

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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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 This paring down of the defendant's fact of conviction with additional documents is referred to as the *modified categorical approach*.

Bear in mind that you do not pare down a statute with a single, indivisible set of elements. *Descamps v. United States*, 133 S.Ct. 2276 (2013). In *Descamps*, the Supreme Court held that lower courts could not use the modified categorical approach to determine whether an entry was

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.

unprivileged if the statute did not contain an element of unprivileged entry. The key take-away: don't let them try to get anything in the record beyond the judgment if the statute of conviction is indivisible (does not contain multiple, alternative elements).

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.

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. **IS IT A FELONY?** For many, if not all, applications of the 2L1.2 enhancements, a central threshold question is: Was the prior conviction a felony? That is, some states define 'felony' in a way that would not meet the 2L1.2 definition of felony. For example, some states like **North Carolina, Kansas, and Arizona** have sentencing guidelines that are much more mandatory than the federal sentencing guidelines. In those states, these guidelines give ranges of punishment for certain offenses with individuals with certain criminal history and judges in those states have limited amounts of discretion to depart from those ranges. Some of those ranges essentially create a sentencing ceiling that exposes a defendant to less than one year of imprisonment, a fact that is helpful in the 2L1.2 context. The Fourth, Eighth, and Tenth Circuits provide some ammunition to this argument. *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014); *United States v. Simmons*, 649 F.3d 327 (4th Cir. 2011); *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011). In the Fifth Circuit, rather than proceed to oral argument, the Government conceded.

- c. **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.

- d. **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.
- e. **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

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).

- 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). ***Except that effective November 1, 2011, a conviction that is too remote to count for criminal history points will receive a smaller offense level enhancement in the +16 and +12 level increase areas. See discussion in the sixteen and twelve level increases, infra.***
 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). *Again, effective Nov. 1, 2011, new rules will dictate how to handle a remote conviction, limiting the full application of the sixteen and twelve level increases, infra.*

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.

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 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-Duberney*, 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 than create a question about what your client actually pled guilty to, the transcripts

Sixteen-level increase (cont'd)

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.

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 (REFERRED TO AS THE ENUMERATED OFFENSES); or**
- 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 (REFERRED TO AS THE DEFINITION).**

FIRST THE ENUMERATED OFFENSES:

⁸Believe 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. The Federal Public Defender, Western District of Texas has 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 this list at the end of this paper. 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)

- (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. 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. **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).⁹

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

⁹Although 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)

curtilage. *United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007).¹⁰

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).

¹⁰I 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). But, I would still file the objection and sing it loud!

Sixteen-level increase (cont'd)

- 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.
- 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.

Sixteen-level increase (cont'd)

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*.

However, the Commission realized that this was an unsavory outcome and decided to amend 2L1.2 to include within the ambit of 'forcible sex offenses' those offenses that are consented to in-fact, but not legally (ie, coercion, duress, deception). The reason I bring this up is to point to a massive distinction in 2L1.2 law on forcible sex offenses and where 'forcible sex offense' is listed elsewhere in the Guidelines (e.g., 4B1.2, 2K2.1, and anywhere else that 'crime of violence' incorporates a 4B1.2 definition)

- 2) If sex was obtained through use of constructive force—such as 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.

Sixteen-level increase (cont'd)

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 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.”¹¹ 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

¹¹*At Worst...the Best of Boy George and Culture Club*, ©1993.

Sixteen-level increase (cont'd)

“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.

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.

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 matter,

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. An offense under federal, state or local law that prohibits the **importation, distribution, transportation, or trafficking** of a firearm described in Title 18 U.S.C. §921, or of an explosive material defined in 18 U.S.C. §841(c).
2. 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
3. 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.

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.

Sixteen-level increase (cont'd.)

NOVEMBER 2011 AMENDMENT TO UNITED STATES SENTENCING GUIDELINE §2L1.2:

If your client has a properly assessed prior criminal conviction that can be classified in USSG §2L1.2(b)(1)(A), *but* the conviction is so remote that it does not receive any criminal history points under USSG §4A1.1, the offense level increase becomes 12, not 16.

For example:

a. Your client was sentenced on May 1, 1993 to 120 months for possession with the intent to distribute marijuana. He was paroled on May 1, 1994. This sentence would qualify for three criminal history points if the instant offense was commenced within fifteen years of the imposition of the sentence OR if the defendant was incarcerated for the offense during the fifteen year time period preceding the instant offense. Practically speaking, this means that you count fifteen years forward from his release from imprisonment. See USSG §§4A1.1(a) and 4A1.2(e)(1). If you are set for sentencing in the present, this offense would receive no criminal history points because it was imposed greater than fifteen years before the instant offense's commission and more than fifteen years have elapsed since the defendant served part of that sentence. **As a result, he would not get the full sixteen-level enchilada¹² because the offense receives no criminal history points.**

Instead, let's say that he was paroled on May 1, 2002 and he lived his life since that time in perfect peace and harmony. His release in 2002 means the offense would count for three points until May 1, 2017....Crikey¹³! BUT....in this scenario you should definitely consider making a departure motion under USSG §4A1.3 (overstated criminal history) or a variance request due to the age of the crime.

¹²I love enchiladas, especially green chicken enchiladas.

¹³Crikey is Australian slang for 'Christ'

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.

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

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).

NOVEMBER 2011 AMENDMENT TO UNITED STATES SENTENCING GUIDELINE §2L1.2:

If your client has a properly assessed prior criminal conviction that can be classified in USSG §2L1.2(b)(1)(B), *but* the conviction is so remote that it does not receive any criminal history points under USSG §4A1.1, the offense level increase becomes 8, not 12.

a. Your client was sentenced on May 1, 1991 to 12 months for possession with the intent to distribute marijuana. This sentence would receive two points for ten years following the date of the imposition of the sentence. If you are going to sentencing in present day, this conviction

would not receive any points because it is too old. See USSG §§4A1.1(b) and 4A1.2(e)(2).

In addition to receiving no criminal history points, it would not receive the full twelve-level enchilada because it is too remote. Instead, it would receive only an eight-level increase.

THE 8-LEVEL BUMP

I. AGGRAVATED FELONIES¹⁴

- 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.** For example, a burglary (unknown as to whether it is a dwelling or building burglary) where there is no intent to commit a theft prior to the unauthorized entry would render fatal an attempt to issue an eight-level increase under this provision of 2L1.2. So, literally, you might find yourself arguing each separate increase away but for the same reason. So, you could go from a +16 to only a +4. Now that’s awesome!!
 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, for the most part. But, a misdemeanor conviction for sexual abuse of a minor can be an ‘aggravated felony’ even though it is a misdemeanor. *United States v. Ramirez*, 731 F.3d 351 (5th Cir. 2013).

¹⁴In most cases, it sounds worse than it is. And, in some cases, it is worse than it sounds.

Eight-level increase (cont'd.)

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). Child 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, 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.

Eight-level increase (cont'd.)

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.
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.*

Eight-level increase (cont'd.)

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.

1. Crime of violence.

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

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. 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

Eight-level increase (cont'd.)

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 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, *supra*. 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 AND VARIANCES

Margy Meyers, who I adore and look up to as a great mentor and humanitarian, not to mention my boss, says that the way you do federal sentencing is to concentrate on objections (making sure the guidelines are correct), then thinking about departures (those things listed in the guidelines that are Commission-sanctioned), and then variances (everything you could possibly argue under Title 18 U.S.C. §3553). The above dealt with putting up a hell of a fight on trying to determine whether Probation has correctly calculated the Guidelines.

DEPARTURES

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 (many 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 Devil¹⁵:

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

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‘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.

II. Cultural assimilation

Cultural assimilation is a permissible basis for a downward departure at sentencing. *United States Sentencing Guideline §2L1.2, Commentary, Application Note 8*; *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 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.

Or, if you think that arguing within the strict dictates of Application Note 8 constrains you too much (i.e., the seriousness of defendant's criminal history), dump it and argue the variance instead. YOU DECIDE.

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.

IV. INSUFFICIENTLY SERIOUS PRIOR CRIMINAL CONVICTION: MAKING UP A WORSE BOOGEYMAN

U.S.S.G. §2L1.2, Note 7 reveals that District Courts can grant a downward departure in circumstances where a defendant might receive an enhancement (4, 8, 12, or 16) but that the enhancement might overstate the seriousness of the criminal history. For example, a person with an alien smuggling conviction will receive the same 16 level increase as a child molester (I always compare my poor client with the worst hypothetical +16 guy out there) or murderer. Since my guy isn't a child molester or a murderer, he shouldn't be treated like one. So, in the end, how much less serious is this conviction compared to your hypothetical boogeyman? Only you know. By the way, under §3553, this argument will work in any contexts:

1. Drug trafficking offenses where the amount of 'sold' drugs was small as compared to your hypothetical Manuel Noriega-like drug kingpin;
2. An aggravated assault conviction where it was a result of insufficient

provocation (bar fight, less perfect self-defense)¹⁶.

These are just a few ideas that seem to come up in a number of our re-entry cases. But, there are more. Read your guidelines well and concentrate on the 5K's and the 5H's and other stuff in the substantive guideline itself.

¹⁶An old, crusty lawyer was once quoted as saying, "It is easier to show that a man needed killing than that a horse needed stealing."

VARIANCES

Title 18 U.S.C. §3553 sets out a number of factors that should be considered by the Court before sentencing the defendant. The Court should impose a sentence that is sufficient, BUT NOT GREATER THAN NECESSARY to:

1. Reflect the seriousness of the offense;
 - A. The defendant simply crossed an international boundary. This offense is the equivalent of a state trespassing offense, with, HOPEFULLY, no other aggravating factors.
2. Promote respect for the law;
 - A. Especially if this is your client's first 1326, the wallop will definitely have a greater impact than someone who has been repeatedly told not to come back or has been repeatedly deported.
3. Provide just punishment;
 - A. What is a just punishment when someone comes here only to work or to better their lives? Or to re-unite with family who is here in the US?
4. Afford adequate deterrence;
 - A. Look into whether your client has or will make arrangements to move his family to his home country. Further, if the reason for his coming to the US is no longer a reason, he won't be coming back anymore. Therefore, the need for an adequate deterrent will be less than otherwise.
5. Protect public from further crimes of the defendant;
 - A. Look not only at the paucity of criminal history of your client but also the age of criminal conduct. If the person has more than a paucity of criminal history (ie, a rapsheet longer than the day) look at the arc of the person's life. Did they start out with more serious crimes and then slow down? Is the arc of their life reflective of a less violent person or emblematic of a rehabilitated person?
6. History and characteristics of the defendant;
 - A. Anything good about your client. Think about this: when a person illegally returns to the country, if he does so without other crimes, he really

is simply coming here to earn a decent living. With all of the plasma, LCD and LED Tv's, computers, jewelry, and other expensive stuff out there in just about every household, a returning alien could make so much more money burglarizing a house and going back home. Instead, he does the honorable thing and finds and gets a job. What a criminal!

These are just a few considerations for us in defending our 1326 clients. The sky is the limit. Use your imagination to make differences in your clients' lives.

A PARTING WORD FOR MY BROTHERS AND SISTERS IN ARMS....

Remember that we engage an epic battle. When we took on the challenge of defending our client we became more acutely aware of all of the inequity and inequality that our clients face. We engage in this struggle because we know there is much to argue, even for the most difficult client.

Practically, engage the process this way:

- a. Argue for the correct guideline;
- b. Argue for departures;
- c. Argue for variances.

JUST ARGUE!

Remember the immortal words of Pink,

*So raise your glass if you are wrong in all the right ways;
All my underdogs,
We will never be never be anything but loud
and nitty gritty dirty little freaks
So won't you come on and come on and raise your glass!
Just come on and come on and raise your glass!¹⁷*

¹⁷Pink, *Raise Your Glass!*, Copyright 2010

CRIMES OF VIOLENCE UNDER § 2L1.2
Updated 10/31/14

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 periodically. 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, 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: [Kristin Kimmelman@fd.org](mailto:Kristin.Kimmelman@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 except in rare instances. 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 objection or you may want to object to preserve the issue or challenge the court’s reasoning.

Note: On March 15, 2013, the Fifth Circuit created a new “plain-meaning” approach for non-common law enumerated offenses. *United States v. Rodriguez*, [No. 11-20881](#), 711 F.3d 541 (5th Cir. 2013). Any pre-*Rodriguez* case addressing an enumerated crime of violence that is not defined at common law, such as sexual abuse of a minor or statutory rape, is potentially abrogated and no longer clear precedent.

Alabama

Alaska

Arizona^{!!!!!!!!!!!!!!!!!!!!}

^{!!!!!!!!!!!!!!!!!!!!}**The 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, 557 F.3d 1019**

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 (contact Kristin Kimmelman)

**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

Human Smuggling, ARIZ. REV. STAT. § 13-2319

US v. Alcantara-Rodriguez, No. 13-40168, 7:12-CR-1350 (S.D. Tex.)

Contact Attorney: Darrell Bryan (SDTX)

Appellate Attorney: Tim Crooks (SDTX)

Not Alien Smuggling Offense

Sexual Assault, ARIZ. REV. STAT. § 13-1406

Contact Attorney: Christine Kelso (contact Kristin Kimmelman)

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

Arkansas

(9th Cir. 2009).

Aggravated Assault, ARK. CODE ANN. § 5-13-204
US v. Esparza-Perez, No. 11-50090, 681 F.3d 228 (5th Cir. 2012)
Contact Attorney: Anne Berton and Mike Gorman
Appellate Attorney: Judy Madewell
Not a Crime of Violence

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

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

Forgery, ARK. CODE ANN. § 5-27-201(a)
Contact Attorney: Marjorie Meyers
Not an Aggravated Felony

California

Burglary, CAL. PENAL CODE § 459²²

2. *Descamps v. US*, [No. 11-9540](#), 133 S. Ct. 2276 (2013)

Not a Crime of Violence

4. Burglary in the Second Degree

Contact Attorneys: Alex Almanzan & Kristin Kimmelman

Not Aggravated Felony (Probation conceded not +8, and Court concurred)

Child Abuse, CAL. PENAL CODE § 273a(a)

US v. Rodriguez-Sandoval, No. EP-06-CR-1334-PRM, 2006 WL 3030779
(W.D. Tex. Oct. 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 F. App'x 446 (5th Cir. 2008) (unpub.)

US v. Cruz-Rodriguez, No. 09-40500, 2010 WL 4299274 (5th Cir. 2010)

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)

²² SEE ALSO *US v. GONZALEZ-TERRAZAS*, NO. 07-50375, 529 F.3D 293 (5TH CIR. 2008); *US v. ORTEGA-GONZAGA*, NO. 06-40493, 490 F.3D 393 (5TH CIR. 2007). BUT SEE *US v. MURILLO-LOPEZ*, NO. 04-41397, 444 F.3D 337 (5TH CIR. 2006).

US v. Raya-Romero, No. 04-40447, 157 F. App'x 703 (5th Cir. 2005)
(unpublished)

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

Oral Copulation of a Minor, CAL. PENAL CODE § 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)³³

US v. Bonilla-Mungia, No. 03-41751, 422 F.3d 316 (5th Cir. 2005)

Possibly Not a Crime of Violence/Remanded

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, COLO. REV. STAT. §18-3-206

³³ 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).

1. *US v. Landeros-Arreola*, No. 00-50512, 260 F.3d 407 (5th Cir. 2001)
Not an Aggravated Felony
2. Contact Attorneys: Reggie Trejo & Kristin Kimmelman (W.D. Tex. 2014)
Not a Crime of Violence
3. *But see US v. Bencomo-Hinojos*, EP-10-CR-811-PRM, 2011 WL 3666716 (W.D. Tex. Feb. 23, 2011) (finding is Crime of Violence)

Misdemeanor Assault, COLO. REV. STAT. § 18-3-204
Contact Attorney: Anne Berton (contact Kristin Kimmelman)
Not a Crime of Violence

Misdemeanor Third Degree Sexual Assault, COLO. REV. STAT. § 18-3-404
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 (contact Laura Spindler)
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, 373 Fed.Appx. 476 (5th Cir. 2010)(unpub.)
Contact Attorneys: Selena Solis, and Mike Gorman
Appellate Attorney: Carolyn Fuentes (contact Laura Spindler)
Not an Aggravated Felony

Connecticut

Delaware

District of Columbia

Florida

Aggravated Battery, FLA. STAT. § 784.045

1. *US v. Gonzalez-Chavez*, No. 04-40173, 432 F.3d 334 (5th Cir. 2005)

Not Categorically Crime of Violence/Vacated & Remanded

2. 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. Insaugarat, No. 02-40917, 378 F.3d 456 (5th Cir. 2004)

Not a Crime of Violence

Battery, FLA. STAT. ANN. § 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. ANN. § 784.07/784.03

Contact Attorney: Maureen Franco

Not a Crime of Violence

Burglary, FLA. STAT. ANN. § 810.02

Not a Crime of Violence

1. *US v. Garcia-Montejo*, [No. 13-40737](#), 2014 WL 2506249, 2014 U.S. App. LEXIS 10420 (5th Cir. June 4, 2014) (unpub.)
FLA. STAT. § 810.02(1) & (2)(a)
2. *US v. Rodriguez-Lopez*, No. 11-50864, 2012 WL 2864523 (5th Cir. 2012) (unpub.)
Contact Attorney: Molly Roth
Appellate Attorney: Judy Madewell
3. *US v. Gomez-Guerra*, No. 05-41789, 485 F.3d 301 (5th Cir. 2007)
FLA. STAT. §810.02(3)(1995)
4. Contact Attorney: Erik Hanshew
Appellate Attorney: Judy Madewell
Gov't conceded at appeal not a COV
5. Contact Attorney: Frances Cusack & Brad Bogan
FLA. STAT. §810.02(1), (3)(b)(2004)

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

FLA. STAT. ANN. § 800.04(2)(1999)

Contact Attorney: Anne Berton

Not a Crime of Violence

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

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

Not a Crime of Violence

Possession of a Firearm by a Felon, FLA. STAT. ANN. § 790.23(1)

US v. Sanchez, No. 11-40139, 2012 WL 89956 (5th Cir. 2012) (unpub.)

Aggravated Felony (under plain error review)

Throwing a Deadly Missile, FLA. STAT. ANN. § 790.19

Contact Attorney: Horatio Aldredge

Not an Aggravated Felony

Georgia

Cruelty to Children, GA. CODE ANN. § 16-5-70(b)

US v. Resendiz-Moreno, [No. 11-51139](#), 705 F.3d 203 (5th Cir. 2013)

Not Crime of Violence

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

US v. Lopez-Hernandez, No. 02-21078, 112 F. App'x 984 (5th Cir. 2004)
(unpub.)

Not a Crime of Violence

Involuntary Manslaughter, GA. CODE ANN. § 16-5-3

Contact Attorney: Marie Romero-Martinez and Mike Gorman

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 8 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, 720 ILL. COMP. STAT. § 5/12-4

Not Crime of Violence

1. *US v. Bustos-Rios*, No. 05-50007, DR-04-CR-530

Contact Attorney: William E. Hermesmeier & Joseph Cordova

Appellate Attorney: Donna Coltharp
Remanded (§ 5/12-4 (1996))

2. *US v. Gomez-Vargas*, 111 F. App'x 741 (5th Cir. 2004) (unpub.)
3. *US v. Aguilar-Delgado*, No. 04-40309, 120 F. App'x 522 (5th Cir. 2004) (unpub.)
4. *US v. Orozco-Pazo*, No. 05-50467, EP-04-CR-1953-FM
Contact Attorney: Selena Solis
Appellate Attorney: Henry Bemporad

Not a COV at resentencing (§ 12-4(b)(1))
5. *US v. Jose Reyes-Vasquez*, A-05-CR-192-SS (§ 12-4(a) (1986))
Contact Attorney: Bill Ibbotson
6. *US v. Hernandez-Zavala*, EP-06-CR-275-FM (§12-4(b)(1))
Contact Attorney: Rebecca Reyes (contact Kristin Kimmelman)

Aggravated Battery/Peace Officer/Fireman

US v. Diaz-Cortez, No. 10-40272, 2011 WL 4601030 (5th Cir. 2011)
(unpub.)

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 Level Enhancement Imposed

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

Contact Attorney: Santiago D. Hernandez (contact Kristin Kimmelman)

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

Failure to Report, 720 ILL. COMP. STAT. § 5/31-6(A)
Chambers v. US, No. 06-11206, 555 U.S. 122 (2009)
Not a Violent Felony Under ACCA

Indiana

Iowa

Aggravated Assault, IOWA CODE §§ 708.1 & 708.2(3)

US v. Rico-Mendoza, [No. 12-41231](#), 2013 WL 6407585, 2013 U.S. App. LEXIS 24459 (5th Cir. Dec. 9, 2013) (unpub.)

Not Crime of Violence

Assault with Intent to Commit Sexual Abuse, IOWA CODE ANN. § 709.11 (West 2003)¹

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

Not a Crime of Violence

Going Armed with Intent, IOWA CODE ANN. § 708.8

Contact Attorney: Reginaldo Trejo

Not a Crime of Violence

Misdemeanor Serious Domestic Abuse Assault, IOWA CODE ANN. §§ 236.2(2), 708.1 & 708.2A

US v. Favela-Masuca, No. 06-40607, 247 F. App'x 464 (5th Cir. 2007) (unpub.)

Not an Aggravated Felony

Kansas

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

US v. Matute-Galdamez, No. 03-41728, 111 F. App'x 264 (5th Cir. 2004) (unpub.)

Not a Crime of Violence

Attempted Aggravated Sexual Battery, KAN. STAT. ANN. § 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)

¹ *But see US v. Amaya*, [No. 13-40080](#), 2014 WL 3767213, 2014 U.S. App. LEXIS 14862 (5th Cir. Aug. 1, 2014) (unpub.) (finding § 709.11 is a crime of violence (attempted sexual abuse of a minor)).

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 (contact Laura Spindler)

Government conceded at trial level Not a Crime of Violence

Louisiana

Aggravated Battery, LA. REV. STAT. ANN. § 14:34

US v. Herrera-Alvarez, ___ F.3d ___, [No. 12-41425](#), 2014 WL 2139107,

2014 U.S. App. LEXIS 9573 (5th Cir. May 22, 2014)

Not a Categorical Crime of Violence (but was COV in this case under modified categorical approach)

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, MASS. GEN. LAWS CH. 265, § 13A

1. *Andrade v. Gonzalez*, No. 04-30247, 459 F.3d 538 (5th Cir. 2006)
Aggravated Felony
2. *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)
3. *US v. Holloway*, No. 08-2273, 630 F.3d 252 (1st Cir. 2011)
Not a Violent Felony Under ACCA

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, 362 F. App'x 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)(C)
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 F. App'x 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
But see US v. Rodriguez-Juarez, [631 F.3d 192](#) (5th Cir. 2011) (“forcible sex offenses” amended in 2008 to include any offenses where consent not given or legally invalid)

Montana

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

1. Contact Attorney: Sandra Lewis
Not a Crime of Violence
2. *Perez-Gonzalez v. Holder*, No. 10-60798, 667 F.3d 622 (5th Cir. 2012)
Not Aggravated Felony (not rape under aggravated felony definition)

Nebraska

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

US v. Ramos-Guerrero, No. 06-41593, 254 F. App'x 305 (5th Cir. 2007)
(unpub.)

Not a Crime of Violence (insufficient record)

Theft By Receiving Stolen Property, NEB. REV. STAT. § 28-517 (2008)
US v. Miller-Ortiz, No. 09-50682, 2010 WL 4269462 (5th Cir. 2010)
(unpub.)

Aggravated Felony

Nevada

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

Contact Attorney: Edgar Holguin

Not a Crime of Violence

Possession of Stolen Vehicle, NEV. REV. STAT. § 205.273

Contact Attorneys: Anne Berton and Mike Gorman

Not an Aggravated Felony

New Hampshire

New Jersey

Promoting Prostitution, N.J. STAT. ANN. § 2C:34-1

Contact Attorney: Edgar Holguin

Not an Aggravated Felony

Third Degree Aggravated Assault, N.J. STAT. ANN. § 2C:12-1b(7)

US v. Martinez-Flores, [No. 11-41375](#), ___ F.3d ___, 2013 WL 3064797,
2013 U.S. App. LEXIS 12522 (5th Cir. 2013)

Not Crime of Violence

New Mexico

Abandonment or Abuse of a Child, N.M. STAT. § 30-6-1

1. Contact Attorney: Erik Hanshew

Not an Aggravated Felony/Four Level Enhancement Imposed

2. *US v. Torres-Reyes*, No. 10-51011, 444 F. App'x 828 (5th Cir. 2011)

Contact Attorneys: Liz Rogers & Donna Coltharp (appellate)

Not a Crime of Violence

Criminal Sexual Contact of a Minor in Fourth Degree, N.M. STAT. § 30-9-13

Contact Attorneys: Jim Langell & Sherri Lynn Allison (D.N.M.)

Not a Crime of Violence (note this was in the Tenth Circuit)

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

Contact Attorney: Anne Berton

Not a Crime of Violence

Driving Under the Influence, N.M. STAT. § 66-8-102(A), (C)

Begay v. US, No. 06-11543, 553 U.S. 137 (2008)

Not a Violent Felony under ACCA

Possession of Stolen Vehicle, N.M. STAT. ANN. §§ 66-3-505 (1978) or
30-16D-4(A)

Contact: Erik Hanshew

Not Aggravated Felony

Vandalism, N.M. STAT. § 30-15-1

Contact Attorneys: Tyrone Mansfield and Bruce Weathers

Not An Aggravated Felony

New York

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

Contact Attorney: William Fry (contact Donna Coltharp)

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

Assault with Deadly Weapon Inflicting Serious Bodily Injury, N.C.

GEN. STAT. § 14-32(b)

US v. Ocampo-Cruz, [No. 13-40112](#), 2014 WL 1329344, 2014 U.S. App. LEXIS 6294 (5th Cir. Apr. 4, 2014) (unpub.)

Not a Crime of Violence

Breaking and Entering, N.C. GEN. STAT. § 14-54(a)

Contact Attorney: Marie Romero-Martinez

Appellate Attorney: Phil Lynch (contact Donna Coltharp)

Government Conceded at Appellate Level that it is Not a Crime of Violence/

8 Levels Imposed

Elude Arrest in a Motor Vehicle-Three or More Aggravating Factors (Felony), N.C. GEN. STAT. § 20-141.5(B)

(See *US v. Castro-Magama*, 465 F. App'x 370 (5th Cir. 2012))

Contact Attorney: Anne Berton and Mike Gorman

Not a Felony (Maximum term of imprisonment set by NC sentencing guidelines.)

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

Involuntary Manslaughter

US v. Peterson, No. 08-4889, 629 F.3d 432 (4th Cir. 2011)

Not a Crime of Violence Under Career Offender

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

Involuntary Manslaughter, OHIO REV. CODE ANN. § 2903.4

US v. Pickens, 1-10cr46 (S.D. Ohio)

Contact Attorney: James Maus

Not a Crime of Violence (For purposes of Career Offender Definition)

Oklahoma

Assault and Battery, OKLA. STAT. TIT. 21, § 644C

US v. Miranda-Ortegon, No. 10-51129, 670 F.3d 661 (5th Cir. 2012)

Contact Attorney: Sandra Lewis
Appellate Attorney: Phil Lynch (contact Donna Coltharp)
Not a Crime of Violence

Burglary in the Second Degree, OKLA. STAT. TIT, 21 § 1435
US v. Avila, [No. 11-50895](#); 2012 U.S. App. LEXIS 23798; 2012 WL 5839153 (5th Cir. 2012) (unpublished)

Not a Crime of Violence, plain error

Child Abuse, OKLA. STAT. TIT. 10, § 7115
US v. Ontiveros-Adame, No. 11-50196 (5th Cir.), EP-10-CR-2499-FM (W.D. Tex.)

Contact Attorneys: Edgar Holguin & Shane McMahon
Appellate Attorney: Carolyn Fuentes (Laura Spindler)

Not a Crime of Violence (Government filed motion to vacate sentence and remand to district court)

First Degree Manslaughter, OKLA. STAT. TIT. 21, § 711(1)
US v. Gutierrez-Salinas, No. 06-41346, 257 F. App'x 448 (5th Cir. 2007)

(unpub.)

Not a Crime of Violence

Kidnapping, OKLA. STAT. TIT. 21, § 741
US v. Najera-Mendoza, No. 11-50187, 683 F.3d 627 (5th Cir. 2012)

Contact Attorney: Reggie Trejo and Mike Gorman

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, 353 F. App'x 959 (5th Cir. 2009)
(unpub.)

Not a Crime of Violence (Gov't conceded)

Terroristic Threats, 18 PA. CONS. STAT. § 2706

US v. Ortiz-Gomez, No. 08-40292, 562 F.3d 683 (5th Cir. 2009) (§ 2706(a))

United States v. Martinez-Paramo, 380 F.3d 799 (5th Cir. 2004)
Not 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, TEX. PENAL CODE § 22.02 (1989)
US v. Cortez-Rocha, [No. 13-40049](#), 2014 WL 129387, 2014 U.S. App. LEXIS 823 (5th Cir. Jan. 15, 2014) (unpub.)
Not a Crime of Violence

Aggravated Assault with a Deadly Weapon, TEX. PENAL CODE § 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, TEX. PENAL CODE § 22.02
Not a Crime of Violence

1. *US v. Mendez-Rubi*, No. 10-10453, 2011 WL 3628876 (5th Cir. 2011) (§ 22.02(a)(2)(A) not aggravated felony COV under § 16(a))

2. *US v. Antuna-Moran*, No. 06-40103, 488 F.3d 1048 (5th Cir. 2007)
3. *US v. Fierro-Reyna*, No. 05-51198, 466 F.3d 324 (5th Cir. 2006)

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)
US v. Davila-Solis, No. 06-40826, 217 F. App'x 402 (5th Cir. 2007) (unpub.)

Not a Crime of Violence/ Not an Aggravated Felony

2. TEX. PENAL CODE ANN. § 22.01(b)(2)
US v. Chairez-Barrera, No. EP-12-CR-1279-FM
 Contact: Manuel Acosta & Kristin Kimmelman
Not Crime of Violence or Aggravated Felony (Government agreed conviction was felony but not COV or aggravated felony, +4)

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

Contact Attorney: Santiago D. Hernandez (contact Kristin Kimmelman)
Not a Crime of Violence

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

Contact Attorney: Tyrone T. Mansfield
Not a Crime of Violence

Bond Jumping, TEX. PENAL CODE ANN. § 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

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

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

Burglary of Habitation

1. TEX. PENAL CODE ANN. §30.02(a)(3)

Not Crime of Violence

- a. *US v. Castaneda*, [No. 12-41353](#), 2013 WL 6672994, 2013 U.S. App. LEXIS 25306 (5th Cir. Dec. 19, 2013) (unpub.)
- b. *US v. Morales-Ramirez*, [No. 13-40122](#), 2013 WL 5346711, 2013 U.S. App. LEXIS 19632 (5th Cir. Sept. 25, 2013) (unpub.)
- c. *US v. Herrera-Montes*, No. 06-41426, 490 F.3d 390 (5th Cir. 2007)⁷⁷

1. TEX. PENAL CODE ANN. § 30.02

US v. Cera-Martinez, EP-08-CR-1024-KC

Contact Attorney: Darren Ligon

Not a Crime of Violence

2. TEX. PENAL CODE § 1389 OR 1390 (1963)

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

Contact Attorney: Bill Fry (contact Donna Coltharp)

Appellate Attorney: Carolyn Fuentes (contact Laura Spindler)

Not a Crime of Violence

Burglary of a Vehicle, TEX. PENAL CODE ANN. § 30.04 (post-1994)

Contact Attorney: David Peterson

Not an Aggravated Felony

⁷⁷ Although this case deals with a Tennessee statute, it is identical to Texas statute 30.02(a)(3). See also *US v. Castro*, No. 07-40762, 272 F. App'x 385 (5th Cir. 2008) (unpub.); *US v. Beltran-Ramirez*, No. 07-50218, 266 F. App'x 371 (5th Cir. 2008) (unpub.); *US v. Constante*, No. 07-41004, 544 F.3d 584 (5th Cir. 2008) (not COV under 18 U.S.C. § 924(e)).

Criminal Mischief, TEX. PENAL CODE ANN. § 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 ANN. § 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

Engaging in Criminal Activity Involving Burglary of a Motor Vehicle,
TEX. PENAL CODE ANN. § 71.02(a)(1)

US v. Aviles, No. 11-20097, 2012 WL 2849497 (5th Cir. 2012) (unpub.)

Aggravated Felony

Engaging in Organized Criminal Activity Involving Vehicle Theft,
TEX. PENAL CODE ANN. § 31.03

US v. Blancas-Rosas, No. 10-40679, 2011 WL 409012 (5th Cir. 2011)
(unpub.)

Aggravated Felony

Evading Arrest with a Motor Vehicle, TEX. PENAL CODE ANN. §
38.04(b)(1)

1. *US v. Sanchez-Ledezma*, No. 10-40451, 630 F.3d 447 (5th Cir. 2011)

Aggravated Felony

2. *US v. Salas Villela*, No. SA-13-CR-1003-XR (W.D. Tex.)
Contact Attorneys: Molly Roth & Laura Spindler

**Not Crime of Violence (Government conceded was only
aggravated felony)**

Felony Assault, TEX. PENAL CODE ANN. §§ 22.01(a)(1) & (b)(2)

US v. Cano-Esparza, No. 06-41020, 243 F. App'x15 (5th Cir. 2007)
(unpub.)
Not a Crime of Violence

Injury to a Child

1. TEX. PENAL CODE ANN. § 22.04 Not a Crime of Violence or Aggravated Felony/4 Levels

- a. *US v. Garcia-Cantu*, No. 01-41029, 302 F.3d 308 (5th Cir. 2002)
- b. *US v. Vasquez-Torres*, No. 04-41172, 134 F. App'x 648 (5th Cir. 2005) (unpub.)
- c. *US v. Andino-Ortega*, No. 09-40498, 608 F.3d 305 (5th Cir. 2010) (not COV; did not address whether aggravated felony)

1. Tex. Penal Code Ann. § 22.04(a)(3)
Perez-Munoz v. Keisler, No. 06-60440, 507 F.3d 357 (5th Cir. 2007)
Aggravated Felony

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

Intoxicated Assault with a Vehicle, TEX. PENAL CODE ANN. § 49.07
Contact Attorney: Anne Berton
Not an Aggravated Felony

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 ANN. § 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 ANN. § 46.05
US v. Rivas-Palacios, No. 00-40508, 244 F.3d 396 (5th Cir. 2001)
Aggravated Felony

Retaliation, TEX. PENAL CODE ANN. § 36.06
Not a Crime of Violence

1. *US v. Martinez-Mata*, No. 03-40490, 393 F3d. 625 (5th Cir. 2004)
(§ 36.06(a))
2. *US v. Acuna-Cuadros*, No. 03-20345, 385 F.3d875 (5th Cir. 2004)
(§ 36.06 (1995))

3. *US v. Rodriguez-Lopez*, No. 08-50608, EP-08-CR-550-DB
Contact Attorney: Margarito Rodriguez
Appellate Attorney: Judy Madewell
Not an Aggravated Felony (Gov't conceded)/ Four Level
Enhancement Imposed
(§ 36.06(a)(1)(A))

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

1. *US v. Luciano-Rodriguez*, No. 04-41016, 442 F.3d 320 (5th Cir. 2006)
Not a Crime of Violence
But see US v. Rodriguez-Juarez, [631 F.3d 192](#) (5th Cir. 2011)
("forcible sex offenses" amended in 2008 to include any offenses
where consent not given or legally invalid)
2. *Rodriguez v. Holder*, [No. 10-60763](#), 705 F.3d 207, 212 (5th Cir. 2013)
Not an Aggravated Felony

Theft from a Person, TEX. PENAL CODE ANN. § 31.03⁵⁵

US v. Luna-Montoya, No. 02-41444, 80 F. App'x 334 (5th Cir. 2003)
(unpub.)

Not a Crime of Violence

Theft of Vehicle, TEX. PENAL CODE ANN. § 31.03

US v. Silva, No. 10-20433, 2011 WL 1560661 (5th Cir. 2011)

Aggravated Felony

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

US v. Armendariz-Moreno, No. 07-40225, 571 F.3d 490 (5th Cir. 2009)⁶⁶

Not an Aggravated Felony

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

⁵⁵ Note: Texas theft arguably is not generic theft if the conviction could have been based on deception. *See* Tex. Penal Code § 31.01(4) (providing that consent is not effective if "induced by deception"); *Martinez v. Mukasey*, 519 F.3d 532, 540 (5th Cir. 2008) (holding that fraud is not theft because there is consent even if unlawfully obtained). *But see Nugent v. Ashcroft*, 37 F.3d 162 (3d Cir. 2004) (providing the generic definition of theft as including theft by deception). Contact Natalia Cornelio (SDTX) or Kristin Kimmelman.

⁶⁶ *See also US v. Lopez-Solis*, No. 07-51091, 330 F. App'x 497 (5th Cir. 2009); *US v. Reyes-Figueroa*, No. 08-40108, 282 F. App'x 330 (5th Cir. 2009) (unpub.).

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 ANN. § 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 & 20.01 (1999)
US v. Hernandez-Rodriguez, No. 03-41524, 135 F. App'x 661 (5th Cir. 2005)
Not a Crime of Violence

Utah

Assault of a Peace Officer, UTAH CODE ANN. § 76-5-102.4
US v. Miranda-Garcia, No. 09-11187, 2011 WL 2150326 (5th Cir. 2011)
Crime Against the Person (Offense Qualifies as "Crime Against the Person" for Purposes of 8 U.S.C. § 1326(b)(1)).

Vermont

Virginia

Assault of a Peace Officer, VA. CODE ANN. § 18.2-57 (1999)
US v. Andrade-Carrillo, B-10-CR-1250
Contact Attorney: Michael Young
Not Crime of Violence

Assault to a Police Officer (Class 6 Felony), VA. CODE ANN. § 18.2-57(C)
US v. Rosales-Miranda, No. 10-41120, 434 F. App'x 404 (5th Cir. 2011) (unpub.)
Felony

Forgery of a Public Record, VA. CODE ANN. § 18.2-168
Contact Attorney: Alex Almanzan
Not an Aggravated Felony

Grand Larceny, VA. CODE ANN. § 18.2-95
US v. Argumedo-Perez, No. 08-10132, 326 F. App'x 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 F.3d 204 (5th Cir. 2005)
Not a Crime of Violence

Washington

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 F. App'x 644 (5th Cir. 2005)
Not Four Level Crime of Violence Based on 3 or More Misdemeanor Crimes of Violence

Drive-By Shooting, WASH. REV. CODE § 9A.36.045(1)
Contact Attorneys: David Fannin & Carolyn Fuentes (contact Laura Spindler)
Not a Crime of Violence

Residential Burglary, WASH. REV. CODE § 9A.52.025
Contact Attorney: Marina Douenat
Not a Crime of Violence (Four Level Enhancement imposed) (*but see US v. Guerrero-Navarro*, [No. 12-40802](#), 2013 WL 6596786, 2013 U.S. App. LEXIS 24906 (5th Cir. Dec. 16, 2013))

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

Third Degree Theft, WASH. REV. CODE §§ 9A.56.020(1) AND 9A.56.050
US v. Juarez-Gonzalez, No. 10-40972, 2011 WL 5554799 (5th Cir. 2011) (unpub.)
Not an Aggravated Felony

West Virginia

Wisconsin

Substantial Battery, WISC. STAT. § 940.19(2)
US v. Calzada-Ortega, [No. 12-40838](#), 2014 WL 97286, 2014 U.S. App. LEXIS 541 (5th Cir. Jan. 10, 2014) (unpub.)
Not a Crime of Violence

Wyoming

Possession of a Forged Instrument, Wyo. Stat. Ann. § 6-3-603(a)(i)

US v. Martinez-Valdez, No.10-50154, 2011 WL 1057578 (5th Cir. 2011)
(unpub.)
Aggravated Felony

U.S.S.C.

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 of Alien Previously Convicted of an Aggravated Felony, 8 U.S.C. § 1326(b)(2)

1. *US v. Gamboa-Garcia*, No. 09-50513, 620 F.3d 546 (5th Cir. 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.)

2. Contact Attorneys: Marie Romero & Kristin Kimmelman (W.D. Tex. 2014)

Not an Aggravated Felony because never deported as an aggravated felon and prior conviction of simple possession no longer an aggravated felony (probation conceded)

Riot, 18 U.S.C. § 1792 (2000)

Contact Attorneys: Anne Berton and Michael Gorman

Not a Crime of Violence

Willfully Making and Subscribing a False Tax Return and Aiding and Assisting in the Preparation of a False Tax Return, 26 U.S.C. §§

7206(1) and (2)

Kawashima v. Holder, No. 10-577, 132 S. Ct. 1166 (2012)

Aggravated Felony (When the Government’s revenue loss exceeds \$10,000.)

A FEW SELECTED DRUG CASES:

U.S.S.C.

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

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)

Sentence of Imprisonment Upon Revocation of State Probation in Drug Trafficking Case

US v. Bustillos-Pena, No. 09-20360, 612 F.3d 863 (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.

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

State Marijuana Possession with Intent to Distribute

Moncrieffe v. Holder, [No. 11-702](#), ___ U.S. ___, 185 L. Ed. 2d 727, 2013 WL 1729220, 2013 U.S. LEXIS 3313 (Apr. 23, 2013) (GA. CODE ANN. § 15-13-30(j)(1) (2007))

Not an Aggravated Felony (if small amount or no remuneration)

Using a Telephone to Facilitate the Commission of a Narcotics Offense, 21 U.S.C. § 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

California

Manufacturing a Controlled Substance, CAL. HEALTH & SAFETY CODE § 11379.6

US v. Reyes-Mendoza, No. 10-11119, 665 F.3d 165 (5th Cir. 2011)

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

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)

Possession of a Controlled Substance for Sale, CAL. HEALTH & SAFETY CODE § 11351

US v. Leal-Vega, No. 11-50065, 680 F.3d 1160 (9th Cir. 2012)

Not Categorically a Drug Trafficking Offense (Defining “controlled substance” as substances listed in schedules under Federal CSA)

Possession of Marijuana for Transportation, CAL. HEALTH & SAFETY CODE § 11379(a)

US v. Nunez-Segura, [No. 13-40529](#), 2014 WL 1779052, 2014 U.S. App. LEXIS 8519 (5th Cir. May 6, 2014) (unpub.)

Not a Drug Trafficking Offense

Possession for Sale of a Controlled Substance, CAL. HEALTH & SAFETY CODE § 11378

US v. Lopez-Cano, [No. 11-4142](#), 2103 WL 1151914, 2013 U.S. App. LEXIS 4893 (Mar. 11, 2013) (unpublished)

Not Drug Trafficking Offense or Aggravated Felony

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))

Selling a Substance in Lieu of a Controlled Substance, CAL. HEALTH & SAFETY CODE § 11355

Contact Attorneys: Anne Berton and Mike Gorman

Not a Drug Trafficking Offense and Not an Aggravated Felony under 2L1.2

Selling or Transporting Marijuana, CAL. HEALTH & SAFETY CODE § 11360(a) (1989)

US v. Santillan-Hernandez, No. 10-10742, 432 F. App'x 288 (5th Cir. 2011) (unpub.)

Not a an Aggravated Felony

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

Distribution of a Controlled Substance, COLO. REV. STAT. § 18-18-405(1)

Contact: David Kimmelman and Kristin Kimmelman

Not Categorically Drug Trafficking Offense or Aggravated Felony
(Court imposed +4 felony enhancement instead of the recommended +16)

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))

Florida

Delivery of Controlled Substance, FLA. STAT. § 893.13(1)(a)(1)

Sarmientos v. Holder, [742 F.3d 624](#) (5th Cir. 2014)²

Not an Aggravated Felony

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

² *But see US v. Juarez-Velazquez*, [No. 13-41007](#), 2014 WL 3827900, 2014 U.S. App. LEXIS 15060 (5th Cir. Aug. 5, 2014) (unpub.) (finding was drug trafficking offense on plain error review).

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, 381 Fed.Appx. 413 (5th Cir. 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

Possession of Marijuana With Intent To Sell, N.C. GEN. STAT. § 90-95

US v. Simmons, No. 08-4475, 649 F.3d 237 (4th Cir. 2011)

Not a Predicate Felony Conviction under the CSA based on Hypothetical Criminal History Enhancement

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

US v. Garcia-Arellano, No. 06-11276, 522 F.3d 477 (5th Cir. 2008)

2. **Not a Drug Trafficking Offense under § 2L1.2(b)(1)(A)& (B)⁷⁷**

US v. Gonzalez, No. 05-41221, 484 F.3d 712 (5th Cir. 2007)

⁷⁷ For 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.

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

US v. Morales-Martinez, No. 06-40467, 496 F.3d 356 (5th Cir. 2007)

4. Not an Aggravated Felony

US v. Ibarra-Luna, No. 09-40768, 628 F.3d 712 (5th Cir. 2010)

US v. Fuentes, No. 06-20325, 245 F. App'x 358 (5th Cir. 2007) (unpub.)

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)

Possession with Intent to Deliver, TEX. HEALTH & SAFETY CODE § 481.112(a)

US v. Flores-Alcorta, ___ F. Supp. 2d ___, 2014 WL 468842, 2014 U.S. Dist. LEXIS 14487 (S.D. Tex. Feb. 5, 2014)

Not a Drug Trafficking Offense

Possession of a Controlled Substance, TEX. HEALTH & SAFETY CODE ANN. § 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 ANN. § 481.12(b)(5)

Arce Vences v. Mukasey, No. 06-6003, 512 F.3d 167 (5th Cir. 2007)

Not an Aggravated Felony

Second State Conviction for Possession, TEX. HEALTH & SAFETY CODE
ANN. § 481.115

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

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)

Virginia

Possession with Intent to Manufacture/Sell Methamphetamine, VA.
CODE ANN. § 18.2-248(A)

US v. Flores Jimenez, No. 11-50566, 2012 WL 2579901 (5th Cir. 2012)
(unpub.)

Drug Trafficking Offense Under § 2L1.2 (b)(1)(A)(i) (Plain Error Review-Appears to suggest that “Giving” is not drug trafficking)

GENERAL

Prior “Adult” Offense Committed While Under 18 Unscorable if Older Than 5 Years, U.S.S.G. § 4A1.2(d)(2)(B)

US v. Trejo-Martinez, No. 11-11123, 2012 WL 3062154 (5th Cir. 2012) (unpub.)
No Criminal History Points assessed for prior offense committed while under 18 and adult sentence imposed more than 5 years prior to commencement of instant offense. Thus, a 12 level enhancement imposed instead of 16 for prior crime of violence.