Immigration Primer

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This Primer discusses some sentencing-related immigration issues. It is not intended to serve as a comprehensive compilation of issues or cases.

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INTRODUCTION

This Primer discusses some sentencing-related immigration issues. It is not intended to serve as a comprehensive compilation of issues or cases.

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 sentenced under §2L1.1 are those prosecuted under 8 U.S.C. §§ 1324(a) and 1327.

8 U.S.C. § 1324. **Bringing in and Harboring Certain Aliens.** As explained by the *en banc* Ninth Circuit, "[i]n ... § 1324, Congress created several discrete immigration offenses, including: (1) bringing an alien to the United States; (2) transporting or moving an illegal alien within the United States; (3) harboring or concealing an illegal alien within the United States; and (4) encouraging or inducing an illegal alien to enter the United States."[1] The statute also criminalizes engaging in conspiracy to commit any of these acts or the aiding and abetting of any of them. *See* § 1324(a)(1)(v)(I and II).

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

This subsection 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 to commit, and aiding and abetting the commission of, any of these acts.

[1] *United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007)(*en banc*).

Transporting, harboring, or encouraging entry without financial gain has a 5-year maximum penalty.[2] Conspiring to commit any of these crimes, or committing any of these crimes, for financial gain, and bringing aliens to the United States have 10-year statutory maximum penalties.[3] Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum is 20 years.[4] And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.[5] 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.[6] A defendant who aids and abets another in the commission of one of these offenses is subject to a 5-year statutory maximum.[7] Because these statutory enhancements are based on facts other than the defendant's criminal record, they must be charged in the indictment and either pleaded to or found beyond a reasonable doubt by a jury.[8]

8 U.S.C. § 1324(a)(2)[9] — <u>Bringing in Aliens</u>

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. Pursuant to § 1324(a)(2), 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.[10] 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

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[2] 8 U.S.C. § 1324(a)(1)(B)(ii).

[3] 8 U.S.C. § 1324(a)(1)(B)(i).

[4] 8 U.S.C. § 1324(a)(1)(B)(iii).

[5] 8 U.S.C. § 1324(a)(1)(B)(iv).

[6] 8 U.S.C. § 1324(a)(4).

[7] 8 U.S.C. § 1324(a)(1)(A)(v)(II; *see also U.S. v. Hilario-Hilario*, 529 F.3d 65, 69 (1st Cir. 2008) ("One who aids and abets is normally liable as a principal, 18 U.S.C. § 2 (2000), but the smuggling statute prescribes in certain cases a lower sentence for mere aiders and abettors. 8 U.S.C. § 1324(a)(1)(B)".)

[8] *See id*. ("Each one of these characteristics raises the maximum sentence available. 8 U.S.C. §§ 1324(a)(1)(B)(i), (iii), (iv). Although pertinent only to sentencing, a jury determination typically is required to invoke the higher sentences under familiar precedent."), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See also United States v. Williams*, 449 F.3d 635 (5th Cir. 2006)("It is plain that, following *Apprendi*, the 'injury factors' in 8 U.S.C. §§ 1324(a)(1)(B)(iii) and (iv) are 'elements' of greater aggravated offenses... .")

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

[10] 8 U.S.C. § 1324(a)(2)(B)(iii).

3-year mandatory minimum and a 10-year statutory maximum.[11]

Multiple violations of § 1324(a)(2) committed for profit or with reason to believe that the alien will commit a felony invoke further enhancements, including a mandatory minimum 3- or 5-year penalty.[12] Note that "the sentence is calculated 'for each alien with respect to whom a violation . . . occurs.'"[13] Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.[14] Although this recidivist provision raises the statutory maximum, because the increase is based on criminal history, it need neither be pleaded in the indictment nor found by a jury.[15]

Finally, as with § 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.[16]

8 U.S.C. § 1324(a)(3) — Employing Aliens, and Bringing in Aliens for Employment

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 up to 10 years for: an offense that was part of ongoing commercial organization in which aliens were transported in groups of 10 or more and the manner of transportation endangered the aliens' lives.[17] The enhancement also applies where the aliens in question presented a life threatening health risk to people in the United States.[18]

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[11] 8 U.S.C. § 1324(a)(2)(B)(i), (ii).

[12] 8 U.S.C. § 1324(a)(2)(B)(i), (ii) (imposing 3–10 year range for first or second violation and 5–15 year range for any further violations).

[13] *U.S. v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002) (quoting § 1324(a)(2)).

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

[15] *See Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

[16] 8 U.S.C. § 1324(a)(4).

[17] 8 U.S.C. § 1324(a)(4)

[18] 8 U.S.C. § 1324(a)(4)

8 U.S.C. § 1327 Aiding or Assisting Certain Aliens to Enter. This statute prescribes a 10-year statutory maximum penalty for knowingly aiding certain aliens (previously convicted for aggravated felonies) to enter the United States. To be convicted, a defendant need not know that the alien in question had a prior felony conviction. As the Eleventh Circuit has observed: "[T]he district court properly instructed the jury that § 1327 did not require [defendant] to know that the alien...had a prior felony conviction but only that the alien he aided or assisted in entering the United States was inadmissible....§ 1327 requires only that [a defendant] knew the alien he aided or assisted was inadmissible at some point before the alien sought to enter the United States."[19]

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.[20] Violations of § 1327 have a base level of 23 or 25, depending on the immigration status and/or criminal history of the alien being smuggled.[21]

B. Specific Offense Characteristics

Beyond the base offense level, §2L1.1 has nine specific offense characteristics:

1) defendant's prior record of immigration crimes;[22]
2) transportation of an unaccompanied minor;[24]
3) # of aliens smuggled, harbored, or transported;[26]
4) substantial risk of death or serious bodily injury;[27]
5) commercial transportation of large groups in a life-threatening manner;[29]
6) Use of a dangerous weapon;[23]
7) Involuntary detention of alien;[25]
8) infliction of serious bodily injury;
9) "other than for profit" or involved family members.[28]

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[19] *U.S. v. Lopez*, 590 F.3d 1238, 1254-55 (11th Cir. 2009((internal citations omitted).

[20] USSG §2L1.1(a)(3).

[21] USSG §2L1.1(a)(1) (base offense level of 25 if alien was inadmissible under 18 U.S.C. § 1182(a)(3)), §2L1.1(a)(2) (base offense level of 23 if alien was previously deported after aggravated felony conviction).

[22] USSG §2L1.1(b)(3).

[23] USSG §2L1.1(b)(5)(A,B,C).

[24] USSG §2L1.1(b)(4).

[25] USSG §2L1.1(b)(8).

[26] USSG §2L1.1(b)(2).

[27] USSG §2L1.1(b)(6).

[28] USSG §2L1.1(b)(1). This reduction does not apply to defendants convicted under § 1327.

[29] 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.[30]

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.[31] 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.'"[32]

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."[33] The Second Circuit has upheld an upward departure based on 300 aliens.[34] Based upon its observation that the guideline's incremental

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[30] USSG §2L1.1(c)(1).

[31] *See, e.g., 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 profit motive where defendant made repeated trips and long distance calls between Montreal and the U.S., did not have any other job, and conspired with others whose prior smuggling operations were for compensation); *U.S. v. Al Nasser*, 555 F.3d 722 (9th Cir. 2009) (holding that reduction did not apply even though defendant did not personally profit since he was part of scheme to transport aliens for money and knew aliens had paid someone to transport them).

[32] *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, 1076 (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 "'[f]or 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."

[33] USSG §2L1.1, comment. (n.3(C)).

[34] *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 upward departure based on transporting 1000 aliens).

punishment enhancements relied on a geometric exponential of four, the Ninth Circuit has held that 180 aliens were not "substantially more than 100 aliens."[35]

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."[36] Thus, a court may determine the number of aliens based on all acts. For example, recently the Fifth Circuit reviewed a case in which a commercial truck driver smuggled 74 aliens in his tractor-trailer during which 19 aliens died from dehydration and asphyxiation.[37] The district court had applied a 9-level §2L1.1(b)(2) enhancement ("100 or more aliens") based on the defendant's earlier transportation of approximately 60 additional aliens.[38] Noting the numerous ways that conduct can be considered "relevant conduct" for sentencing[39] and the specific relationship between §3D1.2(d) and §2L1.1,[40] the court concluded that the district court did not clearly err when including the earlier transportation (of the 60-odd aliens) as relevant conduct as part of a "common scheme or plan:

> It was not clear error for the district court to include [defendant's] first trip, during which he transported approximately 60 unlawful aliens, as part of the relevant conduct for applying § 2L1.1(b)(2). Ample evidence supports a conclusion that the two trips were part of a common scheme or plan. The same accomplices...were involved in both trips, and...testimony established the number of aliens transported during the first trip. Both trips were for the purpose of transporting aliens and were undertaken with the same modus operandi-unlawful aliens were loaded into Williams's trailer....The Guidelines requirement to establish a common scheme or plan is satisfied here because the offenses are "substantially connected to each other by at least one common factor." Accordingly, the district court did not commit clear error in enhancing [defendant's] sentences by nine levels under § 2L1.1(b)(2)(C).[41]

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."[42] 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.[43]

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[35] *U.S. v. Nagra*, 147 F.3d 875, 886 (9th Cir. 1998). The court reasoned that the guideline's stated enhancement would apply to 100-399 aliens.

[36] USSG §1B1.3(a)(2).

[37] *U.S. v. Williams*, 610 F.3d 271, 274-75 (5th Cir. 2010).

[38] *Id*. at 292.

[39] *Id*.

[40] *Id*. at Fn. 28. ("Section 3D1.2(d) includes offenses covered by § 2L1.1.")

[41] *Id*. at 293-294. (Internal citations omitted.)

[42] *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).

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

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 note states 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."[44] This enhancement "is not limited to the examples provided in the commentary."[45] 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."[46] 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 foot, in which case the Fifth Circuit has looked at the "entire picture" in deciding whether to apply the enhancement.[47]

A number of published circuit court opinions apply this enhancement, and some of these are set forth in Table 1 in the Appendix. Note that there is some disagreement as to whether unrestrained passengers lying on the floor of an enclosed van satisfy this enhancement.[48] Also, to qualify for this enhancement, either the defendant must have *created* the risk of danger,[49] or the risk must have, at least, been "reasonably foreseeable in connection with that criminal activity."[50] 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."[51]

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[44] USSG §2L1.1, comment. (n.5).

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

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

[47] *Compare U.S. v. 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 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) (holding that application of enhancement was proper where defendant led 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 without adequate food, water and rest periods qualified for enhancement); *U.S. v. Rodriguez-Cruz*, 255 F.3d 1054, 1056 (9th Cir. 2001) (enhancement proper where defendants guided 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").

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

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

[50] USSG §1B1.3, comment. (n.2); *see also 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).

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

Notably, although "[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,"[52] 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."[53] It has articulated five factors to consider under §2L1.1(b)(6): "the availability of 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."[54]

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.[55]

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,

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

[53] *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).

[54] *Zuniga-Amezquita*, 468 F.3d at 889.

[55] *U.S. v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007).

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).[56]

Thus, it will apply the enhancement "only when the circumstances increased the likelihood of an accident or the chance of injury without an accident."[57]

3. Tenth Circuit

The Tenth Circuit has indicated that the inquiry under this enhancement "essentially equates to a totality of the circumstances test."[58] Under this analysis, the court "must disregard the 'baseline risk . . . inherent in all vehicular travel,' delving instead into whether the 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."[59]

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.[60]

Although "the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct,"[61] courts have typically not required that the defendant be the direct cause of the injury or death.[62] For example, it is not necessary for the defendant to be the driver.[63] Furthermore, the enhancement does not require intent to cause injury or death.[64] The Eleventh Circuit recently held that "to apply the § 2L1.1(b)(7) enhancement it must be reasonably foreseeable to a defendant that his actions or the actions of any other member of the

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[56] *Id.* at 889–90.

[57] *Id.* at 890.

[58] *U.S. v. Munoz-Tello*, 531 F.3d 1174, 1183 (10th Cir. 2008).

[59] *Id.* at 1184 (quoting *Torres-Flores*, 502 F.3d at 889-90).

[60] Before subsequent guideline amendment, this provision was found at subsection (b)(6).

[61] *U.S. v. Flores-Flores*, 356 F.3d 861, 862 (8th Cir. 2004).

[62] *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).

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

[64] *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 [§2L1.1(b)(7)].").

smuggling operation could create the sort of dangerous circumstances that would be likely to result in serious injury or death."[65] The court specifically rejected the suggestion that the enhancement requires that the defendant's individual actions must be the proximate cause of the death or serious injury, although it did note a circuit split of authority on that issue.[66]

Courts have upheld the application of both §2L1.1(b)(6) (Creating Risk of Injury) and §2L1.1(b)(7) (Bodily Injury) in a single case over claims that applying both enhancements reflects 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.'"[67]

E. Involuntary Detention - §2L1.1(b)(8)(A): If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) 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.

The Tenth Circuit approved the application of §2L1.1(b)(8) 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 them urinate in a bottle.[68]

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. Relying directly on Fifth Circuit jurisprudence, the Eight Circuit has recently observed that "the victims of the crime of harboring illegal aliens are, by definition, illegal aliens, and as such, the workers' immigration status does not distinguish them from other potential victims of the crime. Thus, the workers' immigration status did not alone make them more vulnerable in this case."[69] In other words, the relevant question is whether a particular victim of the smuggling offense is "more unusually vulnerable" than any other such

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[65] *United States v. Zalvidar*, 615 F.3d 1346, 1350-51 (11th Cir. 2010).

[66] *Id.* at 1350, n. 2 and 1351.

[67] *Cardena-Garcia*, 362 F.3d at 667; *see also Herrera-Rojas*, 243 F.3d at 1144.

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

[69] *U.S. v. De Oliveira*, 623 F.3d 593, 598 (8th Cir. 2010), citing *U.S, v. Medina-Argueta*, 454 F.3d 479, 482 (5th Cir. 2006) ("This court has determined that, in order for an illegally smuggled alien involved in a violation of 8 U.S.C. § 1324 to be a vulnerable victim, he must be 'more unusually vulnerable to being held captive than would be any other smuggled alien.' " (Internal citation omitted.))

victim.[70] The Fifth Circuit has observed 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."[71] It has noted that the "general characteristics commonly held by aliens seeking to be illegally smuggled" do not create a vulnerability that warrants an upward departure.[72] However, the Fifth Circuit has also recognized that smuggled aliens who were "detained against their will after being transported" are "victims" for purposes of §3A1.1(b)(1).[73]

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

Commentary to section 2L1.1 invites consideration of a defendant's aggravating role in the offense, but states that for purposes of §3B1.1 (leadership role), the smuggled aliens are not considered "participants" "unless they actively assisted in the smuggling, transporting, or harboring of others."[74] Some courts have applied §3B1.1 to increase sentences,[75] and others routinely deny reductions for minor participant under §3B1.2.[76]

C. Special Skill - §3B1.3

The First Circuit has held that piloting a simple wooden boat without benefit of

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[70] *See U.S. v. Angeles-Mendoza*, 407 F.3d 742, 748 (5th Cir. 2005).

[71] *Id*. at 747 (citing *U.S. v. Velasquez-Mercado*, 872 F.2d 632, 636 (5th Cir. 1989) (noting that smuggled aliens "might be more properly characterized as 'customers' than 'victims'")).

[72] *Id*. at 747-78 (stating that "the *inherent* vulnerability of smuggled aliens" has been "adequately taken into account in establishing the base offense level in USSG §2L1.1").

[73] *Id.* at 747.

[74] USSG §2L1.1, comment. (n.2).

[75] *See, e.g., United States v. Caraballo*, 595 F.3d 1214, 1232 (11th Cir. 2010) (affirming enhancement where defendant recruited a co-defendant to participate in the smuggling operation; hosted the other smugglers; specifically instructed co-defendants on how to commit the crime; required co-defendants to sign a contract agreeing to tell a fabricated story to the authorities if they were caught; financed the smuggling trip; and agreed to pay a co-defendant for his role in the venture. *See also 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").

[76] *See, e.g., Villanueva*, 408 F.3d at 204 (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, 754 (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, 1060 (9th Cir. 2001) (affirming decision not to award minor role reduction where defendant acted as "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, 1160 (9th Cir. 1999) ("[T]he mere fact that appellant was to transport the aliens north does not entitle 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).

navigation aids on choppy seas under the direction of another does not qualify as a special skill.[77] But the Eleventh Circuit has recently held that piloting an overloaded, "Scarab" model, high-performance boat at night while evading a Coast Guard vessel does qualify as a special skill.[78]

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.[79] Here, the defendant, who was smuggling two aliens (hidden behind her hatchback car's backseat) across the border, drove away rapidly from the checkpoint after being identified for inspection. Although law enforcement pursued her, she evaded them–until her car hit a highway median and she stalled. When the authorities approached, she ran from the stalled car but was apprehended. After the district court imposed a §2L1.1 "substantial risk of death or bodily injury" enhancement and a §3C1.2 "reckless endangerment during flight" enhancement, the Ninth Circuit reversed. The court noted that the district court had impermissibly based both enhancements upon the defendant's "flight" conduct and concluded that it was improper to assess a §3C1.2 enhancement for the same conduct: "It is clear from the district court's ruling that the sole basis for the application of the [serious bodily injury] enhancement was [defendant]'s reckless flight. We are bound to follow the application notes...and the directive is clear: "If [a substantial risk of serious bodily injury" enhancement] applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from § 3C1.2."[80]

E. Departures and Variances

1. Multiple Deaths. The Tenth Circuit affirmed an upward departure where multiple deaths resulted from defendant's conduct.[81]

2. Duration of the Harboring. The Fourth Circuit affirmed an upward departure for a harboring conspiracy that went on for 19 years.[82]

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."[83]

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

[78] *U.S. v. De La Cruz Suarez*, 601 F.3d 1202, 1219 (11th Cir. 2010), cert. denied, 131 S.Ct. 393 (2010).

[79] *U.S. v. Lopez-Garcia*, 316 F.3d 967 (9th Cir. 2003).

[80] *Id*. at 970. (Internal citations omitted.)

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

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

[83] *U.S. v. Alapizco-Valenzuela*, 546 F.3d 1208, 1220, 1223 (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.[84] Subsequent entries,[85] reentry after deportation,[86] and remaining in the United States after being ordered deported[87] are felonies covered by USSG §2L1.2.[88] 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.

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.[89]

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.

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[84] 8 U.S.C. § 1325(a).
[85] *Id.*
[86] 8 U.S.C. § 1326.
[87] 8 U.S.C. § 1253.
[88] This guideline has been applied to a conviction for false claim of citizenship in the course of reentering the country. *See U.S. v. Castaneda-Gallardo*, 951 F.2d 1451 (5th Cir. 1992).
[89] *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

As with § 1325(a), the statutory maximum term of imprisonment for illegal reentry depends on the defendant's prior criminal record. In general, an alien who has no criminal history is subject to a 2-year maximum.[90] 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.[91] If the prior conviction was an "aggravated felony" as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.[92]

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.[93] This is not the case for enhancements based on a defendant's prior deportation, which must be found by a jury.[94] Under *Apprendi*, for a defendant to be eligible for an enhanced § 1326 statutory maximum, the government's indictment must allege not only a prior removal and subsequent reentry, but also the date of that removal or the fact that it occurred after a qualifying prior conviction.[95] But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.[96]

Thus, the Ninth Circuit has concluded that an indictment will support a § 1326(b) sentencing enhancement if it alleges a removal date because this action will allow a sentencing court to "to compare that date to the dates of any

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[90] 8 U.S.C. § 1326(a)(2).

[91] 8 U.S.C. § 1326(b)(1), (3), (4).

[92] 8 U.S.C. § 1326(b)(2).

[93] *Almendarez-Torres*, 523 U.S. at 226-27 (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).

[94] *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).

[95] *U.S. v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008)

[96] *See, e.g., U.S. v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007) (rejecting a "structural error" analysis and instead concluding that such error "can be adequately handled under the harmless error framework.").

qualifying felony convictions to determine whether the sentence-enhancing sequence [whereby that removal must follow the earlier qualifying conviction] is satisfied."[97] That court also held that the indictment need not include the removal date if the indictment language otherwise alleges facts establishing that the removal occurred after a qualifying conviction.[98]

Furthermore, the Fifth Circuit has concluded that, when an indictment is silent as to a removal date but a defendant admits PSR facts that establish the critical "sequencing" information, the resulting sentencing enhancement survives even plain error review.[99]

Courts have held that it does not violate the Equal Protection clause to enhance a defendant's sentence based on prior convictions.[100]

8 U.S.C. § 1253 — Failure to Depart[101]

This statute makes it a crime for an alien who has been ordered to depart the country to (A) remain in the country 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.[102]

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[97] *Mendoza-Zaragoza*, 567 F.3d 431, 434 (9th Cir.), *cert. denied*, 130 S. Ct.. 420 (2009).

[98] *U.S. v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008) ("[I]n order for a defendant to be eligible for an enhanced statutory maximum under § 1326(b), the indictment must allege, in addition to the facts of prior removal and subsequent reentry, either the date of the prior removal or that it occurred *after* a qualifying prior conviction.") (emphasis in original) citing *U.S. v. Salazar-Lopez*, 506 F.3d 748, 752 (9th Cir. 2007).

[99] *See U.S. v. Ramirez*, 557 F.3d 200 (5th Cir. 2009) (not plain error for court to enhance sentence based on uncharged date of removal acknowledged by defendant in PSR).

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

[101] 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.

[102] 8 U.S.C. § 1253(a)(1). The 10-year statutory maximum applies to individuals deported pursuant to 8 U.S.C. § 1227(a)(1)(E) (for helping an alien enter the United States), § 1227(a)(2) (for certain criminal offenses), § 1227(a)(3) (for failure to register and falsification of documents), and § 1227(a)(4) (for security threats).

II. Guideline Overview: USSG §2L1.2

A. Ex Post Facto Considerations

The Commission's amendment to §2L1.2 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."[103] Notably, courts have held that illegal reentry is a continuing offense that continues until the alien is "found" in the United States, and that, therefore, a court can apply the Guidelines Manual in effect when the alien is "found," as opposed to the Manual in effect when the alien reenters the United States, without violating the *ex post facto* clause.[104] 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."[105] Aan alien can be "found in" the United States when a law enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) (the 287(g) program) issues an immigration detainer.[106]

B. Base Offense Level

Guideline 2L1.2's base offense level is 8.[107]

C. Specific Offense Characteristic

The specific offense characteristic at (b)(1) is based upon a defendant's criminal history that predates his removal order.[108] This "tiered" enhancement assigns a 16-, 12-, 8-, or 4-level increase, depending on the nature (and/or quantity) of the defendant's prior convictions. Effective November 1, 2011, convictions can be enhanced under subsections (b)(1)(A) and (B) with the respective 16- and 12-level enhancements if they receive criminal history points under Chapter

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[103] USSG §1B1.11.

[104] *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).

[105] *U.S. v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *see also U.S. v. Whittaker*, 999 F.2d 38, 42 (2d Cir. 1993) (stating that "found" is synonymous with "discovered in"); *U.S. v. Bencomo-Castillo*, 176 F.3d 1300 (10th Cir. 1999).

[106] *U.S. v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009) (holding that sentence enhancement under §4A1.1(e) did not apply to defendant because law enforcement officer did not issue immigration detainer until March 3, 2007 and defendant had not yet been sentenced at that time).

[107] USSG §2L1.2(a).

[108] USSG §2L1.2(b).

IV (Criminal History and Criminal Livelihood); if they do not, then respective 12- and 8-level enhancements will apply.[109] Because an applicable offense level may substantially overstate or understate the seriousness of a previous conviction, an upward or downward departure may be warranted.[110]

The following categories of convictions receive a 16-level enhancement at (b)(1)(A) regardless of the length of the prior conviction: crimes of violence, firearms offenses, child pornography offenses, national security or terrorism offenses, human trafficking offenses, or alien smuggling offenses.[111] A prior drug trafficking offense also receives a 16-level enhancement if the sentence imposed was greater than 13 months.[112]

A felony drug trafficking offense that received a sentence of less than 13 months qualifies for a 12-level enhancement.[113]

Certain temporal limitations on the 16- and 12-level enhancements. Generally speaking, §2L1.2 looks to the *nature* of a previous convictions when assessing the 16-and 12-level enhancements. But when applied to previous drug-trafficking convictions, the guideline also looks to two other factors: the *length* of the sentence imposed and the *timing* of the sentence's imposition. Where an imposed sentenced is greater then 13 months, the 16-level enhancement may apply; where an imposed sentences is 13 months or less, a 12-level enhancement may apply.

An additional consideration comes into play under the following (relatively rare) circumstance: a defendant's conviction(s) result in a probated sentence; the defendant is deported or removed; the defendant returns; his earlier probation is revoked and a sentence is imposed. The circuit courts are split over whether such a sentence–which occurs *after* the deportation or removal–"relates backs" to the date of the initial (pre-deportation or removal) conviction so as to support the 16- or 12-level enhancements. The Second Circuit has permitted the enhancement;[114] the Tenth Circuit has done likewise on plain error but has said it might have reached a different result if error had been preserved, because "[a] careful examination of the context and purposes of § 2L1.2 might convince us that Defendant's interpretation is the correct one;"[115] and the Fifth

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[109] The Commission proposed this amendment on April 6, 2011, and, absent Congressional action to the contrary, the amendment will become effective on November 1, 2011.

[110] *See* U.S.S.G. §2L1.2 App. Note 7 Departure Based on Seriousness of a Prior Conviction (providing non-exhaustive examples where upward and downward departures might be warranted).

[111] USSG §2L1.2(b)(1)(A)(ii)–(vii).

[112] USSG §2L1.2(b)(1)(A)(i).

[113] USSG §2L1.2(b)(1)(B). This provision is also the subject of possible amendment. *See* note 105, above.

[114] *U.S. v. Compres-Paulino*, 393 F.3d 116, 118 (2nd Cir. 2004).

[115] *U.S. v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003).

and Eleventh Circuits have rejected enhancements under these circumstances.[116]

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).[117] The term "aggravated felony" is defined at 8 U.S.C. § 1101(a)(43) which is set out and discussed below.

Any other felony receives a 4-level enhancement.[118]

A 4-level enhancement also applies where the defendant has had three prior misdemeanor convictions for drug trafficking offenses or crimes of violence.[119]

III. Identifying Prior Convictions

A. General Principles

The enhancements for reentry offenses are based on a defendant's criminal history; therefore 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

To be considered as the basis for an enhancement, a conviction must precede a deportation.[120] It does not matter that the defendant "remained" in the United States following a prior conviction – the conviction must precede deportation to qualify for an enhancement.[121] A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is still pending

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[116] *U.S. v. Bustillos-Pena*, 612 F.3d 863, 868 (5th Cir. 2010) (finding USSG §2L1.2's language ambiguous and applying the rule of lenity to vacate and remand for resentencing); *U.S. v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000). The Ninth Circuit's case law also supports the non-application of the enhancement. *See generally U.S. v. Jimenez*, 258 F.3d 1120, 1125-26 (9th Cir. 2001)(approving the enhancement where the defendant's probated sentence was revoked and 2 years' imprisonment imposed *before* deportation but stating that such an enhancement is only appropriate where the defendant's term of imprisonment was imposed "prior to his deportation and reentry").

[117] USSG §2L1.2(b)(1)(C).

[118] USSG §2L1.2(b)(1)(D).

[119] USSG §2L1.2(b)(1)(E).

[120] 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 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).

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

when the defendant is deported.[122]

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

The law authorizes immigration authorities to reinstate a prior removal order.[123] 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.[124] Thus, the enhancement applies where a conviction follows the original deportation order but precedes a subsequent reinstatement of that order.[125] For purpose of criminal sanctions, "what matters" is "the alien's *physical* removal."[126] 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.[127]

3. Qualifying adult convictions

In contrast to the criminal history guidelines in Chapter 4, which exclude convictions that were imposed more than 5, 10, or 15 years earlier,[128] *as of this writing* there is no current time limit on when a prior conviction must have been imposed to be counted under §2L1.2.[129] But effective November 1, 2011, this will likely change. As a result of a proposed guideline amendment, on that date convictions can be enhanced under subsections (b)(1)(A) and (B) with the respective 16- and 12-level enhancements only if they receive criminal history points under Chapter IV (Criminal History and Criminal Livelihood); if they do not, then respective 12- and 8-level enhancements will apply.[130] In further contrast to the criminal history guidelines, which consider juvenile convictions within the past five years,[131] "a conviction for an offense

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

[123] 8 U.S.C. § 1231(a)(5).

[124] *See, e.g., U.S. v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (holding that the enhanced penalty under § 1326(b)(2) was proper where a defendant was removed in 1997, reentered the United States illegally, was convicted of an aggravated felony, was removed pursuant to the reinstated removal order from 1997, entered the United States once again, and was convicted for illegal reentry; the court stated that "the statute plainly contemplates, *after* the reentry, a *second removal* under the reinstated prior order") (emphasis in original).

[125] *See, e.g., 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).

[126] *Diaz-Luevano*, 494 F.3d at 1161.

[127] *U.S. v. Gomez-Leon*, 545 F.3d 777, 783 (9th Cir. 2008).

[128] USSG §4A1.2(e).

[129] USSG §2L1.2, comment. (n.1(a)(ii), n.6); *see also, e.g., U.S. v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007). But the Commission's proposed amendment (dated April 6, 2011), will , absent Congressional action to the contrary, become effective on November 1, 2011.

[130] The Commission proposed this amendment on April 6, 2011, and, absent Congressional action to the contrary, the amendment will become effective on November 1, 2011.

[131] USSG §4A1.2(d).

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."[132] The conviction for which the defendant receives an enhancement need not be the most recent conviction,[133] nor must the defendant have been deported as a result of that conviction.[134]

4. Delayed adjudications may qualify as convictions

A deferred adjudication qualifies as a prior conviction under §2L1.2.[135] A guilty plea held in abeyance qualifies as a "conviction" under §2L1.2.[136]

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.[137] The enhancement, however, would not apply if the conviction was vacated on "a showing of actual innocence"[138] or a showing "that the conviction had been improperly obtained."[139]

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.[140] Thus, a prior conviction that would support an enhanced sentence under either the statutes or the

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

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

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

[135] *U.S. v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009); *U.S. v. Ramirez*, 367 F.3d 274 (5th Cir. 2004).

[136] *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").

[137] *U.S. v. Luna-Diaz*, 222 F.3d 1 (1st Cir. 2000) (applying enhancement where defendant, after pleading guilty to illegal reentry, was successful at having prior aggravated felony conviction vacated); *U.S. v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (affirming enhancement based on prior conviction that was set aside because terms of probation had been satisfied); *U.S. v. Garcia-Lopez*, 375 F.3d 586, 588 (7th Cir. 2004) (applying enhancement where prior conviction was vacated "based upon 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 (11th Cir. 2005) (stating that conviction vacated after illegally returning to United States should still be considered under § 2L1.2).

[138] *Garcia-Lopez*, 375 F.3d at 589.

[139] *Campbell*, 167 F.3d at 98.

[140] *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.[141] Of course, as in any case, a defendant's sentence is circumscribed by any statutory maximum applicable to the statute charged in the indictment.

7. Is the prior conviction a felony?

Of the five enhancements called for in §2L1.2, four are triggered by a defendant's previous "felony" conviction(s).[142] But while §2L1.2 unremarkably defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year,"[143] this definition–and §2L1.2's definition of "aggravated felony"–expand the type of convictions that qualify for the guideline's felony enhancement(s) to include otherwise qualifying state misdemeanor offenses:

1. *State misdemeanors that are punishable by more than one year.* If a state misdemeanor is punishable by more than a year in prison, §2L1.2's definition of felony may well treat that conviction as qualifying for a guideline felony enhancement.[144] For the same reasons, a prior state court misdemeanor conviction can trigger § 1326(b)(1)'s 10-year statutory maximum if, under federal law, it is a felony, *i.e.*, "an offense punishable by a maximum term of imprisonment of more than one year."[145]

2. *"Aggravated felony" as used in §2L1.2(b)(1)(C) and 8 U.S.C. § 1101(a)(43) can encompass misdemeanor offenses*. Guideline 2L1.2 levies an 8-level enhancement where a defendant's previous conviction qualifies as an "aggravated felony" pursuant to Title 8, United States Code, Section 1101(a)(43).[146] Subsection (a)(43) provides that an aggravate felony, includes, among other things, "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [*is*] *at least one year*."[147] Thus, as numerous circuits have noted, this definition may encompass state misdemeanor offenses that are

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[141] Note that this rule does not apply to the fact of deportation, so that a statutory enhancement based on a finding that a 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).

[142] USSG §2L1.2(b)(1)(A), (B), (C), and (D). The fifth enhancement–§2L1.2(b)(1)(**E**)–allows for a 4-level upward adjustment when a defendant's previous convictions include "three or more misdemeanors for convictions that are crimes of violence or drug trafficking offenses."

[143] USSG §2L1.2, comment. (n.2).

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

[145] *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)).

[146] USSG §2L1.2(b)(1)(C) and App. Note 3(A).

[147] Title 8, United States Code, Section 1101(43)(F) and note (3) (explaining that Congress likely excluded the word "is" when drafting the statute.)(Italics added.)

themselves also punishable by up to a year's imprisonment.[148]

In short, for §2L1.2 enhancement purposes, the focus is generally on the nature of the offense and the length of sentence that *could be* imposed.

The guideline definition of a felony can be difficult to apply when a crime is punishable either as a felony or a misdemeanor.[149] In these cases, courts will examine the court record to determine whether the crime–often known as a "wobbler"[150]–was a felony or misdemeanor.[151] Sometimes, the length of sentence imposed may provide a clue.[152] In one case, the Tenth Circuit held that an offense, which was charged as a felony but was convertible to a misdemeanor upon entry of a judgment imposing a punishment other than imprisonment in state prison or upon declaration by the court, did not convert to a misdemeanor because, although the defendant received probation, the judgment did not note this fact and the court never declared the offense a misdemeanor.[153]

B. Categorical Approach

In reentry cases, courts must often 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 particular §2L1.2 enhancement(s). In general, these tasks are guided by the Supreme Court's opinions in *Taylor v. United States*[154] and *Shepard v. United States*,[155] which set forth a "categorical approach" to deciding whether a prior conviction fits within a certain category of crimes.

Taylor holds that, when deciding whether a prior conviction falls within a certain class of crimes, a sentencing court may "look only to the fact of conviction and the statutory definition of the prior offense."[156] A court is *not* concerned with the "facts underlying the prior convictions;"

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[148] *See*, *e.g.*, *U.S. v. Saenz-Mendoza*, 287 F.3d 10111013-14 (10th Cir. 2002)(collecting cases and observing that "we agree with our sister circuits that an offense need not be classified as a felony to qualify as an 'aggravated felony' as that term is statutorily defined in § 1101(a)(43).")

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

[150] *See, e.g., U.S. v. Melchor-Meceno*, 620 F.3d 1180, 1184 no. 4 (9th Cir. 2010)(observing that various California statutes are "wobbler" provisions because they permit charging as a felony or a misdemeanor.

[151] *Id*.

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

[153] *Hernandez-Castillo*, 449 F.3d at 1131 (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).

[154] 495 U.S. 575 (1990).

[155] 544 U.S. 13 (2005).

[156] *Taylor*, 495 U.S. at 602.

in other words, the court may not focus on the underlying criminal conduct itself.[157]

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."[158]

> 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.[159]

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."[160]

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."[161]

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 enhancement is based on a prior conviction, including §2L1.2.[162] Under this approach, a court begins by looking only at the fact of conviction and determining whether the elements of the crime fit 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.[163]

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[157] *Id.* at 600-02.

[158] *Id.* at 602.

[159] *Id.*

[160] *Id.*

[161] 544 U.S. at 26.

[162] *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 (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. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006).

[163] *U.S. v. Rodriguez-Guzman*, 506 F.3d 738, 744 (9th Cir. 2007); *see also U.S. v. Diaz-Ibarra*, 522 F.3d 343, 348 (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

C. Modified Categorical Approach

In cases where a statute of conviction covers conduct that fits within the category and conduct that does not, 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."[164] 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.[165] "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."[166]

Under this limited review, the court may consider only those sources approved by *Shepard*.[167] These sources include the charging document, jury instructions, any plea statement or admissions, or "some comparable judicial record of this information."[168] The Fifth Circuit has extended this list to include New York Certificates of Disposition[169] and the Ninth Circuit has included California Minute Entries.[170] On the other hand, courts typically may not rely on the description in a federal PSR,[171] California abstracts,[172] or police reports.[173]

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

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715 (8th Cir. 2005); *U.S. v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007).

[164]*Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

[165] *See U.S. v. Reina-Rodriguez*, 468 F.3d 1147, 1153 (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).

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

[167] *Id.* at 1154.

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

[169] *U.S. v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding that certificate of disposition did not support enhancement because it did not specify which subsection of 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 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").

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

[171] *See, e.g., U.S. v. Garza-Lopez*, 410 F.3d 268, 274 (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]").

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

[173] *See, e.g., Shepard*, 544 U.S. at 16; *U.S. v. Almazan-Becerra*, 482 F.3d 1085, 1090 (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 to by defendant).

acknowledged in a guilty plea.[174] 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,"[175] and the Ninth Circuit has authorized courts to look 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."[176] 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.[177]

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. A 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.'"[178] In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.[179] "'[T]he list in *Shepard* is designed to illuminate documents that identify *what crime* the defendant committed. . . . [W]hat matters is the fact of conviction, rather than the facts *behind* the conviction.'"[180]

D. Common Sense Approach

The Fifth Circuit uses a "common sense approach" in connection with the categorical approach.[181] 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

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[174] *See, e.g., U.S. v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding that court could not use criminal information to identify statute of conviction because it charged crime for which defendant was not convicted); *U.S. v. Neri-Hernandes*, 504 F.3d 587, 590 (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).

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

[176] *U.S. v. Almazan-Becerra*, 537 F.3d 1094, 1098, 1100 (9th Cir. 2008).

[177] *See, e.g., U.S. v. Sandoval-Sandoval*, 487 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) (fact of conviction).

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

[179] *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 statute of conviction).

[180] *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) (emphasis in original)).

[181] *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).

§2L1.2's crime-of-violence enhancement."[182] Under the common sense approach, the court takes an undefined guideline term and articulates the "ordinary, contemporary, [and] common" meaning of that term.[183] The "primary source for the generic contemporary meaning of [a category of offenses] is the Model Penal Code,"[184] as well as "treatise[s], modern state cases, and dictionaries."[185]

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."[186] If the statute is broader than the definition, then the court looks at the sources approved by *Shepard* to decide whether the prior conviction falls within the categorical definition.[187] In this way, it appears the Fifth Circuit's "common sense approach" is used in tandem with the "categorical approach."[188]

The Fifth Circuit 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 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.[189]

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[182] *U.S. v. Tellez-Martinez*, 517 F.3d 813, 814 (5th Cir. 2008).

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

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

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

[186] *U.S. v. Ramirez*, 557 F.3d 200, 205 (5th Cir. 2009).

[187] *See, e.g., Torres-Diaz*, 438 F.3d at 534 (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").

[188] *See, 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.").

[189] *U.S. v. Rojas-Gutierrez*, 510 F.3d 545, 548 (5th Cir. 2007) (citations and quotations omitted); *see also U.S. v. Lopez-DeLeon*, 513 F.3d 472, 474 (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

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."[190]

No other circuit court follows the Fifth Circuit's common sense approach, except to the extent that certain courts exhort the use of "common sense" as a general matter in determining whether a conviction fits within a category of crimes[191] and, in fact, the Ninth Circuit has expressly foreclosed resort to the Fifth Circuit's common sense approach.[192]

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

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

Guideline §2L1.2 defines a drug trafficking offense as "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."[193] The interplay between this definition and various statutes can be seen in Table 2 in the Appendix, but a few highlights are worth noting:

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

To qualify for enhancement under the "categorical approach" as a "drug-trafficking" conviction, all of the conduct covered by the statute of conviction must fit within this definition of drug trafficking. If some of the conduct does not, the conviction does not qualify for an

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ordinary, contemporary, and common meaning, by reviewing the Model Penal Code (MPC), treatises, modern state codes, and dictionaries.").

[190] *Rojas-Gutierrez*, 510 F.3d. at 549-50.

[191] *See, e.g., U.S. v. Johnson*, 417 F.3d 990, 999 (8th Cir. 2005) (utilizing categorical approach and indicating that circuit's prior cases "teach that we must take a common sense approach in evaluating the risks created by, and the likely consequences in the commission of, the crime"), *overruled on other grounds by U.S. v. Lee*, 553 F.3d (8th Cir. 2009); *U.S. v. Griffith*, 455 F.3d 1339, 1345 (11th Cir. 2006) (employing a modified categorical approach; faulting Ninth and Seventh Circuits for illogical results in similar cases; and stating that "[w]e will stick to the common sense approach and result where we can, and here we can").

[192] *U.S. v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009); *see also U.S. v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006) (faulting Fifth Circuit's use of common sense approach in case involving sexual abuse of a minor).

[193] USSG §2L1.2, comment. (n.1(b)(iv)).

enhancement.[194] For statutes that include trafficking and non-trafficking 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;[195] if the documents are ambiguous or silent, no drug-trafficking enhancement applies.

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."[196] The Eleventh Circuit has held that when a statutory scheme designates "possession of a significant designated quantity of drugs" as a drug trafficking offense, that designation implies the intent needed to qualify as a drug trafficking offense.[197] 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.[198] In 2008, the Commission adopted an upward departure provision for simple possession convictions in which the defendant possessed a large quantity of drugs.[199]

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[194] *See, e.g., U.S. v. Maroquin-Bran,* 587 F.3d 214 (4th Cir. 2009) (holding that conviction for selling or transporting marijuana, in violation of Cal. Health & Safety Code § 11360(a), is not categorically drug trafficking offense, because transporting marijuana would not trigger the sentencing 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 categorically drug trafficking because § 11379(a) included offers to transport for personal use and 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.

[195] *See, e.g., 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).

[196] *See, e.g., U.S. v. Villa-Lara*, 451 F.3d 963 (9th Cir. 2006) (conviction for possession of a controlled substance in violation of Nev. Rev. Stat. § 453.3385 was not a drug trafficking offense); *U.S. v. Herrera-Roldan*, 414 F.3d 1238 (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).

[197] *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*, 507 F.3d 305 (5th Cir. 2007) (same).

[198] *See, e.g., U.S. v. Herrera-Garduno*, 519 F.3d 526, 530-31 (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 heroin"); *U.S. v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008) (recognizing that upward variance may be appropriate where conviction for simple possession of large quantity of drugs did not qualify as a drug trafficking offense).

[199] USSG §2L1.2, n.7.

B. How long was the sentence?

For felony drug trafficking offenses, it is also necessary to determine the length of the "sentence imposed." For convictions that received a sentence greater than 13 months, a 16-level enhancement applies.[200] A 12-level enhancement applies to felony convictions that received a sentence of 13 months or less.[201]

The rules for this determination are currently similar to the rules for calculating sentence length under Chapter 4.[202] Consistent with Chapter 4, the sentence length is "based on the sentence pronounced, not the length of time actually served."[203] It does not include any portion that was suspended,[204] but it does include "any term of imprisonment given upon revocation of probation, parole, or supervised release."[205] Where a court imposed an indeterminate sentence, however, the sentence imposed is the stated maximum rather than the time actually served on the indeterminate sentence.[206]

A "sentence imposed" under §2L1.2 has the same meaning as a "sentence of imprisonment" under Chapter 4.[207] 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."[208] Thus, a sentence that did not result in any term of imprisonment is not a "sentence

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[200] USSG §2L1.2(b)(1)(A)(i).

[201] USSG §2L1.2(b)(1)(B).

[202] 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).

[203] 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).

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

[205] USSG §2L1.2, comment. (n.1(B)(vii)); *see also U.S. v. Moreno-Cisneros*, 319 F.3d 456, 457 (9th Cir. 2003) (holding that "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) (holding that the length of the "sentence imposed" included sentence imposed on revocation of probation).

[206] 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, 212 (3d Cir. 2003) (holding that "the term 'sentence imposed' in § 2L1.2 means the maximum term of imprisonment in an indeterminate sentence").

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

[208] USSG §4A1.2, comment. (n.2).

imposed" under §2L1.2.[209] Therefore, a prior conviction that received a sentence of probation or a noncustodial fine does not qualify for either a 12- or 16-level increase because each of these enhancements requires a "sentence [be] imposed."[210]

Because suspended time does not count towards the "sentence imposed" under §2L1.2, courts have occasionally considered 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."[211] 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.[212] Likewise, deportation prior to expiration of a defendant's sentence does not constitute a suspension, even when the sentencing court authorized immediate deportation.[213] However, a judicial order reducing a sentence can change the length of the "sentence imposed."[214]

The Ninth Circuit held that while a sentence imposed on a probation violation was properly considered in calculating sentence length, where the statutory scheme and record suggested that the total time could not have exceeded 365 days, the sentence was necessarily less

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[209] *See, e.g., U.S. v. Alvarez-Hernandez*, 478 F.3d 1060 (9th Cir. 2007) (holding that 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. Hernandez-Valdovinos*, 352 F.3d 1243, 1249 (9th Cir. 2003) ("A sentence of probation . . . by definition is a sentence of 13 months or less."); *see also U.S. v. Mullings*, 330 F.3d 123 (2d Cir. 2003); *U.S. v. Garcia-Rodriguez*, 415 F.3d 452 (5th Cir. 2005).

[210] §2L1.2(b)(1)(A) and (B).

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

[212] *See, e.g., U.S. v. Valdovinos-Soloache*, 309 F.3d 91 (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. Frias*, 338 F.3d 206 (3d Cir. 2003) (holding that "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 (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); *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).

[213] *See U.S. v. Chavez-Diaz*, 444 F.3d 1223, 1226 (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").

[214] *See 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).

than the 13-month threshold above which a 16-level enhancement otherwise applies.[215] The court noted that "the government has the burden to establish clearly and unequivocally the conviction was based on all of the elements of a qualifying predicate offense," including the length of the sentence.[216]

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). This term, defined in Application Note 1(B)(iii), includes several enumerated offenses: "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including 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),[217] statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling."[218] 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."[219]

Note: §2L1.2's definition of "crime of violence" differs from–and is less expansive than–§4B1.2's "crime of violence" definition. The §4B1.2 "crime of violence" definition includes those offenses which "otherwise involves conduct that presents a serious potential risk of physical injury to another."[220] But the §2L1.2 definition lacks this ("residual") clause.

A. General Principles

1. To be a § 2L1.2 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.[221] 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

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[215] *U.S. v. Gomez-Leon*, 545 F.3d 777, 785 (9th Cir. 2008).

[216] *Id*. at 785.

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

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

[219] *Id.*

[220] USSG §4B1.2(a)(2).

[221] *See, e.g., 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 (8th Cir. 2002); *U.S. v. Pereira-Salmeron*, 337 F.3d 1148 (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).

one of those establishes "the use, attempted use, or threatened use of physical force against the person of another."[222]

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, to be a crime of violence, a conviction must (1) be punishable by imprisonment of 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) fit within the statutory definition of "crime of violence" at 18 U.S.C. § 16; and (2) have received a term of imprisonment of at least one year.[223]

Because of these definitional differences, a conviction could trigger the 16-level enhancement without being an aggravated felony.[224] For example, a felony crime of violence where the sentence imposed was less than a year is not an aggravated felony but will qualify for the 16-level enhancement.[225] A 2008 guideline amendment provides that in such circumstances, a downward departure may be warranted.[226]

B. Enumerated Offenses

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[222] USSG §2L1.2, comment. (n.1(b)(iii)); *see also, e.g., U.S. v. Grajeda*, 581 F.3d 1186 (9th Cir. 2006) (California offense of assault with a deadly weapon or other non-firearm instrument or by any means of force likely to produce great bodily injury is a crime of violence, because the deadly weapon or means of force elements of the offense were sufficient to bring it within crime of violence definition), *cert. denied* 131 S.Ct. 583 (2010); *U.S. v. Rivera-Ramos*, 578 F.3d 1111 (9th Cir. 2009) (New York attempted robbery conviction is a crime of violence because New York's definition of attempt, requiring conduct that comes within "a dangerous proximity to the criminal end to be obtained" is no broader that the definition at common law); *U.S. v. Saavedra-Velazquez*, 578 F.3d 1103 (9th Cir. 2009) (California attempted burglary conviction is a crime of violence, even though California definition of attempt only requires "slight acts in furtherance" of the crime), *cert. denied*, 130 S.Ct. 1547 (2010).

[223] The statutory term in § 16 is similar to the "use of force" provision under the guideline, but this too differs in important ways. First, 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). Second, the statute 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).

[224] *See, e.g., U.S. v. 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).

[225] *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).

[226] USSG §2L1.2, comment. (n.7).

This section identifies several specific issues that have been raised in deciding how to apply the enumerated categories. Table 3 in the Appendix 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. (Said another way, a statute's title does not end the inquiry but rather begins it.) 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.[227] 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.[228]

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."[229] 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 2008, the Commission amended the definition of "forcible sex offense"[230] 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."[231]

3. Sexual Abuse of a Minor

Because the guidelines do not define this term, courts have had to decide which individuals are "minors" and define what conduct constitutes "sexual abuse." As to the first

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[227] *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 aggravated assault under §2L1.2).

[228] *U.S. v. Fierro-Reyna*, 466 F.3d 324 (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); *U.S. v. Esparza-Herrera,* 557 F. 3d 1019 (9th Cir. 2009) (holding that Arizona conviction for aggravated assault was not an aggravated felony because the Arizona statute was broader than the generic definition of aggravated assault, encompassing "garden-variety" reckless conduct).

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

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

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

issue, the Fifth Circuit has held that because most states focus on individuals sixteen or younger, a statute criminalizing sexual contact with anyone under eighteen years of age does not constitute a conviction for sexual abuse of a minor.[232]

As to the second issue, 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."[233] 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*,[234] the Fifth Circuit held that a conviction for Taking Indecent Liberties with a Child in violation of N.C. Gen. Stat. § 14-202.1(a)(1) "constitutes 'sexual abuse of a minor' as that term is understood in its 'ordinary, contemporary, [and] common' meaning."[235] 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 gratify one's sexual desire."[236] 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.[237]

In *United States v. Baza-Martinez*,[238] 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.[239] For the Ninth Circuit, the question turned on the meaning of "abuse," which it defined as "physical or psychological harm."[240] 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."[241] 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.[242] The court noted that under North Carolina caselaw, a conviction

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[232] *U.S. v. Munoz-Ortenza*, 563 F.3d 112 (5th Cir. 2009) (collecting statutes).

[233] *U.S. v. Ortiz-Delgado*, 451 F.3d 752, 757 (11th Cir. 2006) (quoting *U.S. v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001)).

[234] 405 F.3d 270 (5th Cir. 2005)

[235] *Id.* at 275.

[236] *Id.*

[237] *Id.* at 276-77; *see also United States v. Ayala*, 542 F.3d 494 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1388 (2009) (holding that defendant's prior Texas conviction for indecency with a child constituted sexual abuse of a minor, even if victim was 17 years old and would be of age for legal consent in some states).

[238] 464 F.3d 1010 (9th Cir. 2006).

[239] *Id.* at 1015.

[240] *Id.*

[241] *Id.*

[242] *Id.*

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.[243] Because this scenario caused no harm to a minor, the Ninth Circuit concluded that the statute was not categorically "sexual abuse of a minor."[244]

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,"[245] 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 what it determined was a 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 of intent to commit a crime at the time of entry[246] or of unprivileged or unlawful entry.[247] It also does not apply if the statute of conviction does not require proof that the building was a dwelling or home.[248] 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."[249]

C. "Use of Force"

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[243] *Id.* at 1017.

[244] *Id.*

[245] *Izaguirre-Flores*, 405 F.3d at 277.

[246] *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).

[247] *U.S. v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007) (holding that conviction for residential 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); *U.S. v. Aguila-Montes*, 553 F.3d 1229 (9th Cir. 2009) (same), *reh'g granted by* 594 F.3d 1080 (9th Cir. 2010).

[248] *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).

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

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."[250] Table 4 in the Appendix 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."[251] 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.[252]

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 statute at issue]."[253] 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 by reading and interpreting the statute itself."[254]

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 that a statute that focuses on the resultant harm rather than the defendant's conduct may not qualify for

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

[251] *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").

[252] *See, e.g., U.S. v. Gamez*, 577 F.3d 394 (2d Cir. 2009) (finding that conviction for criminal possession of a weapon in the second degree under New York law, which requires that a defendant intend to use a gun unlawfully against another, was not crime of violence because it did not include as an element the use, attempted use, or threatened use of physical force, even though the defendant had, in fact, used the gun to shoot two people); *U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (holding that crime of intoxication assault does not involve use of force because intentional use of force against another person is not necessary component of the offense).

[253] *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).

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

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."[255] 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."[256] 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.'"[257]

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*,[258] 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."[259] 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.[260] Several of these cases have arisen in the context of vehicular homicide and drunken driving cases, and their outcomes 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

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[255] *U.S. v. Lopez-Hernandez*, 112 Fed. App'x 984, 985 (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).

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

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

[258] 543 U.S. 1 (2004).

[259] *Id.* at 9.

[260] *See, e.g., 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 negligent conduct).

require proof that the building was occupied.[261] Thus, although the use of force was established by the shooting, the conviction did not establish that this force was directed at a person.

VI. Aggravated Felonies

For convictions that do not trigger a 16 or 12-level enhancement, an 8-level "aggravated felony" enhancement may apply. As used in §2L1.2, the term is defined at 8 U.S.C. § 1101(a)(43).[262] To decide whether a prior conviction is an aggravated felony, a 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 above to decide whether the prior conviction fits within that category. Note that the definition includes "an attempt or conspiracy to commit" any of the offenses included in the definition.[263] Summaries of relevant circuit court decisions are set forth in Table 5 in the Appendix.

As discussed earlier, an "aggravated felony" does not actually have to be a "felony:" it may apply to qualifying misdemeanor offenses. "Aggravated felony" is a term of art that "includes certain misdemeanants who receive a sentence of one year."[264] In contrast to the guideline definition of felony, which is based on an offense being punishable by imprisonment exceeding one year,[265] this statute includes a number of convictions "for which the term of imprisonment [is] at least one year."[266]

Under section 1101(a)(43), certain convictions require the court to focus on the term of imprisonment that "may be imposed" under the statute of conviction.[267] For others, the focus is on the length of the "term of imprisonment" that was actually imposed.[268] Under this definition, however, the method for determining sentence length differs from §2L1.2. In contrast to the

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[261] *U.S. v. Alfaro*, 408 F.3d 204 (5th Cir. 2005) (concluding that, under Va. Code Ann. § 18.2-279, force need not necessarily be directed against a person); *U.S. v. Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005) (finding that Wis. Stat. § 941.20(2)(a), prohibiting shooting firearm into building, lacked the element to establish that use of force was "against the person of another"); *Narvaez-Gomez*, 489 F.3d at 977 (finding that California courts only required the mens rea of recklessness toward building, not people, for conviction for shooting into occupied building, under Ca. Penal Code § 246); *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (holding that conviction under A.R.S. § 13-1211, for discharging firearm at a residence, could be based on the structure being suitable for residency rather than actually being occupied).

[262] USSG §2L1.2, comment. (n.3(A)).

[263] 8 U.S.C. § 1101(a)(43)(U).

[264] *U.S. v. Saenz-Mendoza*, 287 F.3d 1011, 1014 (10th Cir. 2002).

[265] USSG §2L1.2, comment. (n.2).

[266] 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

[267] 8 U.S.C. § 1101(a)(43)(J), (Q), (T).

[268] 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

guidelines, the "term of imprisonment" under section 1101 does not exclude time that was suspended.[269] A sentence of probation, on the other hand, is not a suspended sentence and, thus, cannot be an aggravated felony under such a provision.[270]

"The aggravated felony 8-level enhancement is only applicable to "possession" conduct punishable as a felony under federal law.

In *Lopez v. Gonzales*,[271] 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."[272] Because simple possession is generally not punishable as a felony under the CSA, a state court *felony* conviction for simple possession is not an aggravated felony for federal sentencing purposes. Henceforth, under *Lopez*, simple possession conduct that is a felony under state law does not trigger the aggravated felony 8-level enhancement.[273]

Recidivist provisions in § 844(a) ("Possession" offenses) require actual previous state <u>convictions</u> to trigger the "aggravated felony" enhancement.

Section 844(a) ("Penalties for simple possession") generally imposes a (maximum) misdemeanor one-year sentence. But upon a showing of a previous conviction under the federal drug statute or "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State has become final," recidivist provisions increase the § 844(a) punishment ranges. And this fact had generated a circuit split of authority over whether such previous state "possession" convictions would qualify as an 'aggravated felony" because they "could have been" charged as a § 844 felony. The Supreme Court settled the matter in *Carachuri-Rosendo v. Holder*, when it held that "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted'...of a 'felony punishable' as such 'under the Controlled Substances Act [CSA].'"[274] And, by definition, if the offense is not a "felony" under the CSA, it is not a felony under §

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[269] 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 probation violation, qualified conviction for "stealing" as aggravated felony).

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

[271] 549 U.S. 47 (2006).

[272] *Id.* at 60.

[273] *See, e.g., 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).

[274] ___ U.S. ___, 130 S.Ct. 2577, 2589-90 (2010).

1101(a)(43)'s definition of 'aggravated felony."[275]

VII. Other Categories (+16)

The other categories of offenses listed in §2L1.2(b)(1)(A)[276] are used less frequently. Most of these categories are defined by reference to specific federal statutes.[277] For state convictions, the relevant inquiry under these enhancements is whether the elements described in the state statute "would have been an offense" under those statutes.[278] There has been little appellate caselaw discussing these enhancements, but some of the cases that do are collected at Table 6 in the Appendix.

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.[279] A firearms offense may also be any state or federal offense that "prohibits the importation, distribution, transportation, or trafficking" of certain, specified firearms.[280]

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.[281]

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)."[282]

D. Human Trafficking Offense

Human trafficking offenses are convictions under specified federal statutes or under state

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[275] *See* § 1101(a)(43)(B) (which traces the definition of "drug trafficking crime" from § 924(c), which incorporates the definition as being a "felony punishable under...the CSA.")

[276] 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).

[277] *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")).

[278] *See* USSG §2L1.2, comment. (n.1(B)(ii), (v), (vi), (viii)).

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

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

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

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

laws whose elements satisfy any of those statutes.[283]

E. Alien Smuggling Offense

Alien smuggling offenses are only those that are specified as such in 8 U.S.C. § 1101(a)(43)(N).[284] 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."[285] The defendant has the burden of showing that his conviction falls within this exception.[286]

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."[287] One issue that has arisen is whether solicitation to commit one of these offenses triggers 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.[288] 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.[289]

VIII. Criminal History

Under §2L1.2, a single prior conviction may increase a defendant's sentence in three ways: (1) an enhancement under §2L1.2(b)(1); (2) criminal history points under §4A1.1(a), (b), or (c); and (3) status points under §4A1.1(d). 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.[290] In some cases, courts have relied on §4A1.3 to increase a

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

[284] USSG §2L1.2, comment. (n.1(B)(i)).

[285] 8 U.S.C. § 1101(a)(43)(N).

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

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

[288] *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 crime of violence).

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

[290] *See, e.g., 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); *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)).

sentence based on underrepresented criminal history.[291] In contrast, one court held that, to the extent that an upward departure was based on a prior, uncharged illegal entry, the sentencing court erred because there was nothing "unusual" about the illegal entry.[292]

A related issue deals with the application of §4A1.1(d) 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 following conviction for a crime committed after returning to the United States.[293] 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).[294]

Note also that the cross-designation program (the 287(g) program) may affect the "found in" date, and thus whether or not the defendant was "under a sentence of imprisonment" when he committed the § 1326 offense. Specifically, the Fourth Circuit has held that immigration authorities have actual knowledge of an immigrant's presence in the United States when a law enforcement officer participating in the cross-designation program issues an immigration detainer.[295] In *Sosa-Carabantes*, the Fourth Circuit concluded that, since the defendant had not yet been sentenced prior to issuance of the immigration detainer, the district court erroneously applied the two-point increase under §4A1.1(d).[296]

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 reason for a reduction under this guideline is USSG §5K3.1, commonly known as "Fast Track." This guideline authorizes courts to depart downward up to 4

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[291] *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).

[292] *Figaro*, 935 F.2d at 7 (holding that upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).

[293] *U.S. v. Cano-Rodriguez*, 552 F.3d 637, 639 (7th Cir. 2009).

[294] *See, e.g., U.S. v. Santana-Castellano*, 74 F.3d 593 (5th Cir. 1996); *Cano-Rodriguez*, 552 F.3d at 639; *U.S. v. Hernandez-Noriega*, 544 F.3d 1141 (10th Cir. 2008); *United States v. Coeur*, 196 F.3d 1344 (11th Cir. 1999).

[295] *U.S. v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009).

[296] *Id.*

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."

Because these programs are not available in all districts, defendants have argued that the unavailability of Fast Track constitutes an unwarranted disparity. In response, the circuit courts have evinced a deep 4-3 split in authority over whether *Kimbrough* permits district courts to vary in recognition of the unwarranted disparity. The Fifth, Ninth, and Eleventh Circuits hold that *Kimbrough* permits variances based upon disagreement with the *guidelines* and not with *congressional policy* authorizing Fast Track; they conclude that sentencing courts may not consider such disparity occasioned by Fast Track programs because, while such disparity is evident, Congress implicitly intended it.[297] In contrast, the First, Third, Sixth, and Seventh Circuits have found to the contrary; they conclude that, post-*Kimbrough*, courts may consider such fast Track disparity when contemplating a variance sentence.[298]

The circuit courts have uniformly rejected claims that unavailability of fast track violates Equal Protection.[299]

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,[300] although one court has stated that "a downward departure based on collateral consequences of deportation is justified if the circumstances of the case are extraordinary."[301]

Another significant collateral consequence is deportation. District courts are not authorized to depart based on a defendant's stipulation to deportation,[302] and generally,

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[297] *See U.S. v. Gomez-Herrera*, 523 F.3d 554, 562-63 (5th Cir. 2008); *U.S. v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008); *U.S. v. Gonzalez-Sotelo*, 556 F.3d 736, 739-41 (11th Cir. 2009).

[298] *See U.S. v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *U.S. v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *U.S. v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *U.S. v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

[299] *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).

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

[301] *U.S. v. Bautista*, 258 F.3d 602, 607 (7th Cir. 2001) (holding that separation from family, without more, is not sufficiently extraordinary to warrant a downward departure).

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

deportability is not a basis for seeking a departure.[303] However, one circuit court has indicated that "a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence."[304]

C. Motive and Cultural Assimilation

In general, courts have held that a defendant's motive for reentry is irrelevant and not a basis for a downward departure.[305] Courts have recognized that a defendant's motivation to care for a family could mitigate his return, but such circumstances must be exceptional.[306] On the other hand, per guideline amendment dated November 1, 2010, a departure based on the defendant's cultural assimilation may be appropriate where (A) the defendant formed cultural ties to the United States from having continuously resided in the United States from childhood, (B) the reentry was motivated by those cultural ties, and (C) a departure is unlikely to increase the risk of further crimes of the defendant.[307] Notably, one court upheld an increase where the reentry was committed to facilitate the commission of another offense.[308] Relatedly, courts have increased sentences based on post-reentry conduct.[309]

D. Seriousness of Prior Offense

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[303] *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).

[304] *U.S. v. Smith,* 27 F.3d 649, 655 (D.C. Cir. 1994).

[305] *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) (stating that purported lack of criminal intent in reentering the country is not basis for downward departure).

[306] *See, e.g., U.S. v. Carrasco*, 313 F.3d 750 (2d Cir. 2002) (finding that departure not warranted where defendant was separated from his wife; provision of financial support for three children was not exceptional circumstance); *U.S. v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995) (stating that defendant's motivation to reenter to visit his family, absent extraordinary circumstances, may not justify downward departure); *U.S. v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (finding that 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); *Saucedo-Patino*, 358 F.3d at 794 (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 his case outside the heartland).

[307] *See* USSG §2L1.2 comment. (n.8) (2010). See also USSG App. C. amend. 740 (explaining the guideline amendment).

[308] *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).

[309] *See, e.g., U.S. v. Hernandez-Villanueva*, 473 F.3d 118, 123 (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) history of alcohol abuse, and (3) DUI convictions after returning to United States).

Courts have sometimes considered whether the enhancement under the guidelines was appropriate given the nature of a prior conviction. Although some courts have held that the length of time between conviction and deportation was not a reason to depart,[310] at least two circuits since *Booker* have recognized that the age of a prior conviction is relevant to the length of sentence that should be imposed.[311]

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.[312] One case has suggested that a guideline sentence would be unreasonable based on the nature of the prior crime.[313] Another recent opinion reversed a below-guideline sentence, reasoning that the underlying facts were not so different from a typical case under that enhancement.[314]

Because an applicable offense level may substantially overstate or understate the seriousness of a previous conviction, an upward or downward departure may be warranted.[315] And, effective November 1, 2011, and as part of a proposed amendment to §2L1.2 (setting out potentially limited enhancements under subsections (b)(1)(A) or (B)(1)(B),[316] an upward departure may be warranted where any such limited enhancement does not adequately account

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[310] *Stultz*, 356 F.3d at 268 (holding that the fact that prior drug trafficking conviction was more than 16 years old did not justify a downward departure); *Abreu-Cabrera*, 64 F.3d at 76; *U.S. v. Maul-Valverde*, 10 F.3d 544 (8th Cir. 1993) (holding that downward departure could not be based on fact that prior conviction was more than 15 years old and thus would receive no criminal history points).

[311] *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); *U.S. v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (finding that, under circumstances of the case, it was unreasonable to adhere to guidelines sentence including 16-level enhancement "because of the staleness of [the defendant's] prior conviction and his subsequent history showing no convictions for harming others or committing other crimes listed in Section 2L1.2").

[312] *U.S. v. Herrera-Garduno*, 519 F.3d 526, 530 (5th Cir. 2008) (holding that above-guideline sentence was reasonable where prior conviction for possession with intent to deliver did not qualify as "drug trafficking offense" but facts of case "indicated that [defendant] was in fact trafficking [drugs]"); *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 large quantity of drugs did not qualify as drug trafficking offense); *see also U.S. v. Tzep-Mejia*, 461 F.3d 522 (5th Cir. 2006) (upholding 36 month sentence over guideline range of 10–16 months where prior conviction for attempted assault was not crime of violence but would have resulted in range of 46–57 months had enhancement applied).

[313] *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).

[314] *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).

[315] *See* U.S.S.G. §2L1.2 App. Note 7 Departure Based on Seriousness of a Prior Conviction (providing non-exhaustive examples where upward and downward departures might be warranted).

[316] Under the proposed amendment which takes effect November 1, 2011, absent contrary congressional action, convictions can be enhanced under subsections (b)(1)(A) and (B) with the respective 16- and 12-level enhancements if they receive criminal history points under Chapter IV (Criminal History and Criminal Livelihood); if they do not, then respective 12- and 8-level enhancements will apply. *See*, *supra*, at pp. 16-17 and note 109.

for the seriousness or extent of the underlying previous conviction.[317]

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

[317] *See id.*

1. Base Offense Level: 11.[318]
2. Specific Offense Characteristics: As with smuggling offenses, a reduction applies where (1) "the offense was committed other than for profit" or involved only the defendant's family.[319] 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.[320]

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.[321]
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.[322]
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.[323] If death resulted, the homicide guidelines (§2A1.1–1.5) apply.[324]

C. Scope of coverage

A number of 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, §§2L2.1 and 2L2.2 apply, rather than §2B1.1, when "the primary

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[318] USSG §2L2.1(a).
[319] USSG §2L2.1(b)(1).
[320] USSG §2L2.1(b)(2)–(5).
[321] USSG §2L2.2(a).
[322] USSG §2L2.2(b)(1)–(3).
[323] USSG §2L2.2(c).
[324] *Id.*

purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status."[325] Courts have used this same reasoning to apply §2L2.1, instead of §2F1.1, to convictions for making a false statement under 18 U.S.C. § 1001 when the false statement is made in the immigration context.[326]

Notably, 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.[327]

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.[328] Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.[329]

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."[330]

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[325] USSG §2B1.1 comment. (n.9(B)); *see also U.S. v. Shi*, 317 F.3d 715, 718 (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").

[326] *See, e.g., U.S. v. Kuku*, 129 F.3d 1435, 1439 (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 [the defendant's] offense conduct than does §2F1.1; (2) Comment 11 to §2F1.1 suggests that [the defendant'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 [the defendant's] offense conduct").

[327] *See, e.g., 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).

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

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

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

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

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 of documents intended for use by a single person, treat the set as one document."[331] One court explained that documents will "constitute only one document even if used many times, by one individual, to perpetuate the same identity fraud."[332] For example, a set might include "a counterfeit passport, phony green card, and forged work papers."[333] In contrast, some documents are not a set, even though they will be used only one time by the same person.[334]

The application notes also provide that an upward departure may be warranted "[i]f the offense involved substantially more than 100 documents."[335]

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."[336]

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[331] USSG §2L2.2, comment. (n.2); *see also U.S. v. Torres*, 81 F.3d 900 (9th Cir. 1996) (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).

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

[333] *Id.*

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

[335] USSG §2L2.1, comment. (n.5).

[336] *U.S. v. Singh*, 335 F.3d 1321, 1324 (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, 1131-32 (7th Cir. 1992).

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.'"[337]

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, therefore allowing application of the 4-level enhancement.[338]

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.[339]

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."[340]

Without relying on this provision, two cases have increased sentences based on national

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[337] *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 of blank I-94 cards where defendant intended to use these to manufacture fake documents); *Castellanos*, 165 F.3d at 1131-32 (holding that guideline applies to blank documents).

[338] *Polar*, 369 F.3d at 1256-57 (affirming enhancement where defendant knew or should have known that his counterfeiting operation would facilitate fraudulently obtaining Social Security Card in violation of 42 U.S.C. § 408(a)(6)).

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

[340] USSG §2L2.2, comment. (n.5).

security/terrorism concerns. In one case, the Eleventh 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 Vehicles that "impact[ed] national security.[341] In another case, the Second 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.[342]

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.[343]

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.[344]

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

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

[343] *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).

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