Immigration Primer

Prepared by
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ALIEN SMUGGLING, TRANSPORTING, AND HARBORING - USSG §2L1.1

This section of the Primer provides a general overview of the statutes, sentencing guidelines, and case law relating to alien smuggling, transporting, and harboring offenses.

I. Statutory Scheme

The primary offenses sentence under §2L1.1 are those prosecuted under 8 U.S.C. § 1324(a) and § 1327.

8 U.S.C. § 1324(a)(1)(A) — Bringing in, Transporting, and Harboring Aliens

This statute prohibits (i) bringing aliens to the United States, (ii) transporting aliens within the United States, (iii) harboring aliens, (iv) encouraging aliens to come to the United States, and (v) conspiracy and aiding and abetting to commit any of these acts.

Transporting, harboring, or encouraging entry without financial gain has a 5-year maximum penalty.[1] Bringing aliens to the United States, conspiring to commit any of these crimes, or committing any of these crimes for financial gain has a 10-year statutory maximum penalty.[2] Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum is 20 years.[3] And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.[4] All of these maximum penalties may be enhanced an additional 10 years in cases of commercial transportation of large groups in a life-threatening manner.[5] A defendant who aids and abets another in the commission of one of any of these offenses is subject to a 5-year statutory maximum.[6] Because these statutory enhancements are based on facts other than the defendant's criminal record, they must be charged in the indictment and found beyond a reasonable doubt by a plea or jury.[7]

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[1] 8 U.S.C. § 1324(a)(1)(B)(ii).
[2] 8 U.S.C. § 1324(a)(1)(B)(i).
[3] 8 U.S.C. § 1324(a)(1)(B)(iii).
[4] 8 U.S.C. § 1324(a)(1)(B)(iv).
[5] 8 U.S.C. § 1324(a)(4).
[6] 8 U.S.C. § 1324(a)(1)(B)(ii); *U.S. v. Hilario-Hilario*, 529 F.3d 65 (1st Cir. 2008).
[7] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Multiple violations of § 1324(a)(2) committed "for the purpose of commercial advantage or private financial gain" invokes further enhancements, including a mandatory minimum penalty.[8] Note that "the sentence is calculated 'for each alien with respect to whom a violation . . . occurs.'"[9] Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.[10]

8 U.S.C. § 1324(a)(2)[11] Bringing in Aliens

This crime is similar to § 1324(a)(1)(A)(i) in that it also prohibits bringing an alien to the United States. The main difference is in the penalty provision. Where the alien is brought into the United States but is not presented to immigration officials, a first or second offense carries a 10-year maximum.[12] Where this crime is committed for profit or with reason to believe that the alien will commit a felony, the defendant is subject to a 3-year mandatory minimum and a 10-year statutory maximum.[13]

The statute also carries a recidivist provision, imposing a mandatory minimum of 5 years and a maximum of 15 years for a third violation of these provisions. Although this recidivist provision raises the statutory maximum, because the increase is based on criminal history, it need not be pled in the indictment nor found by a jury.[14]

Finally, as with section 1324(a)(1), the statutory maximums set forth here may also be enhanced an additional 10 years for commercial transportation of large groups in a life-threatening manner.[15]

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[8] 8 U.S.C. § 1324(a)(1)(B) (imposing 10-year maximum); § 1324(a)(2)(B)(ii) (imposing 3–10 year range and 5–15 year range for third violation).

[9] *U.S. v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002).

[10] *See, e.g., id.*

[11] The evolution of § 1324(a)(2) is discussed in *U.S. v. Yeh*, 278 F.3d 9, 16 (D.C. Cir. 2002).

[12] 8 U.S.C. § 1324(a)(2)(B)(iii).

[13] 8 U.S.C. § 1324(a)(2)(B)(i), (ii).

[14] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

[15] 8 U.S.C. § 1324(a)(4).

8 U.S.C. § 1324(a)(3)	Employing, and Bringing in for Employment, Aliens
	This statute prohibits hiring at least ten aliens during any 12-month period with actual knowledge that they are aliens.
	This offense has a 5-year maximum penalty. As with the sections described above, the statutory maximums set forth here may also be enhanced an additional 10 years for commercial transportation of large groups in a life-threatening manner.[16]
8 U.S.C. § 1327	Aiding or Assisting Certain Aliens to Enter
	This statute prohibits the knowing aid of certain aliens to enter the United States or the conspiracy to do this same. A violation of this section has a 10-year maximum penalty.

II. Guideline Overview: USSG §2L1.1

A. Base Offense Level

The base offense level for alien smuggling offenses depends on the statute of conviction. Violations of § 1324 have a base offense level of 12.[17] Violations of § 1327 have a base level of 23 or 25, depending on the immigration status of the alien being smuggled.[18]

B. Specific Offense Characteristics

Beyond the base offense level, §2L1.1 has nine specific offense characteristics. If the conduct "was committed other than for profit" or involved only the defendant's family, a 3-level reduction is appropriate.[19] The guideline also provides enhancements based on the number of aliens smuggled, harbored, or transported; a defendant's prior record of immigration crimes; transportation of an unaccompanied minor; use of a dangerous weapon; substantial risk of death or serious bodily injury; actual infliction of serious bodily injury; and involuntary detention of the alien.[20] A defendant convicted under 8 U.S.C. § 1324(a)(4) receives an additional 2-level increase.[21]

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[16] 8 U.S.C. § 1324(a)(4)
[17] USSG §2L1.1(a)(3).
[18] USSG §2L1.1(a)(1), (2).
[19] USSG §2L1.1(b)(1). This reduction does not apply to defendants convicted under § 1327.
[20] USSG §2L1.1(b)(2)–(8).
[21] USSG §2L1.1(b)(9).

C. Cross Reference

If the conduct resulted in the death of another, the cross reference directs that the appropriate homicide guideline be applied.[22]

III. Specific Guideline Application Issues

A. Lack of Profit Motive - §2L1.1(b)(1): If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child . . . , and (B) the base offense level is determined under subsection (a)(2), decrease by 3 levels.

The defendant has the burden of establishing that he is entitled to this reduction, and most reported decisions have found the reduction does not apply.[23] For example, the reduction may not apply where the defendant's only compensation was free transportation: "A defendant who commits the relevant offense 'solely in return for his own entry' may nevertheless be found to have committed the offense 'for profit.'"[24]

B. Number of Aliens - §2L1.1(b)(2): If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase . . . .

The table in §2L1.1(b)(2) provides increases of 3, 6, or 9 levels based on the number of aliens, smuggled, harbored, or transported. Consistent with this graduated scheme, Application Note 3(C) provides that "[a]n upward departure may be warranted [where] . . . [t]he offense involved substantially more than 100 aliens."[25] The Second Circuit has upheld an upward

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[22] USSG § 2L1.1(c)(1).

[23] *U.S. v. Li*, 206 F.3d 78 (1st Cir. 2000) (affirming district court finding that defendants failed to establish lack of profit motive); *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999) (rejecting reduction where defendant harbored undocumented aliens by employing them in his business and relied on one to assist him in running his business); *U.S. v. Krcic*, 186 F.3d 178 (2d Cir. 1999) (holding that district court permissibly inferred a profit motive where defendant made repeated trips and long distance calls between Montreal and the U.S., did not have any other job, and that others in related schemes were paid quite well); *U.S. v. Hussein Al Nasser*, 555 F.3d 722 (9th Cir. 2007) (holding that reduction did not apply even though defendant did not personally profit because he was part of a scheme to transport aliens for money and knew the aliens had paid someone to transport them).

[24] *U.S. v. Juan-Manuel*, 222 F.3d 480, 485 (8th Cir. 2000) (affirming denial of reduction where defendant drove van carrying aliens to pay off debt to coyote who brought him to U.S.); *see also U.S. v. Perez-Ruiz*, 169 F.3d 1075 (7th Cir. 1999) (affirming denial of enhancement where defendant "received in-kind compensation—transportation from Arizona to Chicago—for his role in the offense"). The holding in *Juan-Manuel* is in contrast to pre-1997 commentary, which stated that "'For profit' means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation."

[25] USSG §2L1.1, comment. (n.3(C)).

departure based on 300 aliens.[26] The Ninth Circuit held that 180 aliens were not "substantially more than 100 aliens."[27]

Because this guideline is listed in §3D1.2(d), the relevant conduct for this guideline includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[28] Thus, a court may determine the number of aliens based on all acts. In one case in which the defendant was convicted on only 5 counts and 42 counts were dismissed, the court concluded that the sentence could be based on transportation of 47 aliens.[29]

Courts occasionally have addressed the quantum of evidence needed to establish the enhancement. In one case, the court affirmed a finding based on a list of names in a ledger found in a "stash house."[30] In another case, the circuit court affirmed an estimate of the total number of aliens smuggled based on the assumption that on each of 15 trips, defendants used children to smuggle in two aliens posing as the children's parents.[31]

C. Creating Risk of Injury - §2L1.1(b)(6): If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels.

The application notes state that this enhancement "includes a wide variety of conduct" and cites a number of examples: "transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition."[32] However, this enhancement "is not limited to the examples provided in the commentary."[33] The Ninth Circuit has explained that in each of these situations, "the means of travel either exacerbates the *likelihood* of an accident, subjects the passenger to a risk of injury even during an accident-free ride, or both."[34] Note that while many of these cases arise when defendants transported aliens in vehicles, this enhancement can also apply to defendants who lead aliens into the United States on

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[26] *U.S. v. Moe*, 65 F.3d 245, 251 (2d Cir. 1995); *see also U.S. v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (affirming 108-month sentence over unadjusted guideline range of 70–87 months that reflected a 2-level upward departure based on transporting 1000 aliens).

[27] *U.S. v. Nagra*, 147 F.3d 875, 886 (9th Cir. 1998) (suggesting that "the '100 or more aliens' category would include 100–399 aliens").

[28] USSG §1B1.3(a)(2).

[29] *U.S. v. Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999).

[30] *U.S. v. Angeles-Mendoza*, 407 F.3d 742 (5th Cir. 2005) (applying enhancement for transporting over 100 aliens where ledger found at stash house had 114 unique names, some of which were names of illegal aliens found at the residence).

[31] *U.S. v. Cabrera*, 288 F.3d 163 (5th Cir. 2002).

[32] USSG §2L1.1, Comment. (n.5).

[33] *U.S. v. Zuniga-Amezquita*, 468 F.3d 886, 888 (5th Cir. 2006).

[34] *U.S. v. Torres-Flores*, 502 F.3d 885, 890 (9th Cir. 2007).

foot, in which case the Fifth Circuit has looked at the "entire picture" in deciding whether to apply the enhancement.[35]

A number of published circuit court opinions apply this enhancement, and some of these are set forth in Table 1 in Appendix A. Note that there is some disagreement as to whether unrestrained passengers lying on the floor of an enclosed van satisfy this enhancement.[36] Also, to qualify for this enhancement, the defendant must have *created* the risk of danger,[37] or at least it must have been "reasonably foreseeable in connection with that criminal activity."[38] It does not matter that an alien faced great risk prior to joining a transporting conspiracy involving the defendant—"only that part of [the alien's] experience after he joined [the defendant's] group can properly be assigned to [the defendant] for purposes of sentencing.[39]

Although "[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,"[40] courts have identified factors to consider when applying this enhancement in vehicle cases.

1. Fifth Circuit.

The Fifth Circuit has indicated that this enhancement does not apply when "[t]he only dangers were the same dangers arising from a passenger not wearing a seatbelt in a moving vehicle."[41] It has articulated five factors to consider under §2L1.1(b)(6): "the availability of

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[35] *Compare U.S. v. Mateo Garza*, 541 F.3d 290 (5th Cir. 2008) (holding that guiding aliens on foot through desert-like brush of South Texas in June, by itself, did not qualify for an enhancement in the absence of evidence that the aliens were inadequately prepared), *with U.S. v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008) (leading aliens through desert-like brush without adequate water supply); *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002) (leading aliens on 3-day trek through desert with only one bottle of water and 2 cans of food per person); *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054 (9th Cir. 2001) (guiding through the mountains between Mexico and San Diego a group of "aliens who were obviously woefully under-equipped for the potential hazards that were known prior to departure").

[36] *Compare U.S. v. Solis-Garcia*, 420 F.3d 511 (5th Cir. 2005) (transporting aliens lying down in the cargo area of a minivan did not qualify) *with U.S. v. Maldonado-Ramires*, 384 F.3d 1228, 1229 (10th Cir.2004) (transportation aliens lying on the floor qualified for enhancement).

[37] *U.S. v. Rodriguez-Lopez*, 363 F.3d 1134 (11th Cir. 2004) (split decision holding that defendant created the risk where he drove boat in hazardous manner over dissenting opinion that defendant did not "create" the risk but momentarily tried to regain control of the speeding boat); *U.S. v. Yeh*, 278 F.3d 9 (D.C. Cir. 2002) (holding that although defendant did not create the conditions on the boat at the outset, he acted as "enforcer" in keeping order on a boat carrying over 200 aliens).

[38] USSG §1B1.3, comment. n.2; *U.S. v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008) (holding that defendant was liable for risk of injury created by coconspirators who had aliens walk through the brush to avoid detection).

[39] *U.S. v. Mateo Garza*, 541 F.3d 290, 293 (5th Cir. 2008).

[40] *U.S. v. Hernandez-Guardado*, 228 F.3d 1017, 1028 (9th Cir. 2000), *quoted by U.S. v. Solis-Garcia*, 420 F.3d 511, 515 (5th Cir. 2005).

[41] *U.S. v. Zuniga-Amezquita*, 468 F.3d 886, 889 (5th Cir. 2006) (citing *Solis-Garcia*, 420 F.3d at 516); *but see U.S. v. Cuyler*, 298 F.3d 387 (5th Cir. 2002) (applying enhancement to transportation of four aliens in the bed of a pickup truck).

oxygen, exposure to temperature extremes, the aliens' ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs."[42]

2. Ninth Circuit.

The Ninth Circuit has noted:

> Every passenger traveling on our highways faces a small, but non-trivial, risk of death or injury. This baseline risk is inherent in all vehicular travel and must therefore be disregarded in determining whether the offense was committed in a manner that involved a "substantial risk of death or serious bodily injury to another person." We focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger traveling on our streets and highways.[43]

Consistent with this observation, the Ninth Circuit has identified a number of factors that could increase this risk:

> (1) The driver could increase the likelihood of an accident by taking a dangerous route (e.g., off-road) or driving in a dangerous manner (e.g., recklessly or drunk); (2) the method of transportation could increase the likelihood of an accident (e.g., a severely overloaded vehicle); (3) the method of transportation could increase the risk of an injury even in the absence of an accident (e.g., passengers transported with insufficient ventilation or subject to injury from moving mechanical parts); or (4) the method of transportation could increase the risk that an accident, if it should occur, would cause injury or death (e.g., passengers transported in a manner that makes them more likely to be injured by crumpled metal or shattered glass than if they had been seated normally).[44]

Thus, it will apply the enhancement "only when the circumstances increased the likelihood of an accident or the chance of injury without an accident."[45]

3. Tenth Circuit

The Tenth Circuit has indicated that the inquiry under this enhancement "essentially equates to a totality of the circumstances test."[46] Under this analysis, the court "must disregard the 'baseline risk . . . inherent in all vehicular travel,' delving instead into whether the

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[42] *U.S. v. Zuniga-Amezquita*, 468 F.3d 886, 889 (5th Cir. 2006).
[43] *U.S. v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007).
[44] *U.S. v. Torres-Flores*, 502 F.3d 885, 889–90 (9th Cir. 2007).
[45] *U.S. v. Torres-Flores*, 502 F.3d 885, 890 (9th Cir. 2007).
[46] *U.S. v. Munoz-Tello*, 531 F.3d 1174, 1183 (10th Cir. 2008).

defendant's conduct or his chosen method of transportation 'increase[d] the risk [of] an accident' and whether the method of transportation exacerbated the risk of death or injury in the event of an accident."[47]

D. Bodily Injury - §2L1.1(b)(7): If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury.

Although "the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct,"[48] courts have typically not required that the defendant be the direct cause of the injury or death.[49] It is not necessary for the defendant to be the driver.[50] Furthermore, the enhancement does not require intent to cause injury or death.[51]

Courts have upheld the application of both (b)(6) and (b)(7) over claims that they reflect impermissible double counting. The Tenth Circuit stated: "§2L1.1(b)(6) allows for an enhancement based upon 'the defendant's intentional or reckless conduct, with no consideration of the outcome;' whereas §2L1.1(b)(7) provides for an enhancement based upon the 'outcome. . . with no consideration of the defendant's intentional or reckless conduct.'"[52]

E. Involuntary Detention - §2L1.1(b)(8): If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

One court applied this enhancement where an armed defendant participated in taking the immigrants's shoes and personal belongings, forcing them to call family members or friends to ask for more money under the threat of dismemberment, and keeping them in a van and making

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[47] *Id.* at 1184.

[48] *U.S. v. Flores-Flores*, 356 F.3d 861 (8th Cir. 2004).

[49] *U.S. v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008) (holding that death caused by defendant's coconspirators was reasonably foreseeable and, thus, a proper basis for enhancement); *U.S. v. Flores-Flores*, 356 F.3d 861 (8th Cir. 2004) (applying enhancement where defendant was not driving the overloaded van at the time it collided with another car because he was tired and had switched with another driver); *U.S. v. Miguel*, 368 F.3d 1150 (9th Cir. 2004) (affirming enhancement where child was found unconscious, notwithstanding the possibility that unconsciousness could have been caused by trek through the desert before getting in defendant's car); *U.S. v. Cardena-Garcia*, 362 F.3d 663, 665–66 (10th Cir. 2004) (stating that "[a] sufficient nexus would exist [between the defendant's conduct and the resultant injury] if the death or injury was reasonably foreseeable and [his] conduct was a contributing factor" and applying enhancement where defendant's van was hit from behind, killing the passengers).

[50] *U.S. v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003)) (applying enhancement where defendant was not present when blowout on the overcrowded van caused injury and death to passengers).

[51] *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002); *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054 (9th Cir. 2001); *U.S. v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001) ("[N]o intent is necessary for an increase under [USSG §2L1.1(b)(7)].").

[52] *U.S. v. Cardena-Garcia*, 362 F.3d 663 (10th Cir. 2004); *U.S. v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001).

them urinate in a bottle.[53]

This enhancement was added in 2006.[54] Before then, courts looked to §3A1.3 to increase sentences based on physical restraint.[55] However, §2L1.1 now precludes application of §3A1.3 if the defendant also received an enhancement under this provision.[56]

IV. Chapter 3 Adjustments

A. Vulnerable Victim - §3A1.1(b)(1)

Courts have examined whether an increase under §3A1.1 (Vulnerable Victim) is appropriate in an alien smuggling case. The Fifth Circuit has suggested that smuggled aliens typically are not "victims" "because they *voluntarily* joined the scheme as willing participants as to its objective—to be brought illegally into the United States."[57] The Fifth Circuit has suggested that the "general characteristics commonly held by aliens seeking to be illegally smuggled" do not create a vulnerability that warrants an upward departure.[58] However, smuggled aliens who were "detained against their will after being transported" are "victims" for purposes of §3A1.1(b)(1).[59] The Ninth Circuit has affirmed an enhancement under this section for smuggled children, finding they "were more susceptible to the criminal conduct because they did not fully appreciate the danger involved in illegal smuggling."[60] (Since that case was decided, the Commission has added a specific offense characteristic that applies "[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent."[61])

B. Role in the Offense - §§3B1.1, 3B1.2

Section 2L1.1 invites consideration of a defendant's role in the offense, noting that for purposes of leadership role, the smuggled aliens are not "participants" "unless they actively

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[53] *U.S. v. Alapizco-Valenzuela*, 546 F.3d 1208 (10th Cir. 2008).

[54] USSG, App. C, Amend. 692. In 2009, the Commission renumbered this provision in response to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–147. Effective November 1, 2009, this section will become §2L1.1(b)(8)(A). The guideline amendment adds a new enhancement in §2L1.1(b)(8)(B) for harboring for the purpose of prostitution.

[55] *U.S. v. Angeles-Mendoza*, 407 F.3d 742 (5th Cir. 2005) (applying §3A1.3 for smuggled aliens who were kept in a locked, boarded-up building without socks or shoes and were threatened to be shot if they tried to escape).

[56] USSG §2L1.1, comment. (n.6).

[57] *U.S. v. Angeles-Mendoza*, 407 F.3d 742, 747 (5th Cir. 2005) (citing *U.S. v. Velasquez-Mercado*, 872 F.2d 632, 636 (5th Cir. 1989) (noting that smuggled alines "might be more properly characterized as 'customers' than 'victims'")).

[58] *U.S. v. Angeles-Mendoza*, 407 F.3d 742, 747 (5th Cir. 2005) (stating that "the *inherent* vulnerability of smuggled aliens" has been "adequately taken into account in establishing the base offense level in USSG §2L1.1").

[59] *U.S. v. Angeles-Mendoza*, 407 F.3d 742, 747 (5th Cir. 2005).

[60] *U.S. v. Miguel*, 368 F.3d 1150, 1157 (9th Cir. 2004).

[61] USSG §2L1.1(b)(4).

assisted in the smuggling, transporting, or harboring of others."[62] Still, some courts have applied §3B1.1 to increase sentences,[63] and others routinely deny reductions for minor participant.[64]

C. Special Skill - §3B1.3

The Fifth Circuit has held that piloting a boat on choppy seas under the direction of another does not qualify as a special skill.[65]

D. Reckless Flight - §3C1.2

The Ninth Circuit held that the enhancement for reckless flight does not apply if the act of fleeing was used to enhance the sentence under §2L1.1 for creating a risk of injury to others.[66]

E. Departures and Variances

1. Multiple Deaths. The Tenth Circuit affirmed an upward departure where multiple deaths resulted from defendant's conduct.[67]
2. Duration of the harboring. The Fourth Circuit affirmed an upward departure for a harboring conspiracy that went on for 19 years.[68]
3. Extent of Detention. The Tenth Circuit affirmed a variance above a guideline range that included an enhancement under §2L1.1(b)(8) because the defendant created an extreme "four-day-long hostage situation" rather than "an isolated, minor detention of limited duration."[69]

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[62] USSG §2L1.1, comment. (n.2).

[63] *See, e.g., U.S. v. Villanueva*, 408 F.3d 193, 204 (5th Cir. 2005) (applying adjustment where "[defendant's] house in El Salvador was the assembly point for many of the aliens; his wife collected the initial payments for the smuggling fees for many of the aliens; the 'pollo' list for this and other smuggling trips were found in [his] house in El Salvador; he recruited and hired the driver of the tractor-trailer; and he was in charge of this particular smuggling expedition"); *U.S. v. Cabrera*, 288 F.3d 163 (5th Cir. 2002) (applying adjustment where defendants recruited and directed smugglers as well as children to use in the smuggling operation).

[64] *U.S. v. Villanueva*, 408 F.3d 193, 204 (5th Cir. 2005) (Defendant did not qualify for minor role reduction where he "acted as a guide in multiple countries, over an extended period of time."); *U.S. v. Angeles-Mendoza*, 407 F.3d 742 (5th Cir. 2005) (Defendant was not a minor participant where he was an enforcer at the stash house and "had knowledge of the scope and structure of the enterprise."); *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054 (9th Cir. 2001) (affirming decision not to award minor role reduction where defendant acted as a "guide in training" and had been paid for guiding aliens); *U.S. v. Pena-Gutierrez*, 222 F.3d 1080 (9th Cir. 2000) (reduction did not apply where defendant was convicted of smuggling aliens twice within 16 days); *U.S. v. Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999) ("[T]he mere fact that appellant was to transport the aliens north does not entitled him to a minor role adjustment."); *U.S. v. Uresti-Hernandez*, 968 F.2d 1042 (10th Cir. 1992) (rejecting reduction where defendant left aliens outside checkpoint, drove through, and waited for them on the other side).

[65] *U.S. v. Hilario-Hilario*, 529 F.3d 65 (1st Cir. 2008).

[66] *U.S. v. Lopez-Garcia*, 316 F.3d 896 (9th Cir. 2003).

[67] *U.S. v. Munoz-Tello*, 531 F.3d 1174 (10th Cir. 2008); *U.S. v. Jose-Gonzalez*, 291 F.3d 697 (10th Cir. 2002).

[68] *U.S. v. Bonetti*, 277 F.3d 441 (4th Cir. 2002).

[69] *U.S. v. Alapizco-Valenzuela*, 546 F.3d 1208 (10th Cir. 2008).

ILLEGAL ENTRY OR REENTRY - USSG §2L1.2

Federal law prohibits foreign nationals from entering the United States without permission. A conviction for a first offense of illegal entry is a misdemeanor that is not covered by the guidelines.[70] Subsequent entries,[71] reentry after deportation,[72] and remaining in the United States after being ordered deported[73] are felonies covered by USSG §2L1.2. Section 2L1.2 provides for an enhanced sentence when the prior deportation was preceded by certain types of convictions. This section addresses application issues arising under §2L1.2.[74]

I. Statutory Scheme

All the enhancements for illegal entry and reentry—under both the statute and the guidelines—are based on a defendant's criminal history, and the means by which these enhancements are applied is the same in both contexts.

8 U.S.C. § 1325(a)	Improper Entry By Alien (Illegal Entry)
	This statute prohibits entry (1) at an improper time or place, (2) without inspection, or (3) based on a false or misleading statement.
	The penalty range for this offense depends on whether it is the defendant's first violation of § 1325(a). If this is the defendant's first violation of § 1325(a), then the statute carries a 6-month maximum penalty, and the guidelines do not apply. If this is a subsequent violation of § 1325(a), then the statute carries a 2-year maximum penalty, and the court should apply § 2L1.2. Because the enhanced penalty is based on a defendant's prior criminal record, it does not need to be indicted or found by a jury.[75]
8 U.S.C. § 1326	Reentry of Removed Aliens (Illegal Reentry)
	This statute prohibits an alien's unauthorized return to the United States after deportation, removal, exclusion, or denial of admission.

[70] 8 U.S.C. § 1325(a).
[71] *Id.*
[72] 8 U.S.C. § 1326.
[73] 8 U.S.C. § 1253.
[74] This guideline has been applied to a conviction for false claim of citizenship in the course of reentering the country. *U.S. v. Castaneda-Gallardo*, 951 F.2d 1451 (5th Cir. 1992).
[75] *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

As with § 1325(a), the statutory maximum for illegal reentry also depends on the defendant's prior criminal record. In general, an alien who has no criminal history is subject to a 2-year maximum.[76] A 10-year maximum applies if the defendant's deportation was (a) preceded by a conviction for "three or more misdemeanors involving, drugs, crimes against the person, or both"; (b) preceded by any felony; or (c) based on certain, specified grounds.[77] If the prior conviction was an "aggravated felony" as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.[78]

For statutory enhancements based on a defendant's prior criminal record, the fact of the prior conviction need not be alleged in the indictment or found by a jury.[79] This is not the case for enhancements based on a defendant's prior deportation, which must be found by a jury.[80] Under *Apprendi*, the government must allege in the indictment the date of defendant's prior removal and of his felony conviction.[81] Courts have held that it does not violate Equal Protection to enhance a defendant's sentence based on prior convictions.[82]

8 U.S.C. § 1253 — Failure to Depart[83]

This statute makes it a crime for an alien who has been ordered to depart the country to (A) remain in the country

[76] 8 U.S.C. § 1326(a).

[77] 8 U.S.C. § 1326(b)(1), (3), (4).

[78] 8 U.S.C. § 1326(b)(2).

[79] *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998) (holding that the prior felony is not an element of the offense and need not be charged in the indictment); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (stating that the fact of a prior conviction need not be found by a jury); *see also U.S. v. Aparco-Centeno*, 280 F.3d 1084 (6th Cir. 2002) (holding that prior convictions were not elements but were sentencing factors for enhancement that did not have to be set forth in the indictment); *U.S. v. Velasquez-Reyes*, 427 F.3d 1227 (9th Cir. 2005).

[80] *See, e.g., U.S. v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *U.S. v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding that the *Almendarez-Torres* exception is "limited to prior convictions" and does not apply to the fact or date of the prior removal); *U.S. v. Zepeda-Martinez*, 470 F.3d 909 (9th Cir. 2006).

[81] *U.S. v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007); *but see U.S. v. Ramirez*, 557 F.3d 200 (5th Cir. 2009) (holding it was not plain error for court to enhance sentence based on uncharged date of removal acknowledged by defendant in PSR).

[82] *U.S. v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007); *U.S. v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

[83] One subsection of this statute, 8 U.S.C. § 1253(b), prohibits a false statement or failure to comply with an investigation during the period following an alien's removal order while he is still in the United States under supervision. This crime is a misdemeanor, punishable by up to a year in prison.

after the removal order is entered, (B) fail to arrange for departure, (C) prevent or hamper departure, or (D) fail to appear as required by the departure removal order.

This statute generally imposes a 4-year statutory maximum penalty, although prior convictions under certain, specified statutes will invoke a 10-year statutory maximum.[84]

II. Guideline Overview: USSG §2L1.2

A. Base Offense Level

The base offense level is 8.[85]

B. Specific Offense Characteristic

The specific offense characteristic at (b)(1) is based upon a defendant's criminal history that predates his removal order.[86] This tiered enhancement assigns a 16-, 12-, 8-, or 4-level increase, depending on the nature of the defendant's prior convictions.

The categories of convictions that receive a 16-level enhancement at (b)(1)(A) include crimes of violence, firearms offenses, child pornography offenses, national security or terrorism offenses, human trafficking offenses, or alien smuggling offenses, regardless of the length of the prior conviction.[87] A prior drug trafficking offense also receives a 16-level enhancement if the sentence imposed was greater than 13 months.[88] These prior offenses do not need to be aggravated felonies to qualify for this enhancement.[89]

A felony drug trafficking offense that received a sentence of less than 13 months qualifies for a 12-level enhancement.[90]

A conviction for a crime that is an "aggravated felony" that has not received a 16- or 12-level increase at (b)(1)(A) or (b)(1)(B) receives an 8-level enhancement at (b)(1)(C).[91] The term "aggravated felony" is defined at 8 U.S.C. § 1101(a)(43). As discussed below, these prior

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[84] 8 U.S.C. § 1253(a)(1). The prior record at issue is described at 8 U.S.C. § 1227(a)(1)(E) (helping an alien enter the United States), § 1227(a)(2) (certain criminal offenses), § 1227(a)(3) (failure to register and falsification of documents), § 1227(a)(4) (security threats).

[85] USSG §2L1.2(a).

[86] USSG §2L1.2(b).

[87] USSG §2L1.2(b)(1)(A)(ii)–(vii).

[88] USSG §2L1.2(b)(1)(A)(i).

[89] *See, e.g.,*USSG §2L1.2, comment. (n.7) (noting that a downward departure may be warranted if "the prior conviction does not meet the definition of aggravated felony").

[90] USSG §2L1.2(b)(1)(B).

[91] USSG. §2L1.2(b)(1)(C).

offenses need not be felonies.[92]

Any other felony receives a 4-level enhancement.[93] A 4-level enhancement also applies where the defendant has had three prior misdemeanor convictions for a drug trafficking offense or a crime of violence.[94]

The Commission has amended §2L1.2 a number of times, which may raise ex post facto issues. In general, "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced" unless doing so "would violate the *ex post facto* clause of the United States Constitution," in which case, "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."[95] Courts have held that illegal reentry is a continuing offense that continues until the alien is "found" in the United States.[96] The Fifth Circuit has held that "a previously deported alien is 'found in' the United States when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities."[97]

III. Identifying Prior Convictions

A. General Principles

The enhancements for reentry offenses are based on a defendant's criminal history, so the court must decide what prior convictions might qualify for an enhancement. A few principles are worth remembering, but these can be summarized in a single statement: **consider any adult conviction that was final before the defendant's most recent deportation**.

1. Only count convictions that were final before the defendant was ordered deported.

In order to be considered as the basis for an enhancement, a conviction must precede a deportation.[98] It does not matter that the defendant "remained" in the United States following a

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[92] *U.S. v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir. 2002) ("Aggravated felony" is a term of art that "includes certain misdemeanants who receive a sentence of one year.").

[93] USSG §2L1.2(b)(1)(D).

[94] USSG §2L1.2(b)(1)(E).

[95] USSG §1B1.11.

[96] *U.S. v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994); *U.S. v. Whittaker*, 999 F.2d 38 (2d Cir. 1993); *U.S. v. Lennon*, 372 F.3d 535 (3d Cir. 2004); *U.S. v. Gonzales*, 988 F.2d 16 (5th Cir. 1993).

[97] *U.S. v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *see also U.S. v. Whittaker*, 999 F.2d 38 (2d Cir. 1993) (stating that "found" is synonymous with "discovered in"); *U.S. v. Bencomo-Castillo*, 176 F.3d 1300 (10th Cir. 1999).

[98] USSG §2L1.2(b)(1). While a conviction sustained after the defendant was deported should not trigger an enhancement under §2L1.2, it may still be counted for purposes of calculating the defendant's criminal history. *See, e.g., U.S. v. Cuevas*, 75 F.3d 778 (1st Cir. 1996) (adding two criminal history points for committing the offense

prior conviction—the conviction must precede deportation to qualify for an enhancement.[99] A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is still pending when the defendant is deported.[100] In some cases, a sentence imposed after deportation will count as a pre-deportation sentence if it was based on the violation of a condition of probation that was imposed prior to deportation.[101]

2. The date an order of removal is reinstated constitutes a new deportation.

Federal law authorizes immigration authorities to reinstate a prior removal order.[102] Although this statute states that a "prior order of removal is reinstated from its original date," a removal based on the reinstatement is treated as a separate removal for purposes of determining whether a conviction happened prior to deportation under § 1326.[103] Thus, the enhancement applies where a conviction follows the original deportation order but precedes a subsequent reinstatement of that order.[104] For purpose of criminal sanctions, "what matters" is "the alien's *physical* removal."[105] Similarly, the Ninth Circuit has held that "removal by an immigration officer pursuant to a prior removal order" is a separate removal for purposes of §2L1.2.[106]

3. Consider any adult convictions.

In contrast to the criminal history guidelines in Chapter 4, which exclude convictions that were obtained more than 5, 10, or 15 years earlier,[107] there is no time limit on when a prior conviction must have been obtained to be counted under §2L1.2.[108] In further contrast to the criminal history guidelines, which consider juvenile convictions within the past five years,[109] "a

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while on probation for a crime committed after deportation on the ground that the reentry conviction was for being "found" in the United States, by which time defendant was on probation).

[99] *U.S. v. Sanchez-Mota*, 319 F.3d 1 (1st Cir. 2002); *see also U.S. v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008) (holding that deportation prior to a conviction did not trigger statutory enhancement).

[100] *U.S. v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007).

[101] *U.S. v. Compres-Paulino*, 393 F.3d 116 (2d Cir. 2004) (holding that 29-month sentence imposed after prior deportation applied as a sentence imposed prior to deportation where the sentence was based on violation of probation condition imposed prior to deportation).

[102] 8 U.S.C. § 1231(a)(5).

[103] *U.S. v. Nava-Perez*, 242 F.3d 277 (5th Cir. 2001) (holding that a conviction sustained after the original removal order was entered, after returning to the United States, but before the removal order was reinstated was prior to removal for purposes of § 1326: "the statute plainly contemplates, *after* the reentry, a *second removal* under the reinstated prior order").

[104] *U.S. v. Diaz-Luevano*, 494 F.3d 1159 (9th Cir. 2007) (holding that 1998 conviction that followed 1996 deportation but preceded 2000 reinstatement was "prior" to deportation for purpose of 2004 reentry prosecution).

[105] *U.S. v. Diaz-Luevano*, 494 F.3d 1159, 1161 (9th Cir. 2007).

[106] *U.S. v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008).

[107] USSG §4A1.2(e).

[108] USSG §2L1.2, comment. (n.1(a)(ii), 6); *see also, e.g., U.S. v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007); *U.S. v. Torres-Duenas*, 461 F.3d 1178 (10th Cir. 2006); *U.S. v. Camacho-Ibarquen*, 410 F.3d 1307 (11th Cir. 2005).

[109] USSG §4A1.2(d).

conviction for an offense committed before the defendant was eighteen years of age" does not qualify for an enhancement "unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[110] The conviction for which the defendant receives an enhancement need not be the most recent conviction.[111] Nor is it necessary that the defendant have been deported as a result of that conviction.[112] In short, the enhancement may be based on any adult conviction regardless of when the defendant was convicted.

4. Delayed adjudications may qualify as convictions.

A deferred adjudication can qualify as a prior conviction under § 2L1.2.[113] A guilty plea held in abeyance qualifies as a "conviction" under §2L1.2.[114]

5. Vacating a conviction may disqualify it from consideration.

The guidelines do not expressly address expunged or vacated convictions. Some courts have held that a conviction that was vacated prior to sentencing on technical grounds should be considered under §2L1.2.[115] The enhancement, however, would not apply if the conviction was vacated on "a showing of actual innocence"[116] or "that the conviction had been improperly obtained."[117]

6. Prior convictions need not be charged to qualify for enhancement.

The fact of a prior conviction need not be pled or proven beyond a reasonable doubt.[118] Thus, a prior conviction that would support an enhanced sentence under either the statutes or the

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[110] USSG §2L1.2, comment. (n.1(A)(iv)).

[111] *U.S. v. Soto-Ornelas*, 312 F.3d 1167 (10th Cir. 2002) (enhancing based on conviction other than most recent or the one named in indictment).

[112] USSG §2L1.2, comment. (n.1(A)(ii), (iii)); *U.S. v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

[113] *U.S. v. Ramirez*, 367 F.3d 274 (5th Cir. 2004); *U.S. v. Valdez-Valdez*, 143 F.3d 196 (5th Cir. 1998).

[114] *U.S. v. Zamudio*, 314 F.3d 517 (10th Cir. 2002) (holding that a plea in abeyance was a "conviction" under 8 U.S.C. § 1101(a)(48)(A), which includes a situation where "the alien has entered a plea of guilty . . . and the judge has ordered some form of punishment").

[115] *U.S. v. Luna-Diaz*, 222 F.3d 1 (1st Cir. 2000) (applying enhancement where defendant vacated prior conviction after pleading guilty to illegal reentry); *U.S. v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (enhancing based on prior conviction that was set aside because terms of probation had been satisfied); *U.S. v. Garcia-Lopez*, 375 F.3d 586 (7th Cir. 2004) (applying enhancement where prior conviction was vacated "based on a technicality"); *U.S. v. Cisneros-Cabrera*, 110 F.3d 746 (10th Cir. 1997) (applying enhancement where vacated conviction was in place at the time of illegal entry); *U.S. v. Orduno-Mireles*, 405 F.3d 960, 961 n.1 (11th Cir. 2005) (stating that conviction vacated after illegally returning to United States should still be considered under § 2L1.2).

[116] *U.S. v. Garcia-Lopez*, 375 F.3d 586, 589 (7th Cir. 2004).

[117] *U.S. v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999).

[118] *See, e.g., Almendarez-Torres v. U.S.*, 523 U.S. 224 (1995).

guidelines does not need to be identified until the time of sentencing.[119]

7. Is the prior conviction a felony?

In order to receive a 16-, 12-, or 4-level enhancement, the prior conviction must be a felony.[120] For purposes of §2L1.2, a felony is "any federal, state, or local offense punishable by imprisonment for a term exceeding one year."[121] Thus, some crimes that are classified as misdemeanors under state law will be treated as felonies under the guidelines.[122] Likewise, a conviction that is classified as a misdemeanor under state law can trigger the 10-year statutory maximum for a prior felony conviction if it is a felony under federal law,[123] i.e., "an offense punishable by a maximum term of imprisonment of more than one year."[124]

The focus of this determination is on the length of sentence that *could be* imposed, not the time actually served. The fact that a defendant served less than one year in custody does not change a felony into a misdemeanor.[125]

The guideline definition of a felony can be difficult to apply when a crime—often known as a "wobbler"—is punishable either as a felony or a misdemeanor.[126] In these cases, courts will examine the court record to determine whether the crime was a felony or misdemeanor.[127] Sometimes, the length of sentence imposed may give a clue as to whether the prior conviction was a felony or misdemeanor.[128] In one case, the Tenth Circuit held that an offense charged as a felony did not convert to a misdemeanor because a judgment was never entered, despite the fact the defendant received a probationary sentence with no jail time.[129]

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[119] Note that this rule does not apply to the fact of deportation, so a statutory enhancement based on a finding that defendant had been removed on a particular date may violate the Sixth Amendment if the date of deportation was not admitted by the defendant in the plea. *See, e.g., U.S. v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *U.S. v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding that the *Almendarez-Torres* exception is "limited to prior convictions" and does not apply to the fact or date of the prior removal).

[120] USSG §2L1.2(b)(1)(A), (B), (D). Enhancements under §2L1.2 can be based on misdemeanor in only three situations: (1) some misdemeanors are aggravated felonies, (2) some crimes classified by the state as misdemeanors are felonies under the federal definition, and (3) three misdemeanor convictions that are drug trafficking crimes or crimes of violence will also qualify for an enhancement *Id.* §2L1.2(b)(1)(C), (E).

[121] USSG §2L1.2, comment. (n.2).

[122] *U.S. v. Hernandez-Garduno*, 460 F.3d 1287 (10th Cir. 2006) (holding that misdemeanor conviction under Colo. Rev. Stat. § 18-3-204 was a felony under §2L1.2).

[123] *U.S. v. Cordova-Arevalo*, 456 F.3d 1229 (10th Cir. 2006) (holding that misdemeanor conviction under Colo. Rev. Stat. § 18-3-204 was a felony for purposes of §1326(b)).

[124] 18 U.S.C. § 3156(3).

[125] *U.S. v. Anderson*, 328 F.3d 1326 (11th Cir. 2003).

[126] *See, e.g., U.S. v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006).

[127] *U.S. v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006).

[128] *U.S. v. Simo-Lopez*, 471 F.3d 249 (1st Cir. 2006) (holding that 6-month sentence was evidence that defendant previously pled guilty to a misdemeanor, not a felony)

[129] *U.S. v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (holding that conviction for unlawful sexual intercourse with a minor more than 3 years younger in violation of Cal. Pen. Code § 261.5(c) was a felony because wobbler charged as a felony was not converted to a misdemeanor by entry of judgment).

B. Categorical Approach

In reentry cases, courts must decide (1) whether a prior conviction is a felony or an "aggravated felony" for purposes of the statutory enhancements and (2) whether it qualifies for an enhancement under §2L1.2(b)(1). In general, these tasks are guided by the Supreme Court's opinions in *Taylor v. United States*[130] and *Shepard v. United States*,[131] which set forth a "categorical approach" to deciding whether a prior conviction fits within a certain category of crimes.

In *Taylor*, the Supreme Court held that a court deciding whether a prior conviction fell within a certain class of crimes could "look only to the fact of conviction and the statutory definition of the prior offense."[132]

This categorical approach "may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."[133]

> For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.[134]

Thus, a prior conviction qualifies for an enhancement "if either its statutory definition substantially corresponds to [the definition of the crime], or the charging paper and jury instructions actually required the jury to find all the elements of [the specified crime] in order to convict the defendant."[135]

Shepard applied *Taylor* to a case in which the prior conviction was the result of a guilty plea. In such a case, the court's review is "limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[136]

Although *Taylor* and *Shepard* dealt with statutory enhancements at 18 U.S.C. § 924(e), lower courts have applied their categorical approach in other contexts where a sentencing

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[130] 495 U.S. 575 (1990).
[131] 544 U.S. 13 (2005).
[132] 495 U.S. at 602.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] 544 U.S. at 26.

enhancement is based on a prior conviction, including §2L1.2.[137] Under this approach, a court begins by looking only at the fact of conviction and determining whether the elements of the crime fits within the enumerated categories. Courts must define the scope of the category before they can undertake this categorical analysis and will do this by looking at the "ordinary, contemporary, and common meaning" of the category.[138] If the statute applies both to conduct that would qualify for an enhancement and to conduct that would not, the court can examine the sources approved in *Shepard* to determine whether the specific crime fit within one of the categories.

C. Modified Categorical Approach

In some cases, a statute of conviction may cover conduct that fits within the category and conduct that does not. In these cases, the Supreme Court has authorized courts to look at the judicial record to determine whether the prior conviction was based on conduct that fit within the category at issue. This analysis is called the "modified categorical approach."[139] For example, the Ninth Circuit considers "whether the 'full range of conduct encompassed' or 'prohibited'" by the underlying statute fits within the definition of the category at issue.[140] "If the statute reaches both conduct that would constitute a crime of violence and conduct that would not, we turn to a modified categorical approach, which allows us to examine documentation or judicially noticeable facts that clearly establish that the defendant's actual offense qualifies as a crime of violence."[141]

Under this limited review, the court may consider only those sources approved by *Shepard*.[142] These sources include the charging document, jury instructions, any plea statement or admissions, or "some comparable judicial record of this information."[143] The Ninth Circuit has extended this list to include New York Certificates of Disposition[144] and California Minute

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[137] *See, e.g., U.S. v. Turbides-Leonardo*, 468 F.3d 34 (1st Cir. 2006); *U.S. v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002); *U.S. v. Otero*, 502 F.3d 331 (3d Cir. 2007); *U.S. v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006); *U.S. v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008); *U.S. v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006); *U.S. v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007); *U.S. v. Maldonado-Lopez*, 517 F.3d 1207 (10th Cir. 2008); *U.S. v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006).

[138] *U.S. v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007); *see also U.S. v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008) ("Because the Sentencing Guidelines do not define the phrase, we interpret it by employing the common meaning of the words that the Sentencing Commission used."); *U.S. v Montenegro-Recinos*, 424 F.3d 715 (8th Cir. 2005); *U.S. v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007).

[139] *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

[140] *See, e.g., U.S. v. Reina-Rodriguez*, 468 F.3d 1147 (9th Cir. 2006) (applying both "categorical" and "modified categorical" approaches under §2L1.2), *overruled on other grounds by U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007).

[141] *Reina-Rodriguez*, 468 F.3d at 1153.

[142] *Id.* at 1154.

[143] *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602.

[144] *U.S. v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding that COD did not support enhancement because it did not specify which subsection of a statute with multiple parts was the basis of conviction); *U.S. v. Neri-Hernandes*, 504 F.3d 587, 592 (5th Cir. 2007) (holding that district court may rely on a New York Certificate of

Entries.[145] On the other hand, courts typically may not rely on the description in a federal PSR,[146] California abstracts,[147] or police reports.[148]

For some of these documents, the result depends on how the document will be used. Courts cannot look at allegations in a charging document that were not established at trial or acknowledged in a guilty plea.[149] On the other hand, the Fifth Circuit has allowed use of a police record from a state that allows "a complaint written by a police officer [to] be the charging document,"[150] and the Ninth Circuit has allowed looking at police records "to determine that [a] prior conviction was for selling marijuana" because the defendant had "stipulated during the plea colloquy that the police reports contained a factual basis for his guilty plea."[151] Similarly, while abstracts cannot be used to determine the nature of a prior conviction under the modified categorical approach, they may be used to establish the fact of conviction or the length of a prior sentence.[152]

A court may not look at the underlying facts of the conviction simply because they may supply some fact that is necessary to fit within the category but is not required by the statutory definition. The court may look to the underlying facts as established by *Shepard*-approved documents only "if the statute of conviction contains a series of disjunctive elements."[153] In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.[154] "The list in *Shepard* is designed to illuminate documents that

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Disposition "to determine the nature of a prior conviction," but this evidence "is not conclusive and may be rebutted," such as "where the defendant shows a likelihood of human error in the preparation of the Certificate").

[145] *U.S. v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc).

[146] *U.S. v. Garza-Lopez*, 410 F.3d 268 (5th Cir. 2005) (holding that the court may not "rely on the PSR's characterization of the [prior] offense in order to make its determination of whether it [fit within one of the categories in §2L1.2]").

[147] *U.S. v. Gutierrez-Ramirez*, 405 F.3d 352, 358 (5th Cir. 2005); *U.S. v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

[148] *Shepard v. U.S.*, 544 U.S. 13 (2005); *U.S. v. Almazan-Becerra*, 482 F.3d 1085 (9th Cir. 2007) (noting that "[t]he Supreme Court appears to have foreclosed the use of police reports in a *Taylor* analysis" but that such reports may be used when stipulated by defendant).

[149] *See, e.g., U.S. v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding that court could not use the criminal information to identify the statute of conviction because it charged a crime for which the defendant was not convicted); *U.S. v. Neri-Hernandes*, 504 F.3d 587 (5th Cir. 2007) (holding that "district court cannot use the indictment to pare down the statute of conviction to determine under which subsection [defendant] pleaded guilty" because defendant pleaded guilty to a crime other than the one he was charged with).

[150] *U.S. V. Rosas-Pulido*, 526 F.3d 829, 832 (5th Cir. 2008) (citing Minnesota law).

[151] *U.S. v. Almazan-Becerra*, 537 F.3d 1094 (9th Cir. 2008).

[152] *See, e.g.,U.S. v. Neri-Hernandes*, 504 F.3d 587 (5th Cir. 2007); *U.S. v. Sandoval-Sandoval*, 387 F.3d 1278 (9th Cir. 2007) (length of sentence); *U.S. v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (fact of conviction); *U.S. v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006).

[153] *U.S. v. Gonzalez-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008) (quoting *U.S. v. Mendoza-Sanchez*, 456 F.3d 479, 482 (9th Cir. 2006).

[154] *See, e.g., U.S. v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding that conviction for "assault in violation of a court order" could not categorically be a crime of violence where the government did not provide the statute of conviction).

identify *what crime* the defendant committed. . . . [W]hat matters is the fact of conviction, rather than the facts *behind* the conviction."[155]

D. Common Sense Approach

The Fifth Circuit uses a "common sense approach" in connection with the categorical approach.[156] The Fifth Circuit uses the common sense approach "[w]hen determining whether a state conviction constitutes a specifically enumerated, but undefined, offense for purposes of §2L1.2's crime-of-violence enhancement."[157] Under the common sense approach, the court takes an undefined guideline term and articulates the "ordinary, contemporary, [and] common" meaning of that term.[158] The "primary source for the generic contemporary meaning of [a category of offenses] is the Model Penal Code"[159] as well as "treatise[s], modern state cases, and dictionaries."[160]

Once the scope of the category is defined, the court looks at the statute of conviction to see if it meets the common-sense definition. "State-law labels do not control this inquiry because the [crime of violence] adjustment incorporates crimes with certain elements, not crimes that happen to have the same label under state law."[161] If the statute is broader than the definition, then the court looks at the sources approved by *Shepard* to decide whether the prior conviction fell within the categorical definition.[162] In this way, it appears the Fifth Circuit's "common sense approach" is used in tandem with the "categorical approach."[163]

The Fifth Circuit recently summarized its approach in this way:

> To determine whether a prior conviction qualifies as a crime of violence as an enumerated offense, this court employs what we have called a common sense approach. The common sense approach asks whether a prior conviction is "equivalent to the enumerated offense . . . 'as that term is understood in its ordinary, contemporary, and common meaning.' If the statute of conviction 'encompasses

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[155] *U.S. v. Zuniga-Soto*, 527 F.3d 1110, 1120 (10th Cir. 2008) (quoting *U.S. v. Lewis*, 405 F.3d 511, 515 (7th Cir. 2005)).

[156] *See, e.g., U.S. v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006); *U.S. v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005).

[157] *U.S. v. Tellez-Martinez*, 517 F.3d 813 (5th Cir. 2008).

[158] *Izaguirre-Flores*, 405 F.3d at 274–75.

[159] *U.S. v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006).

[160] *U.S. v. Sanchez-Ruedas*, 452 F.3d 409, 412 (5th Cir. 2006).

[161] *U.S. v. Ramirez*, 557 F.3d 200, 204 (5th Cir. 2009).

[162] *See, e.g., U.S. v. Torres-Diaz*, 438 F.3d 529, 534 (5th Cir. 2006) (citing *Shepard* to support the conclusion that "whenever a statute provides a list of alternative methods of commission . . . we may look to charging papers to see which of the various statutory alternatives are involved in the particular case").

[163] *See also, e.g., U.S. v. Montenegro-Recinos*, 424 F.3d 715 (8th Cir. 2005) ("Because the guidelines do not define 'sexual abuse of a minor,' we give the term its ordinary, contemporary, common meaning, and we employ a categorical approach to determine whether [the prior] crime is a crime of violence under the guidelines.").

prohibited behavior that is not within the plain, ordinary meaning of the enumerated offense, the conviction is not a crime of violence as a matter of law.' To distill the ordinary, contemporary, and common meaning of an enumerated offense, this court looks to sources such as the Model Penal Code, Professor LaFave's treatise, and legal dictionaries. In comparing the definitions provided by these sources to the statute of conviction, the statute of conviction need not correlate precisely with the generic definition."[164]

Under the common sense approach, it may not matter that some conduct covered by the statute does not fit within the category: "Even if the fit between the enumerated offense of aggravated assault and the ordinary, contemporary, and common meaning of aggravated assault may not be precise in each and every way, slight imprecision would not preclude our finding a sufficient equivalence."[165]

IV. Drug Trafficking Offense - §2L1.2(b)(1)(A)(i)

A. What convictions constitute a "drug trafficking offense"?

A drug trafficking offense is "any offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[166] The application of this definition to various statutes can be seen in Table 2 in Appendix B, but a few highlights are worth noting.

1. <u>All conduct under the statute of conviction must be a drug trafficking offense.</u>

As discussed above, in order to qualify for an enhancement under the categorical approach, all of the conducted covered by the statute of conviction must fit within this definition of drug trafficking offense in order for the conviction to qualify for an enhancement. If some of the conduct covered by the statute of conviction does not fit within the definition, the conviction does not qualify for an enhancement.[167] For statutes that include trafficking and non-trafficking

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[164] *U.S. v. Rojas-Gutierrez*, 510 F.3d 545, 548 (5th Cir. 2007) (citations omitted); *see also U.S. v. Lopez-DeLeon*, 513 F.3d 472 (5th Cir. 2008) ("Under the common sense approach, we must determine whether a violation of [a particular statute] constitutes the enumerated offense . . . as that [term] is understood in its ordinary, contemporary, and common meaning, by reviewing the Model Penal Code (MPC), treatises, modern state codes, and dictionaries.").

[165] *Id.* at 550.

[166] USSG §2L1.2, comment. (n.1(b)(iv)). Note that the term "offer to sell" was added in 2008.

[167] *See, e.g. U.S. v. Gonzales*, 484 F.3d 712 (5th Cir. 2007) (holding that conviction for delivery of a controlled substance in violation of Tex. Health & Safety Code § 481.112 was not a drug trafficking offense because statute included "offer to sell," which did not qualify for enhancement); *U.S. v. Garza-Lopez*, 410 F.3d 268 (5th Cir. 2005) (holding that conviction for transporting drugs in violation of Cal. Health & Safety Code § 11379(a) was not

offenses (such as selling and transporting), if *Shepard*-approved documents establish that the conviction was based on conduct that meets the definition, then an enhancement may be appropriate.[168]

2. Simple possession of a "trafficking quantity" of drugs is not a drug trafficking offense but may warrant a sentence increase.

In general, a conviction for simple possession of a controlled substance is not a drug trafficking offense, even where the prior conviction was based on a "trafficking quantity."[169] The Eleventh Circuit has held that when a statutory scheme designates "possession of a specific, designated quantity of drugs" as a drug trafficking offense, that designation implies the intent needed to qualify as a drug trafficking offense.[170] Rather than treating possession of trafficking quantities as trafficking offenses, the Fifth Circuit has affirmed sentences above the guideline range where the defendant possessed a trafficking quantity of drugs.[171] In 2008 the Commission adopted an upward departure provision for simple possession convictions in which the defendant possessed a large quantity of drugs.[172]

B. How long was the sentence?

For felony drug trafficking offenses, it is also necessary to determine the length of the "sentence imposed." Convictions that received a sentence greater than 13 months, a 16-level

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categorically drug trafficking because it included offers to transport for personal use as well as mere "offers" to distribute a controlled substance); *U.S. v. Almazan-Becerra*, 482 F.3d 1085 (9th Cir. 2007) (holding that conviction for transporting methamphetamine in violation of Cal. Health & Safety Code § 11379 was not "drug trafficking" because it could be based on transportation of personal use quantity). Note that Application Note 1(b)(iv) has since been amended to include an offer to sell. USSC, *Guideline Manual Supplement to Appendix C*, Amendment 722.

[168] *U.S. v. Rodriguez-Duberney*, 326 F.3d 613 (5th Cir. 2003) (relying on indictment to conclude that conviction for interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952 was a drug trafficking offense, even though it was possible to violate statute in a way that did not involve drugs).

[169] *U.S. v. Villa-Lara*, 451 F.3d 963 (9th Cir. 2006) (conviction for possession of a controlled substance in violation of NRS 453.3385 was not a drug trafficking offense); *U.S. v. Herrera-Roldan*, 414 F.3d 1238, 1239 (10th Cir. 2005) (holding that conviction for possession of a controlled substance in violation of Tex. Health & Safety Code § 481.121 was not a drug trafficking offense).

[170] *U.S. v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003) (holding that conviction for simple possession of more than 28 grams of methamphetamine in violation of Georgia Code § 16-13-31(e) was a drug trafficking offense); *see also U.S. v. Gutierrez-Bautista*, 494 F.3d 523 (5th Cir. 2007) (same), *superseded by* 507 F.3d 305 (5th Cir. 2007).

[171] *See, e.g., U.S. v. Lopez-Salas*, 513 F.3d 174, 181 (5th Cir. 2008) (recognizing that upward variance may be appropriate where conviction for simple possession of a large quantity of drugs did not qualify as a drug trafficking offense); *U.S. v. Herrera-Garduno*, 519 F.3d 526 (5th Cir. 2008) (holding that above-guideline sentence was reasonable where prior conviction for possession with intent to deliver did not qualify as a "drug trafficking offense" but the facts of the case "indicated that [defendant] was in fact trafficking [drugs]");

[172] USSG §2L1.2, n.7.

enhancement applies.[173] A 12-level enhancement applies to felony convictions that received a sentence of 13 months or less.[174]

The rules for this determination are similar but not identical to the rules for calculating sentence length under Chapter 4.[175] Consistent with Chapter 4, the sentence length is "based on the sentence pronounced, not the length of time actually served."[176] It does not include any portion that was suspended,[177] but it does include "any term of imprisonment given upon revocation of probation, parole, or supervised release."[178] Where the court imposed an indeterminate sentence, however, the sentence imposed is the stated maximum rather than the time actually served on the indeterminate sentence.[179]

Furthermore, a prior conviction that received a sentence of probation or a noncustodial fine does not qualify for either a 12- or 16-level increase. A "sentence imposed" under §2L1.2 has the same meaning as a "sentence of imprisonment" under Chapter 4.[180] Chapter 4 states that "[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence."[181] Thus, a sentence that did not result in any term of imprisonment is not a "sentence imposed" under §2L1.2.[182]

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[173] USSG §2L1.2(b)(1)(A)(i).

[174] USSG §2L1.2(b)(1)(B).

[175] As noted above, when determining whether a prior conviction is a felony, the court focuses on the maximum term of imprisonment that *could* be imposed. When determining sentence length of an aggravated felony under 8 U.S.C. § 1101(a)(43), the court includes time that was suspended. 8 U.S.C. § 1101(a)(48)(B). In one case, the Fourth Circuit recognized that §2L1.2 does not calculate sentence lengths in the same manner as Chapter 4 but nevertheless affirmed a district court's decision to rely on §4A1.2(a)(2) to aggregate three separate sentences committed on the same day and arising out of the same events. *U.S. v. Martinez-Varela*, 531 F.3d 298 (4th Cir. 2008).

[176] USSG §4A1.2, comment. (n.2) (adopted by §2L1.2, comment. (n.1(B)(7)). If the stated sentence was for "time served," then the sentence length is the length of time actually served *U.S. v. D'Oliveira*, 402 F.3d 130 (2d Cir. 2005).

[177] USSG §4A1.2(b)(2) (adopted by §2L1.2, comment. (n.1(B)(7)).

[178] USSG §2L1.2, comment. (n.1(B)(vii)); *see also U.S. v. Moreno-Cisneros*, 319 F.3d 456, 456 (9th Cir. 2003) ("Under the guidelines, the "the length of the 'sentence imposed' for a prior state conviction includes the prison sentence the defendant received after his probation was revoked.""); *U.S. v. Ruiz-Gea*, 340 F.3d 1181 (10th Cir. 2003) (holding that "sentence imposed" was greater than 13 months, despite original sentence of 90 days jail and probation, where probation violation resulted in 1–15 year sentence); *U.S. v. Compian-Torres*, 320 F.3d 514 (5th Cir. 2003).

[179] USSG §4A1.2, comment. (n.2) (adopted by §2L1.2, comment. (n.1(B)(vii)) *see also U.S. v. Frias*, 338 F.3d 206 (3d Cir. 2003) (holding that "the term 'sentence imposed' in § 2L1.2 means the maximum term of imprisonment in an indeterminate sentence").

[180] USSG §2L1.2, comment. (n.1(B)(7)).

[181] USSG §4A1.2, comment. (n.2).

[182] *U.S. v. Alvarez-Hernandez*, 478 F.3d 1060 (9th Cir. 2007) (holding that a fully suspended and probated sentence for unlawful sale of controlled substance was not a "felony drug trafficking offense for which the sentence imposed was 13 months or less"). The quoted guideline language and its analysis in *Alvarez-Hernandez* is based on a 2003 amendment to §2L1.2. USSG App. C, Amend. 658. This analysis is different than the earlier, pre-amendment analysis that treated a noncustodial sentence as a sentence less than 13 months. *See, e.g., U.S. v. Mullings*, 330 F.3d 123 (2d Cir. 2003); *U.S. v. Garcia-Rodriguez*, 415 F.3d 452 (5th Cir. 2005); *U.S. v. Hernandez-*

Because suspended time does not count towards the "sentence imposed" under §2L1.2, courts have occasionally consider what constitutes a suspension. "The defining characteristic of a 'suspended sentence' under the United States Sentencing Guidelines is that it is suspended by a judicial officer, rather than an executive agency."[183] Courts have held that a reduction based on parole or some other executive reduction of sentence (such as good time) does not constitute a suspension.[184] Likewise, deportation prior to expiration of a defendant's sentence likewise does not constitute a suspension, even when the sentencing court authorized immediate deportation.[185] However, a judicial order reducing a sentence can change the length of the "sentence imposed."[186]

In one case, the Ninth Circuit held that while a sentence imposed on a probation violation was properly considered in calculating sentence length, the statutory scheme and evidentiary record suggested that the total time could not have exceeded 365 days, so the sentence was less than 13 months.[187]

V. Crime of Violence

Another basis for enhancement under §2L1.2 is a prior conviction for a "crime of violence" under subsection (b)(1)(A)(ii).[188] This term is defined in Application Note 1(B)(iii) and includes several enumerated offenses: "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not

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Valdovinos, 352 F.3d 1243 (9th Cir. 2003) ("A sentence of probation . . . by definition is a sentence of 13 months or less.").

[183] *U.S. v. Garcia-Gomez*, 380 F.3d 1167, 1172 (9th Cir. 2004).

[184] *U.S. v. Valdovinos-Soloache*, 309 F.3d 91, 93–95 (2d Cir. 2002) (per curiam) (concluding the sentence imposed was the original 10 year sentence although defendant was paroled after serving only 5 months); *U.S. v. Benitez-Perez*, 367 F.3d 1200 (9th Cir. 2004) (holding that release on parole 13 months early did not constitute a reduction in the sentence imposed); *U.S. v. Frias*, 338 F.3d 206, 212 (3d Cir. 2003) (holding that the "sentence imposed" means the maximum term of imprisonment in an indeterminate sentence even though a defendant may be paroled before serving a year in prison); *U.S. v. Mendez-Villa*, 346 F.3d 568, 570 (5th Cir. 2003) (per curiam) (holding that "the plain language of the Guidelines and the authoritative commentary indicate that any portion of the sentence spent on parole shall be included in the calculation of the 'sentence imposed' per U.S.S.G. §2L1.2(b)(1)"); *U.S. v. Rodriguez-Arreola*, 313 F.3d 1064, 1066–67 (8th Cir. 2002) (holding that parole did not constitute a suspension); *U.S. v. Garcia-Gomez*, 380 F.3d 1167 (9th Cir. 2004) (holding that participation in a work ethic camp that resulted in early release did not "suspend" sentence imposed).

[185] *U.S. v. Chavez-Diaz*, 444 F.3d 1223 (10th Cir. 2006) (holding that authorization to deport defendant prior to expiration of sentence did not act to suspend 4-6 year sentence below 13-months, despite the following language: "if deemed appropriate by the Department of Immigration and Naturalization Services, the Defendant shall be immediately deported and returned to Mexico").

[186] *U.S. v. Landeros-Arreola*, 260 F.3d 407 (5th Cir. 2001) (holding that a judicial order changing a 4-year sentence to a sentence of probation was not merely a suspension but a reduction, so the conviction, though a crime of violence, was not an aggravated felony because the sentence was less than one year).

[187] *U.S. v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008).

[188] This enhancement is used in 14% of cases sentenced under §2L1.2. USSC, *Use of Guidelines and Specific Offense Characteristics: FY 2006* at 43, *available at* http://www.ussc.gov/gl_freq/06_glinexgline.pdf.

legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced),[189] statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling."[190] The term also applies to "any other 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."[191]

A. *General Principles*

1. To be a crime of violence, the prior conviction must *either* fit in one of the enumerated categories *or* have as one of its elements the use of force.

Courts have held that a conviction need not fit within both groups in order to qualify for an enhancement.[192] In general, the inquiry for the first set of crimes is simply whether the offense of conviction can properly be classified as one of the enumerated offenses. For the second group, the court must look at the specific elements of the offense and determine whether one of those establishes "the use, attempted use, or threatened use of physical force against the person of another."

2. A crime of violence need not be an aggravated felony to receive a 16-level enhancement.

Both §2L1.2 and 8 U.S.C. § 1101(a)(43) (aggravated felony definition) use the term "crime of violence," but they define the term in different ways, often resulting in a situation where a conviction is a crime of violence under one definition but not the other. Under the guidelines, a conviction must (1) have a maximum sentence greater than one year and (2) fit within one of the categories discussed in Application Note 1(B)(iii). Under the statute, a conviction must (1) receive a sentence of *at least* one year (including any suspended portion) and (2) fit within the statutory definition of "crime of violence" in 18 U.S.C. § 16.[193]

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[189] The definition of "forcible sex offenses" took effect November 1, 2008.

[190] USSG §2L1.2, comment. (n.1(b)(iii)).

[191] *Id.*

[192] *U.S. v. Rayo-Valdez*, 302 F.3d 314 (5th Cir. 2002); *U.S. v. Vargas-Garnica*, 332 F.3d 471 (7th Cir. 2003); *U.S. v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir.2002); *U.S. v. Pereira-Salmeron*, 337 F.3d 1148, 1151-54 (9th Cir.2003);*U.S. v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003); *U.S. v. Munguia-Sanchez*, 365 F.3d 877 (10th Cir. 2004); *U.S. v. Wilson*, 392 F.3d 1243 (11th Cir. 2004).

[193] The statutory term in § 16 is similar to the "use of force" provision under the guideline, but this too differs in important ways. For one thing, the guideline requires that force be used against the person of another, whereas the statute can be satisfied by the use of force "against the person *or property* of another." 18 U.S.C. § 16(a) (emphasis added). The statute also includes offenses that "involve[] a *substantial risk* [in contrast to the actual or threatened use] that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b) (emphasis added).

Because of these differences, it is possible that a conviction will trigger the 16-level enhancement without being an aggravated felony.[194] For example, a felony crime of violence where the sentence imposed was less than 1 year is not an aggravated felony but will qualify for the 16-level enhancement.[195] A 2008 guideline amendment provides that in such circumstances, a downward departure may be warranted.[196]

B. Enumerated Offenses

This section identifies some of the specific issues that have been raised in deciding how to apply some of the enumerated categories. Table 3 in Appendix C shows how the enumerated offenses have been applied to specific state statutes.

1. Aggravated Assault

Statutory labels do not ultimately control the inquiry of whether a crime fits within a certain category for guideline purposes. On the one hand, the fact that a statute of conviction is not labeled "aggravated assault" does not exclude it from this category where the statutory elements fit the common definition of that term, such as where the elements require proof that a dangerous weapon was used.[197] On the other hand, the fact that a crime is labeled an "aggravated assault" does not necessarily bring it within the scope of this definition where the aggravating factor is the status of the victim.[198]

2. Forcible Sex Offense

As discussed above under the categorical approach, "if the [statute at issue] prohibits some conduct that is not a forcible sex offense, then [a conviction under that statute] is not a crime of violence.[199] Consequently, courts have had to consider whether individual subsections of state criminal statutes allow convictions for conduct that is not a "forcible sex offense." In

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[194] *See, e.g., Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding that a conviction need not be an aggravated felony in order to qualify for a 16-level enhancement); *U.S. v. Gonzalez*, 550 F.3d 1319 (11th Cir. 2008).

[195] *U.S. v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005) (holding that felony conviction for attempted aggravated assault that received a sentence of probation was not an aggravated felony but was a "crime of violence" under §2L1.2).

[196] USSG §2L1.2, comment. (n.7).

[197] *See, e.g., U.S. v. Sanchez-Ruedas*, 452 F.3d 409 (5th Cir. 2006) (holding that conviction for "assault with a deadly weapon" in violation of Cal. Pen. Code § 245(a)(1) was aggravated assault under §2L1.2); *U.S. v. Torres-Diaz*, 438 F.3d 529 (5th Cir. 2006) (holding that conviction for second degree assault in violation of Conn. Gen. Stat. § 53a-60(a)(2) was an aggravated assault under §2L1.2).

[198] *U.S. v. Fierro-Reyna*, 466 F.3d 324, 326, 329–30 (5th Cir. 2006) (holding that Texas conviction for aggravated assault on a peace officer in violation of Tex. Pen. Code § 22.02(a)(2) was not "aggravated assault" under §2L1.2 because status of the victim was recognized as an aggravating factor in only a minority of jurisdictions).

[199] *U.S. v. Gomez-Gomez*, 547 F.3d 242, 244–45 (5th Cir. 2008).

2008,[200] the Commission amended the definition of "forcible sex offense" to include convictions "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced."[201] Before this amendment, courts were divided on whether the term "forcible sex offense" required some showing of force.[202]

3. Sexual Abuse of a Minor

Because the Guidelines do not define this term, courts have had to decide what individuals are "minors" and define what conduct constitutes "sexual abuse." On the first point, the Fifth circuit has held that because most states focus on individuals sixteen or younger, a statute criminalizing sexual contact with anyone under eighteen does not constitute sexual abuse of a minor.[203]

On the second point, the Eleventh Circuit has defined sexual abuse of a minor as "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification."[204] The circuit courts' efforts to define the scope of this category exemplify how different applications of the categorical result can lead to divergent results.

In *United States v. Izaguirre-Flores*,[205] the Fifth Circuit held that a conviction for Taking Indecent Liberties with a Child in violation of N.C. § 14-202.1(a)(1) "constitutes 'sexual abuse of a minor' as that term is understood in its 'ordinary, contemporary, [and] common' meaning."[206] The court then considered how contemporary legal sources defined the various terms at issue, concluding that "[g]ratifying or arousing one's sexual desires in the actual or constructive presence of a child is sexual abuse of a minor" as was "[t]aking indecent liberties with a child to

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[200] USSG, App. C, Amend. 722.

[201] USSG §2L1.2, comment. (n.1(B)(iii)).

[202] *Compare U.S. v. Meraz-Enriquez*, 442 F.3d 331 (5th Cir. 2006) (holding that attempted aggravated sexual battery in violation of Kansas Statutes Annotated § 21-3518 was not a forcible sex offense); *U.S. v. Luciano-Rodriguez*, 442 F.3d 320 (5th Cir. 2006) (holding that Sexual assault in violation of Texas Penal Code § 22.011(a)(1) was not a forcible sex offense); *U.S. v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) (holding that Sexual assault in violation of Missouri Annotated Statute § 566.040(1) was not a forcible sex offense); *U.S. v. Beltran-Munguia*, 489 F.3d 1042, 1051 (9th Cir. 2007) ("[W]e have interpreted the phrase 'forcible sex offenses' as requiring the use of force.") *with U.S. v. Remoi*, 404 F.3d 789 (3d Cir. 2005) (holding that penetration that "occurred through exploitation of the victim's helplessness" was a forcible sex offense, regardless of whether force beyond the act of penetration was used); *U.S. v. Chacon*, 533 F.3d 250 (4th Cir. 2008) (holding that "a 'forcible sex offense' can be accomplished by a degree of compulsion that does not constitute the use of physical force"); *U.S. v. Gomez-Gomez*, 547 F.3d 242 (5th Cir. 2008) (holding that "sex offenses committed using constructive force that would cause a reasonable person to succumb qualify as 'forcible sex offenses'"); *U.S. v. Yanez-Rodriguez*, 555 F.3d 931 (10th Cir. 2009); *U.S. v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007) ([W]hen an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent.").

[203] *U.S. v. Munoz-Ortenza*, — F.3d —, 2009 WL 693146 (5th Cir. 2009) (citing cases).

[204] *U.S. v. Ortiz-Delgado*, 451 F.3d 752 (11th Cir. 2006) (quoting *U.S. v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001).

[205] 405 F.3d 270 (5th Cir. 2005).

[206] *Id.* at 275.

gratify one's sexual desire."[207] The court specifically rejected the defendant's claim that the statute covered acts that would not be "sexual abuse of a minor," reasoning that his examples of such conduct were too broad and would produce absurd results.

In *United States v. Baza-Martinez*,[208] the Ninth Circuit reached a contrary result on the ground that the North Carolina statute covered circumstances that would not involve harm to the child. Like the Fifth Circuit, the Ninth Circuit consulted "the dictionary definition" of the relevant terms.[209] For the Ninth Circuit, the question turned on the meaning of "abuse," which it defined as "physical or psychological harm."[210] The Ninth Circuit concluded that § 14-202.1 was not categorically a crime of violence because it prohibited conduct that was not necessarily "*either* physically *or* psychologically harmful to the minor."[211] The difference, according to the Ninth Circuit, was that the statute at issue focused on "the perpetrator's mens rea" rather than the harm caused to the child.[212] The court noted that under North Carolina caselaw, a conviction under this statute could be sustained where the defendant "secretly set up a video camera in an office and asked a minor to undress for the purpose of filming her without her knowledge," and she did not learn of the video until after she was 21.[213] Because this scenario caused no harm to a minor, the Ninth Circuit concluded that the statute was not categorically "sexual abuse of a minor."

The difference between these holdings may lie in the perceived likelihood that non-abusive conduct would be prosecuted under the statute. In the Fifth Circuit case, the defendant's hypotheticals "read[] too broadly the statutory language" and led to "absurd results,"[214] so the court was unwilling to hold that the statute covered non-abusive conduct. In contrast, the Ninth Circuit had before it a decision from a state appellate court that affirmed a conviction under the statute in a what it determined was non-abusive situation. These cases underscore the importance of precisely defining the scope of both the guideline categories and the statutes of conviction. If the conduct covered by the statute does not fall completely within the guideline category, then the enhancement does not apply.

4. Burglary of a Dwelling

This enhancement does not apply if the underlying burglary statute does not require proof

[207] *Id.*
[208] 464 F.3d 1010 (9th Cir. 2006).
[209] *Id.* at 1015.
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.* at 1017.
[214] *Izaguirre-Flores*, 405 F.3d at 277.

of intent to commit a crime at the time of entry[215] or if entry was lawful.[216] It also does not apply if the statute of conviction does not require proof that the building was a dwelling or home.[217] The Fifth Circuit has held that a burglary statute does not qualify as burglary of a dwelling if it can be established by mere entry of a dwelling's "curtilage," which is "the grounds around the dwelling and is not the dwelling itself."[218]

C. "Use of Force"

In addition to these enumerated categories, the enhancement for a crime of violence applies to "any other 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."[219] Table 4 in Appendix D illustrates how this category has been applied to certain convictions.

1. The manner of committing the crime is irrelevant—only the elements matter.

Under this provision, it does not matter whether the defendant's manner of violating the offense used force. The primary consideration is whether the statutory elements entail the use of force. "The elements of an offense of course come from the statute of conviction, not from the particular manner and means that attend a given violation of the statute. . . . [T]he statute of conviction, not the defendant's underlying conduct, is the proper focus."[220] In short, for a non-enumerated offense to qualify, the fact of physical force must be a fact that is necessary for the prosecution to secure a conviction.[221]

Thus, the modified categorical approach does "not permit [the court] to examine judicial records to determine whether [the defendant] in fact used physical force when violating [the

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[215] *U.S. v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007) (holding that conviction for aggravated burglary in violation of Tenn. Code Ann. § 39-14-403 was not a burglary of a dwelling because it did not require intent to commit a crime).

[216] *U.S. v. Aguila-Montes*, 553 F.3d 1229 (9th Cir. 2009); *U.S. v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007) (holding that conviction for burglary in violation of Cal. Penal Code § 459 was not burglary of a dwelling because it did not require proof that the entry was unprivileged or unlawful).

[217] *U.S. v. Rodriguez-Rodriguez*, 388 F.3d 466 (5th Cir. 2004) (holding that burglary of building in violation of Tex. Pen. Code Ann. § 30.02 (1974) was not a burglary of a dwelling).

[218] *Compare U.S. v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007) (holding that Florida burglary statute was not burglary of a dwelling), *with U.S. v. Castillo-Morales*, 507 F.3d 873 (5th Cir. 2007) (holding that same statute was burglary of a dwelling after looking at judicial record).

[219] *Id.*

[220] *U.S. v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004); *see also U.S. v. Remoi*, 404 F.3d 789, 794 (3d Cir. 2005) (stating that the inquiry under this provision is "whether the state crime has the use or threat of 'physical force' as an element of the offense").

[221] *See, e.g., U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 598).

statute at issue]."[222] This is because "what [the defendant] actually did is irrelevant to whether the statute has [a particular] element. The elements are the elements, and they can be determined only be reading and interpreting the statute itself."[223]

2. The fact that the conduct resulted in harm does not establish the use of force.

A related principle is that harm to a victim does not establish the use of force, so a statute that focuses on the resultant harm rather than the defendant's conduct may not qualify for an enhancement. For example, the Fifth Circuit held that a conviction for family violence battery was not a crime of violence because it was "results-oriented and does not contain a requirement that the offender apply force, but rather, leaves open the possibility that harm to the victim might result from omission or from the actions of another person or animal controlled by the offender."[224] Furthermore, the Tenth Circuit has noted that a defendant may cause injury without applying physical force, such as "an injury caused *not by physical force*, but by guile, deception, or deliberate omission."[225] Specifically, the Tenth Circuit has held that drugging a victim is not a crime of violence under §2L1.2, despite the forceful impact it has on the victim, because its elements (administering drugs) do not require the use of *physical* force—"the adjective *physical* must refer to the mechanism by which the force is imparted to the 'person of another.'"[226]

3. Circuits are split as to the mens rea required for enhancement under this provision.

To qualify as a crime of violence under this provision, several courts have considered whether the term "use" requires proof of intent. In *Leocal v. Ashcroft*,[227] the Supreme Court interpreted similar language in 18 U.S.C. § 16 to mean that a DUI statute without a mens rea element could not be a "crime of violence" because the word "use" "naturally suggests a higher degree of intent than negligent or merely accidental conduct."[228] Courts have relied on *Leocal* to hold that the "use of force" provision in the crime of violence definition requires a mens rea greater than recklessness or negligence.[229] Several of these cases have arisen in the context of

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[222] *U.S. v. Zuniga-Soto*, 527 F.3d 1110, 1119 (10th Cir. 2008). This holding repudiates an older line of cases in the Tenth Circuit that seemed to allow courts to look at the judicial record of the prior conviction to determine whether a prior conviction actually entailed the use of force. *Id.* at 1121 (citing cases).

[223] *Id.* at 1118 (quoting *U.S. v. Maldonado-Lopez*, 517 F.3d 1207, 1211 (10th Cir. 2008) (McConnell, J., concurring)).

[224] *U.S. v. Lopez-Hernandez*, 112 Fed. App'x 984 (5th Cir. 2004) (holding that conviction for family violence battery in violation of Ga. Code Ann. § 16-5-23.1 was not a crime of violence).

[225] *U.S. v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008).

[226] *U.S. v. Rodriguez-Enriquez*, 518 F.3d 1191, 1194 (10th Cir. 2008).

[227] 543 U.S. 1 (2004).

[228] *Id.* at 9.

[229] *U.S. v. Portela*, 469 F.3d 496 (6th Cir. 2006); *U.S. v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008); *see also U.S. v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007) (holding without discussion of *Leocal* that crime of violence definition requires "intentional use of force against the person of another rather than reckless or grossly

vehicular homicide and drunken driving cases, and their outcomes cases are set forth in Table 4.

4. Force must be used against a person.

In contrast to the statutory definition of crime of violence at 18 U.S.C. § 16, the guideline definition does not include the use of force against another's property. This point is illustrated by shooting cases. In a number of recent cases, courts have held that a conviction for shooting at a building did not qualify for a 16-level enhancement because the statute of conviction did not require proof that the building was occupied. Thus, although the use of force was established by the shooting, the conviction did not establish that this force was directed at a person.[230]

VI. Aggravated Felonies

For convictions that do not trigger a 16 or 12-level enhancement, an 8-level enhancement may apply for convictions that are "aggravated felonies." This term as used in §2L1.2 has the same definition given it by Congress at 8 U.S.C. § 1101(a)(43).[231] To decide whether a prior conviction is an aggravated felony, the court must determine if it is an offense that is included in the list of crimes found at section 1101(a)(43). Some of these crimes are listed by specific federal statute, others by description. For those crimes that are described rather than identified by specific statute, the court follows the categorical approach discussed below to decide whether the prior conviction fits within that category. The definition includes "an attempt or conspiracy to commit" any of the offenses included in the definition.[232] Summaries of relevant circuit court decisions are set forth in Table 5 in Appendix E.

An "aggravated felony" does not have to be a "felony." "Aggravated felony" is a term of art that "includes certain misdemeanants who receive a sentence of one year."[233] In contrast to the guideline definition of felony, which is based on an available sentence over one year,[234] this statute includes a number of convictions "for which the term of imprisonment [is] at least one

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negligent conduct). Even before *Leocal*, some courts held that "use" required a mens rea greater than recklessness. *U.S. v. Vargas-Duran*, 356 F.3d 598, 602 (5th Cir. 2004) (holding that to qualify as "use," the defendant must "intentionally avail himself of that force"); *see also U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (holding that conviction for injury to child in violation of Tex. Pen. Code Ann. § 22.04(a) was not a crime of violence under § 16(b) because it could be established on a showing of negligence); *U.S. v. Torres-Ruiz*, 387 F.3d 1179 (10th Cir. 2004) (holding that this term "incorporates an intent requirement that cannot be satisfied by negligent conduct"). Some courts pre-*Leocal* reached the opposite conclusion. *See U.S. v. Gonzalez-Lopez*, 335 F.3d 793, 798 (8th Cir. 2003) (holding that conviction for Automobile Homicide in violation of Utah Code Ann. § 76-5-207(1) was a crime of violence); *U.S. v. Grajeda-Ramirez*, 348 F.3d 1123 (9th Cir. 2003) (holding that conviction for reckless vehicular assault in violation of Colo. Rev. Stat. § 18-3-205(1)(a) is categorically a crime of violence).

[230] *See* Table 4.

[231] USSG §2L1.2, comment. (n.3(A)).

[232] 8 U.S.C. § 1101(a)(43)(U).

[233] *U.S. v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir. 2002).

[234] USSG §2L1.2, comment. (n.2).

year."[235]

For some prior convictions, the court must focus on the term of imprisonment that may be imposed under the statute of conviction.[236] For others, however, the focus is on the length of the "term of imprisonment" that was actually imposed. Under this definition, however, the method for determining sentence length differs from §2L1.2. In contrast to the Guidelines, the "term of imprisonment" under section 1101 does not exclude time that was suspended.[237] A sentence of probation is not a suspended sentence and, thus, cannot be an aggravated felony under such a provision.[238]

One area of litigation involves whether convictions for simple possession are "a drug trafficking crime" as defined by the aggravated felony statute.[239] This statute defines the term with reference to 18 U.S.C. § 924(c), which defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46."[240]

In *Lopez v. Gonzales*,[241] the Supreme Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."[242] Because simple possession was not punishable as a felony under the CSA, a conviction for simple possession was not an aggravated felony. Courts have relied on *Lopez* to conclude that a conviction for simple possession that is a felony under state law does not trigger an 8-level enhancement.[243]

The analysis is more complicated when the prior simple possession conviction is a felony based on the fact that it was committed after an earlier drug conviction. Under 21 U.S.C. § 844(a) a second conviction for simple possession is a felony.[244] Before *Lopez*, courts were split as to whether this provision was relevant to deciding whether a prior conviction was an

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[235] 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

[236] 8 U.S.C. § 1101(a)(43)(J), (Q), (T).

[237] 8 U.S.C. § 1101(a)(48)(B); *see also U.S. v. Demirbas*, 331 F.3d 582 (8th Cir. 2003) (holding that suspended 4-year term of incarceration, imposed on a probation violation, qualified conviction for "stealing" as an aggravated felony).

[238] *See, e.g., U.S. v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (holding that a sentence of probation was not a suspended sentence under § 1101 and that a sentence imposed after returning to the United States based on a probation violation did not convert the conviction into an aggravated felony).

[239] 8 U.S.C. § 1101(a)(43)(B).

[240] 18 U.S.C. § 924(c)(1)(D)(2).

[241] 549 U.S. 47 (2006).

[242] *Id.* at 60.

[243] *U.S. v. Matamoros-Modesta*, 523 F.3d 260 (4th Cir. 2008); *U.S. v. Estrada-Mendoza*, 475 F.3d 258 (5th Cir. 2007); *U.S. v. Figueroa-Ocampo*, 494 F.3d 1211 (9th Cir. 2007); *U.S. v. Martinez-Macias*, 472 F.3d 1216 (10th Cir. 2007).

[244] *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005) (holding that second state conviction did not qualify as a felony under CSA because it occurred before the earlier conviction had become final).

aggravated felony.[245] Since *Lopez* some courts have held that a subsequent state conviction for simple possession is an aggravated felony because it could have been prosecuted as a felony in federal court.[246] Other courts have held it is not enough that the conviction *could have been* prosecuted as a felony in federal court—absent evidence that the simple possession was actually prosecuted under a state recidivist provision, the mere fact that it was committed after an earlier drug conviction does not make it an aggravated felony.[247]

VII. Other Categories (+16)

The other categories of offenses listed in §2L1.2(b)(1)(A)[248] are used less frequently. Most of these categories are defined by reference to specific federal statutes.[249] For state convictions, the relevant inquiry under these enhancements is whether the elements described in the state statute "would have been an offense" under these statutes.[250] There has been little appellate caselaw discussing these enhancements, but these are collected at Table 6 in Appendix F.

A. Firearms Offense

A firearms offense is one of several, specified federal statutes or any state offense whose elements satisfy the elements of the federal statute.[251] A firearms offense may also be any state or federal offense that "prohibits the importation, distribution, transportation, or trafficking" of certain, specified firearms.[252]

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[245] *Compare U.S. v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (a court should not consider recidivist provisions when deciding whether a conviction is a felony for purposes of the drug trafficking definition in § 1101); *U.S. v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002), *with U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005); *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005).

[246] *U.S. v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008) (noting that "the relevant inquiry under the sentencing guidelines is whether the crime is *punishable* [as a felony] under § 844(a)," not whether it was actually prosecuted as such); *U.S. v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'rg denied by U.S. v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2007) (holding that a subsequent conviction for simple possession is an aggravated felony).

[247] *U.S. v. Ayon-Robles*, 557 F.3d 110, 112–13 (2d Cir. 2009) (holding that felony conviction under state law for simple possession was not an aggravated felony); *see also Pacheco-Diaz*, 513 F.3d 776, 779 (Rovner, J., dissenting); *cf Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) (holding that subsequent possession conviction not charged under recidivist provision was not an aggravated felony); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008); *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382 (2007) (holding that a subsequent conviction for simple possession is an aggravated felony only if defendant was charged as a recidivist in state court).

[248] USSG §2L1.2(b)(1)(A)(iii) (firearms offense), (iv) (child pornography offense), (v) (national security or terrorism offense), (vi) (human trafficking offense, (vii) alien smuggling offense).

[249] *See* USSG §2L1.2, comment. (n.1(B)(i) ("alien smuggling offense"), (ii) ("child pornography offense"), (v) ("firearms offense"), (vi) ("human trafficking offense"), (viii) ("terrorism offense")).

[250] *Id.*

[251] USSG §2L1.2, comment. (n.1(b)(v)).

[252] *Id.*, comment. (n.1(b)(v)(I)).

B. Child Pornography Offense

A child pornography offense is one of several, specified federal statutes, or any state or local offense whose elements satisfy the elements of those federal statutes.[253]

C. National Security or Terrorism Offense

A "terrorism offense" is "any offense involving, or intending to promote, a 'Federal crime of terrorism,' as that term is defined in 18 U.S.C. § 2332b(g)(5)."[254]

D. Human Trafficking Offense

Human trafficking offenses are convictions under specified federal statutes or under state laws whose elements satisfy any of those statutes.[255]

E. Alien Smuggling Offense

Alien smuggling offenses are only those that are specified as such in 8 U.S.C. § 1101(a)(43)(N). This provision excludes first convictions where "the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter." The defendant has the burden of showing that his conviction falls within this exception.[256]

F. Inchoate Crimes

In addition to the crimes specifically listed in §2L1.2(b)(1), the application notes state that these convictions "include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses."[257] One issue that has arisen is whether solicitation to commit one of these offenses triggered an enhancement. The Tenth Circuit has held that solicitation to commit a crime of violence is a crime of violence, reasoning that it was analogous to the other provisions listed in the application note.[258] In contrast, the Eleventh Circuit has held that soliciting the sale of drugs is not a drug trafficking offense because a conviction could include purchasing drugs for personal use.[259]

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[253] USSG §2L1.2, comment. (n.1(B)(ii)).

[254] USSG §2L1.2, comment. (n.1(B)(viii)).

[255] USSG §2L1.2, comment. (n.1(B)(vi)).

[256] *U.S. v. Rabanal*, 508 F.3d 741 (5th Cir. 2007).

[257] §2L1.2, comment. (n.5). Compare this definition with § 1101(a)(43)(U), which makes it an aggravated felony to commit an "attempt or conspiracy" to commit an aggravated felony.

[258] *U.S. v. Cornelio-Pena*, 435 F.3d 1279 (10th Cir. 2006) (holding that conviction for solicitation to commit burglary of a dwelling under Ariz. Rev. Stat. § 13-1002 was a crime of violence).

[259] *U.S. v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006).

VIII. Criminal History

Under §2L1.2, a single prior conviction may increase a defendant's sentence in three ways: (1) the enhancement under §2L1.2(b)(1), (2) criminal history points under §4A1.1(a), (b), or (c), and (3) status and recency points under §4A1.1(d) or (e). Courts have consistently rejected the argument that considering a defendant's prior convictions in calculating both offense level and criminal history is impermissible double counting.[260] In some cases, courts have relied on §4A1.3 to increase a sentence based on underrepresented criminal history.[261] In contrast, one court reversed an upward departure based on a prior, uncharged illegal entry.[262]

A related issue deals with the application of §4A1.1(d) and (e) to defendants who are "found" while serving a jail sentence on an unrelated state matter. Courts have held that illegal reentry is a continuing offense that "tracks the alien 'wherever he goes,'" including into state custody on a crime committed after returning to the United States.[263] Thus, courts have held that an alien who is "found" by immigration officials while in state custody has committed the § 1326 offense "while under a sentence of imprisonment" and thus subject to a two-point increase under §4A1.1(d).[264]

IX. Departures

Courts have discussed several grounds for imposing a sentence outside the guideline range established by §2L1.2.

A. Early Disposition Programs - §5K3.1: "Fast Track"

The most frequent source for a reduction under this guideline is USSG §5K3.1, commonly known as "Fast Track." This guideline authorizes a downward departure up to 4 levels based on a government motion "pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."

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[260] *U.S. v. Zapata*, 1 F.3d 46 (1st Cir. 1993); *U.S. v. Torres-Echavarria*, 129 F.3d 692 (2d Cir. 1997); *U.S. v. Crawford*, 18 F.3d 1173 (4th Cir. 1994); *U.S. v. Sebastian*, 436 F.3d 913 (8th Cir. 2006) (holding that double counting did not render guideline sentence unreasonable); *U.S. v. Garcia-Cardenas*, 555 F.3d 1049 (9th Cir. 2009) (reaffirming rule established in *U.S. v. Luna-Herrera*, 149 F.3d 1054 (9th Cir. 1998)).

[261] *U.S. v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where criminal history did not include prior, uncharged act of alien smuggling); *U.S. v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2006) (affirming departure under USSG §4A1.3 from Category II to Category VI based on prior uncounted offenses, four deportations, and use of eleven aliases).

[262] *United Stats v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (holding that upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).

[263] *U.S. v. Cano-Rodriguez*, 552 F.3d 637 (7th Cir. 2009).

[264] *U.S. v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir.1996); *U.S. v. Cano-Rodriguez*, 552 F.3d 637 (7th Cir. 2009); *U.S. v. Hernandez-Noriega*, 544 F.3d 1141, 1142-43 (10th Cir. 2008); *United States v. Coeur*, 196 F.3d 1344, 1346 (11th Cir.1999).

Because these programs are not available in all districts, defendants have argued that the unavailability of fast track constitutes an unwarranted disparity. Courts have consistently affirmed guideline sentences, despite the unavailability of fast track, holding that unavailability of fast track does not necessarily render a sentence unreasonable.[265] Some circuits have held that a district court may not rely on the unavailability of fast track to support a sentence below the guideline range.[266] Relatedly, the Ninth Circuit has held that a district court lacks authority to depart downward based on disparity in plea bargaining practices among U.S. Attorneys' Offices in federal districts of California.[267] The First Circuit has expressly held that while district courts are not required to consider the unavailability of fast track, they are certainly authorized to do so and may impose sentence below the guideline range on that basis.[268]

Courts have also rejected the claims that unavailability of fast track violates Equal Protection[269] and that in the absence of fast track a defendant's sentence was greater than necessary under § 3553(a).[270]

B. Collateral Consequences

Another issue that confronts many reentry defendants is the collateral consequences of a reentry conviction. Because of their immigration status, undocumented aliens are ineligible for minimum security facilities and certain BOP programs, including the ability to finish their sentence in a halfway house. Courts generally have rejected these collateral consequences as grounds for a sentence reduction,[271] although one court stated that "a downward departure based on collateral consequences of deportation is justified only if the circumstances of the case are

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[265] *U.S. v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *U.S. v. Hendry*, 522 F.3d 239 (2d Cir. 2008); *U.S. v. Aguirre-Villa*, 460 F.3d 681 (5th Cir. 2006); *U.S. v. Hernandez-Fierros*, 453 F.3d 309 (6th Cir. 2006); *U.S. v. Martinez-Martinez*, 442 F.3d 539 (7th Cir. 2006); *U.S. v. Sebastian*, 436 F.3d 913 (8th Cir. 2006); *U.S. v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006); *U.S. v. Jarrillo-Luna*, 478 F.3d 1226 (10th Cir. 2007); *U.S. v. Morales-Chaires*, 430 F.3d 1124 (10th Cir. 2005); *U.S. v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007).

[266] *U.S. v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006) (reversing sentence below guideline range because unavailability of fast track "did not justify the imposition of a below-guidelines variance sentence"); *U.S. v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008) ("[I]t would be an abuse of discretion for the district court to deviate from the Guidelines on the basis of sentencing disparity resulting from fast track programs that was intended by Congress."); *U.S. v. Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir. 2006) ("[W]e cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program."); *U.S. v. Martinez-Trujillo*, 468 F.3d 1266 (10th Cir. 2006) (stating that unavailability of fast track would never warrant a nonguideline sentence).

[267] *U.S. v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (holding that a district court lacks discretion to depart downward based upon disparity in plea bargaining practices among the United States Attorney's Offices in the federal districts of California (fast track program)) *rev'ing U.S. v. Banuelos-Rodriguez*, 173 F.3d 741 (9th Cir. 1999).

[268] *U.S. v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

[269] *U.S. v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005); *U.S. v. Rodriguez*, 523 F.3d 519 (5th Cir. 2008); *U.S. v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006); *U.S. v. Campos-Diaz*, 472 F.3d 1278 (11th Cir. 2006).

[270] *U.S. v. Hendry*, 522 F.3d 239 (2d Cir. 2008).

[271] *U.S. v. Vasquez*, 279 F.3d 77 (1st Cir. 2002); *U.S. v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001).

extraordinary."[272]

Another significant collateral consequence is deportation. District courts are not authorized to depart based on a defendant's stipulation to deportation,[273] and deportability is not a basis for seeking a departure.[274]

C. Motive and Cultural Assimilation

In general, courts have held that a defendant's motive for reentry is irrelevant and not any basis for a downward departure.[275] Courts have recognized that a defendant's motivation to care for a family could mitigate his return, but such circumstances must be exceptional.[276] Some courts have also recognized that a defendant's "cultural assimilation" may warrant a reduction.[277] On the other hand, one court upheld an increase where the reentry was committed to facilitate the commission of another offense.[278] Relatedly, courts have increased sentences based on post-reentry conduct.[279]

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[272] *U.S. v. Bautista*, 258 F.3d 602 (7th Cir. 2001) (holding that separation from family, without more, is not sufficiently extraordinary to warrant a downward departure).

[273] *U.S. v. Clase-Espinal*, 115 F.3d 1054 (1st Cir. 1997).

[274] *U.S. v. Ebolum*, 72 F.3d 35 (6th Cir. 1995); *U.S. v. Cardosa-Rodriguez*, 241 F.3d 613 (8th Cir. 2001); *U.S. v. Martinez-Ramos*, 184 F.3d 1055 (9th Cir. 1999).

[275] *U.S. v. Saucedo-Patino*, 358 F.3d 790 (11th Cir. 2004); *see also U.S. v. Dyck*, 334 F.3d 736 (8th Cir. 2003) (Purported lack of criminal intent in reentering the country is not a basis for a downward departure.).

[276] *U.S. v. Carrasco*, 313 F.3d 750 (2d Cir. 2002) (departure not warranted where defendant was separated from his wife and providing financial support for three children); *U.S. v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995) (not enough that defendant wanted to visit his family); *U.S. v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (motivation to be reunited with family and fact that prior conviction was 14 years old, though relevant, did not *require* a nonguideline sentence); *U.S. v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005) (holding that departure based on family circumstances was not appropriate where defendant returned to care for his sick wife but did not show that he was the only person capable of caring for his wife); *U.S. v. Saucedo-Patino*, 358 F.3d 790 (11th Cir. 2004) (holding that defendant did not qualify for a departure under § 5H1.5 & 5H1.6 where none of the specific aspects of his employment history or family responsibilities were "so exceptional as to take this case outside the heartland").

[277] *U.S. v. Rodriguez-Mantelongo*, 263 F.3d 429 (5th Cir. 2001) (holding that cultural assimilation was a permissible basis for downward departure); *U.S. v. Lipman*, 133 F.3d 726 (9th Cir. 1998) (recognizing availability of downward departure based on cultural assimilation); *U.S. v. Roche-Martinez*, 467 F.3d 591 (7th Cir. 2006) (evidence of defendant's "cultural assimilation" did not require a nonguideline sentence in light of defendant's lengthy criminal history); *but see U.S. v. Rivas-Gonzalez*, 384 F.3d 1034 (9th Cir. 2004) (holding that alien who developed cultural ties after his reentry could not receive downward departure based on cultural assimilation).

[278] *U.S. v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where reentry was committed to facilitate the commission of alien smuggling).

[279] *U.S. v. Hernandez-Villanueva*, 473 F.3d 118 (4th Cir. 2007) (upholding 18-month sentence despite 0-6 month guideline range where defendant renewed "his association with a violent street gang after his reentry"); *U.S. v. Valtierra-Rojas*, 468 F.3d 1235 (10th Cir. 2006) (upholding 60-month sentence despite 21-27 month guideline range in light of defendant's (1) prior DUI manslaughter, which qualified for a 12-level enhancement, (2) a history of alcohol abuse, and (3) DUI convictions after returning to United States).

D. Seriousness of Prior Offense

Courts have sometimes considered whether the enhancement under the guidelines was appropriate given the nature of a prior conviction. Before *Booker* some courts held that "the circumstance of a prior offense [was not] a proper basis to support a sentencing departure under USSG §2L1.2."[280] Although some courts have held that the length of time between conviction and deportation was not a reason to depart,[281] at least one court since *Booker* has recognized that the age of a prior conviction is relevant to the length of sentence that should be imposed.[282]

Since *Booker*, however, courts have held that an upward departure or variance may be appropriate based on a conviction that did not "'technically' qualif[y]" for an enhancement under §2L1.2.[283] One case has suggested that a guideline sentence would be unreasonable based on the nature of the prior crime.[284] Another recent opinion reversed a below-guideline sentence, reasoning that the underlying facts were not so different from a typical case under that enhancement.[285]

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[280] *U.S. v. Rodriguez-Ceballos*, 365 F.3d 664 (8th Cir. 2004); *see also U.S. v. Amaya-Benitez*, 69 F.3d 1243 (2d Cir. 1995); *U.S. v. Stultz*, 356 F.3d 261, 268 (2d Cir. 2004) (reversing downward departure given where prior conviction was 16 years old and involved only the sale of marijuana, and holding "that the Commission intended the 16-level enhancement to apply to all felony convictions for trafficking controlled substances that resulted in imprisonment for a period greater than 13 months"); *U.S. v. Leiva-Deras*, 359 F.3d 183 (2d Cir. 2004) (holding that the fact that two prior convictions were for $10 sales of marijuana did not justify a downward departure because the guideline scheme showed the Commission had specifically accounted for varying seriousness of different types of crimes); *U.S. v. Abreu-Barera*, 64 F.3d 67 (2d Cir. 1995); *U.S. v. Ibarra-Hernandez*, 427 F.3d 332 (6th Cir. 2005); *U.S. v. Saucedo-Patrino*, 358 F.3d 790 (11th Cir. 2004); *U.S. v. Ortega*, 358 F.3d 1278, 1280 (11th Cir. 2003) ("Because the [difference in the severity among aggravated felonies] was adequately taken into account by the Sentencing Commission in formulating the 2001 amendments to § 2L1.2 , the district court did not have the authority to depart downward based on this factor."); *but see U.S. v. Lopez-Zamora*, 392 F.3d 1087 (9th Cir. 2004), *opinion withdrawn by* 418 F.3d 1004 (9th Cir. 2005).

[281] *U.S. v. Stultz*, 356 F.3d 261 (2d Cir. 2004) (holding that the fact that prior drug trafficking conviction was more than 16 years old did not justify a downward departure); *U.S. v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995); *U.S. v. Maul-Valverde*, 10 F.3d 544 (8th Cir. 1993) (holding that downward departure could not be based on the fact that prior conviction was more than 15 years old and would receive no criminal history points).

[282] *U.S. v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (holding that the fact that prior conviction was 14 years old, though relevant, did not *require* a nonguideline sentence.).

[283] *U.S. v. Lopez-Salas*, 513 F.3d 174, 181 (5th Cir. 2008) (recognizing upward variance may be appropriate where conviction for simple possession of a large quantity of drugs did not qualify as a drug trafficking offense); *U.S. v. Herrera-Garduno*, 519 F.3d 526 (5th Cir. 2008) (holding that above-guideline sentence was reasonable where prior conviction for possession with intent to deliver did not qualify as a "drug trafficking offense" but the facts of the case "indicated that [defendant] was in fact trafficking [drugs]"); *see also U.S. v. Tzep-Mejia*, 461 F.3d 522, 526–28 (5th Cir. 2006) (upholding 36 month sentence over guideline range of 10–16 months where prior conviction for attempted assault was not a crime of violence but would have resulted in a range of 46–57 months had enhancement applied).

[284] *U.S. v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (suggesting that 16-level enhancement based on consensual sexual relations between two teenagers was unreasonable).

[285] *U.S. v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006) (24-month sentence unreasonable in light of 37-45 month guideline range where prior conviction was essentially for statutory rape).

Most recently, the Sentencing Commission added commentary to the guideline addressing departures, both upward and downward, where the applicable guideline level did not accurately reflect the seriousness of the prior conviction:

> There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.[286]

[286] USSG §2L1.2, comment. (n.7).

IMMIGRATION FRAUD OR MISCONDUCT

This section of the Primer provides a general overview of the statutes, sentencing guidelines, and case law related to fraud or misconduct during the immigration process.

I. Statutory Scheme

The most common offenses in this category typically carry a 5-year maximum and are sentenced under §2L2.1 or § 2L2.2.

8 U.S.C. § 1160(b)(7)(A)	False Statements in Applications This statute prohibits knowingly and willfully making false statements in applications for adjustment of status.
8 U.S.C. § 1255a(c)(6)	False Statements in Applications This statute also prohibits knowingly and willfully making false statements in an application to adjust status.
8 U.S.C. § 1325(c)	Marriage Fraud This statute prohibits marrying a person for the purpose of evading immigration laws.
8 U.S.C. § 1325(d)	Immigration-related Entrepreneurship Fraud This statute prohibits establishing a commercial enterprise for the purpose of evading any provision of the immigration laws.

II. Guideline Overview

Immigration fraud crimes can fall under two guidelines: §2L2.1 or §2L2.2

A. Immigration Fraud - §2L2.1: Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

1. Base Offense Level: 11.[287]
2. Specific Offense Characteristics: As with smuggling offenses, a reduction applies where (1) "the offense was committed other than for profit" or

[287] USSG §2L2.1(a).

involved only the defendant's family.[288] The offense level is also increased based on (2) the number of documents, (3) reason to believe the documents would be used to facilitate a felony, (4) prior conviction for a felony immigration offense, and (5) fraudulent use of a passport.[289]

B. Immigration Fraud - §2L2.2: Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

1. Base Offense Level: 8.[290]
2. Specific Offense Characteristics Enhancements apply if the defendant was (1) previously deported, (2) has a record of prior immigration offenses, or (3) fraudulently obtained or used a passport.[291]
3. Cross reference. If the passport or visa was used in the commission of another felony (other than a violation of immigration laws), the Guideline for attempt, solicitation, or conspiracy (§2X1.1) applies. If death resulted, the homicide guidelines (§2A1.1–1.5) apply.[292]

C. Scope of coverage

A number of the statutes are covered by both §2L2.1 and §2L2.2: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), 1255(a)(c)(6), 1325(b), 1325(c), 18 U.S.C. §§ 1015(a)-(e), 1028, 1425, 1426, 1542, 1543, 1544, 1546.

Other crimes are covered only by §2L2.1: 8 U.S.C. § 1185(a)(4), 8 U.S.C. § 1427, 1541.

Still other crimes are covered only by §2L2.2: 8 U.S.C. §§ 1185(a)(5), 1423, 1424.

Regarding convictions under 18 U.S.C. § 1028, which prohibits fraud in connection with identification documents, these guidelines apply only when "the primary purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status."[293]

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[288] USSG §2L2.1(b)(1).
[289] USSG §2L2.1(b)(2)–(5).
[290] USSG §2L2.2(a).
[291] USSG §2L2.2(b)(1)–(3).
[292] USSG §2L2.2(c).
[293] USSG §2B1.1 comment. (n.9(B)); *see also U.S. v. Shi*, 317 F.3d 715 (7th Cir. 2003) (holding that §2L2.1 applied to a conviction under 18 U.S.C. § 1028 where "the immediate purpose of the offense was to violate a law pertaining to legal resident status").

Courts have used this same reasoning to apply §2L2.1 to convictions for making a false statement under 18 U.S.C. § 1001 when the false statement is made in the immigration context.[294]

When "a defendant is convicted of the possession of a relatively minor number of false or fraudulent immigration documents," a court will have to choose whether the conduct reflects trafficking under §2L2.1 or personal use under §2L2.2.[295]

III. Specific Guideline Application Issues

A. Lack of Profit Motive - §2L2.1(b)(1): If the offense was committed other than for profit, or the offense involved . . . only the defendant's spouse or child . . . decrease by 3 levels.

One court refused this reduction where defendants' employment included preparing false asylum applications, despite the fact that their compensation was not specifically tied to specific illegal acts.[296] Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.[297]

Conversely, one court held it was inappropriate to depart upward based on a profit motive "unless there was a finding that the profit involved in the offense of conviction was of such a magnitude that the three-step increase in the offense level already added did not properly reflect the offense level of the offense of conviction."[298]

B. Number of Documents Involved - §2L2.1(b)(2): If the offense involved six or more documents or passports, increase.

1. Number

The enhancement under this provision increases with the number of documents. The application notes explain that "[w]here it is established that multiple documents are part of a set

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[294] *U.S. v. Velez*, 113 F.3d 1035 (9th Cir. 1997); *U.S. v. Kuku*, 129 F.3d 1435 (11th Cir. 1997) (remanding conviction under 18 U.S.C. § 1001 for resentencing under §2L2.1 where "(1) the descriptive language of §2L2.1 more specifically characterizes Kuku's offense conduct than does §2F1.1; (2) Comment 11 to §2F1.1 suggests that Kuku's offense conduct is more aptly covered by §2L2.1 ; and (3) the loss-based method of sentence enhancement used by §2F1.1 does not suit the nature of Kuku's offense conduct").

[295] *U.S. v. Principe*, 203 F.3d 849 (5th Cir. 2000) (remanding sentence imposed under §2L2.1 for resentencing under §2L2.2 where defendant possessed three identification cards with her picture under different names).

[296] *U.S. v. Torres*, 81 F.3d 900 (9th Cir. 1996).

[297] *U.S. v. Buenrostro-Torres*, 24 F.3d 1173 (9th Cir. 1994); *U.S. v. White*, 1 F.3d 13 (D.C. Cir. 1993).

[298] *U.S. v. Mendoza*, 890 F.2d 176, 180 (9th Cir. 1989), *withdrawn by* 902 F.2d 15 (9th Cir. 1990).

of documents intended for use by a single person, treat the set as one document."[299] One court explained that documents will "constitute only one document even if used many times, by one individual, to perpetuate the same identity fraud."[300] For example, a set might include "a counterfeit passport, phony green card, and forged work papers."[301] In contrast, some documents are not a set, even though they will be used only one time by the same person.[302]

Defendants sometimes challenge this enhancement based on the sufficiency of the evidence. One case held that a defendant was liable for documents found in his partner's office,[303] but another held that the defendant was not responsible for every application in his partner's office.[304] In another case, "the government did not need to produce all 27 passports counted" where agent testified that 26 aliens identified defendant as having provided them with counterfeit documents.[305]

The application notes also provide that an upward departure may be warranted "[i]f the offense involved substantially more than 100 documents."[306] One court sitting before this language was added affirmed a 2-level upward departure where the case involved over 2,700 immigration files.[307]

2. Documents

Another issue deals with the scope of the term "documents." The guideline does not define "document," but courts have relied on the definition in 18 U.S.C. § 1028(d), concluding that the term "documents" includes not only "those documents that relate to naturalization, citizenship, or legal resident status" but also any "identification document."[308]

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[299] USSG §2L2.2, comment. (n.2); *see also Torres*, 81 F.3d 900 (holding that the number of separate documents is not the same as the number of "sets of documents" and remanding for resentencing where the government did not establish how many sets were contained in the many separate documents it discovered).

[300] *U.S. v. Badmus*, 325 F.3d 133, 140 (2d Cir. 2003).

[301] *Id.*

[302] *Id.*(holding that multiple visa lottery entries constituted individual documents); *U.S. v. Castellanos*, 165 F.3d 1129 (7th Cir. 1999) (holding that a sheet of blank documents was not a set and counting each blank document individually).

[303] *U.S. v. Proshin*, 438 F.3d 235 (2d Cir. 2006).

[304] *U.S. v. Walker*, 191 F.3d 326 (2d Cir. 1999).

[305] *U.S. v. Polar*, 369 F.3d 1248 (11th Cir. 2004).

[306] USSG §2L2.1, comment. (n.5).

[307] *U.S. v. Velez*, 185 F.3d 1048 (9th Cir. 1999).

[308] *U.S. v. Singh*, 335 F.3d 1321 (11th Cir. 2003) (holding that driver's licenses, military identification cards, and U.S. government identification cards were "documents" under §2L1.2); *see also U.S. v. Castellanos*, 165 F.3d 1129, 1132 (7th Cir. 1999).

3. Involved

A final issue is whether certain documents were "involved" in the offense. One court reasoned that "'involved' does not mean 'produced,'" nor does it "refer[] only to completed documents"; rather, it "refer[s] to items 'draw[n] in,' 'implicated' or 'entangled.'"[309]

C. Use of Passport or Visa to Commit a Felony - §2L2.1(b)(2): If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.

In deciding what are "immigration laws" for purposes of this section, the Eleventh Circuit cited the definition in 8 U.S.C. § 1101(a)(17) to conclude that fraudulently obtaining a Social Security Card in violation of 42 U.S.C. § 408(a)(6) was not a violation of immigration laws.[310]

D. Prior Deportation - §2L2.2(b)(1): If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

A defendant who voluntarily leaves the country while the appeal is pending qualifies for this enhancement.[311]

E. Departures and Variances

1. National Security

Section 2L2.2 specifically authorizes an upward departure "[i]f the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity."[312]

Without relying on this provision, two cases have increased sentences based on national security/terrorism concerns. In one case, the circuit affirmed a 28-month sentence for conspiracy to produce identification documents, despite a guideline range of 15–21 months under §2L2.1, where the offense was linked to "widespread corruption" within the Florida Department of Motor

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[309] *U.S. v. Viera*, 149 F.3d 7, 8–9 (1st Cir. 1998) (affirming 6-level enhancement where defendants had over 600 blank Social Security cards); *see also U.S. v. Salazar*, 70 F.3d 351 (5th Cir. 1995) (affirming enhancement based on hundreds blank I-94 cards where defendant intended to use these to manufacture fake documents); *U.S. v. Castellanos*, 165 F.3d 1129 (7th Cir. 1999) (holding that guideline applies to "blank" documents).

[310] *U.S. v. Polar*, 369 F.3d 1248 (11th Cir. 2004) (affirming enhancement where the defendant knew or should have known that his counterfeiting operation would facilitate fraudulently obtaining a Social Security Card in violation of 42 U.S.C. § 408(a)(6)).

[311] *U.S. v. Blaize*, 959 F.2d 850 (9th Cir. 1992) (interpreting same language in former §2L2.4).

[312] USSG §2L2.2, comment. (n.5).

Vehicles that "impact[ed] national security.[313] In another case, the circuit affirmed a 36 month sentence for possessing a counterfeit green card, despite a guideline range of 0–6 months under §2L2.2, where the defendant was involved in a bombing plot.[314]

2. Facilitating Another Offense - §5K2.9

One court affirmed a 24-month sentence for making false statements on a passport application, based on an upward departure from base offense level 6 to 15 and from criminal history category I to II, where evidence established that the crime was committed to facilitate another offense for which the defendant had never been convicted: the abduction of his children.[315]

3. Motive

One court reversed an upward departure based on the defendant's motive to escape punishment for sexual misconduct, reasoning that motive had already been adequately taken into account by the guidelines.[316]

[313] *U.S. v. Valnor*, 451 F.3d 744 (11th Cir. 2006).

[314] *U.S. v. Khalil*, 214 F.3d 111 (2d Cir. 2000).

[315] *U.S. v. Lazarevich*, 147 F.3d 1061 (9th Cir. 1998). Note that §2L2.2 includes a cross-reference a passport or visa is used "in the commission or attempted commission of a felony offense." USSG §2L2.2(c)(1).

[316] *U.S. v. Donaghe*, 50 F.3d 608 (9th Cir. 1994) (construing former §2L2.3).

APPENDIX

TABLE 1

Table 1 **Risk of Serious Bodily Injury - §2L1.1(b)(6)**
Conduct created a substantial risk of injury or death • Carrying aliens in overloaded van[317] • Concealing aliens lying in the cargo area of a van and with boxes and luggage stacked to the van's ceiling[318] • Carrying aliens in the bed of a pickup truck[319] • Transporting children on a hot day with their legs in trunk that was open to the passenger compartment[320] • Aliens lying prone on the floor of a minivan[321] • Transporting alien with whose upper body was "stuffed in the console, and his feet were twisted around underneath the glove compartment"[322] • Transporting aliens standing on an overcrowded boat without lifejackets while defendants tried to ram Coast Guard vessels[323] • Guiding aliens through harsh areas without adequate preparation[324] • Carrying women on shelves of plywood underneath a commercial truck in freezing weather[325]

[317] *U.S. v. Palomares-Alcantar*, 406 F.3d 966 (8th Cir. 2005) (20 individuals in van with capacity for between 7 and 15, without seats or seatbelts, at freeway speeds and on bald tires); *U.S. v. Flores-Flores*, 356 F.3d 861, 862–63 (8th Cir. 2004) (transporting 11 illegal aliens from Arizona to Michigan in a van that had only four seats and seatbelts, requiring eight of the aliens to ride on the floor); *U.S. v. Rio-Baena*, 247 F.3d 722 (8th Cir. 2001) (transporting 21 aliens (including 8 children) in a van that had no seats or seatbelts for them); *U.S. v. Ortiz*, 242 F.3d 1078, 1078-79 (8th Cir. 2001) (Transporting 23 illegal aliens in a van equipped with seats and seatbelts for 14 passengers); *U.S. v. Ramirez-Martinez*, 273 F.3d 903, 916 (9th Cir.2001) ("twenty people in a dilapidated van without seats or seat belts."), *overruled on other grounds in U.S. v. Lopez*, 484 F.3d 1186 (9th Cir.2007) (en banc); *U.S. v. Angwin*, 271 F.3d 786, 808–09 (9th Cir. 2001) (transporting 16 people—none of them seated or wearing a seatbelt—in motor home rated for 6 people that was likely to tip over), *overruled on other grounds by U.S. v. Lopez*, 484 F.3d 1186 (9th Cir. 2007); *U.S. v. Hernandez-Guardado*, 228 F.3d 1017, 1027–28 (9th Cir.2000) (overloaded vans with passengers lying unrestrained on the floorboards); *U.S. v. Munoz-Tello*, 531 F.3d 1174 (10th Cir. 2008) (vehicle was 50% over capacity, "[leaving] occupants without seats and more without seatbelts"); *U.S. v. Cardena-Garcia*, 362 F.3d 663 (10th Cir. 2004) (Transporting 17 aliens in "a van designed to hold only seven passengers").

[318] *U.S. v. Zuniga-Amezquita*, 468 F.3d 886, 889 (5th Cir. 2006) (holding that while lying unrestrained in the cargo area of a van did not, by itself, qualify for the enhancement, concealing aliens behind boxes and luggage was an aggravating factor that qualified for the enhancement).

[319] *U.S. v. Angeles-Mendoza*, 407 F.3d 742 (5th Cir. 2005) (transporting aliens "in the back of their truck and modified the vehicle to allow more smuggled aliens to fit in by removing the back seats"); *U.S. v. Cuyler*, 298 F.3d 387 (5th Cir. 2002) (noting that "[a]liens who are unrestrained easily can be thrown from the bed of the pickup in the event of an accident or other driving maneuver of the sort that is unavoidable in highway driving").

[320] *U.S. v. Miguel*, 368 F.3d 1150, 1152 (9th Cir.2004).

[321] *U.S. v. Maldonado-Ramires*, 384 F.3d 1228, 1229 (10th Cir.2004).

[322] *U.S. v. Rodriguez-Mesa*, 443 F.3d 397 (5th Cir. 2006).

[323] *U.S. v. Rodriguez-Lopez*, 363 F.3d 1134 (11th Cir. 2004).

[324] *U.S. v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008) (leading aliens through desert-like brush without adequate water supply); *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002) (leading aliens on 3-day trek through desert with only one bottle of water and 2 cans of food per person); *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054 (9th Cir. 2001) (guiding through the mountains between Mexico and San Diego a group of "aliens who were obviously woefully under-equipped for the potential hazards that were known prior to departure"). Although an unexpected snowstorm resulted in the death of some of the aliens, the enhancement was based on the preparations that were inadequate even for known risks.

[325] *U.S. v. Kang*, 225 F.3d 260 (2d Cir. 2000).

Table 1 Risk of Serious Bodily Injury - §2L1.1(b)(6)
Conduct did not create a substantial risk of injury or death • Carrying an alien in a modified space behind the back seat of an extended-cab pickup truck.[326] • Carrying an alien in a hatchback[327] • Aliens lying down in the cargo area of a minivan[328] • Driving late at night[329] • Guiding aliens through harsh areas without evidence they were inadequately prepared[330]

[326] *U.S. v. Torres-Flores*, 502 F.3d 885 (9th Cir. 2007).

[327] *U.S. v. Dixon*, 201 F.3d 1223 (9th Cir. 2000) (noting lack of evidence that hatchback area was airtight or that aliens were "unable to extricate themselves").

[328] *U.S. v. Solis-Garcia*, 420 F.3d 511 (5th Cir. 2005); *see also U.S. v. McKinley*, 272 Fed. App'x 412 (5th Cir. 2008) (enhancement did not apply to carrying aliens in the sleeper compartment of a tractor/trailer, covered by a "king-size" mattress weighing only 15 pounds).

[329] *U.S. v. Aranda-Flores*, 450 F.3d 1141 (10th Cir. 2006) (holding that falling asleep at the wheel, by itself, was negligence, not recklessness and noting lack of pre-trip conduct that would establish recklessness (i.e., not sleeping enough beforehand)).

[330] *U.S. v. Mateo Garza*, 541 F.3d 290 (5th Cir. 2008) (holding that guiding aliens on foot through desert-like brush of South Texas in June, by itself, did not qualify for an enhancement in the absence of evidence that the aliens were inadequately prepared).

TABLE 2[331]

Table 2 Drug Trafficking Offenses - §2L1.2(b)(1)(A)(i), (B), (E)				
Title	**Statute**	**Y**	**Y/M**	**N**
Unlawful use of a communication facility to facilitate controlled substance offense.	21 U.S.C. § 843(b)	[332]		
Possession of controlled substance for sale	Cal. Health & Safety Code § 11378	[333]		
	N.R.S. § 453-337.1	[334]		
Attempted Drug Sale	A.R.S. §§ 13-3408.A.7		[335]	
Purchase of drugs for sale	Cal. Health & Safety Code § 11351	[336]		
Possession with intent to deliver a controlled substance	Tex. Health & Safety Code § 481.112(a)	[337]		
Possession or sale of certain quantity	Ga. Code § 16-13-31(e)	[338]	[339]	
	N.C. Gen. Stat. § 90-95(h)(1) (1993)			[340]
Simple possession	N.R.S. 453.3385			[341]
	Tex. Health & Safety Code § 481.121			[342]
Possession of a listed chemical with intent to manufacture a controlled substance				[343]

[331] The column "Y/M" refers to statutes that were treated as drug trafficking offenses after court records narrowed the statute of conviction under the "modified categorical approach."

[332] *U.S. v. Duarte*, 327 F.3d 206 (2d Cir. 2003); *U.S. v. Pillado-Chaparro*, 543 F.3d 202 (5th Cir. 2008); *U.S. v. Zuniga-Guerrero*, 460 F.3d 733 (6th Cir. 2006); *U.S. v. Jimenez*, 533 F.3d 1110 (9th Cir. 20008); *U.S. v. Orihuela*, 320 F.3d 1302 (11th Cir. 2003).

[333] *U.S. v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007).

[334] *U.S. v. Benitez-Perez*, 367 F.3d 1200 (9th Cir. 2004).

[335] *U.S. v. Hernandez-Valdovinos*, 352 F.3d 1243 (9th Cir. 2003) (court documents established that conviction was for attempted *sale* of drugs).

[336] *U.S. v. Palacios-Quinonez*, 431 F.3d 471 (5th Cir. 2005).

[337] *U.S. v. Ford*, 509 F.3d 714 (5th Cir. 2007) (applying§4B1.2(b) and §2L1.2).

[338] *U.S. v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003) (intent established by statutory scheme); *see also U.S. v. Gutierrez-Bautista*, 494 F.3d 523 (5th Cir. 2007), *superseded by* 507 F.3d 305 (5th Cir. 2007).

[339] *U.S. v. Gutierrez-Bautista*, 507 F.3d 305 (5th Cir. 2007) (plea admitted sale of drugs, excluding possibility that conviction was based on simple possession of drugs).

[340] *U.S. v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008) (despite statutory presumption of intent).

[341] *U.S. v. Villa-Lara*, 451 F.3d 963 (9th Cir. 2006).

[342] *U.S. v. Herrera-Roldan*, 414 F.3d 1238, 1239 (10th Cir. 2005).

[343] *U.S. v. Arizaga-Acosta*, 436 F.3d 506 (5th Cir. 2006) (possession of a listed chemical with intent to manufacture drugs).

Table 2 Drug Trafficking Offenses - §2L1.2(b)(1)(A)(i), (B), (E)				
Title	**Statute**	**Y**	**Y/M**	**N**
Interstate travel in aid of racketeering	18 U.S.C. § 1952		[344]	
Transport or Sell	Cal. Health & Safety Code § 11352(a)		[345]	[346]
Transporting drugs	Cal. Health & Safety Code § 11379(a)		[347]	[348]
Delivery of a controlled substance	Tex. Health & Safety Code § 481.112			[349]
Solicitation to deliver cocaine	Fla. Stat. § 777.04)(2)			[350]
Preparing drugs for distribution	Ohio Rev. Code Ann. § 2925.03(A)(2)	[351]		

[344] *U.S. v. Rodriguez-Duberney*, 326 F.3d 613 (5th Cir. 2003).

[345] *U.S. v. Garcia-Medina*, 497 F.3d 875 (8th Cir. 2007) (record established conviction was based on sale).

[346] *U.S. v. Gutierrez-Ramirez*, 405 F.3d 352, 359 (5th Cir. 2005).

[347] *U.S. v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008) (plea established distribution offense).

[348] *U.S. v. Garza-Lopez*, 410 F.3d 268 (5th Cir. 2005); *U.S. v. Almazan-Becerra*, 482 F.3d 1085 (9th Cir. 2007); *U.S. v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

[349] *U.S. v. Morales-Martinez*, 496 F.3d 356 (5th Cir. 2007); *U.S. v. Gonzales*, 484 F.3d 712 (5th Cir. 2007) (statute included offer to sell);

[350] *U.S. v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006) (included solicitation for personal use).

[351] *U.S. v. Fuentes-Oyervides*, 541 F.3d 286 (5th Cir. 2008).

TABLE 3[352]

Table 3 Enumerated Crimes of Violence - §2L1.2(b)(1)(A)(ii)					
Category	**Title**	**Statute**	**Yes**	**Y/M**	**No**
Manslaughter	Criminally negligent homicide	Tex. Pen. Code § 19.05, 6.03(d)			[353]
	DUI/manslaughter and DUI/bodily injury	Fla. Stat. § 316.193(3)(C)(2) and (3)			[354]
	Vehicular manslaugter wile intoxicated	Cal. Pen. Code § 192(c)(3)			[355]
	Attempted Manslaughter	N.Y. Penal Law § 125.15			[356]
Kidnapping	Kidnapping	N.Y. Pen. Law § 135.20	[357]		
		Tenn. Code Ann. § 39-13-303	[358]		
		Cal. Pen. Code § 207(a)			[359]
	Child Abduction by a Putative Father	720 Ill. Comp. Stat. 5/10-5(b)(3) (2004)			[360]
	Attempted Second-Degree Kidnapping	Colo. Rev. Stat. § 18-3-302			[361]
Agg Assault	Aggravated assault	Tex. Pen. Code § 22.02	[362]		
		Tenn. Code § 39-13-102	[363]		
		N.J. Stat. Ann. §2C:12-1b(7)	[364]		

[352] The column "Y/M" refers to statutes that were treated as drug trafficking offenses after court records narrowed the statute of conviction under the "modified categorical approach."

[353] *U.S. v. Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004).

[354] *U.S. v. Valenzuela*, 389 F.3d 1305 (5th Cir. 2004).

[355] *U.S. v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008) (conviction required only negligence).

[356] *U.S. v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (N.Y. statute was broader than ordinary manslaughter because it could be committed based on recklessly causing deaths or intent to cause a miscarriage).

[357] *U.S. v. Iniguez-Barba*, 485 F.3d 790 (5th Cir. 2007).

[358] *U.S. v. Gonzalez-Ramirez*, 477 F.3d 310 (5th Cir. 2007).

[359] *U.S. v. Moreno-Florean*, 542 F.3d 445 (5th Cir. 2008) (California kidnapping statute "sweeps more broadly than the generic, contemporary meaning of 'kidnapping'").

[360] *U.S. v. Franco-Fernandez*, 511 F.3d 768 (7th Cir. 2008) (statute could be violated by a biological father, which was not historically covered by kidnapping statutes).

[361] *U.S. v. Cervantes-Blanco*, 504 F.3d 576 (5th Cir. 2007) (did not involve a substantial interference with the victim's liberty).

[362] *U.S. v. Guillen-Alvarez*, 489 F.3d 197 (5th Cir. 2007).

[363] *U.S. v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007).

[364] *U.S. v. Ramirez*, 557 F.3d 200 (5th Cir. 2009).

Table 3 Enumerated Crimes of Violence - §2L1.2(b)(1)(A)(ii)					
Category	**Title**	**Statute**	**Yes**	**Y/M**	**No**
Agg Assault	Assault with a deadly weapon	Cal. Pen. Code § 245(a)(1)	[365]		
	Second degree assault	Conn. Gen. Stat. § 53a-60(a)(2)	[366]		
	Assault with Intent to Commit Specified Felony	Cal. Penal Code § 220(a)	[367]		
	Aggravated assault on a peace officer	Tex. Pen. Code § 22.02(a)(2)			[368]
Forcible Sex Offense	Penetration with a helpless victim	N.J. Stat. Ann. § 2C14-2c (1990)	[369]		
	Assault with Intent to Commit Rape	Cal. Penal Code § 220 (1999)	[370]		
	Misdemeanor Unlawful Sexual Contact	Colo. Rev. Stat. § 18-3-404(1)	[371]		
	Second degree sexual abuse	ORS § 163.425			[372]
	Forcible Rape	Cal Penal Code § 261 (1990)	[373]		
	Sexual Assault	Tex. Pen. Code § 22.011(a)(1)			[374]
		Mo. Ann. Stat. § 566.040(1)			[375]
	Aggravated Sexual Battery	Kan. Stat. Ann. § 21-3518	[376]		[377]
	Criminal Sexual Conduct	Minn. Stat. § 609.344(1)(c)		[378]	

[365] *U.S. v. Sanchez-Ruedas*, 452 F.3d 409 (5th Cir. 2006).

[366] *U.S. v. Torres-Diaz*, 438 F.3d 529 (5th Cir. 2006).

[367] *U.S. v. Rojas-Gutierrez*, 510 F.3d 545 (5th Cir. 2007).

[368] *U.S. v. Fierro-Reyna*, 466 F.3d 324, 326, 329–30 (5th Cir. 2006) (victim's status recognized as aggravating factor in only a minority of jurisdictions).

[369] *U.S. v. Remoi*, 404 F.3d 789 (3d Cir. 2005) (despite lack of any element requiring use of force).

[370] *U.S. v. Bolanos-Hernandez*, 492 F.3d 1140 (9th Cir. 2007).

[371] *U.S. v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007).

[372] *U.S. v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007).

[373] *U.S. v. Gomez-Gomez*, 547 F.3d 242 (5th Cir. 2007) (holding that "sex offenses committed using constructive force that would cause a reasonable person to succumb qualify as 'forcible sex offenses'").

[374] *U.S. v. Luciano-Rodriguez*, 442 F.3d 320 (5th Cir. 2006) (conviction criminalized situations where the victim assented as a matter of fact but consent was invalid as a matter of law).

[375] *U.S. v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) (not all conduct was forcible).

[376] *U.S. v. Yanez-Rodriguez*, 555 F.3d 931 (10th Cir. 2009) (not necessary that a sexual offense "require the use physical force to qualify as a forcible sex offense").

[377] *U.S. v. Meraz-Enriquez*, 442 F.3d 331 (5th Cir. 2006) (some conduct did not require force).

[378] *U.S. v. Fernandez-Cusco*, 447 F.3d 382 (5th Cir. 2006) (no plain error to apply enhancement to conviction for sexual penetration based on force or coercion); *U.S. v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006) (statute required use of "force *or* coercion," but plea statement established use of force).

Table 3 Enumerated Crimes of Violence - §2L1.2(b)(1)(A)(ii)					
Category	**Title**	**Statute**	**Yes**	**Y/M**	**No**
Forcible Sex Offense, cont.	Sexual Contact	Minn. Stat. § 609.345(1)(c)			[379]
	Second degree rape	Md. Code Ann. art. 27 § 463	[380]		
Statutory Rape	Consensual sex with a person under 17	Tex. Pen. Code § 22.011(a)(2)	[381]		
	Unlawful sexual intercourse with a minor under 16 by a person over 21	Cal. Penal Code § 261.5(d)	[382]		
	Unlawful sexual intercourse with a minor more than 3 years younger	Cal. Pen. Code § 261.5(c)		[383]	[384]
Sexual Abuse of a Minor	Statutory rape	Ca. Penal Code § 261.5(c)	[385]		
		Ky. Rev. Stat. § 510.060	[386]		
	Criminal sexual assault	720 ILCS 5/20-13(a)(3)	[387]		
	Lewd and/or Lascivious Acts with a Child	Iowa Code § 709.8	[388]		
		Cal. Penal Code § 288(a), (c)(1)	[389]		
	Carnal knowledge of a child	Va. Code § 18.23-63	[390]		
	Unlawful Sexual Activity with Certain Minors		[391]		

[379] *U.S. v. Rosas-Pulido*, 526 F.3d 829 (5th Cir. 2008) (statute prohibiting sexual contact "can include conduct that is not 'forcible' as that term is commonly understood").

[380] *U.S. v. Chacon*, 533 F.3d 250 (4th Cir. 2008) ("[A] 'forcible sex offense' can be accomplished by a degree of compulsion that does not constitute the use of physical force.").

[381] *U.S. v. Alvarado-Hernandez*, 465 F.3d 188 (5th Cir. 2006) (sex with a person less than 17).

[382] *U.S. v. Gomez-Mendez*, 486 F.3d 599 (9th Cir. 2007) (despite the fact that California offense did not allow for an affirmative defense available under the Model Penal Code).

[383] *U.S. v. Lopez-DeLeon*, 513 F.3d 472 (5th Cir. 2008) (although conviction could be sustained by sex with a minor between 16 and 18, the record established the minor was under 14); *U.S. v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (record established conviction was for a felony).

[384] *U.S. v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007) (conviction could be sustained by sex with a minor over 16).

[385] *U.S. v. Vargas-Garnica*, 332 F.3d 471 (7th Cir. 2003).

[386] *U.S. v. Chavarriya-Mejia*, 367 F.3d 1249 (11th Cir. 2004).

[387] *U.S. v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001).

[388] *U.S. v. Garia-Juarez*, 421 F.3d 655 (8th Cir. 2005).

[389] *U.S. v. Montenegro-Recinos*, 424 F.3d 715 (8th Cir. 2005) (§ 288(c)(1)); *U.S. v. Medina-Maella*, 351 F.3d 944 (9th Cir. 2003) (§ 288(a)); *U.S. v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (§ 288(a)); *U.S. v. Ortiz-Delgado*, 451 F.3d 752 (11th Cir. 2006) (§§ 288(a), (c)(1)).

[390] *U.S. v. Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. 2003).

[391] *U.S. v. Orduno-Mireles*, 405 F.3d 960, 961–62 (11th Cir. 2005).

Table 3 Enumerated Crimes of Violence - §2L1.2(b)(1)(A)(ii)					
Category	**Title**	**Statute**	**Yes**	**Y/M**	**No**
Sexual Abuse of a Minor, cont.	Indecent Solicitation of a child	Kan. Stat. Ann. § 21-3510(a)(1)	[392]		
	Indecent Liberties with a Child	N.C. Gen. Stat. § 14-202.1(a)(1)	[393]		[394]
	Indecency with a Child	Tex. Pen. Code § 21.11(a)(1)	[395]		
	Sexual Indecency with a Child by Exposure	Tex. Pen. Code § 21.11(a)(2)	[396]		
	Indecent or Lewd Acts with a Child under 16	Okla. Stat. tit. 21, § 1123	[397]		
	Statutory rape (pre-amendment)	TCA § 39-13-506			[398]
	Attempted Child Molestation	Ga. Code Ann. § 16-6-4	[399]		
	Oral copulation of a minor	Cal. Pen. Code § 288a(b)(1)			[400]
Robbery	Robbery	Cal. Pen. Code § 211	[401]		[402]
		Tex. Penal Code § 29.02	[403]		
Arson	Second Degree Arson	Wash. Rev. Code § 9A.48.030	[404]		

[392] *U.S. v. Ramos-Sanchez*, 483 F.3d 400 (5th Cir. 2007) (despite a scenario that would violate the statute but would not be child abuse because there was no "realistic probability that Kansas would in fact punish conduct of the type [the defendant] describes").

[393] *U.S. v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005).

[394] *U.S. v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006) (holding that conviction for taking indecent liberties with a child in violation of NCGS § 12-202.1 was not a crime of violence).

[395] *U.S. v. Ayala*, 542 F.3d 494 (5th Cir. 2008); *U.S. v. Najera-Najera*, 519 F.3d 509 (5th Cir. 2008); *U.S. v. Medina-Valencia*, 538 F.3d 831 (8th Cir. 2008).

[396] *U.S. v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000).

[397] *U.S. v. Balderas-Rubio*, 499 F.3d 470 (5th Cir. 2007).

[398] *U.S. v. Lopez-Solis*, 447 F.3d 1201 (9th Cir. 2006) (statute prohibited "consensual sexual penetration of a victim just under 18 by an individual who is 22") (pre-amendment that included statutory rape).

[399] *US v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008).

[400] *U.S. v. Munoz-Ortenza*, — F.3d —, 2009 WL 693146 (5th Cir. 2009).

[401] *U.S. v. Tellez-Martinez*, 517 F.3d 813 (5th Cir. 2008); *U.S. v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008).

[402] *U.S. v. Servin-Acosta*, 534 F.3d 1362 (10th Cir. 2008).

[403] *U.S. v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006).

[404] *U.S. v. Velasquez-Reyes*, 427 F.3d 1227 (9th Cir. 2005).

Table 3 Enumerated Crimes of Violence - §2L1.2(b)(1)(A)(ii)					
Category	**Title**	**Statute**	**Yes**	**Y/M**	**No**
Burglary of a Dwelling	Burglary	Utah Code Ann. § 76-6-203		[405]	
		Fla. Stat. § 810.02		[406]	[407]
		Ark. Code Ann. § 5-39-201(a)		[408]	
		Cal. Penal Code §§ 459, 460		[409]	[410]
	Residential Burglary	Cal. Pen. Code § 459			[411]
	Burglary of a Habitation	Tex. Pen. Code § 30.02(a)(1)	[412]		
	Burglary of a Building	Tex. Pen. Code § 30.02 (1974)			[413]
	Burglary of an Inhabitable Structure	Mo. Ann. Stat. § 569.160		[414]	
	Aggravated Burglary	Tenn. Code Ann. § 39-14-403			[415]

[405] *U.S. v. Reina-Rodriguez*, 468 F.3d 1147 (9th Cir. 2006), *overruled by U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007).

[406] *U.S. v. Castillo-Morales*, 507 F.3d 873 (5th Cir. 2007).

[407] *U.S. v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007) (statute included curtilage).

[408] *U.S. v. Mendoza-Sanchez*, 456 F.3d 479 (5th Cir. 2006) (defendant admitted he had entered a home without permission).

[409] *U.S. v. Murillo-Lopez*, 444 F.3d 337 (5th Cir. 2006) (following defendant's concession that the modified categorical approach applied, court records from the prior cases established the dwelling aspect); *U.S. v. Rodriguez-Rodriguez*, 393 F.3d 849 (9th Cir. 2005) (indictment and plea agreement established unlawful entry).

[410] *U.S. v. Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008) (modified categorical approach did not apply because statute had no subpart requiring proof of unlawful entry); *U.S. v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007) (statute did not require proof that entry was unprivileged or unlawful).

[411] *U.S. v. Aguila-Montes*, 553 F.3d 1229 (9th Cir. 2009).

[412] *U.S. v. Garcia-Mendez*, 420 F.3d 454 (5th Cir. 2005).

[413] *U.S. v. Rodriguez-Rodriguez*, 388 F.3d 466 (5th Cir. 2004) (holding that burglary of building in violation of was not a burglary of a dwelling).

[414] *U.S. v. Carbajal-Diaz*, 508 F.3d 804 (5th Cir. 2007).

[415] *U.S. v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007) (statute did not require intent to commit a crime).

TABLE 4[416]

Table 4 "Use of Force" in Crimes of Violence					
Group	**Label**	**Statute**	**Y**	**Y/M**	**N**
Automobile Cases	Negligent Automobile Homicide	Utah Code Ann. § 76-5-207(1)	[417]		
	Vehicular assault	Tenn. Code Ann. § 39-13-106(a)			[418]
	Intoxication assault	Tex. Pen. Code Ann. § 49.07 (1994)			[419]
	DUI/manslaughter and DUI/bodily injury	Fla. Stat. § 316.193(3)(C)(2), (3)			[420]
	Felony DUI	Tex. Pen. Code Ann. § 49.09			[421]
		Cal. Veh. Code § 23153(b)			[422]
	Unauthorized use of a motor vehicle	Tex. Pen. Code Ann. § 31.07(a)			[423]
Shooting Cases	Shooting at an occupied motor vehicle	Ca. Penal Code § 246	[424]		
	Shooting at inhabited dwelling	Ca. Penal Code § 246	[425]		
	Shooting into Occupied Building	Ca. Penal Code § 246			[426]
		Va. Code Ann. § 18.2-279			[427]
	Shooting firearm into building	Wis. Stat. § 941.20(2)(a)			[428]
	Discharging firearm at residential structure	A.R.S. § 13-1211			[429]

[416] The column "Y/M" refers to statutes that were treated as drug trafficking offenses after court records narrowed the statute of conviction under the "modified categorical approach."

[417] *U.S. v. Gonzalez-Lopez*, 335 F.3d 793 (8th Cir. 2003).

[418] *U.S. v. Portela*, 469 F.3d 496 (6th Cir. 2006).

[419] *U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004).

[420] *U.S. v. Valenzuela*, 389 F.3d 1305 (5th Cir. 2004).

[421] *U.S. v. Chapa-Garza*, 243 F.3d 927 (5th Cir. 2001) (even if drunk driving caused injury to another, "such force has not been intentionally 'used' against the other person . . . much less in order to perpetrate any crime, including the crime of felony DWI").

[422] *U.S. v. Torres-Ruiz*, 387 F.3d 1179 (10th Cir. 2004) (could be established on a showing of negligence).

[423] *U.S. v. Rodriguez-Rodriguez*, 388 F.3d 466 (5th Cir. 2004).

[424] *U.S. v. Lopez-Torres*, 443 F.3d 1182 (9th Cir. 2006), *abrogation recognized by U.S. v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007).

[425] *U.S. v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005), *abrogation recognized by U.S. v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007).

[426] *U.S. v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007) (state case law included recklessness).

[427] *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005) (force was not necessarily directed against a person).

[428] *U.S. v. Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005) (statute lacked an element that would establish the use of force was "against the person of another").

[429] *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (conviction could be based on suitability for residency rather than actual occupancy).

Table 4 "Use of Force" in Crimes of Violence					
Group	**Label**	**Statute**	**Y**	**Y/M**	**N**
Sex Cases	Criminal Sexual Conduct	Minn. Stat. § 609.344(1)(c)		[430]	
	Sexual Contact	Minn. Stat. § 609.345(1)(c)			[431]
	Sexual assault	Mo. Ann. Stat. § 566.040(1)			[432]
	Second degree sexual abuse	O.R.S. § 163.425			[433]
	Sexual battery	Cal. Penal Code § 243.4(a)			[434]
	Forcible Rape	Cal Penal Code § 261 (1990)			[435]
Assault and Battery	Assault and battery	Mass. Gen. Laws ch. 265, § 15A	[436]		
	Accomplice to second-degree assault	Wash. Rev. Code § 9A.36.021(1)(a)	[437]		
	Aggravated battery	Fla. Stat. § 784.045(1)(a)	[438]		
		Fla. Stat. § 784.045(1)(b)	[439]		[440]
		Fla. Stat. § 784.045			[441]
		720 Ill. Comp. Stat. 5/12-4(b)(1)	[442]		

[430] *U.S. v. Fernandez-Cusco*, 447 F.3d 382 (5th Cir. 2006) (no plain error to apply enhancement to conviction for sexual penetration based on force or coercion); *U.S. v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006) (statute required use of "force *or* coercion," but plea statement established use of force).

[431] *U.S. v. Rosas-Pulido*, 526 F.3d 829 (5th Cir. 2008) (statute prohibiting sexual contact "can include conduct that is not 'forcible' as that term is commonly understood").

[432] *U.S. v. Sarmiento-Funes*, 374 F.3d 336 (5th Cir. 2004) ("[T]he act of penetration itself is [not] enough to supply the force required under §2L1.2.").

[433] *U.S. v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007) (statute did not require proof that force was used and could be applied in a case where an intoxicated victim gave invalid consent).

[434] *U.S. v. Bonilla-Mungia*, 422 F.3d 316 (5th Cir. 2005) (remanding to determine whether a crime of violence could be established); *U.S. v. Lopez-Montanez*, 421 F.3d 926 (9th Cir. 2005).

[435] *U.S. v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007) (conviction could be obtained without proof that force was used), *rev'd on other grounds by* 547 F.3d 242 (5th Cir. 2008).

[436] *U.S. v. Earle*, 488 F.3d 537 (1st Cir. 2007).

[437] *U.S. v. Hermoso-Garcia*, 413 F.3d 1085 (9th Cir. 2005).

[438] *U.S. v. Dominguez*, 479 F.3d 345 (5th Cir. 2007).

[439] *U.S. v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007) (inasmuch as simple battery on a police officer is a crime of violence, so is simple battery of a pregnant woman).

[440] *U.S. v. Barraza-Ramos*, 550 F.3d 1246 (10th Cir. 2008) (statute of conviction simply enhanced the penalty for simple battery when the victim was pregnant, and simple battery did not require force).

[441] *U.S. v. Gonzalez-Chavez*, 432 F.3d 334 (5th Cir. 2005) (statute criminalized conduct that did not involve the use or threatened use of force).

[442] *U.S. v. Velasco*, 465 F.3d 633 (5th Cir. 2006) (required proof a deadly weapon was used).

Table 4 "Use of Force" in Crimes of Violence					
Group	**Label**	**Statute**	**Y**	**Y/M**	**N**
Assault and Battery, cont.	Second Degree Assault	NY McKinney's Pen. Law § 120.05		[443]	
	Assault II (drugging a victim)	Colo. Rev. Stat. § 18-3-203(1)(e)			[444]
	Third degree assault	Colo. Rev. Stat. § 18-3-204			[445]
	Simple Assault	18 Pa. Cons. Stat. Ann. § 2701(a)(1)			[446]
	Assault on a Public Servant	Tex. Pen. Code § 22.01			[447]
	Aggravated battery against a police officer	Kan. Stat. Ann. § 21-3415	[448]		
Child Abuse	Negligent Child Abuse	Nev. Rev. Stat. § 2000.508			[449]
	Child endangerment	Tex. Pen. Code Ann. § 22.041(c)			[450]
	Child Abuse	A.R.S. § 13-3623		[451]	
Kidnapping	Child Abduction by a Putative Father	720 Ill. Comp. Stat. 5/10-5(b)(3)			[452]
	Attempted Second Degree Kidnapping	Colo. Rev. Stat. § 18-3-302			[453]
	Kidnapping	Cal. Pen. Code § 207(a)			[454]
Terroristic threats		18 Pa. Cons. Stat. § 2706(a) (2003)			[455]
		Minn. Sta. Ann. § 609.713			[456]

[443] *U.S. v. Neri-Hernandes*, 504 F.3d 587 (5th Cir. 2007).

[444] *U.S. v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (elements (administering drugs) do not require the use of *physical* force—"the adjective *physical* must refer to the mechanism by which the force is imparted to the 'person of another'").

[445] *U.S. v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005).

[446] *U.S. v. Otero*, 502 F.3d 331 (3d Cir. 2007).

[447] *U.S. v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008) (could be based on recklessness).

[448] *U.S. v. Treto-Martinez*, 421 F.3d 1156 (10th Cir. 2005) (all sub-parts required proof of either physical contact with a deadly weapon or physical contact that could inflict harm).

[449] *U.S. v. Contreras-Salas*, 387 F.3d 1095 (9th Cir. 2004) (could be violated through negligence).

[450] *U.S. v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (elements of the offense, not the defendant's actual conduct, did not require use of force).

[451] *U.S. v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. 2004) (conviction could be established without showing use of force but was a crime of violence based on admissions in the earlier plea).

[452] *U.S. v. Franco-Fernandez*, 511 F.3d 768 (7th Cir. 2008).

[453] *U.S. v. Cervantes-Blanco*, 504 F.3d 576 (5th Cir. 2007).

[454] *U.S. v. Moreno-Florean*, 542 F.3d 445 (5th Cir. 2008) (kidnaping is not COV under catchall because it could be based on "any other means of instilling fear" and not necessarily the use of physical force).

[455] *U.S. v. Martinez-Paramo*, 380 F.3d 799 (5th Cir. 2004) (remanding to consider whether defendant pled to elements that established use of force).

[456] *U.S. v. Naranjo-Hernandez*, 133 Fed. App'x 96 (5th Cir. 2005).

Table 4 "Use of Force" in Crimes of Violence					
Group	**Label**	**Statute**	**Y**	**Y/M**	**N**
False imprisonment		Cal. Penal Code § 236		[457]	
		Fla. Stat. § 787.02(1)(a): (1)			[458]
		Neb. Rev. Stat. § 28-314(1)			[459]
Other	Retaliation	Tex. Pen. Code § 36.06(a)			[460]
	Deadly Conduct	Tex. Pen. Code § 22.05(b)(1)	[461]		
	Reckless endangerment	Ariz. Rev. Stat. § 13-1201			[462]
	Harassment	Colo. Rev. Stat. § 18-9-111(1)(a)			[463]

[457] *U.S. v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2004).

[458] *U.S. v. Gonzalez-Perez*, 472 F.3d 1158 (9th Cir. 2007).

[459] *U.S. v. Ruiz-Rodriguez*, 494 F.3d 1273 (10th Cir. 2007) (remanding to review *Shepard*-approved documents).

[460] *U.S. v. Martinez-Mata*, 393 F.3d 625 (5th Cir. 2004) (did not have as an element the use or threatened use of force despite element that a person convicted of this offense knowingly harms or threatens to harm another); *U.S. v. Acuna-Cuadros*, 385 F.3d 875 (5th Cir. 2004).

[461] *U.S. v. Hernandez-Rodriguez*, 467 F.3d 492 (5th Cir. 2006) (discharging a firearm in the direction of another individual constituted proof that force was threatened against another).

[462] *U.S. v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) (some conduct covered by the statute did not require use of force).

[463] *U.S. v. Maldonado-Lopez*, 517 F.3d 1207 (10th Cir. 2008) (remanding to review record).

TABLE 5

Table 5 Aggravated Felonies				
Category	**Label**	**Statute**	**Yes**	**No**
Rape	Rape	Wash. Rev. Code § 9A.44.060	[464]	
Sexual abuse of a minor	Statutory Sexual Seduction	Nev. Rev. Stat. § 200.364	[465]	
	Lewd and lascivious act on a child	Cal. Penal Code § 288(a)	[466]	
		Fla. Stat. § 800.04	[467]	
	Indecency with a child	Tex. Pen. Code § 21.11(a)(2)	[468]	
	Attempted child molestation	Washington	[469]	
	Second degree sexual abuse (misdemeanor)	K.R.S. § 510.120	[470]	
Drug trafficking	Possession with intent to distribute		[471]	
	Felony Possession of a Controlled Substance			[472]
	Subsequent Conviction for Simple Possession	Subsequent conviction for possession		[473]
		Cal. Health & Safety Code § 11352	[474]	
		720 ILCS 550/4	[475]	
	Transporting drugs	Cal. Health & Safety Code § 11360(a)		[476]

[464] *U.S. v. Yanez-Saucedo*, 295 F.3d 991 (9th Cir. 2002).

[465] *U.S. v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005).

[466] *U.S. v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999).

[467] *U.S. v. London-Quintero*, 289 F.3d 147 (1st Cir. 2002); *U.S. v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001).

[468] *U.S. v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. 2000) (indecency conviction based on defendant's public masturbation).

[469] *U.S. v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001).

[470] *U.S. v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001) (defendant did not object to facts in the PSR that established it as aggravated felony).

[471] *U.S. v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994).

[472] *U.S. v. Matamoros-Modesta*, 523 F.3d 260 (4th Cir. 2008) (Texas); *U.S. v. Estrada-Mendoza*, 475 F.3d 258 (5th Cir. 2007) (Texas); *U.S. v. Figueroa-Ocampo*, 494 F.3d 1211 (9th Cir. 2007) (California); *U.S. v. Martinez-Macias*, 472 F.3d 1216 (10th Cir. 2007) (Kansas).

[473] *U.S. v. Ayon-Robles*, 557 F.3d 110, 113 (2d Cir. 2009) ("[A] second simple-possession offense is not a felony punishable under the CSA.").

[474] *U.S. v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008).

[475] *U.S. v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'rg denied by* 513 F.3d 776 (7th Cir. 2007); *but see Pacheco-Diaz*, 513 F.3d at 779 (Rovner, J., dissenting).

[476] *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (transporting without proof of intent to sell was not categorically an aggravated felony).

Table 5 Aggravated Felonies				
Category	**Label**	**Statute**	**Yes**	**No**
Firearm Offense	Possession of a firearm by a non-citizen	Wash. Rev. Code § 9.41.170		[477]
Crime of violence	Unauthorized use of a motor vehicle	Tex. Pen. Code § 31.07	[478]	
	Simple Assault (Misdemeanor)		[479]	
	Criminal trespass	Colo. Rev. Stat. § 18-4-502	[480]	
	Misdemeanor Attempted Riot	Utah Code Ann. § 76-9-101	[481]	
	Misdemeanor Menacing	N.Y. Stat. § 120.14	[482]	
	Unlawful possession of an unregistered firearm	Tex.	[483]	
	Indecency with child involving sexual contact	Tex. Pen. Code Ann. § 21.11	[484]	
	Sexual assault of a child	Neb. Rev. Stat. § 28-320.01(1)	[485]	
	Lascivious acts with a child	Iowa Code 709.8	[486]	
	Fleeing from Police Officer	Cal. Vehicle Code § 2800.2	[487]	
	Misdemeanor battery	Nev. Rev. Stat. 200.481	[488]	
	Residential trespass	Colo. Rev. Stat. § 18-4-502	[489]	

[477] *U.S. v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (broader than the analogous federal statute).

[478] *U.S. v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

[479] *U.S. v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor convictions for shoplifting, simple assault, and larceny that received a suspended sentence of one year were aggravated felonies); *U.S. v. Urias-Escobar*, 281 F.3d 165 (5th Cir. 2002).

[480] *U.S. v. Delgado-Enriquez*, 188 F.3d 592 (5th Cir. 1999).

[481] *U.S. v. Hernandez-Rodriguez*, 388 F.3d 779 (10th Cir. 2004) (sentence was 365 days with 305 days suspended).

[482] *U.S. v. Drummond*, 240 F.3d 1333 (11th Cir. 2001).

[483] *U.S. v. Rivas-Palacios*, 244 F.3d 396 (5th Cir. 2001) (Texas conviction for possession of a short-barreled shotgun was a crime of violence under § 16(b) because "unlawful possession of any unregistered firearm . . . 'involves a substantial risk that physical force . . .' will occur").

[484] *U.S. v. Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996).

[485] *U.S. v. Alas-Castro*, 184 F.3d 812 (8th Cir. 1999).

[486] *U.S. v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992).

[487] *U.S. v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004).

[488] *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (holding that misdemeanor battery was aggravated felony)

[489] *U.S. v. Venegas-Ornelas*, 348 F.3d 1273 (10th Cir. 2003) (entering the dwelling of another "creates a substantial risk that physical force will be used against the residents [or property] in the dwelling); *U.S. v. Delgado-Enriquez*, 188 F.3d 592, 595 (5th Cir. 1999).

Table 5 Aggravated Felonies				
Category	**Label**	**Statute**	**Yes**	**No**
Crime of violence, cont.	Burglary		[490]	
	Burglary of a vehicle		[491]	
	Felony Burglary	Tex. Penal Code Ann. § 30.02	[492]	
	Felony endangerment	A.R.S. § 13-1201		[493]
	Felony DUI			[494]
	Assault	Tex. Penal Code § 22.01(a)		[495]
	Attempted aggravated assault with sentence of probation			[496]
	Possession of a deadly weapon	Cal. Pen. Code § 12020(a)		[497]
	Carrying a firearm in a place licensed to sell alcohol	Tex. Pen. Code § 46.02(c)		[498]
	Injury to a child	Tex. Pen. Code § 22.04(a)		[499]
	Criminal mischief	Tex. Pen. Code § 28.03(a)(3)		[500]
	Unlawful Use of Means of Transportation	Ariz. Rev. Stat. § 13-1803(A)(1)		[501]
	Second-degree manslaughter	Minn. Stat. § 609.205		[502]
	Child Abduction by a Putative Father	720 Ill. Comp. Stat. 5/10-5(b)(3)		[503]

[490] *U.S. v. Frias-Trujillo*, 9 F.3d 875 (10th Cir. 1993).

[491] *U.S. v. Ramos-Garcia*, 95 F.3d 369 (5th Cir. 1996).

[492] *U.S. v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir. 1995) (burglary of a nonresidential structure or automobile were both crimes of violence under 16(b)).

[493] *U.S. v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002) ("[A] 'substantial risk of imminent death or physical injury' is not the same thing as a 'substantial risk that physical force . . . may be used.'").

[494] *Dalton v. Ashcroft*, 257 F.3d 200, 205-06 (2d Cir.2001); *U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir.2001) (any force inflicted would not be intentional); *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir.2001); *U.S. v. Portillo-Mendoza*, 273 F.3d 1224 (9th Cir. 2001) (conviction could be established by a showing of negligence, which would not establish "use"); *U.S. v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) ("use" "carries a connotation of at least some degree of intent").

[495] *U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006).

[496] *U.S. v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005) (holding that conviction for attempted aggravated assault was not an aggravated felony where conviction received a sentence of probation for 1 to 5 years).

[497] *U.S. v. Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003).

[498] *U.S. v. Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001) (statute did not require intent to use force).

[499] *U.S. v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (conviction could be established on negligence).

[500] *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir. 2001) (did not involve risk that force would be used).

[501] *U.S. v. Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007).

[502] *U.S. v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) (conviction did not require "use of force").

[503] *U.S. v. Franco-Fernandez*, 511 F.3d 768 (7th Cir. 2008).

Table 5 Aggravated Felonies				
Category	**Label**	**Statute**	**Yes**	**No**
Theft offense	Identity theft	Iowa Code § 715A.8	[504]	
	Misdemeanor Shoplifting		[505]	
	Conspiracy to steal from a bank	18 U.S.C. § 2113(b)	[506]	
	Attempted robbery	N.Y. Penal Law § 110.00	[507]	
	Misdemeanor Petit larceny	NY Penal Law § 155.25	[508]	
	Petit theft	Cal. Penal Code § 484(a)	[509]	
	Knowingly receive or transfer a stolen vehicle	Utah Code Ann. § 41-1a-1316	[510]	
	Unlawful Driving or Taking of Vehicle	Cal. Vehicle Code § 10851(a)		[511]
	Joyriding	A.R.S. § 13-1803		[512]
Alien Smuggling	Alien transporting	8 U.S.C. § 1324(a)(1)(A)(ii)	[513]	
Forgery	Possession of a false document with intent to perpetrate fraud	Iowa § 715A.2(1)(d)	[514]	
Illegal Entry or Reentry	Illegal Reentry	8 U.S.C. § 1326		[515]

[504] *U.S. v. Mejia-Barba*, 327 F.3d 678 (8th Cir. 2003).

[505] *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor convictions for shoplifting, simple assault, and larceny that received a suspended sentence of one year were aggravated felonies); *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir. 2001) (12-month sentence with 12 months suspended).

[506] *U.S. v. Dabeit*, 231 F.3d 979 (5th Cir. 2000).

[507] *U.S. v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002) (state statute not broader than federal definition of attempt).

[508] *U.S. v. Graham*, 169 F.3d 787 (3d Cir. 1999).

[509] *U.S. v. Corona-Sanchez*, 234 F.3d 449 (9th Cir. 2000).

[510] *U.S. v. Vasquez-Flores*, 265 F.3d 1122 (10th Cir. 2001).

[511] *U.S. v. Vidal*, 504 F.3d 1072 (9th Cir. 2007).

[512] *U.S. v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (statute lacked proof of intent to deprive the owner of property).

[513] *U.S. v. Galindo-Gallegos*, 244 F.3d 728 (9th Cir. 2001) (transporting aliens who were already present); *U.S. v. Salas-Mendoza*, 237 F.3d 1246 (10th Cir. 2001).

[514] *U.S. v. Chavarria-Brito*, 526 F.3d 1184 (8th Cir. 2008) ("possession of a false document with the intent to perpetrate a fraud or with the knowledge that his possession was facilitating a fraud is related to [a forgery, i.e.,] the false making or material alteration of a document with the intent to deceive").

[515] *U.S. v. Matamoros-Modesta*, 523 F.3d 260 (4th Cir. 2008) (holding that prior conviction for illegal reentry was not an aggravated felony because it was not committed after being deported based on a prior aggravated felony).

TABLE 6

Table 6 Other Categories				
Category	**Label**	**Statute**	**Yes**	**No**
Firearms	Weapon possession	Cal. Pen. Code § 12020(a)(1)		[516]
Child pornography				
National security				
Terrorism				
Human trafficking				
Alien smuggling	Transporting Aliens	8 U.S.C. § 1324(a)(1)(A)(ii)	[517]	
Inchoate Offenses	Attempted Sale of a Controlled Substance		[518]	
	Solicitation to Commit Burglary	Ariz. Rev. Stat. § 13-1002	[519]	
	Solicitation to deliver cocaine	Fla. Stat. § 777.04)(2)		[520]

[516] *U.S. v. Martinez-Hernandez*, 422 F.3d 1084 (10th Cir. 2005) (despite a police report that stated the weapon was a firearm).

[517] *U.S. v. Solis-Campozano*, 312 F.3d 164 (5th Cir. 2002).

[518] *U.S. v. Phillips*, 413 F.3d 1288 (11th Cir. 2005) (Attempted sale of a controlled substance is a drug trafficking offense)

[519] *U.S. v. Cornelio-Pena*, 435 F.3d 1279 (10th Cir. 2006).

[520] *U.S. v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006) (included solicitation for personal use).