

**SENTENCING ISSUES IN
§1326 ILLEGAL RE-ENTRY CASES**

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I. 8 U.S.C. § 1326 Statutory Sentencing Enhancements.

- A. The statute initially dictates sentencing through a series of mandatory maximum sentencing provisions based on defendant's prior criminal history, as follows:
- A **2-year mandatory maximum** if there are no prior felony convictions or less than 3 misdemeanor crimes of violence or drug trafficking convictions. *See* 8 U.S.C. §1326(a).
- A **10-year mandatory maximum** if there is a felony conviction *or* 3 or more misdemeanor crimes of violence or drug trafficking convictions. *See* 8 U.S.C. §1326(b)(1).
- A **20-year mandatory maximum** if there is any "aggravated felony" as defined in 8 U.S.C. §1101(a)(43). *See* 8 U.S.C. §1326(b)(2).
- B. For conviction purposes, the prior convictions can be proved with evidence beyond that which is used at sentencing for the purposes of the §2L1.2 guideline. However, the indictment must contain some notice that enhanced sentencing will be sought or be supported by an independent notice of penalty enhancement to satisfy *Apprendi*.
- C. If entering a guilty plea, defendant must also be advised he is subject to enhanced sentencing. *See* FED. R. CRIM. PRO. 11. For the purposes of conviction, the prior conviction must have been "obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-1098 (9th Cir. 2006). However, the prior conviction need not be proven at trial for *sentencing* purposes. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

 **Remember, §1326 statutory enhancements and §2L1.2 enhancements may be based on the same prior conviction but can yield different sentencing results and are subject to different evidentiary burdens of proof. Generally, at sentencing the Guideline controls, *subject only to the applicable mandatory maximum*. Restated, a properly calculated advisory sentencing range under §2L1.2 will always apply *unless* it is capped by a §1326 mandatory maximum.**

II. U.S.S.G. § 2L1.2 Sentencing Enhancements Generally.

- A. U.S.S.G. §2L1.2 controls sentencing for 8 U.S.C. §§ 1185(a)(1), 1253, 1324, 1325(a), and 1326.
- B. What are the §2L1.2 enhancements?
1. Under §2L1.2, the base offense level is 8 to which 4, 8, 12, or 16 offense level points can be added if defendant has certain types of prior felony conviction(s) in his/her criminal history. *See* U.S.S.G. §2L1.2 (a) and (b).
 2. A "prior conviction" is defined as a conviction for a felony, and certain misdemeanors, occurring after the "the defendant previously was deported, or unlawfully remained in the United States." U.S.S.G. §2L1.2 (b).


 To trigger the Guideline enhancements under §2L1.2 “an alien must first be convicted of a ... [Guideline-defined prior offense], then be removed, and then attempt to reenter, in that order.” *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006); *see also United States v. Luna-Madellaga*, 315 F.3d 1224, 1226 (9th Cir. 2003) (“All that [§1326] requires is that the alien [attempt to or] reenter the United States illegally after having been removed subsequent to an aggravated felony conviction.”)

3. The **types of prior convictions** used for §2L1.2 enhancement are defined in the Guideline but include drug trafficking, child pornography, human trafficking, alien smuggling, firearms, national security or terrorism offenses, crimes of violence, certain enumerated crimes such as murder, any other felony, and three or more misdemeanor crimes of violence or drug trafficking offenses. U.S.S.G. §2L1.2(b)(1)(A)-(E).

 An “offense” under §2L1.2 is a term of art.

4. **Attempt, aiding and abetting, and conspiracy** of any §2L1.2 offense is included within the Guideline. *See* U.S.S.G. §2L1.2 application note 5.

III. §2L1.2 “Crime of Violence” (“COV”) Enhancements.


 Remember, the definition of COV varies within §2L1.2 depending on the level of enhancement sought.


- A. The **16 and 4 level enhancements** are described in a two-part definition that contains a “**use of force**” strand and an “**enumerated offense**” strand:

“**Crime of violence**” means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling,

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

U.S.S.G. §2L1.2 application note (1)(B)(iii).

 Remember, the 16-level COV enhancement only applies to “felony” prior convictions. The 4-level COV enhancement applies when there are three or more prior misdemeanor convictions that constitute COVs. *Compare* U.S.S.G. §2L1.2(b)(1)(A) with U.S.S.G. §2L1.2(b)(1)(E).


 Remember, only the §2L1.2, 16/4-level enhancements apply to the enumerated COV offenses.


- B. The **8-level enhancement** uses the “**aggravated felony**” COV definition found in 8 U.S.C. § 1101(a)(43)(F) which in turn references the COV definition found in 18 U.S.C. §16-- the same statutes used to support a §1326(b)(2) “aggravated felony” statutory enhancement.

For the purposes of the **8-level enhancement**, “**crime of violence**” means—

- (a) an offense that has as an element **the use, attempted use, or threatened use of force against the person or property of another**, or
- (b) any other offense that is a felony and that, by its nature, **involves a substantial risk that physical force against the person or property of another may be used** in the course of committing the offense.”

8 U.S.C. §16.

 **Remember, §1101(a)(43) has many other provisions that support an 8-level enhancement but do not fall within the aggravated felony COV definition in subsection (F). Ex. Theft or burglary offenses defined in §1101(a)(43)(G), or “sexual abuse of a minor” offenses found in §1101(a)(43)(A). However, the categorical approach generally applies to all §1101(a)(43) offenses.**

 **Remember the COV definition for an 8-level enhancement under §1101(a)(43) and 18 U.S.C. §16 is broader than that under §2L1.2 for a 16-level enhancement because it encompasses the “use of force” against the person or *property* of another.**

The “**substantial risk of use of force**” also broadens the COV definition but does not include DUI. *See Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)(DUI not an 8-level aggravated felony COV). The substantial risk of force strand “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.” *Id.*

C. **The definition of “felony”** varies depending on the level of COV enhancement sought:


A “felony” for a **16/12/4-level, non-drug trafficking enhancements** is defined as “any federal, state, or local offense **punishable by imprisonment** for a term exceeding one year.” *See* U.S.S.G. §2L1.2 application note 2.

A “felony” for **most, but not all, 8-level “aggravated felonies”** is defined as an offense “for which the **term of imprisonment** is at least one year.” *See* 8 U.S.C. §1101(43)(a)(F),(G),(J),(R)and (S); U.S.S.G. §2L1.2 application note 3(A)(incorporating felony definitions from 8 U.S.C. §1101(a)(43)).


“**Imprisonment**” means “any term of imprisonment given upon revocation of probation, parole, or supervised release” but NOT straight probation. *See* U.S.S.G. §2L1.2 application note 1(B)(vii).

IV. §2L1.2 “Drug Trafficking Offense” Enhancements.


 **The definition of a §2L1.2 “drug trafficking” offense varies depending on the level of enhancement sought.**

 **Drug quantity, even if an element of the underlying offense, cannot be used to prove distribution to bring the prior offense within §2L1.2’s definition of drug trafficking.**

See Lopez v. Gonzalez, 127 S.Ct. 625, 633 (2006). However, drug quantity can be considered for departure purposes. *See* U.S.S.G. §2L1.2 application note 7.


 **A single conviction for mere possession of a controlled substance never rises to the level of an §2L1.2 drug enhancement because it cannot be charged as a felony under the CSA. *See Lopez v. Gonzalez*, 127 S.Ct. 625, 627 (2006); *United States v. Estrada-Mendoza*, 475 F.3d 258 (5th Cir. 2007).**

A. §2L1.2 contemplates **16, 12, and 4 level** enhancements for prior convictions for “**drug trafficking offenses.**”


 **The only definition of “drug trafficking” that applies to 16/12/4-level enhancements is:**


“an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.”

U.S.S.G. §2L1.2 application note 1(B)(iv). **These terms are strictly construed.** *See United States v. Garza-Lopez*, 410 F.3d 268, 272-274 (5th Cir. 2005) *but see United States v. Ford*, 509 F.3d.714, 717 (5th Cir. 2007)(“pure sophistry to distinguish between the conduct of one who possesses drugs with intent to deliver those drugs and one who possesses drugs with intent to distribute them”).

 **The only difference between the 16 and the 12-level “drug trafficking” enhancement is the length of “sentence imposed” for the prior offense—more than 13 months for the 16-level and less than 13 months for the 12-level.**

B. §2L1.2 also includes an **8-level** enhancement for drug offenses that involve “**illicit trafficking in a controlled substance.**” This includes drug crimes as defined in 18 U.S.C. § 924(c) which in turn references all crimes that can be charged under the federal Controlled Substances Act, 21 U.S.C. §§802 *et seq.*. *See Lopez v. Gonzalez*, 127 S.Ct. 625, 630-631 (2006).

 **The definition of the 8-level, “drug trafficking offense” is controlled solely by federal, law as enunciated in the CSA--state law definitions do not apply. *See Lopez v. Gonzalez*, 127 S.Ct. 625, 631 (2006)(“Unless a state offense is punishable as a federal felony it does not count.”).**

 **The definition of an “illicit trafficking offense” under §1101(a)(43)(B) is broader than the definition of a “drug trafficking offense” under the §2L1.2 16/12/4-level enhancements or §4B1.2 definition of an “illicit trafficking offense” because it encompasses all the crimes defined in the Controlled Substances Act including the use of two or more prior drug possession convictions for enhanced felony sentencing pursuant to 21 U.S.C. §844(a). *See United States v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008)(two prior simple possession convictions constitute an “illicit drug trafficking offense); *United States v. Sanchez Villalobos*, 412 F.3d 572 (5th Cir. 2006) (same); *United States v. Castro-Coello*, 474 F.Supp. 2d 853 (S.D.Tx. 2007) *aff’d sub nom. United States v. Molina-Gonzalez*, No. 07-40239, 2007 WL 2046878 (5th Cir. July 17,**

2007)(same); *but see United States v. Ayon-Robles*, 557 F.3d 110 (2d Cir. 2009)(no enhancement available for two prior simple possession convictions).

- C. With **drug trafficking offenses** check the statute’s definitional section to determine whether the definition of “distribute” or “deliver” includes “giving away” or other forms of dealing that does not involve exchanges for value. With such statutory language you won’t be able to support **any** enhancement for a drug trafficking offense. *See e.g., United States v. Garza-Lopez*, 410 F.3d 268, 274-275 (5th Cir. 2005)(finding prior conviction under CALIF. HEALTH & SAFETY CODE §11379 does not constitute “drug trafficking offense” because it includes the giving away of drugs). **N.B.** With the 2008 amendments, however, distribution or delivery that includes an element of “offer to sell” is included in the Guideline definition. *See U.S.S.G. §2L1.2 application note (1)(B)(iv) (2008).*

V. Other 16-Level Enhancement §2L1.2 Offenses.

- A. “Firearms Offenses.”

These are defined in U.S.S.G. §2L1.2 application note (B)(v)(I)-(VI) as:

(I) An offense under federal, state, or local law that prohibits **the importation, distribution, transportation, or trafficking of a firearm** described in 18 U.S.C. 921, or of an explosive material as defined in 18 U.S.C. 841(c).

(II) An **offense under Federal, state, or local law that prohibits the possession of a firearm** described in 26 U.S.C. 5845(a), or of an explosive material as defined in 18 U.S.C. 841(c).

(III) A violation of 18 U.S.C. 844(h).

(IV) A violation of 18 U.S.C. 924(c).

(V) A violation of 18 U.S.C. 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the **special maritime and territorial jurisdiction of the United States**.

- B. “Child Pornography Offenses.”

These are defined in U.S.S.G. §2L1.2 application note (B)(ii) as follows:

(ii) “Child pornography offense” means (I) an offense described in 18 U.S.C. 2251, 2251A, 2252, 2252A, or 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the **special maritime and territorial jurisdiction of the United States**.

Essentially, **the possession, manufacture, receipt, distribution etc. of child pornography**.

- C. “National Security or Terrorism Offenses.”

These are defined in U.S.S.G. §2L1.2 application note (B)(viii) as follows:

(viii) “Terrorism offense” means 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).

18 U.S.C. 2332b(g)(5) defines the “federal crime of terrorism” as:

“an offense that--(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and(B) is a violation of” an enormous laundry list of other statutes.

D. “Human Trafficking Offenses.”

These are defined in U.S.S.G. §2L1.2 application note (B)(vi) as follows:

(vi) “Human trafficking offense” means (I) any offense described in 18 U.S.C. 1581, 1582, 1583, 1584, 1585, 1588, 1589, 1590, or 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the **special maritime and territorial jurisdiction** of the United States.

The offenses encompass the trafficking of human beings for profit, such as prostitution, slavery, and worker exploitation.

E. “Alien Smuggling Offenses.”

These are defined in U.S.S.G. §2L1.2 application note (B)(i) as follows:

(i) “Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(N)).

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which 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. 8 U.S.C. §1101(a)(43)(N).

8 U.S.C. §1324 (a)(1)(A) and (2) provides criminal penalties for “any person who--

(i) **knowing that a person is an alien, brings to or attempts to bring to the United States** in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;


(ii) **knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States** in violation of law, **transports, or moves or attempts to transport or move such alien within the United States** by means of transportation or otherwise, in furtherance of such violation of law;

(iii) **knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States** in violation of law, **conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection**, such alien in any place, including any building or any means of transportation;


(iv) **encourages or induces an alien to come to, enter, or reside in the United States**, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) **engages in any conspiracy to commit** any of the preceding acts, or

(II) **aids or abets** the commission of any of the preceding acts.

 **There is no *per se* importation element to alien smuggling. Defendant can therefore be guilty of the offense even if he does not smuggle an alien across the border but instead transports, conceals, harbors, etc. an alien within the United States.**

VI. §2L1.2 Method: The Categorical Approach And Its Progeny.

 **Only the statute of prior conviction is examined in a categorical analysis—*never* the underlying facts of the prior conviction.**

A. The “categorical” analysis of a state criminal statute under which an illegal reentry defendant was previously convicted proceeds by looking solely at elements of crime as defined by that statute--the fact of conviction and the statutory definition of prior offense completely control the analysis and the specific facts of defendant's underlying conduct must be disregarded. *See United States v. Carbajal-Diaz*, 508 F.3d 804 (5th Cir. 2007).

B. With all categorical analyses you must examine the statute *and its subsections* carefully to ensure you have support for the enhancement. Most state indictments and judgments do not cite subsections, and without narrowing *Shepard* proof the prior conviction will be found to be overbroad.

Ex. TEX. PENAL CODE §30.02(a)(1) passes 16-level muster as a burglary of a dwelling, but TEX. PENAL CODE §30.02(a)(3) does not. *See United States v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007).

C. The COV “Use Of Force Strand.”

When determining whether a prior offense is a crime of violence because it has as an element the use, attempted use, or threatened use of force, district courts must employ the categorical approach. *See Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Hernandez-Rodriguez*, 467 F.3d 492, 494 (5th Cir.2006).

Under the categorical standard, “the court must analyze the prior offense’s statutory definition and not the defendant's underlying conduct.” *United States v. Velasco*, 465 F.3d 633, 638 (5th Cir.2006); *see United States v. Otero*, 502 F.3d 331, 336 (3rd Cir. 2007)(The “intentional use of force must be an element of the predicate offense if the predicate offense is to enhance a defendant's sentence.”).

If any set of facts would secure a conviction under the statute “without proof of the intentional use of force against the person of another, then the offense cannot be characterized as a crime of violence for sentence-enhancement purposes.” *Velasco*, 465 F.3d at 638. However, where a conviction can be obtained under alternative theories and proof, courts have limited authority to look outside the statute to determine which alternative was pursued by the prosecutor to obtain the conviction. *Hernandez-Rodriguez*, 467 F.3d at 494.

If a “statute contains multiple, disjointed subsections, courts may look beyond the statute to certain conclusive records made or used in adjudicating guilt in order to determine which particular statutory alternative applies to the defendant's conviction. These records are generally limited to the charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Hernandez-Rodriguez*, 467 F.3d at 494; *see Shepard v. United States*, 544 U.S. 13, 16, (2005).

D. §2L1.2 And The “Modified Categorical Approach.”

The “modified categorical approach” is used explicitly and virtually exclusively by the 9th Circuit. However, other Circuits, including the 5th and 10th have referred to it by name. *See e.g., United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2008); *United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (9th Cir. 2007); *United States v. Gonzales-Terrazas*, 529 F.3d 293 (5th Cir. 2008). Other circuits essentially use the method without referring to it by name.

The “modified categorical approach” uses *Shepard* documentation to clearly establish that the conviction is a predicate conviction for §2L1.2 enhancement purposes when an offense is not a categorical crime of violence under the sentencing guidelines. *See Narvaez-Gomez*, 489 F.3d at 977.

The 9th Circuit uses the modified categorical approach for all §2L1.2 enhancements.

E. §2L1.2 And The “Commonsense Approach” To The COV Enumerated Crimes.

The 5th Circuit, frustrated by the counter-intuitive, illogical results achieved with the strict categorical approach developed the “commonsense” approach to the categorical analysis and applies it only to the §2L1.2 enumerated offenses. *See United States v. Izaguirre-Flores*, 405 F.3d 270, 272-273 (5th Cir. 2005); *United States v. Gonzales*, 484 F.3d 712, 716 (5th Cir. 2007)(rejecting the commonsense approach to “drug trafficking offenses” because they are defined within the Guideline itself).

This approach requires the court “to determine whether a violation of the [statute of prior conviction] constitutes [an enumerated offense] as that specific offense is understood in its ‘ordinary, contemporary, and common meaning’.” The analysis pre-dates *Shepard* but dovetails into language from *Taylor* where “the enhancement provision does not specifically define the enumerated offense, we must define it according to its ‘generic, contemporary meaning’ and should rely on a uniform definition, regardless of the ‘labels employed by the various States’ criminal codes.” *United States v. Dominguez-Ochoa*,

386 F.3d 639, 642-643 (5th Cir. 2004) quoting *Taylor v. United States*, 495 U.S. 575, 592, 598 (1990).

To divine the “contemporary” definition of an enumerated offense the Circuit frequently looks to sources of authority such as the Model Penal Code and LaFave and Scott’s Substantive Criminal Law to determine its generic meaning. *Id.* Fifty-state statutory reviews and Black’s Law Dictionary are also employed in the effort to determine the essential, common elements of the enumerated offenses.

Some examples of the commonsense approach can be found in *United States v. Balderas-Rubio*, 499 F.3d 270 (5th Cir. 2007)(sexual abuse of a minor); *United States v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007)(burglary); *United States v. Iniguez-Barba*, 485 F.3d 790 (5th Cir. 2007)(kidnapping); *United States v. Santiesteban-Hernandez*, 469 F.3d 376 (5th Cir. 2006)(robbery); *United States v. Alvarado-Hernandez*, 465 F.3d 188 (5th Cir. 2006)(statutory rape).

VII. *Shepard* Documentation.

A. Under *Shepard*, the court may examine the following documents to narrow the scope of an otherwise over-broad statute of prior conviction:

1. The charging instrument. *But see United States V. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993)(charging instrument alone cannot be used to prove the character of the prior conviction).
2. The judgment memorializing the prior conviction.
3. Any admissions made by defendant while under oath at trial, plea, or sentencing.
4. Jury instructions *given* at the defendant’s trial, not jury instructions generally applied to the statute of conviction.
5. The transcript of the plea colloquy for the prior conviction, or
6. Any other judicially approved fact-finding.

Shepard v. United States, 544 U.S. 13, 16, (2005).

B. Examples of documents that cannot be used for categorical analysis purposes:


1. California (or anybody else’s) abstracts of judgment (unless perhaps signed by a judge). *See United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2006).
2. Offense or arrest reports or criminal complaints.
3. A-files or NCIC printouts.
4. Information contained within the PSR concerning the prior conviction. *See United States v. Gutierrez-Ramirez*, 405 F.3d 352, 353 (5th Cir. 2005).




Remember to attach *Shepard* documentation to the PSR or get it introduced as an sentencing exhibit regardless of whether there is an objection to the enhancement.

Restated, plain error does not prevent the reversal of a miscalculated Guideline range.

VIII. Trial Burdens Of Proof (“BOP”) And Appellate Standards Of Review.

 **The burden of proof rests with the party propounding the enhancement.**


A. **In the district court**, most Circuits hold that the BOP is by a preponderance of the evidence. *See e.g., United States v. Tzep-Mejia*, 461 F.3d 522, 526 (5th Cir. 2006). The 9th Circuit requires §2L1.2 16 and 12-level enhancements be proven by “clear and convincing” evidence. *See United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1050 (9th Cir. 2003). As a practical matter, a properly-conducted categorical analysis relies upon clear and convincing evidence.

 **Remember, a miscalculated Guideline range generally results in an “unreasonable” and erroneous sentence that is subject to appellate remand for re-sentencing.**

B. **In the appellate court**, the district court’s ruling concerning the application of a §2L1.2 enhancement is a question of law reviewed *de novo*, unless the issue was not preserved below. *See United States v. Gutierrez-Ramirez*, 405 F.3d 352, 355-356 (5th Cir. 2005).

An objection to the application of the enhancement raised for the first time on appeal is subject to plain error review. *See United States v. Gonzalez-Ramirez*, 477 F.3d 310, 311 (5th Cir. 2007). The misapplication of an enhancement is plain error, however, an appellate court may exercise its discretion to notice the forfeited error only if “the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Gonzalez-Ramirez*, 47 F.3d at 312.

Issues of fact are reviewed for clear error. *See United States v. Gutierrez-Bautista*, 507 F.3d 305, 307 (5th Cir. 2007).

 **Remember, after *Booker*, *Gall*, and *Kimbrough*, the district court’s discretion to ignore a correctly-calculated Guideline range and impose a “reasonable” sentence is reviewable only for an abuse of discretion.**

IX. Other Sources Of Precedent And Inspiration For §2L1.2 Enhancements: §4B1.2 (Career Offender And Criminal Livelihood Guideline) and §2K2.1 (Firearms and Ammunition Offenses Guideline).

A. U.S.S.G. §4B1.2 covers all career offenders and enhancements under 18 U.S.C. §§924(c) and 929(a) pursuant to U.S.S.G. § 4B1.1. U.S.S.G. §2K2.1 covers firearms offenses under 18 U.S.C. §§922(a)-(p), (r)-(w), and (x)(1), 923, 924(a)-(b), (e)-(i) and (k)-(o), 2332(g); 26 U.S.C. §5861(a)-(l).

B. What are the §4B1.2 enhancements?

1. “Crime of Violence” (COV).

- a. Like §2L1.2 COV definition includes a “use of force” strand and an enumerated offense section that is exactly the same as the COV definition in § 2L1.2.
- b. Additionally, a COV under §4B1.2 can also be an offense that “involved the use of explosives,” or an offense that “by its nature, presented a serious potential risk of physical injury to another.” *See* U.S.S.G. §4B1.2 application note 1 (defining crime of violence).



The COV definition under § 4B1.2 is therefore broader than that under § 2L1.2 because of these two extra definitions. You must therefore use §4B1.2 cases carefully.



Also note that the “serious potential risk of physical injury to another” under §4B1.2 is not the same as the expanded §2L1.2, 8-level “aggravated felony” definition of COV for a felony that “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 8 U.S.C. §16(b).

Restated, causation (injury) under §4B1.2 is not the same as intent (use of force) under §2L1.2. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

2. “Controlled Substance Offense.”

- a. The definition of “controlled substance offense” under § 4B1.2 to be virtually the same as the definition of “drug trafficking offense” under §2L1.2. *Compare* U.S.S.G. §4B1.2(b) *with* U.S.S.G. §2L1.2 application note 1(B)(iv).
3. U.S.S.G. §2K2.1 provides that the definitions of “crime of violence” and controlled substance offense” are contiguous with those found in U.S.S.G. §4B1.2. *See* U.S.S.G. §2K2.1 application note 1.

APPENDIX A

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

APPENDIX B

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after--

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

APPENDIX C

§ 1101. Definitions.

(a) As used in this chapter—...**(43)** The term “aggravated felony” means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in [section 802 of Title 21](#)), including a drug trafficking crime (as defined in [section 924\(c\) of Title 18](#));

(C) illicit trafficking in firearms or destructive devices (as defined in [section 921 of Title 18](#)) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in [section 1956 of Title 18](#) (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000;

(E) an offense described in--

(i) [section 842\(h\)](#) or [\(i\) of Title 18](#), or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) [section 922\(g\)\(1\), \(2\), \(3\), \(4\), or \(5\), \(j\), \(n\), \(o\), \(p\), or \(r\) or 924\(b\) or \(h\) of Title 18](#) (relating to firearms offenses); or

(iii) [section 5861 of Title 26](#) (relating to firearms offenses);

(F) a crime of violence (as defined in [section 16 of Title 18](#), but not including a purely political offense) for which the term of imprisonment at [\[FN4\]](#) least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [\[FN4\]](#) least one year;

(H) an offense described in [section 875, 876, 877, or 1202 of Title 18](#) (relating to the demand for or receipt of ransom);

(I) an offense described in [section 2251, 2251A, or 2252 of Title 18](#) (relating to child pornography);

(J) an offense described in [section 1962 of Title 18](#) (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in [section 2421, 2422, or 2423 of Title 18](#) (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of [sections 1581-1585 or 1588-1591 of Title 18](#) (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) [section 421 of Title 50](#) (relating to protecting the identity of undercover intelligence agents); or

(iii) [section 421 of Title 50](#) (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or

(ii) is described in [section 7201 of Title 26](#) (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;

(N) an offense described in [paragraph \(1\)\(A\)](#) or [\(2\) of section 1324\(a\)](#) of this title (relating to alien smuggling), except in the case of a first offense for which 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

(O) an offense described in [section 1325\(a\)](#) or [1326](#) of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of [section 1543 of Title 18](#) or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which 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;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.