

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

Updated October 2007

By²
Francisco “Frank” Morales, AFPD
Western District of Texas
Del Rio Division

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).

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. By no means whatsoever is an exhaustive treatise on the defense of 1326 cases. And, since the law may vary circuit to circuit, always conduct careful and detailed legal research to determine how your circuit may handle a particular issue. I cannot, here, fully replicate all of the issues that may exist in these cases, nor would I attempt to. L’est we forget the words of Wolfgang Amadeus Mozart:

My great-grandfather used to say to his wife, my great-grandmother, who in turn told her daughter, my grandmother, who repeated it to her daughter, my mother, who used to remind her daughter, my own sister, that to talk well and eloquently was a very great art, but that an equally great one was to know the right moment to stop.

² In compiling this outline, I would like to give special thanks to Brad Bogan, Research and Writing Specialist, Western District of Texas, San Antonio Division. The Outstanding Research and Writing Specialist for 2007 contributed immeasurably to this outline.

1. FIRST STEP: GATHER ALL ‘YE DOCUMENTS TO DETERMINE 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).

1. 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.

b. Next, once you know which statute was violated, get a copy of the statute of conviction.³

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 offense⁴ (including mental states) then...

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).⁵

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.

³As 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!

⁴This is what we often refer to as a “divisible statute.”

⁵But, be very wary of your clients’ admissions to facts during previous plea colloquies. They CAN be used against them.

WHERE IT ALL BEGINS
BASE OFFENSE LEVEL 8.

- A. All §1326 prosecutions begin with a base offense level 8. If your client does not receive any “bumps⁶” 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.⁷
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 determining offense level. *United States v. Lara-Aceves*, 183 F.3d 1007 (9th Cir. 1999).

⁶I use the terms “bumps,” “increases,” “upward adjustments,” all interchangeably. They all mean the same thing: if your client gets one, he’ll be upset.

⁷If 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).

THE UPWARD BUMPS⁸ MISERY LOVES COMPANY.

SEQUENCING

First and foremost, in order for the government to seek an enhancement, the deportation they allege in the indictment is what triggers the enhancement. 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, you can argue that 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, but it also hinders the application of the bouncing 1326 penalty 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.

Now, assume that the indictment has alleged a deportation that triggers some enhancement. Let's see what happens:

⁸Remember 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)*.

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 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.

1. To the extent that indictments list all of the various ways to commit an offense (ie, actual

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

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

Sixteen-level increase (cont'd)

purposes of “drug trafficking crime.” *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc); See also *United States v.*

- B. Offers to transport, sell, furnish, administer, or give away a controlled substance are not acts within the definition of “drug trafficking offense.” *United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir.), *cert. denied*, 126 S.Ct. 298 (2005).
- C. Cf *United States v. Palacios-Quinonez*, 431 F.3d 471 (5th Cir. 2005), possession/purchase for sale satisfies definition of drug trafficking offense because possession is necessary to distinguish from a mere offer to sell.
- D. 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).
- E. 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. *United States v. Gonzalez*, 484 F.3d 712 (5th Cir. 2007)(where statute defined delivery as actual possession, constructive possession or an offer to sell). 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.
 - 1. For this same reason, delivery may not even qualify as an aggravated felony, discussed below, because of the same and additional logic. *United States v. Fuentes*, 06-20325 (5th Cir. Aug. 8, 2007)(unpublished)(per curiam)(where it was not discernible which element defendant pled guilty to as indictment listed all possibilities: actual possession, constructive possession and offer to sell).
- F. 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.’ Consider *United States v. Ford*, No. 06-20142, 2007 WL 1501745 (5th Cir. May 24, 2007). A prior conviction for

Sixteen-level increase (cont'd)

Possession with Intent to Deliver equated to possession with intent to offer to sell (since deliver could be defined as a mere offer to sell) and could not be a proper predicate for purposes of U.S.S.G. §4B1.2(b)(career offender). Bear in mind that *Ford* dealt with the definition of “controlled substance offense” and not the drug trafficking offense listed in 2L1.2. But, the two definitions are virtually identical.

iii. Sentence imposed must exceed 13 months.

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

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-Duberney*, 326 F.3d 613 (5th Cir. 2003).

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) do nothing more 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 violence⁹.

1. Crime of violence is...

A. any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, 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* 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).

B. MANSLAUGHTER.

1) For an example, see *United States v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004)(finding contemporary, generic definition of

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)

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).

C. 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).
- 2) Generic burglary of a dwelling does NOT include entries into the curtilage. *United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007).

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.

Sixteen-level increase (cont'd)

D. 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).

E. 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).

F. FORCIBLE SEX OFFENSES.

- 1) CA rape statute prohibiting sexual intercourse by, among other things, duress and duress definition encompassed threat of retribution or hardship (including revealing unsavory secrets about a person or threatening to fire someone who does not yield to sexual requests) was broader than contemporary, generic rape (ie, forcible sex offenses) and was not a crime of violence. *United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007).
 - a) *But see 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 is 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

Sixteen-level increase (cont'd)

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.

H. STATUTORY RAPE

- 1) As Boy George once sang, “Love is love is nothing without you.”¹⁰ 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.

¹⁰*At Worst...the Best of Boy George and Culture Club*, ©1993.

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).

FUN 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. One interesting issue worth fighting: 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. It is reported to the author that this argument has prevailed in some district courts. It may be worth trying in your courts as well.

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.

E. A felony that is a national security or terrorism offense.¹¹

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

¹¹With 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.

Sixteen-level increase (cont'd.)

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.

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 FELONIES¹²

- 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.
- 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.
 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,

¹²In most cases, it sounds worse than it is. And, in some cases, it is worse than it sounds.

Eight-level increase (cont'd.)

- 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.
- D. 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.
- E. 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.
- F. For some crimes to qualify as aggravated felonies, the term of imprisonment that *may be imposed* is important.
- 1. 8 U.S.C. §1101a(43)(J). RICO offenses where a sentence of one year of imprisonment may be imposed.

Eight-level increase (cont'd.)

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.

G. 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."

H. 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).

I. 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).

J. 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.

K. Some important differences between §1101a(43) and U.S.S.G. §2L1.2, to name a few.

1. Crime of violence. §1101 crime of violence definition more broad and is defined at Title 18 U.S.C. §16.

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

- 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.
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, 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). This will have tremendous impact on folks with simple possession priors of usable quantities of drugs. But, 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. Because of the prevailing arguments with respect to delivery of drugs cases, and the Lopez case, previously sixteen-level enhanced defendants are now only receiving four level increases.
- L. UNLAWFUL USE OF A MOTOR VEHICLE CIRCUIT SPLIT. Please be aware that there is currently a circuit split between the Fifth (*United States v. Galvan-Rodriguez*, 169

Eight-level increase (cont'd.)

F.3d 217 (5th Cir. 1999) holding that UUMV is an aggravated felony) and Tenth (*United States v. Sanchez-Garcia*, No. 06-2262, 2007 WL 2537883 (10th Cir. Sept. 6, 2007) holding that UUMV is NOT an aggravated felony) circuits over whether the offense of unlawful use of a motor vehicle is an aggravated felony. The analysis, or lack thereof, turns on the application of the term 'crime of violence' in Title 8 U.S.C. §1101(a)(43)(F) as defined in Title 18 U.S.C. §16 and the extent that the use, attempted use, or threatened use of physical force is needed to effectuate the offense.

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 Devil¹³:

- 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

¹³‘Opening 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).

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 1/30/08

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 district court decisions will be taken from the brief abstracts sent by the appellate section and from the trial attorneys themselves. 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, successfully or unsuccessfully. 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 court's reasoning.

Alabama

Alaska

Arizona

Aggravated Assault (Class 6 Felony), ARIZ. REV. STAT. ANN §13-1204
Contact Attorney: Jim Langell (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
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,

1. ARK CODE ANN. §5-39-201(a)(1987)
US v. Mendoza-Sanchez, 456 F.3d 479 (5th Cir. 2006)
Crime of Violence

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

California

Assault with a Deadly Weapon

1. CAL. PENAL CODE §245(a)(1)
US v. Sanchez-Ruedas, No. 05-40804, 452 F.3d 409 (5th Cir. 2006)
Crime of Violence

2. CAL. PENAL CODE §245(a)(1)
US v. Robles-Enriquez, 194 Fed. Appx. 189(5th Cir. 2007)(unpub.)
Crime of Violence

Assault with Intent to Commit a Felony, CAL. PENAL CODE §220(a)
US v. Rojas-Gutierrez, No. 06-50584, -F.3d-, 2007 WL 4341006 (5th Cir. 2007)
Crime of Violence

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

Burglary

1. CAL. PENAL CODE §459
US v. Ortega-Gonzaga, No. 06-40493, 490 F.3d 393 (5th Cir. 2007)
Not a Crime of Violence

2. CAL. PENAL CODE §459
US v. Murillo-Lopez, No. 04-41397, 444 F.3d 337, (5th Cir. 2006)
Crime of Violence

3. CAL. PENAL CODE §459
Contact Attorney: Reginaldo Trejo, Jr.
Appellate Attorney: Carolyn Fuentes
Crime of Violence/appealed/affirmed 10/5/06

4. CAL. PENAL CODE §459
Contact Attorney: Ahilan T. Arulanantham (contact Anne Berton)
Not a Crime of Violence

5. CAL. PENAL CODE §459
Contact Attorney: Tyron Mansfield & Erik Hanshew
Appellate Attorney: Carolyn Fuentes
Crime of Violence

False Imprisonment, CAL. PENAL CODE §236 AND 237
Contact Attorney: Horatio Aldredge
Not a Crime of Violence/Not an Aggravated Felony

First Degree Robbery, CAL. PENAL CODE §211, 212.5, and 12022(a)(1)
US v. Estrada-Borjas, No. 05-40739, 174 Fed. Appx. 820(5th Cir. 2006)(unpub)
Crime of Violence

Lewd Conduct With a Minor, CAL. PENAL CODE §288(b)
US v. Olivas-Pena, No. 05-11371, 202 F. Appx. 656 (5th Cir. 2006)
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

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

Rape, CAL. PENAL CODE §261(c) (1991)
Us v. Gomez-Gomez, No. 05-41461, 493 F.3d 562 (5th Cir. 2007)
Not a Crime of Violence

Robbery

1. CAL. PENAL CODE §211
Contact Attorney: Christine W. Kelso
Not a Crime of Violence

2. CAL. PENAL CODE §211
Contact Attorney: Bill Fry
Not a Crime of Violence

3. CAL. PENAL CODE §211
Contact Attorney: John Calhoun
Appellate Attorney: Henry Bemporad
Crime of Violence - appeal pending

Sexual Battery, CAL. PENAL CODE §243.4 (1998)¹
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

Unlawful Sexual Intercourse with a Minor²

1. CAL. PENAL CODE §261.5(c)
US v. Lopez-De Leon, No. 06-41553, 2008 WL 82521 (5th Cir. 2008)
Crime of Violence

2. CAL. PENAL CODE §261.5(c)
US v. Vigil-Sanchez, No. 06-41313, 2007 WL 2489718 (5th Cir. 2007)(unpub.)
Crime of Violence

3. CAL. PENAL CODE §261.5
US v. Diaz-Vela, No. 06-40939, 224 Fed. Appx. 381(5th Cir. 2007)(unpub.)
Crime of Violence

4. CAL. PENAL CODE §261.5
US v. Lopez-Garcia, No. 05-40061, 163 Fed. Appx. 306 (5th Cir. 2006)(unpub.)
Crime of Violence

5. CAL. PENAL CODE §261.5
US v. Eusebio-Giron, No. 05-51000, 186 Fed. Appx. 507, (5th Cir. 2006)(unpub.)
Contact Attorney: Anne Berton
Appellate Attorney: Carolyn Fuentes
Crime of Violence/appeal/affirmed 6-22-06

6. CAL. PENAL CODE §261.5
US v. Morales-Macias, 131 Fed. Appx. 433 (5th Cir. 2005)(unpub.)
Contact Attorney: Manuel Pacheco
Appellate Attorney: Donna Coltharp
Crime of Violence at Resentencing

¹ 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, 2005 WL 2045774 (9th Cir. Aug. 26, 2005).

²The Ninth Circuit held that CAL. PENAL CODE § 261.5(c) is overly inclusive and, therefore, is not a crime of violence. *US v. Rodriguez-Guzman*, No. 06-10585, —F.3d—, 2007 WL 3052987 (9th Cir. 2007).

Colorado

Attempted Second Degree Kidnapping, COLO. REV. STAT. §18-3-302(1)
US v. Cervantes-Blanco, No. 06-50738, –F.3d–, 2007 WL 2966821(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

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
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

Second Degree Burglary: Dwelling, COLO. REV. STAT. §18-4-203(2)(a) (1998)
Contact Attorney: Anne Berton
Appellate Attorney: Carolyn Fuentes
Crime of Violence/appeal/affirmed 7-13-06

Second Degree Sexual Assault, COLO. REV. STAT. §18-3-403
US v. Palomares-Candela, No. 03-10535, 104 Fed. Appx. 957 (5th Cir. 2004)(unpub.)
Not a Crime of Violence

Connecticut

Second Degree Assault, CONN. GEN. STAT. § 53a-60(a)(2)
US v. Torres-Diaz, No. 05-40090, 438 F.3d 529 (5th Cir. 2006)
Crime of Violence

Delaware

District of Columbia

Florida

Aggravated Battery

1. FLA. STAT. §784.03(1)(a)(1), 784.045(1)(a)(2)
US v. Dominguez, No. 06-40292, 479 F.3d 345(5th Cir. 2007)
Crime of Violence

2. FLA. STAT. §784.045 (1998)
US v. Gonzalez-Chavez, No. 04-40173, 432 F.3d 334 (5th Cir. 2005)
Awaiting decision-remanded for reconsideration

3. FLA. STAT. §784.045 (1998)
Contact Attorney: Edgar Holguin
Not a Crime of Violence/Not an Aggravated Felony/4 Level Enhancement Imposed

4. FLA. STAT. §784.045(1)(b)
Contact Attorney: Erik Hanshew
Appellate Attorney: Henry Bemporad
Crime of Violence/ Appeal Pending

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 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(3)(1995)
US v. Gomez-Guerra, No. 05-41789, 485 F.3d 301, 2007WL1175743 (5th Cir. 2007)
Not a Crime of Violence

2. **Second Degree Burglary**, FLA. STAT. §810.02(1), (3)(2005)
US v. Castillo-Morales, No. 07-40053, -F.3d-, 2007 WL 3287531 (5th Cir. 2007)
Crime of Violence

3. **Unoccupied Dwelling, Second Degree Burglary**, FLA. STAT. §810.02(1), (3)(b)(2004)
Contact Attorney: Frances Cusack & Brad Bogan
Not a Crime of Violence

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 F.3d 1305 (5th Cir. 2004)
Not a Crime of Violence

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

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

Rape, IDAHO CODE ANN § 18-6101(1)
Contact Attorney: Edgar Holguin
Appellate Attorney: Judy Madewell
Crime of Violence/Appeal Pending

Illinois

Aggravated Battery

1. 720 ILL. COMP. STAT. §5/12-4(b)(1)(1995)
US v. Velasco, No. 05-10451, 465 F.3d 633 (5th Cir. 2006)
Crime of Violence

2. 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

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 (1996)
Contact Attorney: William E. Hermesmeier & Joseph Cordova
Appellate Attorney: Donna Coltharp
Crime of Violence./Appealed/Remanded

5. 720 ILL. STAT. CH. 38 §12-4(b)(1)
Contact Attorney: Rebecca Reyes
Not a Crime of Violence/ 8 Level Enhancement Imposed

6. 720 ILL. STAT. CH. 38 §12-4(b)(1)
Contact Attorney: Selena Solis
Appellate Attorney: Henry Bemporad
Not a Crime of Violence at Resentencing

7. 720 ILL. STAT. CH. 38 §12-4(a)(1986)
Contact Attorney: Bill Ibbotson
Not a Crime of Violence

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 Levels Imposed

Domestic Battery, 720 ILL. COMP. STAT. §5/12-3.2 (1996)
Contact Attorney: Santiago D. Hernandez
Not a Crime of Violence

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

Kansas

Aggravated Battery, KAN. STAT. §21-3414(a)(1)(C)
Larin-Ulloa v. Gonzalez, No. 462 F.3d 456 (5th Cir. 2006)
Not an Aggravated Felony

Aggravated Indecent Liberties with a Child, KAN. STAT. §21-3504(a)(3)
Contact Attorney: Manuel Acosta
Appellate Attorney: Philip Lynch
Crime of Violence/Appealed/Appeal Dsmissed by Client

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

Indecent Solicitation of a Child, KAN. STAT. §21-3510
US v. Ramos-Sanchez, No. 05-50943, 483 F.3d 400 (5th Cir. 2007)
Contact Attorney: Selena Solis
Appellate Attorney: Judy Madewell
Crime of Violence/ Appeal/ Affirmed 4-2-07

Kentucky

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
US v. Deras-Rodriguez, No. 05-50222, 173 Fed. Appx. 355 (5th Cir. 2006)(unpub.)
Contact Attorney: Frances Cusack
Appellate Attorney: Henry Bemporad
Crime of Violence/Appeal/Affirmed 4-15-06

Indecent Assault and Battery of a Minor, MASS. GEN. LAWS CH 265§13B
US v. Castillo-Suarez, No. 05-41242, 215 Fed. Appx. 361 (5th Cir. 2007)(unpub.)
Crime of Violence

Michigan

Attempted Home Invasion, MICH. COMP. LAWS § 750.110
Contact Attorney: Rebecca Reyes and Bruce Weathers
Not a Crime of Violence/ Not an Aggravated Felony

Felonious Assault, MICH. COMP. LAWS §750.82
US v. Saucedo-Roman, No. 05-41013, 202 F. Appx. 723 (5th Cir. 2006)
Crime of Violence

Attempted Assault with a Deadly Weapon, MICH. COMP. LAWS §750.82

US v. Avila-Nava, No. 06-51190, 2007 WL 1840446 (5th Cir. 2007) (unpub.)
Contact Attorney: Rita Rodriguez
Appellate Attorney: Henry Bemporad
Crime of Violence/Appeal Pending

Minnesota

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

Third Degree Sexual Contact, MINN. STAT. §609.344
US v. Fernandez-Cusco, No. 05-40289, 447 F.3d 382 (5th Cir. 2006)
Crime of Violence

Mississippi

Missouri

Burglary, MO. REV. STAT. § 569.160 (1997)
US v. Carbajal-Diaz, No. 06-41491, –F.3d–, 2007 WL 4154092 (5th Cir. 2007)
Crime of Violence

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

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

Aggravated Assault with a Deadly Weapon, N.M. STAT. § 30-3-1
Contact Attorney: Horacio Aldredge
Appellate Attorney: Phil Lynch
Crime of Violence/Appealed/Appeal Dismissed by Client

Aggravated Battery, N.M. STAT. §30-3-5
Contact Attorney: William Hermesmeyer & Clare Koontz
Appellate Attorney: Donna Coltharp
Crime of Violence/Remanded

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 Assault in the Second Degree, N.Y. PENAL LAW § 120.05
US v. Neri-Hernandes, No. 06-41173, —F.3d—, 2007 WL 2966825 (5 Cir. 2007)
Crime of Violence

Criminal Possession of Stolen Property in the Third Degree, N.Y. PENAL LAW § 165.50
Burke v. Mukasey, No. 06-60710, —F.3d—, 2007 WL 4295386 (5th Cir. 2007)
Aggravated Felony

Rape in the Third Degree, N.Y. PENAL LAW §130.25-2
US v. Gonzalez-Alonzo, No. 05-51538, 204 Fed Appx. 359 (5th Cir. 2006)(unpub.)
Contact Attorney: John Calhoun
Appellate Attorney: Judy Madewell
Crime of Violence - appeal pending

Second Degree Kidnapping, N.Y. PENAL LAW §135.20
US v. Iniguez-Barba, No. 06-50434, 485 F.3d 790 (5th Cir. 2007)
Contact Attorney: Robert Castaneda
Appellate Attorney: Donna Coltharp
Crime of Violence-appeal pending

North Carolina

Breaking and Entering

1. 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**

2. N.C. GEN. STAT. §14-54
Contact Attorney: Abe Hernandez
Appellate Attorney: Phil Lynch
Crime of Violence/Appeal Pending

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

Taking Indecent Liberties with a Child, N.C. GEN. STAT. §14-202.1 (a)(1)
US v. Izaguirre-Flores, No. 04-40276, 405 F3d 270, (5th Cir. 2005)
Crime of Violence

North Dakota

Ohio

Oklahoma

Indecent or Lewd Acts with a Child

1. OKLA. STAT. TIT. 21, §1123(A)(4)
US v. Balderas-Rubio, No. 06-41153, –F.3d–, 2007 WL2483366 (5th Cir. 2007)
Crime of Violence

2. OKLA. STAT. TIT. 21, §1123(A)(4)
US v. Lerma-Galindo, No. 06–50149, 209 Fed. Appx. 375 (5th Cir. 2006)(unpub.)
Contact Attorney: Joseph Cordova
Appellate Attorney: Henry Bemporad
Crime of Violence/Appealed/Affirmed

3. OKLA. STAT. TIT. 21, §1123(A)(4)
Contact Attorney: Frank Morales
Appellate Attorney: Donna Coltharp
Crime of Violence/Appealed/Affirmed

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

Oregon

Pennsylvania

Terroristic Threats, 18 PA. CONS. STAT. §2706 (2003)
United States v. Martinez-Paramo, 380 F.3d 799 (5th Cir. 2004)
Not Crime of Violence

Rhode Island

Third Degree Sexual Assault, R.I. GEN. LAWS §11-37-6 (2004)
Contact Attorney: Bill Fry
Crime of Violence

South Carolina

South Dakota

Tennessee

Attempted Kidnapping, TENN. CODE ANN. § 39-13-303
US v. Gonzalez-Ramirez, No. 04-51355, 477 F.3d 310 (5th Cir. 2007)

Crime of Violence

Aggravated Assault (Reckless), TENN. CODE ANN. §39-13-102
US v. Mungia-Portillo, No. 06-40273, 484 F.3d 813 (5th Cir. 2007)
Crime of Violence

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, TEX. PENAL CODE ANN. §22.02
US v. Ramirez, 367 F.3d 274 (5th Cir. 2004)
Crime of Violence

Aggravated Assault with a Deadly Weapon, TEX. PENAL CODE ANN §22.02
US v. Guillen-Alvarez, No. 05-41787, 489 F.3d 197(5th Cir. 2007)
Crime of Violence

Aggravated Assault with a Motor Vehicle, Tex. Penal Code Ann. §22.01(a)(1), 22.02
US v. Fuentes-Berlanga, No. 04-41163, 149 Fed. Appx. 258(5th Cir. 2005)(unpublished)
Crime of Violence

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

Aggravated Kidnapping, TEX. PENAL CODE ANN. §20.04
Contact Attorney: Christine W. Kelso
Crime of Violence

Aggravated Robbery of an Elderly Person, TEX. PENAL CODE ANN. §29.03(a)(3)(A)
(1998)
US v. Garcia-Aguirre, No. 05-50318, 2006 WL 509400 (5th Cir.)(unpub.)
Contact Attorney: Frances Cusack
Appellate Attorney: Henry Bemporad
Crime of Violence-Affirmed 3/1/06

Aggravated Sexual Assault of a Child, TEX. PENAL CODE ANN. §22.021
US v. Rayo-Valdez, No. 02-10010, 302 F.3d 314 (5th Cir. 2002)

Crime of Violence

Assault,

1. 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

2. 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

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

Attempted Indecency with a Child, TEX. PENAL CODE §21.11

US v. Rivera-Perez, 322 F.3d 350 (5th Cir. 2003)

Crime of Violence Despite Being a Misdemeanor Under §12.44

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

(*See: US v. Ortega-Gonzaga*, –F.3d–, 2007 WL 1806594 (5th Cir. 2007) and
US v. Herrera-Montes, –F.3d–, 2007 WL 1806652 (5th Cir. 2007)--**Not a Crime of Violence**)

1. TEX. PENAL CODE §30.02
US v. Valdez-Maltos, No. 05-40869, 443 F.3d 910 (5th Cir. 2006)
Crime of Violence

2. TEX. PENAL CODE ANN. §30.02(a)(1) (2000)
US v. Garcia-Mendez, No. 04-41152, 420 F. 3d 454 (5th Cir. 2005)
Crime of Violence

Consensual Sexual Intercourse with Person Less Than 17, TEX. PENAL CODE §22.011(a)(2)

US v. Alvarado-Hernandez, No. 05-50994, 465 F.3d 188 (5th Cir. 2006)

Crime of Violence

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,

1. TEX. PENAL CODE ANN. §22.05(b)(1)
US v. Hernandez-Rodriguez, No. 05-51429, 467 F.3d 492 (5th Cir. 2006)
Crime of Violence

2. 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

Indecency with a Child

1. TEX PENAL CODE §21.11(a)
US v. Figueroa-Hernandez, 212 Fed. Appx. 326 (5th Cir. 2007)(unpub.)
Crime of Violence

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

3. TEX. PENAL CODE §21.11 (a)(1)
US v. Guerrero-Delgado, No. 06-40227, 202 Fed. Appx. 780 (5th Cir. 2006)
(unpub.)
Crime of Violence

4. TEX. PENAL CODE 21.11(a)(1991)
US v. Nino-Jaramillo, No. 05-20496, 2006 WL 2683383 (5th Cir. 2006)(unpub.)
Crime of Violence

5. 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 (a)(3)
Perez-Munoz v. Keisler, No. 06-60440, –F.3d–, 2007 WL 3257182 (5th Cir. 2007)
Crime of Violence

2. 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

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. 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

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

Kidnapping, TEX. PENAL CODE ANN. §20.03
Contact Attorney: Rita Rodriguez
Appellate Attorney: Carolyn Fuentes
Crime of Violence/appeal pending

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

Retaliation

1. TEX. PENAL CODE ANN. §36.06 (a)
US v. Martinez-Mata, No. 03-40490, 393 F.3d 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.3d 875 (5th Cir. 2004)
Not a Crime of Violence

Robbery, TEX. PENAL CODE ANN. §29.02
US v. Santiesteban-Hernandez, No. 05-50399, 469 F.3d 376 (5th Cir. 2006)
Crime of Violence

Sexual Assault

1. TEX. PENAL CODE §22.011
US v. Martinez-Vega, No. 05-41498, 471 F.3d 559 (5th Cir. 2006)
Crime of Violence

2. 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

3. TEX. PENAL CODE ANN. §22.011(a)(2)
Contact Attorney: Molly Roth
Appellate Attorney: Judy Madewell
Crime of Violence-reconsideration motion pending

4. TEX. PENAL CODE ANN. §22.011(a)(2)
US v. Alvarado-Hernandez, No. 05-50994, 465 F.3d 188 (5th Cir. 2006)
Crime of Violence

5. Attempted Sexual Assault
US v. Rosas-Aguilar, No. 06-50850, 2007 WL 853176 (5th Cir. 2007) (unpub.)
Crime of Violence

Sexual Assault of a Child, TEX. PENAL CODE §22.011(c)(1)
US v. Flores-Morales, 2006 WL 3626258 (5th Cir. 2006)(unpub.)
Crime of Violence

Unauthorized Use of a Motor Vehicle, TEX. PENAL CODE ANN. §31.07 (a)

1. *US v. Rodriguez-Rodriguez*, No. 02-20697, 388 F.3d 466 (5th Cir. 2004)
Not a Crime of Violence

2. *US v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999)
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

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

Utah

Vermont

Virginia

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

Washington³

Assault in the Second Degree

³**Fourth Degree Assault**, §9A.36.041(1) & (2) (2004)
US v. Sanchez-Torres, 136 Fed. Appx 644, 2005WL 146102 (5th Cir. 2005)
Not a Crime of Violence under 2L1.2(b)(1)(E)

1. WASH. REV. CODE §9A.36.021(1)(c) (West 1988 & Supp. 1995)
Contact Attorney: Todd Durden and Brad Bogan
Not a Crime of Violence

2. WASH. REV. CODE §9A.36.021(1)(e)
US v. Magdaleno-Sanchez, No. 05-50047, 169 Fed. Appx. 830 (5th Cir. 2006)(unpub.)
Contact Attorney: Anne T. Berton
Appellate Attorney: Carolyn Fuentes
Crime of Violence/Remanded 3-2-06/appeal pending

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

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

A FEW SELECTED DRUG CASES:

U.S.S.C.

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)

Purchase for Sale, Cal. Health & Safety Code §11351

US v. Palacios-Quinonez, No. 05-10323, 431 F.3d 471 (5th Cir. 2005)

Drug Trafficking Offense under §2L1.2 (b)(1)(A)(i)

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)

Georgia

Trafficking Methamphetamine, GA. Code Ann. §16-13-31(e) (1999)

US v. Gutierrez-Bautista, No. 06-40486, 507 F.3d 305 (5th Cir. 2007)

Drug Trafficking Offense Under §2L1.2(b)(1)(A)

North Carolina

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

US v. Lopez-Salas, No. 06-41637, –F.3d–, 2008 WL 44592 (5th Cir. 2008)

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

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)

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)

3. *US v. Fuentes*, No. 06-20325, 2007 WL 2264093 (5th Cir. 2007)(unpub.)

Not an Aggravated Felony

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 with Intent to Deliver a Controlled Substance, Tex. Health & Safety Code §481.112(a)
US v. Ford, 06-20142, –F.3d–, 2007 WL 1501745 (5th Cir. 2007)
Not a Drug Trafficking Offense Under §2L1.2

Possession with Intent to Deliver a Controlled Substance, Tex. Health & Safety Code §481.112(a)
US v. Ford, 06-20142, –F.3d–, 2007 WL 4303800 (5th Cir. 2007)
Drug Trafficking Offense

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, –F.3d–, 2007 WL 4465221 (5th Cir. 2007)
Not an Aggravated Felony