



Federal Sentencing of Illegal Reentry:

The Impact of the 2016 Guideline Amendment



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INTRODUCTION

In 2016, the United States Sentencing Commission promulgated an amendment that comprehensively revised the guideline covering illegal reentry offenses—§2L1.2 (Unlawfully Entering or Remaining in the United States).¹ The amendment, Amendment 802, became effective November 1, 2016, and represented the most comprehensive revision of a major guideline in the last two decades.

This report examines the impact of Amendment 802 by looking back at sentencings under §2L1.2 over the last ten fiscal years. The report first describes the concerns leading to the amendment, including that §2L1.2’s 12- and 16-level increases were overly severe and led to variances, and that using the “categorical approach” to apply enhancements was overly complex, resource intensive, and increased litigation and uncertainty. After outlining the changes made by Amendment 802, the report assesses its impact on guideline application for §2L1.2 offenders and on appeals involving §2L1.2.

KEY FINDINGS

1 Over the last ten fiscal years, immigration offenders have represented either the highest number or second-highest number of offenders sentenced annually. The vast majority of immigration offenders were sentenced under §2L1.2.

2 Amendment 802 to the *Guidelines Manual* ameliorated concerns about the severity of §2L1.2's enhancements.

- While variance rates for §2L1.2 offenders remained largely consistent before and after the amendment, courts imposed sentences within the applicable guideline range at a higher rate on average (66.0%) in the five fiscal years after the amendment than the five fiscal years before the amendment (56.6%). Furthermore, the difference between the average guideline minimum and the average sentence imposed decreased from at least three months before the amendment to no more than one month between fiscal years 2017 and 2020, and slightly over two months in fiscal year 2021.
- These sentencing trends likely are attributable to the decreasing severity of the sentencing enhancements applicable to offenders sentenced under §2L1.2. The number of offenders who received sentencing increases of 12 or more offense levels decreased substantially from 26,094 in the five fiscal years before the amendment to 5,497 in the five fiscal years after the amendment. The average sentencing increase similarly decreased from seven to four offense levels.

3 Amendment 802 significantly simplified guideline application and reduced appeals.

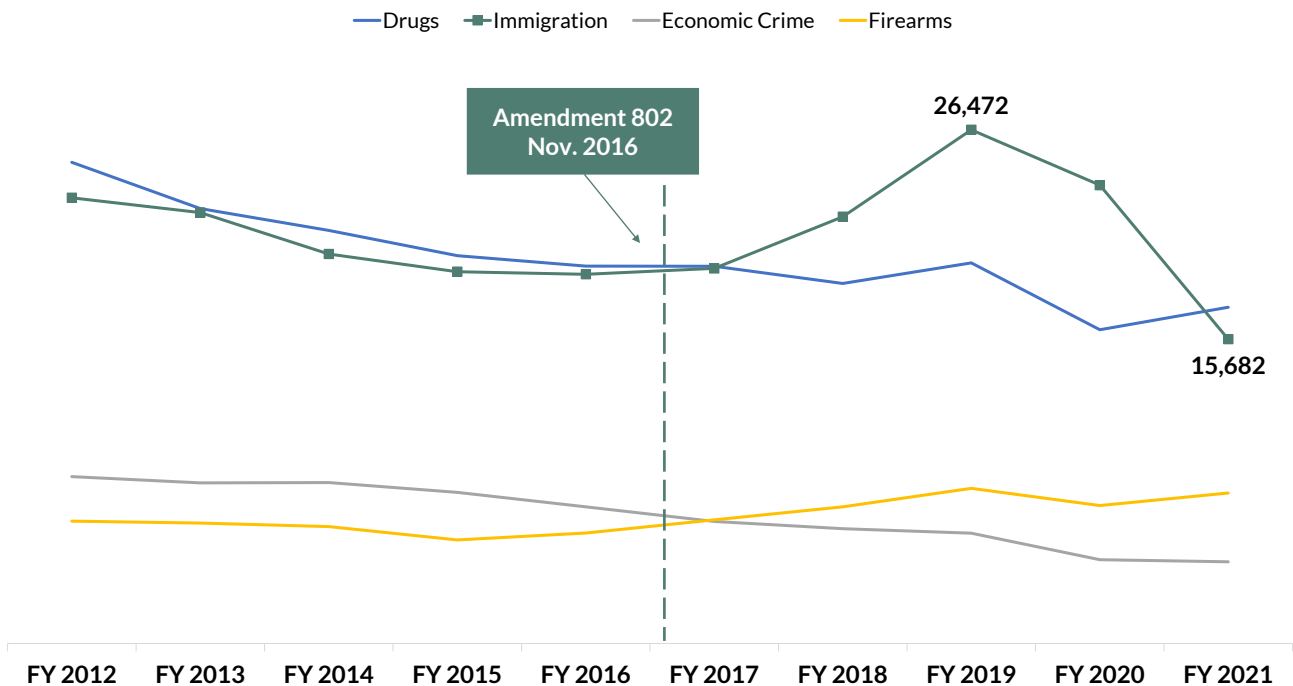
- In the five fiscal years before the amendment, 31,824 offenders sentenced under §2L1.2 (37.1%) received a sentencing enhancement that potentially required courts to analyze predicate offenses using the categorical approach. That number decreased considerably to only 59 offenders (0.1%) in the five fiscal years after the amendment.
- After Amendment 802, the number of opinions on §2L1.2 appeals decreased by 90 percent, from 239 in fiscal year 2017 to 24 in fiscal year 2021. Notably, this decline occurred even while the number of immigration sentencing rose steadily from fiscal year 2017 to a ten-year high in fiscal year 2019. By contrast, before the amendment, appellate courts issued 249 opinions on §2L1.2 appeals in fiscal year 2016 alone, and two-thirds of the appeals raised application issues relating to the categorical approach.

BACKGROUND

Over the last ten fiscal years, immigration offenders consistently have accounted for a sizable portion of the federal sentencing caseload, representing either the highest number or second-highest number of offenders sentenced annually across major crime types (Figure 1). Immigration sentencings rose to a ten-year high in fiscal year 2019 (n=26,472), before declining to a ten-year low (n=15,682) in fiscal year 2021.

The vast majority of immigration offenders sentenced over the last decade (82% to 84% each year) were sentenced under §2L1.2.² Section 2L1.2 covers various immigration offenses, including failure to depart the United States (8 U.S.C. § 1253), illegal entry (8 U.S.C. § 1325(a)), and illegal reentry (8 U.S.C. § 1326).³ Over 99 percent of offenders sentenced under §2L1.2 in the last ten fiscal years were convicted of illegal reentry.⁴

Figure 1. Number of Offenders Sentenced Annually in Major Crime Types



AMENDMENT 802

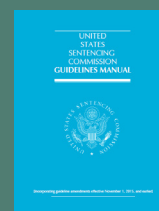
Until November 1, 2016, §2L1.2 provided for a base offense level of 8, and one specific offense characteristic (SOC) related to criminal history (Figure 2). The SOC provided for a 4-, 8-, 12- or 16-level increase if “the defendant previously was deported, or unlawfully remained in the United States” after a conviction for various types of offenses.⁵ For example, if the previous deportation followed a conviction for a felony “drug trafficking offense” or “crime of violence,” the pre-amendment guideline provided for an increase of 12 or 16 levels.⁶

Courts relied on the “categorical approach” to assess whether a prior conviction met these definitions. The categorical approach is an analytic framework whereby courts compare the statutory elements of the prior offense (*i.e.*, the parts of that offense’s legal definition) to the relevant definition (*e.g.*, for a “crime of violence”) to determine if the prior offense criminalizes the same conduct as the definition or a broader range of conduct.⁷ If the statute reaches more

Figure 2. Pre-Amendment Guideline (2015 Guidelines Manual)

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
 - (1) Apply the Greatest:
 - If the defendant previously was deported, or unlawfully remained in the United States, after—
 - (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;
 - (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;
 - (C) a conviction for an aggravated felony, increase by **8** levels;
 - (D) a conviction for any other felony, increase by **4** levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.



conduct than the relevant definition, then it is overbroad and the conviction does not qualify. Under the categorical approach, courts are prohibited from considering the facts underlying the prior offense.

Motivations for the Amendment

Over the course of several years preceding the amendment, the Commission received extensive comment from courts and stakeholders that the use of the categorical approach to determine increases under §2L1.2 was “overly complex and resource-intensive and often leads to litigation and uncertainty.”⁸

In addition, the Commission received comments indicating that §2L1.2’s 12- and 16-level increases were overly severe. The Commission analyzed sentencing data and found an “unusually high rate of downward variances and departures from the guideline” for offenders who received a 12- or 16- level increase under §2L1.2.⁹

The Commission’s research also identified a concern that §2L1.2 did not account for criminal conduct committed by illegal reentry offenders *after* their first deportations.¹⁰ In a 2015 study, the Commission found that 48.0 percent of §2L1.2 offenders were convicted of at least one offense (other than an illegal entry or reentry offense) after their first deportation.¹¹ The 2015 study also found that the average §2L1.2 offender was previously deported 3.2 times, and that 38.1 percent of §2L1.2 offenders illegally reentered at least once after being convicted for a prior illegal entry or reentry offense.¹²

Concerns Motivating Amendment 802

- 1. Simplification***
- 2. Severity***
- 3. Accounting for Other Criminal Conduct***

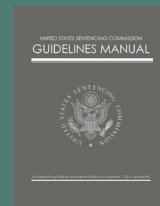
Post-Amendment Guideline

During the 2015–16 amendment cycle, the Commission sought to address these concerns. Following public comment and hearings, the Commission promulgated Amendment 802, which introduced a simpler, “sentence-imposed” approach to assessing prior convictions and aimed to account for prior criminal conduct in a broader and more proportionate way.¹³ Amendment 802 kept the base offense level of 8, but it provided for three SOCs reflecting various aspects of criminal history: (1) prior immigration convictions; (2) other convictions *before* the first order of deportation or removal; and (3) other convictions *after* the first order of deportation or removal (Figure 3). The amendment also provided that only prior convictions that received criminal history points can be considered when applying the SOCs.¹⁴

Prior Immigration Convictions

The amendment added a new SOC at §2L1.2(b)(1) for prior immigration convictions.¹⁵ Under this SOC, “[i]f the defendant committed the instant offense after sustaining . . . a conviction for a felony [] illegal reentry offense,” a 4-level increase applies.¹⁶ If the instant offense followed two or more misdemeanor illegal entry convictions under 8 U.S.C. § 1325(a), a 2-level increase applies.¹⁷

Figure 3. Post-Amendment Guideline (2016 Guidelines Manual)



§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by **4** levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by **2** levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

Other Prior Convictions

The amendment made several changes to how other prior convictions (other than for illegal entry or reentry offenses) are considered. The amended guideline includes two subsections, §2L1.2(b)(2) and §2L1.2(b)(3), that consider criminal history in two time periods—before and after “the defendant was ordered deported or ordered removed from the United States for the first time.”¹⁸ Under each subsection, the guideline assigns incremental offense level increases based on the length of the sentence imposed for the prior conviction (e.g., a 10-level increase for a prior sentence of five years or more).¹⁹ Previously, offense level increases were based on the type of prior conviction (e.g., “drug trafficking offense” or “crime of violence”). The sentence lengths triggering offense level increases are parallel under both subsections.²⁰

In adopting the “sentence-imposed” model, the Commission concluded that “the length of sentence imposed by a sentencing court is a strong indicator of the court’s assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal

history is generally scored in [] Chapter Four of the *Guidelines Manual*.”²¹ Public comment also indicated that a sentence-imposed approach would greatly simplify application of the guideline by no longer requiring use of the categorical approach.²² The sentence lengths triggering the various increases were based on “Commission data showing differing median sentence lengths for a variety of predicate offense categories.”²³ For example, sentences for “more serious predicate offenses, such as drug-trafficking and felony assault, exceeded the two- and five-year benchmarks far more frequently than did sentences for less serious felony offenses, such as drug possession and theft.”²⁴

In addition, the amended guideline limits the offense level increases for prior convictions to a maximum of 10 levels in response to criticism that §2L1.2’s 12- and 16-level enhancements were overly severe. Commenters had criticized §2L1.2’s “use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement up to 16 levels [that] is often disproportionate to a defendant’s culpability or recidivism risk.”²⁵

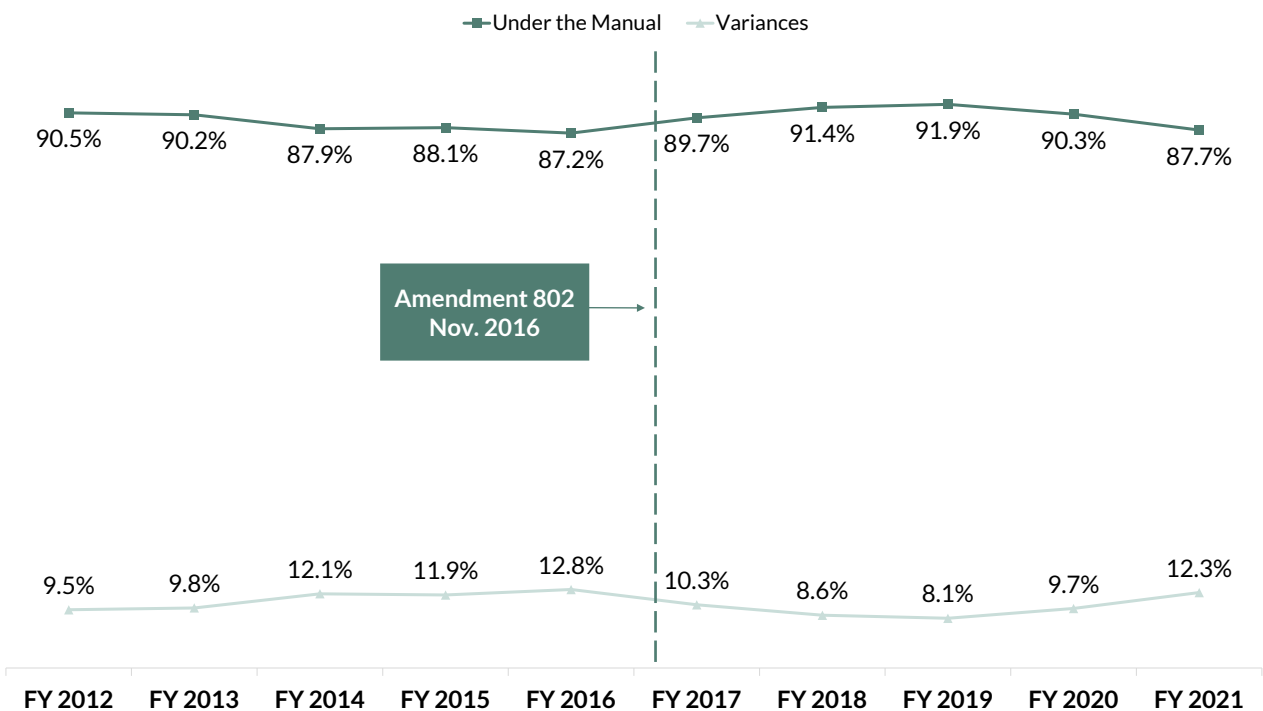
MEASURING THE IMPACT OF THE AMENDMENT

Guideline Application

Both before and after the amendment, courts sentenced §2L1.2 offenders under the *Guidelines Manual* at consistently high rates (Figure 4).²⁶ Variance rates for §2L1.2

sentences, in turn, have been consistently low overall over the last decade (between 8.1% to 12.8%).

Figure 4. §2L1.2 Sentences Under the Guidelines Manual



Before the amendment, however, courts varied downward at noticeably higher rates for §2L1.2 offenders with 12- and 16-level increases (18.1% and 22.5%, respectively) (Figure 5). This trend continued after the amendment: courts varied downward at higher rates for offenders with higher SOC increases (Figure 6).

However, the number of offenders receiving higher SOC increases declined considerably after the amendment. In the five fiscal years before the amendment, 26,094 offenders received a SOC increase of 12 or more levels. By contrast, 5,497 offenders received a total SOC increase of 12 or more in the five fiscal years after the amendment (Figure 7).

Figure 5. Sentence Relative to the Guideline Range by Specific Offense Characteristic Increase Pre-Amendment (Fiscal Years 2012–2016)²⁷

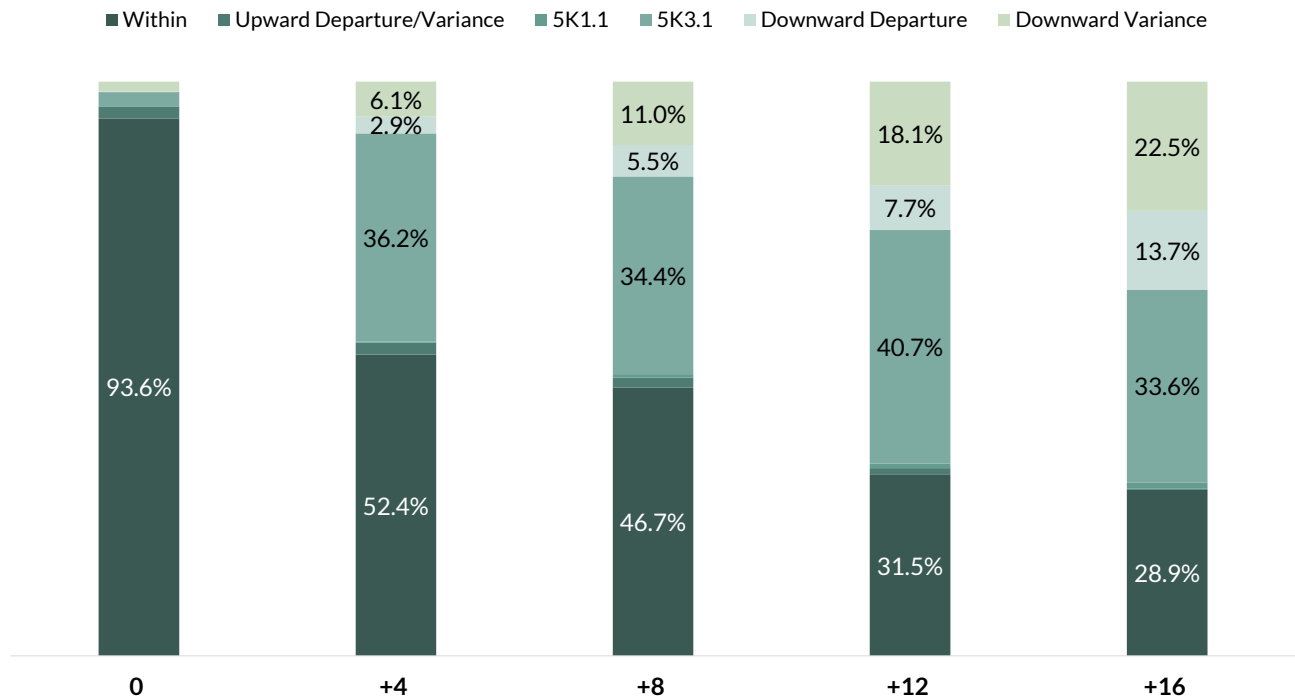
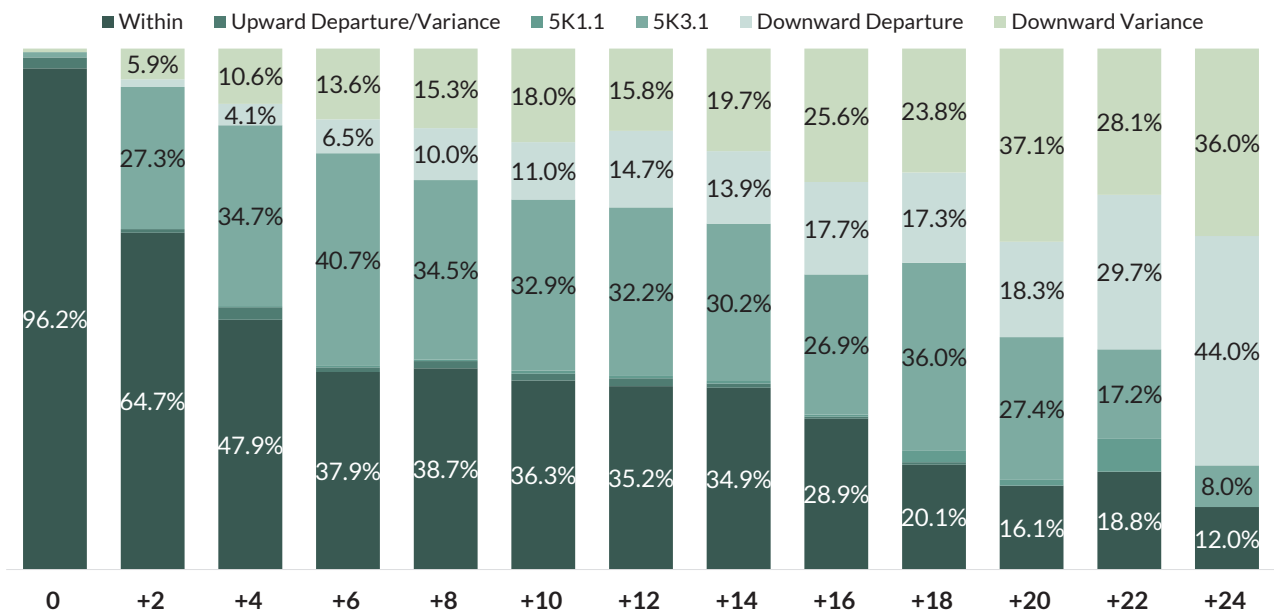


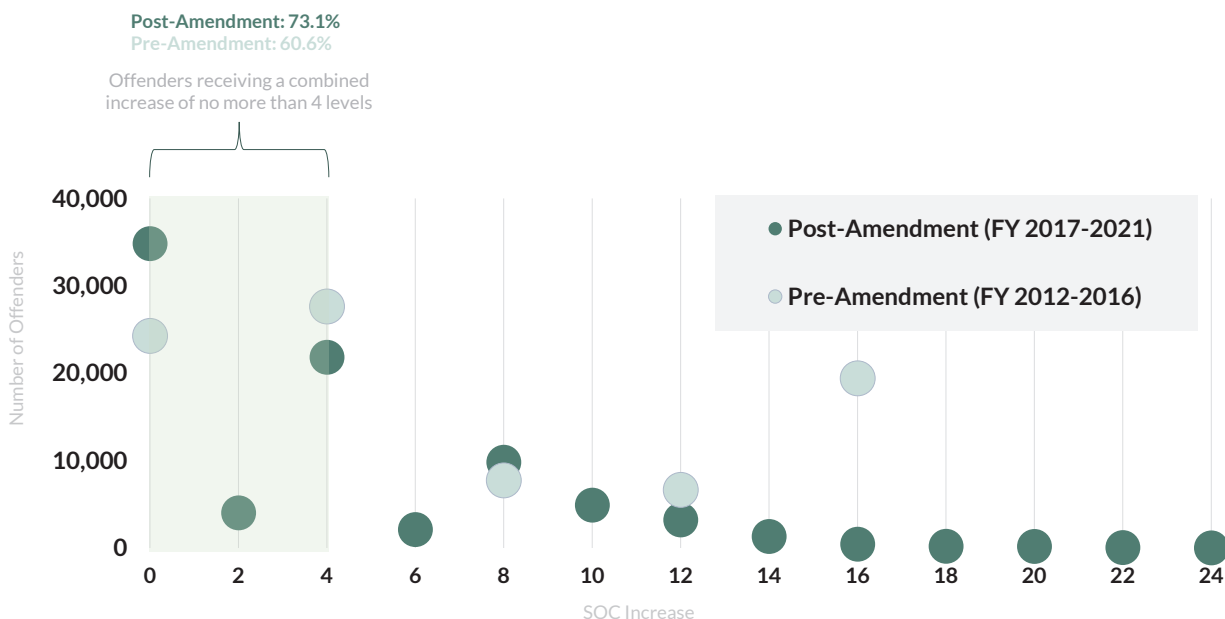
Figure 6. Sentence Relative to the Guideline Range by Total Specific Offense Characteristic Increase Post-Amendment (Fiscal Years 2017–2021)



Relatedly, the average SOC increase was lower in the five fiscal years after the amendment (4 levels) than the five fiscal years before (7 levels). Nearly three-quarters (73.1%) of offenders sentenced after the amendment received a combined increase of no more than 4 levels,

compared to approximately three-fifths (60.6%) of offenders sentenced before the amendment. In addition, 41.9 percent of offenders sentenced after the amendment received no SOC increase at all, compared to 28.3 percent of those sentenced beforehand.

Figure 7. Number of §2L1.2 Offenders by Total Specific Offense Characteristic Increase



The lower SOC increases after the amendment may be due in part to the fact that all §2L1.2 SOC's relate to criminal history, and §2L1.2 offenders sentenced after the amendment generally had less extensive criminal histories than those sentenced beforehand. Nearly 60 percent (59.3%) of §2L1.2 offenders were in the lowest criminal history categories (CHC), I and II, in the five years after the amendment, compared to 45.3 percent beforehand (Figure 8). The proportion of §2L1.2 offenders in CHC I rose steadily from 29.0 percent in fiscal year 2017 to 41.6 percent in fiscal year 2020, before declining to 19.1 percent in fiscal year 2021 (Figure 9).

Figure 8. Criminal History Category for §2L1.2 Offenders

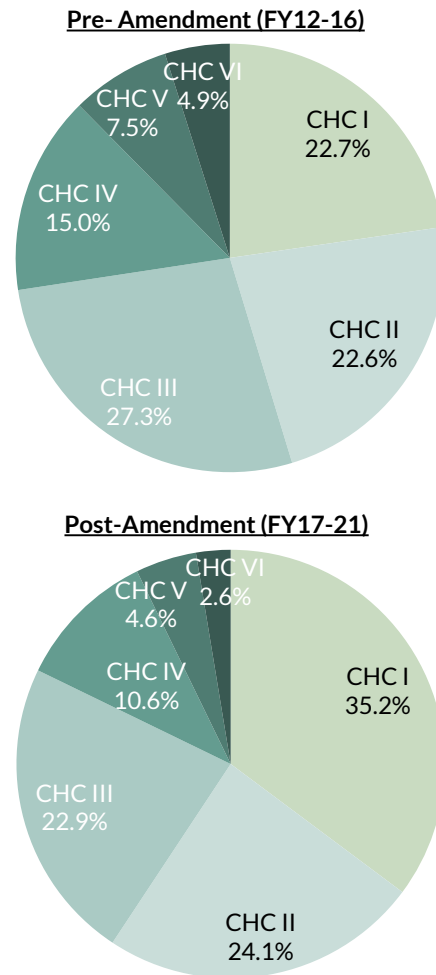
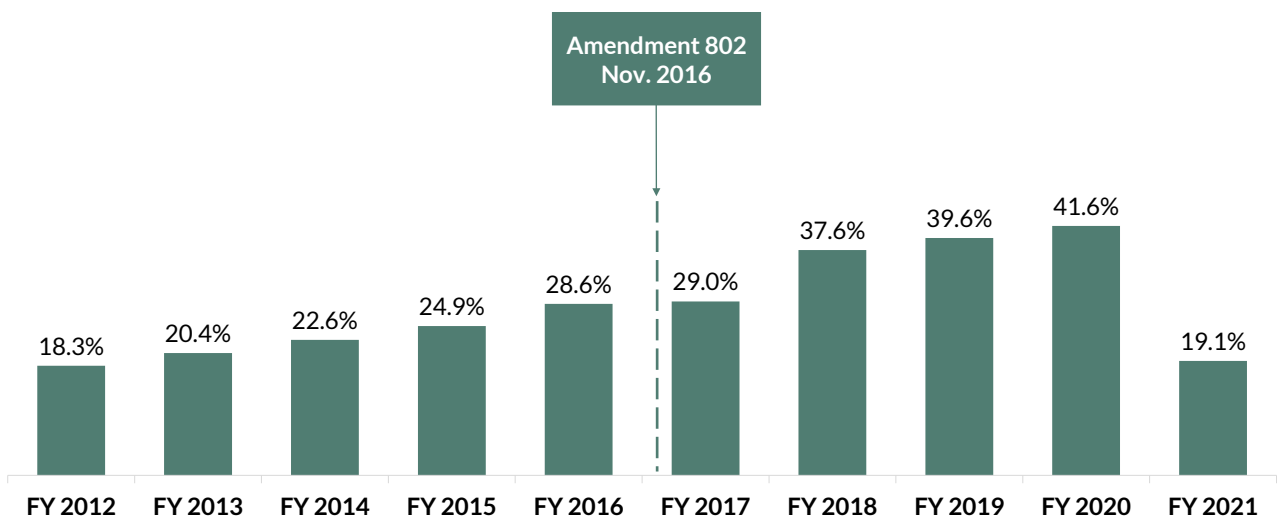


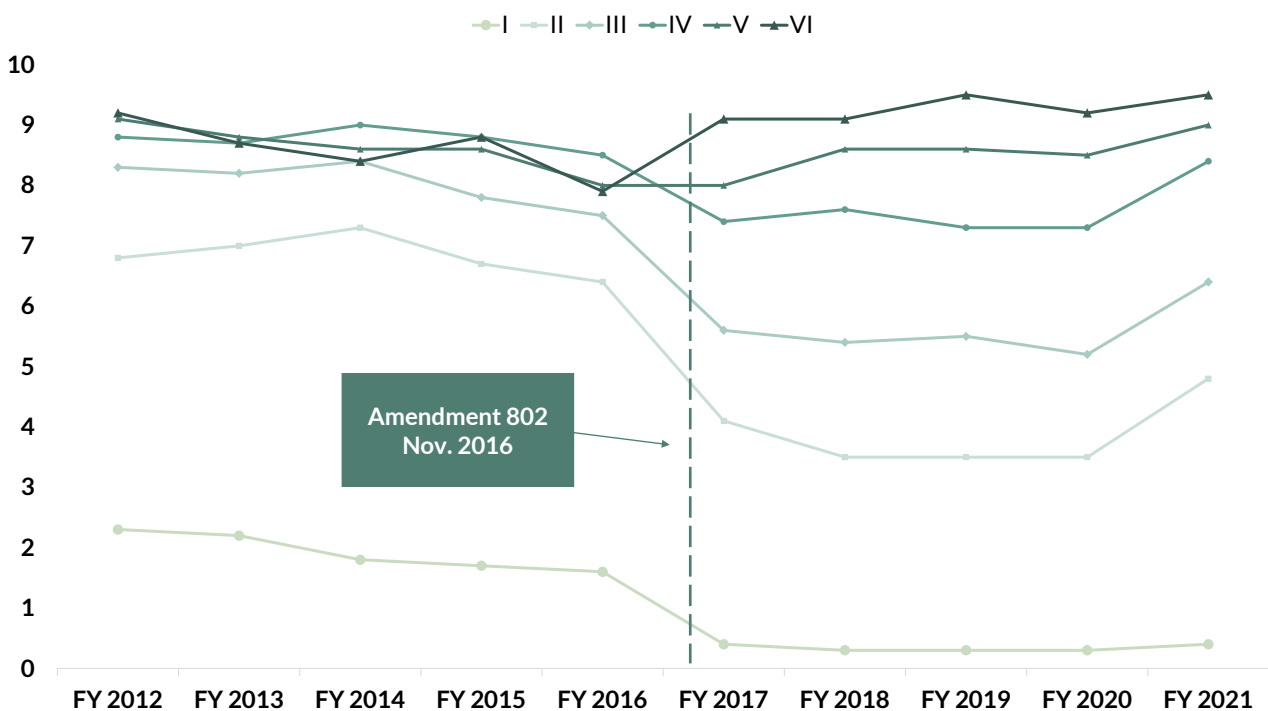
Figure 9. Proportion of §2L1.2 Offenders in Criminal History Category I



Even with the change in criminal history distribution, offenders had lower SOC increases on average after the amendment than offenders with similar criminal histories had before the amendment (Figure 10).²⁸ For example, offenders in CHC I had an average SOC increase of two levels before the amendment and zero levels after the amendment. In short, the revised guideline structure resulted in lower average SOC increases post-amendment for §2L1.2 offenders even when criminal history was held constant.

Both before and after the amendment, the rate of within-guideline sentences decreased as the number of SOC levels increased. Courts sentenced offenders with no SOC increase within the guideline range over 90 percent of the time, while they sentenced those with an increase of 12 or more levels within the guideline range 35 percent of the time or less (Figures 5 and 6, *supra*).

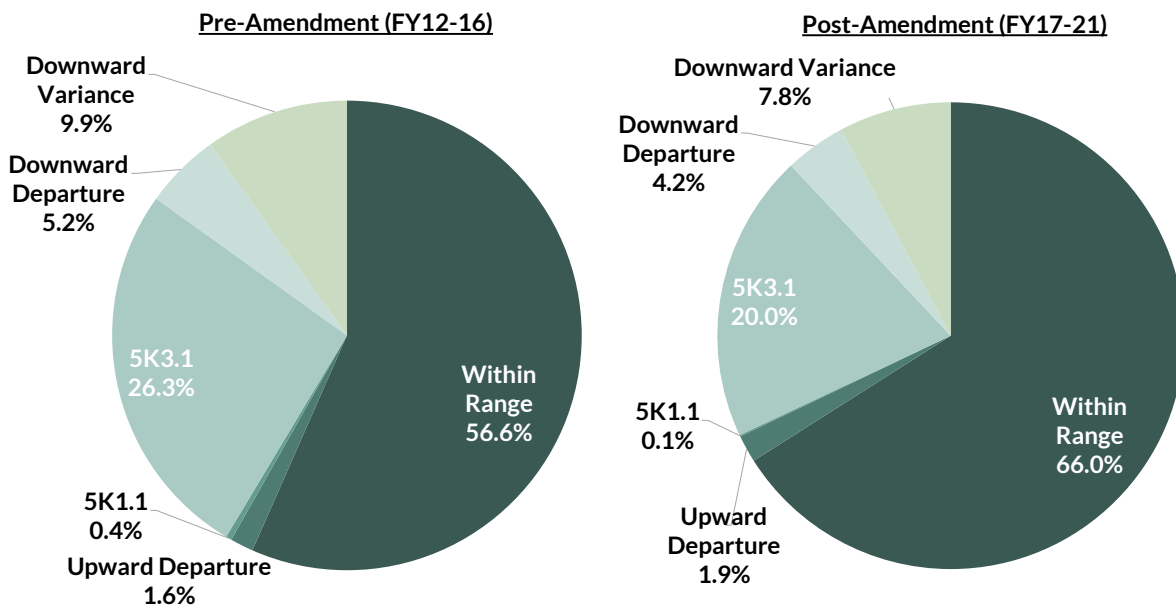
Figure 10. Average Total Specific Offense Characteristic Increases by Criminal History Category



With §2L1.2 offenders having lower SOC increases on average after the amendment, courts sentenced within the guideline range more frequently. The percentage of sentences within the

guideline range increased from an average of 56.6 percent for the five fiscal years before the amendment to an average of 66.0 percent for the five fiscal years afterward (Figure 11).

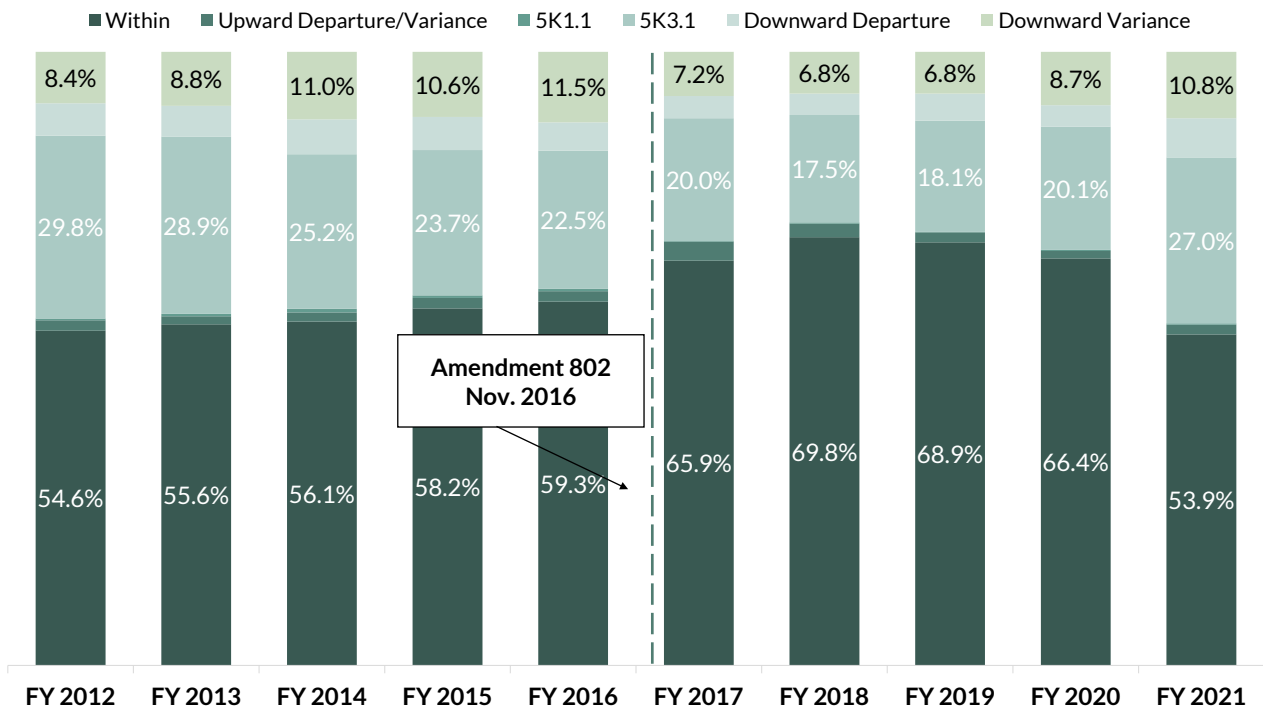
Figure 11. Sentence Relative to the Guideline Range



Examining these figures on an annual basis, courts sentenced §2L1.2 offenders within the guideline range between 55 to 59 percent of the time overall from fiscal years 2012 to 2016 (Figure 12). After the amendment went into effect, courts sentenced §2L1.2 offenders within the

guideline range at a higher rate overall—between 66 to 70 percent of the time from fiscal years 2017 to 2020.²⁹ The within-guideline rate dropped to 53.9 percent in fiscal year 2021, and the first quarter of fiscal year 2022 data shows a similar rate of within range sentences (52.9%).

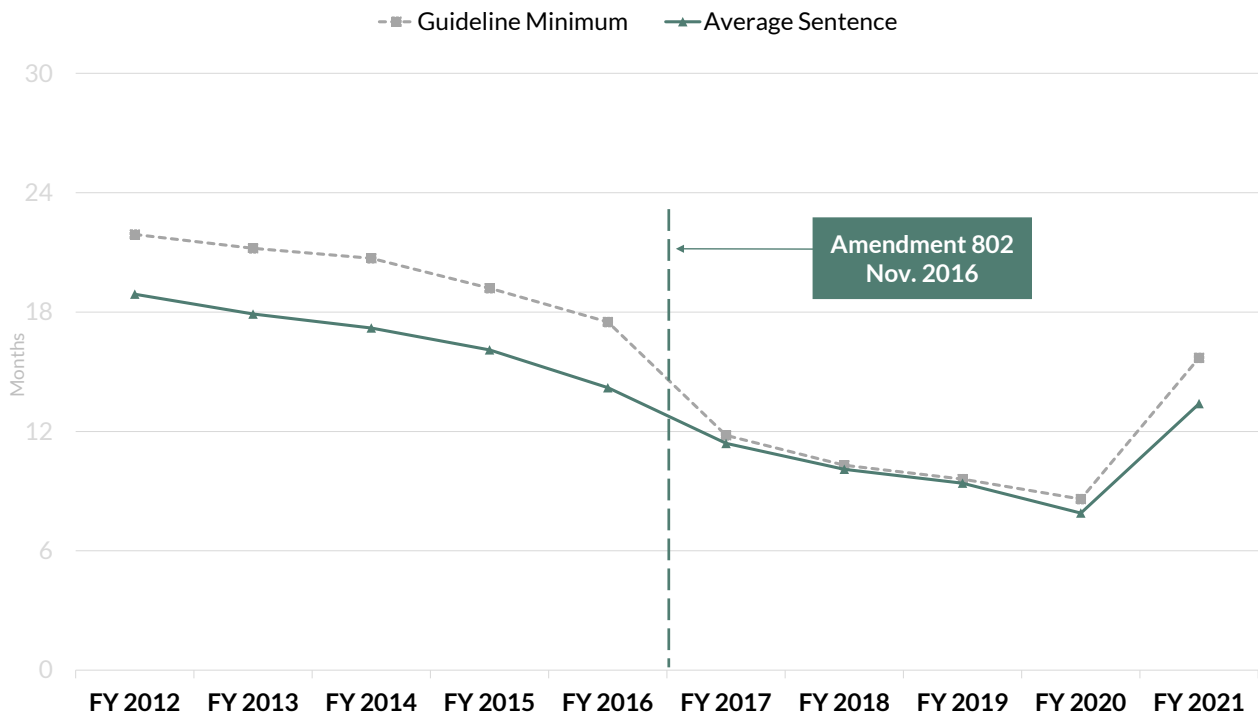
Figure 12. Sentence Relative to the Guideline Range for §2L1.2 Offenders



With lower CHCs and lower SOC increases after the amendment, §2L1.2 offenders also had lower guideline minimums on average between fiscal years 2017 and 2021 (between 9 and 16 months), as compared to fiscal years 2012 to 2016 (between 17 and 22 months) (Figure 13).³⁰ The average sentence length for §2L1.2 offenders also decreased after the amendment. The average sentence was 10 months for fiscal years 2017 through 2021, compared to 17 months for fiscal years 2012 through 2016.

In addition, the gap between average guideline minimum and average sentences narrowed after the amendment (Figure 13). Before the amendment, courts imposed sentences that were, on average, three to three and a half months below the average guideline minimum. Between fiscal years 2017 and 2020, courts imposed sentences that were, on average, no more than one month below the applicable guideline minimum, and slightly over two months below in fiscal year 2021.

Figure 13. Average Guideline Minimum and Average Sentence for §2L1.2 Offenders

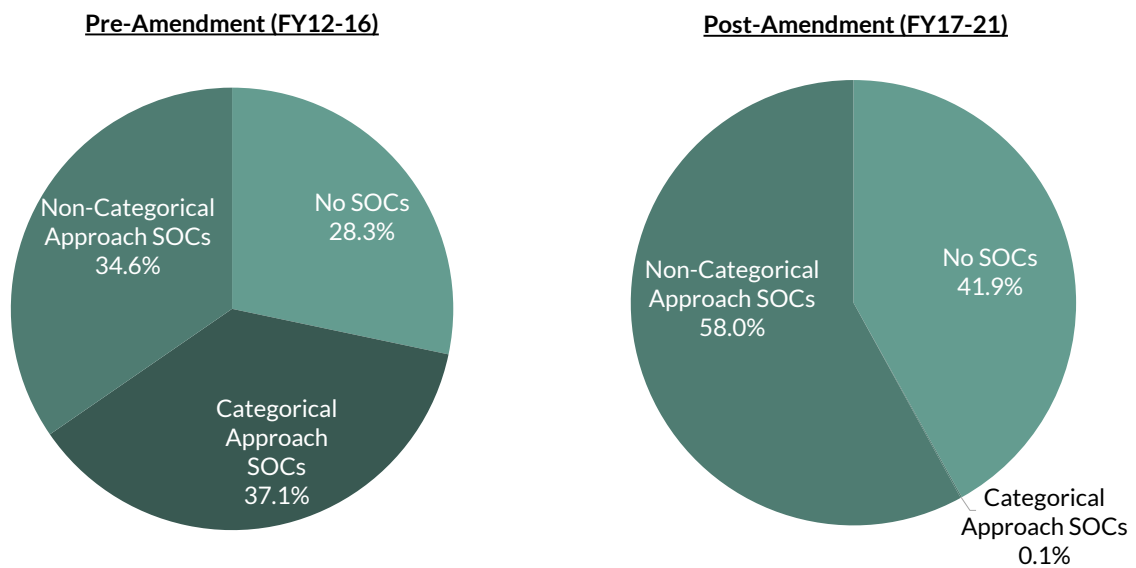


While average sentences largely aligned with average guideline minimums after the amendment, several external factors may have affected §2L1.2 guideline application during that period. The post-amendment period coincided with two changes in presidential administration, which may have impacted immigration priorities and the profile of offenders prosecuted. The COVID-19 pandemic also affected how courts have processed cases across all offense types—including immigration—over the last two years.³¹ Lastly, a public health order under title 42 of the United States Code issued in March 2020 resulted in increased expulsions of migrants at the border and fewer detentions and immigration prosecutions.³²

Guideline Simplification and Resulting Impact on Litigation

Regardless of external factors, the amendment succeeded in simplifying SOC application by essentially eliminating the need for courts to use the categorical approach. In the five fiscal years after the amendment, only 0.1 percent of §2L1.2 offenders (n=59) received a SOC increase that potentially required use of the categorical approach (Figure 14).³³ By contrast, a combined 37.1 percent of §2L1.2 offenders (n=31,824) received an SOC increase that potentially required use of the categorical approach in the five fiscal years before the amendment.³⁴

Figure 14. Application of Specific Offense Characteristics Potentially Involving the Categorical Approach



To further assess whether the amendment decreased litigation over §2L1.2, Commission staff reviewed appeals filed by offenders sentenced under §2L1.2 in the years before and after Amendment 802. Commission staff identified 249 written opinions across all circuit courts of appeals addressing such appeals in fiscal year 2016—the year immediately preceding the amendment.³⁵ The Court of Appeals for the Fifth Circuit issued over two-thirds of the opinions.³⁶

Across all circuits, 168 of the 249 (67.5%) written opinions addressed appeals in which at least one of the issues related to the use of the categorical approach

to determine whether a prior conviction qualified for an enhancement (Table 1).³⁷ In 100 of the 168 opinions, defendants had appealed whether a prior sentence qualified as a “drug trafficking offense.”³⁸ In 55 of the 168 opinions, defendants had appealed whether a prior conviction qualified as a “crime of violence.”³⁹ The other 13 opinions related to whether a prior conviction was an “aggravated felony.”⁴⁰ Several times during fiscal year 2016, the Fifth Circuit issued multiple opinions on these issues on the same day. For example, on October 22, 2015, the Fifth Circuit issued 24 opinions related to “drug trafficking offense” increases.⁴¹

Table 1. Appeals Relating to Application of the Categorical Approach (Fiscal Years 2016–2021)

| | FY 2016 | FY 2017* | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|--|---------|----------|---------|---------|---------|---------|
| TOTAL §2L1.2 Appeals | 249 | 239 | 115 | 62 | 52 | 24 |
| 2015 Guidelines Manual or Earlier | 249 | 169 | 58 | 23 | 7 | 2 |
| <i>Categorical Approach Issues</i> | 168 | 162 | 57 | 21 | 3 | 1 |
| 2016 Guidelines Manual or Later | N/A | 70 | 57 | 39 | 45 | 21 |
| <i>Sentence-Imposed Issues</i> | N/A | 5 | 10 | 11 | 10 | 6 |

**Amendment 802 went into effect one month into fiscal year 2017*

Commission staff identified a total of 492 opinions on §2L1.2 appeals issued in the five fiscal years after Amendment 802. As shown in Table 1, the total number of opinions on such appeals declined in each of the five fiscal years after Amendment 802. Notably, this decline occurred even while the number of immigration sentencings rose steadily from fiscal year 2016 to a ten-year high in fiscal year 2019.⁴²

Some opinions concerned appeals by §2L1.2 offenders sentenced under the 2015 *Guidelines Manual* or an earlier version—that is, before Amendment 802 became effective. In most of those appeals, at least one of the issues raised related to whether a prior conviction qualified for an increase under §2L1.2 using the categorical approach.⁴³ The number of appeals raising such issues decreased each year.

The balance of the opinions concerned appeals by §2L1.2 offenders sentenced under the 2016 *Guidelines Manual* or later, which incorporated Amendment 802. Some of those appeals involved application issues related to the amendment's new sentence-imposed approach.⁴⁴

For example, some defendants raised factual issues concerning the length of a prior sentence,⁴⁵ or whether a prior conviction was a felony.⁴⁶ In addition, the amended guideline's consideration of criminal history in two time periods led to disputes about whether the timing of prior criminal conduct, deportation or removal orders, and sentences imposed qualified for enhancements.

Notably, in *United States v. Franco-Galvan*, the Fifth Circuit vacated the defendant's sentence, which included a 10-level enhancement that applied if, before the first order of deportation or removal, the defendant sustained a

"conviction for a felony offense . . . for which the sentence imposed was five years or more."⁴⁷ The defendant had an aggravated assault conviction before he was ordered removed for the first time for which the sentence imposed was 30 days in jail and ten years' deferred adjudication probation. After the order of removal, a Texas court revoked his probation and sentenced him to 15 years in prison.⁴⁸ The Fifth Circuit determined that the district court should not have included the revocation sentence in calculating the total sentence length. Rather, "courts should look to the original sentence of probation imposed prior to the defendant's deportation order and not any prison sentence imposed upon revocation that followed the order" in determining increases under §2L1.2.⁴⁹

In *United States v. Martinez*, the Ninth Circuit similarly determined that the defendant's prior sentence did not qualify for the eight-level enhancement under

§2L1.2(b)(2)(B) for sustaining a pre-deportation conviction for which the sentence imposed was two years or more.⁵⁰ The court found that the defendant “was sentenced to only one year of incarceration before his first deportation order; the sentence was increased to three years of incarceration after he returned to the United States,” and that the sentence thus did not qualify.⁵¹

Amendment 809

In 2018, the Commission promulgated a new amendment to address *Franco-Galvan, Martinez*, and other application issues. Amendment 809, which became effective on November 1, 2018, addressed scenarios where “a felony will not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occur when a defendant committed a crime before being ordered

removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal.”⁵² Amendment 809 addressed this issue by establishing that subsection (b)(2) applies if “criminal conduct” before the first removal resulted in a conviction “at any time.”⁵³ Similarly, subsection (b)(3) now applies if “criminal conduct” after the first removal resulted in a conviction “at any time.”⁵⁴

Amendment 809 also addressed issues related to length of the “sentence imposed” that were addressed by the Fifth and Ninth Circuits.⁵⁵ The Commentary to §2L1.2 had explained that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.”⁵⁶ The amendment added the phrase “regardless of when the revocation occurred” to clarify how to calculate the length of the sentence imposed.⁵⁷

CONCLUSION

Amendment 802 represented a significant overhaul of the illegal reentry guideline, §2L1.2, which has accounted for roughly one-third of the federal sentencing caseload in recent years. Before the amendment went into effect, courts and stakeholders had expressed various concerns about the guideline, including the severity of 12- and 16-offense level increases, the complexity of using the categorical approach to assess whether prior convictions qualified for offense level increases, and whether §2L1.2 adequately accounted for other criminal conduct.

In addition to adding new specific offense characteristics to capture prior immigration offenses and criminal conduct after removal or deportation, Amendment 802 addressed concerns about the severity of §2L1.2's enhancements. Considerably fewer §2L1.2 offenders received increases of 12 or more levels in the five fiscal years after the amendment than the five fiscal years before, and the average offense level increase was lower. While these changes were likely due in part to §2L1.2 offenders'

having less extensive criminal histories after the amendment, most offenders received lower increases even accounting for criminal history. The rate of within-guideline sentences also increased from 56.6 percent to 66.0 percent after the amendment. External factors, including changes in presidential administrations and the Covid-19 pandemic, also may have affected guideline trends after the amendment.

Regardless of external factors, Amendment 802 succeeded in simplifying the guideline and reducing litigation. The amendment introduced a simpler, sentenced-imposed approach that essentially eliminated the use of the categorical approach. Less than 0.1 percent of §2L1.2 offenders received an enhancement requiring the categorical approach in the five fiscal years after the amendment as compared to more than 37 percent in the five fiscal years beforehand. In addition, the number of §2L1.2 appeals decreased by 90 percent after the amendment.

APPENDIX A: SNAPSHOT OF §2L1.2 SENTENCINGS

Figure A-1. Demographic Characteristics of Offenders Sentenced under §2L1.2 and All Other Guidelines (Fiscal Year 2021)

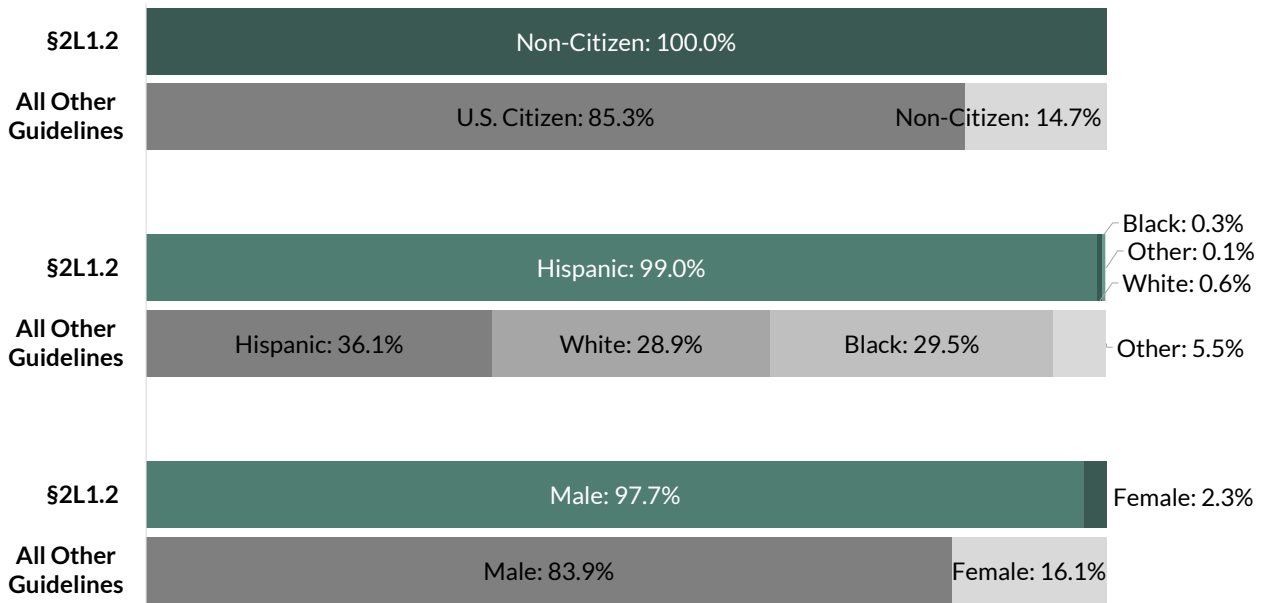


Figure A-2. Top Judicial Districts for §2L1.2 Sentencings (Fiscal Year 2021)

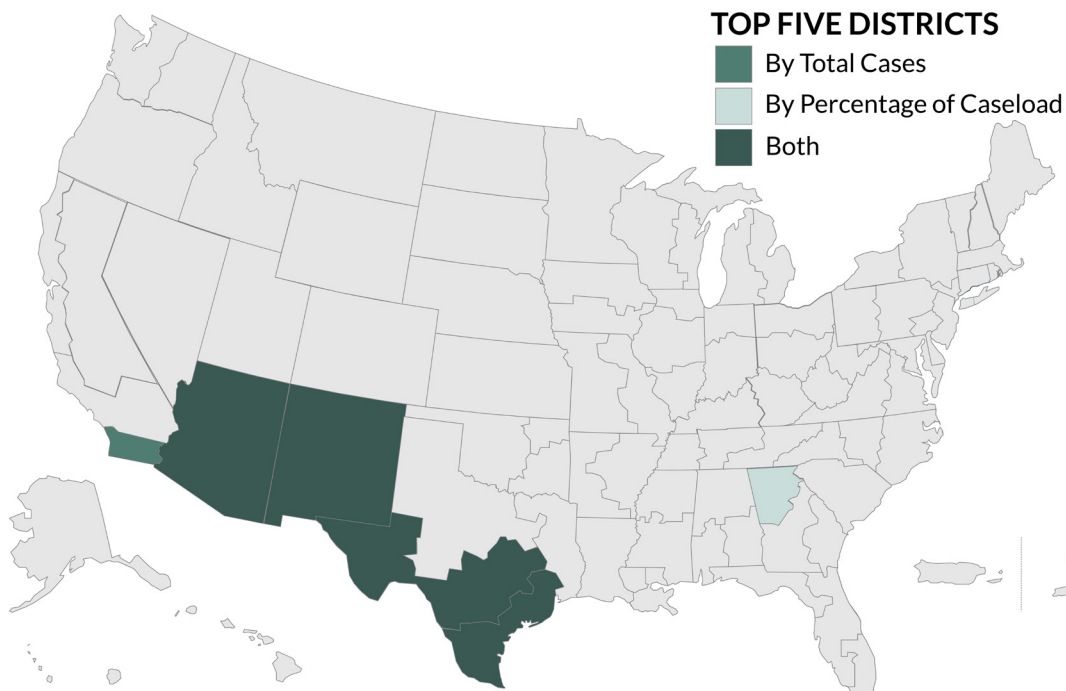


Figure A-3. Statutory Maximums for §2L1.2⁵⁸ Offenders (Fiscal Year 2021)

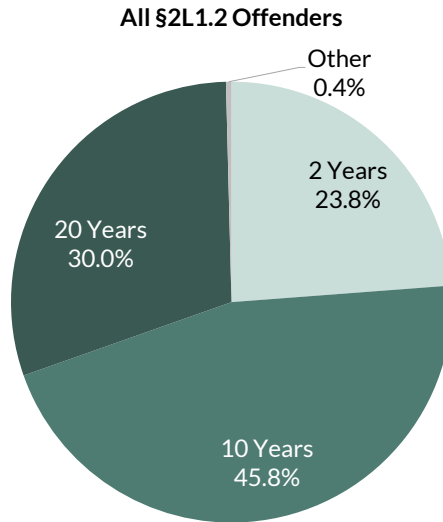
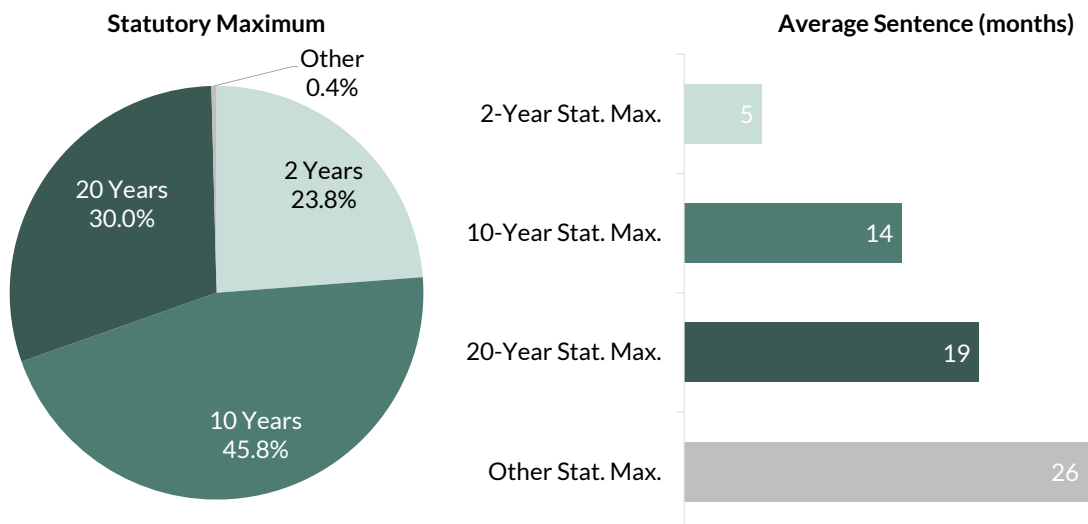


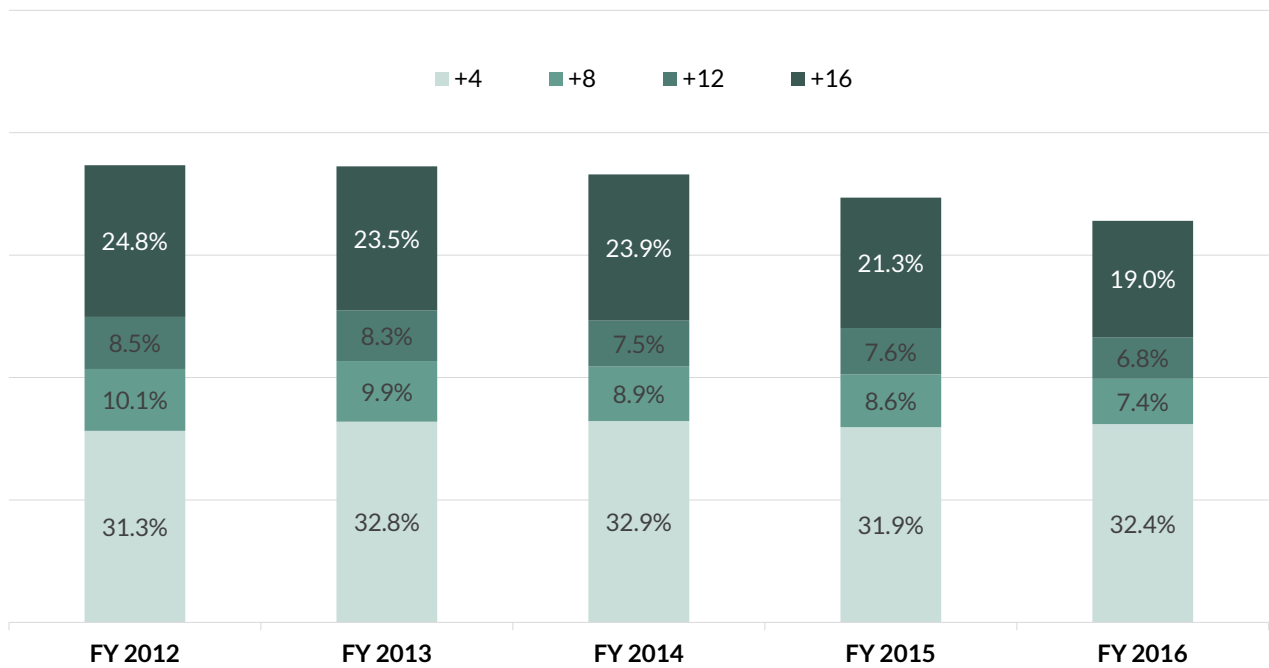
Figure A-4. Average Sentence Imposed by Statutory Maximum for §2L1.2 Offenders (Fiscal Year 2021)



APPENDIX B: APPLICATION OF SPECIFIC OFFENSE CHARACTERISTICS FOR §2L1.2 OFFENDERS

Pre-Amendment

Figure B-1. SOC Increases Under §2L1.2 (Fiscal Years 2012–2016)



Post-Amendment

Figure B-2. Increases Under §2L1.2(b)(1): Prior Immigration Convictions (Fiscal Years 2017–2021)

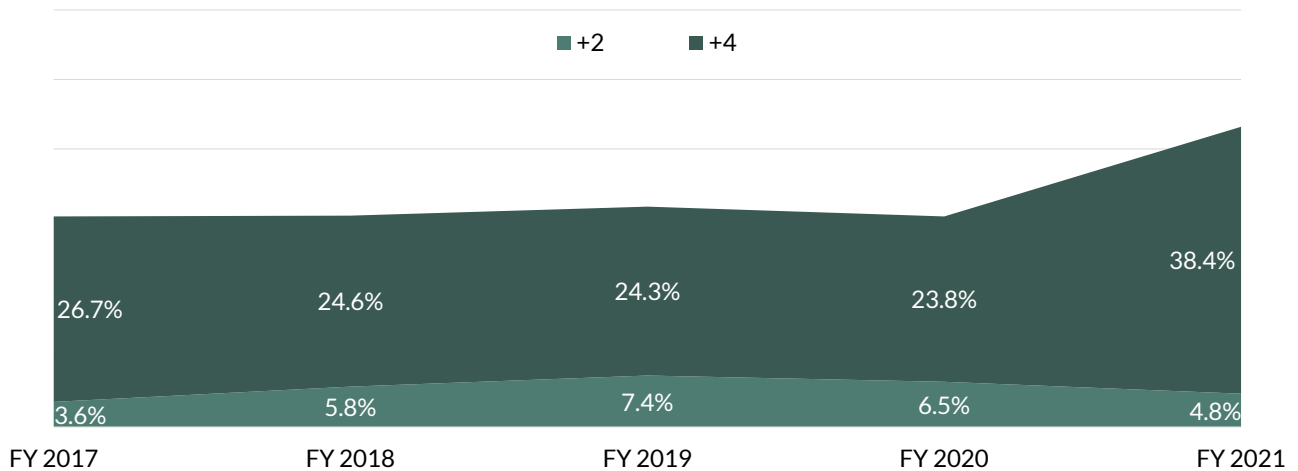


Figure B-3. Increases Under §2L1.2(b)(2): Convictions/Criminal Conduct Before First Deportation or Removal (Fiscal Years 2017–2021)

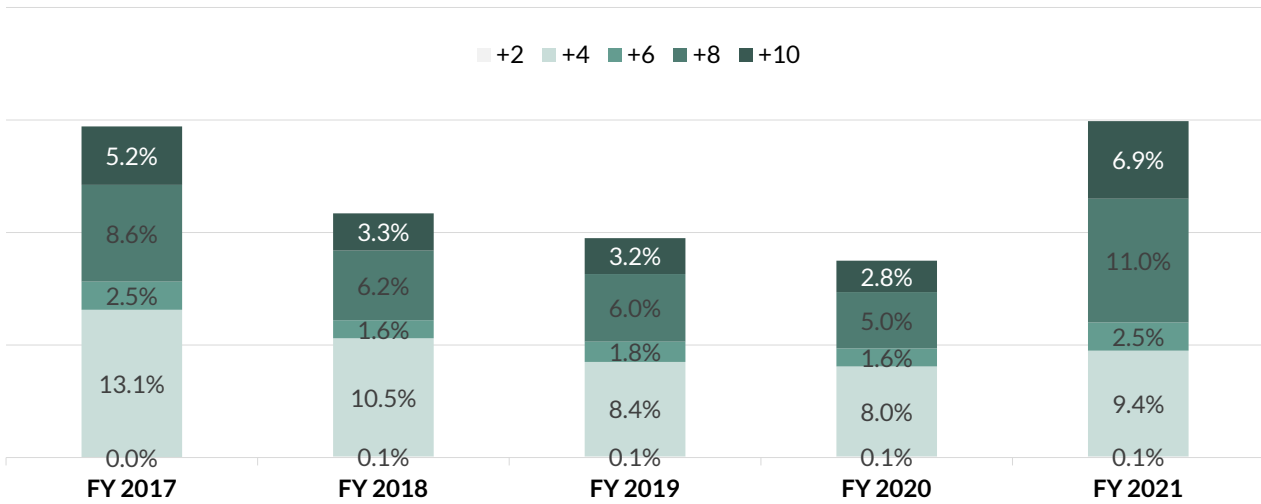
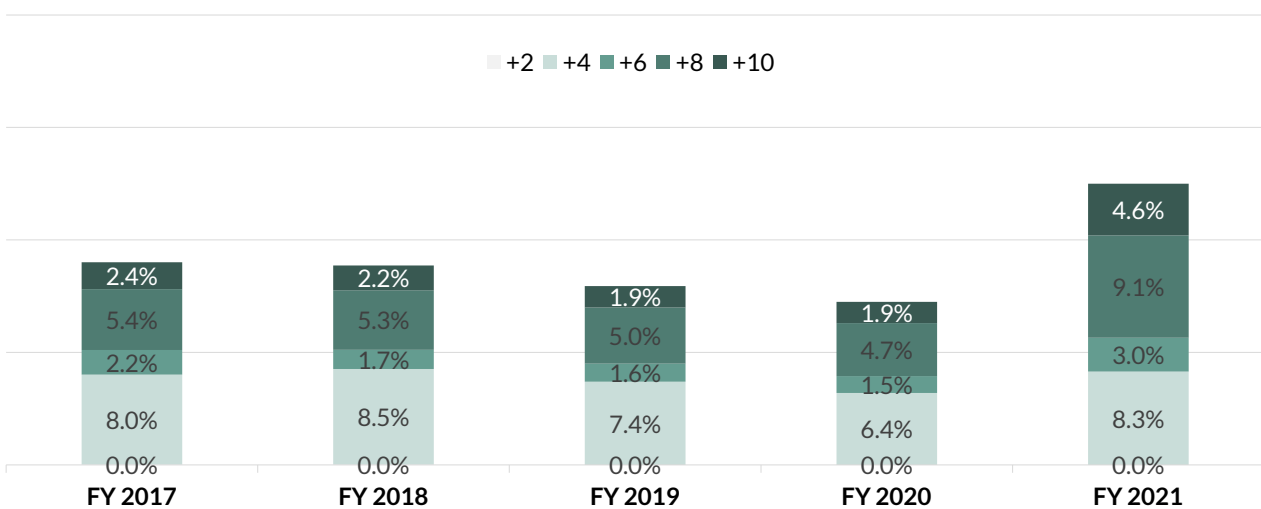


Figure B-4. Increases Under §2L1.2(b)(3): Convictions/Criminal Conduct After First Deportation or Removal (Fiscal Years 2017–2021)



Endnotes

- 1 U.S. SENT'G COMM'N, *Guidelines Manual*, App. C, amend. 802 (effective Nov. 1, 2016) [hereinafter 2016 *Guidelines Manual*].
- 2 In fiscal year 2021, 73 percent of immigration offenders were sentenced under §2L1.2.
- 3 See U.S. SENT'G COMM'N, *Guidelines Manual*, App. A (Statutory Index) (Nov. 2021) [hereinafter USSG].
- 4 The illegal reentry statute prohibits an alien's unauthorized return to the United States after deportation, removal, exclusion, or denial of admission. 8 U.S.C. § 1326. Less than one percent of offenders sentenced under §2L1.2 in the last ten fiscal years were convicted under 8 U.S.C. §§ 1253 or 1325(a), and none were convicted under 8 U.S.C. § 1185(a)(1), the fourth statute referenced to §2L1.2. See USSG App. A (Statutory Index).
- 5 See U.S. SENT'G COMM'N, *Guidelines Manual*, §2L1.2 (Nov. 2015) [hereinafter 2015 *Guidelines Manual*]. These offense level increases first were included in §2L1.2 in the 2001 version of the *Guidelines Manual*. See USSG App. C, amend. 632 (effective Nov. 1, 2001); see also USSG §2L1.2, historical note.
- 6 See 2015 *Guidelines Manual* §2L1.2(b)(1)(A)(i)–(ii); see also *id.* §2L1.2(b)(1)(B).
- 7 The Supreme Court first established the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and later created the “modified categorical approach” in *Shepard v. United States*, 544 U.S. 13 (2005). Subsequent Supreme Court cases have expanded on these concepts. See generally U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2021) [hereinafter PRIMER ON CATEGORICAL APPROACH]. Unless otherwise noted, Commission materials cited herein are available on the Commission's website at www.ussc.gov.
- 8 USSG App. C, amend. 802 (effective Nov. 1, 2016); see also, e.g., Written Statement of Philip R. Martinez, United States District Judge, Western District of Texas, El Paso Division (March 2016) (noting significant amount of resources expended under then-current system by prosecutors, defense counsel, probation officers, district and circuit judges and that the categorical approach “has led courts to inconsistent and arbitrary sentencing outcomes”).
- 9 USSG App. C, amend. 802 (effective Nov. 1, 2016).
- 10 *Id.* (citing U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES (April 2015) [hereinafter 2015 ILLEGAL REENTRY OFFENSES]).
- 11 See 2015 ILLEGAL REENTRY OFFENSES, *supra* note 10, at 18.
- 12 *Id.* at 14–15.
- 13 USSG App. C, amend. 802 (effective Nov. 1, 2016).
- 14 *Id.*; see also USSG §2L1.2, comment. (n.3). Previously, some convictions that were too old to receive criminal history points nonetheless triggered offense level increases under §2L1.2. See USSG App. C, amend. 802 (effective Nov. 1, 2016).
- 15 USSG App. C, amend. 802 (effective Nov. 1, 2016).

16 USSG §2L1.2(b)(1)(A); *see also* USSG §2L1.2, comment. (n.2) (defining “illegal reentry offense” as “(A) an offense under 8 U.S.C. § 1253 [failure to depart] or § 1326 [illegal reentry], or (B) a second or subsequent offense under 8 U.S.C. § 1325(a) [illegal entry]”).

17 USSG §2L1.2(b)(1)(B).

18 2016 *Guidelines Manual* §2L1.2(b)(2)–(3).

19 *Id.*

20 *Id.* As explained further below, certain application issues related to these subsections arose after the amendment. Accordingly, in 2018, the Commission promulgated a further amendment establishing that the increases under §2L1.2(b)(2) and §2L1.2(b)(3) depend on the timing of the underlying “criminal conduct,” not on when the resulting conviction occurred. USSG App. C, amend. 809 (effective Nov. 1, 2018).

21 USSG App. C, amend. 802 (effective Nov. 1, 2016).

22 *Id.* The Commission retained the categorical approach for predicate misdemeanors in §2L1.2(b)(2)(E) and §2L1.2(b)(3)(E) due to a congressional directive. *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 Sentences under the manual include sentences within the guideline range and upward or downward departures. By way of comparison, the rate of sentences under the manual for all other guidelines declined from 76.6 percent to 62.5 percent between fiscal years 2012 and 2021, while the variance rate rose from 23.4 percent to 37.5 percent.

27 In addition to the departures available in most cases, such as for substantial assistance to the government (§5K1.1), §2L1.2 offenders who participated in an early disposition program, also known as a “fast-track” program, are eligible for a downward departure of up to four levels. USSG §5K3.1.

28 The average SOC increase remained largely consistent for offenders in CHCs V and VI, which account for the smallest proportions of §2L1.2 offenders.

29 For those offenders sentenced in fiscal year 2017 or later, only those sentenced under a *Guidelines Manual* effective November 1, 2016, or later were included in order to analyze the effect of Amendment 802. In total, 3,877 offenders sentenced between fiscal years 2017 and 2021 were excluded because they were sentenced under an earlier version of the *Guidelines Manual*.

30 The *Guidelines Manual*’s Sentencing Table combines CHC and final offense level in a grid that determines offenders’ sentencing ranges. USSG Ch.5, Pt.A. The final offense level is the total of the base offense level and any SOC increase, plus any adjustments from Chapter Three of the *Guidelines Manual*.

31 *See, e.g.,* U.S. SENT’G COMM’N, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES 2 (2021).

32 *See* Department of Health and Human Services, Centers for Disease Control and Prevention, Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 17060 (Mar. 26, 2020).

33 These offenders received increases under §2L1.2(b)(2)(E) and/or (b)(3)(E) for three or more misdemeanor “crimes of violence” or “drug trafficking offenses.” *See supra* Figure 3.

34 These offenders received increases for a prior conviction for: a felony “drug trafficking offense” under

former §2L1.2(b)(1)(A)(i) or (b)(1)(B); a felony “crime of violence” under former §2L1.2(b)(1)(A)(ii); an “aggravated felony” under former §2L1.2(b)(1)(C); or three or more misdemeanor “crimes of violence” or “drug trafficking offenses” under former §2L1.2(b)(1)(E). *See supra* Figure 2.

35 Commission staff reviewed appellate opinions citing §2L1.2 in the Westlaw case database. Commission staff excluded appeals in which §2L1.2 was cited but the defendant was sentenced under or appealed from another guideline and appeals from Board of Immigration Appeals decisions that referenced §2L1.2. In addition, staff excluded appeals concerning only the illegal reentry statute (18 U.S.C. § 1326). Such appeals often challenged whether a prior conviction was to an “aggravated felony” for purposes for an increased statutory maximum under 18 U.S.C. § 1326(b)(2). *See, e.g.,* United States v. Valle-Ramirez, 908 F.3d 981, 984 (5th Cir. 2018).

36 The Fifth Circuit hears appeals from the Southern and Western Districts of Texas, among others, both of which are among the top judicial districts for §2L1.2 sentencings. *See* Appendix A, Figure A-2.

37 Commission staff counted appeals in this tally if the defendant raised an issue regarding whether the statute underlying a prior conviction matched the definition of “drug trafficking offense,” “crime of violence” or “aggravated felony,” regardless of whether the court addressed the argument substantively in the written opinion. Commission staff did not include in the tally appeals in which the defendant did not argue whether a prior conviction was a categorical match but instead raised challenges to the sufficiency of the evidence demonstrating a prior conviction or whether a prior conviction was a felony.

38 These appeals related both to the 16-level increase under former §2L1.2(b)(1)(A)(i) for a prior conviction for a drug trafficking offense for which the sentence imposed exceeding 13 months, and the 12-level increase under former §2L1.2(b)(1)(B) for a prior drug trafficking offense for which the sentence imposed was 13 months or less. *See supra* Figure 2.

39 Such appeals related to the 16-level increase under former §2L1.2(b)(1)(A)(ii). *See supra* Figure 2.

40 Such appeals related to the 8-level increase under former §2L1.2(b)(1)(C). *See supra* Figure 2.

41 In each case, the defendant’s arguments were foreclosed by circuit precedent. *See, e.g.,* United States v. Martinez-Lugo, 782 F.3d 198, 205 (5th Cir. 2015) (per curiam) (under categorical approach, possession with intent to distribute under Georgia law is a “drug trafficking offense” even though it criminalizes such possession without remuneration).

42 *See supra* Figure 1.

43 In some of these appeals, defendants referenced notable opinions related to the categorical approach that the Supreme Court issued in the years surrounding the amendment. *See generally* PRIMER ON CATEGORICAL APPROACH, *supra* note 7; *see also, e.g.,* United States v. Godoy, 890 F.3d 531, 541–42 (5th Cir. 2018) (guidelines are not subject to vagueness challenges, so *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) does not prevent application of guidelines incorporating the statutory definition of “crime of violence”).

44 Other appeals after the amendment challenged the procedural or substantive reasonableness of the sentence or raised *ex post facto* concerns about which *Guideline Manual* to use.

45 *See, e.g.,* United States v. Velasquez-Canales, 987 F.3d 367, 369 (4th Cir.) (prior sentence of six to 17 months in prison, of which the last nine months were to be served in post-release was sufficient for enhancement under §2L1.2(b)(3)(C)), *cert. denied*, 142 S. Ct. 261 (2021); United States v. Cuevas-Lopez, 934 F.3d 1056, 1058 (9th Cir. 2019) (district court did not err in aggregating two sentences; “[we] [] join[] the Fifth Circuit in holding that the single sentence rule in §4A1.2(a)(2) governs the determination whether an enhancement applies under § 2L1.2(b)”).

46 *See, e.g.,* United States v. Valencia-Mendoza, 912 F.3d 1215, 1216 (9th Cir. 2019) (prior offense was not a felony; although the general statutory maximum exceeded one year, “the actual maximum term that Defendant could have received was only six months, because Washington law imposed a mandatory sentencing range”).

47 864 F.3d 338, 340 (5th Cir. 2017) (per curiam) (citing 2016 *Guidelines Manual*, §2L[b](2)(d)).

48 *Id.* at 339.

49 *Id.* at 340.

50 870 F.3d 1163, 1164 (9th Cir. 2017).

51 *Id.*

52 USSG App. C, amend. 809 (effective Nov. 1, 2018).

53 USSG §2L1.2(b)(2) (“If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time resulted in [a conviction for which the sentenced imposed was]”).

54 USSG §2L1.2(b)(3) (“If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in [a conviction for which the sentenced imposed was]”).

55 USSG App. C, amend. 809 (effective Nov. 1, 2018) (citing *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017); *United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017)).

56 2016 *Guidelines Manual* §2L1.2, comment. (n.2); *see also* USSG §4A1.2(k)(1).

57 USSG App. C, amend. 809 (effective Nov. 1, 2018); USSG §2L1.2, comment. (n.2).

58 The baseline maximum statutory penalty of two years, 18 U.S.C. § 1326(a)(2), increases to ten years if an alien’s removal followed a conviction for “three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony).” *Id.* § 1326(b)(1); *see also id.* § 1326(b)(3)–(b)(4). A 20-year maximum applies if removal followed an “aggravated felony.” *Id.* § 1326(b)(2).



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