CRIMINAL DEFENSE AS IT RELATES TO GUN CASES

DONALD H. FLANARY, III.
Goldstein, Goldsetin & Hilley
29th Floor Tower Life Building
San Antonio, Texas 78205
(210) 226 – 1463
donflanary@hotmail.com

State Bar of Texas
WHAT EVERY TEXAS LAWYER NEEDS TO KNOW ABOUT FIREARMS LAW
September 27, 2013
Fort Worth

CHAPTER 11

Donald H. Flanary, III
Goldstein Goldstein & Hilley
310 S. St. Mary's St., Ste. 2900
San Antonio, Texas 78205
(210) 226-1463 donflanary@hotmail.com

Practice:

Criminal Defense
State and Federal Trial, and Appellate.

Education:

St. Mary's University School of Law, San Antonio, Texas, 2004, J.D.

St. Mary's University, 2000
Masters Degree: International Relations

Texas A&M – Commerce, 1999
Bachelor of Science: Political Science and Philosophy

Bar Admissions:

State of Texas
United States Supreme Court
U.S. Court of Appeals 5th Circuit
U.S. District Court Western District of Texas
U.S. District Court Southern District of Texas
U.S. District Court Northern District of Texas

Organizations:

Board of Directors - Texas Criminal Defense Lawyers Association
National Association of Criminal Defense Lawyers
Federal Bar Association
Bar Association of the Fifth Federal Circuit
American Bar Association
San Antonio Bar Association
San Antonio Criminal Defense Lawyers Association

Awards:

St. Mary's School of Law, Pro Bono Achievement Award
College of the State Bar of Texas - Member

TABLE OF CONTENTS

I. SCOPE OF ARTICLE:

This Lecture is designed to cover the established law and available defenses in gun cases, including emerging issues in firearm law from a defense perspective. This will cover both Texas state law and related Federal law.

II. DEFENDING FIREARM CASES

As a criminal defense attorney I believe in a vigorous strategy when it comes to defending clients. This is certainly true in firearm cases.

The 2nd Amendment is one of those pieces of law that are known by many outside the legal community. Lay persons, who do not know many specific pieces of statutory law, know the 2nd Amendment. The right to bear arms is often cited as a constitutional right by any interested party.

The courts are a key battleground where 2nd amendment rights are continually defended or eroded conversely. The tide is often shifting and it's the job of defense counsel in a firearm trial to safeguard not just the defendant's rights, but by extension all of our 2nd amendment rights.

III. FEDERAL FIREARM LAW

a. Proscribing Certain Persons

The government has long held that the right to bear arms is to be denied certain classes of individuals: persons unlawfully addicted to drugs, illegal aliens, anyone under indictment for or already convicted of a crime punishable by over a year, anyone dishonorably discharged from military service, persons whom are the subject of restraining or protective order, persons convicted of misdemeanor crime of domestic violence, those adjudicated to be mentally ill, and lastly, those who have renounced their citizenship. 18 USC § 922(g).

In a charge under § 922(g), the government must prove three separate elements of the offense. They must prove (1) the status of the person as that prohibited by the statute; (2) there was knowing possession of a firearm and it was (3) in or affecting interstate commerce. *United States v. Ybarra*, 70 F.3d 362, 365 (5th Cir. 1995)

1. FELON STATUS

The term "felon" in possession relies on 18 U.S.C. § 922 (g)(1) as anyone who has been convicted of a court of law for a crime punishable by a term exceeding one year. So, what does that mean for the defense?

Defense counsel should immediately check whether the indictment is using a predicate conviction that does not qualify as a felony as defined in 18 U.S.C. § 921. The definition lays out what the legislature meant when prohibiting firearm possession by persons whom have "been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." § 922 (g)(1). Firstly, the "business practice exception" is a white collar crime exception built into the statute, which excludes as predicate offenses: "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offense relating to the regulation of business practices" 18 U.S.C. § 921(20)(A). The statute then goes on to disallow use of "any State offense classified by the laws of the State as misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(20)(B). The latter exception, simply serves to clarify that it is felonies that are to be used as predicate offenses, even if

the state classified the offense as a misdemeanor. In other words, if a predicate offense is classified by a state as a misdemeanor and is punishable by 18 months in jail, and doesn't otherwise fall under § 922(g), then it cannot be used as predicate to a felon in possession charge. Yet if a state somehow classifies a crime as a misdemeanor that is punishable for more than two years, it may be used and is a felony as defined by federal law. If the state classifies it as a felony, the language of § 922 applies and the punishable term need only be more than one year.

So if the predicate offense falls into either of these statutory exceptions of white collar law or "misdemeanors" punishable by sentences under two years, then defendant is not a "felon" as defined in § 922. Therefore state jail felonies, punishable by more than a year, are valid predicate offenses unless they happen to fall under one of the statute's exceptions. *United States v. Caicedo-Cuero*, 312 F.3d 697, 700 (5th Cir. 2002)

The white collar exception built into the Federal statute seems to counter the argument that felons may be constitutionally denied their 2nd Amendment rights based on their disregard for the rights of others, as white collar crime certainly shows such disregard. The constitutionality of that exception has been challenged in the 5th Circuit as to its vagueness and was found constitutional in that regard. *United States v. Coleman*, 609 F.3d 699, (5th Cir. 2010) Here, the predicate felony offense was conspiracy and the government had proven effect upon competition as element of that offense, and therefore the conspiracy conviction fell within the "business practices exception" and could not support a conviction for violating § 922. *Coleman* at 704. Also, the court buttresses the precedent that when an appeal challenges either the validity or the interpretation of a federal statute, and therefore the standard of review is *de novo*. *Coleman* at 702 (5th Cir. 2010)

The clause also carves out exceptions for felons that have had their convictions pardoned or expunged, or if otherwise their civil liberties have been restored, so long as that restoration did not forbid firearm possession or use, etc. Although it does not happen often in Texas, this is an extremely important defense as it would pull the rug out from under the indictment. Defense counsel should diligently examine any and all predicate offenses. If the client should have had their civil rights restored, the predicate offense will no longer serve as basis for the charge.

To determine whether or not the civil liberty restoration aspect applies, the government uses a two prong test. *United States v. Chenowith*, 459 F.3d 635, (5th Cir. 2006) The first prong the courts use is to examine whether, either automatically or by certificate, essentially all of the person's civil rights had been restored. Included in the first prong of the *Chenowith* test, are three civil rights to examine in order to see whether or not there has been an essential restoration of all. These are comprised of the right to vote, the right to seek and hold public office, and the right to serve on a jury. *United States v. Huff*, 370 F.3d 454, 459-61 (5th Cir. 2004)

Secondly, if it is found that rights have been restored, the courts will look to "whether he 'was nevertheless *expressly* deprived of the right to possess a firearm by some provision of the restoration law or procedure of the state of the underlying conviction'" *Chenowith*, at 637, quoting *United States v. Thomas*, 991 F.2d 206, 213 (5th Cir. 1993) (emphasis in original).

It is mainly within the province of the state and convicting jurisdiction to

restore civil rights. The Supreme Court of the United States has determined that the second prong of *Chenowith* may be failed if any restriction at all is placed on firearm rights. *Caron v. United States*, 524 U.S. 308, 118 S. Ct. 2007, 141 L. Ed. 2d 303 (1998) (while restoring essentially all of felon's civil rights, Massachusetts carved out an exception solely prohibiting the carrying of handguns, this exception was sufficient to not meet the second prong of the test and to render the actor prohibited to possess any firearms under federal law.)

As the Supreme Court noted, Texas is one of several states that does not have a statutory scheme for restoration of rights. *Beecham v. United States*, 511 U.S. 368, 373 (1994). Additionally, to determine whether a person was still a felon and under the scope of the federal statute, the Courts of Appeals looks to the state law of the predicate conviction to decide if a successful restoration has occurred. Without explicit direction from the Texas Court of Criminal Appeals on the matter, The 5th Circuit found "[t]here is substantial support in Texas law for the proposition that persons convicted of a felony are still considered convicted felons even after they successfully complete community supervision." *United_States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001)

Defense counsel should be watchful of jury charges. When it comes to defining who is a "felon" under the statute, the government is not required to instruct the jury on the definition of the one year sentence.). The Court of Appeals has stated recently that because the definition under § 921(a)(20) including the phrase "crime punishable by imprisonment for a term in excess of one year," isn't strictly an element of the offense of § 922(g)(1), that "the district court committed no error in not instructing the jury on that legal definition." *United States v. Broadnax*, 601 F.3d 336, 347 (5th Cir. 2010) cert. denied, 131 S. Ct. 207, 178 L. Ed. 2d 124 (U.S. 2010)

2. POSSESSION

The government will try to prove either actual or constructive possession of the firearm. Actual possession will be shown by literal physical contact and control of the firearm, while constructive possession is established through a defendant's control over the area in which the firearm was found. *United States v. Smith,* 930 F.2d 1081, 1085 (5th Cir.1991); *United States v. Jones*, 484 F.3d 783, 788 (5th Cir. 2007);

In a recent 5th Circuit case, where the charge was of actual possession occurring during a robbery, the government was not permitted to argue constructive possession based on an incident 6 days later. *United States v. Houston*, 481 Fed. Appx. 188 (5th Cir. 2012). In that case, a robbery had occurred which two trash collectors witnessed. After conducting an investigation, law enforcement officials executed an arrest warrant of appellant at his house six days later for that robbery. During that arrest they found a sawed off shotgun in appellant's garage. At trial, appellant denied playing in part in the robbery, and stated he no longer lived at the house, although he had access to it. The case at hand charged him with actual possession in connection with the robbery. However, the trial court allowed a constructive possession jury instruction to be given the jury based on the shotgun being present at the house during the arrest. The government tried to argue that if the evidence was insufficient to find he actually possessed the firearm during the robbery, he may still be found guilty of constructive possession because of the firearm present during the arrest. The Court decided that whether or not appellant was constructively in possession of a firearm

during the arrest, the indictment in the present case was only for the actual possession occurring during the robbery and therefore jury instructions allowing either theory to be considered for conviction was error and abuse of discretion by the trial court. Therefore the government cannot instruct the jury to use either theory when only one is justified by the indictment. *Houston*, 481 Fed. Appx. 188 (5th Cir. 2012). And in another case, the government permits the jury to infer constructive possession by gauging for itself whether or not the defendant's explanation for the existence of the weapon in the locale was credible. *United States v. Mudd*, 685 F.3d 473 (5th Cir. 2012) (where parole officers discovered a shotgun during a consensual and routine house visit to parolee, parolee's deceased father had been a police officer and that explanation of the weapon's presence was a matter of credibility to be determined by the jury) In the *Mudd* case, appellant shared the home, owned by his mother, with his girlfriend and occasionally his mother. The court hews to the doctrine that to establish constructive possession, mere dominion and control over the premises is insufficient in cases of joint occupancy. *Mudd, Id.*

Constructive possession is less straight forward than proving actual possession, and therefore contains more vulnerability for the defense counsel to take advantage of when the government tries to overstep its bounds. Constructive possession is comprised of both knowledge and intent. Note that the government bears the burden of proving that defendant knew the thing was present and intended to exercise control over it. The government cannot be allowed to rely on constructive possession where the facts of the case charge only actual possession, simply because they feel their actual possession case is weak and may need to establish constructive possession as a backup plan. *Jones*, 484 F.3d at 790. In the *Jones* case, the Court ruled that because the government only had an actual possession possibility at hand, they could not admit prior offenses under Fed. R. Evid. 404(b) to establish either knowledge or intent for constructive possession, where there is only evidence of either actual or no possession at all. *Jones* at 790.

In the past, the government has attempted to establish possession without proving a nexus between a defendant and a firearm by evidence of merely sharing occupancy of the premises with another. The Court disallowed this method of proving nexus. "Mere control or dominion over the place in which contraband or an illegal item is found by itself is not enough to establish constructive possession when there is joint occupancy of a place." *United States v. Mergerson,* 4 F.3d 337, 349 (5th Cir.1993) cert. denied, 510 U.S. 1198 (1994); and *Mudd*, *Id.*

In trying to prove aiding and abetting a felon in possession of a firearm, the government has the burden to prove that the defendant knew or had reasonable cause to know about the co-defendant's felon status. *United States v. Murray*, 988 F.2d 518,521 (5th Cir. 1993).

The 5th Circuit has long gone over the methods for establishing possession. "In determining what constitutes dominion and control over an illegal item, this Court considers not only the defendant's access to the dwelling where the item is found, but also whether the defendant had knowledge that the illegal item was present." *United States v. De Leon,* 170 F.3d 494, 497 (5th Cir.1999) "In our previous joint occupancy cases, this court has adopted a commonsense, fact-specific approach to determining whether constructive possession was established." *Id.* (internal quotation

marks omitted). "We have found constructive possession in such cases only when there was some evidence supporting at least a plausible inference that the defendant had knowledge of and access to the weapon or contraband." *Id.*

This court has likewise determined that mere proof of dominion over a place or vehicle is insufficient to sustain a conviction, of which knowing possession is an element, where the contraband at issue was discovered in a hidden compartment. "[I]n order to satisfy the knowledge element in hidden compartment cases, this Court has normally required additional 'circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge.' " *United States v. Resio–Trejo*, 45 F.3d 907, 911 (5th Cir.1995) (quoting *United States v. Anchondo–Sandoval,* 910 F.2d 1234, 1236 (5th Cir.1990)). Inconsistent statements and implausible explanations are among the behaviors previously recognized in this circuit as circumstantial evidence of guilty knowledge. *See United States v. Ortega Reyna,* 148 F.3d 540, 544 (5th Cir.1998) *abrogated by United States v. Vargas-Ocampo*, 711 F.3d 508 (5th Cir. 2013) (holding that the "standard for reviewing sufficiency of evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")**.**

With regard to further discussion on *mens rea* required for possession, it should be noted that "innocent possession" has been deemed a valid defense and counsel should not shy from pressing it home when applicable. The defense in the D.C. Circuit case of *United States v. Mason*, 233 F.3d 619, 625 (D.C. Cir. 2000) managed to attain a reversal on appellant's conviction for unlawful possession of a firearm by a felon and the case was remanded for new trial. There, appellant had discovered the gun in a paper bag on his work delivery route, near a school and kept it in his possession with the intent to give it a police officer the next day whom he expected to see on his route. The Court stated that although it is a narrow defense, "it is easy to understand why the innocent possession defense-which focuses precisely on how the defendant came into possession of the gun, the length of time of possession, and the manner in which the defendant acts to rid himself of possession-is fully consistent with the legislative purpose underlying § 922(g)(1). *Mason* at 233. The D.C. Court also quotes *Logan v. United States*, 402 A.2d 822, 827 (D.C.1979) to describe how the defense is established, "'record must reveal 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. In particular, 'a defendant's actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.'" *Mason* at 233 quoting *Logan* at 827. The court maintained that the defense is admissible and credibility of such a defense is for the jury to decide. *Mason, Id.*

3. AFFECTING COMMERCE

On appeal to the Supreme Court on writs of certiorari, defense counsel should know that attacking the constitutionality of congress' power to regulate firearms has been long fought. "[T]he objection that the Act usurps police power reserved to the States is plainly untenable." *United States v. Miller*, 307 U.S. 174, 178 (1939) [upholding the constitutionality of the National Firearms Act.]

However, it is possible to win the fight over constitutionality with regard to proving the nexus to interstate commerce. In the notable case originating from San Antonio in the Western District of Texas, The Supreme Court has ruled to that effect. With the defendant charged with violating a federal law against possessing guns in school zones, the Court ruled that Congress' power under the Commerce Clause could not extend to regulating firearms in schools "since possession of gun in local school zone was not economic activity that substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549 (1995) This was a landmark case in firearm law while the Court curbed back the potentially unlimited exploitation of the Commerce Clause and Congress' power therein.

In the fight over proving the nexus of interstate commerce, the tide has ebbed and flowed. In 2005, the defendant convicted of being a felon in possession of ammunition, was later acquitted in that the government had constructively amended their indictment, and the commerce nexus was offered up through the ammunition's component parts having interstate origins. "Here, by contrast, the government seeks to uphold the interstate commerce element of the offense on the basis of facts—transportation of powder from Tennessee to Texas, of primer from South Dakota to Texas and of projectiles from Montana to Texas before any of those items were incorporated into any completed rounds—which facts are all wholly different than and distinct and separate from the only facts alleged in the indictment in respect to commerce, namely the necessarily subsequent transportation in interstate commerce of the completed rounds (as to which there was no evidence)." *United States v. Chambers*, 408 F.3d 237, 245 (5th Cir. 2005)

Recently, the Supreme Court denied certiorari on 9th Circuit case challenging the prohibition on a felon possessing body armor as exceeding Congress' commerce clause authority. Justices Scalia and Thomas voiced their dissent in denial, stating they would have granted certiorari in light of *Lopez*. The argument in the dissent is particularly persuasive in pointing out that the 9th Circuit court's opinion would seem to allow the criminalization of any product offered for sale that crossed state lines. To illustrate the point, they quote a 3rd Circuit opinion in a case of similar issue, "Congress arguably could outlaw 'the theft of a Hershey kiss from a corner store in Youngstown, Ohio, by a neighborhood juvenile on the basis that the candy once traveled ... to the store from Hershey, Pennsylvania.' *United States v. Bishop,* 66 F.3d 569, 596 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part). The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of french fries that have been offered for sale in interstate commerce." *Alderman v. United States*, 131 S. Ct. 700, 178 L. Ed. 2d 799 (2011) quoting *United States v. Bishop*, 66 F.3d 569, 596 (3d Cir. 1995)

And in the 5th Circuit, although it is government's burden to prove beyond a reasonable doubt that the weapon possessed was "in and affecting commerce", the nexus between the act and the interstate commerce element of the crime is an area where the government has found itself to be given wide latitudes. The 5th circuit allowed a conviction where an agent from the Bureau of Alcohol, Tobacco and Firearms was the key piece of evidence with his testimony that the gun was one that was made in Florida and made its way to Texas. "Finally, he testified that he did not know how the gun "particularly got to Texas in this instance, but it would have been bought and

sold in commerce." *United States v. Broadnax*, 601 F.3d 336, 343 (5th Cir. 2010) cert. denied, 131 S. Ct. 207, 178 L. Ed. 2d 124 (U.S. 2010)

This practice of relying on the testimony of agents from the Bureau of Alcohol, Tobacco and Firearms is not uncommon. *United States v. Wallace*, 889 F.2d 580, 584 (5th Cir. 1989) (where appellant argued that ATF agent's expert testimony with regard to the markings found on the gun, could not establish the gun's origins sufficient to overcome hearsay rules as exceptions under Fed.R.Evid. 702 and 703.)

Although the ATF's testimony has been allowed in that instance, their use of "trace forms", ATF form No. 7520.5, have been deemed inadmissible as evidence by not meeting criteria necessary to be considered under Fed. R. Evid. 803(6). *United States v. Davis*, 571 F.2d 1354, 1358 (5th Cir. 1978) (where the Bureau attempted to argue that the forms were admissible as exceptions to the hearsay rule as "public records or reports" and the court found them rather to be factual findings resulting from an investigation) The ruling barring the ATF from using trace forms has been followed in other circuits as well. *United States v. Simmons*, 773 F.2d 1455, 1458 (4th Cir. 1985) However, a dissimilar finding was found in the 11th Circuit with regard to Honduran naval records *United States v. Martinez*, 700 F.2d 1358, 1365 (11th Cir. 1983).

Somewhat related to the commerce element is simply the constitutionality of prohibitive firearm law based on 2nd Amendment rights which has come before the Court of Appeals. The 5th Circuit has found in *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004), that the law did not violate right to bear arms. The *Everist* court found that a felon has shown a "manifest disregard for the rights of others, and so a felon could not justly complain about limitations on his liberty when his possession of a firearm would otherwise threaten the lives of his fellow citizens." *Id*.

b. POSSESSION BY UNLAWFUL USERS OF CONTROLLED SUBSTANCES 18 USC § 922(g)(8)

The ruling in *Everist* would suggest that a door may be open to proving that the prohibition violates a person's 2nd Amendment rights if they could show that they did not exhibit disregard for the rights of others, potentially such as the § 922's prohibiting of persons unlawfully addicted to a controlled substance from possessing a weapon. However, in 2005 the 5th Circuit did not avail that viewpoint, and hewed to the law as set down in *Everist* as applicable to unlawful users of controlled substances as well. *United States v. Patterson*, 431 F.3d 832, 836 (5th Cir. 2005) (where appellant was found with evidence of several bags of marijuana, marijuana paraphernalia, and growing plants of marijuana in 2 bucket containers, he was found to be constitutionally denied the right to bear arms as belonging to a "limited, narrowly tailored exception.") Similarly, *United States v. McCowan*, 469 F.3d 386, (5th Cir. 2006) and *United States v. Roach*, 201 Fed. Appx. 969, 974 (5th Cir. 2006).

Controlled substances are those defined in the Controlled Substances Act 21 U.S.C. § 802. To define an "unlawful user" of a controlled substance, the courts have held slightly varying rulings on what constitutes that classification. The 4th Circuit applied the statute "reasonably" to a user of marijuana who was smoking in his vehicle and thus attracted the attention of a law enforcement officer. The officer conducted an investigatory stop of the individual and

inquired about weapons also being in the vehicle. *United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002) Note that the 7th Circuit has found that the bar to possessing firearms only applies to current users of illegal drugs, and not former users. The court stated "unlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user like Yancey could regain his right to possess a firearm simply by ending his drug abuse. In that sense, the restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill." *United States v. Yancey*, 621 F.3d 681, 686-87 (7th Cir. 2010) (where the person convicted of the violation was shown to be a current user at the time of the offense and not simply someone who had formerly used illegal drugs, and then possessed a firearm illegally)

The 5th Circuit addressed the issue of defining an "unlawful user" as one "who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction" *United States v. Herrera*, 289 F.3d 311, 322 *reh'g en banc granted, opinion vacated*, 300 F.3d 530 (5th Cir. 2002) and *on reh'g en banc*, 313 F.3d 882 (5th Cir. 2002). While the 8th Circuit requires a person whose use may be described as "actively engaging" *United States v. Boslau*, 632 F.3d 422, 430 (8th Cir. 2011) And the 6th Circuit's definition of use that is "in a manner other than as prescribed by a licensed physician" *United States v. Burchard*, 580 F.3d 341, 351 (6th Cir. 2009) (where jury instruction defining "unlawful" user to that affect was not overly broad) See also *United States v. Muniz Tellez*, 251 Fed. Appx. 915, 916 (5th Cir. 2007) (where the 5th Circuit held movant was foreclosed by precedent for seeking a *Herrera* type instruction)

c. PROTECTIVE ORDER, 18 USC § 922(g)(8)

Federal law also proscribes possession of a firearm by any individual who is the subject of a court order protecting an intimate partner or family member or injunction restraining that person from the proximity of the other for specific reasons regarding the latter's safety. There are three categories to this statute. These include one who is the subject of a court order that 1) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; 2) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and 3) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; 18 U.S.C. § 922.

An often cited case that falls under this section of the statute is the 5th Circuit's *United States v. Emerson*, 270 F.3d 203, (5th Cir. 2001). Here, the subject of the court order argued that it contained no express finding that he presented a credible threat to his wife or child. The court stands unpersuaded by the argument, and holds that with such an order as they had in the present case, the *likelihood* that irreparable harm would occur must be present. They therefore state that Congress was within its rights to proscribe the possession of a firearm in the context of such a likelihood and court order. *Emerson, Id* Similarly, *see United States v. Spruill*, 292 F.3d 207, 220 (5th Cir. 2002)

(where the court was troubled by the lack of a hearing date, and therefore conviction was vacated and remanded)

Chronology is important to the defense in cases involving these types of court orders. In one case, appellant's argument attacking the validity of the court order was rejected on the grounds that it was not a timely objection to the court order. The court stated that "If Hicks truly believed that it was invalid, he should have objected to the Fannin County Court's subject-matter jurisdiction at the original court hearing, appealed the order for lack of jurisdiction, or sought a writ of mandamus from the local appellate court *before* possessing either firearms or ammunition." *United States v. Hicks*, 389 F.3d 514, 536 (5th Cir. 2004) Other circuits hold similar opinions that "defendant may not collaterally attack the underlying protective order" *United States v. DuBose*, 598 F.3d 726, 732 (11th Cir. 2010) and the 4th Circuit very recently, "we have found that there is a reasonable fit between § 922(g)(8) and the substantial governmental objective of reducing domestic gun violence" *United States v. Mudlock*, 483 Fed. Appx. 823 (4th Cir. 2012)

d. PERSONS CONVICTED OF MISDEMEANOR CRIME OF DOMESTIC VIOLENCE, 18 USC § 922(g)(9)

This section of the statute proscribes the possession of a firearm by anyone "who has been convicted in any court of a misdemeanor crime of domestic violence.". The definitions section of the chapter defines "misdemeanor crime of violence" as having "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim" 18 U.S.C. § 921.

Again, this is an important reminder of the need to take a closer look at predicate offenses. As the 5th Circuit in a 2001 case reversed and remanded a conviction based on the lack of applicability in the state conviction used as predicate offense. "Because section 22.07(a)(2) is not 'an offense that ... has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon' against the victim, as required by section 921(a)(33)(A), it is not a crime of domestic violence for purposes of section 922(g)(9). *United States v. White*, 258 F.3d 374, 384 (5th Cir. 2001) The *White* underlies the importance of a good defense in firearm law.

e. POSSESSION OF FIREARM ILLEGAL ALIEN, 18 USC § 922(g)(5)

The courts have established that pending applications for legal residency cannot be used as proper defense to § 922(g)(5). The focus of when to examine the illegal alien's status is at the time of possession of the firearm. If the illegal alien has not yet been granted lawful residency in the United States, mere petition for said status is untenable as defense. *United States v. Flores*, 404 F.3d 320, 328 (5th Cir. 2005) However, very soon after *Flores*, the court recognized that if "temporary protected status" is granted, then a § 922 conviction cannot be upheld as the convicted person's status in this country is at that point lawful. "Thus, the plain language of section 922(g)(5)(A) provides support for the proposition that his presence in the United States was lawful at the time alleged in his

indictment. At the very least, it does not unambiguously indicate that his presence was unlawful." *United States v. Orellana*, 405 F.3d 360, 366 (5th Cir. 2005)

Second Amendment challenges have been made by illegal aliens, but the 5th circuit has found that is not a proper defense in light of their status. They concluded "that the rights conferred by the Second Amendment do not extend to individuals like Mirza who are unlawfully in the United States. Because he does not possess a right to keep and bear arms, he is foreclosed from arguing that his weapons and ammunition convictions violate his Second Amendment rights. His Second Amendment challenge to his convictions under Section 922(g)(5)(A) is therefore unavailing. *United States v. Mirza*, 454 Fed. Appx. 249, 257 (5th Cir. 2011) *cert. denied,* 132 S. Ct. 1725 (2012) and *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011), as revised (June 29, 2011), cert. denied, 132 S. Ct. 1969 (2012)

The *Mirza* case is also significant from a defense perspective because it precluded the attack of the statute as requiring a heightened *mens rea* with regard to knowing it was illegal for defendant to possess a firearm if in the United States illegally. Defense counsel attempted to rely on the Supreme Court decision *Lambert v. People of the State of California*, 355 U.S. 225 (1957). However, the opinion of the court in *Mirza* states "('Knowingly'—in contrast to at least some uses of 'willfully'—does not require that the defendant know that his actions are unlawful, but only that he know he is engaging in the activity that the legislature has proscribed."). We therefore reject *Mirza's* effort to graft a higher mens rea requirement onto Section 922(g)(5). *United States v. Mirza*, 454 Fed. Appx. 249, 260 (5th Cir. 2011) *cert. denied,* 132 S. Ct. 1725 (2012). Although rejected in that instance, the defense was an aggressively interesting strategy.

With regard to sentencing, the 5th Circuit recently vacated a sentence relying on an illegal alien in possession of a firearm crime but it was due to timeliness of the sentence and proper consideration by the probation office. The Court deemed it "was plain error that substantially affected Aguirre's rights because, as noted above, it is not clear that his sentencing guideline range was properly calculated or that the sentence imposed was the result of a meaningful consideration of all relevant factors" *United States v. Aguirre-Alva*, 459 Fed. Appx. 395, 397 (5th Cir. 2012)

Proper admonishment is required when a rights are given up by plea or waiver. In a recent case, a defendant's firearm possession conviction was vacated and remanded due to improper admonishment. *United States v. Carreon-Ibarra*, 673 F.3d 358 (5th Cir. 2012) Therefore proper admonishment of the loss of any constitutionally guaranteed rights should always be accompanied by proper admonishment, reflected in the trial record, as a matter of Due Process. If a defendant is charged with unlawful possession of a firearm and the record does not reflect a proper admonishment regarding such loss of rights, defense counsel should argue that it is any plea made was not knowing and voluntary, and therefore not valid to be used as a predicate offense. This is therefore an area that defense counsel should be continually be pressing.

f. MULTIPLICTY DOUBLE JEOPARDY

The prohibitive class status of the defendant is always the basis for the charges under § 922, and therefore it is inappropriate

for the government to charge multiple counts of violating the statute for possessing multiple firearms. If the government does move forward with multiple counts of a § 922 charge, the convicting court may only return one conviction and one sentence. *Ball v. United States*, 470 U.S. 856, 862, 105 S. Ct. 1668, 1672, 84 L. Ed. 2d 740 (1985); and where the government has indicted on multiple charges arising under distinct and separate statutes, they may still only return one conviction and sentence if they arise from a single instance. *United States v. Berry*, 977 F.2d 915, 919-20 (5th Cir. 1992) Similarly, "As applied to the facts of this case, § 924(c)(1) is ambiguous, so we apply the rule of lenity and decide that the statute does not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses." *United States v. Phipps*, 319 F.3d 177, 183 (5th Cir. 2003) See

However, the government has been able to get convictions affirmed for violating more than one statute where they require the government to provide different elements of proof. *United States v. Nation*, 832 F.2d 71, 74 (5th Cir. 1987), where appellant's cumulative sentences were affirmed as having different evidence provided to establish violations of § 922(g) and § 922(i), possessing a firearm as a prohibited person and firearm being stolen, respectively.

Additionally, it should be noted that the government cannot try to bring multiple cases against a single individual for possessing a firearm and simultaneously falling in more than one of those restricted categories. *United States v. Munoz–Romo,* 989 F.2d 757, 759–60 (5th Cir.1993) and *United States v. Ortiz-Gonzalez*, 115 Fed. Appx. 696, 698 (5th Cir. 2004), where dual charges of being a felon in possession and illegal alien in possession with regard to the same weapon were multiplicities and violated double jeopardy.

g. DEALING/EXPORTING/ POSESSION OF FIREARMS WITHOUT A LICENSE AND FIREARMS WITH AN OBLITERATED SERIAL NUMBER

The statutory defense to dealing firearms without a license is that the dealer was not engaged in the business of dealing in firearms, but rather is a person who makes occasional sale for the enhancement of a personal collection or for a hobby. To overcome the "hobby exception", the government must show that the dealer acted willfully. The Supreme Court held that willfulness was satisfied by showing "an evil meaning mind. *Bryan v. United States*, 524 U.S. 184, 192, 118 S. Ct. 1939, 1945, 141 L. Ed. 2d 197 (1998) And similarly in another case, "the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she was making false statements in connection with the acquisition of firearms" *Dixon v. United States*, 548 U.S. 1, 5-6, 126 S. Ct. 2437, 2441, 165 L. Ed. 2d 299 (2006)

"Government failed to meet the preponderance of evidence standard to warrant an enhancement of Green's sentence. Although Green admitted that she bought the firearms in question and knew her actions were illegal, the record is devoid of any evidence showing that she knew or had reason to believe that Gardea and FNU LNU intended to use or dispose of the firearms unlawfully." *United States v. Green*, 360 Fed. Appx. 521, 525 (5th Cir. 2010)

h. SPECIFIC DEFENSES, ENTRAPMENT, INOPERABILITY

Defense counsel for appellant in the 11th Circuit Court of Appeals managed to get the lower court reversed where they ruled that entrapment by estoppel was not an available defense. "That simply is not true." *United States v. Thompson*, 25 F.3d 1558, 1563 (11th Cir. 1994) The 11th Circuit court states that entrapment by estoppel differs from the plain defense of entrapment in that it relies on the conduct of law enforcement over the defendant's predisposition to committing the offense. The doctrine applies when a defendant believes his conduct to be legal, and is told otherwise by officials. The underlying case in *Thomson* involved a defendant who was working with law enforcement to gather evidence on others, when he was told he would be given immunity and was thereafter charged with possession of a firearm by a felon and making false statements to a firearm dealer. *Thompson, Id.*

The 5th Circuit has rejected entrapment by estoppel as a defense. "The evidence adduced at both the motions hearing and trial does not show that either the firearms dealer or another government official affirmatively represented to Uresti–Careaga that he could legally possess ammunition. The record thus refutes Uresti–Careaga's claim of entrapment by estoppel. *See Trevino–Martinez,* 86 F.3d at 69.

Uresti–Careaga complains that he did not know his possession of the ammunition was unlawful; however, a § 922(g)(5)(B) violation is not a specific intent crime. *United States v. Uresti-Careaga*, 281 Fed. Appx. 404, 405-06 (5th Cir. 2008) The Court used the ruling in *United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir. 1996) to illustrate that entrapment is untenable as a defense in many situations due to § 922 not being specific intent crime.

Neither inoperability nor abandonment of the firearm is available to counsel as a defense to possession. "Perez had possession, either actual or constructive." *United States v. Perez*, 897 F.2d 751, 754 (5th Cir. 1990) In *Broadnax*, the "frame" of the gun was determined to be potentially usable to expel projectiles and therefore sufficient to meet the definition under the statute in order to obtain a conviction. "As discussed above, this is a distinction without a difference." *United States v. Broadnax*, 601 F.3d 336, 344 (5th Cir. 2010) *cert. denied*, 131 S. Ct. 207, 178 L. Ed. 2d 124 (U.S. 2010)

i. PENALTIES UNDER 18 USC § 924, INCLUDING THE ARMED CAREER CRIMINAL ACT

Title 18, section 924 regulates penalties for crimes such as the carrying and use of a firearm during a drug related or violent crime. It also provides the penalty requirements with regard to the same said crimes. § 924(c) requires a consecutive sentence of not less than five years for anyone who in relation to a drug trafficking crime or crime of violence, uses or carries a firearm. Alternatively, the statute requires that a person can commit an offense by possessing a firearm in furtherance of any such crime. The courts have found that this implies 2 different ways of violating the statute. "The two prongs of the statute are separated by the disjunctive 'or,' which, according to the precepts of statutory construction, suggests the separate prongs must have different meanings. *United States v. Combs*, 369 F.3d 925, 931 (6th Cir. 2004); see also *United States v. Owens*, 224 Fed. Appx. 429, 430 (5th Cir. 2007).

The statute also increases the mandatory minimum from five years to seven years if the weapon is brandished. If discharged, the minimum goes to ten years. The use of certain types of weapons and devices, such as a machine gun or a silencer, will add thirty years to the sentence, regardless of brandishing or discharge. The defendant in a 5th Circuit opinion successfully argued that the use and possession of the firearm was not in furtherance of the drug crime for which he was convicted, and therefore his conviction for violating § 924 was vacated. "The record as a whole does not show that Owens's possession of firearms furthered, advanced, or helped forward his drug trafficking activities" *United States v. Owens*, 224 Fed. Appx. 429, 430 (5th Cir. 2007); see also *United States v. Timmons*, 283 F.3d 1246, 1254 (11th Cir. 2002)

It is important to distinguish the question of whether the requisite acts in the statute and their accompanying sentencing requirements are offenses to be proven to a jury or sentencing guidelines to be proven to a judge by the lesser standard of a preponderance of the evidence. The statute had blurred the lines between elements and sentencing but recently, the Supreme Court has cleared that delineation at least in respect to the part of the statute which mandates a 30 year sentence for the use of either a machine gun or a silencer in furtherance of the aforementioned crimes of violence or drugs. The court in *United States v. O'Brien*, 130 S. Ct. 2169, 2178, 176 L. Ed. 2d 979 (2010), found that the mandatory 30 year sentence for using either of those particular weapons or devices was an element of the crime rather than a sentencing requirement, and therefore must be proven to the jury beyond a reasonable doubt rather than proven to a judge by a preponderance of the evidence. In the words of Justice Kenedy, "Perhaps Congress was not concerned with parsing the distinction between elements and sentencing factors, a matter more often discussed by the courts when discussing the proper allocation of functions between judge and jury. Instead, it likely was more focused on deterring the crime by creating the mandatory minimum sentences. But the severity of the increase in this case counsels in favor of finding that the prohibition is an element, at least absent some clear congressional indication to the contrary. *O'Brien* at 2178.

O'Brien is a crucial case for defense in firearm cases. Although specifically referencing the machine gun and silencer section of the statute, the principle could potentially be extended to any part of the statute that mandates a sentence for the described act. The Court was persuaded by the lengthy sentence of the mandated thirty years, *O'Brien* at 2178, but the argument can and should be made that its ruling applies to any part of the statute and the government should not be allowed to prove any aspect of § 924 through a preponderance of the evidence. This brings the Court back toward hewing to the principle set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361, 147 L. Ed. 2d 435 (2000) (where the Court ruled that any fact other than a prior conviction that adds to sentencing beyond the prescribed statutory maximum, must be shown to a jury and proven beyond a reasonable doubt)

Any defense counsel willing to argue a section is an element rather than sentencing factor should be aware of the history and context of the argument before *O'Brien*. Prior to the 2010 Supreme Court case, the Court in 2002, *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), had stated that brandishing a weapon in furtherance of the crime was a sentencing factor rather than an element of the offense. In *Harris*, the Court specifically found that brandishing, §

924(c)(1)(A), was part of the sentencing section of the statute, after the initial paragraph that composed the elements of the crime. The sixth circuit then departed from *Harris* in another similarly named case, *United States v. Harris*, 397 F.3d 404, (6th Cir. 2005). There, the court ruled that in light of *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, they distinguish "those aspects of crimes traditionally considered elements from those traditionally considered sentencing factors, the § 924 Firearm-Type Provision mandatory minimum is not binding on a sentencing court unless the type of firearm involved is either admitted by the defendant or charged in the indictment and proved to a jury beyond a reasonable doubt." *Harris* at 414. In 2013, the Supreme Court overruled *Harris v. United States* holding that any "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (U.S. 2013).

Very Recently, in an opinion from the D.C. Circuit Court of Appeals, the NACDL and appellant argued that in light of *O'Brien* and the clear demarcation of the machine gun section as an element of the offense to be proven beyond a reasonable doubt to the jury, the statute carries with it an implicit heightened *mens rea* requirement, specifically that appellant knew his weapon had automatic capability and was therefore a machine gun. Unfortunately, the D.C. Court rejected that argument. They often referred to Congress' creation of other law that did not explicitly require heightened *mens rea* such as the Mann Act which does not require the government to prove beyond a reasonable doubt that the defendant knew the young person they enticed was under the age of 18. *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012).

The government has repeatedly used sentence enhancements under the USSG to get a four level increase for persons found with controlled substances and a firearm. The guidelines allow for increases when the firearm is present in furtherance of the felony charged. U.S.S.G. § 2K2.1 To be successful when using this guideline in drug cases, the government must show that the amount is more than that of personal consumption level and is enough to infer trafficking, and that there is a nexus between the firearm(s) and the drugs found. The statutes for sentence enhancement require that the firearm be present in furtherance of the drug trafficking, such as what they refer to as the "fortress" theory, where a person used the firearm to either ward off drug thieves or facilitate a drug deal or embolden themselves while carrying out the felonious conduct. The government must prove this theory, as mere coincidental presence of the firearm during the felony is legally insufficient. *United States v. Taylor*, 648 F.3d 417, 432 (6th Cir. 2011)

In one recent case, the Supreme Court reviewed a case where the defendant had been convicted and sentenced under the Armed Career Criminal Act. The Court looked to the State law in the jurisdiction of the convicting court to examine the validity of the predicate offense. There, with Justice Scalia writing for the majority, the Court determined that Florida Law's statutory elements of battery did not require enough force to make appellant's predicate conviction a "violent felony" for the purposes of a predicate offense under the ACCA. *Johnson v. United States*, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)

a. Federal pattern jury instructions for § 924(c)(1):

The federal pattern jury instruction for § 924 reads as follows:

> Title 18, United States Code, Section 924(c)(1), makes it a crime for anyone to use or carry a firearm during and in relation to a drug trafficking crime *[crime of violence]* or to possess a firearm in furtherance of such a crime.
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:
>
> - *First*: That the defendant committed the crime alleged in Count . I instruct you that is a drug trafficking crime *[crime of violence]*; and
> - *Second*: That the defendant knowingly used *[carried]* a firearm during and in relation to *[knowingly possessed a firearm in furtherance of]* the defendant's alleged commission of the crime charged in Count .
>
> To prove the defendant "used" a firearm in relation to a drug trafficking crime *[crime of violence]*, the government must prove that the defendant actively employed the firearm in the commission of Count_____ , such as a use that is intended to or brings about a change in the circumstances of the commission of Count _____. "Active employment" may include brandishing, displaying, referring to, bartering, striking with, firing, or attempting to fire the firearm. Use is more than mere possession of a firearm or having it available during the drug trafficking crime *[crime of violence]*.
> To prove the defendant "carried" a firearm, the government must prove that the defendant carried the firearm in the ordinary meaning of the word "carry," such as by transporting a firearm on the person or in a vehicle. The defendant's carrying of the firearm cannot be merely coincidental or unrelated to the drug trafficking crime *[crime of violence]*.
> [To prove the defendant possessed a firearm "in furtherance," the government must prove that the defendant possessed a firearm that furthers, advances or helps forward the drug trafficking crime *[crime of violence]*.]
> "In relation to" means that the firearm must have some purpose, role, or effect with respect to the drug trafficking crime *[crime of violence]*.

2A Fed. Jury Prac. & Instr. § 39:18 (6th ed.)

j. Defining Crimes of Violence and Drug Crimes

In defining what a crime of violence or crime involving controlled substances is, the statutes make clear their definitions. A statutory definition makes a crime of violence one that is defined as an act that "has as an element the use, attempted use, or threatened use of physical force against the person of another" U.S.S.G. § 4B1.2. Recent case law from the 5th Circuit is as follows "In deciding whether a prior statute

of conviction qualifies as a crime of violence, this court has alternatively employed (1) a 'common sense approach,' defining the offense according to its 'ordinary, contemporary, [and] common meaning,' or (2) a 'categorical approach,' defining the offense according to a 'generic, contemporary definition.' " *United States v. Mungia–Portillo*, 484 F.3d 813, 816 (5th Cir.2007) (alteration in original) (citations omitted). The particular approach used depends on whether the prior offense constitutes a crime of violence (1) because it is an enumerated offense or (2) because it has as an element the use or attempted use of force. If it is the former, then the common sense approach is used; if it is the latter, then the categorical approach is used." *United States v. Olalde-Hernandez*, 630 F.3d 372, 374 (5th Cir. 2011) Defense counsel should never allow the government to assert that mere possession of a firearm constitutes a crime of violence. This definition would be lacking in meeting even the statutory level of "violence".

A drug crime, or crime involved with controlled substances, has also been thoroughly defined by the statutes and by courts. A "controlled substance" is defined by the Controlled Substances Act. Case law from the 5th Circuit has more clearly defined what may be used as a predicate offense qualifying as a "drug crime" for § 924. "Mere possession of illegal drugs, without more, is not a 'controlled substance offense' for these purposes. *Salinas v. United States,* 547 U.S. 188, 126 S.Ct. 1675, 164 L.Ed.2d 364 (2006). Here, Neal was found with 'undetermined' amounts of illegal drugs in his home. The district court did *not* make a finding that Neal possessed the drugs 'with intent to manufacture, import, export, distribute, or dispense.' *See* § 4B1.2(b). Indeed, the government concedes that there is no evidence in the record to support such a finding. Accordingly, Neal did not possess the firearms in connection with a 'controlled substance offense,' and application of the enhancements in § 4B1.4(b)(3) & (c)(2) was erroneous. *United States v. Neal*, 578 F.3d 270, 273-74 (5th Cir. 2009) and quoting *Salinas v. United States,* 547 U.S. 188 (2006).

The court in *Neal* specifically declined to allow the cocaine possession charge to act as un underlying drug crime in connection with possession of a firearm. This is a classic example of aggressive defense strategy delivering the desired result and further establishing good law. It is also noteworthy that the Supreme Court of the United States found "A person does not "use" a firearm under 18 U.S.C. § 924(c)(1)(A) when he receives it in trade for drugs. *Watson v. United States*, 552 U.S. 74, 128 S. Ct. 579, 580, 169 L. Ed. 2d 472 (2007) Here, the Court in *Watson* refused to allow the government to claim that the firearm being traded for drugs was being "used" in connection with a drug crime. It was simply bartered away.

k. POSSESSION OF A FIREARM UNDER THE REVENUE CODE, 26 U.S.C. § 5861, THE NATIONAL FIREARMS ACT

The National Firearms Act criminalized certain conduct with respect to firearms under the Internal Revenue Code. Title 26, Section 5861 states that

> It shall be unlawful for any person--
>
> **(a)** to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required

by section 5801 for his business or having registered as required by section 5802; or

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or

(h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

(l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

26 U.S.C. § 5861

A landmark case arising under charges brought by this Act was *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994). Here, the Court ruled that the *mens rea* component is a matter of law to be determined by the court, and that with regard to the instant case and § 5861, gun owners in violation of the statute would have to possess the requisite *mens rea* that they did so unlawfully. The court was mindful that without the requisite *scienter*, large masses of innocent gun owners would become criminals under the statute. In the words of the court, they found "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply. *Staples* at 618-19. And "We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect." *Staples* at 620. Note also, "the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant." *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)

IV. TEXAS LAW

a. Standard law

Texas, in large part, follows much of the federal patterns of proscribing firearm possession or use in specific situations or by specific persons. However, we do differ from the Federal law in some significant areas that everyone should be aware of.

Texas has codified its own version of 18 USC § 922 as Chapter 46 in the Texas Penal Code. The Texas statute allows for possession of a firearm five years after the person has been released from confinement, but only at the location where the person lives. Tex. Pen. Code Ann. § 46.04

The Texas Court of Criminal Appeals has held that determining crimes of violence must be examined and determined by the facts at hand. In one case, they held that "breaking" in a burglary was not sufficient evidence per se of establishing a crime of violence. As the court stated, "We now reaffirm this holding and state unequivocally that proof sufficient to establish "breaking" in a burglary prosecution under our former penal code, see V.A.P.C. Articles 1389 et seq., 1404b, does not *automatically* establish violence to property under § 46.05, supra. *Gardner v. State*, 699 S.W.2d 831, 836 (Tex. Crim. App. 1985)

The Texas statute states that a person commits an offense when the person has been convicted of a felony offense and possess a firearm under either (1) After conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision, parole, or mandatory supervision, whichever date is later; or (2) After the period described above, at any location other than the premises at which the person lives. Tex. Pen. Code Ann. § 46.04

The government can use state jail felonies to predicate charges of a felon in possession of a firearm. "[W]e are compelled to conclude that persons convicted of state-jail felonies may be prosecuted under Section 46.04 *Tapps v. State*, 294 S.W.3d 175, 179 (Tex. Crim. App. 2009)

Additionally, if the defendant has been punished by a Class A misdemeanor involving assault of a family member, they would be prohibited from possessing a firearm. In any case, defense counsel should always check that defendant was properly admonished regarding this revocation of a right.

Although the Texas statutes do not create specific defenses, common law claims of self-defense and necessity could be argued in certain cases. A self-defense claim may warrant a felon to possess, carry, and or use a firerarm in the actual course of conflict, so long as the felon did not provoke the conflict in accordance with standard self-defenses. As long as there is genuine belief in fear of safety, the defense is lawful. *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982); and though overruled in part, portion still applicable to point at hand *Johnson v. State*, 650 S.W.2d 414 (Tex. Crim. App. 1983) *overruled by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002)

This self-defense is related to the idea of necessity. Necessity could also be argued separately. Under certain circumstances, a felon's possession of a firearm could be lawfully warranted. *Vasquez v. State*, 830 S.W.2d 948 (Tex. Crim. App. 1992), (where Court of Criminal Appeals held that evidence raised issue as to the defense of necessity, and trial counsel was ineffective in failing to request an instruction thereon.) The *Vasquez* court further establishes that defense counsel in gun control cases should examine every avenue of defense, and in the instant case, necessity was vital to defendant's relief from conviction.

b. Prohibited in certain premises

Texas has also codified the prohibition of weapons on certain premises. It is a statutory defense to the unlawful possession of a weapon within 1000 feet from a specified premise that the person possessed the firearm while in a vehicle while being driven on a public road or at the actor's residence or place of employment.

When it comes to Texas' prohibition on certain classifications of weapons, there are specific statutory defenses in place. If the person's conduct with the weapon was incidental to the performance of official duty by the armed forces or national guard, or government law enforcement agency, or correctional facility.

Texas also allows for defense of possession of certain firearms, under the "curio defense." This allows for the possession of firearms that are antiques or collectables. However, as an affirmative defense to the Texas statute, the burden is on the defendant to prove that the weapon does not fall under the definition of "firearm" as defined by statute. *Cantu v. State*, 802 S.W.2d 1, 2 (Tex. App.--San Antonio 1990, pet. ref'd) Defense counsel should therefore be watchful of any indicators that the item in question is in fact an antique under the "curio defense".

c. Texas's Concealed Handgun Law

Texas' concealed handgun laws are a specific area of law that differs with federal law in its issuance of licenses to carry a concealed handgun. The law covering who in Texas is eligible to carry a concealed weapon is governed by Tex. Gov't Code § 411.172. Certain Texas decisions have ruled on who may obtain a concealed handgun license. In this case arising from Fort Worth, "Tune did not receive deferred adjudication, but was adjudicated guilty and subsequently placed on probation. It would lead to an absurd result for the legislature to purposely deny a concealed handgun license to those *never* adjudicated guilty because of successful completion of deferred adjudication, yet allow someone adjudicated guilty, who subsequently completes probation and has the indictment dismissed, the privilege of obtaining a license. *Texas Dept. of Pub. Safety v. Tune*, 977 S.W.2d 650, 653 (Tex. App.--Fort Worth 1998) aff'd, 23 S.W.3d 358 (Tex. 2000)

d. Discharge or Display of Firearm

In Texas, it is against the law to intentionally or knowingly:

- discharges a firearm in a public place other than a public road or a sport shooting range
- displays a firearm or other deadly weapon in a public place in a manner calculated to alarm
- discharges a firearm on or across a public road

Tex. Pen. Code Ann. § 42.01

Texas has criminalized this under its Disorderly Conduct statute, Chapter 42 of the Texas Penal Code. Statutory defenses to this provision are that it is a "defense to prosecution for disorderly conduct for discharging a firearm that the person who discharged the firearm had a reasonable fear of bodily injury to the person or to another by a dangerous wild animal." Tex. Pen. Code Ann. § 42.0 In one interpreting Texarkana case, a juvenile was charged with violating the statute after having his pellet gun on school campus. Although the court sensibly found that the pellet gun did not

qualify as a "firearm", *In re K.H.*, 169 S.W.3d 459, (Tex. App.--Texarkana 2005, no pet.)

Very recently, the Court of Criminal Appeals has ruled on the discharge of a firearm in a public place. The issue of Texans being hit by stray bullets from indiscriminate gunfire was raised as a valid state concern. But note that this case is an important victory for defense counsel in the instant cause and should be noted by any counsel similarly situated. In the case, the State tried to attain a conviction for recklessly discharging a firearm without any specific evidence of the circumstances with which to infer recklessness on the part of defendant. As the court put it, there belief was that the State legislature's intent "was to assign a reckless culpable mental state to the act of discharging-a-firearm-within-a-densely-populated-city-limits, requiring that the conduct occur under such *additional* circumstances (albeit not spelled out on the face of the statute) as to create a substantial and unjustifiable risk of injury to another person, with the actor aware of but consciously disregarding *that* risk. I therefore agree with the Court that we should construe the notice requirement of Article 21.15 to dictate some allegation of recklessness of that sort." *State v. Rodriguez*, 339 S.W.3d 680, 688 (Tex. Crim. App. 2011). The Court had previously explained "The Court holds that an actor must be reckless *not* simply with respect to the simple act of pulling the trigger of the firearm itself, but rather, with respect to some circumstance surrounding the conduct of discharging the firearm—some circumstance *other than* the only circumstance expressly listed in the statute. Thus, the Court holds that in order to comply with Article 21.15's notice requirement, the State must allege that the firearm was, *e.g.,* discharged into the ground or sky amidst a crowd of people, or in the backyard of a residential neighborhood, on the grounds of an elementary school, in the direction of a traffic sign, or in a public park." *Rodriguez* at 687

The *Rodriguez* case is an example of where defense counsel should be diligent in helping to affirm a gun owner's rights. Texas has a long proud tradition of gun ownership, and that tradition must be defended continually in the courtrooms.

V. CONCLUSION

In conclusion, attention should be brought back to *U.S. v. Lopez*. Occurring not so long ago, issues apart from those in *Lopez* may still arise and are going to require a lot of vigorous defense lawyers to take them on and see them through to the end. That case started with one man being arrested in San Antonio for carrying his gun and the resultant appellate case went all the way to the United States Supreme Court, paving new path for defense in firearm law from here to Washington D.C. Every lawyer should be watchful for the defense opportunities that would yield similarly landmark results.

Firearm law originates in the bodies of the U.S. Congress and State legislatures. However, these laws are either maintained or tossed out in the Federal and State courtrooms that we find ourselves in. The importance of defending a firearm case cannot be understated to anyone with an interest in maintaining 2nd Amendment rights to bear arms. Even those disinterested in gun ownership should be wary of waning gun rights. It is easily conceived that where the first brick of a constitutional right is removed, others will soon fall after it.