

# §2L1.2

## Unlawfully Entering or Remaining in the United States

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Guideline for  
8 U.S.C. §§ 1325 and 1326

# Statutory Penalties for Illegal Reentry

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## 8 U.S.C. § 1326

- With no prior 2 years
- With prior felony 10 years
- With “aggravated felony” 20 years

Note: These determinations are based on statutory definitions

# “Aggravated Felony”

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- Defined at 8 U.S.C. § 1101(a)(43)
- Only used in guideline for illegal reentry at §2L1.2(b)(1)(C)

## “Aggravated Felony” (cont.)

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- An offense does not have to meet this statutory definition to be included in guideline application under §2L1.2(b)(1)(A), (B), or (D)

# §2L1.2 Unlawfully Entering/Remaining in the U.S.

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(a) Base Offense Level

8

(b) Specific Offense Characteristics

(1) Apply the Greatest:

If the  $\Delta$  previously was deported, or unlawfully remained in the U.S. after –

(A) a conviction for a felony that was a (i) drug trafficking offense with sentence imposed > 13 mos., (ii) crime of violence, (iii) firearms offense, (iv) child porn offense, (v) national security or terrorism offense, (vi) human trafficking offense, (vii) alien smuggling offense

+16

# Unlawfully Entering/Remaining in the U.S.

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## (b) Specific Offense Characteristics

(1) (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less  
+12

(C) a conviction for an aggravated felony,  
+ 8

(D) a conviction for any other felony, + 4

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, + 4

# “Felony”

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## §2L1.2, App. Note 2

- Any federal, state, or local offense punishable by imprisonment exceeding one year
- Does not matter that the offense may be classified as a misdemeanor in its respective jurisdiction

# “Misdemeanor”

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§2L1.2, App. Note 4(A)

Any federal, state, or local offense punishable by imprisonment of one year or less



# Guideline Definitions for Prior Offenses Listed at §2L1.2(b)(1)(A)

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- Crime of violence
- Drug trafficking offense
- Firearms offense
- Child pornography offense
- National security or terrorism offense
- Human trafficking offense
- Alien smuggling offense

# Categorical Approach

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*Taylor v. U.S.*  
495 U.S. 575  
(1990)

*Shepard v. U.S.*  
544 U.S. 13 (2005)

# “Crime of Violence”

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§2L1.2, App. Note 1(B)(iii)

- Means any of the following:
  - murder,
  - manslaughter,
  - kidnapping,
  - aggravated assault,
  - forcible sex offenses
  - statutory rape
  - sex abuse of a minor
  - robbery,
  - arson,
  - extortion,
  - extortionate extension of credit,
  - burglary of a dwelling

OR

## “Crime of Violence” (cont.)

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- Any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

# Crime of Violence

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- **Does not** include “substantial risk of physical force against the person or property”
- No requirement of “imprisonment for at least one year”
- May not be an “aggravated felony”

## 8 U.S.C. § 1101

- References 18 U.S.C. § 16, which includes “substantial risk of physical force against the person or property”
- “Imprisonment for at least one year”

# “Drug Trafficking Offense”

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§2L1.2, App. Note 1(B)(iv)

- Means an offense under federal, state, or local law that prohibits the:
  - Manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or
  - Possession of a controlled substance (or counterfeit substance) with intent to do any of the above

# Drug Trafficking Offense: “Sentence Imposed”

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§2L1.2, App. Note 1(B)(vii)

- Does not include any portion of a sentence of imprisonment that was probated, suspended, deferred, or stayed
- Note: This does not affect the statutory definition of “aggravated felony” (8 U.S.C. §1101(a)(43))

# Suspended Sentence

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## §2L1.2

- **Not** included to calculate “sentence imposed” –  
Application Note  
1(B)(vii)

## 8 U.S.C. § 1101

- Included at 8 U.S.C.  
§ 1101(a)(48)(B)



# Drug Trafficking Offense: Prior Revocation

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## App. Note 1(B)(vii)

- Prior revocation time added to its original term of imprisonment for “sentence imposed”
- Case law in support
  - *U.S. v. Hidalgo-Macias*, 300 F.3d 281 (2d Cir. 2002)
  - *U.S. v. Compian-Torres*, 320 F.3d 514 (5<sup>th</sup> Cir. 2003)
  - *U.S. v. Marino-Cisneros*, 319 F.3d 456 (9<sup>th</sup> Cir. 2003)

# Drug Trafficking Offense: Indeterminate Sentence

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§2L1.2, App. Note 1(B)(vii)

- Length of prior indeterminate sentence is the stated maximum
- Case law in support
  - *U.S. v. Rodriguez-Arreola*, 313 F.3d 1064 (8<sup>th</sup> Cir. 2002)

*Lopez v. Gonzales*  
127 S.Ct. 625  
(2006)

# Relationship of §2L1.2 and Chapter Four (Criminal History)

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## §2L1.2, App. Notes 1(A)(vii) & 6

- No requirement that a prior conviction at §2L1.2 must receive criminal history points under §4A1.1
- “Time frames” at §4A1.2(e) not applicable under §2L1.2

# Relationship of §2L1.2 and Chapter Four (Criminal History) (cont.)

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## §2L1.2, App. Notes 1(A)(vii) & 6

- *However*, prior convictions considered under §2L1.2 may also receive criminal history points under §4A1.1
- Juvenile adjudications cannot be used at §2L1.2 (but can be used at Chapter Four)

# §2L1.1

## Smuggling, Transporting, or Harboring an Unlawful Alien

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Guideline for  
8 U.S.C. §§ 1324(a) &  
1327

# 2006 Amendment §2L1.1: National Security

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- New base offense level (BOL) of **25** added at subsection (a)(1)
- Applies if defendant convicted under **8 U.S.C. § 1327** of a violation involving an alien who was inadmissible under **8 U.S.C. § 1182(a)(3)**

## §2L1.1(b)(2)

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(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

| # of Unlawful Aliens Smuggled, Transported, or Harbored | Increase in Level |
|---|-------------------|
| 6 - 24  | + 3               |
| 25 - 99   | + 6               |
| 100 or more   | + 9               |



# §2L1.1

## Specific Offense Characteristic (b)(6)

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- 2 level increase (floor of 18) if offense involved intentionally or recklessly creating a substantial risk of death or bodily injury to another
- App. Note 6 provides examples
  - *e.g.*, carrying excess passengers

# “Substantial Risk” SOC

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## §2L1.1(b)(6)

- *U.S. v. Cuyler*, 298 F.3d 387 (5<sup>th</sup> Cir. 2002)
- *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5<sup>th</sup> Cir. 2002)
- *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054 (9<sup>th</sup> Cir. 2001)
- *U.S. v. Mares-Martinez*, 329 F.3d 1204 (10<sup>th</sup> Cir. (2003)

# §2L1.1(b)(7)

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(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the

| injury:<br>Death or Degree of Injury        | Increase in Level |
|---|-------------------|
| Bodily Injury                               | + 2               |
| Serious Bodily Injury                       | + 4               |
| Permanent or Life-Threatening Bodily Injury | + 6               |
| Death                                       | + 10              |

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## Specific Offense Characteristic (b)(7)

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- Strict liability: Does not require that the injury or death be intended
  - *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5<sup>th</sup> Cir. 2002)