

CHALLENGING THE UPWARD BUMPS: THE CATEGORICAL APPROACH AND OTHER SENTENCING STRATEGIES FOR ILLEGAL RE-ENTRY (8 U.S.C. §1326) CASES¹

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By
Francisco “Frank” Morales, AFD
Southern District of Texas
Corpus Christi Division

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¹Please bear in mind that this “outline” is meant as a nuts-and-bolts quick reference that aims to provide some helpful hints in defending your 1326 cases. As always conduct careful and detailed legal research to determine how your circuit may handle a particular issue.

INTRODUCTION

In too many of our §1326 cases, the government is usually able to gather all of its documents in an effort to prove your client guilty at trial, should he/she decide to go to trial. Often, we end up pleading our §1326 clients guilty and we head toward sentencing holding onto our hats, getting ready for the rough ride. However, there is plenty we can do to reduce our clients' stays in Club Fed. Our efforts at sentencing might significantly reduce the sentence our clients receive. Even though we plead our clients guilty in the face of overwhelming evidence, we've only just begun to fight. This is our fight.

CARDINAL RULE: Courts utilize a categorical approach to determine how prior convictions may affect a guideline sentence. Look to the fact of conviction and the statutory definition of the prior offense to determine whether the prior conviction fits into a class of offenses and how that class is handled. The particular facts that underlie the criminal conviction are not to be inspected. This approach has been utilized to end the needless re-litigation of prior convictions by strictly examining *only* the record of conviction to determine how a certain conviction should be handled by the Guidelines. *Taylor v. United States*, 495 U.S. 575 (1990).

I.

1. DETERMINING THE FACT OF CONVICTION

- a. First, find the judgment of conviction from the convicting court. The judgment will tell you the essentials of your client's criminal conviction. That is, it will reveal the statute that was violated. Because statutes change from year to year and they are affected by case law, make sure you retrieve the proper version of the statute (i.e., the right year).
- b. Next, once you know which statute was violated, get a copy of the statute of conviction.²
- c. After getting the statute of conviction, ask yourself these questions:
 1. **Does the statute make clear that there is only one way of committing the offense?**
 2. **Are there various ways of committing the offense, including mental states?**

If there is more than one way to commit the offense³ (including mental states) then the Court may also consider "judicially noticeable documents": indictment, jury instructions, if any, signed guilty plea, or transcript from plea proceedings to try to "pare down" your client's fact of conviction. *United States v. Casarez-Bravo*, 181 F.3d 1074, 1076 (9th Cir. 1999); *United States v. Kirksey*, 138 F.3d 120, 124 (4th Cir. 1998)(look at charging document); *United States v. Damon III*, 127 F.3d 139, 141-42 (1st Cir. 1997)(when statute of conviction covers both violent and nonviolent offenses, court can look at charging instrument and/or jury instructions); *United States v. Allen*, 282 F.3d 339(5th Cir. 2002)(reiterating the categorical approach). **Court may not look beyond indictment to police reports, probable cause affidavits, et cetera to help establish fact of conviction.** *Shepard v. United States*, 125 S.Ct. 1254 (2005).⁴

If there is only one way to commit the offense then...
The statute itself becomes your client's fact of conviction. This is exceedingly rare, however.

²As you know, state legislatures like to amend provisions of their codes all the time. Be sure to examine the correct statute as it was applied to your client's former case. The Bar card you save may be your own!

³This is what we often refer to as a "divisible statute."

⁴But, be very wary of your clients' admissions to facts during previous plea colloquies. They CAN be used against them.

2. POSSIBLE CHALLENGES AT THIS POINT:

- a. **WAS THERE A CONVICTION?** The following types of dispositions *may* pose a problem in the Probation Officer's attempt to assess an upward bump:
 1. Juvenile adjudications
 2. Diversionary Dispositions
 3. Appeal
 4. Expungements
 5. Federal First Offender Act (Title 18 U.S.C. §3607) and state analogs. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000)(expunged drug convictions not "convictions" for purposes of §1101.

- b. **UNCOUNSELED CONVICTIONS.** Uncounseled convictions should not score out because a violation of the right to counsel essentially amounts to a jurisdictional defect, rendering the conviction null and void. *Custis v. United States*, 511 U.S. 485 (1994)(holding that uncounseled convictions cannot serve as the basis for a statutory enhancement). The strength of this argument was curtailed somewhat by *Iowa v. Tovar*, 124 S.Ct. 1379 (2004) wherein the Court held that in a guilty plea scenario "the constitutional requirement [for a valid waiver of counsel] is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 1383. In so holding, the Court rejected the idea that lower courts must advise the defendant pursuant to *Faretta v. California*, 422 U.S. 806 (1975) regarding the value of an independent legal opinion as well as the risk of proceeding where a viable defense may be present. While *Tovar* has curtailed the success of challenging prior uncounseled convictions, the possibility still exists to challenge the waiver of counsel on knowing and intelligent grounds. Keep in mind that for that type of challenge we bear the burden.

- c. **IMPROPER CONVICTIONS OBTAINED AGAINST JUVENILES IN ADULT COURT.** A conviction obtained in violation of a juvenile's rights (ie, rights he has because of his age) can become null and void, depriving a court of jurisdiction if no transfer proceeding occurred. This area of challenge is subject to each of the states' individual laws relating to juvenile proceedings. Consult each state juvenile code for guidance.

- d. **PADILLA V. KENTUCKY CONCERNS.** In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court set a certain baseline for basic competence of criminal defense attorneys when defending clients who may face immigration

consequences of certain criminal convictions. The Court rendered materially important the ideal that criminal defense attorneys must be considerate of and advise on the immigration consequences of certain types of convictions. If one of your current 1326 clients was convicted following faulty or non-existent advice regarding the immigration consequences of his criminal conviction, what, if anything, can you do to challenge that? See the discussion above regarding uncounseled convictions.

If it was the case that the conviction took hold while prior defense counsel did not/did not adequately advise on the consequences of his conviction, this the Supreme Court held in *Padilla* amounted to ineffective assistance of counsel. You might want to argue that the current court should not use that conviction for any purpose since it was effectuated under the tint of ineffective assistance of counsel.

While the *Padilla* decision is very fresh, counsel should think as much out-of-the-box in attempting to make some ground for relief for their clients.

II.

WHERE IT ALL BEGINS BASE OFFENSE LEVEL 8.
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- A. All §1326 prosecutions begin with a base offense level 8. If your client does not receive any “bumps⁵” from the specific offense characteristics under (b)(1) of U.S.S.G. §2L1.2, consider yourself and your client lucky and say nothing further.
- B. Specific Offense Characteristics will, in most cases, add levels to your base offense level, depending on your client’s criminal history. There are four potential increases that can apply to your client:
1. 16-level bump (Sixteen levels added to the base offense level, ie, **8 + 16 = 24**);
 2. 12-level bump (Twelve levels added to the base offense level, ie, **8 + 12 = 20**);
 3. 8-level bump (Eight levels added to the base offense level, ie, **8 + 8 = 16**);
 4. 4-level bump (Four levels added to the base offense level, ie, **8 + 4 = 12**).
- C. Some other considerations.⁶
1. It is permissible to use same conviction to enhance offense level and to add criminal history points. *United States v. Luna-Herrera*, 149 F.3d 1054 (9th Cir. 1998).
 2. Nothing is too remote for purposes of the upward bumps. *United States v. Gonzalez*, 112 F.3d 1325 (7th Cir. 1997).
 3. Even if prior conviction would not count for purposes of assessing criminal history points under U.S.S.G. §4A1.2, this does not prevent the use of that conviction for

⁵I use the terms “bumps,” “increases,” “upward adjustments,” all interchangeably. They all mean the same thing: if your client gets one, he’ll be upset.

⁶If any of these issues are present in your case, consider making a motion for downward departure or variance or whatever language is appropriate in your district. In the case of remoteness, stress rehabilitation. In the event of counting the offense for criminal history points and offense levels, consider an over-stated criminal history departure (covered elsewhere in this paper).

determining offense level. *United States v. Lara-Aceves*, 183 F.3d 1007 (9th Cir. 1999).

III.

THE UPWARD BUMPS⁷ MISERY LOVES COMPANY.

THE SEQUENCING DEFENSE

First and foremost, in order for the government to seek an enhancement, the deportation they allege in the indictment is what triggers the enhancement. *United States v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007). That is the case because that temporal relationship between the deportation date and the dates of sustained convictions is important for purposes of triggering the enhancements under 2L1.2(b)(1). Further, this consideration is countenanced pursuant to *Apprendi v. New Jersey*, 530 US 466 (2000). The only matter that can raise the statutory maximum beyond 2 years is whether there is a fact alleged and proven beyond a reasonable **OR ADMITTED BY YOUR CLIENT** which would kick in the higher maximum sentences. For example, consider these facts:

1. Defendant sustains a misdemeanor conviction for DWI in 1995;
2. Defendant gets deported in 1996;
3. Defendant returns and commits crime of murder in 1997;
4. Defendant gets deported again in 2005;
5. Defendant returns to US and is charged with 1326, but is alleged to have returned to the US after his previous deportation in 1996 (before his murder conviction).

Based on the foregoing facts, the enhancements in U.S.S.G. §2L1.2 are not triggered because the indictment alleged a deportation that was only subsequent to a DWI conviction *and not the murder conviction*. Not only does this sequencing of events hinder the application of 2L1.2(b)(1), but it also hinders the application of the bouncing 1326 penalty maximums (2/10/20 year maximums).

AND, best of all, since the issue is the fact of a date of deportation as it relates to a conviction, your *Apprendi* argument is solid. You are not complaining about the *fact of a previous conviction*. You are complaining about the proof of a deportation relative to criminal convictions. This, you would argue, requires proper pleading and proper proof (beyond a reasonable doubt). Otherwise, the 1326 is capped by the lowest applicable statutory maximum. Even at 24 months of imprisonment, this could be a significant victory.

⁷Remember that the bumps/increases do not count if a conviction occurred before the defendant attained the age of 18, unless the conviction was classified as an adult conviction under the laws of the jurisdiction of conviction. U.S.S.G. §2L1.2 *Commentary, Application Note 1(A)(iv)*.

Please bear in mind that if a prosecutor does not allege a deportation date in the indictment, make sure your client **does not admit being deported on a certain date**. Further, be very careful with admitted facts in the pre-sentence report for that same reason. *See United States v. Velasquez-Torres*, 609 F.3d 743 (5th Cir. 2010)(where defendant, through counsel, stated that the pre-sentence report was correct amounted to an admission as to all parts of the report). The wisest course of practice might be to object to portions of the PSR that need objecting and remaining silent on the rest.

Now, assume that the indictment has properly alleged a deportation that triggers some enhancement. Where do we go from here?

IV.

THE UPWARD BUMPS AND HOW TO ATTACK THEM.

THE 16-LEVEL BUMP.

To be assessed a 16-level bump, conviction must have been a felony.

Application Note 2 defines felony as any federal, state, or local offense punishable by imprisonment for a term exceeding one year. IF THE CONVICTION IS NOT A FELONY, DROP TO 8 LEVEL INCREASE TO SEE IF IT APPLIES.

I. Types of offenses that get 16 level bump

A. Felony drug trafficking offense for which the sentence imposed exceeded 13 months.

- i. Again, must be felony.
- ii. Must be a drug trafficking offense. *Application Note 1(B)* defines drug trafficking offense as an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance or the possession of a controlled substance with the intent to manufacture, import, export, distribute, or dispense.
 - A. Be very careful with “divisible statutes.” These are statutes that are broad enough to include multiple offenses, some of which are drug trafficking and others which are not.

PRACTICE NOTE:
IF OFFENSE DOES NOT MEET DEFINITION OF TRAFFICKING, DROP DOWN TO EIGHT LEVEL BUMP TO SEE IF IT APPLIES.

Sixteen-level increase (cont'd)

CASE STUDY EXAMPLE:

For example, consider California Health and Safety Code §11360(a) which states that every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana will be punished...

A look at the J&C will only reveal the statute of conviction. A look at the statute will only reveal the above information. The court is then allowed to look at other documents to see precisely what defendant entered a guilty plea to. If from indictment, jury instructions, if any, and any signed plea documents, court cannot determine which element was pled to, does not suffice for purposes of "drug trafficking crime." *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc).

- B. Cf *United States v. Palacios-Quinonez*, 431 F.3d 471 (5th Cir. 2005), possession/purchase for sale satisfies definition of drug trafficking offense.
 - C. Prior conviction for possession of a listed chemical (ie, ephedrine, or other chemicals used to manufacture drugs) NOT a drug trafficking offense because 2L1.2 does not include language relating to listed chemicals where 4B1.2(b) does. Under rules of statutory construction, where language is included in one section but is omitted in an identical section, it is generally presumed that the exclusion was intentional. *United States v. Arizaga-Acosta*, 436 F.3d 506 (5th Cir. 2006).
 - D. Pay particular attention to delivery of drug statutes where delivery is defined to include a possibility that the defendant may not have actually possessed the drug. The reason for this result is that only an analogue to 'possession with intent to distribute' can qualify as a drug trafficking crime. If a delivery conviction includes any possibility other than actual or constructive possession, you have an objection.
 - E. What about a statute that prohibits possession with intent to deliver? Possession is no longer an issue...BUT is intent to deliver the same as intent to distribute? You will have to pay particular attention, again, to the way that the state has defined deliver(y) and hope to God that maybe their definition encompasses conduct that cannot be equated to 'distribution.'
- iii. Sentence imposed must exceed 13 months.

Sixteen-level increase (cont'd)

A. *Application Note 1(B)(vii)* defines sentence imposed the same as *Application Note 2* and subsection (b) of §4A1.2.

1. Sentence of imprisonment means a sentence of incarceration and refers to the maximum sentence imposed (in the event of an indeterminate sentence);
2. If part of a sentence of imprisonment was suspended, “sentence of imprisonment” refers only to the portion that was not suspended;

A. If all of the sentence was suspended then there was no “sentence imposed” for purposes of the either the sixteen- or twelve-level increase and neither increase can be justified. *US v. Rodriguez-Parra*, 581 F.3d 227 (5th Cir. 2009).

3. The length of the sentence imposed includes any revocations.

CHECK THIS OUT: Imagine that a person receives a term of probation for a DTO gets deported and then returns. During his illegal presence, he is revoked on his DTO and is assessed a sentence in excess of thirteen months. During his revocation imprisonment he is “discovered” by immigration officials and charged with re-entry. Since he was deported with a DTO conviction that had a probationary punishment, it cannot be said that he was deported following conviction for a DTO *where the term of imprisonment exceeded thirteen months*. This was the case in *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010).

- iv. Be very careful with non-DTO sounding offenses that incorporate drug trafficking. Defendant’s prior conviction under the Travel Act was drug trafficking crime because racketeering activity was drug trafficking as listed in indictment. *United States v. Rodriguez-Duborney*, 326 F.3d 613 (5th Cir. 2003). *See also United States v. Pillado-Chaparro*, 2008 WL 4228232 (5th Cir. September 17, 2008)(court found that conviction for use of a telecommunications facility to facilitate a drug trafficking crime is a DTO).

A. In this regard, also be careful with the loose fissile statements that may be floating out there in the form of judicial statements and admissions made by our clients at prior hearings. If your case on paper (judgment, indictment) does nothing more

Sixteen-level increase (cont'd)

than create a question about what your client actually pled guilty to, the transcripts of the proceedings will only hurt your case. Right?

ETHICAL CONSIDERATION:

What if your objection stems from a failure of proof and your otherwise assiduous investigation reveals the “truth” about your client’s criminal past? What obligation do you have to disclose that? What obligation do you have to not mislead? How do you speak the truth without lying?

Let’s say you issued an objection on April 1, 2007 that “no documents have been cited by the Government that would allow for any adjustments; therefore, we do not know the exact variant or elements of the statute that defendant entered a plea of guilty to.” Then on April 10, 2007, you receive the documents you requested from the convicting jurisdiction. What do you do now?

B. A conviction for a felony that is a ‘crime of violence’^{8 9}.

1. Crime of violence is...

- A. any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling; or**

(1) Take a look at the type of analysis that the Supreme Court engages in *Taylor*

⁸The crime of violence definition has two parts: enumerated offenses and the definitional approach. The various enumerated offenses are listed on pages 13-18; the definitional approach begins on page 19.

⁹Believe it or not, for some time now, the Fifth Circuit has been the most progressive circuit with respect to case law surrounding crimes of violence. Anne Berton and Molly Roth, both Assistant Federal Public Defenders with the Western District of Texas have compiled a running list of crimes of violence adjudications in the Fifth Circuit, both at the appellate level, and at the district court level, together with those cases where the Government has conceded the crime of violence objection. To get a taste of the jurisprudence in this area, refer to Appendix A. As the list will indicate on its face, do not take the prior holdings as gospel. And, do not assume that because you don’t see your particular researched offense that you are sunk. Like my mama always said, “Nothing beats good legal research in the proper context and jurisdiction.” Okay, mama never said that. But the sentiment is true. So, research, research, research.

Sixteen-level increase (cont'd)

to determine whether your enumerated offense *is* any of the listed offenses.

A. In this context, counsel should have in hand two things: the statute of conviction for his client's prior offense, and the contemporary, generic definition of the enumerated offense. What you are trying to ascertain is: 1) what conduct was meant to be prohibited by the statute? and 2) is this the type of conduct Congress had in mind when formulating the guideline section?

1. The primary source for determining the contemporary, generic definition of offenses is the Model Penal Code. *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006).¹⁰

A. MANSLAUGHTER

1) For an example, see *United States v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004)(finding contemporary, generic definition of manslaughter to hold that conviction for criminally negligent homicide did not amount to manslaughter and was not, therefore, equivalent to the enumerated offense of manslaughter because level of disregard of risk between the two types of cases involved was different).

B. BURGLARY OF A DWELLING.

1) A prior conviction for burglary (even of a dwelling or home) where the entry was not unprivileged or where there was no intent to commit another crime at the time of the entry may not qualify as burglary. *United States v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007); *United States v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007); *See United States v. Constante*, 2008 WL 4457007 (5th Cir. 2008)(court found that a burglary that lacked specific intent at the time of the entry was not a burglary and therefore not a violent felony under ACCA).

2) Generic burglary of a dwelling does NOT include entries into the curtilage. *United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir.

¹⁰Although primary, the Model Penal Code is not the only source. To do an effective job of assessing the contemporary, generic definition of an offense, the practitioner should also undertake the arduous task of surveying the legal landscape of the fifty states to determine what type of conduct predominates for a given offense.

Sixteen-level increase (cont'd)

2007).¹¹

¹¹I probably shouldn't use a footnote to explain the absolute indecipherableness of the state of the law with respect to 'burglary of a dwelling' and whether entry into curtilage of that dwelling qualifies as 'dwelling.' The Fifth Circuit previously held it did not. Then, it seemed to reverse course in *US v. Garcia-Mendez*, 420 F.3d 454 (5th Cir. 2005) and then make no sense in *US v. Cardenas-Cardenas*, 543 F.3d 731 (5th Cir. 2008) in which it seemed to contradict Supreme Court precedent in *James v. US*, 550 U.S. 192 (2007)(finding that inclusion of curtilage in a Florida burglary statute was more broad than generic burglary). Should you have this issue, research your circuit's law carefully and rely on the language in *James* as precedent.

CASE STUDY:

A person is convicted of aggravated burglary pursuant to Kansas Statute Annotated §21-3716 which prohibits a person from knowingly and without authority entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being, with intent to commit a felony, theft or sexual battery therein.

Very similar to the divisible statute problem, this statute, *on its face*, contains reference to possible dwellings and other non-dwellings. Therefore, a closer look at the charging paper might resolve the issue. The charging paper reveals that the defendant was charged with knowingly and without authority and with the intent to commit a theft, enter into or remain within a building, to wit: an attached garage of the residence...

Since the charging paper made reference to a “building,” even though it was an attached garage, the court ruled that it was a burglary of a building and not a dwelling. Sixteen level increase rejected, while Probation Officer kept insisting that the garage was attached and the victim was at home.

C. AGGRAVATED ASSAULT

- 1) Aggravated assault on a peace officer is not equal to contemporary, generic definition of aggravated assault since contemporary, generic definition does not require an element pertaining to the status of the victim. *United States v. Fierro-Reyna*, 466 F.3d 324 (5th 2006).
 - a. The 2008 amendments to the Sentencing Guidelines suggest that a departure should be considered when something that could not be considered an aggravated felony is nonetheless treated as a +16 level enhancement. For example, a person sustains an aggravated assault conviction but receives less than a year’s term of imprisonment. This would not qualify as an aggravated felony (see discussion below), but will still conceivably qualify for the major, sixteen-level enhancement. Consider making an argument relating to this anomaly.

Sixteen-level increase (cont'd)

- 2) The mental state required to constitute generic, contemporary aggravated assault can be as low as simple recklessness. *US v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007)(where Fifth Circuit utilized a version of the ‘common sense’ approach rather than the categorical approach.) *But see US v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009)(wherein Ninth Circuit expressly disagrees with both the outcome of *Mungia-Portillo* and the use of the ‘common sense’ approach and finds that to constitute contemporary, generic aggravated assault requires something more than simple recklessness.) **This schism has created a circuit split on this issue.**

D. ROBBERY.

- 1) In the Fifth Circuit, the contemporary, generic definition of robbery that requires a taking by force or fear is met by Texas’s definition requiring bodily injury. *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006).
- 2) Bear in mind that many jurisdictions call offenses ‘robbery’ where the elements may not contain a taking or the requirement of the concomitant force or fear. Carefully read the statute involved and see if you have some wiggle room.

E. FORCIBLE SEX OFFENSES

- 1) Forcible sex offense denotes a species of forcible compulsion more than just the force used to accomplish sexual penetration. Further, intercourse does not involve the use of force when it is accompanied by consent-in-fact. *US v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004). The key issue involved in *Sarmiento-Funes* that practitioners must not lose sight of is that the statute of conviction had various ways of accomplishing unconsented-to sex. Consent, in Missouri, encompassed assent plus legal ability to assent. So, therefore, an intoxicated person, mentally diminished person, or a minor can assent to sex, but the State disregards or countermands that decision. This was a possibility under the statute, together with possibilities of assented-to sex accomplished through coercion, duress, or deception. This is the key distinction under *Sarmiento-Funes*.
- 2) If sex was obtained through use of constructive force—such as

Sixteen-level increase (cont'd)

nonphysical duress—it will be a forcible sex offense. *US v. Beliew*, 492 F.3d 316 (5th Cir. 2007); *US v. Gomez-Gomez*, 547 F.3d 242 (5th Cir. 2008); *Accord United States v. Remoi*, 404 F.3d 789 (3rd Cir. 2005) (where the Third Circuit affixed the definition of forcible sex offenses as “a sexual act that committed against the victim’s will or consent.”)

G. SEXUAL ABUSE OF A MINOR

1. There exists a circuit split on North Carolina’s TAKING INDECENT LIBERTIES WITH A CHILD statute (N.C. Gen. Stat. §14-202.1(a)(1)). The split represents the spectrum of arguments with respect to sexual abuse of a minor. Check the statute and see if it is so broad so as to focus more on the motive of the perpetrator than on the conduct of the perpetrator. *See United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006). Further, is it possible to commit the offense without the child being aware?
 - a) In the Fifth and Eleventh Circuits, the statute is not so broad so as to prohibit conduct that is beyond the contemporary, generic definition. *United States v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005) and *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001). The Fifth Circuit used a “common sense approach” to so hold that the statute was sexual abuse of a minor.
- 2) Indecency with a child by contact is sexual abuse of minor. *United States v. Najera-Najera*, 519 F.3d 509 (5th Cir. 2008).
- 3) What is a minor? The Fifth Circuit has held that a minor is anyone under the age of seventeen. *Najera-Najera, supra*. *But see Lopez-DeLeon*, 513 F.3d 472, (5th Cir. 2008)(age of consent for purposes of ‘statutory rape’ is 16); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008)(holding that a ‘minor’ is anyone under the age of 16). **This creates a nice, little Circuit split.**
- 4) A relevant task that often has to be undertaken in determining the contemporary, generic definition of is to canvass the state and federal definitions of various terms. For example, in *United States v. Munoz-Ortenza*, 563 F.3d 112 (5th Cir. 2009) the Court undertook a canvassing of the definitions relating to ‘minor’ whether contained in state codes or the federal system. By so doing, the Court determined

Sixteen-level increase (cont'd)

that the vast majority of jurisdictions defined 'minor' as a person under the age of seventeen. Since California's definition of 'minor' included people under the age of eighteen the definition was too broad and did not meet the contemporary, generic definition of minor.

H. STATUTORY RAPE

- 3) As Boy George once sang, "Love is love is nothing without you."¹² So many more of our cases involve defendants who had a great and abiding love for their less-than-legal girlfriends. What would Romeo do? Chances are Pedro did time. Hard time. Well, aside from pissing and moaning "It ain't right," let's focus on a legal challenge.
 - a) Check to see if your client was convicted of a statute specifically attempting to prohibit statutory rape (otherwise consensual sex with a minor). For obvious reasons, consensual sex with a minor is not forcible because it generally does not involve coercion or force. And, it usually is not sexual abuse of a minor because of the closeness of ages between the willing "victim" and the willing "perp". So, only statutory rape can stick. But only if they can make it stick. Look out for these problematic statutory schemes:
 - (1) If the statute of conviction merely prohibits sex with a person under a certain age without reference to the age of the so-called perpetrator;
 - (2) If the statute of conviction prohibits sex with a person under a certain age and specifies a span of age difference between victim and perp that is less than three years of age;
 - (3) If the statute of conviction prohibits sex with a person under a certain age, but if, and only if, the perp is the same sex as the victim.
 - b) #1,2 above would constitute grounds for challenge of the enhancement because it may not be statutory rape categorically; #3 above can be challenged because of its gender-specificity. Additionally #3 might be challenged because of the disparate treatment between the genders.

¹²*At Worst...the Best of Boy George and Culture Club*, ©1993.

I. ARSON

A. Generic arson is defined as wilful and malicious burning of property without regard to whether there was threatened harm to a person. *US v. Velez-Alderete*, 569 F.3d 541 (5th Cir. 2009).

1. As Brad Bogan, the creator of the Fifth Circuit Blog and Western District of Texas wunderkind has commented, footnote 4 of the opinion announces the various states that have arson statutes with similar arson statutes. So, if your client was convicted of arson in a state different from that listed in the string cite in footnote 4, argue that it is not contemporary, generic arson.

NOW THE OTHER PART OF THE CRIME OF VIOLENCE DEFINITION:

B. is any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

- (1) Strictly engage categorical approach (ie, Look at statute of conviction and determine whether the statute of conviction has *as an element* the use, attempted use, or threatened use of force against the *person* of another.
 - a. “Use” requires an intentional use, and not merely a negligent or reckless use. *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004)(holding that intoxication assault is not a crime of violence because it lacks as an element the use, attempted use, or threatened use of physical force against the person of another because forced used was not intentional).
 - b. Check to see which mental state applied to the commission of the offense. If more than just knowingly or intentionally is listed, check the indictment. If the indictment does not further elucidate the mental state, argue that the crime could have been committed with something less than a knowing or intentional mens rea and therefore does not categorically have an element the use, attempted use, or threatened use of physical force against another.
 - c. MANNER AND MEANS OF COMMITTING THE CRIME: Do not be thrown by language in an indictment which describes the manner and means of committing the offense. The manner and means of committing the offense is not part of the statute of conviction, it is merely intended to meet a due process concern with respect to charging. IT IS NOT PART OF THE STATUTE AND SHOULD NOT BE TREATED AS PART OF THE STATUTE. *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004).
 - d. WHAT IS IMPORTANT IS THE USE OF FORCE AGAINST THE PERSON AND NOT THE RESULT OF SOME ACTIVITY. Look to confirm that the statute/indictment has the element of physical, intentional force against the person of another. Consider this distinction: Does the statute actually have a requirement that the offender apply force or does it leave open the possibility that harm might befall the victim by some mode other than physical force applied by the actor? If the statute is results-

Sixteen-level increase (cont'd)

oriented (ie, that injury occur, without requiring direct application of physical force), this does not suffice. *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006).

**CASE STUDY:
WHAT DOES 'USE' MEAN?**

Felony reckless endangerment.

A person is convicted of reckless endangerment under an awful set of facts. He kidnapped and held his wife and four kids at bay with a knife and kept mom tied up with electrical cord. This event lasted a couple of hours.

Our hero is charged with reckless endangerment, a felony, which reads, "a person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." Tennessee Code Annotated 39-10-103.

Court appeared convinced that this statute would otherwise qualify as a crime of violence. But, counsel then honed in on "use" issue because the charging paper read that defendant, "unlawfully, knowingly, and recklessly engaged in conduct which placed ... in imminent danger of death or serious bodily injury by displaying a knife in a reckless manner..."

Arguing that a person cannot knowingly and recklessly commit an action, as well as noting that the actus reus was done recklessly, as noted in the charging paper, the court sustained counsel's objections and denied the 16-level bump. Compare this to *Leocal v. Ashcroft*, 543 U.S. 1 (2004) for a good discussion of what mental state is required when thinking about the use of force.

Sixteen-level increase (cont'd)

CASE STUDY:

WHAT DOES 'FORCE' AGAINST THE PERSON OF ANOTHER MEAN?

Consider the following statute:

Ga.Code Ann. §16-5-23.1(f)—Family Violence Battery

“...intentionally caus[ing] substantial physical harm or visible bodily harm to another....”

Because this statute is results-oriented, ie that harm be an outcome, and does not require physical force by the actor upon the person, this statute does not have an element the use, attempted use, or threatened use of physical force against another. This is the holding of an unpublished Fifth Circuit case called *US v. Lopez-Hernandez*, 112 Fed. Appx. 984, No. 02-21078 (2004). *Lopez-Hernandez* cites *US v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004)(en banc) and *US v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002).

In a related manner,

A generic crime of violence or an aggravated felony must involve force which is purposeful, violent, and aggressive. Further, the risk of physical force must be an essential element of the offense, not simply that the force could occur. *United States v. Chambers*, 129 S.Ct. 687 (2009); *United States v. Begay*, 128 S.Ct. 1581 (2008).

INTERESTING FACT:

Remember, the Court is prohibited from looking beyond the four corners of the statutory definition or charging paper, together with the jury instructions, if any. Therefore, if your client intentionally ran over and killed a group of nuns on their way to pray for a group of deaf schoolchildren injured in a bus accident, but was charged only with reckless driving, a misdemeanor, this would not qualify as a crime of violence for which a sixteen-level enhancement would properly apply.

C. A felony that is a firearms offense.

1. Compare the indictment, charge, and statute in your case with the specific statute enumerated in the presentence report.

A. Gather more statutes.

1. 18 U.S.C. §921;
2. 18 U.S.C. §841(c);
3. 26 U.S.C. §5845(a);
4. 18 U.S.C. §844(h);
5. 18 U.S.C. §924(c);
6. 18 U.S.C. §929(a);
7. State/local catch all

2. Some have tried to argue that the lack of interstate commerce nexus in state versions of the above-listed statutes might be grounds to suggest that the statute is not the equivalent of one of the enumerated offenses, the Fifth Circuit had held the interstate commerce nexus is not a necessary element. *Nieto-Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009). But, if you find yourself in a different circuit, you might want to consider making this argument.

So, if a conviction has been sustained based on a state firearm conviction, check to see if the firearm traveled in interstate commerce. If no, then enhancement may not apply.

D. A felony that is a child pornography offense.

1. Gather more statutes.

A. An offense described in 18 U.S.C. §§2251, 2251A, 2252, 2252A, 2260; or

B. State/local catch all.

1. For example, child pornography offenses under state or local law that were not prosecuted under federal law, but could have been.

Sixteen-level increase (cont'd.)

E. A felony that is a national security or terrorism offense.^{13 14}

1. Take a look at the fudgery of the language of the terrorism offense definition in *Application Note 1(B)(viii)*.
 - A. ...means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. §2332b(g)(5).

F. A felony that is a human trafficking offense.

1. An offense described in 18 U.S.C. §§1581, 1582, 1583, 1584, 1585, 1588, 1589, 1590, 1591; or
2. State/local catch all.

G. A felony that is an alien smuggling offense.

1. Any offense under 8 U.S.C. 1324(a)(1)(A) and (2), regardless of monetary gain, unless the person being smuggled was the defendant’s spouse, child, or parent (and no one else).
 - A. Whether the offense was committed for profit, commercial advantage, or private financial gain is irrelevant. However, if the smuggling offense involved either the alien’s spouse, child, or parent, *and* there is an affirmative showing of that relationship, the increase cannot stand. And, the same affirmative showing will also help to erase the eight-level enhancement, *infra.*, as well.

¹³With this country’s current penchant for torture, rendition, and garden-variety totalitarianism, it is hard to see that someone could sustain a national security or terrorism conviction, serve his time, be deported to his home country, and then, after all that pleasantries, illegally return to the United States.

¹⁴Please note that while footnote 15 was mostly in play during the years 2001-2008, one would hope that the facts contained therein are moot and without merit. In the unfortunate event that those things still occur, I leave footnote 15 where it stands.

THE 12-LEVEL BUMP.

I. A felony conviction for drug trafficking offense for which the sentence imposed was 13 months or less

- A. Refer to rules stated earlier about drug trafficking offense definition and amount of imprisonment to count.
- B. Important consideration and something to worry about: If the statute of conviction is a divisible statute (ie, multiple different offenses included where ones would be trafficking but others wouldn't), be mindful that under *Booker* the district court although bound to consider the guidelines, may seek to jack up the sentence to better reflect the actual conduct of the conviction. In at least one case, the Fifth Circuit has given its imprimatur to this type of increased sentence. *See United States v. Gutierrez-Ramirez*, 405 F.3d 352, 359 n.14 (5th Cir. 2005)(although underlying conviction could not be proven to involve drug trafficking simply because of the over-inclusiveness of the statute of conviction, facts underlying offense could be relied on to jack up sentence).

THE 8-LEVEL BUMP

I. AGGRAVATED FELONIES¹⁵

- A. Refer to 8 U.S.C. §1101(a)(43).
- B. “Aggravated felony” is a term of art. Disregard any prior definition that you may possess whether through schooling, training, experience, common sense, or serendipity. Only recently has the Supreme Court recently rejected the categorical approach in determining whether certain offenses are aggravated felonies or not. *Nijhawan v. Holder*, 129 S.Ct 2294 (2009)(holding that a prior conviction for fraud where the loss exceeded a certain dollar amount did not require that the statute have an element the amount of loss, rather that the loss be found as a circumstance of the case.)
- C. Some matters to keep in mind. Some places might have overlap with +16 land. A probation officer could mistakenly assess only the 8-level bump, rather than the 16-level increase out of confusion or laziness. In that case, keep your mouth shut, no objections, and get sentenced fast.
- D. For all the offenses listed in 1101(a)(43), be sure to compare the generic definition of the offense against the actual definition of the offense of conviction. You may be able to argue that a particular crime is not one listed in 1101(a)(43) and, therefore, not an aggravated felony.
 1. 8 U.S.C. §1101a(43)(A). Murder, rape, sexual abuse of a minor. Traditional murder/rape convictions and sexual abuse of a minor already subsumed in sixteen-level bump.
 2. 8 U.S.C. §1101a(43)(C), (E). Firearms/Explosive offenses.
 3. 8 U.S.C. §1101a(43)(G) as it relates to burglary and theft.
 4. 8 U.S.C. §1101a(43)(H) maybe as it relates to ransom and cross-reference to kidnapping.
 5. 8 U.S.C. §1101a(43)(I). Kiddie porn.

¹⁵In most cases, it sounds worse than it is. And, in some cases, it is worse than it sounds.

Eight-level increase (cont'd.)

6. 8 U.S.C. §1101a(43)(J). As it relates to racketeering activities found in 18 U.S.C. §1962.
 7. 8 U.S.C. §1101a(43)(K)(iii). As it relates to human trafficking (ie, slavery, peonage, involuntary servitude).
 8. 8 U.S.C. §1101a(43)(L). Arguably, most of this chapter includes offenses under the “Federal crimes of terrorism” (18 U.S.C. §2332b(g)(5)) that would probably get +16 level bump.
 9. 8 U.S.C. §1101a(43)(N). Alien smuggling.
- E. Some sections under 8 U.S.C. §1101a(43) require different types of proof of similarity to other offenses.
1. Some “aggravated felonies” are specific about the offense (ie, murder, rape, sexual abuse of a minor) or “as defined” in some other part of the law. 8 U.S.C. §1101a(43)(A), (B), (C), (F), (G), for example.
 2. Other agg. felonies are for “offenses described in...”. 8 U.S.C. §1101a(43)(E), (H), (I), (J), for example.
 3. Still others are for offenses “relating to...”. 8 U.S.C. §1101a(43)(K), (Q), (R), (S), (T), for example.
- F. For some crimes to qualify as aggravated felonies, the term of imprisonment imposed becomes important.
1. 8 U.S.C. §1101a(43)(F). To qualify to be an aggravated felony, the defendant must received a term of imprisonment of one year.
 2. 8 U.S.C. §1101a(43)(G). Theft and burglary, must have received a sentence of imprisonment of at least one year.
 3. 8 U.S.C. §1101a(43)(R). Forgery, bribery where the term of imprisonment is at least one year.
 4. 8 U.S.C. §1101a(43)(S). Obstruction offenses where the term of imprisonment is at least one year.
- G. For some crimes to qualify as aggravated felonies, the term of imprisonment that *may be imposed* is important.

Eight-level increase (cont'd.)

1. 8 U.S.C. §1101a(43)(J). RICO offenses where a sentence of one year of imprisonment may be imposed.
2. 8 U.S.C. §1101a(43)(Q). FTA for sentence where underlying offense was punishable by a term of imprisonment of 5 years or more.
3. 8 U.S.C. §1101a(43)(T). FTA for which two years may be imposed.

H. Remember, term of imprisonment means the period of incarceration or confinement ordered **regardless** of any suspension of the imposition or execution of that sentence in whole or in part.

Compare this language above to U.S.S.G. §2L1.2's definition of term of imprisonment: "If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended."

- I. Remember a conviction does not have to be a felony to be an aggravated felony. Misdemeanor assault, theft, burglary of an auto, criminal mischief, criminal trespass, for example, where the sentence was at least one year. See *United States v. Urias-Escobar*, 281 F.3d 165 (5th Cir. 2002)(holding that, at the time, a misdemeanor assault conviction where the sentence imposed was one year was aggravated felony under 1101); *United States v. Graham*, 169 F.3d 787 (3rd Cir. 1999)(misdemeanor theft offense an aggravated felony because defendant sentenced to one year jail).
- J. Aggravated Assault anomaly and term of probation.
 1. Under 1101a(43) this would not be an aggravated felony.
 2. However, this could receive a 16-level bump because it is enumerated in the 16-level group. And, a felony does not first have to qualify as an aggravated felony before assessing a sixteen-level bump against your client. *United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir.2003).
- K. Keep in mind that there is a catch-all in 1101(a)(43). 1101(a)(43)(U) treats as an aggravated felony an attempt or conspiracy to commit any offense described therein. So, if you avoid some of the hurdles with respect to definition or sentence imposed, beware the upwardly mobile Probation Officer who tries to use (U) to make a prior aggravated felony out of your client's criminal conduct.
- L. Some important differences between §1101a(43) and U.S.S.G. §2L1.2, to name a few.

Eight-level increase (cont'd.)

Title 18 U.S.C. §16....A crime of violence is (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another, or (b) any other offense that is a felony and 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

1. Crime of violence. §1101 crime of violence definition more broad and is defined at Title 18 U.S.C. §16.
 - a. Consider DWI-Felony. Texas felony DWI not an aggravated felony because, *inter alia*, "substantial risk that physical force ... may be used" contemplates only reckless disregard for the probability that intentional force may be employed; and the physical force described in section 16(b) is that "used in the course of committing the offense," not that force that could result from the offense having been committed. *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001).
 - b. AN INTERESTING NOTE: What is meant by the use of the phrase "by its nature"? In *Leocal*, Chief Justice Rehnquist said that burglary is an offense that by its nature would result in the use of force against a person. Does the "by its nature" language essentially create a black hole that could boldly sweep so many offenses into its fold. The 9-0 *Leocal* court did not do it with DWI—Causing Injury so think about the chances you have in your cases. The answer to this question may have been found in *Begay* and *Chambers*, *supra* wherein generic crimes of violence and aggravated felonies must involve physical force that is purposeful, violent, and aggressive AND be elemental in the statute.
2. Suspended sentences. §1101 counts entire sentence, regardless of whether part of it was suspended. §2L1.2 does not include suspended sentences. PRACTITIONER TIP: It is ideal for you to have your client sentenced to straight probation, for probationary sentences are not terms of imprisonment. However, a suspended sentence of one year jail suspended for one year probation spells the death knell for your client. That is why it is often better to have your client sentenced to anything short of one year, even if he has to do jail time (ie, anything less than 365 days).
3. **DRUG TRAFFICKING OFFENSE.** In order to be considered a drug trafficking offense under the aggravated felony enhancement, a prior drug conviction has to be punishable as a felony under the Federal Controlled Substances Act. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). That is, when simply possessing cocaine, an amount greater than 5 grams will result in an aggravated felony enhancement. Or, a second or subsequent conviction for possession amounts of marijuana could result in an

Eight-level increase (cont'd.)

aggravated felony enhancement, but only if the prior conviction is alleged. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010). See Title 21 U.S.C. §844. Pay particular attention to Title 21 U.S.C. §844 (federal drug misdemeanors and some felonies). If an argument can be made that the prior would have been a felony under the federal schema, be weary.

A. However, in order for a subsequent conviction for simple possession to count as an aggravated felony, the first conviction must have become final. *US v. Andrade-Aguilar*, 570 F.3d 213 (5th Cir. 2009).

M. Unlawful Use of a Motor Vehicle NOT an aggravated felony. *US v. Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009).

THE 4-LEVEL BUMP

- I. Any other felony; or
 - A. An interesting issue exists where a person sustains a conviction in a state with mandatory sentencing guidelines. You will have to research your client's convictions and the states to determine whether that particular state has a mandatory sentencing guideline scheme. Example: Kansas.
 1. In these states, a viable argument can be made that when a judge is required to assess a sentence of less than one year (ie, less than a felony under the 2L1.2 definition), you might be able to argue that the sentence restrictions make this a non-felony. You might want to give it a shot.
- II. Three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.
 - A. Any combination of misdemeanor crimes of violence or drug offenses will suffice.
- III. Very few of our clients get hit with this four-level enhancement and, as a result, it wains in comparison to the importance of fighting other higher enhancements. However, you will engage the same categorical strategies to objecting to these enhancements as has been discussed in the rest of this paper.

SOMETHING TO CHEW ON:

So few of our clients get assessed only a four-level increase that we sometimes jump for joy, click our heels, and thank a higher being for the luck and the mercy shown our client. Just be sure that this increase properly applies. Sometimes, although the rate of this occurrence is unknown, a client receives a four-level increase in error when, in fact, he should have received an eight- or even sixteen-level enhancement. If you are aware of that error, what ethical obligation do you have to the Court to correct the error? Does this ethical obligation interfere with your duty of loyalty to your client? If it does interfere, then what? How on earth do you expect your client to ever trust you again if you go and do something which increases his time? Is there a way to save your bar card and your reputation?

MOTIONS FOR DOWNWARD DEPARTURE

I. Overstated criminal history

“There may be cases where the court concludes that a defendant’s criminal history category significantly over-represents the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.”

—United States Sentencing Guideline §4A1.3, Policy Statement

Considerations:

- A. Few offenses (usually misdemeanors);
- B. Remoteness (10 years prior to instant offense); and
- C. No criminal activity during intervening period.

Other Considerations:

- A. Likelihood of committing other crimes (pre- and post-arrest rehabilitation, restitution, education, volunteerism, church-going activities, etc.);
- B. Reasons for commission of instant offense;
- C. Intervening good acts; and
- D. Intervening life event.

Opening the door to the Devil¹⁶:

- A. Facts underlying “minor offenses”;
- B. Same type of offense; and
- C. Recency

II. Cultural assimilation

Cultural assimilation is a permissible basis for a downward departure at sentencing. *U.S. v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001); *U.S. v. Lipman*, 133 F.3d 726 (9th Cir. 1998). This motion seeks downward departure specifically under United States Sentencing Guideline §5K2.0 as a “mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.”

In essence, this motion asserts that your defendant is a “de facto American.” The relevance is two-fold. First, a de facto American facing deportation is essentially

¹⁶Opening the door to the Devil’ is an awkward phraseology that I use to describe situations where your argument, albeit intended to be helpful to your client, gets your client into hotter water. For example, in a case involving an assault that was actually a rape, mentioning that the assault puts your client into category III and that, therefore, his criminal history category is overstated might draw the special ire of the judge, especially if the judge was previously unaware of those facts. Everybody knows you want to help your client, but, on the way to Nirvana, don’t step in doggy doo.

being banished to a foreign land. *Lipman*, 133 F.3d at 729. This represents a greater hardship on a culturally assimilated deportee because of the ties to the only homeland he has known. Second, as in *Lipman*, a deportee's return to the United States mitigates his culpability because of the strong "cultural, emotional, and psychological ties to this country." *Id.*

Evidence to present includes, but is not limited to:

- A. Arrival on US soil;
- B. When became LPR;
- C. Educational attainment;
- D. English language acquisition;
- E. Spanish language depletion;
- F. Number of trips to country of citizenship (i.e., uninterrupted residence in US?);
- G. Family resides in US (including mother, father, siblings, spouse, and defendant's own children);
- H. American cultural acquisition (i.e., Scouts, history, politics, economics, psychology, etc.);
- I. Civics lessons taught, if any; and
- J. Employment history (i.e., payment into Social Security, Medicaid, with no possible return on investment).

Effective November 1, 2010, U.S.S.G. §2L1.2, *Commentary, Application Note 8* is added to 2L1.2 to include a provision for cultural assimilation. The author does not necessarily believe that incorporating a cultural assimilation departure ground in the Guidelines helps our clients since it might give nervous judges an out, a way to avoid giving a departure based on a hyper-technical reading of the application note. However, keep in mind that if a judge finds that your client doesn't 'qualify' for the departure, suggest a variance....there is a difference.

III. Voluntary Disclosure—U.S.S.G. §5K2.16

Defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted.

If discovery of defendant's involvement in other crimes was likely, departure not available. *U.S. v. Adams*, 996 F.2d 75 (5th Cir. 1993).

Considerations:

- A. Timing of disclosure;
- B. Place of disclosure;
- C. Motivation for disclosure;
- D. Person's lack of sophistication; and
- E. Person's lack of experience and familiarity with the criminal justice system.

CRIMES OF VIOLENCE UNDER §2L1.2
Updated 10/29/10

This list was created to assist attorneys in determining whether or not a prior conviction is a crime of violence warranting a **16 level** enhancement under U.S.S.G. §2L1.2(b)(1)(A)(ii). This list will be updated on a monthly basis. It will attempt to include the most recent 5th Circuit decisions, government concessions at the appellate level and district court decisions at the trial level. The purpose of this list being to provide attorneys with a quick reference on crimes of violence under 2L1.2 as well as informing attorneys that an issue has already been researched, written, and litigated. An effort will be made to provide a point of contact and to indicate if an appeal is pending. While the focus of this list is crimes of violence warranting a 16 level enhancement, a few selected aggravated felonies will be included as well as a few cases from other districts and some important drug cases. ***For additions or corrections, please contact: [Anne Berton@fd.org](mailto:Anne.Berton@fd.org), or [Lupe Maldonado@fd.org](mailto:Lupe.Maldonado@fd.org).***

Disclaimer: This list should not be used as a substitute for thorough research by each attorney. Although every effort will be made to keep the list updated, it may not be complete. This list includes 5th Circuit decisions and district court decisions in the Western District. It does not include decisions from other circuits or districts. Also, it does not include all possible arguments regarding each prior conviction. Finally, even if an offense is listed as a crime of violence, attorneys should review the listed case and look at the **reasoning** behind the court's decision. You may still have a viable objections or you may want to object to preserve the issue or challenge the
c o u r t ' s r e a s o n i n g .

Alabama

Alaska

Arizona¹⁷

Aggravated Assault (Class 6 Felony), ARIZ. REV. STAT. ANN §13-1204
Contact Attorney: Jim Langel (Please note this case if from the 10th Circuit)
Not a Crime of Violence/Not an Aggravated Felony/Not a Felony

Aggravated Assault on Law Enforcement Officer

¹⁷The Ninth Circuit disagrees with the Fifth Circuit's holding in *US v. Mungia-Portillo* and has held that Aggravated Assault under ARIZ. REV. STAT. §13-1204(A)(11) is not a crime of violence. *US v. Esparza-Herrera*, No. 07-30490, -F3.d-, 2009 WL 455512 (9th Cir. 2009).

Contact Attorney: Reggie Trejo
**Not a Crime of Violence/Not an Aggravated Felony/Agreement Reached
for 4 Level
Enhancement**

Aggravated Assault Serious Physical Injury, ARIZ. REV. STAT. ANN § 13-1204 (A)(1)
Contact Attorney: Joseph Cordova
Not a Crime of Violence

Aggravated Assault with a Deadly Weapon, ARIZ. REV. STAT. ANN § 13-1203
Contact Attorney: Santiago Hernandez
**Not a Crime of Violence/Not an Aggravated Felony/4 Level Enhancement
Imposed**

Attempted Aggravated Assault, ARIZ. REV. STAT. § 13-1204 and § 13-1001
Contact Attorney: Margarito G. Rodriguez
Not a Crime of Violence

Sexual Assault, ARIZ. REV. STAT. § 13-1406
Contact Attorney: Christine Kelso
**Not a Crime of Violence/ Not an Aggravated Felony/ 4 Level
Enhancement Imposed**

Arkansas

Battery in the Second Degree, ARK. CODE ANN. § 5-13-202
Contact Attorney: Sandra S. Lewis
Appellate Attorney: Philip Lynch
Not a Crime of Violence

Burglary, ARK CODE ANN. § 5-39-201(2004)
Contact Attorney: Todd Durden
Not a Crime of Violence

California

Attempted Robbery, CAL. PENAL CODE § 211
Contact Attorney: Sandra S. Lewis
Not A Crime of Violence

Burglary

1. CAL. PENAL CODE §459

Contact Attorney: Ahilan T. Arulanantham (contact Anne Berton)

Not a Crime of Violence _____

2. CAL. PENAL CODE §459

US v. Ortega-Gonzaga, No. 06-40493, 490 F.3d 393 (5th Cir. 2007)

Not a Crime of Violence

3. CAL. PENAL CODE §459

US v. Gonzalez-Terrazas, No. 07-50375, 529 F.3d 293 (5th Cir. 2008)

Not a Crime of Violence

Child Abuse, CAL. PENAL CODE §273a(a)

US v. Rodriguez-Sandoval, No. EP-06-CR-1334-PRM, 2006 WL 3030779

(W.D. Tex. October 16, 2006)

Contact Attorney: Marie Romero-Martinez

Not a Crime of Violence/Not an Aggravated Felony/Four Levels Imposed

Criminal Terroristic Threats, CAL. PENAL CODE §422

US v. De La Rosa-Hernandez, 264 Fed. Appx. 446 (5th Cir. 2008)(unpub.)

Not a Crime of Violence_

False Imprisonment, CAL. PENAL CODE §236 AND 237

Contact Attorney: Horatio Aldredge

Not a Crime of Violence/Not an Aggravated Felony_

Kidnapping, CAL. PENAL CODE §207(a)

US v. Moreno-Flores, No. 07-50833, 542 F.3d 445 (5th Cir. 2008)

Not a Crime of Violence

Oral Copulation, Victim Unconscious and Sexual Penetration, Victim Unconscious, CAL. PENAL CODE §288a(f) and 289 (d)

US v. Raya-Romero, No. 04-40447, 157 Fed. Appx. 703 (5th Cir. 2005)
(unpublished)

Not a Crime of Violence b/c not supported by the record

Oral Copulation of a Minor, §288a(b)(1)

Us v. Munoz-Ortenza, No. 07-51344, 563 F.3d 112 (5th Cir. 2009)

Not a Crime of Violence

Possession of a Deadly Weapon, CAL. PENAL CODE §1202 (a)

US v. Medina-Anicacio, No. 01-41171, 325 F.3d 638 (5th Cir. 2003)
Not a Crime of Violence/ Not an Aggravated Felony

Sexual Battery, CAL. PENAL CODE §243.4 (1998)¹⁸

US v. Bonilla-Mungia, No. 03-41751, 422 F.3d 316 (5th Cir. 2005)
Possibly Not a Crime of Violence/Remanded: 200 Fed.Appx. 376 (5th Cir. 2006)(unpub.)

Taking Vehicle without Consent, CAL. PENAL CODE §10851(a)
Gonzalez v. Dueñas-Alvarez, 127 S.Ct. 815 (2007)
Aggravated Felony

Colorado

Attempted Second Degree Kidnapping, COLO. REV. STAT. §18-3-302(1)
US v. Cervantes-Blanco, No. 06-50738, 504 F.3d 576 (5th Cir. 2007)
Contact Attorney: Margarito Rodriguez
Appellate Attorney: Judy Madewell
Not a Crime of Violence/Appealed/Remanded

Criminal Attempt to Commit Assault in the Second Degree, COLO. REV. STAT. §18-2-101 and §18-3-203
Contact Attorney: Rita Rodriguez
Not a Crime of Violence

First Degree Criminal Trespass, COLO. REV. STAT. § 18-4-502
Contact Attorney: Edgar Holguin
Aggravated Felony (8 level Enhancement Imposed)

Menacing

1. COLO. REV. STAT. §18-3-206
US v. Landeros-Arreola, No. 00-50512, 260 F.3d 407 (5th Cir. 2001)
Not an Aggravated Felony

2. COLO. REV. STAT. §18-3-206
Contact Attorney: Maureen Franco

¹⁸ The Ninth Circuit held that a sexual battery conviction under CAL. PENAL CODE § 243.4(a) does not constitute a crime of violence. *US v. Lopez-Montanez*, No. 04-50260, 421 F.3d 926 (9th Cir. 2005).

Not a Crime of Violence

3. COLO. REV. STAT. §18-3-206
Contact Attorney: Manuel Acosta-Rivera
Appellate Attorney: Henry Bemporad

Not a Crime of Violence at Resentencing/Not an Aggravated Felony/ 4

Level

Enhancement Imposed

Misdemeanor Assault, COLO. REV. STAT. §18-3-204

Contact Attorney: Anne Berton

Not a Crime of Violence

Misdemeanor Third Degree Sexual Assault, COLO. REV. STAT. §18-3-404

Contact Attorney: Edgar Holguin

Not a Crime of Violence

Misdemeanor Unlawful Sexual Contact, COLO. REV. STAT. §18-3-404

Contact Attorney: Marie Romero-Martinez

Appellate Attorney: Carolyn Fuentes

Government conceded Not a Crime of Violence

Trespass of An Automobile, COLO. REV. STAT. §18-4-502 (2006)

US v. Portillo-Covos, No. 09-50061, 2010 WL 1521261 (5th Cir.

2010)(unpub.)

Contact Attorneys: Carolyn Fuentes, Selena Solis, and Mike Gorman

Not an Aggravated Felony

Connecticut

Delaware

District of Columbia

Florida

Aggravated Battery, FLA. STAT. §784.045 (1998)

Contact Attorney: Edgar Holguin

Not a Crime of Violence/Not an Aggravated Felony/4 Level Enhancement Imposed

Aggravated Stalking, FLA. STAT. §784.048(4)

US v. Insaulgarat, No. 02-40917, 378 F.3d 456 (5th Cir. 2004)

Not a Crime of Violence

Battery, FLA. STAT. §784.03(1)(a), (2) (2003)

Johnson v. US, No. 08-6925, 130 S. Ct. 1265 (2010)

Not a Violent Felony Under ACCA (Offering approach to interpreting state law in connection with enhancements)

Battery of a Police Officer, FLA. STAT. §784.07/784.03

Contact Attorney: Maureen Franco

Not a Crime of Violence

Burglary

1. FLA. STAT. §810.02(1), (3)(b)(2004)

Contact Attorney: Frances Cusack & Brad Bogan

Not a Crime of Violence

2. FLA. STAT. §810.02(3)(1995)

US v. Gomez-Guerra, No. 05-41789, 485 F.3d 301 (5th Cir. 2007)

Not a Crime of Violence

3. FLA. STAT. § 810.02

Contact Attorney: Erik Hanshew

Appellate Attorney: Judy Madewell

Not a Crime of Violence/ Govt Conceded at Appellate Level

Committing a Lewd and Lascivious Act Upon a Child Under the Age of 16 Years,

Fla. Stat. §800.04(2)(1999)

Contact Attorney: Anne Berton

Not a Crime of Violence

DUI/Manslaughter and DUI/Bodily Injury, FLA. STAT. §316.193 (3)(c)(2) & (3)

US v. Valenzuela, No. 03-20395, 389 F3d 1305 (5th Cir. 2004)

Not a Crime of Violence

Throwing a Deadly Missile, FLA. STAT. §790.19

Contact Attorney: Horatio Aldredge

Not an Aggravated Felony

Georgia

Family Violence Battery, GA. CODE ANN. §16-5-23.1 (f)

US v. Lopez-Hernandez, No. 02-21078, 112 Fed. Appx. 984 (5th Cir. 2004)(unpub.)
Not a Crime of Violence

Hawaii

Idaho

Accessory to First Degree Murder, IDAHO CODE ANN. §18-205
United States v. Gamboa-Garcia, No. 09-50513, 2010 WL 3633061 (5th Cir. Sept. 21, 2010)
Aggravated Felony

Attempted Robbery and Battery, IDAHO CODE ANN §§18-6501, 18-6502, 18-306, 18-909 and 18-903
Contact Attorney: Margarito Rodriguez
Not a Crime of Violence/Aggravated Felony 9 Level Enhancement Imposed

Second Degree Burglary, IDAHO CODE ANN §18-1401
Contact Attorney: Bill Ibbotson
Appellate Attorney: Judy Madewell
Not a Violent Felony under 924(e)(ACCA)/Govt Conceded at Appellate Level

Illinois

Aggravated Battery

1. 720 ILL. STAT. CH. 38 §12-4(b)(1)
Contact Attorney: Selena Solis
Appellate Attorney: Henry Bemporad
Not a Crime of Violence at Resentencing

2. 720 ILL. COMP. STAT. § 5/12-4 (1996)
US v. Bustos-Rios, No. 05-50007, DR-04-CR-530
Contact Attorney: William E. Hermesmeier & Joseph Cordova
Appellate Attorney: Donna Coltharp
Crime of Violence/Appealed/Remanded

3. 720 ILL. COMP. STAT. §5/12-4
US v. Gomez-Vargas, 111 Fed.Appx. 741 (5th Cir. 2004)(unpub.)
Not a Crime of Violence

4. 720 ILL. COMP.STAT. §5/12-4
US v. Aguilar-Delgado, No. 04-40309, 120 Fed.Appx 522 (5th Cir. 2004)(unpub.)
Not a Crime of Violence

5. 720 ILL. STAT. CH. 38 §12-4(a)(1986)

Contact Attorney: Bill Ibbotson

Not a Crime of Violence

6. 720 ILL. STAT. CH. 38 §12-4(b)(1)

Contact Attorney: Rebecca Reyes

Not a Crime of Violence/ 8 Level Enhancement Imposed

Aggravated Stalking, 720 ILL. STAT. CH. 38§12-7.4

Contact Attorney: Selena Solis

Appellate Attorney: Judy Madewell

Gov't Conceded Not a Crime of Violence/Remanded/ 4 Level Enhancement Imposed

Domestic Battery, 720 ILL. COMP. STAT. §5/12-3.2 (1996)

Contact Attorney: Santiago D. Hernandez

Not a Crime of Violence

Domestic Battery-Class 4 Felony, 720 ILL. COMP. STAT. §5/12-3.2(a)(2)

US v. Rocha-Martinez, A-10-CR-326

Contact Attorney: Bill Ibbotson

Not a Crime of Violence/4 Level Enhancement Imposed

Domestic Battery and Battery Causing Bodily Harm, 720 ILL. COMP. STAT. §5/12-3.2-A-1; 5/12-3-A-1

Contact Attorney: Randall Lockhart

Not a Crime of Violence

Indiana

Iowa

Assault with Intent to Commit Sexual Abuse, IOWA CODE ANN. §709.11 (West 2003)

Contact Attorneys: Christina Norton, Manuel Pacheco, and Bill Fry

Not a Crime of Violence

Going Armed with Intent, IOWA CODE §708.8

Contact Attorney: Reginaldo Trejo

Not a Crime of Violence

Misdemeanor Serious Domestic Abuse Assault, IOWA CODE ANN. §§236.2(2),

708.1 AND 708.2A

US v. Favela-Masuca, No. 06-40607, 247 Fed.Appx. 464 (5th Cir. 2007)(unpub.)

Not an Aggravated Felony

Kansas

Aggravated Battery, KAN. STAT. §21-3414(a)(1)(C)

Larin-Ulloa v. Gonzalez, No. 03-60721, 462 F.3d 456 (5th Cir. 2006)

Not an Aggravated Felony

Aggravated Sexual Battery, KAN. STAT. §21-3518

US v. Matute-Galdamez, No. 03-41728, 111 Fed. Appx. 264 (5th Cir. 2004)(unpub.)

Not a Crime of Violence

Attempted Aggravated Sexual Battery, KAN. STAT. §21-3518

US v. Meraz-Enriquez, No. 04-40607, 442 F.3d 331 (5th Cir. 2006)

Not a Crime of Violence

Kentucky

Assault, KY. REV. STAT. ANN §508025(1)(a)(1)

Contact Attorney: Reggie Trejo

Not a Crime of Violence/Eight Level Enhancement Imposed

Misdemeanor 4th Degree Assault, KY. REV. STAT. ANN. §508.030

Contact Attorney: Clare Koontz

Government conceded at trial level Not a Crime of Violence

Louisiana

Unauthorized Entry of Inhabited Dwelling, LA. REV. STAT. ANN. 14:62.3

Contact Attorney: Dan Ramirez

Not a Crime of Violence/Aggravated Felony 8 Level Enhancement Imposed

Maine

Maryland

Massachusetts

Assault and Battery,

1. MASS. GEN. LAWS CH. 265, §13A

Andrade v. Gonzalez, No. 04-30247, 459 F.3d 538 (5th Cir. 2006)

Aggravated Felony

2. MASS. GEN. LAWS CH. 265, §13A(a)(2004)

US v. Grant-Martinez, No. EP-07-CR-1163-PRM, 511 F.Supp.2d 738 (W.D. Tex. 2007)

Not a Crime of Violence (insufficient record)

Assault and Battery with a Deadly Weapon, MASS. GEN. LAWS CH. 265, §15A(b)

Contact Attorney: Frank Morales

Not a Crime of Violence

Michigan

Home Invasion

1. MICH. COMP. LAWS § 750.110

Contact Attorney: Rebecca Reyes and Bruce Weathers

Not a Crime of Violence/ Not an Aggravated Felony

2. MICH. COMP. LAWS § 750.110a(3)

Molina-Ramirez v. Holder, No. 09-60070, slip copy, 362 Fed.Appx. 387 (5th Cir. 2010)(unpub.)

Aggravated Felony

Manslaughter, MICH. COMP. LAWS §750.321(1990)

Contact Attorneys: Alex Almanzan and Mike Gorman

Not a Crime of Violence

Minnesota

First Degree Damage to Property (Gross Misdemeanor), MINN. STAT. §609.13

Contact Attorney: Tyrone Mansfield

Not a Felony/No Enhancement

Fourth Degree Criminal Sexual Conduct, MINN. STAT. §609.345(1)©

US v. Rosas-Pulido, No. 06-41223, 526 F.3d 829 (5th Cir. 2008)

Not a Crime of Violence

Terroristic Threats , MINN. STAT. §609.713 (2000)

US v. Naranjo-Hernandez, No. 03-41081, 133 Fed. Appx. 96 (5th Cir. 2005) (unpub.)

Not Crime of Violence

Mississippi

Missouri

Sexual Assault, MO. REV. STAT. §566.040 (1)

US v. Sarmiento-Funes, No. 03-40741, 374 F3d. 336 (5th Cir. 2004)

Not a Crime of Violence

Montana

Sexual Intercourse Without Consent, MONT. CODE ANN. § 45-5-503(1)

Contact Attorney: Sandra Lewis

Not a Crime of Violence

Nebraska

Manslaughter, NEB. REV. STAT. §28-305 (1999)

US v. Ramos-Guerrero, No. 06-41593, 254 Fed.Appx. 305 (5th Cir. 2007)(unpub.)

Not a Crime of Violence (insufficient record)

Nevada

Invasion of the Home, NEV. REV. STAT. §205.067

Contact Attorney: Edgar Holguin

Not a Crime of Violence

New Hampshire

New Jersey

New Mexico

Child Abuse, N.M. STAT. §30-06-01

Contact Attorney: Erik Hanshew

Not an Aggravated Felony/Four Level Enhancement Imposed

Criminal Sexual Penetration, N.M. STAT. §30-9-1 (c)

Contact Attorney: Anne Berton

Not a Crime of Violence

New York

Attempted Gang Assault in the Second Degree, N.Y. PENAL LAW § 120.06

Contact Attorney: William Fry

Not a Crime of Violence

Attempted Manslaughter, N.Y. PENAL LAW §125.15
US v. Bonilla, No. 06-40894, 524 F.3d 647 (5th Cir. 2008)
Not a Crime of Violence

Criminal Possession of Stolen Property in the Third Degree, N.Y. PENAL LAW § 165.50
Burke v. Mukasey, No. 06-60710 509 F.3d 695 (5th Cir. 2007)
Aggravated Felony

Second Degree Assault, N.Y. PENAL LAW §120.05
Contact Attorney: Santiago Hernandez and Bruce Weathers
Not a Crime of Violence/Not an Aggravated Felony

North Carolina

Breaking and Entering, N.C. GEN. STAT. §14-54(a)
Contact Attorney: Marie Romero-Martinez
Appellate Attorney: Phil Lynch
**Government Conceded at Appellate Level that it is Not a Crime of Violence/
8 Levels Imposed**

Involuntary Manslaughter, N.C. GEN. STAT. §14-18(1994)
Contact Attorney: Anne Berton & Bruce Weathers
Not a Crime of Violence/Not an Aggravated Felony/4 Levels Imposed

North Dakota

Ohio

Aggravated Burglary, OHIO REV. CODE ANN. §2911.11(A)(1)(2001)
US v. Ramirez, No. 08-41192, 344 Fed.Appx. 962 (5th Cir. 2009)(unpub.)
Not a Crime of Violence

Oklahoma

First Degree Manslaughter, OKLA. STAT. TIT. 21, §711(1)
US v. Gutierrez-Salinas, No. 06-41346, 257 Fed.Appx. 448 (5th Cir. 2007)(unpub.)
Not a Crime of Violence

Maiming, OKLA. STAT. TIT. 21, §751
Contact Attorney: Francisco “Frank” Morales
Not a Crime of Violence

Oregon

Pennsylvania

Aggravated Assault, 18 PA. CONS. STAT. § 2702 (2000)

US v. Gonzalez-Molina, No. 09-10097, slip copy, 353 Fed.Appx. 959 (5th Cir. 2009)(unpub.)

Not a Crime of Violence(Gov't conceded)

Terroristic Threats

1. 18 PA. CONS. STAT. §2706 (2003)

United States v. Martinez-Paramo, 380 F.3d 799 (5th Cir. 2004)

Not Crime of Violence

2. 18 PA. CONS. STAT. §2706(a)

US v. Ortiz-Gomez, No. 08-40292, 562 F.3d 683 (5th Cir. 2009)

Not a Crime of Violence

Rhode Island

South Carolina

South Dakota

Tennessee

Aggravated Burglary, TENN. CODE ANN §39-14-403

US v. Herrera-Montes, No. 06-41426, 490 F.3d 390 (5th Cir. 2007)

Not a Crime of Violence

Facilitation of Aggravated Robbery, TENN. CODE ANN. §39-11-403

US v. Trejo-Palacios, 418 F. Supp. 2d 915 (S.D. Tex. 2006)

Not Crime of Violence/It is an Aggravated Felony/ 8 Levels Imposed

Reckless Aggravated Assault, TENN. CODE ANN. §39-13-102

Contact Attorney: Selena Solis

Not a Crime of Violence

Texas

Aggravated Assault with a Deadly Weapon, TEX. PENAL CODE ANN §22.02(a)(4) (1993)

Contact Attorney: Anne Berton and Mike Gorman

Not a Crime of Violence (Note: There may be some arguments to the pre-1994 statute)

Aggravated Assault of a Peace Officer

1. TEX. PENAL CODE ANN. §22.02(a)(2) (1979)
US v. Fierro-Reyna, No. 05-51198, 466 F.3d 324 (5th Cir. 2006)

Not a Crime of Violence

2. TEX. PENAL CODE ANN. §22.02(a)(2)
US v. Antuna-Moran, No. 06-40103, 488 F.3d 1048 (5th Cir. 2007)

Not a Crime of Violence

Assault

1. TEX. PENAL CODE ANN. §22.01(a)(1) (misd)
US v. Villegas-Hernandez, No. 05-40988, 468 F.3d 874 (5th Cir. 2006)

Not a Crime of Violence/ Not an Aggravated Felony

2. TEX. PENAL CODE ANN. §22.01(a)(1)
US v. Davila-Solis, No. 06-40826, 217 Fed. Appx. 402 (5th Cir. 2007)(unpub.)

Not an Aggravated Felony

Assault on a Public Servant-Third Degree, TEX. PENAL CODE ANN. §22.01

Contact Attorney: Santiago D. Hernandez

Not a Crime of Violence

Attempted Aggravated Assault-Third Degree, TEX. PENAL CODE ANN. §22.02

Contact Attorney: Tyrone T. Mansfield

Not a Crime of Violence

Bond Jumping, TEX. PENAL CODE §38.10

Contact Attorney: Jose Gonzalez-Falla

Not an Aggravated Felony (b/c no element in the offense requiring a court order)

Burglary of Building, TEX. PENAL CODE ANN. §30.04

US v. Rodriguez-Guzman, No. 94-60379, 56 F.3d 18 (5th Cir. 1995)

Aggravated Felony

Burglary of a Building, TEX. PENAL CODE ANN. §30.02 (1990), applying 1974 version

US v. Rodriguez-Rodriguez, No. 02-20697, 388 F.3d 466 (5th Cir. 2004)

Not a Crime of Violence

Burglary of Habitation (TEX. PENAL CODE §30.02(a)(3) is not a Crime of Violence, see below)

1. TEX. PENAL CODE ANN. §30.02(a)(3)

Contact Attorney: Erik Hanshew

Not a Crime of Violence

2. TEX. PENAL CODE ANN. §30.02(a)(3)

US v. Herrera-Montes, No. 06-41426, 490 F.3d 390 (5th Cir. 2007)

Not a Crime of Violence (Although this case deals with a Tennessee statute, it is identical to Texas statute 30.02(a)(3)).

3. TEX. PENAL CODE ARTICLE 1389 OR 1390 (1963)

US v. Montoya-Beltran, No. 07-51410, slip copy, 2008 WL 3876507 (5th Cir. 2008)

Contact Attorney: Bill Fry

Appellate Attorney: Carolyn Fuentes

Not a Crime of Violence

4. TEX. PENAL CODE ANN. §30.02

Contact Attorney: Darren Ligon

Not a Crime of Violence/Eight Levels Imposed

5. TEX. PENAL CODE ANN. §30.02(a)(3)

US v. Beltran-Ramirez, No. 07-50218, 266 Fed. Appx. 371 (5th Cir. 2008)(unpub.)

Not A Crime of Violence

6. TEX. PENAL CODE ANN. §30.02(a)(3)

US v. Castro, No. 07-40762, 272 Fed. Appx. 385 (5th Cir. 2008)(unpub.)

Not a Crime of Violence

7. TEX. PENAL CODE ANN. §30.02(a)(3)

US v. Constante, No. 07-41004, 544 F.3d 584 (5th Cir. 2008)

Not a Crime of Violence under 18 USC §924(e)

Criminal Mischief, TEX. PENAL CODE §28.03 (a)(3)

US v. Landeros - Gonzalez, No. 01-10066, 262 F.3d 424 (5th Cir. 2001)

Not a Crime of Violence/Not an Aggravated Felony

Criminally Negligent Homicide, TEX. PENAL CODE ANN. §19.05

US v. Dominguez-Ochoa, No. 03-40260, 386 F.3d 639 (5th Cir. 2004)

Not a Crime of Violence

Child Endangerment, TEX. PENAL CODE ANN. §22.041 (c)
US v. Calderon-Pena, No. 02-20331, 383 F.3d 254 (5th Cir. 2004)
Not a Crime of Violence

Deadly Conduct, TEX. PENAL CODE ANN. §22.05(b)(2)
Contact Attorney: Robert Castaneda and Bruce Weathers
Not a Crime of Violence/4 Level Enhancement Imposed

Driving While Intoxicated, TEX. PENAL CODE §49.04
US v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) see also 262 F.3d 479 (5th Cir. 2001)
Not a Crime of Violence/ Not an Aggravated Felony

Felony Assault, TEX. PENAL CODE §§22.01(a)(1) AND (b)(2)
US v. Cano-Esparza, No. 06-41020, 243 Fed. Appx.15 (5th Cir. 2007)(unpub.)
Not a Crime of Violence

Indecency with a Child

1. TEX. PENAL CODE §21.11 (a)(1)
US v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996)
Aggravated Felony

2. TEX. PENAL CODE §21.11(a)(2) **(by Exposure)**
US v. Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000)
Aggravated Felony

Injury to a Child

1. TEX. PENAL CODE ANN. §22.04
US v. Garcia-Cantu, No. 01-41029, 302 F.3d 308 (5th Cir. 2002)
Not a Crime of Violence/Not an Aggravated Felony/4 Level Enhancement Imposed

2. TEX. PENAL CODE ANN. §22.04
Contact Attorney: Manuel Acosta
Appellate Attorney: Judy Madewell
Not a Crime of Violence at Resentencing/Not an Aggravated Felony/ 4 Level Enhancement Imposed

3. TEX. PENAL CODE ANN. §22.04
US v. Vasquez-Torres, No. 04-41172, 134 Fed. Appx 648 (5th Cir. 2005)(unpub.)
Not a Crime of Violence/Not an Aggravated Felony/4 Level Enhancement Imposed

4. TEX. PENAL CODE ANN. §22.04

Contact Attorney: Molly Roth

Appellate Attorney: Henry Bemporad

Not a Crime of Violence at Resentencing/Not an Aggravated Felony/ 4 Level Enhancement Imposed

5. **(By Criminal Negligence)**, TEX. PENAL CODE ANN. §22.04

Contact Attorney: Reggie Trejo

Not an Aggravated Felony/Four Level Enhancement Imposed

6. TEX. PENAL CODE §22.04(a)

US v. Andino-Ortega, No. 09-40498, 608 F.3d 305 (5th Cir.2010)

Not a Crime of Violence

Intoxicated Assault, TEX. PENAL CODE ANN. §49.07 (1994)

US v. Vargas-Duran, No. 02-20116, 356 F.3d 598 (5th Cir. 2004)

Not a Crime of Violence

Intoxication Manslaughter, TEX. PENAL CODE ANN. §49.08

US v. Iovino, No. Crim. A. B-05-602, 405 F. Supp.2d 771 (S.D. Tex. 2005)

Not a Crime of Violence

Possession of Short-Barrel Firearm, TEX. PENAL CODE §46.05

US v. Diaz-Diaz, No. 02-20392, 327 F.3d 410 (5th Cir. 2003)

Aggravated Felony

Possession of Short-Barrel Shotgun, TEX. PENAL CODE §46.05

US v. Rivas-Palacios, No. 00-40508, 244 F.3d 396 (5th Cir. 2001)

Aggravated Felony

Retaliation

1. TEX. PENAL CODE ANN. §36.06 (a)

US v. Martinez-Mata, No. 03-40490, 393 F3d. 625 (5th Cir. 2004)

Not a Crime of Violence

2. TEX. PENAL CODE ANN. §36.06(1995)

US v. Acuna-Cuadros, No. 03-20345, 385 F.3d875 (5th Cir. 2004)

Not a Crime of Violence

3. TEX. PENAL CODE ANN. §36.06(a)(1)(A)

Contact Attorney: Margarito Rodriguez

Appellate Attorney: Judy Madewell

Not an Aggravated Felony (Gov't conceded)(Four Level Enhancement Imposed)

Sexual Assault, TEX. PENAL CODE ANN. §22.011(a)(1)

US v. Luciano-Rodriguez, No. 04-41016, 442 F.3d 320 (5th Cir. 2006), reh'g en banc denied, -F3.d- (5th Cir. Aug 3, 2006)

Not a Crime of Violence

Theft from a Person, TEX. PENAL CODE §31.03

US v. Luna-Montoya, No. 02-41444, 80 Fed.Appx. 334 (5th Cir. 2003)(unpub.)

Not a Crime of Violence

Unauthorized Use of a Motor Vehicle,

1. TEX. PENAL CODE ANN. §31.07 (a)

US v. Armendariz-Moreno, No. 07-40225, 571 F.3d 490 (5th Cir. 2009)

Not an Aggravated Felony (following remand in Armendariz-Moreno v. United States, 129 S.Ct. 993 (2009))

2. TEX. PENAL CODE ANN. §31.07 (a)

US v. Lopez-Solis, No. 07-51091, 330 Fed.Appx. 497 (5th Cir. 2009)(unpub.)

Not an Aggravated Felony

3. TEX. PENAL CODE §31.07(a)

US v. Reyes-Figueroa, No. 08-40108, 282 Fed.Appx. 330 (5th Cir. 2009)(unpub.)

Not an Aggravated Felony

Unlawfully Carrying a Firearm, TEX. PENAL CODE §42.02(c)

US v. Hernandez-Neave, No. 01-50059, 291 F.3d 296 (5th Cir. 2001)

Not an Aggravated Felony

Unlawful Possession of a Firearm by Felon, TEX. PENAL CODE §46.04(a)

Hernandez v. Holder, No. 09-60261, 592 F.3d 681 (5th Cir. 2009)

Aggravated Felony

Unlawful Restraint, TEX. PENAL CODE ANN. § 22.01 and 20.01 (1999)

US v. Hernandez-Rodriguez, No. 03-41524, 135 Fed. Appx 661 (5th Cir. 2005)

Not a Crime of Violence

Utah

Vermont

Virginia

Grand Larceny, VA. CODE ANN. §18.2-95
US v. Argumedo-Perez, No. 08-10132, 326 Fed.Appx 293 (5th Cir. 2009)(unpub.)
Not an Aggravated Felony

Shooting into an occupied dwelling, VA. CODE ANN. §18.5-279
US v. Alfaro, No. 04-40176, 408 F3d 204 (5th Cir. 2005)
Not a Crime of Violence

Washington¹⁹

Assault in the Second Degree, WASH. REV. CODE §9A.36.021(1)(C) (West 1988 & Supp. 1995)

Contact Attorney: Todd Durden and Brad Bogan

Not a Crime of Violence

Assault in the Fourth Degree, WASH. REV. CODE §9A.36.041(1)

US v. Sanchez-Torres, 136 Fed. Appx. 644 (5th Cir. 2005)

Not Four Level Crime of Violence Based on 3 or More Misdemeanor Crimes of Violence

Residential Burglary, WASH. REV. CODE §9A.52.025

Contact Attorney: Marina Douenat

Not a Crime of Violence (Four Level Enhancement imposed)

Robbery, WASH. REV. CODE §9A.56.210

US v. Swanson, 502 F.Supp.2d 563 (W.D. Tex. 2007)

Contact Attorney: Erik Hanshew

Not a Crime of Violence Under Career Offender

Second Degree Manslaughter, WASH. REV. CODE §9A.32.070(1) (West 1988)

Contact Attorney: Todd Durden and Brad Bogan

Not a Crime of Violence

West Virginia

Wisconsin

Wyoming

¹⁹**Fourth Degree Assault**, §9A.36.041(1) & (2) (2004)
US v. Sanchez-Torres, 136 Fed. Appx 644 (5th Cir. 2005)
Not a Crime of Violence under 2L1.2(b)(1)(E)

FEDERAL

Conspiring to Commit Mail Fraud, Wire Fraud, Bank Fraud, and Money Laundering, 18 USC § 371, 1341, 1343, 1344, 1956(h)

Nijhawan v. Holder, No. 08-495, 129 S.Ct. 2294 (2009)

Aggravated Felony (pursuant to 8 USC 1101(a)(43)(m)(i) (“an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000))

Illegal Reentry, 8 U.S.C. § 1326 (b)(2)

US v. Gamboa-Garcia, No. 09-50513, 2010 WL 3633061 (5th Cir. Sept. 21, 2010)

Contact Attorney: John Calhoun

Appellate Attorney: Judy Madewell

Aggravated Felony (Court made this finding based on fact that judgment listed § 1326(b)(2) as statute of conviction.)

Riot, 18 U.S.C. §1792 (2000)

Contact Attorneys: Anne Berton and Michael Gorman

Not a Crime of Violence

Using a Telephone to Facilitate the Commission of a Narcotics Offense, 21 USC §843(b)

US v. Henao-Melano, No. 08-41313, 591 F.3d 798 (5th Cir. 2009)

Some Conduct Not Drug Trafficking Under 2L1.2(b)(1)(A)(i) But Issue Not Adequately Preserved Here

A FEW SELECTED DRUG CASES:

U.S.S.C.

Second or Subsequent Simple Possession

Carachuri -Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010)

Not an Aggravated Felony (unless record of conviction shows it was based on fact of a prior drug conviction)

State Drug Possession

Lopez v. Gonzalez No. 05-547, 127 S.Ct. 625 (2006)

Not a Drug Trafficking Offense under §2L1.2 (b)(1)(A)(i) and Not an Aggravated Felony

California

Offer to Transport, Sell, Furnish, Administer, or Give Away a Controlled Substance, Cal. Health & Safety Code §11379(a)

US v. Garza-Lopez, No. 03-41750, 410 F.3d 268 (5th Cir. 2005)

Not a Drug Trafficking Offense under §2L1.2 (b)(1)(A)(i)²⁰

Second State Conviction for Possession, Cal. Health & Safety Code §11352

US v. Cepeda-Rios, No. 07-50731, 530 F.3d 333 (5th Cir. 2008)

Aggravated Felony (No longer an aggravated felony - see Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

Unlawful Transport, Import, Sale, Administration or Gift of Controlled Substance,

Cal. Health & Safety Code §11352

US v. Gutierrez-Ramirez, No. 03-41742, 405 F.3d 352 (5th Cir. 2005)

Not a Drug Trafficking Offense under §2L1.2 (b)(1)(A)(I)

Colorado

Conspiracy to Distribute or Manufacture a Controlled Substance, COLO. REV. STAT. §18-18-405(1)(a)

Contact Attorney: Reggie Trejo

Not a Drug Trafficking Offense

Second State Conviction for Possession, COLO.REV.STAT.§18-1.3-501(1)

US v. Sanchez-Villalobos, No.04-50732, 412 F.3d 572 (5th Cir. 2005)

Aggravated Felony (No longer an aggravated felony - see Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

²⁰For Illegal Reentry Offenses Committed on or after November 1, 2008, Offer to Sell Under 2L1.2, Application Note 1(B)(iv) is a Drug Trafficking Offense.

New Mexico

Conspiracy to Commit Trafficking of a Controlled Substance, N.M. Stat. §30-31-20

Attorney: Anne Berton

Not a Drug Trafficking Offense under 2L1.2(b)(1)(B) (b/c could have been by “barter or giving away of”)

Criminal Solicitation to Commit Trafficking, N.M. STAT. §30-31-20(A)(2) (1978)

Contact Attorney: Rita Rodriguez

Not a Drug Trafficking Offense

Distribution of Marijuana (Cause the Transfer) and Criminal Solicitation to Commit Distribution of Marijuana, N.M. STAT. §30-31-22(A)(1)(C)

Contact Attorney: Anne Berton and Mike Gorman

Not a Drug Trafficking under 2L1.2(b)(1)(B)

New York

Attempted Criminal Sale of Controlled Substance, N.Y. Penal Law §220.39

Contact Attorney: Rita Rodriguez

Not an Aggravated Felony/Four Level Enhancement Imposed

Criminal Sale of Cocaine in the Second Degree, N.Y. PENAL LAW §220.41(2003)

United States v. Davila, No. 08-60530, 2010 WL 2465075 (5th Cir. June 15, 2010)

Not an Aggravated Felony (Note: offense may warrant a 4 level enhancement if sentence was entirely suspended based on *US v. Rodriguez-Parra*.)

North Carolina

Transporting Marijuana, N.C. Gen Stat §90-95(h)

US v. Lopez-Salas, No. 06-41637, 513 F.3d 174 (5th Cir. 2008)

Not a Drug Trafficking Offense Under 2L1.2 (b)(1)(A)

South Carolina

Trafficking in Cocaine, S.C. CODE ANN §44-53-370 (E)(2)
Contact Attorney: Joseph Cordova
Not an Aggravated Felony/Four Level Enhancement Imposed

Texas

Delivery of a Controlled Substance, Tex. Health & Safety Code §481.112

1. *US v. Gonzalez*, No. 05-41221, 484 F.3d 712 (5th Cir. 2007)
Not a Drug Trafficking Offense under §2L1.2 (b)(1)(A)& (B)⁶
2. *US v. Morales-Martinez*, No. 06-40467, 496 F.3d 356 (5th Cir. 2007)
Not a Drug Trafficking Offense Under §2L1.2 (b)(1)(A)⁶
3. *US v. Fuentes*, No. 06-20325, 245 Fed. Appx. 358 (5th Cir. 2007)(unpub.)
Not an Aggravated Felony⁶

Knowing and Intentional Delivery of Cocaine, TEX. PENAL CODE ANN §481.112(a)

US v. Price, No. 07-40040, 516 F.3d 285 (5th Cir. 2008)
Not a Drug Trafficking Offense 2K2.1(a)(2) but may apply under 2L1.2(b)(1)(A)(i)⁶

Possession of a Controlled Substance, Tex. Health & Safety Code §481.115
US v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007)
Not an Aggravated Felony

Possession of Marijuana, 2,000 lbs. or less but over 50 lbs., Tex. Health & Safety Code §481.12(b)(5)
Arce Vences v. Mukasey, No. 06-6003, 512 F.3d 167 (5th Cir. 2007)
Not an Aggravated Felony

⁶For Illegal Reentry Offenses Committed on or after November 1, 2008, Offer to Sell Under 2L1.2, Application Note 1(B)(iv) is a Drug Trafficking Offense.

⁶For Illegal Reentry Offenses Committed on or after November 1, 2008, Offer to Sell Under 2L1.2, Application Note 1(B)(iv) is a Drug Trafficking Offense.

Second State Conviction for Possession, Tex. Health & Safety Code §481.115

1. *US v. Andrade-Aguilar*, No. 07-41132, 570 F.3d 213 (5th Cir. 2009)
Not an Aggravated Felony (See Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

2. *US v. Rodriguez*, No. 08-41337, slip copy, 2009 WL 3231222 (5th Cir. 2009)(unpub.)
Aggravated Felony (No longer an aggravated felony - see Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

3. *US v. Reyes*, No. 09-40596, slip copy, 2009 WL 4885145 (5th Cir. 2009)(unpub.)
Aggravated Felony (No longer an aggravated felony - see Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

Second State Conviction for Possession, TEX. HEALTH & SAFETY CODE § 481.117(b)

Carachuri-Rosendo v. Holder, No. 07-61006, 570 F.3d 263 (5th Cir. 2009)
Aggravated Felony (No longer an aggravated felony - see Carachuri-Rosendo v. Holder, No. 09-60 , 130 S. Ct. 2577 (2010))

Utah

Attempted Distribution of a Controlled Substance (Arrange to Distribute), UTAH CODE ANN. §58-37-8(1)(a)(ii)
Contact Attorney: Anne Berton and Mike Gorman
Not Drug Trafficking under 2L1.2(b)(1)(A)

General

Entirely Suspended Sentence in Drug Trafficking Case
US v. Rodriguez-Parra, No. 08-40708, 581 F.3d 227 (5th Cir. 2009)
Not a Drug Trafficking Offense Warranting a Twelve Level Enhancement

Sentence of Imprisonment Upon Revocation of State Probation in Drug Trafficking Case
US v. Bustillos-Pena, No. 09-20360, 2010 WL 2891632 (5th Cir. 2010)
Court finds 16 level enhancement for drug trafficking NOT warranted due to ambiguous Sentencing Guideline under 2L1.2 requiring

defendant be deported AFTER a sentence was imposed that exceeded thirteen months where defendant sentenced INITIALLY to probation on state drug trafficking conviction, deported, re-entered illegally, and sentenced to imprisonment that exceeded thirteen months upon revocation of state probation.