

Immigration Offenses

USSC National Seminar – Philadelphia, PA

Friday, September 19, 2014

10:00 – 11:30 a.m.

1:00 – 2:30 p.m.

Panelists

Honorable Ricardo H. Hinojosa

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Unlawfully Entering or Remaining in the United States

§2L1.2

and

8 U.S.C. § 1326

(and 8 U.S.C. § 1325 for 2nd or subsequent conviction)

Statutory Penalties for Illegal Reentry

8 U.S.C. § 1326

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

Note: These determinations are based on
statutory definitions

“Aggravated Felony”

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

Illegal Reentry - §2L1.2

(a) Base Offense Level

8

(b) Specific Offense Characteristics

(1) Apply the Greatest: If the Δ previously was deported, or unlawfully remained in the U.S. after –

(A) a conviction for a felony that was a (i) drug trafficking offense with sentence imposed > 13 mos., (ii) crime of violence, (iii) firearms offense, (iv) child porn offense, (v) national security or terrorism offense, (vi) human trafficking offense, (vii) alien smuggling offense **increase by 16 levels if conviction receives criminal history points under Chapter Four or by 12 levels if conviction did not receive criminal history points**

Illegal Reentry - §2L1.2 (cont.)

(b) Specific Offense Characteristics (cont.)

(1) (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less **increase by 12 levels** *if the conviction receives criminal history points under Chapter Four* or **by 8 levels** *if the conviction does not receive criminal history points*

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

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

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

**Guideline Terms
Defined at §2L1.2**

“Felony”

§2L1.2, App. Note 2

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

“Misdemeanor”

§2L1.2, App. Note 4(A)

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

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

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

“Drug Trafficking Offense”

- Means an offense under federal, state, or local law that prohibits the:
 - Manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or counterfeit substance) or
 - Possession of a controlled substance (or counterfeit substance) with intent to do any of the above
 - Note: simple possession does not meet this definition

“Simple Possession” and “Aggravated Felony”

- Simple possession offenses are not aggravated felonies
 - *See Lopez v. Gonzales*, 549 U.S. 47 (2006)
- An alien’s second or subsequent crime of state simple drug possession does not qualify as an aggravated felony
 - *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010)

“Crime of Violence”

§2L1.2, App. Note 1(B)(iii)

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

OR

“Crime of Violence” (cont.)

- 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

“Crime of Violence”

§2L1.2

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

8 U.S.C. § 1101

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

“Categorical Approach”

The Categorical Approach

- The determination of whether a prior *conviction* (or possibly the instant offense of conviction) meets the criteria of a certain category of offense

The Categorical Approach (cont.)

- In this determination, only *the elements of the offense of conviction can be considered*
 - **Do not** rely on the title of the statute
 - **Do not** use relevant conduct
 - **Do not** look to the facts of the specific case

Key Supreme Court Cases Establishing the Categorical Approach

- *Taylor v. United States*, 495 U.S. 575 (1990)
- *Shepard v. United States*, 544 U.S. 13 (2005)
- *James v. United States*, 550 U.S. 192 (2007)
- *Begay v. United States*, 128 S. Ct. 1581 (2008)

Key Supreme Court Cases Establishing the Categorical Approach (cont.)

- *United States v. Chambers*, 129 S. Ct. 687 (2009)
- *Johnson v. United States*, 130 S. Ct. 1265 (2010)
- *Sykes v. United States*, 131 S. Ct. 2267 (2011)
- *Descamps v. United States*, 133 S. Ct. 2276 (2013)

Steps in the Categorical Approach

1. Examine the definition under consideration
2. Establish the offense of conviction
 - Examine the statute of conviction: “the Categorical Approach”
 - Only if necessary to establish *the offense of conviction*, use limited documents beyond the statute of conviction: “the *Modified Categorical Approach*”
3. Analyze the offense of conviction to determine if it meets the category of offense

Example: Immigration Guideline

- Defendant is awaiting sentencing in federal court upon conviction for illegal reentry (8 USC § 1326(b))
- The determination is being made as to whether a 16-level increase at specific offense characteristic §2L1.2(b)(1)(A)(ii) applies; specifically whether Defendant's prior 2009 Texas state conviction for Sexual Assault of a Child meets the definition of a "crime of violence"

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

§2L1.2, App. Notes 1(A)(vii) & 6

- Prior convictions considered under §2L1.2 may also receive criminal history points under §4A1.1
- Juvenile adjudications cannot be used at §2L1.2 but can be used at Chapter Four

Revocation and a “Sentence Imposed” Prior to Illegal Reentry

§2L1.2 – “Circuit Split”

- In the §2L1.2 (Unlawfully Entering or Remaining in the U.S.) determination of the length of “sentence imposed” for a prior drug trafficking offense, a revocation *after* the illegal reentry is not added to the initial sentence

Departure Considerations at §2L1.2

- Seriousness of prior conviction (App. Note 7)
- Cultural assimilation (App. Note 8, currently)

Proposed Amendment to §2L1.2: Departures for Time in State Custody

New Application Note 8 to
Take Effect on November 1, 2014

- Addresses the period from when defendant was located by immigration authorities in state custody until the commencement of the federal sentence that will not be credited by the Bureau of Prisons
- Gives public safety considerations for making such a departure

Smuggling, Transporting, or Harboring an Unlawful Alien

§2L1.1

and

8 U.S.C. §§ 1324(a) & 1326

Relevant Conduct & Multiple Counts

§§2L1.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of §2L1.1, based on all relevant conduct

§2L1.1(b)(2)

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

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

§2L1.1(b)(6)

- 2 level increase, with floor of 18, if offense involved intentionally or recklessly creating a substantial risk of death or bodily injury to another
- App. Note 5 provides examples
 - *e.g.*, carrying excess passengers; harboring persons in a crowded, dangerous, or inhumane condition

Proposed Amendment: **Alien Smuggling - §2L1.1**

Application Note 5

- Guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements is “reckless endangerment” under §2L1.1(b)(6)

§2L1.1(b)(7)

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

Death or Degree of Injury	Increase in Level
Bodily Injury	+ 2
Serious Bodily Injury	+ 4
Permanent or Life-Threatening Bodily Injury	+ 6
Death	+ 10

§2L1.1(b)(7) (cont.)

- Strict liability: Does not require that the injury or death be intended
 - *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002)
- Can apply both (b)(6) and (b)(7)

“Fast Track” Departures

§5K3.1 - Early Disposition Programs

- Only under a program authorized by the Attorney General and the U.S. Attorney
- Requires a motion from the government
- Departure not more than 4 levels

Supervised Release

§5D1.1(c)

- November 2011 amendment provides that, unless required by statute, supervised release ordinarily should not be imposed if the defendant is a deportable alien who will likely be deported after imprisonment

END