
ILLEGAL REENTRY OFFENSES



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ILLEGAL REENTRY OFFENSES



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ILLEGAL REENTRY OFFENSES

This report analyzes data collected by the United States Sentencing Commission¹ concerning cases in which offenders are sentenced under USSG §2L1.2 — commonly called “illegal reentry” cases.² Such cases are a significant portion of all federal cases in which offenders are sentenced under the United States Sentencing Guidelines. In fiscal year 2013, for instance, illegal reentry cases constituted 26 percent of all such cases. As part of its ongoing review of the guidelines, including the immigration guidelines,³ the Commission examined illegal reentry cases from fiscal year 2013, including offenders’ criminal histories, number of prior deportations, and personal characteristics.

Part I of this report summarizes the relevant statutory and guideline provisions. Part II provides general information about illegal reentry cases based on the Commission’s annual datafiles. Part III presents the findings of the Commission’s in-depth analysis of a representative sample of illegal reentry cases. Part IV presents key findings.

Among the key findings from analysis of fiscal year 2013 data: (1) the average sentence for illegal reentry offenders was 18 months; (2) all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without “aggravated felony” convictions); (3) the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to §2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under §2L1.2(b) (92.7%); (4) significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most

¹ The United States Sentencing Commission (“Commission”) is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues. *See* 28 U.S.C. § 995(a)(14), (15) and (20).

² In addition to illegal reentry in violation of 8 U.S.C. § 1326, offenses punishable under this guideline include three related offenses: 8 U.S.C. § 1185(a)(1) (aliens departing from or entering the United States contrary to regulation), 8 U.S.C. § 1253 (failure to depart), and 8 U.S.C. § 1325(a) (second or subsequent offense of improper entry by alien). Of all offenses punished under §2L1.2 during fiscal year 2013, 95 percent were illegal reentry offenses prosecuted under 8 U.S.C. § 1326. Throughout this Report, “illegal reentry” will be used as shorthand to refer collectively to all of the related offenses punished under §2L1.2.

³ One of the Commission’s policy priorities during the amendment cycle ending May 1, 2015 is “Study of the guidelines applicable to immigration offenses and related criminal history rules, and consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.” 79 Fed. Reg. 49378-01, 49379 (Aug. 20, 2014).

illegal reentry offenders were prosecuted; (5) the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction; (6) 61.9 percent of offenders were convicted of at least one criminal offense *after* illegally reentering the United States; (7) 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions; and (8) most illegal reentry offenders were apprehended by immigration officials at or near the border.

In 2013, there were approximately 11 million non-citizens illegally present in the United States, and the federal government conducted 368,644 deportations.⁴ The information contained in this report does not address the larger group of non-citizens illegally present in the United States and, instead, solely concerns the 18,498 illegal reentry offenders sentenced under §2L1.2 of the United States Sentencing Guidelines in fiscal year 2013. Therefore, the information should not be interpreted as representative of the characteristics of illegal immigrants generally.

I. RELEVANT STATUTORY AND GUIDELINE PROVISIONS

A. The Illegal Reentry Statute — 8 U.S.C. § 1326

The offense of illegal reentry is set forth in 8 U.S.C. § 1326. Subsection (a) provides that any alien who “enters, attempts to enter, or is at any time found in the United States” without permission of the Attorney General, after previously having been deported from the United States, faces imprisonment for up to two years upon conviction. If the defendant was previously deported from the United States after sustaining three or more misdemeanor convictions “involving drugs, crimes against the person, or both,” or a conviction for a felony offense (other than an “aggravated felony” as defined in 8 U.S.C. § 1101(a)(43)), the statutory maximum penalty increases to 10 years under section 1326(b)(1). Where the deportation occurred after an “aggravated felony” conviction, section 1326(b)(2) provides for a 20-year statutory maximum penalty. A conviction for any type of offense that occurred *after* a defendant was last deported from the United States (and subsequently illegally reentered) has no additional bearing on the defendant’s statutory penalty range under section 1326.⁵

⁴ See Pew Research Center, *5 Facts About Illegal Immigration in the United States*, <http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/> (last accessed on April 2, 2015); Bureau of Immigration and Customs Enforcement, *News Release: ICE Announces FY 2013 Removal Numbers*, <http://www.ice.gov/news/releases/ice-announces-fy-2013-removal-numbers> (Dec. 19, 2013).

⁵ See, e.g., *United States v. Rojas-Luna*, 522 F.3d 502, 504 (5th Cir. 2008) (“As noted above, the statute under which Rojas-Luna was convicted, 8 U.S.C. § 1326(a), provides for a maximum penalty of two years’ imprisonment for illegal reentry. However, pursuant to § 1326(b)(2), the maximum penalty is increased to twenty years in prison for an alien whose prior removal ‘was subsequent to a conviction for commission of an aggravated felony’ At his arraignment, Rojas-Luna pleaded guilty to reentering the country after having been removed in 1988. Because he was not convicted of aggravated assault until 2003, his 1988 removal, although sufficient to convict him of violating § 1326(a), could not form the basis of the enhancement in § 1326(b)(2), because it was not ‘subsequent to’ his conviction.”) (citations omitted).

Table 1
Relevant Illegal Reentry Statutory Penalties

Statutory Provision	Criminal History Requirement	Maximum Penalty
8 U.S.C. § 1326(a)	No significant criminal history	2 years
8 U.S.C. § 1326(b)(1)	“whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)”	10 years
8 U.S.C. § 1326(b)(2)	“whose removal was subsequent to a conviction for commission of an aggravated felony”	20 years

The original version of section 1326 was enacted in 1952 as part of the Immigration and Nationality Act. It provided for a statutory maximum of two years of imprisonment for the crime of illegal reentry but did not provide for enhanced statutory maximums for aliens who were convicted of predicate offenses before being deported.⁶ The penalty scheme remained unaltered for more than 35 years, until a 1988 amendment provided for an enhanced penalty of up to five years of imprisonment for an alien who had been deported after a felony conviction and up to 15 years for an alien who had been deported after an “aggravated felony” conviction.⁷ Congress increased these maximum penalties again in 1994, to 10 and 20 years, respectively, where they remain today, and also applied the 10-year maximum to those convicted of three or more misdemeanors “involving drugs, crimes against the person, or both” prior to deportation.⁸

⁶ Act of June 27, 1952, title II, ch. 8, § 276, 66 Stat. 163, 229 (1952).

⁷ Pub. L. No. 100-690, title VII, § 7345(a), 102 Stat. 4181, 4471 (1988).

⁸ Pub. L. No. 103-322, title XIII, § 130001, 108 Stat. 1796, 2023 (1994). The Anti-Terrorism and Effective Death Penalty Act of 1996 added a provision applying the enhanced 10-year maximum to those who had been deported under terrorism-related provisions of the immigration code, even if they had been convicted of no criminal offense. *See* Pub. L. No. 104-132, title IV, §§ 401(c); 438(b); 441(a), 110 Stat. 1214, 1267, 1276, 1279 (1996). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 similarly extended the 10-year maximum to aliens who had been deported prior to completing a term of imprisonment. Pub. L. No. 104-208, div. C, title III, § 305(b), 110 Stat. 3009 (1996). The 1996 statutes also contained a number of less substantive amendments, such as updating the statute’s language to refer to “removal” as well as “deportation” and “exclusion.” For purposes of simplicity, in this report all types of removal or exclusion of aliens will be referred to as “deportations.”

A related offense is illegal entry, which is found in 8 U.S.C. § 1325.⁹ Commission of a first illegal entry offense is a petty misdemeanor punishable by no more than six months of incarceration. A second or subsequent illegal entry offense is a felony and, upon conviction, a defendant may be sentenced to up to two years of imprisonment. The sentencing guidelines do not apply to petty misdemeanor convictions under section 1325 but do apply to felony convictions under section 1325.¹⁰

B. The “Aggravated Felony” Statute — 8 U.S.C. § 1101(a)(43)

As noted above, the maximum term of imprisonment for illegal reentry increases from two to 20 years if the defendant was previously deported after a conviction for an “aggravated felony.” In addition to its relevance in the criminal context, the definition of aggravated felony also determines substantive and procedural rights for non-citizens regarding deportation from the United States.¹¹

The first definition of “aggravated felony” was enacted in 1988, simultaneously with the amendment to section 1326(b) increasing sentences for illegal reentry offenders with prior felony or aggravated felony convictions.¹² The original definition included only murder, “drug trafficking” crimes as defined in 18 U.S.C. § 924(c), and illicit trafficking in firearms or destructive devices as defined in 18 U.S.C. § 921.¹³ Since 1988, Congress has repeatedly expanded the definition to include several other crimes.¹⁴

⁹ Under section 1325, it is unlawful for any alien to: (1) enter or attempt to enter the United States at any time or place other than as designated by immigration officers; (2) elude examination or inspection by immigration officers; or (3) attempt to enter or obtain entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact. 8 U.S.C. § 1325. Although related to section 1326, section 1325 is not a lesser-included offense. *See* United States v. Flores-Peraza, 58 F.3d 164, 167-68 (5th Cir. 1995).

¹⁰ *See* USSG § 1B1.9 (“The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.”).

¹¹ *See* Moncrieffe v. Holder, 133 S.Ct. 1678, 1682 (2013) (“[I]f a noncitizen has been convicted of [an] . . . ‘aggravated felon[y],’ then he is not only deportable, [8 U.S.C.] § 1227(a)(2)(A)(iii), but also ineligible for [various] discretionary forms of relief [from deportation]. *See* §§ 1158(b)(2)(A)(ii), (B)(i); §§ 1229b(a)(3), (b)(1)(C).”).

¹² *See supra* note 7.

¹³ Pub. L. No. 100-690, title VII, § 7342, 102 Stat. 4181, 4469-70 (1988).

¹⁴ *See, e.g.*, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (adding money laundering, all drug trafficking offenses, and crimes of violence, and eliminating a requirement that the crime have been committed within the United States); Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994) (significantly expanding the definition); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277 (1996) (substantially expanding the definition to near its current form); Pub. L. No. 104-208, div. C, title III, § 321, 110 Stat. 3009-627-28 (1996) (reducing the triggering fraud and tax evasion amounts to \$10,000 from \$100,000, reducing the minimum requirement sentence to trigger some subsections from five to one years, and making other changes); Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2879 (2003) (adding human trafficking offenses).

Today, section 1101(a)(43) of title 8 defines “aggravated felony” in 21 subsections. Covered offenses range from murder, to failing to protect the identity of intelligence agents, to tax evasion over \$10,000, to failure to appear in court to answer for a felony for which a sentence of two or more years may be imposed.¹⁵ Among the many offenses listed as aggravated felonies, subsection (f) also includes “a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.”¹⁶

C. The Illegal Reentry Guideline — USSG §2L1.2

In its current form, §2L1.2 provides as follows:

§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 child pornography offense; (v) a national security or terrorism offense; (vi) 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.

¹⁵ 8 U.S.C. § 1101(a)(43)(A), (L), (M), & (T).

¹⁶ 8 U.S.C. § 1101(a)(43)(F).

The guideline provides a base offense level of 8, which has remained unchanged since January 1988. The guideline also contains a specific offense characteristic (“SOC”) that provides for graduated enhancements based on a defendant’s pre-deportation criminal history. Under §2L1.2(b)(1)(A), 16 levels are added if a defendant previously was deported following 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 child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense.” That enhancement decreases to 12 levels if the prior conviction does not receive criminal history points under Chapter Four of the *Guidelines Manual* because the age of the prior conviction did not fall within the time periods set forth in USSG §4A1.2(e). Where the prior conviction was for a felony drug trafficking offense for which the sentence imposed was 13 months or less, 12 levels are added under §2L1.2(b)(1)(B), or 8 levels where that prior conviction does not receive criminal history points because of the age of the conviction. A prior aggravated felony conviction (other than one that also qualifies for a 12- or 16-level enhancement) results in an 8-level increase under §2L1.2(b)(1)(C). All other prior felony convictions, or three or more convictions for misdemeanor crimes against the person or drug trafficking offenses, result in a 4-level increase under §2L1.2(b)(1)(D) & (E).

A defendant may receive only a single enhancement from §2L1.2(b) — whichever is the highest applicable to his criminal record. For each of these possible enhancements, the sentencing court is instructed to consider only those convictions that occurred *prior* to the defendant’s most recent deportation from the United States. Just as under section 1326, convictions that occurred since the defendant last illegally reentered the United States (that is, after the last prior deportation) have no bearing on the defendant’s offense level under §2L1.2. Such post-deportation convictions may, however, receive criminal history points under §4A1.1.

To understand the potential impact of the enhancements set forth in §2L1.2(b), it is helpful to consider the case of a defendant who has been convicted of illegal reentry and is situated at Criminal History Category (“CHC”) III in the sentencing table (the most common CHC for illegal reentry offenders, as discussed *infra*). If such a defendant has no prior convictions triggering a §2L1.2(b) enhancement, he will have a base offense level of 8 under §2L1.2(a), which may be further reduced to 6 if he receives credit for acceptance of responsibility pursuant to §3E1.1. The guideline range for offense level 6, at CHC III, is 2-8 months.¹⁷ Each additional increase of 2 offense levels will increase the sentencing range by approximately 25 percent. If the defendant has a felony conviction resulting in the application of the 4-level enhancement, he will have an offense level 10 with credit for acceptance of responsibility; at CHC III, the corresponding guideline range is 10-16 months. If the defendant receives the 8-level increase for a prior aggravated felony, he will have an offense level of 13 after credit for acceptance of responsibility, resulting in a guideline range of 18-24 months. If a defendant receives the 12-level enhancement, he will have an offense level 17 after credit for acceptance of responsibility, with a guideline range of 30-37 months.

¹⁷ Because this range is in Zone B of the Sentencing Table, the defendant legally would be eligible for a probationary sentence, with certain restrictions, under §5B1.1(a). As a practical matter, however, illegal immigrants who have previously been deported and who illegally reentered the United States are very unlikely to receive a sentence of probation because they almost certainly will again be deported.

Finally, a defendant who receives the 16-level enhancement and a reduction for acceptance of responsibility will be at offense level 21, with a range of 46-57 months. Thus, a CHC III defendant who receives the 16-level enhancement for a predicate conviction will face a guideline range with a minimum term of imprisonment 23 times higher than the minimum applicable to a CHC III defendant with no predicate convictions.

D. The “Fast Track” Program

Another major factor affecting sentencing under §2L1.2 is the early disposition program (“EDP” or “fast track” program) used by the Department of Justice and the courts in sentencing many illegal reentry offenders. Such programs began in the 1990s in high-volume southwestern border districts as a means of efficiently processing the large number of immigration offenders encountered there; “[t]hey are based on the premise that a defendant who promptly agrees to participate in such a program saves the government significant and scarce resources that can be used to prosecute other defendants,” and, accordingly, should be granted additional reductions at sentencing beyond the ordinary reduction for acceptance of responsibility.¹⁸ The 2003 PROTECT Act established a statutory basis for EDP departures¹⁹ and directed the Commission to incorporate EDP departures into the guidelines, which the Commission did by adopting the policy statement at §5K3.1, providing for a downward departure of up to 4 levels pursuant to a fast track program. Subsequently, districts outside the southwestern border region were made eligible to participate in the fast track program at their discretion, and, in 2012, the Department of Justice mandated that all offenders, regardless of district, receive the benefit of EDP if otherwise eligible.²⁰

According to current DOJ guidance, fast track eligibility requires that an illegal reentry defendant enter a guilty plea within 30 days of being taken into custody, agree to a factual basis accurately describing his conduct, and waive arguments for a variance from the applicable guideline range (along with a waiver of appellate and certain other rights). In return, the government will move for a downward departure of four levels, except for defendants with particularly serious criminal histories, who may receive only a 2-level departure. United States Attorneys retain discretion to exclude a defendant from the fast track program based on aggravating factors such as prior criminal or immigration history, other ongoing criminal investigations or prosecutions involving the defendant, and the defendant’s conduct at arrest.²¹ As noted below (at Figure 5), 28.9 percent of illegal reentry offenders in fiscal year 2013 received an EDP departure, resulting in an

¹⁸ See Mem. from Deputy Attorney General James M. Cole to U.S. Attorneys (Jan. 31, 2012) (“Cole Memorandum”), available at <http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf>.

¹⁹ Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003).

²⁰ See Cole Memorandum, *supra* note 18.

²¹ *Id.*

average sentence reduction of 39.9 percent from the otherwise applicable range.

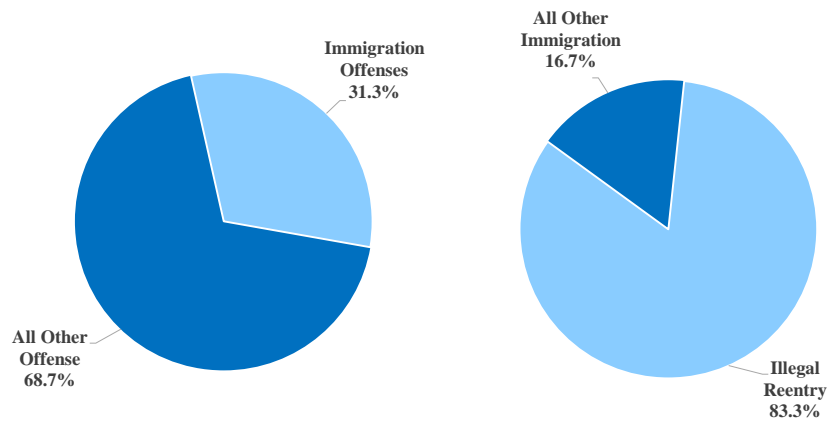
II. DATA REGARDING ILLEGAL REENTRY CASES

A. General Data About Illegal Reentry Cases

There were 80,035 federal criminal cases reported to the Commission during fiscal year 2013. Of those cases, 71,004 had sufficient documentation for purposes of the analyses in this report.²² Of the 71,004, 22,209 (31.3%) involved immigration offenses.²³ Among those immigration cases, 18,498 (83.3%) were illegal reentry cases, which constituted 26 percent of all federal criminal cases reported to the Commission.

The number of illegal reentry cases increased from 2009 to 2013, from 16,921 cases in fiscal year 2009, to 18,498 cases in fiscal year 2013, an increase of 9.3 percent.

Figure 1
Immigration and Illegal Reentry Caseload
Fiscal Year 2013



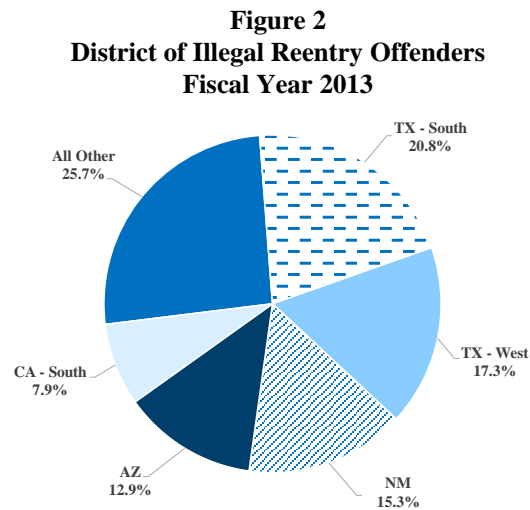
The top five districts in terms of number of illegal reentry cases in fiscal year 2013 all were located along the southwestern border of the United States: Southern Texas (N=3,853), Western Texas (N=3,200), New Mexico (N=2,837), Arizona (N=2,387), and Southern California (N=1,460).

²² Of the 9,031 cases with insufficient documentation, 2,204 cases involved convictions under 8 U.S.C. §§ 1253 (failure to depart), 1325 (illegal entry), or 1326 (illegal reentry). In the remaining 6,827 cases, the offenses of conviction were not ones referenced to the illegal reentry guideline, §2L1.2. *See generally* USSG App. A. Because the sentencing documentation in those 2,204 cases was incomplete, the Commission was not able to determine the courts' guideline applications, and, therefore, those cases were excluded from the analyses contained in this report.

²³ Immigration cases include cases with complete guideline application information in which offenders were sentenced under §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L1.2 (Illegal Reentry), 2L2.1 (Trafficking in Documents Relating to Citizenship), 2L2.2 (Fraudulently Acquiring Documents Related to Citizenship), and 2L2.5 (Failure to Surrender Canceled Naturalization Certificate).

Figure 2 below depicts the illegal reentry caseload nationally.

In fiscal year 2013, the vast majority of illegal reentry offenders were male (96.8%). The vast majority were Hispanic (98.1%), followed by White (1.0%), and Black (0.8%). The average age of illegal reentry offenders was 36 years. The most common Criminal History Category (“CHC”) for illegal reentry offenders was Category III (28.6%). The proportion of offenders in other CHCs was as follows: CHC I (20.4%), CHC II (22.4%), CHC IV (15.5%), CHC V (7.9%), and CHC VI (5.2%).



As shown in Figure 3, in fiscal year 2013, approximately one-quarter of illegal reentry offenders were sentenced for “simple” illegal reentry (*i.e.*, they were not enhanced based on predicate convictions and thus faced a two-year statutory maximum under 8 U.S.C. § 1326(a)); one-third of illegal reentry offenders faced a 10-year statutory maximum sentence under § 1326(b)(1) (*i.e.*, they had predicate felony convictions, other than aggravated felonies, or they had three or more misdemeanor convictions involving drugs, crimes against the person, or both); and slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2) (*i.e.*, they had predicate aggravated felony convictions). Less than one percent of offenders sentenced under § 2L1.2 faced statutory maximums other than two, 10, or 20 years (*e.g.*, they were convicted of failure to depart under 8 U.S.C. § 1253, which has a four-year statutory maximum).

The average sentence length for illegal reentry offenders was 18 months in fiscal year 2013 (with a median sentence of 12 months). This represents a 14.3 percent decrease since 2009, when the average sentence for illegal reentry offenders was 21 months. The average guideline minimum in fiscal year 2013 was 21 months (with a median guideline minimum of 15 months).

Figure 3
Illegal Reentry Offenders with Two, 10, and 20 Year Statutory
Maximums Under 8 U.S.C. § 1326(a), (b)(1), and (b)(2)
Fiscal Year 2013

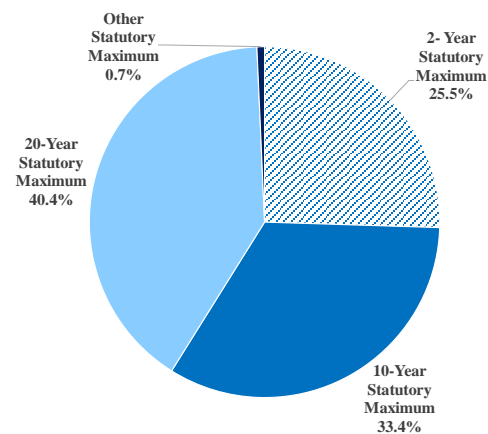
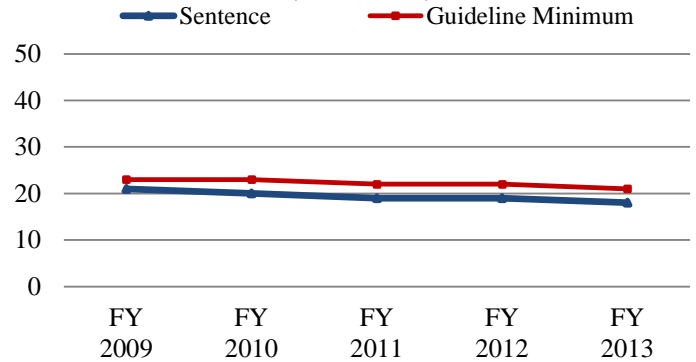


Figure 4 shows the average sentence and average guideline minimum from fiscal year 2009 to fiscal year 2013.

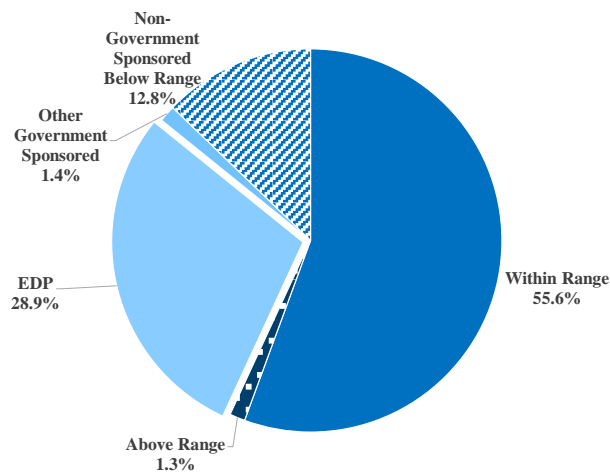
Notably, virtually all illegal reentry offenders — including the 40.4 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years (240 months) under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the *ten*-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without “aggravated felony” convictions). Only two of the 18,498 illegal reentry offenders sentenced in fiscal year 2013 received a sentence above ten years. This result appears consistent with §2L1.2, as the maximum guideline range for illegal reentry offenders—absent any adjustment from Chapter Three of the *Guidelines Manual*—is 100-125 months.²⁴

Figure 4
Average Sentence and
Average Guideline Minimum
(in months)



As shown in Figure 5, which depicts sentences relative to the guideline range, the overall within-range rate of all §2L1.2 cases was 55.6 percent; 28.9 percent received early disposition program downward departures pursuant to §5K3.1; 1.4 percent received other government sponsored downward departures (pursuant to §5K1.1 or for other reasons); 12.8 percent had non-government sponsored below-range sentences; and 1.3 percent had above-range sentences.

Figure 5
Place in Range for Illegal Reentry Offenders
Fiscal Year 2013

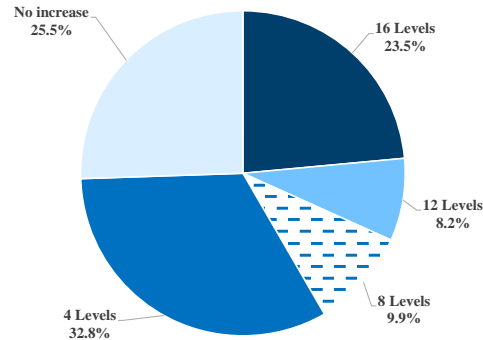


²⁴ A defendant who is in Criminal History Category VI, who receives the maximum 16-level enhancement under §2L1.2(b)(1), and who does not receive a reduction for acceptance of responsibility under §3E1.1, will be at offense level 24, with a resulting guideline range of 100-125 months. With credit for acceptance of responsibility, the guideline range for such an offender would be 77-96 months. Only 28 offenders in fiscal year 2013 had a guideline minimum above 77 months.

B. Guideline Enhancements Under USSG §2L1.2(b)

As discussed above, illegal reentry offenders can receive enhancements from 4 to 16 levels under §2L1.2(b) depending on their criminal history. In fiscal year 2013, one-quarter (25.5%) of illegal reentry offenders received no enhancement under §2L1.2(b)(1), while nearly one-quarter (23.5%) received a 16-level enhancement. Approximately one-third received a 4-level enhancement (32.8%), while one-tenth received an 8-level enhancement (9.9%), and nearly one-tenth received a 12-level enhancement (8.2%). Figure 6 shows the distribution of enhancements.

Figure 6
Illegal Reentry Specific Offense Characteristic Levels
Fiscal Year 2013



Notably, the distribution of the guideline enhancements generally corresponds to the distribution of the statutory enhancements under § 1326, depicted in Figure 3, *supra*.

As noted above, the overall within-range rate of all §2L1.2 cases was 55.6 percent. As Table 2 below shows, however, the rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1) — from 92.7 percent for cases with no enhancement to 31.3 percent for cases with the 16-level enhancement. Moreover, offenders who received a 16-level enhancement had the highest rate of non-government below-range sentences (29.4%), followed by offenders who received a 12-level enhancement (21.2%). Both groups of offenders also had higher rates of EDP departures (36.4% and 42.2%, respectively) than illegal reentry offenders generally (28.9%).

Table 2
Place in Range by §2L1.2(b)(1) Enhancement Level
Fiscal Year 2013

	TOTAL		Within-Range		Above Range		Substantial Assistance		Early Disposition Program		Other Government Below		Other Below Range	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	18,498	100.0	10,280	55.6	248	1.3	76	0.4	5,349	28.9	180	1.0	2,365	12.8
No Increase	4,724	25.5	4,377	92.7	99	2.1	0	0.0	139	2.9	3	0.1	106	2.2
4 Levels	6,068	32.8	3,188	52.5	98	1.6	7	0.1	2,292	37.8	43	0.7	440	7.3
8 Levels	1,828	9.9	854	46.7	22	1.2	16	0.9	691	37.8	28	1.5	217	11.9
12 Levels	1,526	8.3	500	32.8	17	1.1	13	0.8	644	42.2	29	1.9	323	21.2
16 Levels	4,352	23.5	1361	31.3	12	0.3	40	0.9	1,583	36.4	77	1.8	1,279	29.4

Table 3 below shows the types of prior offenses for which illegal reentry offenders received enhancements pursuant to §2L1.2(b).

Table 3
Types of Predicate Offenses For §2L1.2(B)(1) Enhancements
Fiscal Year 2013

		Applied	Percent
	§2L1.2 Unlawfully Entering or Remaining in the United States	18,498	100.0
	Chapter 2 Specific Offense Characteristic Adjustments	13,774	74.5
Previously deported after a conviction for:	(b)(1)(A)(i) Drug trafficking offense with sentence that exceeded 13 months (16 levels)	1,810	9.8
	(b)(1)(A)(i)(2) Drug trafficking offense with sentence that exceeded 13 months – no criminal points (12 levels)	281	1.5
	(b)(1)(A)(ii) Crime of violence (16 levels)	2,189	11.8
	(b)(1)(A)(ii) Crime of violence – no criminal history points (12 levels)	439	2.4
	(b)(1)(A)(iii) Firearms offense (16 levels)	27	0.1
	(b)(1)(A)(iii) Firearms offense – no criminal history points (12 levels)	8	0.0
	(b)(1)(A)(iv) Child pornography offense (16 levels)	4	0.0
	(b)(1)(A)(v) National security/terrorism offense (16 levels)	0	0.0
	(b)(1)(A)(vi) Human trafficking offense (16 levels)	12	0.1
	(b)(1)(A)(vi) Human trafficking offense – no criminal history points (12 levels)	5	0.0
	(b)(1)(A)(vii) Alien smuggling offense (16 levels)	309	1.7
	(b)(1)(A)(vii) Alien smuggling offense – no criminal history points (12 levels)	83	0.4
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less (16 levels) ²⁵	1	0.0
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less (12 levels)	710	3.8
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less – no criminal history points (8 levels)	330	1.8
	(b)(1)(C) “Aggravated felony” (8 levels)	1,498	8.1
	(b)(1)(D) Any other felony (4 levels)	6,046	32.7
	(b)(1)(E) Three or more misdemeanor crimes against the person or drug trafficking offenses (4 levels)	22	0.1

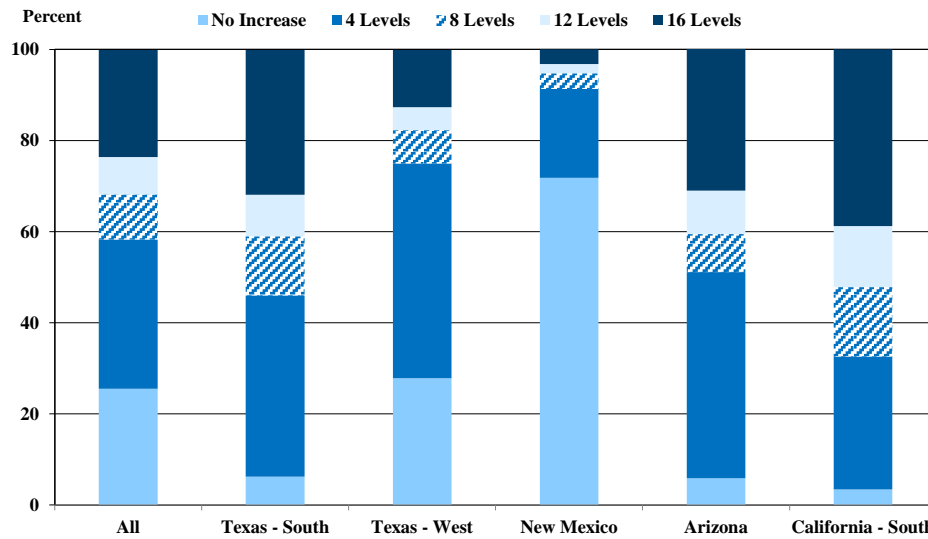
Notably, of the offenders receiving 16- or 12-level enhancements, the vast majority — 92.4 percent — received an enhancement for a prior conviction for either a “crime of violence” or a “drug-trafficking offense” within the meaning of §2L1.2(b)(1)(A) and Application Note 1(B) following §2L1.2. There were slightly more cases with drug-trafficking convictions (47.7%) than

²⁵ This enhancement was not available under the guidelines, but court documents reflected the court’s finding that this was the proper level for this offense.

cases with convictions for crimes of violence (44.7%). Only a small percentage (7.6%) of illegal reentry offenders who received a 16- or 12-level enhancement received such an enhancement for one of the other predicate offenses (*e.g.*, firearms offenses, alien smuggling offenses) listed in §2L1.2(b)(1)(A).

Figure 7 below shows the geographic distribution of the different levels of enhancements in §2L1.2(b)(1) using data from the five districts that handle the most illegal reentry cases. As the data shows, the frequency of the various levels of enhancement apply at different rates across the districts. For instance, in fiscal year 2013, in the District of New Mexico, the majority of illegal reentry offenders received no enhancement and less than 10 percent of offenders received an enhancement of 8, 12, or 16 levels, while in the Southern District of Texas less than ten percent received no enhancement and a majority received an enhancement of 8, 12, or 16 levels.

Figure 7
SOC Level Distribution for Selected Districts
Fiscal Year 2013



III. SPECIAL CODING PROJECT OF ILLEGAL REENTRY CASES

A. Methodology

The data reported in Part II above was derived by analyzing the Commission’s electronic database of information that is routinely collected by the Commission on an annual basis, for all federal cases for which the Commission receives full documentation in accordance with 28 U.S.C. § 994(w).²⁶ Such routinely collected data primarily concerns information about applicable statutory

²⁶ Pursuant to 28 U.S.C. § 994(w), a district court is directed to submit to the Commission the following sentencing documents in each felony or Class A misdemeanor case: the presentence report, the judgment, the statement of reasons form, the indictment or other charging instrument, and any plea agreement.

penalty ranges, sentencing guidelines calculations, certain information about offenders' criminal histories, and basic demographic information about offenders. In order to examine additional relevant data, it was necessary for the Commission to conduct a "special coding project," in which the relevant sentencing documents (particularly the presentence reports) were individually reexamined, and the desired information was collected ("coded") and entered into a database.

Because, as discussed above, the current illegal reentry guideline has enhancements based on the existence or non-existence of a single qualifying prior conviction, a special coding project was necessary to analyze the full criminal history of offenders. In addition to offenders' complete criminal histories, the Commission also collected information about offenders' prior deportations and certain personal characteristics such as their educational backgrounds, work histories, and substance abuse histories (information not routinely collected by the Commission). The Commission conducted this special coding project by examining a representative random sample (1,897 cases) of all 18,498 illegal reentry cases in which offenders were sentenced under §2L1.2 (and for which the Commission received full documentation) in fiscal year 2013 (referred to as the "coding sample" below). The results are set forth below.

B. Prior Deportations

Both 8 U.S.C. § 1326(b) and USSG §2L1.2(b) provide for enhanced penalties solely based on certain types of predicate convictions that an illegal reentry offender obtained before being deported. They do not account for the number of times an offender was previously deported and thereafter illegally reentered (except that prior convictions for illegal reentry or felony illegal entry would count to the same extent as any other "felony"). For the purposes of the Commission's report, "deportations" include references in presentence reports to prior "deportations," "exclusions," and "removals."²⁷

With respect to the 1,894 cases in which the exact number of prior deportations was known, the average offender was deported 3.2 times (with a median of two deportations). The most common number of prior deportations was one (34.8% of cases). The highest number of deportations for any offender was 73. Offenders deported 10 or more times made up 4.6 percent of the sample. These offenders averaged 17.1 deportations. Figures 8 and 9 below summarize the Commission's findings regarding offenders' prior deportations.

²⁷ See 8 U.S.C. § 1326(a) (referring to illegal reentry by "any alien who . . . has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding"). Information concerning the number of deportations was available in all but one of the 1,897 cases coded. The exact number of deportations was not known in two other cases. In one case, the offender was deported more than once, but the exact number was unknown and, in another case, the offender was deported more than five times but the exact number was unknown.

Figure 8
Number of Deportations Per Offender
Fiscal Year 2013 Coding Sample

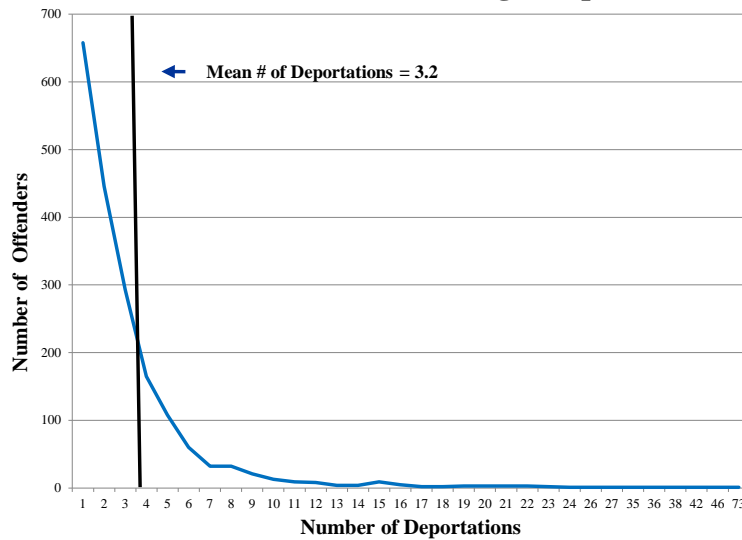
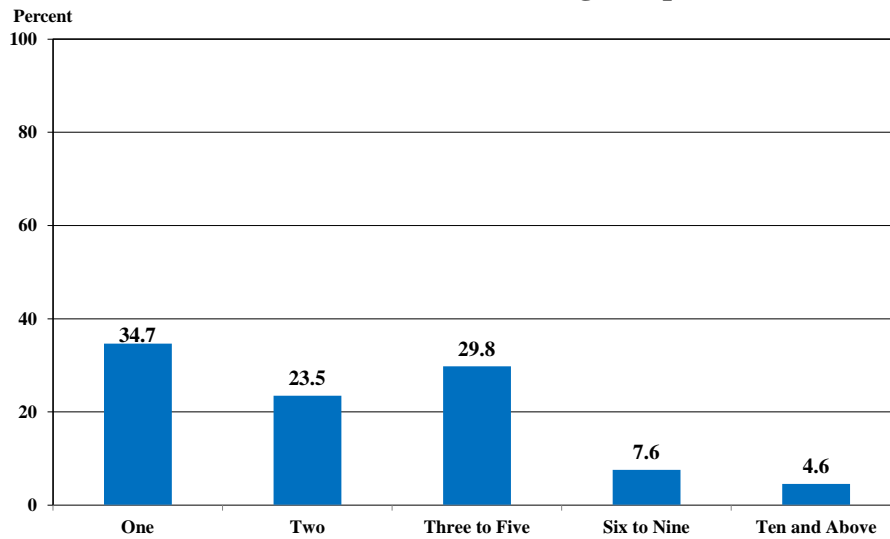


Figure 9
Number of Deportations Per Offender
Fiscal Year 2013 Coding Sample



Notably, 38.1 percent of offenders were deported and subsequently illegally reentered at least one time *after* being convicted and sentenced for either a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326).

C. Offenders' Criminal Histories

1. Prior Convictions

a. Prior Convictions Generally

With one exception, every prior conviction was coded, regardless of whether it received criminal history points under §4A1.1 or was the basis for an enhancement under §2L1.2(b)(1).²⁸ That exception was prior traffic offenses for which an offender did not receive any criminal history points.²⁹ Based on separately coded data concerning offenders' first and — in the case of multiple deportations — most recent deportations (discussed above), the data collected in the special coding project allowed the Commission to identify which prior convictions occurred *before* an offender was first deported and which convictions occurred *after* an offender was deported from (and subsequently illegally reentered) the country, both for the first and most recent times. Because many offenders were deported on multiple occasions, some offenders had prior convictions that qualified as both pre-deportation and post-reentry convictions.

The vast majority of illegal reentry offenders in the coding sample (92.0%) had at least one prior conviction for a non-traffic offense.³⁰ Only 151 offenders (8.0%) in the coding sample had no prior convictions. Of those 151 offenders, 90 (or 4.7% of all illegal reentry offenders in the coding sample) had only a single prior deportation before their instant illegal reentry prosecutions.³¹ The 1,746 offenders with at least one prior non-traffic conviction had a total of 7,683 prior convictions, with an average of 4.4 prior convictions per offender³² (median of three). The highest number of prior convictions for any single offender was 41. The 1,746 offenders with at least one prior non-

²⁸ For purposes of this special coding project, the Commission used a list of offense codes originally created for a prior Commission recidivism project conducted in 2004-05.

²⁹ Because it was frequently difficult to determine whether a prior conviction was a felony or a misdemeanor offense from the information provided in the presentence report ("PSR") — for example, with respect to offenses such as theft, assault, drug possession, and some DUIs, which are treated differently from jurisdiction to jurisdiction — it was impossible to determine the percentage of prior convictions that were felonies versus misdemeanor offenses.

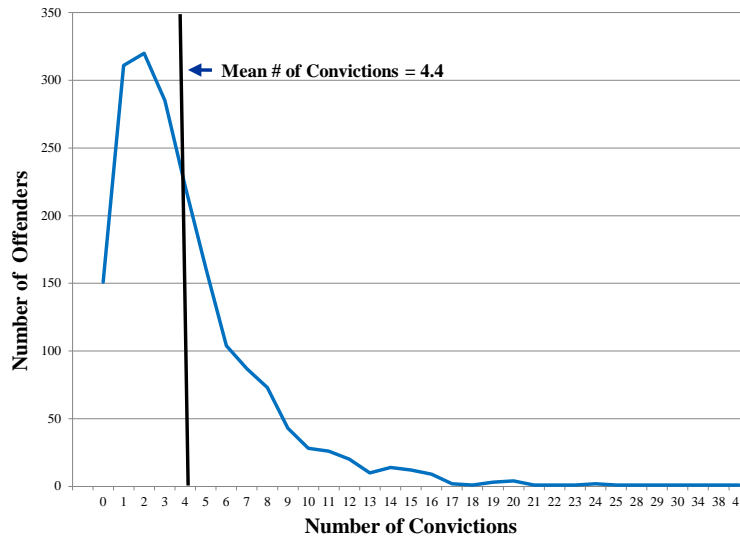
³⁰ For the purposes of this project, DUI-type offenses were considered "non-traffic" offenses. Of the 151 offenders (8% of all offenders) who did not have a prior conviction for a non-traffic offense, four (2.6% of the 151) had a conviction for a traffic offense that received criminal history points after their first deportation.

³¹ Offenders with no prior convictions had an average of 1.9 prior deportations (ranging among the cases from a low of one deportation to a high of eight).

³² If all offenders are included, each offender had an average of 4.0 convictions (median of three).

traffic conviction had 6,529 prior “sentencing events,”³³ with an average of 3.7 prior sentencing events per offender³⁴ (median of three prior sentencing events). The highest number of prior sentencing events for any single offender was 32.

Figure 10
Number of Convictions Per Offender
Fiscal Year 2013 Coding Sample



The most common prior offense type was driving under the influence (“DUI”) or a related offense (*e.g.*, driving while intoxicated), with 30.8 percent of offenders having at least one prior DUI-type conviction (16.7 percent had multiple DUI-type convictions). Next in frequency rate were “other offenses,”³⁵ illegal entry, illegal reentry, and simple possession of drugs. The average sentence imposed for prior convictions (for cases in which an exact sentence was noted in a presentence report) was 14 months (median of six months). The highest sentence for a prior conviction was 420 months.

³³ A prior “sentencing event” refers to a situation when an offender was sentenced for multiple convictions by the same court at a single sentencing hearing. All sentences imposed by the same court on the same date were counted as a single sentencing event.

³⁴ If all offenders are included, the average number of sentencing events per offender was 3.4 (median of three).

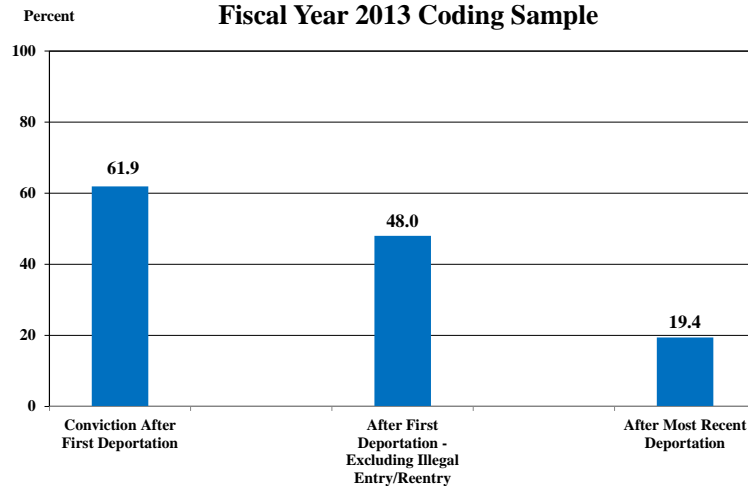
³⁵ This was a catchall category for both felony and misdemeanor offenses (non-traffic offenses) that were not more specifically described by another offense code.

b. Post-Reentry Convictions³⁶

Both 8 U.S.C. § 1326(b) and USSG §2L1.2(b) provide sentencing enhancements for offenders’ pre-deportation convictions but do not provide for enhancements based on convictions for offenses committed *after* an offender illegally reentered the country. The latter type of convictions are only factored into offenders’ guideline ranges through the criminal history calculations in Chapter Four of the *Guidelines Manual*. As part of the special coding project, the Commission examined offenders’ criminal histories to identify convictions occurring after offenders were deported (excluding their instant illegal reentry convictions). Such convictions necessarily occurred after the offenders had illegally reentered the United States and, thus, will be referred to as “post-reentry convictions.”

As depicted in Figure 11, the Commission determined that 61.9 percent of offenders were convicted of at least one offense (other than their instant illegal reentry conviction) *after* their first (and, in some cases, only) deportation.³⁷ A subset of that group — 19.4 percent of all illegal reentry offenders in the sample — were convicted of at least one offense after their most recent deportation. There were some cases in which the only offense (other than the instant illegal reentry offense) for which an offender was convicted after his or her first deportation was a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326). If those two prior offense types are excluded from the analysis, 48.0 percent of all offenders in the sample were convicted of at least one post-reentry offense.

Figure 11
Convictions after Deportation
Fiscal Year 2013 Coding Sample



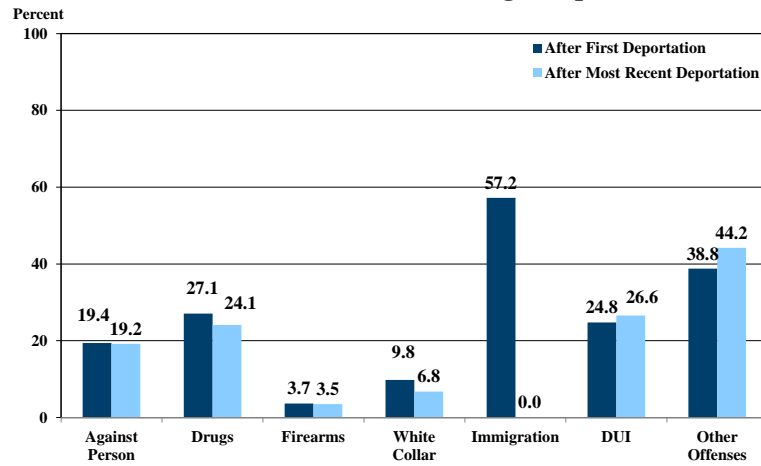
³⁶ Only post-reentry *convictions* were coded. There were also cases where offenders were *arrested* for state offenses after illegally reentering, but the state charges were dismissed when the federal government filed charges under 8 U.S.C. § 1326.

³⁷ In 82.8 percent of cases in which the offender committed at least one offense after their most recent deportation (other than the instant illegal reentry offense), the offender was apprehended by immigration officials for the instant illegal reentry offense in connection with that other offense (*e.g.*, the offender was found by immigration officials in prison or jail where the offender was awaiting prosecution or serving a sentence on a state charge).

With respect to offenses committed by offenders following their first and, in some cases, most recent deportations, Figure 12 includes a breakdown of the offense types.³⁸

As Figure 12 shows, a significant proportion of illegal reentry offenders committed serious offenses — including drug-trafficking and violent offenses — between the time that they were initially deported and when they were ultimately arrested for their instant illegal reentry offense.

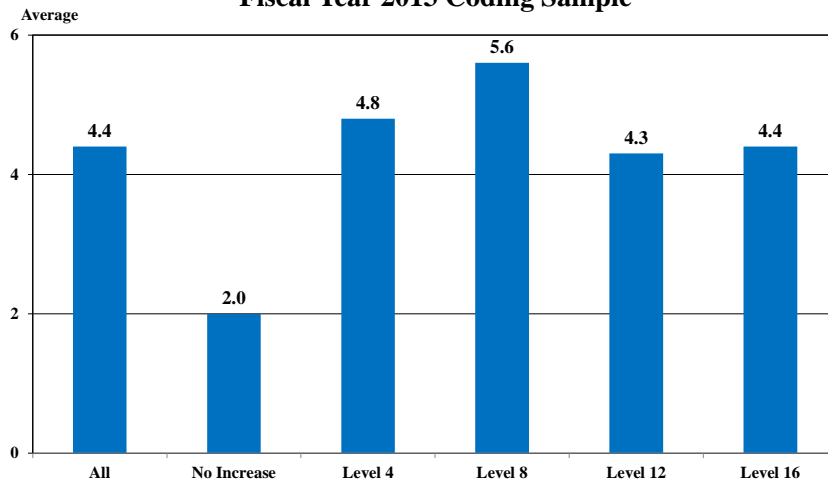
Figure 12
Offenses of Conviction after Deportation
Fiscal Year 2013 Coding Sample



c. The §2L1.2(b)(1) Enhancement Received for Defendants’ Prior Convictions

The analysis that follows concerns offenders’ complete criminal histories in relation to their level of enhancement under §2L1.2(b)(1). As a preliminary matter, Figure 13 shows the average number of prior convictions for each level of enhancement.

Figure 13
Average Number of Convictions by § 2L1.2(b)(1) Level
Fiscal Year 2013 Coding Sample



³⁸ Because some offenders were convicted of multiple offenses after illegally reentering the United States, the chart’s statistical breakdown of different offense types exceeds the 61.9% figure that represents the percentage of all offenders who committed one or more post-reentry offenses.

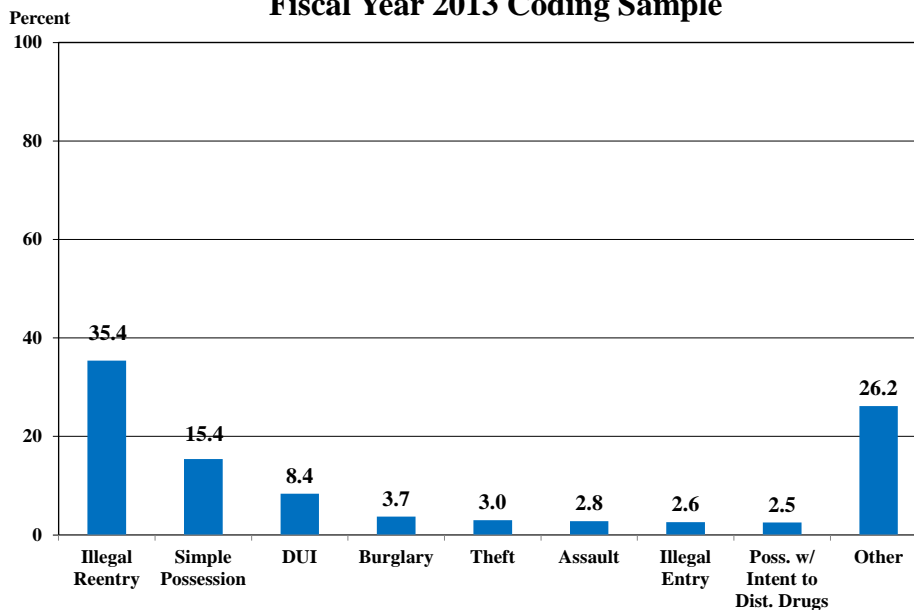
i. No Enhancement Under §2L1.2(b)(1)

Offenders with no enhancement under §2L1.2(b)(1) had an average of 2.0 prior convictions and 1.8 prior sentencing events. Those prior convictions did not qualify for enhancement for one of three reasons: (1) the convictions did not meet the legal criteria for enhancement under §2L1.2(b)(1); (2) the convictions occurred *after* the most recent illegal reentry; or (3) the parties entered into a plea agreement accepted by the court that exempted an eligible prior conviction from an enhancement that otherwise would have applied.

ii. 4-Level Enhancement Under §2L1.2(b)(1)(D) or (E)

Offenders with a 4-level enhancement under §2L1.2(b)(1)(D) or (E) had an average of 4.8 prior convictions and 4.2 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 4-level enhancements ranged from probation (12.1% of such cases) to 300 months of imprisonment.³⁹ There was a prison sentence of one month or greater imposed for 85.3 percent of these convictions, and the average sentence was 13 months (median of six months). As shown in Figure 14, the most frequent conviction triggering the 4-level enhancement was illegal reentry (which triggered the enhancement in 35.4% of cases), followed by simple possession of drugs (15.4%), and DUI (8.4%).

Figure 14
Offenses Triggering the Four-Level Enhancement
Fiscal Year 2013 Coding Sample

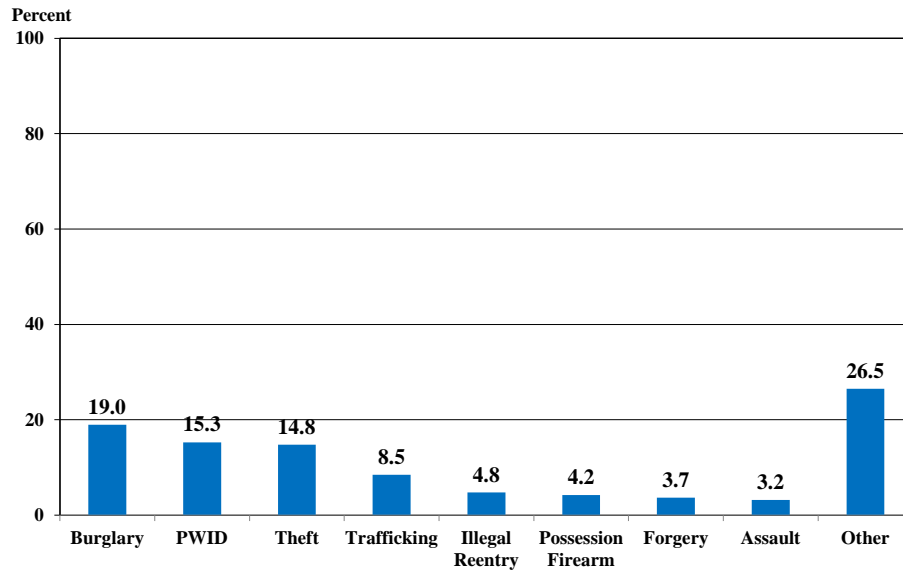


³⁹ The sentences mentioned above were imposed for the offenders' prior convictions (as opposed their instant federal illegal reentry conviction).

iii. 8-Level Enhancement Under §2L1.2(b)(1)(C)

Offenders with an 8-level enhancement under §2L1.2(b)(1)(C) had an average of 5.6 prior convictions and 4.7 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 8-level enhancement ranged from probation (14.8% of such cases) to 144 months. There was a prison sentence of one month or more imposed for 94.1 percent of these convictions, and the average sentence was 21 months (median of 13 months). As shown in Figure 15, the most frequent conviction triggering the 8-level enhancement was burglary (19.0%), followed by possession with intent to distribute drugs (“PWID”) (15.3%), and larceny and theft (14.8%).

Figure 15
Offenses Triggering the Eight-Level Enhancement
Fiscal Year 2013 Coding Sample

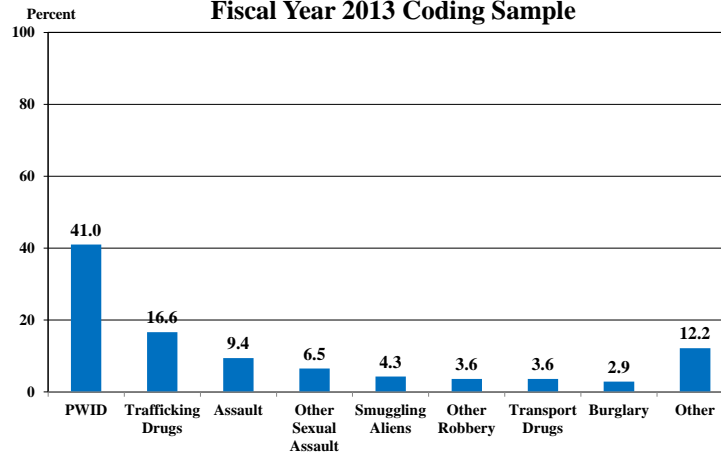


iv. 12-Level Enhancement Under §2L1.2(b)(1)(B)

Offenders with a 12-level enhancement under §2L1.2(b)(1)(B) had an average of 4.3 prior convictions and 3.7 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 12-level enhancement ranged from probation (10.9% of such cases) to 144 months. There was a prison sentence of one month or more imposed for 89.1 percent of these convictions, and the average sentence was 20 months (median of 12 months).

As shown in Figure 16 below,⁴⁰ the most frequent conviction triggering the 12-level enhancement was possession with the intent to distribute drugs (41.0%), followed by trafficking or distribution of drugs (16.6%), and assault (9.4%).

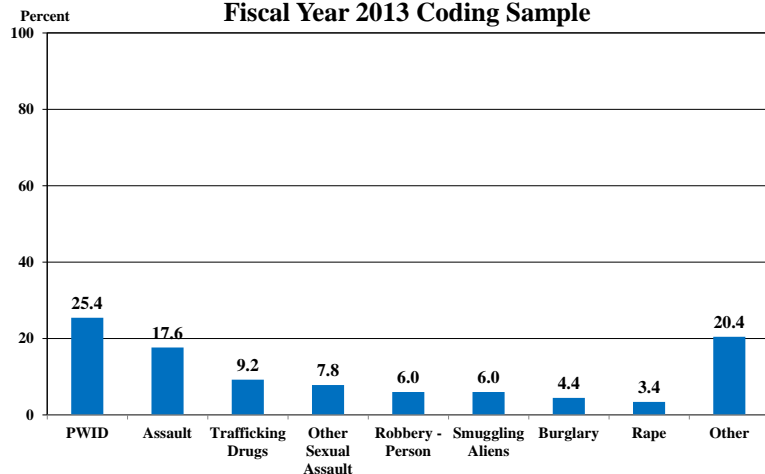
Figure 16
Offenses Triggering the 12 Level Enhancement
Fiscal Year 2013 Coding Sample



v. 16-Level Enhancement Under §2L1.2(b)(1)(A)

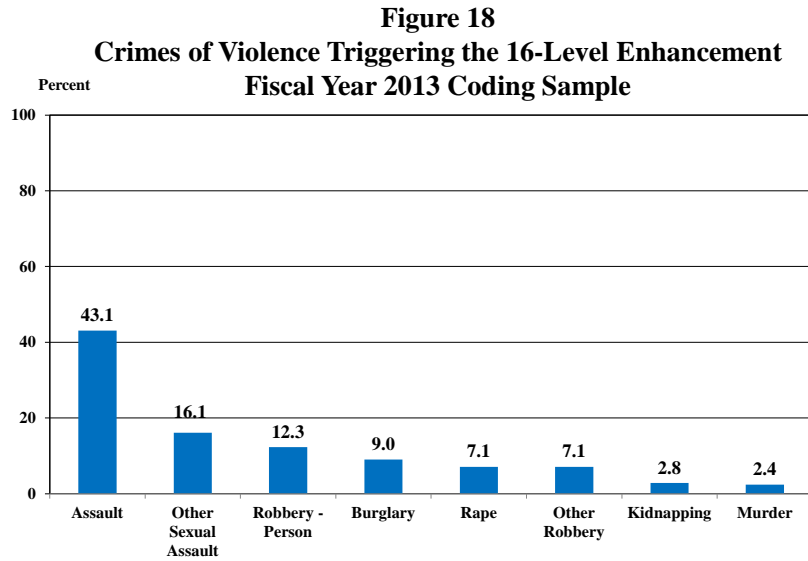
Offenders with a 16-level enhancement under §2L1.2(b)(1)(A) had an average of 4.4 prior convictions and 3.6 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 16-level enhancement ranged from probation (2.7% of such cases) to 420 months. There was a prison sentence of one month or more imposed for 97.0 percent of these convictions, and the average sentence was 40 months (median of 30 months). As shown in Figure 17 below, the most frequent conviction triggering the 16-level enhancement was possession with the intent to distribute drugs (“PWID”) (25.4%), followed by assault (17.6%), and trafficking or distribution of drugs (9.2%).

Figure 17
Offenses Triggering the 16 Level Enhancement
Fiscal Year 2013 Coding Sample



⁴⁰ “Other Sexual Assault” and “Other Robbery” are offense type codes from the Commission’s list of offense types.

As shown in Figure 18, among crimes of violence that triggered the 16-level enhancement, the most frequent type of offense was assault (43.1%), followed by other sexual assault (16.1%), and robbery (12.3%).



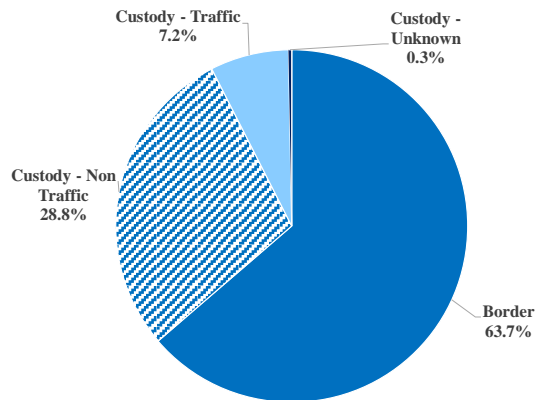
D. Offender Characteristics and Circumstances Related to Their Offenses

The special coding project also examined several characteristics of offenders and circumstances related to the commission of their illegal reentry offenses.

1. Location of Apprehension

As shown in Figure 19, the majority of offenders (63.7%) were apprehended for the instant offense at or near an international border. An additional 28.8 percent were first found by immigration officials while in custody for a non-traffic offense, while 7.2 percent were in custody for a traffic offense. In a small number of cases, it could not be determined whether the offender was in custody for a traffic or non-traffic offense.

Figure 19
Where Apprehended for Instant Offense
Fiscal Year 2013 Coding Sample



2. United States Residence

Most offenders (64.1%) did not have an established residence within the United States at the time of apprehension for the instant illegal reentry offense. Offenders who had an established United States residence at the time of the instant offense made up 35.9 percent of the sample.

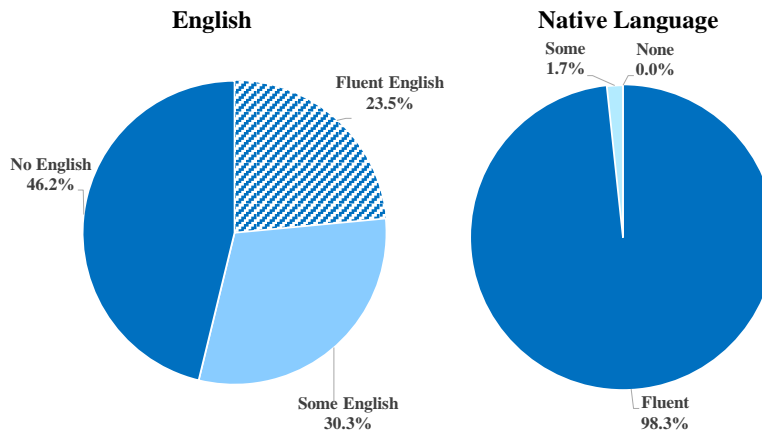
3. Schooling in the United States

The clear majority (82.0%) of offenders did not receive any schooling (primary, secondary, post-secondary school or college) within the United States. Offenders who did attend at least one of these types of educational institutions made up 18.0 percent of the sample.

4. Language(s) Spoken

As shown in Figure 20, the majority of offenders (53.8%) spoke at least some English. Offenders who spoke fluent English made up 23.5 percent of the sample, while offenders who spoke some English, but were not fluent speakers, made up 30.3 percent of the sample. Offenders who spoke no English were 46.2 percent of the sample. Almost all offenders spoke the language of their native country⁴¹ fluently (98.3%) and another 1.7 percent spoke their native language, but not fluently. No offenders reported that they were totally unable to speak the language of their native country.

Figure 20
Language(s) Spoken
Fiscal Year 2013 Coding Sample



⁴¹ There were some cases in which the offender’s native country’s language was English (for example, Canada or Jamaica). These cases are included in the total of those who speak their native language. Native language was determined to be the predominant language of the offender’s country of citizenship.

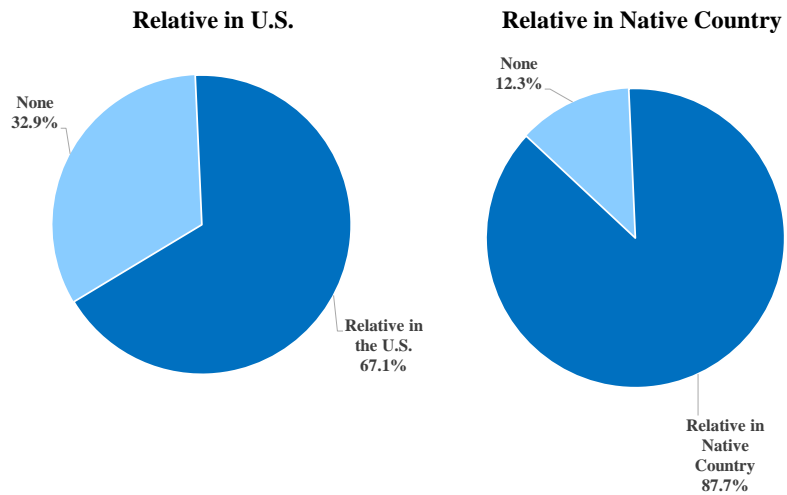
5. Location of Relatives and Children

Most offenders (67.1%) had relatives (other than their children) in the United States⁴² at the time of the instant offense, while 32.9 percent did not have such relatives in the United States. Of the offenders who did not have relatives in their native country, 95.8 percent had relatives in the United States, while of the offenders who did not have relatives in the United States, 98.4 percent had relatives in their native country.

The Commission also collected information regarding whether offenders had at least one child (either a minor or an adult) living in the United States or living in the offender’s native country, regardless of whether the child lived with the offender.⁴³ Offenders who had at least one child living in the United States (49.5%) made up the largest single percentage of the sample.

Figures 21a⁴⁴ and 21b⁴⁵ summarize the Commission’s findings concerning offenders’ relatives, including their children.

Figure 21a
Location of Relatives Other than Children
Fiscal Year 2013 Coding Sample



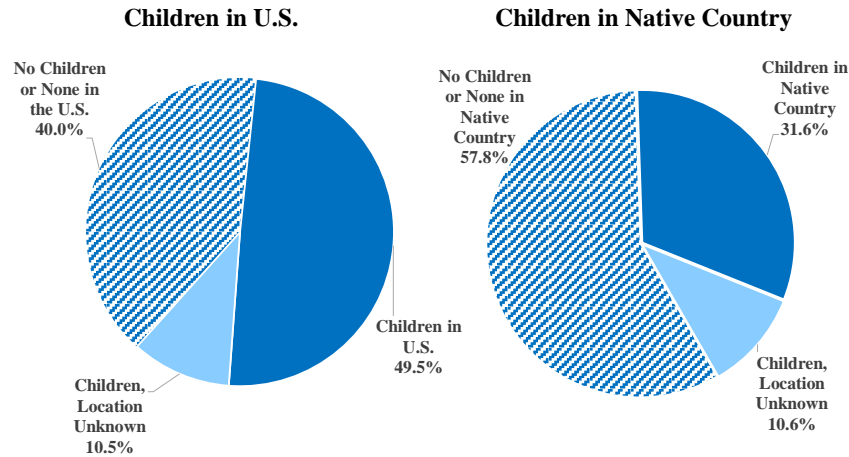
⁴² A relative was considered to be a spouse, sibling, parent, grandparent, aunt, uncle, or cousin. As discussed below, offenders’ children were analyzed separately.

⁴³ The child/children did not have to be citizens of the United States. Where an offender had at least one child in both the United States and his or her native country, he or she would be included in both data categories.

⁴⁴ Totals do not include the 17.4% of cases for which it could not be determined whether the offender had relatives in the United States, or the 17.3% of cases for which it could not be determined whether the offender had relatives in his or her native country.

⁴⁵ Totals do not include the 5.0% of cases for which it could not be determined whether an offender had children in the United States, or the 5.2% of cases for which it could not be determined whether an offender had children in his or her native country.

Figure 21b
Location of Children
Fiscal Year 2013 Coding Sample



6. Age at First Entry Into the United States

The age at which the offender first entered the United States⁴⁶ could be determined in 73.5 percent of the cases. The average age at the time of initial entry in those cases was 17 years (median of 17 years). Offenders who first entered the United States before the age of 18 were 53.1 percent of the sample, while those who were 18 years or older were 46.9 percent.

7. Work History in the United States

Most illegal reentry offenders (74.5%) had worked in the United States for more than one year⁴⁷ at some time prior to being arrested for the instant offense. Offenders who had no work history in the United States accounted for 9.8 percent of the sample, while those who had less than one year of work were 2.6 percent of the sample, and those who did work, but for an undetermined length of time, were 13.2 percent of the sample.

⁴⁶ The age at which an offender first entered the United States (whether legally or illegally) should be contrasted with the age at which an offender last illegally *reentered* the United States. As noted above, the average age of illegal reentry offender (at the time of their sentencing) was 36 years old.

⁴⁷ This work history included full-time and part-time employment, as well as “off the books” employment. The totals do not include the 21.6% of cases in which the information on the work histories the offenders could not be determined.

8. Substance Abuse

A majority of offenders (64.2%) reported no substance abuse problems, as reflected in their answers to the presentence report writers' questions about their substance abuse history, whether they had been to a rehabilitation facility, and whether they had ever been clinically diagnosed with a substance abuse problem (questions typically posed during the presentence interview). Offenders who reported attending a rehabilitation facility made up 7.6 percent of the sample, while those who were diagnosed by a professional were 1.1 percent of the sample, those who self-reported some level of prior substance abuse were 22.1 percent of the sample, and those who admitted a history of "daily abuse" were 5.0 percent of the sample.⁴⁸

There were offenders who reported no substance abuse history but who had been convicted of DUI or a related offense. Of the offenders who reported no substance abuse history, 27.3 percent had been convicted of a DUI-type offense (13.6 percent had multiple convictions, 13.7 percent had one conviction). Of the offenders whose substance abuse history could not be determined,⁴⁹ 23.3 percent had a conviction for a DUI-type offense (10.6 percent had multiple convictions and 12.7 percent had one conviction).

Combining the information on reported substance abuse histories and DUI-type convictions, 56.1 percent of all illegal reentry offenders in the coding sample either had reported substance abuse issues or had been convicted of a DUI-type offense, or both.

IV. CONCLUSION

The Commission analyzed all 18,498 illegal reentry cases in fiscal year 2013 and also conducted a special coding project of a representative sample of those cases. Based on these analyses, the Commission reports the following key findings:

- Among all types of federal cases reported to the Commission in fiscal year 2013, 26 percent were illegal reentry cases.
- The number of illegal reentry cases rose from 2009 to 2013, with the majority of cases occurring in five districts located along the southwestern border of the United States.
- The vast majority of illegal reentry offenders were male (96.8%) and Hispanic (98.1%). The average age of such offenders was 36 years.
- In fiscal year 2013, all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory

⁴⁸ The totals do not include the 21.3% of cases in which a determination of the offender's substance abuse could not be determined from the PSR.

⁴⁹ *See id.*

maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without “aggravated felony” convictions).

- Regarding sentences relative to the guideline range, the overall within-range rate for all illegal reentry cases was 55.6 percent. The rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1) — from 92.7 percent for cases with no enhancement to 31.3 percent for cases with the 16-level enhancement. Among offenders receiving 16- or 12-level enhancements, 92.4 percent received the enhancement because of a prior conviction that was either a crime of violence or a drug-trafficking offense.
- Significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted.
- The average offender was previously deported 3.2 times. Notably, 38.1 percent of offenders were deported and subsequently illegally reentered at least once after being convicted and sentenced for a prior conviction under 8 U.S.C. § 1325 (illegal entry) or 8 U.S.C. § 1326 (illegal reentry).
- The vast majority of illegal reentry offenders (92.0%) had at least one prior conviction for a non-traffic offense, with an average of 4.4 prior convictions per offender.
- The Commission determined that 61.9 percent of offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first (and, in some cases, only) deportation. If prior convictions under 8 U.S.C. §§ 1325 or 1326 are excluded from the analysis, 48.0 percent of all offenders in the sample were convicted of at least one post-reentry offense. A significant proportion of illegal reentry offenders committed serious offenses — including drug-trafficking and violent offenses — between the time that they were first deported and their arrest for the instant illegal reentry offense. Among all convictions that occurred after a prior deportation, 19.4 percent involved a crime against the person, and 27.1 percent involved a drug crime.
- Only 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions.
- The special coding project revealed the following data concerning illegal reentry offenders’ personal characteristics and the circumstances of their offenses:
 - The majority of offenders (63.7%) were apprehended for the instant illegal reentry offense at or near the border.
 - Most offenders (64.1%) did not have an established residence within the United States at the time of apprehension for the instant offense.
 - The vast majority (82.0%) of offenders did not receive any schooling (primary, secondary, post-secondary school or college) within the United States.

- A majority of offenders (53.8%) spoke at least some English. No offenders reported that they were totally unable to speak the language of their native country.
- Most offenders (67.1%) had relatives in the United States at the time of the instant offense. Nearly half (49.5%) had children in the United States.
- When an exact age could be determined, the average age at which offenders first entered the United States was 17 years.
- Most offenders (74.5%) had worked in the United States for more than one year at some time prior to being arrested for the instant offense.
- A majority of offenders (64.2%) reported no substance abuse histories, although 56.1 percent of all offenders either had a reported substance abuse history or had been convicted of a DUI-type offense, or both.