Six Areas to Worry About in Firearms Cases

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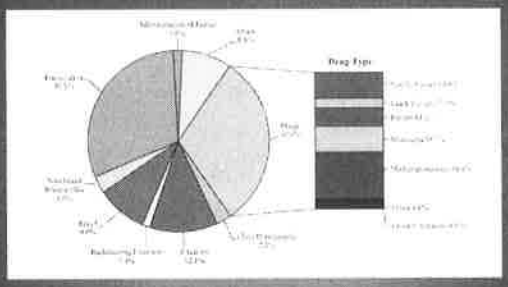
6 Areas of Focus

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 12.1 percent of the total federal criminal convictions for FY 2017.

Guns accounted for 12.1% of federal convictions in FY 2017



Project Exile/Safe Neighborhoods

- Federal prosecution of gun crimes likely will increase under the Trump administration.
- Attorney General Sessions is a strong supporter of Project Exile. Project Exile (aka Project Safe Neighborhoods) seeks to bring together police and prosecutors to take gun-crime cases to federal court to impose longer sentences in prisons far from home.
- Trump has indicated that he wants to expand the program.

Targeted and Prioritized Enforcement

- Identify locations within the district with greatest need of comprehensive violent crime reduction efforts
- Focus on offenders driving violence in those areas
- Target those offenders for prosecution in the jurisdiction that can provide the most certain and appropriate sanction.

Increased Enforcement of Existing Gun Laws

In Fight Against Violent Crime, Justice Dept. Targets Low-Level Gun Offenders

- "In the three months following a directive from Mr. Sessions last year to pursue gun crimes, possession cases . . . rose nearly a quarter."
- There was a 15% increase in all federal gun prosecutions in the first nine months of 2017

https://www.nytimes.com/2018/05/07/us/politics/jeff-sessions-gun-charges.html

Make Sessions "Nervous"

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.**

Antique Firearm Bill

- Federal law does not prevent prohibited persons from possessing an "antique" firearm.
- An antique firearm is any firearm manufactured before 1898. *See* 18 U.S.C. § 921(a)(16)(A).
- On July 12, 2017, Sen. Bill Cassidy (R-LA) introduced bill (S. 1541) to modify the definition of antique firearm.

- Under proposed bill, "1898," is stricken and replaced with "the calendar year that is **100 years** before the calendar year in which the determination as to whether the firearm meets the requirement of this subparagraph being made."

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).

Gorsuch and Knowledge?

- Gorsuch concurrence in *Games-Perez*, 667 F.3d 1136, 1142-43 (10th Cir. 2012) (Gorsuch, J., concurring)
  - Precedent dictates that the only knowledge required is the knowledge that instrument possessed is a firearm.
  - "[P]recedent sometimes requires us to make mistakes."
  - Holding that the government does not need to prove a defendant knew he was a felon "simply can't be squared with the text of [§ 922(g)]

- § 924(a)(2) authorizes imprisonment for "whoever knowingly violates" § 922(g).
- Precedent "leapfrog[s]" over first element (felony conviction) to focus on the second (possessed firearm)
- Gorsuch argues that knowingly should be applied to *all* three elements.

Bifurcation

- Bifurcation in a single-count case.
- Tremendous risk of unfair prejudice inherent in the fact of a prior felony conviction.
- *United States v. Thompson*, 675 Fed. App'x 221, 224 (3d Cir. 2017) (concluding bifurcation for single-count cases not required but permissible).

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)

Duress

- *Dixon v. United States*, 548 U.S. 1 (2006)
- Dixon was charged with 18 U.S.C. § § 922(n) (receiving a firearm while under indictment) and 922(a)(6) (making false statements in connection with the acquisition of a firearm).
- Dixon claimed duress and requested a jury instruction placing the burden on the government to disprove her duress defense beyond a reasonable doubt.

- Held: (1) The jury instructions in this case did not run afoul of the DP clause when they placed the burden on Dixon to establish the existence of duress by a preponderance of the evidence; (2) Modern common law requires Dixon to bear burden of proving defense of duress by a preponderance of the evidence.

Innocent Possession

- The Third Circuit has yet to recognize the affirmative defense of "innocent" or "transitory" possession.
- Only one published appellate opinion finding crime of innocent possession and affirmative defense to § 922(g)(1). *U.S. v. Mason*, 233 F.3d 619 (D.C. Cir. 2000)

- To successfully invoke innocent possession defense, the facts must be that:

  (1) the firearm was attained innocently and held with no illicit purpose and

  (2) possession of the firearm was transitory – *i.e.*, in light of the circumstances presented there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.

- The Third Circuit has assumed for the sake of argument that if the affirmative defense applied, it would use the standard articulated in *U.S. v. Mason*.
- *See* ***U.S. v. Langforddavis***, 454 Fed. App'x 34 (3d Cir. 2011) (holding instruction on innocent possession not warranted); *see also* ***U.S. v. Holloway***, 402 Fed. App'x 692 (2010)(holding defendant not entitled to instruction on fleeting innocent contact).

- ***U.S. v. Jackson***, 282 Fed. App'x 999 (3d Cir. 2008) (no evidence suggesting that defendant obtained weapons in an "innocent" fashion as required to support affirmative defense for transitory possession).
- ***U.S. v. Daniels***, 248 Fed. App'x 387 (3d Cir. 2007) (holding innocent possession not affirmative defense to possession of firearm by convicted felon)

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*, 840 F. 3d 99 124 (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.

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. Samuels, 521 F.3d 804, 811-12 (7th Cir. 2008)(explaining that defendant "must know or have reason to know" that individual is a felon at time of aiding and abetting)

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*)

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 - mando consecutive 5 years

if brandished - mando consecutive 7 years

if discharged - mando consecutive 10 years

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

924(c)(1)(B) –

if machine gun – mando 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)

The 8th Amendment & 924(c)

- *United States v. Slatten*, 865 F.3d 767 (D.C. Cir. 2017) (holding 924(c)'s 30- year mandatory minimum, as-applied, violates the Eighth Amendment)
  - Defendant's were providing diplomatic security for Department of State in Iraq.
  - Gov't-issued weapons.
  - No prior convictions.

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. King, 632 F.3d 646 (10th Cir. 2011) (concluding evidence was sufficient that King had the ability to exercise dominion or control over rifle

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).

Dean v. United States

- The district court may take into account a consecutive mandatory minimum penalty under 18 U.S.C. § 924(c) when determining the appropriate sentence for the underlying predicate offense.
- "Nothing in § 924(c) restricts the authority conferred on sentencing courts by [18 U.S.C.] § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count."

Dean v. United States, 137 S. Ct. 1170 (2017)

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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff

vs.

MICHAEL SLAGER,
Defendant.

Criminal No: 2:16-378

GLOBAL PLEA AGREEMENT

7. **Agreements by the State of South Carolina.** In return for the defendant's plea of guilty as set forth herein, the State of South Carolina agrees:

(a) to dismiss, within five days of the acceptance of this guilty plea, the charge pending in *State v. Slager*, Case No. 2015-GS-10-3466, subject to re-indictment if, for any reason caused by the defendant, the agreement is not fulfilled;

(b) to not file any additional charges against the defendant arising out of the facts forming the basis for the crimes charged in the Indictment.

The defendant agrees that the Solicitor may address the Court at sentencing on behalf of the State of South Carolina.

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")

- *United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017) (holding multiple convictions under V.I. Code. Ann. Tit. 14 § 2553(a) violated Double Jeopardy Clause because defendant's commission of COV could only enhance the sentence, and could not serve as the basis for another prosecution for a firearms offense)
- *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, [redacted] 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, [redacted] 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.

Stay Tuned . . .

- The Court is presently considering a cert petition (*Gamble v. United States*) on the issue of whether the Supreme Court should overrule the "separate sovereigns" exception to the double jeopardy clause.

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 mandatories/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 Initial Proceeding

Court Security

Assistant PD punished by judge resigns in protest after jurist refuses to bench

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.* Green, 414 F.Supp. 2d 1029 (N.D. Okla. 2006) (holding magistrate judge erred in finding that 922(g)(1) is not COV within meaning of BRA);*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)

Constitutional Challenge to Statute

- A guilty plea does not inherently waive a constitutional challenge to the statute of conviction. *Class v. United States*, No. 16-424, No. 16-424, 2018 U.S. LEXIS 1378 (Feb. 21, 2018).
- Note that *Class* will not be of any help if your client enters into a plea agreement that broadly waives his or her right to challenge the conviction with language that encompasses constitutional challenges.

But Are Waivers Ethical?

- DOJ announces in 2014 that "[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel[.]"
- Under 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."

Broomfield, 417 F.3d at 655.

- "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."

Id. (emphasis added)

- *U.S. v. Gaines*, No. RDB—10—0398, 2010 U.S. Dist. LEXIS 130111 (D. Md. Dec. 8, 2010) (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).

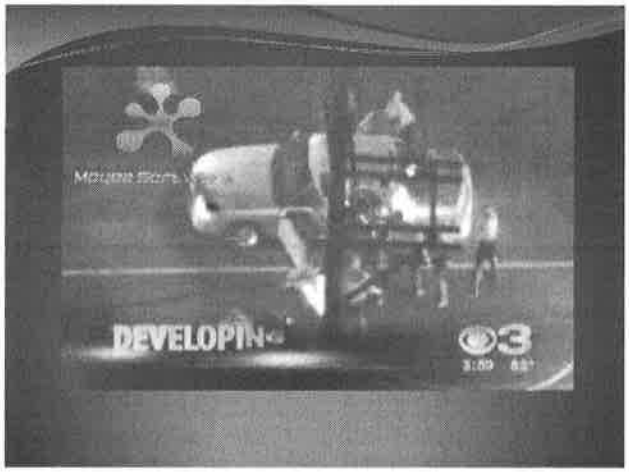
- The government will provide an I/S nexus report to show that the gun(s) traveled in I/S commerce.
- Usually, an agent with ATF will make a report that he/she researched the manufacturer of the gun(s) and the gun was manufactured by the XYZ company, which is located in, say, Kansas City, Missouri.

- *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.

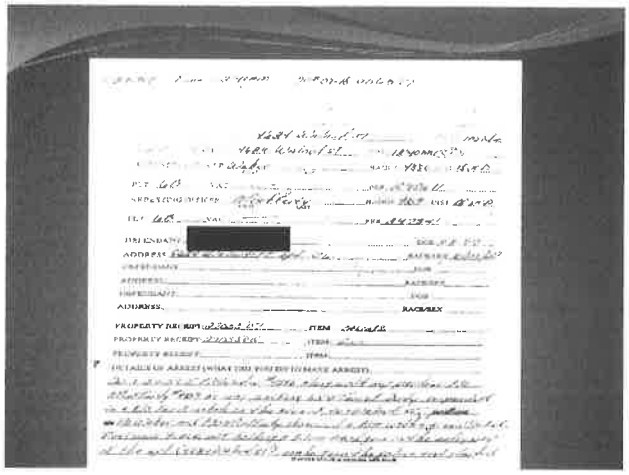
RE-CREATE SCENE

- It's not what cops say!



RECENT CASE EXAMPLES

- Litigate pre-trial hearing
- Credibility



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

UNITED STATES OF AMERICA : CRIMINAL NUMBER

v.

[redacted]

PHILADELPHIA, PENNSYLVANIA
THURSDAY, 1-19-06

BEFORE: THE HONORABLE TIMOTHY J. SAVAGE,

JURY TRIAL STARTS

APPEARANCES:
JOHANNA G. WEISS, ESQ., AUSA, FOR
OFFICIAL COURT REPORTER:
KIRK PRIOR M. C. SUPERVISOR
600 MARKET STREET
PHILADELPHIA, PA 19101
(215)431-7347

PROCEEDINGS RECORDED BY ELECTRONIC SOUNDING
TRANSCRIPT PRODUCED BY COMPUTER AIDED TRANSCRIPTION

DIRECT EXAMINATION

BY MR. GEORGE:

Q. GOOD MORNING, YOU HAVE BEEN SWORN PREVIOUSLY,
OFFICER ROSENBERG?

A. YES

Q. AND OFFICER ROSENBERG WENT TO THE REAR OF THE
PREMISES; IS THAT RIGHT?

A. YES, HE DID.

Q. SO WAS THE INFORMATION JUST YOU TESTIFIED TO
YOU -- YOU WERE THE ONLY ONE TO SEE WHAT YOU WERE
TESTIFYING TO, SO WAS CORRECT?

A. CORRECT.

Q. THERE WAS NO FOLLOW OFFICER WITH YOU WITH YOU
MADE THE OBSERVATIONS THAT YOU WERE TESTIFYING?

A. NO.

Q. IS THAT RIGHT?

A. THAT'S CORRECT.

Q. YOU HAVE MADE ARRESTS BEFORE WITH MARIJUANA IN THEY
POSSESS IN THE VOCATIONAL AREA, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND THE NAME OF NEXT ACTIVITY WAS HERE IN THIS
SECURITY, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. IN THOSE RECORDS SHEET OF THE ARRESTEES, IT
THEY SIGN?

A. THAT'S CORRECT.

Q. AND SO FROM THAT THERE IS A SIGNATURE? AND YOU
HAVE PROBLEM IN THIS ARRESTEE SIGNING, CORRECT?

A. CORRECT.

Q. AND YOU DID A SEARCH -- DID YOU FIND ANYONE ELSE?

A. I BELIEVE, NO.

Q. AND YOU KNOW OF OTHER PEOPLE BEING CHARGED AT
THAT TIME?

A. I DON'T RECALL. I WAS -- MY FOCUS WAS ON DRUGS.

Q. WERE THERE OTHER RAIDS NOT THERE TO BE CHARGED?

A. BUT AT THE TIME I WAS CHARGED CHARGE, NO.

Q. YOU HAVE NO RECOLLECTION OF WHETHER YOU OR OUT
OTHER -- FOR PART OFFICERS, I'M SORRY, DID YOU SEE WHERE
THE THERE, I KNOW THERE ARE APPROXIMATELY 4 TO 5 UNITS?

A. I DON'T RECALL.

Q. WERE THERE 2 MEN CAME OF THE MAN CAME?

A. DON'T RECALL.

Q. SO IT'S POSSIBLE THAT IT THERE ARE 3 PEOPLE
THERE AND ARE DEFENDING THE AREA, CORRECT?

MR. GEORGE: OBJECTION, SPECULATION
THE COURT: OVERRULED

BY MR. GEORGE:

Q. IS THAT POSSIBLE?

A. YES

Q. AND YOU DID A SEARCH -- DID YOU FIND ANYONE ELSE?

A. I BELIEVE, NO.

Q. AND YOU KNOW OF OTHER PEOPLE BEING CHARGED AT
THAT TIME?

A. I DON'T RECALL. I WAS -- MY FOCUS WAS ON DRUGS.

Q. WERE THERE OTHER RAIDS NOT THERE TO BE CHARGED?

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A. DON'T RECALL.

Q. SO IT'S POSSIBLE THAT IT THERE ARE 3 PEOPLE
THERE AND ARE DEFENDING THE AREA, CORRECT?

MR. GEORGE: OBJECTION, SPECULATION
THE COURT: OVERRULED

BY MR. GEORGE:

Q. IS THAT POSSIBLE?

A. YES

Q. YOU PROVIDE TESTIMONY AT THE PRELIMINARY HEARING
CONCERNING AN ARREST OF [redacted] ON
AUGUST 18TH, 2005?

A. I DON'T RECALL THE DATE, BUT I DID TESTIFY AT A
PRELIMINARY HEARING.

Q. AND YOU WERE THE ONLY ONE TO SEE WHAT YOU WERE
TESTIFYING TO, SO WAS CORRECT?

A. CORRECT.

Q. THERE WAS NO FOLLOW OFFICER WITH YOU WITH YOU
MADE THE OBSERVATIONS THAT YOU WERE TESTIFYING?

A. NO.

Q. IS THAT RIGHT?

A. THAT'S CORRECT.

Q. YOU PROVIDE TESTIMONY AT THE PRELIMINARY HEARING
CONCERNING AN ARREST OF [redacted] ON
AUGUST 18TH, 2005?

A. I DON'T RECALL THE DATE, BUT I DID TESTIFY AT A
PRELIMINARY HEARING.

Q. AND YOU WERE THE ONLY ONE TO SEE WHAT YOU WERE
TESTIFYING TO, SO WAS CORRECT?

A. CORRECT.

Q. THERE WAS NO FOLLOW OFFICER WITH YOU WITH YOU
MADE THE OBSERVATIONS THAT YOU WERE TESTIFYING?

A. NO.

Q. IS THAT RIGHT?

A. THAT'S CORRECT.

JURY INSTRUCTION

DEFENSE REQUEST NUMBER 11
POSSESSION - DEFINED

The government must prove beyond a reasonable doubt that defendant [redacted] possessed a firearm. The legal concept of possession may differ from the everyday usage of the word, so I will explain it to you now.

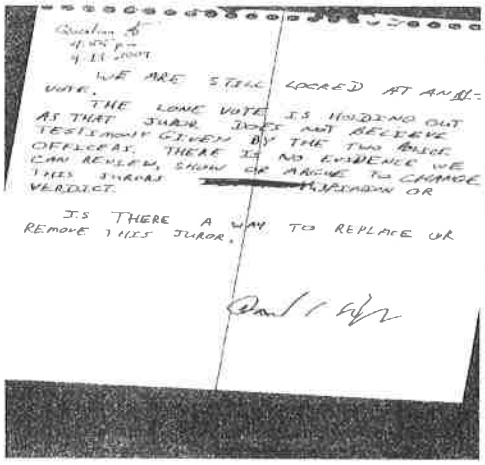
Actual possession is the thing you think it usually is: control of an object, and knowing that you have it. For example, if you had that like, clearly had a firearm on his person, and you were to find it on your first that he had possession of a firearm. However, a person need not have actual physical 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 individual control over it, then he is in possession of that item. As an example of this, if you have a apartment [illegible] possession of items he keeps in the safe deposit box of the 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 simply on the ground that defendant [redacted] was present at or near a firearm. Nor can it be found simply because Mr. [redacted] was present at a scene where a firearm was found, or which became in association with a person who did control it because the property where a firearm was found.

Authority And/Or Adapted From

United States v. Jackson, 90 F.3d 884 (3d Cir. 1996); 3 Sand, Sand, et al., Modern Federal Jury Instructions, Instruction 56-4 (2002) (modified).

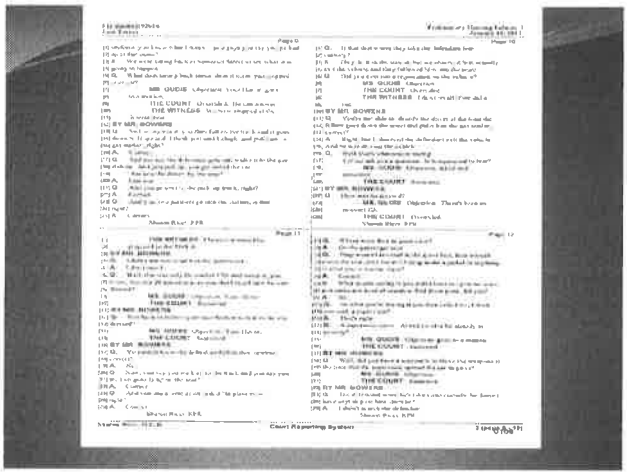
Therefore, you cannot find defendant A[redacted] in possession of any item unless it is proved beyond a reasonable doubt that he had direct physical control or authority over the item, or knowingly controlled and intended to control it.

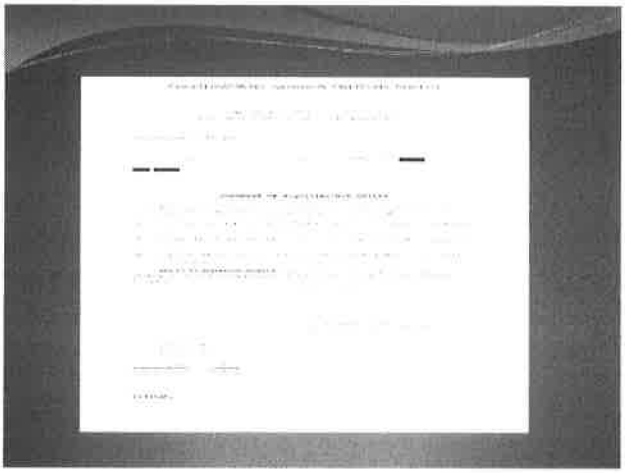

Question #
4:55 p.m.
4-11-2007

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 PERSUASION OR VERDICT.

IS THERE A WAY TO REPLACE OR REMOVE THIS JUROR.





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.

Retroactivity of *Johnson*?

- *Welch v. United States*, 136 S. Ct. 1257 (2016). *Johnson* announced new substantive rule of constitutional law that applies retroactively to ACCA cases on collateral review.

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*.

Vagueness and Advisory Guidelines

- The advisory Guidelines are not subject to vagueness challenges under the Due Process Clause.
- Therefore, U.S.S.G. § 4B1.2's (career offender guideline) residual clause is not void for vagueness.
- NOTE: The Court's holding is limited to the advisory Guidelines only, leaving open the possibility that defendants sentenced under the pre-*Booker* mandatory Guidelines may raise vagueness challenges to their sentence.

USSC Votes to Change Definition of COV

- The USSC's 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).

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 *(See Dimaya)*.

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.

Third Circuit View

- *United States v. Robinson*. 844 F.3d 137 (3d Cir. 2016) (holding categorical approach does not apply where robbery and § 924(c) were tried to the same jury)
- When the predicate COV offense and § 924(c) are tried together, categorical approach not required.
- Therefore, court must examine contemporaneous conviction to determine whether predicate is COV.

924(c)(3)(B) & 16(b)

- The residual clause in 18 U.S.C. § 16(b) uses language that is virtually identical to that which the high court declared unconstitutionally vague in the ACCA in *Johnson*.

- *Dimaya v. Lynch*, 808 F.3d 1110 (9th Cir. 2015) (applying *Johnson* and ruling that § 16(b) is unconstitutionally vague)
- *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding residual clause in the COV definition of 18 U.S.C. § 16(b) is unconstitutionally vague)

Implications

- *Sessions v. Dimaya* means that *Johnson*'s analysis is not limited to the ACCA. Therefore, any laws that use language like the residual clause (federal/state) should be declared unconstitutionally vague.

Post-*Dimaya*

- Post-*Dimaya* the Supreme Court has issued a number of GVR orders (grant, vacate, remand)
- The list of cases includes not only § 16(b) cases, but also numerous cases challenging § 924(c)'s residual clause.

- The 924(c) cases that were GVRed were: Glover v. United States, No. 16-8777; Taylor v. United States, No. 16-8996; Davis v. United States, No. 16-8997; United States v. Jenkins, No. 17-97; United States v. Jackson, No. 17-651; McCoy v. United States, No. 17-5484; Winters v. United States, No. 17-5495; Lin v. United States, No. 17-5767; Eizember v. United States, No. 17-6117; Enix v. United States, No. 17-6340; Ecourse-Westbrook v. United States, No. 17-6368; Carreon v. United States, No. 17-6926

10th Cir Holds 924(c) Residual Clause Void for Vagueness

- The residual clause of § 924(c)(3)(B) defining COV is unconstitutionally vague in light of *Sessions v. Dimaya*.
- Section 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combined to produce more unpredictability and arbitrariness than the DP Clause would allow.

United States v. Salas, No.2:12-CR-03183-RB-3, 2018 U.S. App. LEXIS 11665 (10th Cir. May 4, 2018).

Preserve, Preserve, Preserve

- Reading the Tea Leaves: the 924(c) residual clause may be struck down.
- File a MTD in every § 924(c) case. And if it is a plea, try to negotiate a conditional plea to preserve the issue (negotiate a carve-out if you have a plea agreement appeal waiver).
- Every § 924(c) case must be appealed.

OTHER ACCA CASES

- *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.

- *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.

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!