-213s in their A-file. In United States v. Noria, 945 F.3d 847 (5th Cir. 2019), the Fifth Circuit held as a matter of first impression that introducing the front page of the I-213 was nontestimonial and therefore did not implicate the Confrontation Clause. Noria held that the page was admissible under the Public Records Exception to the hearsay rule, FRE 803 (8). Other pages to the I-213 were not before the court on appeal.

c. Previous Removal. The statute applies to an alien who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter" is found in the country. 8 U.S.C. § 1326 (a). This language resulted from the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made significant alterations to immigration law, including changing the terms deportation and exclusion to removal and inadmissibility. Pre-IIRIRA decisions may at times provide misleading guidance to understanding present law. See, e.g., United States v. Ramirez-Carcamo, 559 F.3d 384 (5th Cir. 2009) (noting inapplicability of pre-IIRIRA precedent to deciding issue of whether defendant's removal was proven under statute). Title 8 U.S.C. § 1101 (g), which addresses removal, provides that "any alien ordered deported or removed ... who has left the U.S., shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." To establish a removal, the government must show that a removal order was entered and, either before or after entry of that order, the alien departed the United States. Ramirez-Carcamo, 559 F.3d at 389. Thus, in Ramirez-Carcamo, the alien could not defeat his prosecution for illegal reentry (and the impact of a removal order) by leaving the United States on his own dime in advance of the removal hearing. The court was concerned that if it held the other way, aliens would be encouraged to not comply with their obligation to appear at removal hearings. Appealing the removal order will not nullify its impact for purposes of an illegal reentry prosecution if the alien departs the country. United States v. Blaize, 959 F.2d 850, 852 (9th Cir. 1992) (alien who leaves while his appeal is pending has been "deported" and the appeal is withdrawn by operation of law). The fact that a defendant was "removed" rather than "deported" does not preclude a conviction under § 1326, even where the indictment alleges the defendant "having previously been ... deported." United States v. Pena-Renovato, 168 F.3d 163 (5th Cir. 1999). Typically, proof of the prior removal is shown by a Form I-205, consisting of a Warrant of Removal\Deportation signed by an immigration official, which further reflects that a deportation officer witnessed the alien's removal from the United States. Courts have held that the introduction as evidence of this information does not violate the Sixth Amendment's Confrontation Clause because it is not "testimonial" hearsay subject to the stringent requirements of admissibility that Crawford v. Washington imposed on unavailable witnesses. United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006); United States v. Rojas-Pedroza, 716 F.3d 1253 (9th Cir. 2013); United States v. Lopez-Moreno, 420 F.3d 420 (5th Cir. 2005)(computer printouts regarding alien passengers' removal from US admissible as public record under FRE 803 (8)); United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005). The courts reason that the document merely records an unambiguous factual matter, not fact

gathering in anticipation of prosecution.

An alien's removal must follow a conviction to trigger the increases to the statutory maximum. United States v. Nevares-Bustamante, 669 F.3d 209 (5th Cir. 2012) (crime of violence adjustment inapplicable where no removal order was issued after the predicate conviction nor was any prior removal order reinstated after same). The timing of the alien's removal prior removal qualifies as a fact under Apprendi which must be admitted by the defendant or proven to a jury beyond a reasonable doubt if the conviction is to be used to increase the statutory maximum. United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008). Thus, in Rojas-Luna, at the guilty plea, the government introduced evidence that the defendant was removed in 1988. At sentencing, the PSR showed that the defendant was removed in 2006 after serving a prison term for an aggravated felony. Because no evidence of the 2006 removal was presented during the guilty plea, the sentence enhancement did not apply and the defendant's sentence was capped at 2 years.

The lawfulness of a prior deportation is not an element of the offense that the government must prove. United States v. Alvarado-Delgado, 98 F.3d 492 (9th Cir. 1996) (citing, United States v. Mendoza-Lopez, 481 U.S. 828 (1987)). However, if the original deportation hearing was so "fundamentally unfair" as to violate due process, the original deportation order may be challenged. 8 U.S.C. § 1326 (d). This rule codifies the Supreme Court's decision in United States v. Mendoza-Lopez, 481 U.S. 828 (1987), which as applied by the Fifth Circuit permits a collateral constitutional challenge if the alien can "establish that (1) the prior hearing was 'fundamentally unfair'; (2) the hearing effectively eliminated the right of the alien to challenge the hearing by means of judicial review of the order; and (3) the procedural deficiencies caused the alien actual prejudice." United States v. Lopez-Vasquez, 227 F.3d 476, 483 (5th Cir. 2000). See also, United States v. Lopez-Ortiz, 313 F.3d 225, 230 (5th Cir. 2002); United States v. Ramirez-Cortinas, 945 F.3d 286 (5th Cir. 2019). The defendant must show three. That is, failing one prong, the court need not consider the others. United States v. Mendoza-Mata, 322 F.3d 829, 832 (5th Cir. 2003).

Establishing fundamental unfairness in the Fifth Circuit is more difficult than in other circuits. See, e.g., United States v. Villanueva-Diaz, 634 F.3d 844 (5th Cir. 2011) (attorney's failure to give client notice of BIA's adverse decision thus preventing appeal did not affect fundamental fairness of proceedings). In Lopez-Ortiz, the immigration judge told the defendant that he was ineligible for 212 (c) relief, advice which though correct at the time, was rendered incorrect by St. Cyr. The defendant was removed without challenging the procedure and later reentered the United States, where he was found by immigration authorities and prosecuted for illegal reentry. The defendant later challenged the fundamental fairness of the removal hearing in his illegal reentry case. The Fifth Circuit found that even though St. Cyr later proved the immigration judge wrong, the immigration judge's incorrect admonishment did not render the removal hearing "fundamentally unfair." The court based its holding on its finding that eligibility for 212 (c) relief is not a liberty or property interest warranting due process protection. Accordingly, the immigration judge's error did not rise to the level of "fundamental unfairness." Id., at 230.

In unpublished decisions, the Fifth Circuit used Lopez-Ortiz, to reject the argument that an illegal reentry indictment was invalid because the underlying removal order, which was based on having been convicted of the felony driving while intoxicated, was invalid under United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001). See United States v. Sanchez-Parra, No. 03-50661 (5th Cir. August 31, 2004) (not published). The circuits remain split. See, United States v. Leon-Paz, 340 F.3d 1003 (9th Cir. 2003) (holding that an immigration judge's failure to advise a permanent resident alien of his right to apply for § 212(c) discretionary

relief from deportation in pre-St. Cyr case violated due process and rendered the deportation order "fundamentally unfair" and, thus, was a basis to dismiss illegal reentry indictment that relied on that deportation order); United States v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. 2003)(immigration judge's failure to advise alien of his eligibility to apply for discretionary relief from deportation was due process violation that rendered the deportation hearing fundamentally unfair); United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010)(immigration judge, though obligated to advise alien of eligibility for relief, not required to inform alien of relief for which he was not eligible at time of hearing and for which he would become eligible later only with a change of law); United States v. Perez, 330 F.3d 97, 104 (2d Cir. 2003)(same); United States v. Lopez, 445 F.3d 90 (2d Cir. 2006)(erroneous information given by Immigration Judge and Board of Immigration Appeals to defendant on the unavailability of relief under former § 212 (c) of INA deprived defendant of judicial review within the meaning of 8 USC § 1326 (d)(2), vacating conviction and remanding to district court to determine whether error rendered conviction fundamentally unfair under § 1362 (d)(3)). At some point, the Supreme Court will need to resolve this circuit split. Until then, objections must be made to preserve the issue for such review.

A showing of actual prejudice means "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." Ramirez-Cortinas, 945 F.3d at 291 (quoting, United States v. Benitez-Villafuerte, 186 F.3d 651, 658 (5th Cir. 1999)). This places the burden upon the defendant to show that the error resulted in his removal. It is not enough to show that the error "might have prevented" the defendant's ultimate removal. Ramirez-Cortinas, 945 F.3d at 291 (reversing district court for applying "diluted" actual prejudice standard).

For a moment, some district courts granted motions to dismiss illegal reentry indictments where the notice to appear failed to provide a hearing time or place. See Pereira v. Sessions, 138 S. Ct. 2105 (2018) (holding in context of "stop time rule" that notice to appear was insufficient to stop time). The theory underlying the attack rested upon the argument that, because of the missing time and date information, the notice to appear failed to vest jurisdiction in the immigration court. Therefore, the argument went, the court acted without jurisdiction and the removal order was null and void. The Fifth Circuit rejected this argument in United States v. Pedroza-Rocha, 933 F.3d 490 (5th Cir. 2019). Relying on Pierre-Paul v. Barr, 930 F.3d 684 (5th Cir. 2019), a cased decided after the trial court ordered the indictment dismissed, the Fifth Circuit found the no place no time notice to appear to be not defective, and if defective, to be a defect that was not jurisdictional. More importantly, the Fifth Circuit held in Ramirez-Cortinas, that the defendant's removal while the appeal was pending did not render it moot.

An alien exhausts administrative remedies by raising an issue "either on direct appeal or in a motion to reopen" before the BIA. United States v. Parrales-Guzman, 922 F.3d 706, 707 (5th Cir. 2019). Moreover, "a remedy is available as of right if (1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim." Omari v. Holder, 562 F.3d 314, 318 (5th Cir. 2009). If an alien waives appeal, or if he appeals and loses and fails to seek reopening his case with the BIA or the IJ, the court may find the alien failed to exhaust administrative remedies and deny relief. Parrales-Guzman, 922 F.3d at 707 (defendant removed after felony DWI improperly graded an aggravated felony who waived appeal of removal order could not collaterally attack removal for lack of exhaustion).

Even if an attack on the unfairness of the removal order fails, demonstrating inequity in the removal process also serves

to mitigate the offense. For example, in Parrales-Guzman, the district court sentenced the defendant to time served after denying the motion to dismiss.

d. "Entered or Was Found In"

The element of being 'found in' the United States… depends not only on the conduct of the alien but also on the acts and knowledge of the federal authorities." United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995). The offense does not become complete "until the authorities both discover the illegal alien in the United States, and know, or with the exercise of diligence typical of law enforcement could have discovered, the illegality of his presence." United States v. Acevedo, 229 F.3d 350, 355 (2d Cir. 2000); United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002). Importantly, the statute of limitations does not run until the defendant's presence in the country, as well as the illegal status of that presence, is discovered by t1he B.I.C.E. (formerly called I.N.S.). United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996).

The "found in" fact can be critical for several reasons. In United States v. Gumera, 479 F.3d 373 (5th Cir. 2007), the Fifth Circuit found a statute of limitations violation where the indictment was returned five years after the defendant was "found." Applying Santana-Castellano, supra, the Fifth Circuit held that the defendant was found when he applied for Temporary Protected Status with INS at the Texas Service Center using his true name, date of birth, and place of birth, even though he failed to disclose a prior removal or prior criminal conviction.

Using a bogus identity may hide the alien from being found. An alien won't be deemed "found," if he applies under bogus name for a temporary resident card under an amnesty program. United States v. Gomez, 38 F.3d 1031 (8th Cir. 1994). See also, United States v. Are, 498 F.3d 460 (7th Cir. 2007) (rejecting "constructive knowledge" theory to trigger running of statute).

Discovery by ICE marks the *end* of the continuing illegal reentry violation, but not the beginning of the offense. United States v. Jimenez-Borja, 363 F.3d 956, 960 (9th Cir. 2004).

Where the alien is "found" also marks the place where venue is proper. United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002). In Delgado-Nunez, the alien was found in the Northern District of Texas when immigration authorities interviewed him while serving a prison sentence. From there he was transferred to the Western District of Texas where immigration authorities again interviewed him. The Fifth Circuit concluded that venue was not proper in the Western District as the offense of illegal reentry was already completed in the Northern District where he was found. Although the right to trial in the proper venue is constitutionally protected it can be waived. Thus, unless the facts showing the impropriety of venue only become apparent at the close of the government's case counsel must object to improper venue prior to trial or waive the venue complaint. Id. An improper venue argument may get an illegal reentry prosecution dismissed. Prosecutors may not be able to get the appropriate district to prosecute an illegal reentry case as the case may not meet their charging policies.

The found in fact also sets the guideline book to use because it establishes the date the offense ended. This may make a big difference depending upon which version of the guidelines result in a better outcome. Big changes were made effective November 2016 that can result in much higher ranges than before.

Near the border, other considerations apply. Attempting to enter may involve simply presenting false documents at a port of entry. United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007); United States v. Cardenas-Alvarez, 987 F.2d 1129 (5th Cir. 1993). A defendant must pass through immigration inspection in order to be "found in" the country; it is not enough, for example, to be arrested in an airport before the immigration inspection (though an attempt may be proven). United

States v. Canals-Jimenez, 943 F.2d 1284 (11th Cir. 1991) (also suggesting that the "found in" aspect of the statute may be void for vagueness). The Fifth Circuit has held that there is no requirement of specific intent in the statute. United States v. Trevino-Martinez, 86 F.3d 65, 68 (5th Cir. 1996), cert. denied, 117 S.Ct. 1109 (1997).

The circuits are split as to whether an alien is "found in" the United States when the alien is forcibly returned there. In United States v. Macias, 740 F.3d 96 (2d Cir. 2014), the defendant, a citizen of Honduras who had lived in the United States illegally for approximately a decade, came to the attention of U.S. border authorities when Canadian border authorities forcibly returned him to the U.S. side of the border after they discovered him attempting entry into Canada. The court found that Macias was not in the United States when he was "found" and, when "found in" the United States he was there involuntarily. Accordingly, it was plain error to convict him and was a manifest injustice to allow the conviction to stand. In contrast, under identical circumstances, the Ninth Circuit has twice held that the aliens were "found in" the United States after having crossed into Canadian territory. See, United States v. Gonzalez-Diaz, 630 F.3d 1239, 1243-44) (9th Cir. 2011); United States v. Ambriz-Ambriz, 586 F.3d 719, 723-24 (9th Cir. 2009). The Second Circuit disagreed in Macias with the Ninth Circuit's assumption that under these circumstances the alien was legally "present" in either the United States or Canada. These decisions illustrate the special legal meaning of "presence" in the context of the illegal reentry statute.

In United States v. Herrera-Ochoa, 245 F.3d 495 (5th Cir. 2001), the court found that the government had failed to introduce sufficient evident that the defendant was "found in" the United States from the fact that the defendant was present in the courtroom during his trial, or that docket entries accounted for the date of the defendant's arrest. This was a court trial that followed a suppression hearing. On appeal, the Fifth Circuit declined the government's invitation to take judicial notice of the defendant's presence, something the trial court failed to do. Moreover, because this was an element of the offense, the appellate court was reluctant to violate the defendant's Sixth Amendment right to confront witnesses and to have each element proved beyond a reasonable doubt by inferring from the record that the defendant had been found. The appellate court also refused to use the record of the suppression hearing to supply the missing evidence as the trial judge had failed to mention it.

Lengthy delays to sentencing from the date an alien was "found" in the United States may justify a lower than guideline range sentence. USSG § 2L1.2, comment. (n. 7)(Nov. 2018). The Guidelines direct that "any such departure should be fashioned to achieve a reasonable punishment for the instant offense." Id. The departure "should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant." Id. Courts have approved downward departures to an illegal alien for all or part of time served in state custody from the time immigration authorities located the defendant until he was received into federal custody to compensate for time that would not be credited towards his federal sentence. United States v. Barrera-Saucedo, 385 F.3d 533 (5th Cir. 2004).

e. Without Consent of the Government. The previously removed alien must obtain the consent in advance of reentry. The fact that the Order of Removal instructs the alien that he is prohibited from re-entering the United States for five years and that if the alien wished to re-enter the United States he would first need to obtain the permission of the Attorney General does not alter this requirement. United States v. Romero-Caspeta, 744 F.3d 405 (6th Cir. 2014); United States v. Bernal-Gallegos, 726 F.2d 187 (5th Cir. 1984). That is, the mere fact that a visa might be available to the alien after the five-year exclusionary period is not a defense to illegal reentry. United States v. Joya-Martinez, 947 F.2d 1144 (4th Cir. 1991).

For offenses committed on or after March 1, 2003, the alien must have failed to have applied for permission from the Secretary of Homeland Security rather than from the Attorney General. See Singh v. Ashcroft, 367 F.3d 1139 n.* (9th Cir. 2004); United States v. Ramirez-Gonzalez, 2003 WL 22953188 (D. Del. Dec. 2, 2003). The previous version of the statute required that the defendant receive the consent of the Attorney General to apply for readmission to the United States. United States v. Flores-Peraza, 58 F.3d 164, 166 (5th Cir. 1995) cert. denied, 116 S.Ct. 782 (1996); United States v. Vasquez-Olvera, 999 F.2d 943, 945 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). Such authorization may only be issued by the Attorney General or the INS (or now, the successor government agency, the Department of Homeland Security). United States v. Trevino-Martinez, 86 F.3d 65 (5th Cir. 1996)(citing C.F.R. §§ 212.2(b)(2), 212.4(c) (non-immigrant visa issued by American consular official to previously deported alien failed to satisfy the requirement that alien obtain "the express consent of the Attorney General...." Id. at 68.

The government used to prove this element through introduction at trial of a document called a certificate of non-existence of record (CNR) prepared by an immigration official who would certify that after a diligent review no record was found that the alien had applied for permission to enter the United States. United States v. Sanchez-Milam, 305 F.3d 310 (5th Cir. 2002). CNRs are no longer admissible without affording defendants the right to cross-examine the witness who prepared the report. United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010).

f. *Mens Rea*. Only *general* intent – that is, intent to engage in voluntary behavior (as opposed, say, to being accidentally driven into the United States while sleeping) – is an element of illegal reentry. See United States v. Berrios-Centeno, 250 F.3d 294 (5th Cir.2001). Even if "attempted" entry is charged, the government need not prove that the defendant possessed the specific intent to enter the United States without the permission of the Government. See, United States v. Morales-Palacios, 369 F.3d 442 (5th Cir. 2004). This view was undermined by the Supreme Court in Resendiz-Ponce, supra, which on the way to reviewing the validity of an attempted re-entry indictment discussed the elements necessary for conviction. Resendiz-Ponce concluded that attempted reentry included the common law elements of attempt (intent to commit object crime plus an overt act that constitutes a substantial step towards completing the offense), and that "the word 'attempt' encompasses both the overt act and intent elements. Imputing the intent element undermines the Fifth Circuit's analysis in Berrios-Centeno. See, United States v. Gracidas-Ulibarry, 231 F.3d 433 (9th Cir. 2000) (en banc) (attempted illegal reentry does require such specific intent because "attempt" necessarily implies specific intent to violate the law); United States v. Lombera-Valdovinos, 429 F.3d 927 (9th Cir. 2005) (attempted reentry not proven where alien was arrested while attempting entry for the sole purpose of being taken into custody by authorities). "Congress did not impose a requirement of specific intent anywhere in [8 U.S.C. § 1326(a)] nor did it provide that an alien's reasonable belief that he was legally entitled to reenter the United States is a defense to criminal liability." United States v. Trevino-Martinez, 86 F.3d 65, 68 (5th Cir. 1996); United States v. Leon-Leon, 35 F.3d 1428 (9th Cir. 1994) (same, even though alien possessed green card he thought was valid); United States v. Carlos-Colmenares, 253 F.3d 276 (7th Cir. 2001) (no intent to violate the law required).

g. Venue. In illegal reentry cases, challenging venue can result in dismissal of the charges. This occurs when an alien is "found" outside of the charging district. Proper venue is constitutionally and statutorily required U.S. Constitution Amend. VI; Fed. R. Crim. P. 18. Venue lies where the offense was committed. The

illegal reentry statute provides three separate occasions for a deported alien to violate it: 1) when he/she illegally reenters; 2) when he/she attempts to illegally enter the United States; or 3) when he/she is at any time found in the United States." United States v. Santana-Castellano, 74 F.3d 593, 597 (5th Cir. 1996). Moreover, 8 U.S.C. § 1329 provides that "[n]otwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violations may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended." Also relevant is the venue statute for continuing offenses, which provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

An alien is "found in" the United States, and an illegal reentry crime is completed, when immigration authorities discover the alien's unlawful physical presence in the country. United States v. Hernandez, 189 F.3d 785 (9th Cir. 1999). The first time that immigration authorities "find" an illegal reentry defendant concludes the offense. That is, a defendant who is "found" in one district cannot be "found" again in another district. Id. For example, in Hernandez, the alien was arrested in Oregon on traffic violations and interviewed by the INS who determined that he was in the US illegally in violation of § 1326. Eventually, the defendant was transferred to Washington to face other state charges and again interviewed by the INS. Upon completion of the state sentence the defendant was indicted for illegal reentry. After conviction, the defendant appealed and won his improper venue claim. A defense of improper venue must be raised before trial, otherwise the claim will be deemed waived. United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002).

2. Bringing in Aliens Other than Point of Entry: 8 U.S.C. § 1324(a)(1)(A)(i)

This section of Title 8 makes it a crime for anyone knowing that a person is an alien to bring the alien into the United States at a place other than a designated point of entry, regardless of whether the alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future action which may be taken with regard to the alien. The government must prove that the defendant intended to commit a criminal act. See, United States v. Zayas-Morales, 685 F.2d 1272, 1275 (11th Cir. 1982); United States v. Nguyen, 73 F.3d 887, 894 (9th Cir. 1995). The failure to so instruct the jury is reversible error. Nguyen, 73 F.3d at 895. The evidence must show that the defendant accompanied or arranged to have the alien accompanied (as in an alien smuggling operation) across the border into the United States. United States v. Garcia-Paulin, 627 F.3d 127 (5th Cir. 2010). Providing false documents to an alien, or otherwise encouraging an alien to enter unlawfully will not violate the statute. Id. (factual basis in guilty plea that defendant supplied fraudulent passport stamp and advised alien that it would allow him to work in U.S. after secret entry did not support finding of guilt). Such indirect assistance violates § 1324(a)(iv), which makes it a crime to encourage or induce an alien "to come to, enter, or reside in the United States." Id. If financial or private gain motivate the commission of the crime, the statutory maximum doubles from 5 years to 10 years imprisonment. 8 U.S.C. § 1324 (a)(1)(B)(i)
& (ii).

3. Bringing in Aliens at Point of Entry: 8 U.S.C. § 1324(a)(2)

Anyone knowingly bringing an illegal alien into the United States through a designated port of entry may be prosecuted for a lesser crime that is punishable by up to one year in prison for

a first offense. 8 U.S.C. § 1324 (a)(2)(A). To establish a violation the government need only show that the defendant acted knowingly, that is with an awareness of the facts that constituted the offense, not willfully, that is with knowledge that his conduct was illegal. United States v. Barajas-Montiel, 661 F.3d 1051 (11th Cir. 2011) cert. denied, 132 S.Ct. 2711 (2012)(sports agent brought Cuban baseball players into United States and district judge prohibited defense from making argument regarding defendant's belief that he believed Cubans would enter under Wet-Foot/Dry – Foot policy under which immigration authorities applied Cuban Adjustment Act to Cubans who attempted entry into United States). Though truly a misdemeanor, a conviction will be deemed to be an aggravated felony, inasmuch as it amounts to an alien smuggling offense, an offense enumerated in 8 U.S.C. § 1101 (a)(43) which lists aggravated felonies. Biskuspsi v. A.G. of U.S., 503 F.3d 274, 279-81 (3d Cir. 2007). If the offense was committed with the intent or with reason to believe that the alien would commit a felony, or if committed for the purpose of commercial advantage or private financial gain, the offense, if a first or second offense, is punishable by a range of imprisonment of between 3 to 10 years. 8 U.S.C. § 1324 (a)(2)(B)(1). For a person who violates the statute three or more times, the range of imprisonment is not less than 5 nor more than 15 years imprisonment. Id. A first offender who violates the law and merely fails to present the illegal alien to the appropriate immigration officer at the point of entry may be punished by not more than 10 years imprisonment. 8 U.S.C. § 1324 (a)(2)(B)(iii).

4. Unlawfully Transporting Aliens: 8 U.S.C. § 1324(a)(1)(A)(ii)

a. Elements of Proof. The government must prove that: (1) an alien had entered or remained in the United States in violation of the law; (2) that the defendant transported the alien within the United States with intent to further the alien's unlawful presence; and (3) that the defendant knew or recklessly disregarded the fact that the alien was in the United States in violation of the law. United States v. Diaz, 936 F.2d 786 (5th Cir. 1991). Acting with specific intent to violate the immigration laws is not necessary to support a conviction. United States v. Rivera, 879 F.2d 1247, 1251 (5th Cir. 1989). The statute reaches and criminalizes conduct that occurs outside the United States, where the alien smugglers intend to bring the undocumented aliens to the United States. United States v. Villanueva, 408 F.3d 193 (5th Cir. 2005). The statute exempts certain volunteer religious ministers or missionaries from its reach.

b. Intent to Further Illegal Presence. Mere transportation of an illegal alien, without more, is insufficient as a matter of law to support a conviction under this statute. United States v. Chavez-Palacios, 30 F.3d 1290 (10th Cir. 1994); see also, United States v. Esparza, 876 F.2d 1390 (9th Cir. 1989) (evidence insufficient as only evidence was that defendant rode in front seat of vehicle traveling in convoy with van transporting aliens). There must be a direct and substantial relationship between the defendant's act of transportation and its furtherance of the alien's presence. The defendant must have the specific intent to further the alien's unlawful presence. United States v. Rivera, 879 F.2d 1247 (5th Cir. 1989), cert. denied, 110 S. Ct. 554 (1989). The defendant does not have the requisite mental state if she merely intends to assist the alien in obtaining legal status. United States v. Merkt, 764 F.2d 266 (5th Cir. 1985) (worker at sectarian shelter for refugees drove aliens from border to San Antonio so they could apply for political asylum); United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977) (foreman of reforestation workers who transported aliens to job sites, with "direct and substantial evidence to support the finding that the appellant knew the immigration status of the aliens not guilty of § 1324(a)(1)(A)(ii) violation as

the act of transportation was only incidental to and not in furtherance of the aliens' illegal presence); United States v. Moreno-Duque, 718 F. Supp. 254 (D. Vt. 1989) (same). The possibility that aliens can apply for asylum and remain in the country on bond or parole pending the disposition of the applications does protect one from prosecution. United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983); United States v. Rodriguez-Rodriguez, 840 F.2d 697 (9th Cir. 1988) (same for possibility of adjustment of immigration status). The Fifth Circuit has held that a defendant that transports an alien who has applied for and received a Form I-210, 30-day parole, is nonetheless culpable as a "paroled alien is in the same position as one who seeks admission on the border." United States v. Alvaro-Machado, 867 F.2d 209 (5th Cir. 1989), quoting, Delgado-Carrera v. I.N.S., 773 F.2d 629 (5th Cir. 1985) (in context of expulsion proceeding), and citing United States v. Anaya, 509 F.Supp. 289, 299 (S.D.Fla. 1980) (en banc decision of district judges), aff'd, United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982); but see, United States v. Medina-Garcia, 918 F.2d 4, 7 (1st Cir. 1990).

c. Alienage. "An alien is any person who is not a natural-born or naturalized citizen the United States." Fifth Circuit Pattern Jury Charge, Criminal § 2.03 (West 2019). While the statute prohibits transportation of someone who has "come to, entered, or remains" in the country unlawfully, the government does not need to prove all three conditions. United States v. Esparza, 882 F.2d 143, 145 (5th Cir. 1989), cert. denied, 110 S.Ct. 418, (1989). Thus, though the alien may be granted Orders of Release on Recognizance by immigration, he will still be considered to have "come to" and "entered" the U.S. unlawfully. Id. The alienage of those transported must be proved. Alvaro-Machado, 867 F.2d at 212. The government may not introduce the final judgment arising from a conviction for an immigration status crime in order to prove that the alien-transportee was unlawfully in the country. Diaz, 936 F.2d at 788. Typically, proof of alienage is provided through the videotaped depositions of the aliens being transported, a procedure authorized under § 1324 (d) of Title 8. The government may also do so through introduction of the Form I-213. See, United States v. Noria, 945 F.3d 847 (5th Cir. 2019) (Form-213 documenting encounter with alien not testimonial and admissible under public records exception of FRE 803 (8)).

Depositions pose special hurdles. The government must use "reasonable means" to secure the live testimony of the witness before the video deposition will be deemed admissible at trial. See, United States v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009) (error for court to admit video deposition where government failed to show that witness was unavailable for trial - measures taken by the government failed to constitute "good faith" or reasonable efforts" to secure the witness for trial). The constitutionality of this deposition procedure has been upheld. United States v. Aguilar-Tamayo, 300 F.3d 562 (5th Cir. 2002) (holding § 1324(d) constitutional as it does not eliminate requirement of showing witness is unavailable, any error in not requiring government to show reasonable means to acquire witness testimony was harmless).

5. Concealing or Harboring Aliens: 8 USC § 1324(a)(1)(A)(iii)

Title 8, United States Code, Section 1324(a)(1)(A)(iii) makes it a crime for anyone to conceal or harbor an alien, knowing or in reckless disregard of the fact that the alien has entered or remained in the United States in violation of the law. The conduct must tend to "substantially facilitate the alien remaining in the United States illegally." United States v. De Jesus-Batres, 410 F.3d 154 5th Cir. 2005). "Substantially facilitate" means "to make an alien's illegal presence in the United States substantially 'easier or less difficult'" United States v. Shum, 496 F.3d 390 (5th Cir. 2007)(affirming conviction - defendant employed illegal aliens as janitors,

provided them with false identifications, and did not file social security paperwork on their behalf); United States v. Costello, 666 F.3d 1040 (7th Cir. 2012)(evidence not sufficient where defendant knew her live-in Mexican boyfriend was in the country illegally and had been previously deported even though she picked him up from the bus terminal and drove him home, where there was no evidence that she concealed the boyfriend or shielded him from detection and there was no evidence that she was trying to encourage or protect or secrete aliens). Telling an alien how to stay out of trouble and avoid immigration authorities by simply conveying common sense advice does not qualify as "substantially" facilitating the alien's remaining in the United States. United States v. Ozcelik, 527 F.3d 88 (8th Cir. 2008). The indictment need not allege nor the jury charge require that the government prove that the defendant acted with specific intent to violate immigration law. Id. But see, United States v. Nguyen, 73 F.3d 887, 894-95 (9th Cir. 1995) (requiring proof of specific intent to violate immigration laws). The jury instruction must require the jury to find that "each individual was in the United States in violation of law" and that the defendant "knew or was in reckless disregard of that fact." United States v. Pereyra-Gabino, 563 F.3d 322 (8th Cir. 2009). In the case of an offense committed for purpose of commercial advantage or private financial gain, the maximum punishment is 10 years imprisonment for each alien. 8 U.S.C. §1324 (a)(1)(B)(i). Otherwise, the maximum punishment is 5 years imprisonment. 8 U.S.C. § 1324(a)(1)(B)(ii). When a defendant is tried and convicted for "aiding and abetting" a violation of § 1324, rather than as a principle, the question of financial gain by the defendant or others is immaterial. United States v. Nolasco-Rosas, 286 F.3d 762, 766-67 (5th Cir. 2002). The punishment for "aiding and abetting" a § 1324 violation is no more than five years, regardless of financial gain. Id.

6. Illegal Entry: 8 U.S.C. § 1325 (a)

Title 8, United States Code, Section 1325 prohibits an alien from entering or attempting to enter the United States by three means:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by willfully false or misleading representation or the willful concealment of a material fact, shall, for the first such commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years.

This offense is not a lesser included offense of 8 U.S.C. § 1326, Illegal Reentry. United States v. Flores-Peraza, 58 F.3d 164 (5th Cir. 1995) (holding that because § 1326(a) only requires proof of entry, while § 1325(a) requires additional proof of how entry was effected, same elements test of Blockburger not satisfied).

B. PENALTY PROVISIONS

1. Illegal Reentry

Absent a criminal record, an alien prosecuted under this subsection faces a maximum punishment of two years imprisonment. 8 U.S.C. § 1326(a)(2). If the removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person or both, or a felony (other than an aggravated felony), a

maximum ten-year prison sentence may be imposed. 8 U.S.C. § 1326 (b)(1). See, United States v. Trejo-Galvan, 304 F.3d 406 (5th Cir. 2002) (driving while intoxicated did not qualify as "crimes against the person" to warrant enhanced sentence). If subsequent to a conviction for an aggravated felony, a maximum twenty-year sentence may be imposed. 8 U.S.C. 1326 (b)(2). As with all federal enhancement, courts use the categorical approach to determine if a prior conviction meets the term at issue. Moncrieffe v. Holder, 133 S.Ct. 1678 (2013).

a. Apprendi and the Timing of Removals. The date of an alien's prior removal is an element of enhanced illegal reentry penalties. United States v. Nevares-Bustamante, 669 F.3d 209 (5th Cir. 2012); United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008). To enhance an alien's sentence, based on unlawfully remaining in the United States after a felony conviction, a removal order must issue or be reinstated after the predicate conviction. Nevares-Bustamante, supra. Moreover, the removal order must be valid. United States v. Rodriguez-Ocampo, 664 F.3d 1275 (9th Cir. 2011). Counsel must pay attention to the sequence and timing of the removal and prior conviction. In Rojas, the defendant was charged with illegal reentry and the indictment was silent as to the date of removal. At his guilty plea, the government introduced evidence and the defendant admitted that he was removed in 1988. When the PSR came back it showed that he was also removed in 2006, after serving a prison sentence for an aggravated felony. On that basis, the PSR described his penalty range as up to 20 years. The district court sentenced him to 73 months. On appeal, Rojas argued that Apprendi prevented use of the 2006 removal because he did not admit that removal and a jury did not find that removal beyond a reasonable doubt. The government argued that the removal was like a prior conviction and therefore, under Almendarez-Torres, was not subject to the Sixth Amendment rule of Apprendi. The Fifth Circuit reversed, and held that, because the temporal relationship between the removal and a prior conviction increase the statutory maximum penalty for illegal reentry, the date of removal is a fact subject to the rule of Apprendi that must be admitted by a defendant or proved to a jury beyond a reasonable doubt. It was therefore error for the district court to increase the defendant's punishment beyond the 2 years available for a simple illegal reentry case. The court found the error to meet the plain error standard of review. But different facts concerning what the defendant or counsel represented to the court at sentencing will lead to a different result. In United States v. Velasquez-Torrez, 609 F.3d 743 (5th Cir.) cert. denied, 562 US 990 (2010), the court found no plain error to an enhanced sentence where the defendant, through counsel, stated at sentencing that the PSR contained no mistakes and the defendant remained silent about the prior conviction and its timing before a removal. These statements qualified as admissions by a defendant regarding a fact used to raise a statutory maximum supporting the increase. Id. See also, United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009). To be clear, facts contained in a PSR alone will not suffice, but a defendant's admissions to the facts contained in the PSR will. Counsel must prevent making, or allowing the client, to make such admissions. To win this objection on appeal the Apprendi error must be preserved. Importantly, illegal reentry sentences may be capped where the timing of the removal with the conviction is not established by a defendant's admissions. Be alert to dates of removal mentioned during guilty plea hearings and to objecting where later dates of removal are relied upon to enhance a sentence.

b. Aggravated Felonies. An Aggravated felony is any of many crimes listed in 8 U.S.C. §1101(a)(43). They are violations of state, federal or foreign laws, for which the term of imprisonment was completed within the previous 15 years. 8 U.S.C. §1101 (a)(43). Non-citizens found in the United States after a removal for an aggravated felony conviction face up to 20

years imprisonment, 8 U.S.C. §1326 (b), in addition to a boost under the guidelines.

Twenty categories of crimes qualify as aggravated felonies and one must compare the listed crimes to the conviction at issue to see if there is a match. Aggravated felonies include, but are not limited to, illicit trafficking in controlled substances or firearms, money laundering (over $10,000), rape, sexual abuse of a minor, murder, certain theft offenses (terms of imprisonment exceed one year), child pornography, crimes of violence (terms of imprisonment exceed one year), running a prostitution business, alien smuggling (unless first offender smuggling family), illegal entry (with prior conviction), document fraud, bond jumping, bribery, forgery, obstruction of justice (terms of imprisonment exceeding one year), perjury, bribery of a witness, and attempts or conspiracies to commit the offenses listed. The categorical approach is used by courts to determine if a prior conviction qualifies as an aggravated felony. Moncrieffe v. Holder, 133 S.Ct. 1678 (2013). Accordingly, courts look to the elements of the law violated not to the facts underlying the conviction. This can produce unexpected results as the labels affixed to crimes may mask the elements necessary for enhancement.

How the Supreme Court has analyzed whether a drug conviction is for "illicit trafficking in a controlled substance" is instructive. Until Lopez v. Gonzales, 127 S.Ct. 625 (2006) was decided, a majority of circuits held that a state conviction for simple possession of controlled substance qualified as it was punishable as a felony under the state law at issue, even though the same crime was not a felony under federal law. Lopez rejected this view, holding the conviction needed to punishable as a felony under federal law, a sanction not available for most mere possession drug cases. In Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010) the Supreme Court dealt with the question of recidivist drug offenders and held that a second or subsequent simple drug possession offense was not an aggravated felony where the conviction was not based on the fact of a prior conviction. Carachuri looked at what was essential to the fact of the conviction at issue. The availability of enhancement, without actual enhancement, was insufficient to establish the higher penalty necessary to qualify the conviction as a federal felony. Then, in Moncrieffe v. Holder, 133 S.Ct. 1678 (2013), the Court held that the alien's state conviction for possession of marijuana with intent to distribute was not for an "aggravated felony" conviction for "illicit trafficking in a controlled substance." Again, applying the categorical approach, the Court looked at the elements of the state statute that was violated to see what the state conviction necessarily involved, presuming that the conviction "rested upon [nothing] more than the least of the acts" criminalized, before determining whether even those acts are encompassed by the generic federal offense. Id. at 1684. The aggravated felony at issue, "illicit trafficking in a controlled substance," was a generic crime and the Georgia law violated needed to satisfy two conditions to fit the federal term: 1) proscribe conduct that was an offense under the federal Controlled Substance Act (CSA) and 2) prescribe felony punishment for that conduct. The Court compared the CSA with the Georgia law and found the two incompatible. Under Georgia law it was not necessary to establish that the offense involved either remuneration or more than a small amount of marijuana to obtain a conviction. This contrasted with the CSA's requirements for conviction for a felony. Because the fact of conviction under Georgia law did not necessarily involve facts that corresponded to a CSA felony the Court held that the Georgia conviction was not an aggravated felony. Id. at 1693. Moncrieff marked the third time in seven years that the Court considered whether the Government properly characterized a low-level drug

offense as "illicit trafficking in controlled substances" and thus an "aggravated felony." See also, Sarmientos v. Holder, 742 F.3d 624 (5th Cir. 2014)(Florida conviction for delivery of cocaine was not a categorical match with federal drug trafficking as unlike federal law, state law did not require proof that defendant knew illicit nature of the controlled substance); Donawa v. Holder, 735 F.3d 1275 (11th Cir. 2013)(remanding to BIA to consider whether Florida conviction constituted "illicit trafficking aggravated felony).

Numerous "aggravated felonies" may trigger enhanced penalties. Crimes of violence, theft, and burglary offenses qualify as aggravated felonies if "the term of imprisonment [is] at least one year." 8 U.S.C. §§ 1101(a)(43)(F), (G). The meaning of "term of imprisonment" under the INA is broad and defined in § 1101(a)(48)(B) of Title 8. It provides that any reference to a term of imprisonment includes a period of "incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment." The length of the term is measured by the duration for which the sentence imposed was suspended. Thus, if a court imposes a sentence of five years, and suspends it for a five-year period of probation, the term of imprisonment is five years. United States v. Vasquez-Balandran, 76 F.3d 648 (5th Cir. 1996); see also, United States v. Quinonez-Terrazas, 86 F.3d 382 (5th Cir. 1996) (indeterminate sentence of 4-10 years counts as sentence of at least five years); United States v. Yanez-Huerta, 207 F.3d 788 (5th Cir. 2000) (term of probation precluded downward departure where "the term of imprisonment" was higher than one year). A term of imprisonment is not imposed when a sentence of probation is ordered without any specific prison sentence being pronounced. United States v. Santiago-Mondragon, 564 F.3d 357 (5th Cir. 2009) (4-year term of Texas deferred adjudication not sentence of imprisonment); United States v. Herrera-Solorzano, 114 F.3d 48 (5th Cir. 1997); United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999). These cases recognize that "when a defendant is directly sentenced to probation, with no mention of suspension of a term of imprisonment, there has been no suspension of a term of imprisonment." Banda-Zamora, 178 F.3d at 730. Thus, if the court does not order a period of incarceration and then suspend it, but instead "imposes probation directly," the conviction will not qualify as a term of imprisonment. Id. This distinction is crucial and may require counsel to obtain and review court records relating to a client's criminal history. Terms of imprisonment may be reduced through subsequent court action. For example, sentence reduction that result from the successful completion of a "boot camp" or similar program will replace the original terms of imprisonment. United States v. Landeros-Arreola, 206 F.3d 407 (5th Cir. 2001).

For a "crime of violence" to qualify as an "aggravated felony" (in addition to having a term of imprisonment of at least one year) it must satisfy 18 U.S.C. § 16, which requires, in part, the intentional, threatened, or attempted "use" of force "against the person or property of another." In Leocal v. Ashcroft, 125 S.Ct. 377 (2004) the Supreme Court found that a conviction for causing bodily injury while driving intoxicated did not qualify as "use of force" because a conviction could be achieved with proof of negligent, rather than intentional, conduct. A crime is either violent by its nature or not, without regard to its particular factual circumstances, a defining principle of the "categorical approach."

A reckless state of mind was found to be enough to show "use" of force in United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc). Reyes-Contreras wiped away a long line of Fifth Circuit precedent. First, Reyes-

Contreras held there would no longer be a distinction between the use of direct or indirect force. Both direct force (using destructive violent force against someone) and indirect force (causing bodily injury through action that are not themselves violent) now constituted "physical force." Reyes-Contreras 910 F.3d at 181-182. Reyes-Contreras also held that causing injury necessarily involved the use of physical force. Id. at 183-184. Moreover, Reyes-Contreras overruled cases that previously required bodily contact to show physical force, that is, a risk of injury was now enough to implicate force.

After Reyes-Contreras, an offense satisfies the force clause "if the proscribed conduct (1) is committed intentionally, knowingly, or recklessly; and (2) employs a force capable of causing physical pain or injury; (3) against the person of another." Id. at 185. Reyes-Contreras fundamentally changed the crime of violence analysis in elements clause cases, taking what the opinion described to be a "more realistic approach" that "comports with reason and common sense." Reyes-Contreras, 910 F.3d at 186.

The "crime of violence" definition contains a residual clause in subpart (b) that was found to be unconstitutionally vague in Sessions v. Dimaya, 138 S.Ct. 1204 (2018).

2. Harboring, Transporting, Bringing Aliens Into the United States.

The penalty provisions for these offenses are found in Title 8, Section 1324(a)(1)(B). Punishments range from 1 to 15 years imprisonment, depending upon the crime committed, the offender's criminal record, and whether the offense was committed for profit. Applying the Supreme Court's penalty enhancer (not element of crime) rationale of Almendarez-Torres to these prosecutions, counsel should never rely upon the indictment to predict a client's sentencing range. Crucial penalty elements, such as profit motive and past criminal record, may not be mentioned, although an Apprendi challenge to a sentence above the charged offense range remains available.

V. CONCLUSION

This paper surveys a broad area of federal practice that is constantly evolving. Counsel must remain vigilant to changes in the law and double check to insure that the material reported here continues to reflect the current state of the matter under review.