



# Immigration Offenses

Annual National Seminar

New Orleans, LA

Friday, September 18, 2015

10:30 am – 12:00 pm



## Panelists:

Honorable Ricardo Hinojosa, Chief Judge, SD/TX (McAllen)

Richard Bohlken, ADCUSPO, NM

John Crews, AUSA, NM

Margy Meyers, FPD, SD/TX (Houston)

Krista Rubin, USSC



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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 2<sup>nd</sup> or subsequent conviction)



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# 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



# Illegal Reentry - §2L1.2

(a) Base Offense Level

8

(b) Specific Offense Characteristics

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

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



# Application of SOC (b)(1) FY2014

+ 16	23.9%
+ 12	7.5%
+ 8	8.8%
+ 4	32.9%
No increase	26.9%





# Terms Used at §2L1.2



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# “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)

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



# “Aggravated Felony”

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





# “Categorical Approach”



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# The Categorical Approach

- The determination of whether a prior *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
  - **State** case law might be important



## Step 1:

**Examine the definition under consideration**





# The Structure of a Definition of a Category of Offense

## Three Potential Sections

- Elements section
  - List of the elements that will include an offense in the category
- Enumerated section
  - List of offenses included in the category
- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category



# EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence” §2L1.2, App. Note 1(B)(iii)

- **means** .... 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
- any other offense ....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”



# “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



## Step 2:

# Establish the offense of conviction

- **Examine the statute of conviction:**  
**“the Categorical Approach”**
- **Only if necessary to establish the offense of conviction, and the statute is divisible, use limited documents beyond the statute of conviction:**  
**“the Modified Categorical Approach”**



# “Divisible” Statutes

- If the judgment cites only to the statute of conviction and that statute is *divisible* and can be violated in multiple ways, some of which satisfy the definition and some do not, use ***the modified categorical approach*** to determine if the additional documents clarify the defendant’s specific offense of conviction
  - Charging document (e.g., indictment)
  - Plea agreement
  - Plea colloquy in which the defendant confirmed the elements of the offense of conviction
  - Jury instructions
  - Comparable judicial record
  - Judicially-ruled documents



# “Divisible” Statutes

*Descamps v. U.S.*, 133 S.Ct. 2276 (2013)

- “That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile.”



# “Divisible” Statutes

## *Descamps v. U.S.*, 133 S.Ct. 2276 (2013)

- “If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents...to determine which alternative formed the basis of the defendant’s prior conviction.”





***Are these statutes divisible?***



# New Mexico Aggravated Assault (§30-3-2)

Aggravated assault consists of either:

- A. unlawfully assaulting or striking at another with a deadly weapon;
- B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or
- C. willfully and intentionally assaulting another with intent to commit any felony.



## Arizona Sexual Abuse (§ 13-1404)

- A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.



# Divisible Statutes

*U.S. v. Quintero-Junco*, 754 F.3d 746 (9th Cir. 2014)

- “As this language demonstrates, a defendant can violate the statute in two distinct ways. First, a defendant violates the statute if he “intentionally or knowingly engag[es] in sexual contact with any person who is fifteen or more years of age without consent of that person.”



# Divisible Statutes

*U.S. v. Quintero-Junco*, 754 F.3d 746 (9th Cir. 2014)

- “Alternatively, a defendant also violates the statute if he “intentionally or knowingly engag[es] in sexual contact ... with any person who is under fifteen years of age if the sexual contact involves only the female breast.” “Because the Arizona statute “list[s] potential offense elements in the alternative,” it is divisible, and the modified categorical approach may be applied to discern the prong under which Quintero–Junco was convicted.”



## Step 3:

**Analyze the offense of conviction to determine if it meets the category of offense**



Analysis:  
Whether a Conviction Meets  
the *Elements Section*  
of a Categorical Definition



## §2L1.2 “Crime of Violence”

- 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





# Supreme Court Case Involving *Elements Section* of <sup>33</sup> “Violent Felony”

*Johnson v. U.S.*, 130 S. Ct. 1265 (2010)

- Florida’s battery conviction **is not** a violent felony under the “force” component because the statute did not require physical force of a violent nature
- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another



# Louisiana Aggravated Battery (§ 34)

- Aggravated battery is a battery committed with a dangerous weapon
- Definitions:
  - Battery – intentional use of force or violence upon the person of another or the intentional administration of a poison or other noxious liquid or substance to another
  - Dangerous weapon – includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm
- Does this conviction qualify as a crime of violence?



# Louisiana Aggravated Battery (§ 14:34)

*U.S. v. Herrera-Alvarez*, 753 F.3d 132 (5<sup>th</sup> Cir. 2014)

“Because section 14:34 criminalizes aggravated batteries committed by administering poison, which does not necessarily entail the use of destructive or violent physical force, the statute as a whole does not categorically qualify as a crime of violence.”



## Georgia Cruelty to a Child § 16–5–70(b)

- Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.
- Is this a crime of violence under §2L1.2?



# Georgia Cruelty to a Child § 16–5–70(b)

*U.S v. Resendiz-Moreno*, 705 F.3d 203 (5<sup>th</sup> Cir. 2013)

“In the instant case, the language of the statute makes clear that “the use, attempted use, or threatened use of physical force” is not necessary to commit the crime. Specifically, a person can commit first-degree child cruelty and maliciously inflict excessive pain upon a child by depriving the child of medicine or by some other act of omission that does not involve the use of physical force.”



# Willful Infliction of Corporal Injury on a Spouse § 273.5

“Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony...”



# Use of Force

*U.S. v. Ayala-Nicanor*, 659 F.3d 744 (9<sup>th</sup> Cir. 2013)

- “CA 273.5 (Willful infliction of corporal injury on a spouse) is categorically a crime of violence because it requires the intentional use of physical force against the person because the plain terms of the statute require a person willfully to inflict upon another person a traumatic condition, thus satisfying both the elements of intent and active violence...”



Analysis:  
Whether a Conviction Meets  
the *Enumerated Section*  
of a Categorical Definition





# “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



## Analysis: *Enumerated Section* (cont.)

### Based on the Elements of the Offense of Conviction

- Requires a determination of whether the *elements* of the offense of conviction meet the definition for the enumerated offense



# Analysis: *Enumerated Section* (cont.)

## Use of the Generic, Contemporary Definition

- The elements of the offense of conviction must meet the elements of the enumerated offense in its generic, contemporary definition
  - It is not sufficient that the offense of conviction has the same title as an enumerated offense



## Analysis: *Enumerated Section* (cont.)

- Generic form of burglary (based on *Taylor*):
  - Unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime



# Texas Burglary

## Texas Penal Code § 30.02

A person commits an offense if, without the effective consent of the owner, the person:

- 1) enters a habitation ... not then open to the public, with intent to commit a felony ... or
  - 2) remains concealed, with intent to commit a felony ... in a ... habitation; or
  - 3) enters a ... habitation and commits or attempts to commit a felony....
- Is this offense generic burglary?



# Generic Definition: Burglary of a Dwelling

*U.S. v. Conde-Castaneda*, 753 F.3d 172 (5<sup>th</sup> Cir. 2013)

“The generic offense of burglary of a dwelling requires entering a habitation with the intent to commit a crime. Because § 30.02(a)(1) expressly requires this intent, we have held that a prior conviction for violating that section is a “burglary of a dwelling” under the Sentencing Guidelines. *United States v. Garcia–Mendez*, 420 F.3d 454, 456–57 (5th Cir.2005). By contrast, § 30.02(a)(3) lacks such an intent requirement and consequently does not qualify as a “burglary of a dwelling.”



# New Mexico Aggravated Assault (§30-3-2)

Aggravated assault consists of either:

- A. unlawfully assaulting or striking at another with a deadly weapon;
- B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or
- C. willfully and intentionally assaulting another with intent to commit any felony.

Does this meet the enumerated offense of aggravated assault?



# Generic Definition - Aggravated Assault

*U.S. v. Hernandez, 788 F.3d 193 (5<sup>th</sup> Cir. 2015)*

A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a dangerous weapon...”  
Model Penal Code § 211.1(2).





# DC Robbery (§ 22-2801)

Whoever by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value



# Generic Definition - Robbery

*U.S. v. Velasquez-Bosque*, 601 F.3d 955 (9<sup>th</sup> Cir. 2010)

“We defined generic robbery as aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person.”



## 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



# Criminal History Category of §2L1.2 Offenders FY2014

I	22.6%
II	22.4%
III	27.1%
IV	15.1%
V	7.9%
VI	4.9%



# Departure Considerations at §2L1.2

- Seriousness of prior conviction (App. Note 7)
- Time served in state custody (App. Note 8)
- Cultural assimilation (App. Note 9)



# “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)

- 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





# Smuggling, Transporting, or Harboring an Unlawful Alien

§2L1.1

and

8 U.S.C. §§ 1324(a) & 1326



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# §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



# Application of §2L1.1(b)(2) FY2014

Fewer than 6 aliens	45.2%
6 – 24 aliens	37.6%
25 to less than 100 aliens	11.8%
100 or more aliens	5.4%



## §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
  - 2014 amendment added examples of situations involving dangerous or remote geographic area without food, water, clothing, or protection



## §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 (5<sup>th</sup> Cir. 2002)
- Can apply both (b)(6) and (b)(7)



Thank  
You!