No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL ERNESTO PALACIOS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

Thomas V. Burch
Counsel of Record
University of Georgia
School of Law
Appellate Litigation Clinic
225 Herty Drive
Athens, GA 30602
(706) 542-5236
tvburch@uga.edu

Table of Contents

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6067

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISRAEL ERNESTO PALACIOS, a/k/a Homie,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasanow, Senior District Judge. (8:05-cr-00393-DKC-14; 8:13-cv-02949-DKC)

Argued: October 29, 2020 Decided: December 15, 2020

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Affirmed in part and dismissed in part by published opinion. Judge Motz wrote the opinion, in which Judge Keenan and Judge Floyd joined.

ARGUED: Mollie Fiero, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Charles David Austin, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Thomas V. Burch, Anna W. Howard, Miranda Bidinger, Third-Year Law Student, Mandi Goodman, Third-Year

Law Student, Adeline Lambert, Third-Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Robert K. Hur, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

DIANA GRIBBON MOTZ, Circuit Judge:

Israel Ernesto Palacios sought to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. We granted a certificate of appealability as to one issue he raised in order to consider whether his counsel rendered ineffective assistance by failing to assert a double jeopardy defense. We now affirm in part on that question, deny a certificate of appealability as to the remaining issues, and dismiss the remainder of the appeal.

I.

In 2007, a federal grand jury indicted Palacios on several counts stemming from his involvement in the La Mara Salvatrucha gang — more commonly known as MS-13. *See United States v. Palacios*, 677 F.3d 234, 238–42 (4th Cir. 2012). As relevant to this appeal, the lengthy indictment charged Palacios with use of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and murder resulting from the use of a firearm in a crime of violence, in violation of 18 U.S.C. § 924(j). Both crimes concern the murder of Nancy Diaz.

Each of these statutory provisions is designed to punish gun possession by persons engaged in crime. *See Abbot v. United States*, 562 U.S. 8, 12 (2010). Section 924(c) applies to "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," and carries a mandatory minimum five-year sentence. 18 U.S.C. § 924(c). Section 924(j) applies to any "person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," and, if the killing was a murder, carries a mandatory sentence

of death or life in prison. *Id.* § 924(j). Sentences imposed under each of these statutes "must run consecutively to any other sentence." *United States v. Bran*, 776 F.3d 276, 278, 281–82 (4th Cir. 2015).

Before Palacios's trial, his counsel moved "to dismiss multiplicious [sic] counts." In support of that motion, he argued that either the § 924(c) or the § 924(j) charge should be dismissed because each could "be proven entirely through the evidence necessary to establish" the other. The district court denied the motion, correctly explaining that the Double Jeopardy Clause did not "require the Government to elect [between the offenses] at this juncture." The court stated that it would continue to study the issue and that if Palacios were found guilty on more than one count it would be willing to revisit whether any charges should merge or be dismissed.

After a trial in 2008, a jury convicted Palacios of numerous crimes, including both the § 924(c) and § 924(j) violations that are at issue here. The district court had instructed the jury that, to convict Palacios of the § 924(j) offense, the jury would have to find that he committed the § 924(c) offense. After the jury returned its verdict, Palacios's counsel did not renew his earlier challenge to the multiplicity of the § 924(c) and § 924(j) counts or assert the double jeopardy challenge at issue here. The district court sentenced Palacios to life in prison for the § 924(j) conviction and a successive 120-month term of imprisonment for the § 924(c) conviction. Palacios appealed his conviction — again without asserting the present double jeopardy challenge — and we affirmed. *Palacios*, 677 F.3d 234.

Palacios then filed a motion to vacate under 28 U.S.C. § 2255, arguing, *inter alia*, that his counsel provided ineffective assistance by failing to raise a double jeopardy

challenge to his convictions under § 924(c) and § 924(j). The district court denied the motion. It held that, given the state of the law at the time of Palacios's trial, "it was not unreasonable for his attorneys to fail to object to his sentence on double jeopardy grounds." We granted a certificate of appealability to consider this question.

II.

A.

We review a district court's denial of relief on a § 2255 motion de novo. *United States v. Dinkins*, 928 F.3d 349, 353 (4th Cir. 2019). To succeed on an ineffective assistance of counsel claim, the movant must show that counsel performed in a constitutionally deficient manner and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This standard also applies to ineffective assistance claims lodged against appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285–89 (2000). Moreover, "[d]eclining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017).

"To avoid the distorting effects of hindsight, claims under *Strickland*'s performance prong are evaluated in light of the available authority at the time of counsel's allegedly deficient performance." *United States v. Morris*, 917 F.3d 818, 823 (4th Cir. 2019) (internal quotation marks omitted). "Even where the law is unsettled, . . . counsel must raise a material objection or argument if there is relevant authority strongly suggesting that it is warranted." *Id.* at 824 (internal quotation marks omitted). That is, while counsel "need

not predict every new development in the law, they are obliged to make arguments that are sufficiently foreshadowed in existing case law." *Id.* (alterations and internal quotation marks omitted). But counsel "does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent" or "by failing to anticipate changes in the law, or to argue for an extension of precedent." *Id.*

B.

The Double Jeopardy Clause of the Fifth Amendment provides that no "person [shall] be subject for the same offence to be put twice in jeopardy of life or limb." U.S. Const. amend. V. For nearly a century, courts have interpreted this clause to "protect[] against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). "It does not, however, prohibit the legislature from punishing the same act or course of conduct under different statutes." *United States v. Ayala*, 601 F.3d 256, 265 (4th Cir. 2010). Instead, the Double Jeopardy Clause prevents courts from imposing cumulative sentences unless Congress intended to authorize such multiple punishment. *Id.*

To determine whether two crimes constitute the "same offence" for double jeopardy purposes, we apply the test from *Blockburger v. United States*, 284 U.S. 299, 304 (1932): two crimes are the same unless "each provision requires proof of a fact which the other does not." *See, e.g.*, *Ayala*, 601 F.3d at 265. Two statutes define the same offense when "one is a lesser included offense of the other." *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *see also Harris v. Oklahoma*, 433 U.S. 682, 682–83 (1977) (noting that the Double Jeopardy Clause treats offenses as one "[w]hen, as here, conviction of a greater crime . . . cannot be had without conviction of the lesser crime"). When the offenses are

the same under the *Blockburger* test, "cumulative punishment [cannot] be imposed under the two statutes" absent "clear indication of contrary legislative intent." *Missouri v. Hunter*, 459 U.S. 359, 367 (1983).

With these principles in mind, we turn to their application in this case.

III.

The parties agree that § 924(c) is a lesser-included offense of § 924(j).[1] The Government has not suggested that Congress intended to authorize cumulative punishments for convictions under these two statutes. And we can find no evidence of such congressional intent. Indeed, in a number of cases before appellate courts since at least 2014, the Government has argued or conceded, that the imposition of punishments for such convictions would violate the Double Jeopardy Clause. *See, e.g.*, *United States v. Gonzales*, 841 F.3d 339, 355 (5th Cir. 2016); *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014); *United States v. Ablett*, 567 F. App'x 490, 491 (9th Cir. 2014). For these reasons, we have no trouble in now joining these circuits in holding that the Double

[1]The parties dispute whether Palacios's trial counsel actually raised the double jeopardy claim at trial. The record is unclear as to the precise issue counsel sought to advance before the trial court. What is apparent, however, is that although the district court indicated willingness to consider a double jeopardy argument regarding the firearm offenses after the jury returned its verdict, defense counsel did not assert the argument at that time. Accordingly, in reaching our holding, we assume that counsel did not adequately present the double jeopardy argument to the trial court.

Jeopardy Clause prohibits imposition of cumulative punishments for § 924(c) and § 924(j) convictions based on the same conduct.

The dispositive issue before us, however, is whether counsel's performance at trial in 2008 fell outside of the "wide range" of competent assistance because counsel failed to adequately raise the double jeopardy challenge. *Morris*, 917 F.3d at 823. Our review of counsel's performance in this analysis is "highly deferential." *United States v. Carthorne*, 878 F.3d 458, 465 (4th Cir. 2017). The Supreme Court has repeatedly instructed courts to "indulge a strong presumption that counsel" was effective. *Strickland*, 466 U.S. at 689.

Palacios can demonstrate ineffective assistance under *Strickland* if "existing case law" "sufficiently foreshadowed" the double jeopardy challenge such that trial counsel's failure to raise it rendered his performance constitutionally deficient. *Morris*, 917 F.3d at 824 (quoting *Shaw v. Wilson*, 721 F.3d 908, 916–17 (7th Cir. 2013)). Counsel must raise an argument where "relevant authority strongly suggest[s]" it. *Carthorne*, 878 F.3d at 466. But to be constitutionally effective, counsel need not identify *all* plausible arguments, including those that have never been raised before or which would require an extension in precedent. *See Morris*, 917 F.3d at 826. It is "not enough . . . that the law on this question was unsettled at the time . . . or that an objection would have been plausible and non-frivolous." *Id.*

We thus evaluate claims of ineffective assistance against the strength of case law as it existed at the time of the allegedly deficient representation. *Carthorne*, 878 F.3d at 466. Palacios does not point to any contemporary case in which a court accepted his double jeopardy argument. Indeed, at the time of Palacios's trial, no court had addressed the issue.

The first appellate court to consider such a double jeopardy challenge did not do so until three years after Palacios's trial — and that court rejected the argument. *See United States v. Julian*, 633 F.3d 1250, 1257–58 (11th Cir. 2011). A few months later, another circuit addressed the question and came to the opposite conclusion. *United States v. Garcia–Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011) (finding a double jeopardy violation). The law was thus far from settled even in 2011, let alone at the time of Palacios's trial in 2008.

Moreover, before Palacios's trial, a then-recent unpublished opinion of this Court cast doubt on the likelihood of success of a double jeopardy argument challenging the § 924(c) and § 924(j) convictions. *See United States v. Drayton*, 267 F. App'x 192 (4th Cir. 2008). There, we upheld the sentences of a defendant convicted of violating both §§ 924(c) and 924(j). *Id*. at 197. To be sure, the double jeopardy challenge at issue here was not directly before us in *Drayton*. And "an unpublished and non-binding decision rejecting a defendant's position may not in all cases establish that counsel has no obligation to advance that position." *Morris*, 917 F.3d at 826. But given the absence of law on the question at that time, it is understandable that our nearly contemporaneous decision in *Drayton* may have reasonably dissuaded Palacios's trial counsel from bringing such a challenge.

Palacios's contrary argument rests on cases that recognized or suggested that the offense specified in § 924(c) is a lesser-included offense of that specified in § 924(j). Palacios cites, for example, our decision in *United States v. Smith*, 452 F.3d 323, 336 (4th Cir. 2006), in which we held that "a violation of § 924(c) is itself a conduct element of § 924(j)." But *Smith* so held in the context of an argument about venue — the opinion does

not even suggest any lurking constitutional problem with the imposition of cumulative punishment for violations of these two statutes.

Similarly, the First Circuit's acceptance of an argument that § 924(c) defines a lesser-included offense of § 924(j) in *United States v. Jimenez-Torres*, 435 F.3d 3, 10 (1st Cir. 2006), did not hint at any double jeopardy problem. *Jimenez-Torres* dealt only with ambiguity in a jury's general verdict. *Id.* And even where courts reached similar conclusions in the context of *other* double jeopardy arguments, those cases only involved challenges to cumulative punishment for both a § 924(j) conviction and its underlying predicate crime. *See, e.g.*, *United States v. Battle*, 289 F.3d 661 (10th Cir. 2002), *overruled on other grounds*, *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018); *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated and remanded on other grounds*, 536 U.S. 953 (2002).

Moreover, none of these cases goes further than to hold that § 924(c) defines a lesser-included offense of § 924(j). This provides only the foundation on which to build a double jeopardy claim. The Supreme Court has cautioned that "simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition . . . of cumulative punishments pursuant to those statutes." *Hunter*, 459 U.S. at 368. Instead, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366; *see also Allen*, 247 F.3d at 767 ("[I]mposition of multiple punishments for the same underlying circumstances does not violate the Constitution as long as Congress intended it."). Therefore, a double

jeopardy argument will still fail if "there is a clear indication of . . . legislative intent" to impose cumulative punishments for the offenses. *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

For this very reason, we have upheld cumulative punishments for violations of the statute at issue here, § 924(c), even though we recognized it was a lesser-included offense of another federal statute, 18 U.S.C. § 2119. *See United States v. Johnson*, 32 F.3d 82, 85 (4th Cir. 1994). In doing so, we reasoned from the statutory language in § 924(c)(1) that Congress had clearly intended to authorize cumulative punishments for violations of § 924(c) and § 2119. *Id.* By contrast, none of the cases on which Palacios relies even acknowledged this second step of the double jeopardy analysis.

For all of these reasons, we cannot conclude that the double jeopardy claim that Palacios now presses was sufficiently foreshadowed at the time of trial to render his counsel's failure to raise it constitutionally deficient representation. And because Palacios's claim fails on the performance prong, we need not address prejudice.[2]

[2] For the same reasons, we can quickly dispose of Palacios's argument that his appellate counsel's representation was ineffective. Moreover, appellate counsel need not present on appeal all issues that might have merit — appellate counsel is ineffective only for failing to raise issues that were "clearly stronger than those presented." *United States v. Mason*, 774 F.3d 824, 829 (4th Cir. 2014). Palacios's appellate counsel presented numerous arguments challenging the jury's finding of Palacios's guilt. *See Palacios*, 677 F.3d 234. Because of the unsettled state of the law at the time of his appeal, we cannot conclude that it was clear at the time that the double jeopardy argument was stronger than those arguments his appellate counsel did present.

IV.

We affirm the portion of the district court's order denying relief on Palacios's claim that counsel rendered ineffective assistance by failing to assert a double jeopardy defense. Accordingly, we deny a certificate of appealability and dismiss the remainder of the appeal.

AFFIRMED IN PART;
DISMISSED IN PART

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ISRAEL ERNESTO PALACIOS	:	
v.	:	Civil Action No. DKC 13-2949 Criminal No. DKC 05-0393-014
UNITED STATES OF AMERICA	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this case is a motion filed by Petitioner Israel Ernesto Palacios ("Petitioner") to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1791).[1] For the following reasons, the motion will be denied.

I. Background

Petitioner was charged with conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. § 1962(d) (Count 1); conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count 14); murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Count 15); assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(3) (Count 16); two counts of use of a firearm in relation to a crime of violence, in

[1] All citations to court filings refer to the docket in the criminal case. This case was exempt from electronic filing; most of the docket entries exist only in hard copy, although some later entries were also filed electronically.

violation of 18 U.S.C. § 924(c) (Counts 17 and 19); and murder resulting from the use of a firearm in a crime of violence, in violation of 18 U.S.C. § 924(j) (Count 18), by a fourth superseding indictment filed June 4, 2007. (ECF No. 715).

The United States Court of Appeals for the Fourth Circuit described the underlying facts of this case:

> La Mara Salvatrucha, otherwise known as MS-13 . . . is a transnational gang formed by El Salvadorian immigrants in Los Angeles, California in the 1980s. Originally organized to protect its members from being preyed upon by other gangs in southern California, MS-13 grew into a larger organization characterized by intimidation and violence. Enhancing its reputation for violence became the gang's primary purpose. MS-13 eventually expanded into Central America, Mexico, Canada, and other areas of the United States. In addition to Los Angeles, MS-13 strongholds in this country include metropolitan Washington, D.C. — including northern Virginia and southern Maryland — Long Island, New York; Houston, Texas; Boston, Massachusetts; and North Carolina. This case involves MS-13 activities in and around Prince George's County, Maryland.
>
> Although MS-13 members are affiliated with their counterparts throughout North America, the gang is organized into smaller subgroups or "cliques" that operate locally. Each clique has its own leadership, conducts its own meetings, and is permitted to create rules in addition to — but not in place of — the rules of the broader gang. Cliques are run by a leader, known as the "first word"; a gang member who assumes the role of second in command, known as the "second word"; and a treasurer or secretary. Clique leaders gather periodically at regional meetings led

by mid-level bosses, known as "ranfleros." At these meetings, clique leaders share information about law enforcement activities in their areas, settle arguments, and discipline members who have violated gang rules. Ranfleros also relay directives from top MS-13 leaders who reside outside the United States.

The gang utilizes uniform rules, regulations, and symbols throughout the many territories in which it is located. For example, the method of initiation into the gang is the same throughout its various iterations: a prospective MS-13 member is beaten for 13 seconds "to signify the beginning of a new, more brutal lifestyle." *United States v. Ayala*, 601 F.3d 256, 261 (4th Cir. 2010). Gang members are required to fight – and, if possible, kill – members of rival gangs. Those who have been initiated into MS-13 may not assist law enforcement, and they are prohibited from using numbers or colors associated with rival gangs. MS-13 members are required to attend local clique meetings and pay dues. These dues are used for, among other things, sending money to gang members in other countries, financing attorneys for gang members who have been arrested, and buying weapons or other equipment for the use of the gang. Cliques maintain discipline by imposing punishments – ranging from a short beating (a "13") to death (a "green light") – in response to violations of gang rules. MS-13 cliques also have an internet presence and have been known to post information on websites such as My Space.

The primary MS-13 clique involved in this prosecution is known as the Langley Park Salvatruchas ("LPS"). Palacios co-founded LPS and operated as its second word and, subsequently, as its first word. Trial testimony indicated that, as relevant to this appeal, Palacios helped orchestrate the

murder of Nancy Diaz during the time he was second word of LPS.

Palacios and Roberto Argueta (a.k.a. "Buda") – who was LPS first word at the time – heard rumors that Diaz, a female friend of LPS members, had been fraternizing with rival gang members. The two investigated whether the rumors were true, questioning Suyapa Chicas, Palacios's girlfriend at the time, about whether Diaz had been spending time with members of rival gangs. Chicas confirmed that she had heard the same rumors. Sometime thereafter, Argueta and Palacios brought up the issue of Diaz's supposed interactions with rival gangs at an LPS clique meeting. As the conversation proceeded, Palacios and the other LPS leaders determined that Diaz needed to be killed and began planning her death. At the conclusion of the meeting, Argueta issued a final order that Diaz should be killed. Palacios was involved in the discussion throughout and stood by Argueta's side as he issued the order.

LPS members Jesus Canales (a.k.a. "Fantasma") and Jeffrey Villatoro (a.k.a. "Magic") carried out the order to kill Diaz. On October 25, 2004, Canales and Villatoro drove Diaz and her friend Alyssa Tran to a cemetery near Langley Park, Maryland, informing the two women that they were going to drink together. Instead, once inside the cemetery grounds, Canales and Villatoro fell behind the two women. Tran heard a gunshot from behind and felt Villatoro pull her to the ground. Villatoro then shot Tran in the face. When Canales discovered Tran had not perished from the gunshot wound, Canales stabbed her twice in the chest. Tran somehow survived the attack and began searching for Diaz. When Tran found Diaz, the latter was dead.

United States v. Palacios, 677 F.3d 234, 238-240 (4th Cir. 2012).

In Petitioner's criminal trial in July and August of 2008, the jury found him guilty of Counts 1, 14, 15, 17, and 18, which related to Ms. Diaz's murder, but not guilty of Counts 16 and 19, which related to the assault on Ms. Tran. (ECF No. 1153). In a judgment entered on November 12, Petitioner was sentenced to life imprisonment and a consecutive term of 120 months imprisonment. (ECF No. 1248). Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed. *Palacios*, 677 F.3d at 250. The Supreme Court of the United States denied Petitioner's petition for writ of certiorari on October 1, 2012. *Palacios v. United States*, 133 S.Ct. 124 (2012) (mem.).

On October 7, 2013, Petitioner, proceeding *pro se*, filed the pending motion pursuant to 28 U.S.C. § 2255. (ECF No. 1791).[2] Petitioner supplemented his motion on August 8, 2014. (ECF No. 1878). The government responded on February 6, 2015 (ECF No. 1891), and Petitioner replied on May 26 (ECF No. 1908).

II. Standard of Review

Section 2255 requires a petitioner asserting constitutional error to prove by a preponderance of the evidence that "the

[2] Petitioner's motion was signed and placed in the prison mail system on September 30, 2013. (ECF No. 1791, at 13). Under Rule 3(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts, a filing made by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing.

sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law[.]" 28 U.S.C. § 2255(a). If the § 2255 motion, along with the files and records of the case, conclusively shows that the petitioner is not entitled to relief, a hearing on the motion is unnecessary and the claims raised in the motion may be summarily denied. *See id.* § 2255(b).

III. Analysis

Petitioner raises five claims of ineffective assistance by his trial and appellate counsel. First, Petitioner argues that his counsel failed to "investigate and utilize the testimony of Jesus Canales." (ECF No. 1791, at 4a). Second, he maintains that his counsel failed to present the theory that Ms. Diaz was murdered because of her personal relationship with Mr. Argueta. (*Id.* at 5a). Third, Petitioner contends that his counsel failed to object to, or appeal based on, the government's use of an expert witness on the issues of knowledge and foreseeability of violence. (*Id.* at 7a). Fourth, he avers that his counsel should have moved to dismiss or appealed certain charges against him on double jeopardy grounds. (*Id.* at 8a). Fifth, Petitioner argues that counsel failed to challenge the government's use of a co-conspirator theory of liability under *Pinkerton v. United*

States, 328 U.S. 640 (1946). In addition to his ineffective assistance of counsel claims, Petitioner claims that his sentence relied on facts not submitted to the jury for proof beyond a reasonable doubt, as required by *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are governed by the well-settled standard adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a *Strickland* claim, a petitioner must show both that his attorney's performance fell below an objective standard of reasonableness and that he suffered actual prejudice. *See Strickland*, 466 U.S. at 688.

There is a strong presumption that counsel's conduct falls within a wide range of reasonably professional conduct, and courts must be highly deferential in scrutinizing counsel's performance. *Strickland*, 466 U.S. at 688-89; *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991). Courts must assess the reasonableness of attorney conduct "as of the time their actions occurred, not the conduct's consequences after the fact." *Frye v. Lee*, 235 F.3d 897, 906 (4th Cir. 2000). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *id.* at 690, but counsel also "has a duty to make reasonable investigations or to make a reasonable decision that [] particular investigations [are] unnecessary," *id.* at 691.

A determination need not be made concerning an attorney's performance if it is clear that no prejudice could have resulted from some performance deficiency. *See id.* at 697. To demonstrate actual prejudice, Petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "In cases where a conviction has been the result of a trial, the defendant must demonstrate that but for counsel's errors, there is a reasonable probability that he would not have been convicted." *United States v. Luck*, 611 F.3d 183, 186 (4th Cir. 2010).

1. Failure to Investigate and Utilize the Testimony of Jesus Canales

Petitioner first argues that his trial counsel was ineffective because his attorneys failed to call Mr. Canales as a witness. (ECF No. 1878, at 4). Petitioner contends that Mr. Canales would have testified, as he purportedly did in a related

trial two years later, that, contrary to the government's theory of the case, there was no decision to kill Ms. Diaz at the clique meeting. (*Id.* at 5). Petitioner avers that he told his counsel to inquire into Mr. Canales's potential testimony prior to his trial, but that his attorneys "did [not] make any effort to subject the Government's case to meaningful adversarial testing on this basis." (*Id.* at 6-7).

The record shows that Petitioner's counsel had, in fact, considered calling Mr. Canales. In his opening statement, counsel noted, "One of the people that was on the scene that actually sank a knife in one of the victims . . . says the murder was ordered by Buda, Mr. Argueta. He never mentioned Israel Palacios." (ECF No. 1374, at 41). Petitioner's counsel also included Mr. Canales on an initial witness list. During the trial, on July 24 and 25, Petitioner's counsel arranged for Mr. Canales to be brought to court to testify. (ECF Nos. 1377, at 81; 1387, at 172). On July 29, however, counsel for Petitioner informed the court that "Mr. Goldman and I decide[d] this morning that we're not going to call him. I'm sorry that the Government has brought him up, but we didn't decide that until very recently." (ECF No. 1388, at 50).

Counsel's plan to call Mr. Canales and subsequent decision not to do so indicates that this decision was a "strategic choice." As noted above, attorneys "are permitted to set

priorities, determine trial strategy, and press those claims with the greatest chances of success," *United States v. Mason*, 774 F.3d 824, 828 (4th Cir. 2014), and a lawyer's "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable," *Strickland*, 466 U.S. at 690. Petitioner disputes whether his counsel sufficiently investigated Mr. Canales as a potential witness, and the record does not indicate to what degree counsel investigated Mr. Canales. Petitioner cannot show, however, that counsel ignored Mr. Canales's potential value as a witness. The decision not to challenge the government's case with Mr. Canales's testimony does not appear to be the result of a lack of "effort," as Petitioner suggests, but a strategic choice.

Furthermore, Petitioner has not shown that counsel's decision not to call Mr. Canales prejudiced his case. Petitioner contends that Mr. Canales testified in Mr. Argueta's later trial that the gang members present at the LPS meeting were reluctant and did not agree with the decision to kill Ms. Diaz. (ECF No. 1878, at 5). Mr. Canales actually testified that Petitioner and the others present at the meeting did not agree with the "particular plan about how it should be done." (*United States v. Argueta*, No. DKC-05-0393-06, ECF No. 1660, at 119; *see also id.* (noting that one member did not agree with the plan because "he didn't want to use his car" in case "it could

be tracked back to him.")). Mr. Canales later testified that Ms. Diaz had indeed been "greenlighted" at the meeting. (*Id.* at 207). Mr. Canales further noted at that trial that Petitioner had given him a gun on a different occasion for the purpose of killing "chavalas," members of a rival gang. (*Id.* at 108, 111). Given the limited weight of any helpful testimony and the potentially harmful testimony that Mr. Canales might have given in Petitioner's trial, there is not a reasonable probability that Petitioner would not have been convicted if Mr. Canales had testified. Accordingly, he cannot show prejudice on this claim.

2. Failure to Present the Theory That Ms. Diaz Was Murdered as a Result of Personal Animus

Petitioner next argues that his counsel failed to present the theory that Mr. Argueta issued the "greenlight" to kill Ms. Diaz because he had been romantically involved with her and she was now "seeing" rival gang members. (ECF No. 1878, at 8). Petitioner points out that Counts 14 and 15 against him were based on 18 U.S.C. § 1959(a), which requires that the crime was committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." He contends that counsel should have argued that Mr. Argueta's jealousy was the motive for Ms. Diaz's murder, rather than maintaining or increasing a position within the gang. (*Id.*).

Although this theory might have explained Mr. Argueta's motive, it does not explain Petitioner's motive for aiding or abetting in the murder. The Court instructed the jury to consider whether Petitioner's "purpose in . . . aiding or abetting in the commission of the crime charged . . . was to maintain or increase his position in the enterprise." (ECF No 1395, at 53). Mr. Argueta's putative jealousy is not material to Petitioner's motive, and therefore Petitioner's counsel's failure to raise it was both reasonable and non-prejudicial.

3. Failure to Object to or Appeal Expert Testimony

Petitioner also alleges that his counsel's assistance was ineffective because they failed to object to and exclude the government's elicitation of expert opinions on knowledge and foreseeability. (ECF No. 1878, at 8-10). Federal Rule of Evidence 704 prohibits an expert in a criminal case from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Petitioner points to testimony from Sergeant George Norris in which Sergeant Norris, testifying as an expert on MS-13, explained that MS-13 members are "aware that the gang routinely engages in violence" and know about "others[']' participation in substantive crimes." (ECF No. 1374, at 103-04, 130-31). Petitioner contends that his knowledge of the crimes of other gang members was an element bearing on the

ultimate issue of his guilt, and that Sergeant Norris's testimony should have been excluded for infringing on the role of the jury as factfinders as to that element. (ECF No. 1878, at 10).

"An expert witness does not impermissibly testify on mental state evidence if he . . . is clear that his opinion is based upon general criminal practices, and not special knowledge of the defendant's mental processes." *United States v. Amick*, No. 99-4557, 2000 WL 1566351, at *3 (4th Cir. Dec. 20, 2000) (unpublished opinion) (citing *United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995); *Unites States v. Lipscomb*, 14, F.3d 1236, 1240 (7th Cir. 1994)). So long as the expert "does not speak directly to the guilt or innocence of the accused," he may testify about "established practice[s] among [criminals like the defendant]" without violating Rule 704. *United States v. Bumpus*, No. 99-4283, 2000 WL 493014 (4th Cir. Apr. 27, 2000) (unpublished opinion) (citing *United States v. Conyers*, 118 F.3d 755, 758 (D.C. Cir. 1997)).

Read in context, Sergeant Norris's testimony states:

> Q. Sergeant Norris, do you have an expert opinion as to whether a member of MS-13, someone who's gone through the initiation process, is aware that the gang routinely engages in violence?
>
> A. Yes, they have to.
>
> Q. And why is that?

A. If you're a member of MS- 13, you've already hung out with MS-13. You already became familiar with MS-13 and the other members and their actions. You might not know everything involved with being a member of MS-13, but at least you have a general idea of what the gang talks about all the time, the kind of activities they do. When you, in fact, get jumped in or join into them, that, in itself, is a violent act. You're getting beaten by numerous people for a period of time. Once you become a member and you have been jumped in, you go to the meetings. During these meetings, the violent acts or the violent crimes that they're involved with are discussed openly in these meetings. You can't skip meetings. If you skip meetings for one or two meetings in a row, you end up getting disciplined, so when you're going to these meetings you have to hear what's going on. You have to know what's going on. A lot of the general public that aren't even MS members now know that MS-13 is a violent gang, and they know what different crimes that MS-13 might have been involved in. The fact that you're an actual gang member and you're in these meetings that discuss openly the crimes that are involved, or you witness it, you can't deny that you know about it.

. . .

Q. What, if any, expert opinion do you have about an MS member's knowledge of others participation in substantive crimes?

. . .

A. If you're an actual member of MS-13, you attend meetings. You're privy to the information discussed at the meetings. Some of the information discussed is the crime that the gang has committed, or the crime that's been committed against the gang, as well as what law enforcement does and what's

> going on generally in the gang community in that area. So you are privy to the information.
>
> You - obviously, since you're a gang member, you hang out with the gang often, so gang members talk to each other. There's no way that you cannot know about some of the crimes that are committed by the gang, specifically since you're an actual member and you go to the meetings and that's what's discussed at the meetings.

(ECF No. 1374, at 103-04, 130-31). Although Sergeant Norris states an opinion that an MS-13 member would have been aware of the criminal acts of his clique, he speaks in general, not specific, terms and his testimony is a description of the established practices for MS-13 meetings.

Petitioner argues that Sergeant Norris's testimony does an end-run around Rule 704 by giving an opinion about Petitioner's state of mind in terms of what a hypothetical person in his position would know. Courts have held that the government may not "simply recite a list of 'hypothetical' facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove [a specific mental state]." *Boyd*, 55 F.3d at 672. Impermissible "hypothetical" facts in cases like *Boyd* are far more specific than those stated by Sergeant Norris. *See id.* at 670 (noting a "hypothetical" criminal at a specific address at a specific time holding specific amounts of drugs in specific packaged amounts). Sergeant Norris's testimony was not that a hypothetical MS-13

member in Petitioner's position would have had knowledge about the murder of Ms. Diaz or a hypothetical murder of a young woman like her. Rather, the statements he made indicated that the violent and criminal acts of MS-13 would generally be discussed at the meetings. This type of testimony is not barred by Rule 704, and counsel's failure to challenge the government's use of this testimony was not unreasonable.

4. Failure to Raise Double Jeopardy Issues

Petitioner next contends that counsel was ineffective for failing to challenge some of his charges on double jeopardy grounds. (ECF No 1878, at 10-11).[3] He contends that his convictions under § 924(c) were lesser included offenses to his § 924(j) offenses and therefore are prohibited under the double jeopardy doctrine. He points to *United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011), in which the United States Court of Appeals for the First Circuit held that § 924(c) is a lesser included offense of § 924(j). The government concedes that

[3] Petitioner also argues that the government should have been collaterally estopped from obtaining his conviction on his § 924(j) offense because he had been acquitted for the same § 924(c) offense. (ECF No. 1878, at 11). Petitioner's § 924(j) offense in Count 18 was based on the death of Ms. Diaz during the § 924(c) offense of her attack in Count 17. Petitioner was convicted on both of these counts. Petitioner was acquitted for the § 924(c) charge for the assault on Ms. Tran in Count 19. Because Ms. Tran survived the attack, the government had not charged him with a § 924(j) offense as to Ms. Tran. Petitioner's acquittal for Count 19 had no bearing on his § 924(j) charge in Count 18.

several federal circuits and a court in the Eastern District of Virginia have adopted this position. (ECF No. 1891, at 25). It points out, however, that there is a circuit split on the issue that the Fourth Circuit has not yet weighed in on. *Id.* Given that the law in the Fourth Circuit remains unclear, and that most of the cases composing this circuit split, including *Garcia-Ortiz*, were decided after Petitioner's trial, it was not unreasonable for his attorneys to fail to object to his sentence on double jeopardy grounds.[4]

5. Failure to Challenge the Use of *Pinkerton* Liability in a RICO Case

Petitioner's final ineffective assistance of counsel claim is based on the application of *Pinkerton* liability to his RICO conspiracy in Count 1. Petitioner claims only that "the Government's theory of guilt and characterization of the evidence presented at trial resulted in an unwarranted and unconstitutional extension of criminal liability." (ECF No. 1791, at 13a). Petitioner cites without explanation to *United States v. Benabe*, 654 U.S. 753, 777 (7th Cir. 2011). The *Benabe*

[4] The government points out that, even if the Fourth Circuit applied the *Garcia-Ortiz* rule, Petitioner's prison sentence would stay the same - if the § 924(j) conviction was removed - or increase - if the § 924(c) offense was removed and the § 924(j) conviction was applied consecutively under the consecutive sentence requirement in § 924(c), as it was in *United States v. Bran*, 776 F.3d 276, 280-82 (4th Cir. 2015). (ECF No. 1891, at 25-26). Petitioner counters that he was assessed a special assessment for both convictions, which would constitute a form of prejudice. (ECF No. 1908, at 12).

court "noted the need for caution in using *Pinkerton* instructions in RICO conspiracy charges," but affirmed the district court's use of a *Pinkerton* instruction. *Id.* at 777-78 ("Each defendant could be held responsible for the various predicate acts charged, either as a direct participant, as an aider-and-abetter, or under *Pinkerton*."). Petitioner's argument thus fails to articulate a theory for ineffective assistance upon which he might be entitled to relief. Moreover, the court's instruction as to co-conspirator liability was limited to Counts 14-19. (*See* ECF No. 1395, at 64-66). Petitioner thus has not provided any evidence that his counsel acted unreasonably by failing to challenge a *Pinkerton* instruction.

B. Sentence Imposed in Violation of *Alleyne*

Finally, Petitioner argues that his sentence was based upon facts not submitted to the jury for proof beyond a reasonable doubt in violation of the Supreme Court's holding in *Alleyne*. (ECF No. 1791, at 13b). *Alleyne*, which extended the rule of *Apprendi v. New Jersey*, 530 U.S. 466, (2000), held that "any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury." *Alleyne*, 133 S.Ct. at 2155. As this court has previously held, "insofar as *Alleyne* is based on *Apprendi*, it likely does not apply retroactively on collateral review." *See Johnson v. United States*, No. DKC-12-2454, 2014 WL 470077, at *5 (D.Md. Feb. 5,

2014) (citing *Tate v. United States*, Nos. 3:13-cv-00293-MOC, 3:00cr137, 2014 WL 340381, at *4-5 (W.D.N.C. Jan. 30, 2014) (collecting cases)); *Proctor v. United States*, No DKC-13-2728, 2014 WL 109061, at *1 n.1 (D.Md. Jan. 10, 2014) ("[T]here is no indication in *Alleyne* that the Supreme Court intended its holding to apply retroactively to cases on collateral review, and the Fourth Circuit has not yet spoken on the issue."); *see also Hughes v. United States*, 770 F.3d 814, 818-19 (9th Cir. 2014); *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1286 (11th Cir. 2014); *In re Mazzio*, 756 F.3d 487, 489-91 (6th Cir. 2014); *United States v. Winkelman*, 746 F.3d 134, 136 (3d Cir. 2014); *In re Kemper*, 735 F.3d 211, 212 (5th Cir. 2013); *United States v. Redd*, 735 F.3d 88, 91-92 (2d Cir. 2013); *In re Payne*, 733 F.3d 1027, 1029 (10th Cir. 2013); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013). In a non-binding unpublished opinion, the Fourth Circuit has similarly noted that that *Alleyne* "has not been made retroactively applicable to cases on collateral review." *United States v. Stewart*, 540 F. App'x 171, 172 (4th Cir. 2013); *see also United States v. Surratt*, 797 F.3d 240, 249 (4th Cir. 2015) (noting that courts have generally held that *Alleyne* does not apply retroactively), *reh'g granted*, No. 14-6851 (4th Cir. Dec. 2, 2015) (en banc). Moreover, even if *Alleyne* could be applied retroactively, Petitioner has not

provided any explanation to support his claim. Accordingly, Petitioner is not entitled to relief.

IV. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2255, the court is also required to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability is a "jurisdictional prerequisite" to an appeal from the court's earlier order. *United States v. Hadden*, 475 F.3d 652, 659 (4th Cir. 2007). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the court denies petitioner's motion on its merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find the court's assessment of the claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85. Upon review of the record, the court finds that Petitioner does not satisfy the above standard. Accordingly, the court will

decline to issue a certificate of appealability on the issues which have been resolved against Petitioner.

V. Conclusion

For the foregoing reasons, Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 will be denied. A separate order will follow.

Deborah K. Chasanow

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ISRAEL ERNESTO PALACIOS	:	
v.	:	Civil Action No. DKC 13-2949 Criminal No. DKC 05-0393-014
UNITED STATES OF AMERICA	:	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 30th day of March, 2017, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 1791) filed by Petitioner Israel Ernesto Palacios BE, and the same hereby IS, DENIED;

2. The court DECLINES to issue a certificate of appealability; and

3. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties.

/s/
DEBORAH K. CHASANOW
United States District Judge

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) 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 (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under 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 (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to

a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device —

(1) In general—

(A) Suspension or revocation of license; civil penalties—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review —An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.