

Ammunition for Firearms Defenses

Federal Criminal Practice Seminar

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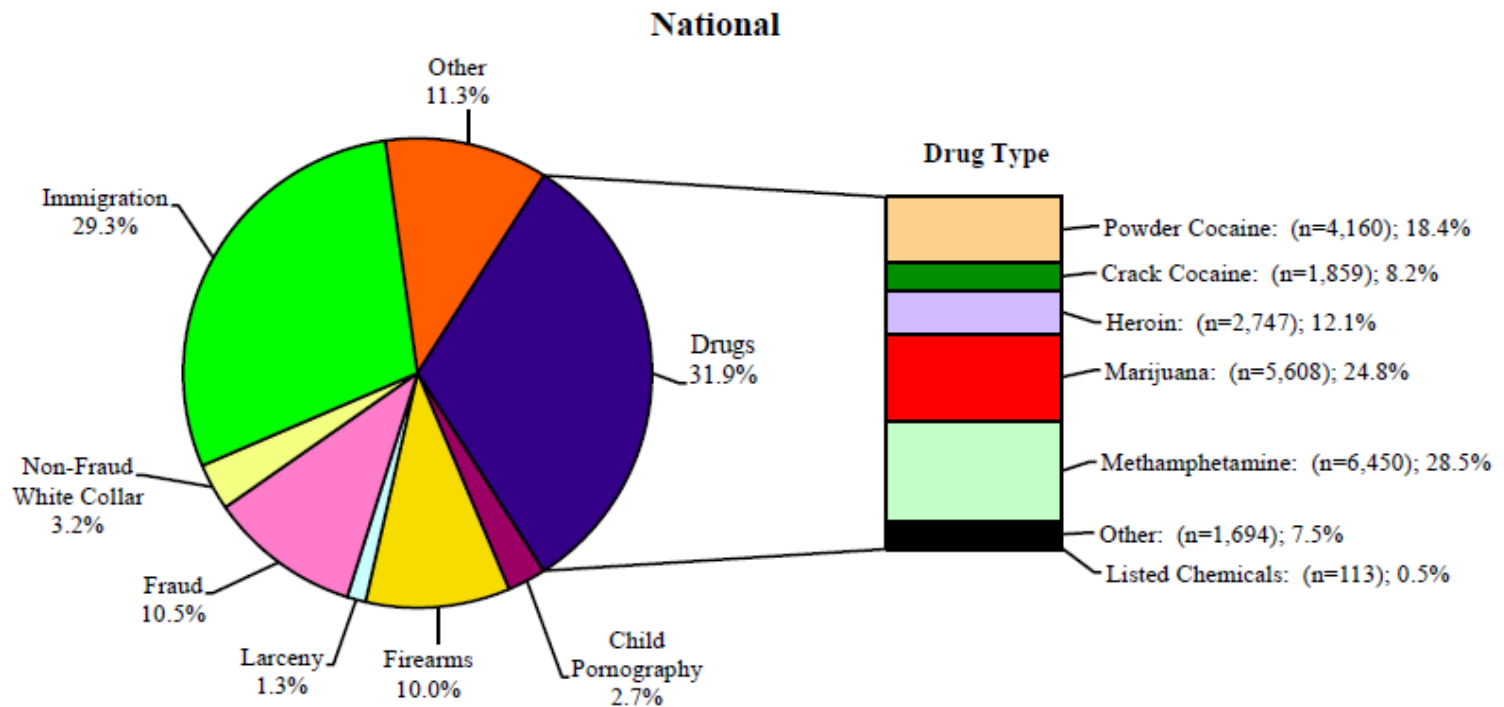
6 Areas of Focus

1. § 922(g) and § 924(c)
2. Knowledge
3. Possession
4. Trial
5. Sentencing
6. Trends

Firearms Prosecutions

- Substantial number of federal prosecutions are for firearms.
- Firearms crimes were **10.0** percent of the total federal criminal convictions for FY 2015.

Guns accounted for 10.0% of federal convictions in FY 2015



**Top Five Districts
18 U.S.C. § 924(c) Offenders
FY 2015**

District of Puerto Rico
(N=269)

Southern District of New York
(N=153)

Southern District of Florida
(N=80)



Eastern District of North Carolina
(N=78)

Eastern District of Pennsylvania
(N=74)

I. Two Firearms Offenses That Are Most Common

1. Possession of firearm by a convicted felon (18 USC § 922(g)(1)); and
2. Firearm possessed during and in relation to crime of violence or drug trafficking offense (18 USC § 924(c)(1)(A))

FIRST TYPE OF GUN CASE: 18 USC § 922(g)(1)

18 U.S.C. § 922(g)(1) makes it a Federal crime or offense for an individual who has been convicted of a felony offense to possess a firearm in or affecting interstate commerce.

Other “Prohibited Persons”

Prohibited persons also include:

- “Illegal” aliens
- Fugitives from justice
- Unlawful users of controlled substances; addicts
- Adjudicated “mental defectives”
- Dishonorably discharged service personnel
- U.S. citizens who have renounced citizenship
- Misdemeanor domestic violence matters

Elements of Offense

A defendant can be found guilty of a § 922(g) offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a firearm;

Second: That the Defendant knowingly possessed a firearm in or affecting interstate or foreign commerce, as charged; and

Third: That before the Defendant possessed the firearm **the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.**

But see 18 U.S.C. § 921(a)(20)(B): if state classifies offense as a misdemeanor and doesn't exceed 2 year stat max, not a felony.

II. KNOWLEDGE ELEMENT

- Defendant consciously possessed what he knew to be a firearm.
- Government must only prove that defendant was aware that he possessed a firearm.
- Government need not prove that defendant knew possession of firearm was unlawful.

U.S. v. Games-Perez, 667 F.3d 1136, 1140-41 (10th Cir. 2012); *U.S. v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *U.S. v. McCray*, 345 F. App'x 498 (11th Cir. 2009); *U.S. v. Wilson*, 437 F.3d 616, 620 (7th Cir. 2006); *U.S. v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *U.S. v. Frazier-El*, 204 F.3d 553, 561 (4th Cir. 2000).

III. Actual vs. Constructive Possession

- Two types of possession: actual and constructive
- Constructive possession: power and intent to exercise dominion and control over object. Mere proximity not enough.

DEFENSES TO POSSESSION

- Insufficient evidence to establish that defendant constructively possessed firearm:

U.S. v. Cunningham, 517 F.3d 175 (3d Cir. 2008) (holding that defendant – who simply walked down street with co-defendant who was carrying gun in a backpack – did not constructively possess gun in backpack)

See also U.S. v. Anderson, 632 F.3d 1264, 1268-69 (D.C. Cir. 2011) (defendant “trying to kick the gun up under the seat” does not amount to admission of constructive possession)

U.S. v. Hooks, 551 F.3d 1205, 1213-14 (10th Cir. 2009) (no constructive possession where defendant was one of several passengers, no fingerprints, no showing of knowledge or control)

Rule 404(b) Is A Rule Of Exclusion, Not Inclusion

- Rule 404(b) carries no presumption of admissibility.
- Prior act evidence is inadmissible unless the evidence is (1) offered for a proper non-propensity purpose; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403; (4) accompanied by a limiting instruction.

- *U.S. v. Caldwell*, 760 F.3d 267 (3d Cir. 2014)
(holding evidence of defendant's prior convictions for unlawful firearm possession was not admissible to show knowledge).
- Caldwell was charged with violating 922(g)(1). The government's theory was "purely one of actual possession[.]"

Knowledge Not At Issue

- A defendant's "knowledge" is almost never a material issue when the government relies exclusively on a theory of actual possession."

- The government failed to adequately articulate the non-propensity chain of inferences it hoped the jury would make from the introduction of Caldwell's prior convictions.
- How did Caldwell's two prior convictions for unlawful firearm possession from 2005 and 2006 suggest he knowingly possessed a gun seven years later?

Two Prior Gun Convictions Irrelevant

- Not enough to merely recite a Rule 404(b) purpose; must articulate how the evidence is probative of that purpose.
- How did Caldwell's prior unlawful firearm possession convictions suggest he knowingly possessed this gun on this occasion?

- *U.S. v. Bailey*, No. 15-2128 , slip op. at 21(3d Cir. Oct. 18, 2016)
 - drug trafficking and gun case challenging admission of drug-trafficking-related murder.
 - District court admitted video of murder and non-video evidence (testimony and recorded conversations).
 - Held: Court did not err in admitting non-video evidence of murder. However, court was “extremely troubled” the court allowed surveillance video of shooting/murder into evidence.

- *U.S. v. McBride*, 676 F.3d 385 (4th Cir. 2012) (admission of prior bad acts evidence was error)

Reverse 404(b) evidence inadmissible to show another person's propensity to possess firearms:

- *U.S. v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006) (affirming exclusion of reverse 404(b) evidence where only purpose was to show propensity to carry firearms where defendant presented no evidence that individual's prior conviction involved the same gun, the same type of gun or that he had continued access to the type of gun).
- For more support of the use of Reverse 404(b) evidence see: *U.S. v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991)(defendant may introduce reverse 404(b) evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations);

REVERSE 404(b) cont'd:

- *U.S. v. Seals*, 419 F.3d 600, 606-07 (7th Cir. 2005) (explaining that a reverse 404(b) analysis should be held to a less rigorous standard because prejudice to the defendant is not a factor);
- *U.S. v. Lucas*, 357 F.3d 599, 605-06 (6th Cir. 2004) (applying the same rule as *Stevens*);

Is 922(g) CONSTITUTIONAL?

District of Columbia v. Heller, 128 S. Ct. 2783 (2008)
(holding D.C. ban on handgun possession in home
violates the 2nd Amendment)

However, every circuit post-*Heller* has held 922(g)
constitutional.

- *See U.S. v. Torres-Rosario*, 658 F.3d 110, 113, 113 n.1 (1st Cir. 2011); *U.S. v. Bogle*, 717 F.3d 281, 282 (2d Cir 2013); *U.S. v. Barton*, 633 F.3d 168, 170-175 (3d Cir. 2011); ***U.S. v. Moore***, 666 F.3d 313, 316-17 (4th Cir. 2012); *U.S. v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *U.S. v. Khani*, 362 Fed. App'x 501, 507-8 (6th Cir. 2010); *U.S. v. Williams*, 616 F.3d 685, 691-94 (7th Cir. 2010); *U.S. v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *U.S. v. Vangxay*, 594 F.3d 1111, 1114-5 (9th Cir. 2010); *U.S. v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) and *U.S. v. Rozier*, 598 F.3d 768, 770-1 (11th Cir. 2010).

Heller Extends to the States

- *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010)
- Second Amendment right to bear arms is fully applicable to the States by virtue of the 14th Amendment.
- *McDonald* leaves in tact ban on ownership of firearms by felons.

Second Amendment & Machine Guns

- *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016) (upholding federal law barring possession of machine guns holding machine guns are not protected by the Second Amendment).
 - Machine guns not protected by Second Amendment.

As-Applied Challenge to § 922(g)(1)

- *Binderup v. Holder*, No. 13-cv-06750, 2014 WL 4764424, slip. op. (E.D. Pa. Sept. 25, 2014).
- Despite prior conviction, defendant demonstrated that he poses no greater risk of future violent conduct than average law-abiding citizen.
- Thus, application of § 922(g)(1) as applied to him violates the Second Amendment

- Binderup rebutted the presumption raised in *Heller* that there is no problem with barring felons from possessing guns.
- To raise successful as-applied challenge, challenger must distinguish his circumstances from those historically barred from Second Amendment protections.
- Case offers thin ray of hope for the extreme case.

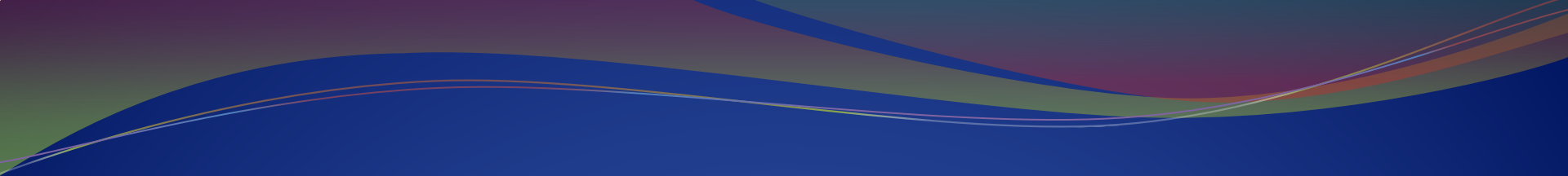
Binderup v. Att'y Gen.

- Third Circuit *en banc* court affirmed two as-applied Second Amendment challenges to claimants who were prohibited persons based on non-violent state misdemeanor convictions that were punishable by more than one year in prison.
- The claimants were convicted of corrupting the morals of a minor (for dating a 17 year-old), and misdemeanor unlicensed gun possession, crimes that are punishable by more than one year in prison, but are not serious enough to justify stripping away a person's Second Amendment rights.

- Both defendants had gone crime free for substantial amounts of time.
- The government could not show that the felon-in-possession statute survives intermediate scrutiny as-applied to these challengers, because their isolated, decades-old non-violent misdemeanor convictions do not permit an inference that disarming people like them would promote responsible firearm use

- Fractured *en banc* decision.
- Law of Circuit:
 - (1) the two-step US v. Marzzarella framework controls all Second Amendment challenges, including as-applied challenges to § 922(g)(1);
 - (2) a challenger will satisfy the first step of that framework only if he proves that the law or regulation at issue burdens conduct protected by the Second Amendment;

- (3) to satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime;
- (4) evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis;
- (5) as the narrowest ground supporting the Court's judgments for *Binderup* and *Suarez*, the considerations discussed above will determine whether crimes are serious (*i.e.*, disqualifying) at step one; and

- 
- (6) if a challenger makes the necessary step-one showing, the burden shifts to the Government at step two to prove that the regulation at issue survives intermediate scrutiny.

§ 2 Aiding & Abetting

- 922(g)(1) violation
- Principal is a felon and possessed firearm.
- Must co-defendant know of principal's convicted felon status?

YES

U.S. v. Ford, 821 F.3d 63 (1st Cir. 2016) (holding gov't must prove beyond a reasonable doubt that putative aider and abettor knew that principal had previously been convicted of a crime punishable by more than one year in prison).

U.S. v. Ecklin, 837 F. Supp.2d 589, 593 (E.D. Va. 2011) (same)

U.S. v. Gardner, 488 F.3d 700, 714-16 (6th Cir. 2007)
(holding gov't must show defendant “knew or had cause to know that the principal was a convicted felon”)

U.S. v. Xavier, 2 F.3d 1281, 1286-87 (3d Cir. 1993) (holding “there can be no criminal liability for aiding and abetting a violation of § 922(g)(1) without knowledge or having cause to believe the possessor’s status as a felon”)

NO

U.S. v. Canon, 993 F.2d 1439, 1442 (9th Cir. 1993) (gov't does not have to prove that defendant knew principal was a felon); *but see U.S. v. Graves*, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998) (acknowledging “serious reservations about the soundness” of the holding in *Canon*)

U.S. v. Moore, 936 F.2d 1508, 1527-28 (7th Cir. 1991) (defendant's awareness of principal's use of gun was sufficient for conviction under aiding & abetting theory)

SECOND TYPE OF GUN CASE:

18 USC § 924(c)(1)(A)

§ 924(c)(1)(A) – Firearm possessed during and in relation to crime of violence or drug trafficking offense:

if possessed - mandatory consecutive 5 years

if brandished - mandatory consecutive 7 years

if discharged - mandatory consecutive 10 years

§ 924(c) Offense Characteristics (cont'd)

924(c)(1)(B) –

if machine gun – mandatory consecutive 30 years

U.S. v. O'Brien, 130 S. Ct. 2169 (2010) (§ 924(c)
machine gun provision requiring 30-year mandatory
minimum is an element of the crime to be proved to a
jury beyond a reasonable doubt, not a sentencing factor
to be proved to a judge at sentencing)

- *U.S. v. Burwell*, 690 F.3d 500, 515 (D.C. Cir. 2012) (rejecting notion that *O'Brien* contained implicit requirement that the government prove defendant knew firearm was a machine gun)
- *See also U.S. v. Haile*, 685 F.3d 1211, 1218 (11th Cir. 2012) (explaining that *O'Brien* does not require proof defendant knew firearm was machine gun)

Jury instructions requiring knowledge:

U.S. v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003) (instruction requiring knowing possession firearm was machine gun not plain error)

U.S. v. Dixon, 273 F.3d 636, 640-41 (5th Cir. 2001) (knowingly used short-barreled shotgun);

§ 924(c) Possession

U.S. v. Walker, 657 F.3d 160 (3d Cir. 2011)(where brothers jointly sold cocaine, brother's knowledge of other brother's firearm was sufficient for jury to reasonably infer that he constructively possessed weapon in furtherance of drug trafficking);

U.S. v. Perez, 661 F.3d 568, 578 (11th Cir. 2011)(mere awareness of the presence of guns is insufficient for constructive possession. Need intention or ability to exercise dominion or control over weapons).

§ 924(c) Accomplice Liability

In *Rosemond*, the Supreme Court clarified what the government must prove to convict a defendant of §924(c) under an aiding-and-abetting theory (*i.e.*, when the gun is used/carried/possessed/brandished by someone else).

Rosemond v. U.S., 134 S. Ct. 1240 (2014)

Holding of *Rosemond*

The government must prove:

- (1) Advance knowledge of gun and
- (2) Facilitation of underlying offense (not facilitation of gun)

Advance Knowledge

- This means knowledge “beforehand,” such that the defendant has a “realistic opportunity to quit the crime.”
- A key factor in determining “realistic opportunity” is whether withdrawal during commission of offense would risk *danger to bystanders, to other criminal participants, or to the defendant himself*.

Rejection of Continued- Participation Standard

- Knowledge first gained during the commission of the offense typically will not be enough, even when the defendant continues to participate.
- In unusual circumstances, such knowledge could be sufficient – perhaps in a particularly protracted offense where the defendant actually had a realistic opportunity to withdraw.

Knowledge -- Government's Burden

- It is the government's burden beyond a reasonable doubt.
- It is not the defendant's burden to prove lack of advance knowledge

Facilitation of Underlying Offense

- No facilitation required as to the gun itself, so long as the defendant facilitates the underlying offense.

CRITICAL TO UNDERSTAND THAT WITH MULTIPLE 924(C) COUNTS, STACKING IS APPLIED TO EACH COUNT

Example: Multiple Hobbs Act Robbery counts with multiple 924(c) counts, if first 924(c) count is brandished the consecutive application would mandate 84 months plus 25 consecutive years for each additional count in addition to the underlying guidelines.

See U.S. v. Deal, 508 U.S. 129 (1993)

Using or Carrying a Firearm During and In Relation To Any Crime of Violence or Drug Trafficking Crime (18 U.S.C. § 924(c)(1)(A))

924(c) penalty:

MUST BE IMPOSED CONSECUTIVELY TO OTHER COUNTS -

See 924(c)(1)(D)(ii)

Alleyne v. U.S., 133 S. Ct. 2151 (2013), overruling *Harris v. U.S.*, 122 S. Ct. 2406 (2002) (holding any fact increasing statutory mandatory minimum sentence is element of offense, not a sentencing factor, that must be submitted to jury and found BRD)

- Holding applies to drug types and quantities, and any other fact triggering a mandatory minimum sentence
- A majority of five justices view the continuing vitality of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) as an open question, making these objections important to preserve for appeals

- This case has no impact on guidelines fact-finding, so long as the guidelines remain advisory
- *Alleyne* not retroactive to cases on collateral review:
U.S. v. Olvera, 775 F.3d 726 (5th Cir. 2015); *U.S. v. Reyes*, 755 F.3d 210 (3d Cir. 2014); *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283 (11th Cir. 2014).

STAGES OF THE PROCEEDINGS

GUN PROSECUTIONS

WHOM DO THE FEDS TYPICALLY TARGET?

- Typically state-adopted offenses involving a gun.
- Government screens cases from local D.A.'s offices and usually waits until after the preliminary hearing to adopt.

TRENDS FOR FEDERAL PROSECUTION

- STATS

1. Bad Case

- Possibility of utilizing the *Petite* doctrine (however, this is not legally binding upon AUSAs)
- Nasty state aggravated assault, re shooting, etc. with gun involved
- Client could have minimal record

Dual/Successive Prosecution

- Dual Sovereignty - Gun adopted regardless of state disposition:
- *Bartkus v. IL*, 359 U.S. 121 (1959)
- *Koon v. U.S.*, 518 U.S. 81, 112 (1996) (“successive state and federal prosecutions do not violate the Double Jeopardy clause”)

- *U.S. v. Mardis*, 600 F.3d 693, 696-699 (6th Cir. 2010) (holding no Double Jeopardy violation where successive case was not a “sham prosecution”)
- *U.S. v. Wilson*, 413 F.3d 382, 390 (3d Cir. 2005) (prosecution of the same crime in both federal and state court does not violate double jeopardy);
- *U.S. v. 817 N.E. 29th Dr. Wilton Manors, FL*, 175 F.3d 1304, 1311 (11th Cir. 1999) (holding 5th Amendment does not bar two prosecutions for same conduct by separate sovereigns).

Successive Prosecution – Ripe for Review?

Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016)
(holding separate sovereigns exception to double jeopardy does not permit the Commonwealth of Puerto Rico to prosecute and convict a person for an offense for which he was convicted in the U.S. District Court).

- Justice Ginsburg, joined by Justice Thomas, wrote a concurring opinion which urges defense practitioners to challenge the “separate sovereigns” exception to double jeopardy when the separate sovereign is a state or Indian tribe.
- According to Justice Ginsburg, the doctrine fails to serve the purpose of double jeopardy and is “an affront to human dignity.” The argument may be strongest in a case where the defendant is acquitted in state court, and then prosecuted in federal court.

Deference to State Prosecutions

1. On March 28, 2015, Danial Shank was arrested by Philadelphia Police Officers and charged in state court with multiple gun-related crimes.
2. On May 19, 2015, a federal grand jury returned this indictment charging the defendant, Danial Shank, with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), based on the March 28, 2015 Philadelphia Police arrest.
3. The Philadelphia District Attorney's Office has elected to proceed with its firearm case against the defendant in state court. The government believes that it is in the interest of justice to defer to this state prosecution.

2. Gang affiliation

- Weak cases /intimidation
- Seeking intelligence – just taking a shot to keep off the street temporarily

ACCA

3. Historically , Armed Career Criminals (ACCA) (18 U.S.C. § 924(e))

- At least 3 prior convictions for a “violent felony” or “serious drug offense” equals 15 year mando.

ACCA -- 18 U.S.C. § 924(e)(2)(B):

- (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - (ii) is burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .**

- ACCA guidelines upon conviction can be as high as 262 through 327 months or 21 to 27 years after trial
- Likely now, in post-*Booker* world, to get variance after trial closer to mando of 15 years
- Trial – If can't get substantial assistance under 18 U.S.C. § 3553(e) below mandatory, cases should probably be tried.

DISCUSSIONS WITH CLIENT BEFORE ARRIVAL IN FEDERAL COURT

- No opportunity to try case in state court, *i.e.*, unable to obtain benefit of more favorable jury pool or Fourth Amendment Law



DISCUSSIONS WITH CLIENT BEFORE ARRIVAL IN FEDERAL COURT (cont'd)

- Compare federal mandates/guidelines with state offer (sometimes unpredictability of state parole process might make federal guidelines in non-mandatory cases more advantageous for client)
- Often requires numerous visits for client to fully comprehend the harsh realities of federal system

Battle Starts At First Initial Proceeding



Court Security

Assistant PD punched by judge resigns in protest after jurist returns to bench

Posted Jul 8, 2014 4:20 PM CDT
By [Martha Neil](#)

An assistant public defender who said he was [punched by a Florida judge](#) in a Brevard County courtroom hallway has resigned in protest following the jurist's [return to the bench](#) less than a month after the incident.

Andrew Weinstock said in a Monday letter that he was resigning, effective immediately, because his boss did not oppose Judge John Murphy's resumption of judicial duties, [Florida Today](#) reports.

"I wish he hadn't resigned, but apparently Mr. Weinstock feels strongly that I should oppose Judge Murphy's return to the bench," said Blaise Trettis, who serves as 18th Judicial Circuit Court public defender, to the Wall Street Journal [Law Blog](#) (sub. req.).

Murphy, who issued a public apology and reportedly agreed to get anger management counseling and unspecified treatment during his paid leave, is now assigned to hear civil cases.

Trettis told Florida Today that he felt it would be hypocritical to argue against giving the judge a second chance. "Defense attorneys routinely plead that their clients should be given a second chance when their bad behavior is uncharacteristic of who they are and is an isolated instance in their life," he explained.

Trettis also pointed out that the Florida Judicial Qualifications Commission is investigating Murphy's conduct and said he expects the state supreme court to discipline the judge after the investigation is complete, the Law Blog reports. The newspaper couldn't reach Weinstock on Tuesday for comment.

The [Associated Press](#), [WFTV](#) and [WESH](#) also have stories.

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Bail/Detention

- Can you get your client released?
- *See* 18 U.S.C. § 3142, *et seq.*
- Judicial officer has to determine whether conditions will reasonably assure the appearance of the defendant as required and the safety of any other person and the community.

- The government has to establish by a preponderance of the evidence that no condition, or set of conditions, will **reasonably assure** the defendant's presence at trial. Alternatively, the government has to establish by clear and convincing evidence that the defendant constitutes a danger to others and to the community. *See generally United States v. Quartermaine*, 913 F.2d 910, 916-18 (11th Cir. 1990).

- *U.S. v. Fortuna*, 769 F.2d 243, 250 (5th Cir. 1985) (noting that standard is “reasonably assure appearance, not ‘guarantee’ appearance” and holding that court should apply preponderance standard).
- *U.S. v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986)(provides the best analysis for a detention determination. Despite multiple convictions and parole violations, still found defendant could be released).

Factors Considered at Detention Hearing

- Nature and circumstances of the offense (crime of violence, firearms, terrorism, etc.);
- Weight of the evidence;
- History and characteristics of the person;
- Nature and seriousness of the danger to any person or the community that would be posed by the person's release.

§ 922(g)(1) is not a Crime of Violence Under BRA

“[T]he crime of felon in possession is not a crime of violence within the meaning of § 3156(a)(4).” *U.S. v. Bowers*, 432 F.3d 518, 520 (3d Cir. 2005)

“Felon in possession does not involve substantial risk of violence, 18 U.S.C. § 3156(a)(4)(B), and there is not a direct relationship between the offense and a risk of violence[.]” *Id.* at 432 F.3d at 522.

See also U.S. v. Hardon, No. 98-1625, 1998 WL 320945 (6th Cir. June 4, 1998); *U.S. v. Lane*, 252 F.3d 905, 907-08 (7th Cir. 2001); *U.S. v. Twine*, 344 F.3d 987, 987-88 (9th Cir. 2003); *U.S. v. Ingle*, 454 F.3d 1082 (10th Cir. 2006); *U.S. v. Johnson*, 399 F.3d 1297, 1302 (11th Cir. 2005); *U.S. v. Singleton*, 182 F.3d 7, 16 (D.C. Cir. 1999); *U.S. v. Gray*, 529 F.Supp. 2d 177, 180 (D. Mass 2007); *U.S. v. Tadlock*, 399 F.Supp. 2d 747, 752 (S.D. Miss. 2005).

But see U.S. v. Dillard, 214 F.3d 88, 93 (2d Cir. 2000) (holding that being felon in possession of firearm is a “crime of violence” under Bail Reform Act); *U.S. v. Allen*, 409 F.Supp. 2d 622, 631 (D. Md. 2006); *U.S. v. Shirley*, 189 F.Supp. 2d 966, 968 (W.D. Mo. 2002); *U.S. v. Lee*, 156 F. Supp.2d 620, 624 (E.D. La. 2001).

Trial vs. Guilty Plea

- If, after a review of the case, your client decides to plead guilty rather than go to trial, the guilty plea can be done either of these two ways: a negotiated plea agreement or an “open” guilty plea.
- If the client will receive no benefit from signing a plea agreement then s/he should plead guilty without an agreement.

Appellate Waivers Are Valid

U.S. v. Thornsbury, 670 F.3d 532, 537 (4th Cir. 2012)
(appellate waiver valid if defendant's agreement to it was
“knowing and intelligent”)

U.S. v. Quintero, 618 F.3d 746, 751 (7th Cir. 2010)
(appellate waiver valid if made “knowingly and
voluntarily” and language of waiver is “express and
unambiguous”)

U.S. v. Peralte, 464 Fed. App'x 55, 57 (3d Cir. 2012) (appellate waivers are valid “if entered into knowingly and voluntarily, unless they work a miscarriage of justice”) (citing *U.S. v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001)).

U.S. v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008) (appellate waiver is valid if it was made knowingly and voluntarily, and defendant “otherwise understood the full significance of the waiver”).

- *U.S. v. Banks*, 743 F.3d 56, 58-59 (3d Cir. 2014) (appeal waiver did not except challenge to consecutive sentencing, thus, defendant was not permitted to appeal on that basis)
- *U.S. v. Wilson*, 707 F.3d 412, 416 (3d Cir. 2013) (general appellate waiver encompassed original sentence only, not subsequent modification of terms of supervised release at government's request)

But Are Waivers Ethical?

- DOJ announces that “[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel[.]”
- Under new policy, however, prosecutors are “free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law.”

Mem. for all Federal Prosecutors from J. Cole of 10/14/14.

COOPERATION

- Only way to get below mandatory minimum sentence is if the Government files a substantial assistance motion. 18 USC 3553(e).
- Only real way to evaluate cooperation variables is to have a total appreciation of your forum.

Refusal to File § 5K1.1

“[F]ederal district courts have authority to review a prosecutor’s refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive,” such as defendant’s race or religion.”

Wade v. United States, 504 U.S. 181, 185-86 (1992) (no plea agreement).

Substantial Assistance & Plea Agreements

See also U.S. v. Floyd, 428 F.3d 513, 515-16 (3d Cir. 2005)
(using contract law to determine whether the agreement
has been satisfied);

U.S. v. Isaac, 141 F.3d 477, 481, 484 (3d Cir. 1998)
(even where prosecutor retains “sole discretion” in plea
agreement, court is required to evaluate whether
prosecutor has made decision in good faith).

PRETRIAL MOTIONS

- Suppression- 4th Amendment
 - Frequently turns on police credibility involving circumstances leading to reasonable suspicion and/or probable cause.
 - Consider conditional plea under Rule 11(a)(2). Goal is to obtain “Acceptance of Responsibility” while motion issue is preserved. If defendant is successful on appeal, withdraw plea.

Credibility

- *U.S. v. Roberts*, No. 11-cr-0018, 2012 WL 1033515, *7 (E.D. Pa. Mar. 28, 2012) (granting motion due to lack of credibility of the testifying officer.)
- Officer's fabrication of facts to justify illegal search, warranted finding all subsequent evidence (even that which under most circumstances would be considered legally obtained) to be fruit of the poisonous tree.

- *See also United States v. Broomfield*, 417 F.3d 654, (7th Cir. 2005).
- Stop upheld, but good language by J. Posner

- Gilding the lily, the officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and getting out and accosting him he noticed that Broomfield was "staring straight ahead."

- Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, "furtive." Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.

- *U.S. v. Gaines*, No. RDB—10—0398, 2010 WL 5101106, at *6 (D. Md.) (suppressing firearm and commenting that “it simply strains credulity to believe that Officer . . . could see this crack [in windshield] from the rear seat of the police vehicle . . . across an intersection”)

Fruits Loophole?

- *Utah v. Streiff*, 136 S. Ct. 2056 (2016)
 - In this case, a police officer unlawfully stopped and detained Streiff and learned during the detention that he had a valid warrant out for his arrest for a traffic violation.
 - The officer arrested him pursuant to the warrant and conducted a search incident to arrest, finding methamphetamine and paraphernalia.

- *Held*: Under the three “attenuation” factors announced in *Brown v. Illinois*, 422 U.S. 590 (1975): (1) the temporal proximity between the unconstitutional conduct and the discovery of evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct, the evidence was admissible in Streiff’s criminal prosecution.

- Thus, discovery of arrest warrant (even for minor traffic violation) *after* illegal stop, legitimizes stop and fruits are admissible in court.
- The only restriction is “flagrant police misconduct” which is left undefined.

IV. TRIAL MODE

- INVESTIGATION

- Evidence:

- ATF investigates
 - Often little forensic evidence – no prints, DNA, etc.
 - Frequently seeing client in - prison telephone recordings
 - Not dealing with informants or videotape
 - Almost exclusively cop credibility
 - Reverse 404(b) (i.e., cop files, prior acts, etc.)

STIPULATIONS

- Obvious prejudicial element of 922(g)(1) is previous conviction punishable by one year or more.

BECAUSE OF SUBSTANTIAL PREJUDICE AND RISK OF VERDICT TAINTED BY IMPROPER CONSIDERATIONS FROM NATURE OF PRIOR, ONLY ELEMENT WHERE DEFENSE CAN DEMAND STIPULATION. *Old Chief v. U.S.*, 117 S. Ct. 644, 174 (1997).

Commerce Element

- Preserve a constitutional commerce challenge in case there is one day a change in the law.
- Request a jury instruction requiring gov't to prove that possession had substantial effect on I/S commerce

- OK to obtain language indicating by virtue of firearm's presence in state, given manufacturer's location, firearm must have travelled in interstate or foreign commerce -- provided no language as to effect or impact on commerce is in stipulation
- *U.S. v. Carter*, 270 F.3d 731, 735 (8th Cir. 2001), (assuming *arguendo* that the stamped info on gun is hearsay, pursuant to F.R.E. 703, an expert may rely upon it because it is "of a type reasonably relied upon" by firearms experts).

- The government will provide an I/S nexus report to show that the gun(s) traveled in I/S commerce.
- Usually, an agent with ATF will make a report that he/she researched the manufacturer of the gun(s) and the gun was manufactured by the XYZ company, which is located in, say, Kansas City, Missouri.

- *Taylor v. United States*, 136 S. Ct. 2074 (2016)
- To obtain a conviction under the Hobbs Act for robbery or attempted robbery of a drug dealer, the government is not required to prove that the drugs the defendant stole or attempted to steal either traveled or were destined for transport across state lines.

- It is sufficient for the government to prove the defendant knowingly stole or attempted to steal drugs or drug proceeds, because, as a matter of law, the market for illegal drugs is commerce over which the federal government has jurisdiction.
- The evidence on the interstate commerce element was sufficient in this case because the government introduced evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds, and both robberies were committed with intent to obtain those illegal drugs and drug proceeds.

RE-CREATE SCENE

- It's not what cops say!



Moyea Software

DEVELOPING



3:59 82°

RECENT CASE EXAMPLES

- Litigate pre-trial hearing
- Credibility

1-27-07 Time - 12:40 AM DC# 07-18-006077

LOCATION OF CONFERENCE 4624 Walnut ST. SIDE inside
LOCATION OF ARREST 4624 Walnut ST. TIME 12:40 AM
ARRESTING OFFICER Weber BADGE: 4836 DIST: 18UCD
FIRST LAST

PLT: 6B VAC: — PR# 248611

ARRESTING OFFICER: McCarthy BADGE: 9859 DIST: 18UCD
FIRST LAST

PLT: 6B VAC: — PR# 247341

DEFENDANT: Shawn Jackson DOB: 11-3-77

ADDRESS: 4624 Walnut St apt. C6 RACE/SEX B/M/69

DEFENDANT: DOB:

ADDRESS: RACE/SEX

DEFENDANT: DOB:

ADDRESS: RACE/SEX

PROPERTY RECEIPT: 2705507 ITEM: casuals

PROPERTY RECEIPT: 2705508 ITEM: Gun

PROPERTY RECEIPT: ITEM:

DETAILS OF ARREST (WHAT DID YOU DO TO MAKE ARREST):

On 1-27-07 I P/O Weber #4836 along with my partner P/O McCarthy #9859 as u/c, working 6x2 Tour of Duty, responded to a R/C for Gunshots in the area of 4600 Walnut St. ~~and~~ P/O Weber and P/O McCarthy observed a B/M with a green Jacket, Blue Jeans, BLACK HAT holding a silver hand gun in the entry way of the apt. (4624 Walnut St), make seen the police and started

IF MORE SPACE IS NEEDED, USE BACK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NUMBER

V.

ANTHONY SHANDS : 07-659

PHILADELPHIA, PENNSYLVANIA
THURSDAY, 1-17-08

BEFORE: THE HONORABLE TIMOTHY J. SAVAGE, J.

SUPPRESSION HEARING

SUZANNE R. WHITE, RPR, CM, FCRR
OFFICIAL COURT REPORTER
FIRST FLOOR U. S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA. 19106
(215) 627-1882

PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

CROSS EXAMINATION

9 BY MR. SKIPPER:

10 Q. OFFICER WEBER, YOU WERE WITH YOUR PARTNER,
11 OFFICER MCCAFFERTY?

12 A. YES.

13 Q. AND OFFICER MCCAFFERTY WENT TO THE REAR OF THE
14 PREMISES, IS THAT RIGHT?

15 A. YES, HE DID.

16 Q. SO ALL THE OBSERVATIONS THAT YOU TESTIFIED TO
17 YOU -- YOU WERE THE ONLY ONE TO SEE WHAT YOU HAVE
18 TESTIFIED TO, IS THAT CORRECT?

19 A. CORRECT.

20 Q. THERE WAS NO FELLOW OFFICER WITH YOU WHILE YOU
21 MADE THE OBSERVATIONS THAT YOU HAVE TESTIFIED TO?

22 A. NO.

23 Q. IS THAT RIGHT?

24 A. THAT'S CORRECT.

7

Q. YOU HAVE MADE ARRESTS BEFORE WITH MALES IN THAT VICINITY IN THE VESTIBULE AREA, IS THAT CORRECT?

8

9

A. THAT'S CORRECT.

10

Q. YOU ARE AWARE OF DRUG ACTIVITY AND GUNS IN THAT VICINITY, IS THAT CORRECT?

11

12

A. THAT'S CORRECT.

13

Q. IN THESE VESTIBULE AREAS OF THE APARTMENTS, IS

14

THAT RIGHT?

15

A. THAT'S CORRECT.

16

Q. AND YOU KNOW THAT THERE IS A SIGNIFICANT GUN AND

17

DRUG PROBLEM IN THIS APARTMENT COMPLEX, CORRECT?

18

A. CORRECT.

15 Q. YOU RECALL RESIDENTS AT THE APARTMENT COMPLEX
16 COMING OUT AND COMPLAINING AS A RESULT OF THE ACTIVITY?

17 A. AFTER HE WAS APPREHENDED, YES.

18 Q. DO YOU RECALL ONE OF THEM BEING A MAN AND WOMAN,
19 ELDERLY COUPLE?

20 A. THAT, I DON'T RECALL, NO.

21 Q. DO YOU RECALL THEM COMPLAINING ABOUT A GUN OR
22 GUN ACTIVITY IN THE BUILDING?

23 A. DON'T RECALL.

24 Q. DID YOU AT ANY POINT OR ANY OF THE FELLOW
25 OFFICERS ON THE SCENE RUN ANYBODY ELSE? IN OTHER WORDS,

1 DID YOU RUN A RECORD -- DID YOU STOP ANYBODY ELSE?

2 A. I DIDN'T, NO.

3 Q. ARE YOU AWARE OF OTHER PEOPLE BEING STOPPED AT
4 THAT TIME?

5 A. I DON'T RECALL, I WAS -- MY FOCUS WAS ON SHANDS.

6 Q. WERE THERE OTHER MALES OUT THERE TO BE STOPPED?

7 A. NOT AT THE TIME I WAS CHASING SHANDS, NO.

8 Q. YOU HAVE NO RECOLLECTION OF WHETHER YOU OR ANY
9 OTHER -- HOW MANY OFFICERS, I'M SORRY, DID YOU SAY WERE
10 OUT THERE, I KNOW THERE ARE APPROXIMATELY 3 TO 4 UNITS?

11 A. I DON'T RECALL.

12 Q. WERE THERE 2 MAN CARS OR ONE MAN CARS?

13 A. DON'T RECALL.

14 Q. SO IT'S POSSIBLE THAT IF THERE ARE 3 PEOPLE
15 THERE ARE SIX OFFICERS OUT THERE, CORRECT?

16 MR. NGUYEN: OBJECTION, SPECULATION.

17 THE COURT: OVERRULED.

18 BY MR. SKIPPER:

19 Q. IS THAT ACCURATE?

20 A. YES.

JURY INSTRUCTION

DEFENSE REQUEST NUMBER 11

POSSESSION – DEFINED

The government must prove beyond a reasonable doubt that defendant Anthony Shands “possessed” a firearm. The legal concept of possession may differ from the everyday usage of the term, so I will explain it in some detail.

Actual possession is having physical custody or control of an object, and knowing that you have it. For example, if you find that Mr. Shands had a firearm on his person, and knew that he had it, you may find that he had possession of a firearm. However, a person need not have actual physical custody of an object in order to be in legal possession of it. If an individual has knowledge of the item and the ability and intent to exercise substantial control over it, then he is in possession of that item. An example of this from everyday experience would be a person’s possession of items he keeps in the safe deposit box of his bank. Although the person does not have physical custody of those items, he exercises substantial control over them and so has legal possession of them.

Legal possession of a firearm cannot be found solely on the ground that defendant Anthony Shands was near or close to a firearm. Nor can it be found simply because Mr. Shands was present at a scene where a firearm was involved, or solely because he associated with a person who did control a firearm or the property where a firearm was found.

Therefore, you cannot find defendant Anthony Shands in possession of any item unless it is proved beyond a reasonable doubt that he had direct physical control or authority over the item, or knowingly controlled and intended to control it.

Authority And/Or Adapted From

United States v. Jenkins, 90 F.3d 814 (3d Cir. 1996); 3-56 L. Sand, *et al.*, Modern Federal Jury Instructions, Instruction 56-4 (2007) (modified).

Question 4

4:55 p.m.

9-19-2009

WE ARE STILL LOCKED AT AN 11-
VOTE.

THE LONE VOTE IS HOLDING OUT
AS THAT JUROR DOES NOT BELIEVE
TESTIMONY GIVEN BY THE TWO POLICE
OFFICERS. THERE IS NO EVIDENCE WE
CAN REVIEW, SHOW OR ARGUE TO CHANGE
THIS JURORS ~~TESTIMONY~~ OPINION OR
VERDICT.

IS THERE A WAY TO REPLACE OR
REMOVE THIS JUROR.

Paul / WZ



Camera11 (2010-12-17 11:35:00:928)

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[1] uniform, you know what I mean -- you guys you say you parked
[2] up at that point?
[3] **A.** We were sitting back at Somerset Street to see what was
[4] going to happen.
[5] **Q.** What does sitting back mean, does it mean you stopped
[6] your car?
[7] **MS. GUDIS:** Objection, Your Honor, goes
[8] to a motion.
[9] **THE COURT:** Overruled. He can answer.
[10] **THE WITNESS:** We were stopped at the
[11] intersection.
[12] **BY MR. BOWERS:**
[13] **Q.** And in any event, you then follow the truck and it goes
[14] down to Hope and, I think you said Lehigh, and pulls into a
[15] gas station, right?
[16] **A.** Correct.
[17] **Q.** And you say the defendant gets out, walks into the gas
[18] station. And you pull up, you get out of the car.
[19] Are you the driver, by the way?
[20] **A.** I am not.
[21] **Q.** And you go over to the pick-up truck, right?
[22] **A.** Correct.
[23] **Q.** And your two partners go into the station; is that
[24] right?
[25] **A.** Correct.

Sharon Ricci, RPR

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[1] **THE WITNESS:** I believe it would be
[2] prepared in the 7548-A.
[3] **BY MR. BOWERS:**
[4] **Q.** I didn't ask you what was the paperwork.
[5] **A.** I don't recall.
[6] **Q.** Well, this was only December 17th and today is, you
[7] know, January 20-something, so you don't recall how he was
[8] dressed?
[9] **MS. GUDIS:** Objection, Your Honor.
[10] **THE COURT:** Sustained.
[11] **BY MR. BOWERS:**
[12] **Q.** You have to refresh your recollection as to how he was
[13] dressed?
[14] **MS. GUDIS:** Objection, Your Honor.
[15] **THE COURT:** Sustained.
[16] **BY MR. BOWERS:**
[17] **Q.** You didn't know the defendant before this incident,
[18] correct?
[19] **A.** No.
[20] **Q.** Now, you say you walk up to the truck and you say you
[21] see two guns lying on the seat?
[22] **A.** Correct.
[23] **Q.** And you use a term of art called "In plain view,"
[24] right?
[25] **A.** Correct.

Sharon Ricci, RPR

Sharon Ricci, O.C.R.

Court Reporting System

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[1] **Q.** Is that that where they take the defendant into
[2] custody?
[3] **A.** They do it in the station, but we observed him actually
[4] exit the vehicle and they followed him into the store.
[5] **Q.** Did you ever run a registration on the vehicle?
[6] **MS. GUDIS:** Objection.
[7] **THE COURT:** Overruled.
[8] **THE WITNESS:** I don't recall if we did or
[9] not.
[10] **BY MR. BOWERS:**
[11] **Q.** You're not able to identify the driver at the time the
[12] fellow goes down the street and pulls into the gas station,
[13] correct?
[14] **A.** Right, but I observed the defendant exit the vehicle.
[15] And he was driving the vehicle.
[16] **Q.** Well, that's what you're saying.
[17] Let me ask you a question: Is it registered to him?
[18] **MS. GUDIS:** Objection, asked and
[19] answered.
[20] **THE COURT:** Sustained.
[21] **BY MR. BOWERS:**
[22] **Q.** How was he dressed?
[23] **MS. GUDIS:** Objection. There's been an
[24] in-court ID.
[25] **THE COURT:** Overruled.
Sharon Ricci, RPR

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[1] **Q.** Where were they in plain view?
[2] **A.** On the passenger seat.
[3] **Q.** They weren't secreted in the glove box, they weren't
[4] under the seat, they weren't hiding under a jacket or anything
[5] is what you're saying, right?
[6] **A.** Correct.
[7] **Q.** What you're saying is you didn't have to open the trunk
[8] and make any kind of search to find these guns, did you?
[9] **A.** No.
[10] **Q.** So what you're saying is you then called for, I think
[11] you said, a supervisor?
[12] **A.** That's right.
[13] **Q.** A supervisor came. At that point is he already in
[14] custody?
[15] **MS. GUDIS:** Objection, goes to a motion.
[16] **THE COURT:** Sustained.
[17] **BY MR. BOWERS:**
[18] **Q.** Well, did you have a warrant to retrieve the weapons at
[19] the time that the supervisor opened the car to go in?
[20] **MS. GUDIS:** Objection.
[21] **THE COURT:** Sustained.
[22] **BY MR. BOWERS:**
[23] **Q.** The defendant when he's taken into custody, he doesn't
[24] have anything on him, does he?
[25] **A.** I didn't search the defendant.

Sharon Ricci, RPR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

:

:

vs.

:

CRIMINAL NO. [REDACTED]

:

:

JUDGMENT OF ACQUITTAL/NOT GUILTY

AND NOW, this 12th day of December, 2012, came the attorney for the Government and the defendant being present with counsel, and

- ☐ The Court having granted the defendant's motion for judgment of acquittal as to:
- ☐ A jury has been waived, and the Court has found the defendant not guilty as to:
- ☒ The jury has returned its verdict, finding the defendant not guilty as to: Count 1.

AND IT IS THEREFORE ORDERED that Judgment in accordance with the above finding is hereby entered pursuant to Rule 32(b), Federal Rules of Criminal Procedure.

BY THE COURT:

S/Petrese B. Tucker
PETRESE B. TUCKER, J.

cc: U.S. Marshal
Probation Office
Counsel

12-12-2012 MO
Date By Whom

V. Sentencing and Related Case Law

- Is your client an ACCA?
- 18 USC § 924(e)

ACCA Residual Clause

Violent Felony =

- Force (elements)
- enumerated offenses
- residual clause

Residual Clause Is Void for Vagueness

- Held: “[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.”
- We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denies due process of law.”

Two Features That Make Residual Clause Unconstitutionally Vague

- (1) “[T]he residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.”

(2) “[T]he residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.”

Johnson & ACCA

- The gov't and probation should no longer be relying on residual-clause predicates.
- Pre-*Johnson* caselaw holding various crimes to be ACCA predicates under residual clause no longer good law.
- Even if gov't/probation labels predicate as force/enumerated offense, make sure it is not a residual clause-type offense.

- In cases with appeal waivers:

“[T]he government has elected not to rely [on them] in ACCA cases in which ‘the defendant is, post *Johnson*, ineligible for the 15-year minimum sentence created by the [Act].”

United States v. Munoz-Navarro, 803 F.3d 765, 766(5th Cir. 2015).

What's Next?

- Left to the lower courts to determine whether defendants previously sentenced under the residual clause may obtain relief; and
- To what other statutory contexts may the court's constitutional vagueness extend? (Career offender, 924(c), etc.)

Retroactivity of *Johnson*?

- *Welch v. United States*, No. 15-6418, — S. Ct. — (April 18, 2016). *Johnson* announced new substantive rule of constitutional law that applies retroactively to ACCA cases on collateral review.

Force Clause

- Do client's priors satisfy force clause?
- Violent force = "strong physical force" *Johnson v. U.S.*, 559 U.S. 133 (2010)
- If force element is lacking, challenge the predicate

- Required violent force, not unwanted touching
- Directed against person, not property
- Required use of force, not merely the causation of physical injury
- Intentional force, not reckless or negligent

Career Offenders

- The definition of "crime of violence" under the career-offender guideline contains a substantially identical residual clause at 4B1.2(a)(2).
- Argue that it, too, is void for vagueness under *Johnson*.

6th Cir: *Johnson* and Career Offenders

- Issue: Whether one of defendant's predicates qualifies as a COV under the residual clause of § 4(B)1.2(a)(2).
- Holding: In light of *Johnson*, which deems the identically-worded residual clause of ACCA void for vagueness, Darden's sentence must be vacated.
- Reasoning: The Sixth Circuit interprets both residual clauses identically. Therefore, Darden is entitled to the same relief as Johnson.

United States v. Darden, 605 F. App'x 545 (6th Cir. 2015).

Other Updates

“[T]he career offender guideline’s residual clause uses the same language that *Johnson* held was impermissibly vague and is therefore vague. Consequently, Estrada’s prior Texas conviction for assault on a peace officer may not be construed as qualifying as a crime of violence under the residual clause of the career offender guideline.”

United States v. Estrada, No. 15-40264 (5th Cir. Oct. 8, 2015) (Gov’t Unopposed Mot. to Remand for Resentencing in Light of *Johnson*, at 5.)

- Held: Prior robbery conviction under Ohio Revised Code (§ 2911.02(A)(3)) “cannot qualify under the U.S. Sentencing Guidelines career offender enhancement as a predicate conviction for a crime of violence.”

United States v. Litzy, No. 3:15-00021, 2015 U.S. Dist. LEXIS 137355, at *1 (S.D.W. Va. Oct. 8, 2015)

- Held: Applying *Johnson* to the career offender guideline and concluding that prior conviction for attempting to elude a police officer is not a crime of violence.

United States v. Townsend, No. 14-3652, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015).

In a published decision, *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015), the Eighth Circuit holds that *Wivell* (the forerunner of *Tichenor*), which said the guidelines were not subject to vagueness challenges, does not foreclose a *Johnson* claim because intervening Supreme Ct precedent (*Johnson*) casts doubt on *Wivell*, and because judge must still consider and calculate the guidelines correctly. The panel left to the district court whether the guidelines residual clause is unconstitutional.

- *U.S. v. Hulburt/Gillespie*, __ F.3d __ (7th Cir. Aug. 29, 2016) (“Simply put, after *Peugh* we can no longer say, as we did in *Tichenor*, that because the Guidelines are ‘advice’ rather than ‘rules,’ they are immune from challenge on vagueness grounds. Because *Tichenor* has lost its analytical foundation, we now overrule it. Applying *Johnson*, we hold that the residual clause in 4B1.2(a)[(2)] is unconstitutionally vague.”)

What the Gov't Is Saying

- *United States v. Pagán-Soto*, No. 13-2243 (1st Cir.) (gov't concedes in supplemental brief that *Johnson* applies to the residual clause of the GLs definition of COV)
- *United States v. Zhang*, No. 13-3410 (2d Cir.) (gov't states in letter brief “Because the [DOJ] now takes the position that the guideline’s residual clause, like the ACCA residual clause is void for vagueness, it is the government’s position that, after *Johnson*, [defendant] does not qualify as a career offender and should be resentenced.”)

- *But see United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015).
- Rejecting argument that the definition of COV in the Guidelines is unconstitutionally vague in light of *Johnson*.
- Vagueness doctrine applies only to laws that prohibit conduct and fix punishments, not advisory guidelines.

Gov't Disagrees w/ Matchett

- In *United States v. Townsend* (3d Cir. 2015) (holding that *Johnson* invalidates residual clause of career offender guideline, the gov't filed a 28(j) letter.
- The letter informed the court that it disagrees with the 11th Circuit reasoning in *Matchett*
- It also asked court to “accept the Government’s concession that *Johnson* invalidates [the] residual clause of § 4B1.2(a)(2)”

Johnson and Sawed-Off Shotguns?

- *Beckles v. United States*, No. 15-8544 (Cert. Granted June 27, 2016).

Questions presented:

- Whether Johnson's constitutional holding (that the Armed Career Criminal Act's residual clause is unconstitutionally vague) applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

- Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)?
- Whether mere possession of a sawed-off shotgun, an offense listed as a “crime of violence” only in the commentary to U.S.S.G. § 4B1.2, remains a “crime of violence” after *Johnson*?

USSC Votes to Change Definition of COV

- The USSC's proposed amendment eliminates the residual clause providing that a “crime of violence” includes a felony offense that “otherwise involves conduct that presents a serious risk of physical injury to another.”

See USSG § 4B1.2(a)(2)

- In voting to eliminate the residual clause in the career offender guideline, the Commission acknowledges “the ongoing litigation in this area across the nation and the uncertainty resulting from the *Johnson* case.”

Press Release, United States Sentencing Commission, U.S. Sentencing Comm’n Adopts Amendment to Definition of “Crime of Violence” in Federal Sentencing Guidelines and Proposes Additional Amendments (Jan. 8, 2016).

- Use this development immediately to continue arguing for variances.
- Show the court that a non-career offender sentence is warranted because the COV predicates no longer count.

Aggravated Felonies

- The definition of "crime of violence" for "aggravated felony" as used in 1326(b)(2) and 2L1.2 (via 18 USC 1101(a)(43(f) and 16(b)) contains a residual clause that is open to a vagueness challenge.
- Argue that both clauses are invalid under *Johnson*, and that those predicates no longer count.

- *United States v. Gonzalez-Longoria*, -- F.3d --, 2016 WL 537612, at * (5th Cir. Feb. 10, 2016) (holding residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague)
- *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015) (applying *Johnson* and ruling that § 16(b) is unconstitutionally vague)
- *Dimaya v. Lynch*, 808 F.3d 1110 (9th Cir. 2015) (same)

- *Shuti v. Lynch*, __ F. 3d __, 2016 WL 3632539 (6th Cir. July 7, 2016).
- “Like the Seventh and Ninth Circuits, we are convinced that *Johnson* is equally applicable to the INA’s residual definition of crime of violence. 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b). . . Imposing the penalty of deportation under this nebulous provision, we conclude, denies due process of law.” (Internal citation omitted).

- *Golicov v. Lynch*, ___ F.3d ___, 2016 WL 4988012 (10th Cir. Sept. 19, 2016).
- “[W]e agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA’s residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*.”

924(c)

- 924(c)(3)(B) defines “crime of violence” as a crime:
 - that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
- Argue that clause is void for vagueness.
- Also, same language as 16(b). Make similar argument.

- *United States v. Baires-Reyes*, No. 15-cr-00122-EMC-2 (N.D. Cal. June 7, 2016) (granting motion to dismiss and ruling that the residual clause in § 924(c) is void for vagueness after *Johnson*; conspiracy to commit Hobbs Act robbery does not qualify under remaining force clause)

- *Ruiz v. United States*, No. 16-1193 (7th Cir. Dec. 19, 2016) (authorizing second/successive petition in 924(c) case because the 924(c) residual clause is identical to 16(b)'s residual clause which was held unconstitutionally vague in *Vivas-Ceja*)
- *United States v. Lattanaphom*, -- F. Supp. 3d --, 2016 WL 393545 (E.D. Cal. Feb. 24, 2016) (holding residual clause of 924(c) unconstitutionally vague)

- *United States v. Bell*, No. 15-cr-00258, 2016 WL 344749 (N.D. Cal. Jan. 28, 2016) (same)
- *United States v. Edmundson*, No. PWG-13-15, 2015 WL 9311983 (D. Md. Dec. 30, 2015) (holding 924(c) residual clause unconstitutionally vague)
- *But see United States v. Taylor*, -- F.3d --, 2016 WL 537444 (6th Cir. 2016) (holding *Johnson* analysis does not apply to 924(c)(3)(B)).

924(c) Challenge

- “[A]ny person who, during and in relation to **any crime of violence** or drug trafficking crime . . .
- *Johnson* as a basis for challenging the 924(c)
- Argument: Hobbs Act, bank robbery, carjacking, etc., no longer qualify as crimes of violence, following *Johnson*, because they do not categorically require the use of force.
- Thus, they may not form the basis for 924(c) counts.

Motion to Dismiss

Count __ of the current indictment currently charges Mr. ____ with ____ a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Specifically, the Count alleges that the underlying “crime of violence” for the § 924(c) offense is “Hobbs Act robbery”, in violation of 18 U.S.C. § 1951(b). However, the Government cannot prove this charge because Hobbs Act robbery categorically fails to qualify as a “crime of violence”.

The Supreme Court’s recent precedent in *Johnson* renders the Government’s task unachievable. Under current law, Hobbs Act robbery as proscribed by 18 U.S.C. § 1951(b) categorically fails to constitute a crime of violence under § 924(c)(3)(A) (the force clause) because

it can be accomplished by placing one in fear of future injury to his person or property, which does not require violent physical force. Additionally, in light of *Johnson*, the “residual clause” within § 924(c)(3)(B), is unconstitutionally vague and cannot sustain a conviction. Therefore, Count ____ of the superseding indictment must be dismissed.

Additional Non-ACCA Applications of Johnson

- § 2K1.3(a)(1)-(2) (BOLs for explosive materials)
- § 2K2.1(a)(1)-(4) (BOLs for gun possession)
- § 2L1.2(b)(1)(C) (aggravated felony for immigration)
- § 2S1.1(b)(1)(B)(ii) (money laundering enhancement)
- § 3B1.5 (body armor enhancement)
- § 4A1.1(e) (CH points for uncounted COVs)
- § 7B1.1(a)(1)(A)(i) (SR violation grading)

OTHER

ACCA CASE UPDATES

- *U.S. v. Young*, 766 F.3d 621 (6th Cir. 2014) (defendant sentenced to mandatory 15-year term of imprisonment under the ACCA for being a felon in possession of ammunition)
 - Mandatory minimum sentence did not violate Eighth Amendment because it was not grossly disproportionate to offense committed. Gravity of offense is viewed in light of defendant's previous crimes.
 - The ACCA as applied to defendant because he had fair notice of the prohibition against felons possessing ammunition.

- *Descamps v. U.S.*, 133 S. Ct. 2276 (2013) (“modified categorical approach” of determining whether prior conviction under state statute qualifies as a violent felony under ACCA does not apply to statutes that have only one set of divisible elements. Focus on status of conviction)
- *U.S. v. Geddie*, 125 F. Supp.3d 592 (E.D. N.C. 2015) (all violations of N.C. assault w/ a deadly weapon inflicting serious injury did not qualify as violent felonies under ACCA)

- *U.S. v. Hemingway*, 734 F.3d 323 (4th Cir. 2013) (holding S.C. crime of aggravated assault and battery of a high and aggravated nature not violent felony under ACCA force or residual clauses)
- *U.S. v. Brock*, 724 F.3d 817, 824 (7th Cir. 2013) (unlawful possession of machine gun not a violent felony under ACCA)
- *U.S. v. Miller*, 721 F.3d 435, 440 (7th Cir. 2013) (mere possession of short-barreled shotgun does not qualify as violent felony under ACCA)

- *U.S. v. Tucker*, 703 F.3d 205, 211 (3d Cir. 2012) (prior state conviction for conspiracy to sell drugs was not a serious drug offense under ACCA)
- *U.S. v. Bethea*, 603 F.3d 254, 260 (4th Cir. 2010) (S.C. escape conviction not violent felony under ACCA)
- *U.S. v. Goodpasture*, 595 F.3d 670, 672-73 (7th Cir. 2010) (CA conviction for lewd or lascivious act involving person under age 14 not violent felony under ACCA)

- *Begay v. U.S.* 128 S. Ct. 1581 (2008) New Mexico DUI not a “violent felony” for ACCA purposes.
- *Watson v. U.S.*, 128 S. Ct. 579 (2007) – Exchange of drugs for gun – not “use” within meaning of 924(c)(1)(A).

- *Chambers v. U.S.*, 129 S. Ct. 687 (2009) (IL failure to report conviction not violent felony under ACCA's otherwise clause)
- *Shepard v. U.S.*, 544 U.S. 13 (2005) – Sentencing Court can't look at police reports in making “general burglary” determination. Need to look at reliable Court documents, plea agreement , or transcript, etc.

ACCA Case Updates, cont'd

- *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009). When the laws under which the defendant has been convicted contain statutory phrases for several different generic crimes, the court may consult the trial record to determine which phrase was the basis for conviction.
- *United States v. Archer*, 531 F.3d 1347, 1347 (11th Cir. 2008) (concluding that in light of *Begay*, the crime of carrying a concealed firearm no longer be considered a crime of violence under the Sentencing Guidelines).

Physical Force

- *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010)(finding that the question was whether the term “force” in 18 U.S.C. § 924(e)(2)(B)(i) has the specialized meaning that it bore in the common-law definition of battery; “the Government asserts that it does. We disagree.”).
- “Physical force” in the context of a statutory definition of a “violent felony” is “force capable of causing physical pain or injury to another person.” *Id.* at 1270.

- “We think it clear that in the context of a statutory definition of “violent felony,” the phrase “physical force” means violent force—that is, force capable of causing physical pain or injury to another person.
Johnson, supra.
- Held: The Florida felony offense of battery by “actually and intentionally touching” another person does not have “as an element the use ... of physical force against the person of another,” § 924(e)(2)(B)(I), and thus does not constitute a “violent felony” under §924(e)(1).
Johnson, supra.

- *But see U.S. v. Krause*, 13 Fed. App'x (4th Cir. 2001) (holding defendant's prior conviction for possession of sawed-off shotgun was conviction for violent felony under ACCA).
- *U.S. v. Vincent*, 575 F.3d 820, 827-28 (8th Cir. 2009) (holding possession of sawed-off shotgun is a violent felony under ACCA)

- U.S. v. *Miles*, 309 Fed. App'x 329, 331 (11th Cir. 2009)(holding that possession of an unregistered sawed-off shotgun was a violent felony for purposes of ACCA)(unpublished opinion).

924(c)(1)(A) “EXCEPT” CLAUSE

“Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . .”

If other mandos such as drugs or guns, *i.e.*, 851 or ACCA cases, exceed the 924(c) provision.

- *Abbott v. U.S.*, 131 S. Ct. 18 (2010)
- A defendant is subject to a mandatory, consecutive sentence for a 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction.
- A defendant is subject to the highest mandatory minimum specified for his conduct in § 924(c) unless another provision of law directed to conduct proscribed by § 924(c) imposes an even greater mandatory minimum.

- *U.S. v. Robles*, 709 F.3d 98, 100 (2d Cir. 2013) (holding that the “except” clause does not exempt a defendant, sentenced on multiple § 924(c) counts, from receiving a consecutive mandatory minimum sentence for each of his consecutive § 924(c) convictions)

If your client is not an Armed Career Criminal then his/her guidelines will fall under USSG §2K2.1. In light of *Begay*, *Johnson*, *Archer*, *Harrison*, be careful of the base offense level that calls for its application to offenses involving a crime(s) of violence.

§ 2K2.1. Gun Guidelines

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

U.S.S.G. 2K2.1

- DOUBLE COUNTING PERMISSIBLE
 - Same predicate used for both BOL & CH
 - *U.S. v. Vizcarra*, 668 F.3d 516, 520-21 (7th Cir. 2012) (double counting permissible unless a specific guideline provides otherwise)
 - *U.S. v. Webb*, 665 F.3d 1380, 1382 (11th Cir. 2012) (double counting permitted if USSC intended that result and each guideline section in question concerns separate notions related to sentencing)

- *U.S. v. Morgan*, 687 F.3d 688, 695 (6th Cir. 2012) (“Permissible double counting occurs ‘where it appears that Congress or the Sentencing Commission intended to attach multiple penalties to the same conduct.’”)
- *U.S. v. Hampton*, 628 F.3d 654, 664 (4th Cir. 2010) (presuming double counting proper where the guidelines do not expressly prohibit it).
- *U.S. v. Fisher*, 502 F.3d 293, 309 (3d Cir. 2007) (double counting impermissible only when guidelines specifically prohibit it)

What About Variances?

- *U.S. v. Robertson*, 309 Fed. App'x 918, 923 (6th Cir. 2009)
- "An argument that a district court should award a variance based on the § 3553(a) factors because the guideline range double counted prior offenses is a nonfrivolous argument."

NOT GUILTY!

