

PRIMER



IMMIGRATION GUIDELINES

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INTRODUCTION

This primer is intended to provide an overview of sentencing-related criminal immigration topics. It is not a comprehensive compilation of issues and it is not a substitute for researching, reading and interpreting the actual cases, statutes, or the *Guidelines Manual*. Rather, it should serve as a supplement to those primary sources.

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

This section of the primer discusses the statutes, sentencing guidelines, and case law relating to alien smuggling, transporting, and harboring offenses.¹

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 Ninth Circuit, in § 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.”² The statute also criminalizes conspiracy to commit any of these acts or the aiding and abetting of any of them. *See* § 1324(a)(1)(v)(I and II).³

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

This subsection prohibits (i) bringing aliens to the United States without official permission; (ii) transporting undocumented aliens within the United States; (iii) harboring undocumented aliens; (iv) encouraging aliens to come to the United States without official

¹ The 2016 amendment increased the specific offense characteristic at §2L1.1(b)(4) for smuggling, transporting, or harboring an unaccompanied minor from two levels to four levels, and it ensures that a “serious bodily injury” enhancement of four levels under §2L1.1(b)(7)(B) will apply to offenses in which an alien (whether or not a minor) is sexually abused.

² *United States v. Lopez*, 484 F.3d 1186, 1190-91 (9th Cir. 2007) (en banc).

³ *United States v. Flores-Blanco*, 623 F.3d 912, 920-923 (9th Cir. 2010).

permission; and (v) conspiracy to commit, and aiding and abetting the commission of, any of these acts.

Transporting, harboring, or encouraging entry without financial gain has a statutory 5-year maximum penalty.⁴ 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.⁵ Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum increases to 20 years.⁶ And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.⁷ 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.⁸ Furthermore, a defendant who aids and abets another in the commission of one of these offenses is subject to a 5-year statutory maximum.⁹ 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.¹⁰

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

This crime is similar to § 1324(a)(1)(A)(i) in that it also prohibits bringing an alien to the United States. The main difference is the penalty provisions. Section 1324(a)(2)(A) is a misdemeanor offense punishing bringing to the United States aliens without “prior authorization,” despite their presentation to immigration officials or ultimate admission. Pursuant to § 1324(a)(2)(B), where the alien is brought into the United States but is not

⁴ 8 U.S.C. § 1324(a)(1)(B)(ii).

⁵ 8 U.S.C. § 1324(a)(1)(B)(i).

⁶ 8 U.S.C. § 1324(a)(1)(B)(iii).

⁷ 8 U.S.C. § 1324(a)(1)(B)(iv).

⁸ 8 U.S.C. § 1324(a)(4).

⁹ 8 U.S.C. § 1324(a)(1)(A)(v)(II); *see also* United States 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).”).

¹⁰ *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 . . .”).

¹¹ The evolution of § 1324(a)(2) is discussed in United States v. Nguyen, 73 F.3d 887 (9th Cir. 1995), and United States v. Dominguez, 661 F.3d 1051 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2711 (2012) (history of amendments to § 1324(a) in context of Mariel boatlift cases and provision’s *mens rea* requirements).

presented to immigration officials, a first or second offense carries a 10-year maximum.¹² Where this crime is committed for profit or with reason to believe that the alien will commit a felony, the defendant is subject to a 3-year mandatory minimum and a 10-year statutory maximum.¹³

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.¹⁴ Note that “the sentence is calculated ‘for each alien with respect to whom a violation . . . occurs.’”¹⁵ Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.¹⁶ 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 beyond a reasonable doubt by a jury.¹⁷

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.¹⁸

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.¹⁹ The enhancement also applies where the aliens in question presented a life-threatening health risk to people in the United States.²⁰

¹² 8 U.S.C. § 1324(a)(2)(B)(iii); *United States v. Torres-Flores*, 502 F.3d 885, 887-88 (9th Cir. 2007) (discussing § 1324(a)(2)(A), (B) in terms of lesser included and presentation for inspection).

¹³ 8 U.S.C. § 1324(a)(2)(B)(i), (ii).

¹⁴ 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).

¹⁵ *United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002) (quoting § 1324(a)(2)).

¹⁶ *See, e.g., id.*

¹⁷ *See Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

¹⁸ 8 U.S.C. § 1324(a)(4).

¹⁹ 8 U.S.C. § 1324(a)(4).

²⁰ 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.”²¹

II. GUIDELINE OVERVIEW: §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 12.²² 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.²³

B. SPECIFIC OFFENSE CHARACTERISTICS

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

- (1) whether the offense lacked a profit motive or involved only the defendant’s spouse or child;²⁴
- (2) the number of aliens smuggled, harbored, or transported;²⁵
- (3) the defendant’s prior record of immigration crimes;²⁶
- (4) transportation of an unaccompanied minor;²⁷

²¹ United States v. Lopez, 590 F.3d 1238, 1254-55 (11th Cir. 2009) (internal citations omitted).

²² USSG §2L1.1(a)(3).

²³ 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).

²⁴ USSG §2L1.1(b)(1).

²⁵ USSG §2L1.1(b)(2).

²⁶ USSG §2L1.1(b)(3).

²⁷ USSG §2L1.1(b)(4). Changes to this specific offense characteristic took effect on November 1, 2016. The amendment increases the enhancement at subsection (b)(4) from 2 levels to 4 levels, and broadens its

- (5) the discharge, use, or possession of a firearm or other dangerous weapon;²⁸
- (6) intentional or reckless substantial risk of death or serious bodily injury;²⁹
- (7) death or bodily injury of any person;³⁰
- (8) involuntary detention of an alien through coercion or threat in connection with a demand for payment;³¹
- (9) harboring an alien for the purpose of prostitution;³² and
- (10) commercial transportation of large groups in a life-threatening manner.³³

C. CROSS REFERENCE

If the conduct resulted in the death of another, the cross reference directs that the appropriate homicide guideline be applied.³⁴

scope to offense-based rather than defendant-based. Subsection (b)(4) specifies that the enhancement does not apply if the minor was accompanied by the minor's "parent, adult relative, or legal guardian." The definition of "minor" in subsection (b)(4) includes an individual under the age of 18. *See* USSG App. C, amend. 802 (effective Nov. 1, 2016).

²⁸ USSG §2L1.1(b)(5).

²⁹ USSG §2L1.1(b)(6).

³⁰ USSG §2L1.1(b)(7). The November amendment also changes subsection (b)(7) by amending the commentary to §2L1.1 to clarify that the term "serious bodily injury" included in subsection (b)(7)(B) has the meaning given that term in the commentary to §1B1.1 (Application Instructions). That instruction states that "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law. *See* USSG App. C, amend. 802 (effective Nov. 1, 2016).

³¹ USSG §2L1.1(b)(8)(A).

³² USSG §2L1.1(b)(8)(B).

³³ USSG §2L1.1(b)(9).

³⁴ USSG §2L1.1(c)(1).

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.³⁵ 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.'"³⁶

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 7 provides that "[a]n upward departure may be warranted [where] . . . [t]he offense involved substantially more than 100 aliens."³⁷ The Second Circuit has upheld an upward departure based on 300 aliens.³⁸ Based upon its observation that the guideline's

³⁵ See, e.g., *United States 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); *United States v. Li*, 206 F.3d 78 (1st Cir. 2000) (affirming district court finding that defendants failed to establish lack of profit motive); *United States 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); *United States v. Krcic*, 186 F.3d 178 (2d Cir. 1999) (holding that district court permissibly inferred a profit motive where defendant made repeated trips and long distance calls between Montreal and the United States, did not have any other job, and conspired with others whose prior smuggling operations were for compensation).

³⁶ See USSG §2L1.1, comment. (n.1), *United States 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 *United States 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").

³⁷ USSG §2L1.1, comment. (n.7(C)).

³⁸ *United States v. Moe*, 65 F.3d 245, 251 (2d Cir. 1995); see also *United States v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (affirming upward departure based on transporting 1000 aliens).

incremental punishment enhancements relied on a geometric exponential of four, the Ninth Circuit has held that 180 aliens were not “substantially more than 100 aliens.”³⁹

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.”⁴⁰ Thus, a court may determine the number of aliens based on all acts.⁴¹

Courts have occasionally addressed the quantum of evidence needed to establish the enhancement. In one case, the circuit court affirmed an enhancement based on a list of names in a ledger found in a “stash house.”⁴² In another case, the circuit court affirmed the application of the enhancement based on 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

C. UNACCOMPANIED MINORS - §2L1.1(B)(4)

If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor’s parent, adult relative, or legal guardian, increase by 4 levels. . . .

The specific offense characteristic at §2L1.1(b)(4) provides a 4-level enhancement “[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent, adult relative, or legal guardian. The definition of “minor” includes an individual under the age of 18.

³⁹ United States 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.

⁴⁰ USSG §1B1.3(a)(2).

⁴¹ For example, in United States v. Williams, 610 F.3d 271, 274-75 (5th Cir. 2010), the Fifth Circuit aggregated the number of aliens smuggled in prior trips with the number of aliens in the instant conviction to determine the appropriate enhancement increase. It found that all trips were relevant conduct as part of a common scheme or plan.

⁴² United States 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 United States v. Cabrera, 288 F.3d 163 (5th Cir. 2002).

As noted, this version was amended effective November 1, 2016.⁴⁴ The Commission's amendment to §2L1.1 may raise *ex post facto* issues.⁴⁵ 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."⁴⁶

D. 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.

This enhancement "includes a wide variety of conduct."⁴⁷ Application Note 3 lists 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; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements."⁴⁸ This enhancement "is not limited to the examples provided in the commentary."⁴⁹ The Ninth Circuit 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."⁵⁰ While many of these cases arise when defendants transport aliens in vehicles, this enhancement applies to any situation where the offense creates risks of death, injury, starvation, dehydration, or exposure.⁵¹ A number of circuit opinions considering the application of this enhancement are discussed below.

⁴⁴ See *supra* note 27 for changes made on November 1, 2016.

⁴⁵ See *Peugh v. United States*, __ U.S. __, 133 S. Ct. 2072 (June 10, 2013) (whether a sentencing court violates the *ex post facto* clause by using the guidelines in effect at the time of sentencing rather than those in effect at the time of the offense).

⁴⁶ USSG §1B1.11.

⁴⁷ USSG §2L1.1, comment. (n.3).

⁴⁸ *Id.*

⁴⁹ *United States v. Zuniga-Amezquita*, 468 F.3d 886, 888 (5th Cir. 2006).

⁵⁰ *United States v. Torres-Flores*, 502 F.3d 885, 890 (9th Cir. 2007) (emphasis in original).

⁵¹ Compare *United States 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 *United States 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); *United States 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); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1056 (9th Cir. 2001) (enhancement proper

Courts have disagreed as to whether unrestrained passengers lying on the floor of an enclosed van satisfy this enhancement.⁵² Also, to qualify for this enhancement, either the defendant must have *created* the risk of danger,⁵³ or the risk must have, at least, been “reasonably foreseeable in connection with that criminal activity.”⁵⁴ 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.”⁵⁵

Notably, although “[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,”⁵⁶ courts have identified factors to consider when applying this enhancement in vehicle cases.

1. Fifth Circuit

The Fifth Circuit has made clear that this enhancement creates no *per se* rules; instead, “[d]efining the contours of this enhancement is dependent upon carefully applying the words of the guideline in a case-specific analysis.”⁵⁷ As a result, the court has articulated several factors to consider when applying the §2L1.1(b)(6) enhancement for vehicle passengers, including “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.”⁵⁸ The court has also held that the risk of injury enhancement does not apply when “[t]he only dangers were the same

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”).

⁵² Compare *United States 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 *United States v. Maldonado-Ramires*, 384 F.3d 1228 (10th Cir. 2004) (transporting aliens lying on floor of minivan qualified for enhancement).

⁵³ *United States v. Rodriguez-Lopez*, 363 F.3d 1134 (11th Cir. 2004) (holding that defendant created the risk where he drove boat in hazardous manner); *United States 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).

⁵⁴ USSG §1B1.3, comment. (n.2); see also *United States 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).

⁵⁵ *United States v. Garza*, 541 F.3d 290, 293 (5th Cir. 2008).

⁵⁶ *United States v. Solis-Garcia*, 420 F.3d 511, 515 (5th Cir. 2005) (quoting *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1028 (9th Cir. 2000)).

⁵⁷ *Garza*, 541 F.3d at 294 (quoting *Solis-Garcia*, 420 F.3d at 516).

⁵⁸ *Zuniga-Amezquita*, 468 F.3d at 889.

dangers arising from a passenger not wearing a seatbelt in a moving vehicle.”⁵⁹ Additional facts that have supported the enhancement include the severity of vehicle overcrowding, whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey.⁶⁰

2. Ninth Circuit

The Ninth Circuit 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.⁶¹

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

(1) Taking a dangerous route (e.g., off-road) or driving in a dangerous manner (e.g., recklessly or drunk); (2) using a method of transportation that increases the likelihood of an accident (e.g., a severely overloaded vehicle); (3) using a method of transportation that increases 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) using a method of transportation that increases the risk that an accident 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).⁶²

⁵⁹ *Id.* (citing *Solis-Garcia*, 420 F.3d at 516); *but see* *United States v. Cuyler*, 298 F.3d 387 (5th Cir. 2002) (applying enhancement to transportation of four aliens in the bed of a pickup truck).

⁶⁰ *See, e.g.*, *United States v. Cardona-Lopez*, 602 F. App’x 191, (5th Cir. 2015); *United States v. Chapa*, 362 F. App’x 411 (5th Cir. 2010); *United States v. De Jesus-Ojeda*, 515 F.3d 434 (5th Cir. 2008); *United States v. Hernandez-Pena*, 267 F. App’x 367 (5th Cir. 2008).

⁶¹ *United States v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007).

⁶² *Id.* at 889-90.

Thus, it will apply the enhancement “only when the circumstances increased the likelihood of an accident or the chance of injury without an accident.”⁶³

3. Tenth Circuit

The Tenth Circuit reasoned that the inquiry under this enhancement “essentially equates to a totality of the circumstances test.”⁶⁴ 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.”⁶⁵

E. 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.*⁶⁶

Although “the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct,”⁶⁷ courts have typically not required that the defendant be the direct cause of the injury or death.⁶⁸ For example, it is not necessary for the defendant to be the driver of a vehicle that crashes, injuring smuggled aliens.⁶⁹ Neither

⁶³ *Id.* at 890.

⁶⁴ *United States v. Munoz-Tello*, 531 F.3d 1174, 1183 (10th Cir. 2008).

⁶⁵ *Id.* at 1184 (quoting *Torres-Flores*, 502 F.3d at 889-90).

⁶⁶ Before subsequent guideline amendments, this provision was found at subsection (b)(6).

⁶⁷ *United States v. Flores-Flores*, 356 F.3d 861, 862 (8th Cir. 2004).

⁶⁸ *United States 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); *United States 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); *United States 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); *United States 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).

⁶⁹ *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (applying enhancement where defendant was not present when blowout on overcrowded van caused injury and death to passengers).

does enhancement require intent to cause injury or death.⁷⁰ The Eleventh Circuit held that the §2L1.1(b)(7) enhancement is limited to where it was “reasonably foreseeable to a defendant that his actions or the actions of any other member of the smuggling operation could create the sort of dangerous circumstances that would be likely to result in serious injury or death,” but specifically rejected requiring the defendant’s individual actions be the proximate cause of the death or serious injury.⁷¹ However, the court noted a circuit split exists on the requirement of proximate cause.⁷² The Fifth Circuit also recognized that there was a split among the circuit courts, and held that the enhancement “contains no causation requirement” and “the only causation requirement is that contained in 1B1.3”.⁷³ The Fifth Circuit concluded that “the defendants relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range.”⁷⁴

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.’”⁷⁵

F. 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’ 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.⁷⁶

⁷⁰ United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002); United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001); United States v. Herrera-Rojas, 243 F.3d 1139, 1144 (9th Cir. 2001) (“[N]o intent is necessary for an increase under [§2L1.1(b)(7)].”).

⁷¹ United States v. Zalvidar, 615 F.3d 1346, 1350-51 (11th Cir. 2010).

⁷² *Id.* at 1350, n.2 and 1351.

⁷³ United States v. Ramos-Delgado, 763 F.3d 398, 401 (5th Cir. 2014)

⁷⁴ *Id.*

⁷⁵ *Cardena-Garcia*, 362 F.3d at 667; *see also Herrera-Rojas*, 243 F.3d at 1144.

⁷⁶ United States v. Alapizco-Valenzuela, 546 F.3d 1208 (10th Cir. 2008).

IV. CHAPTER THREE ADJUSTMENTS

A. VULNERABLE VICTIM - §3A1.1(B)(1)

An increase under §3A1.1 (Vulnerable Victim) may be appropriate in alien smuggling cases, but courts generally require additional factors beyond the immigration status of the persons smuggled. The Eighth Circuit observed that “the victims of the crime of harboring illegal aliens are, by definition, illegal aliens, and as such, [their] immigration status does not distinguish them from other potential victims of the crime. Thus, [their] immigration status did not alone make them more vulnerable in this case.”⁷⁷ In other words, the relevant question is whether a particular victim of the smuggling offense is “more unusually vulnerable” than any other such victim.⁷⁸ The Fifth Circuit reasoned 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.”⁷⁹ The “general characteristics commonly held by aliens seeking to be illegally smuggled” do not create a vulnerability that warrants an upward departure.⁸⁰ However, smuggled aliens “detained against their will after being transported” can be considered “victims” for purposes of §3A1.1(b)(1).⁸¹ Moreover, “an undocumented alien’s illegal status could be the basis for a ‘vulnerable victim’ finding for offenses that do not necessarily involve illegal aliens.”⁸²

B. ROLE IN THE OFFENSE - §§3B1.1, 3B1.2

Commentary to §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,

⁷⁷ United States v. De Oliveira, 623 F.3d 593, 598 (8th Cir. 2010) (citing United States v. Medina-Argueta, 454 F.3d 479, 482 (5th Cir. 2006)) (to be considered a vulnerable victim, illegally smuggled alien must be “more unusually vulnerable to being held captive than would be any other smuggled alien”).

⁷⁸ See United States v. Angeles-Mendoza, 407 F.3d 742, 748 (5th Cir. 2005).

⁷⁹ *Id.* at 747 (citing United States v. Velasquez-Mercado, 872 F.2d 632, 636 (5th Cir. 1989) (noting that smuggled aliens “might be more properly characterized as ‘customers’ than ‘victims’”)).

⁸⁰ *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”).

⁸¹ *Id.* at 747.

⁸² United States v. Cedillo-Narvaez, 761 F.3d 397, 404 (5th Cir. 2014).

or harboring of others.”⁸³ Some courts apply §3B1.1 to increase sentences,⁸⁴ and others routinely deny reductions for minor participant under §3B1.2.⁸⁵

C. SPECIAL SKILL - §3B1.3

The First Circuit held that piloting a simple wooden boat without benefit of navigation aids on choppy seas under the direction of another does not qualify as a special skill.⁸⁶ But the Eleventh Circuit held that piloting an overloaded “Scarab” model high-performance boat at night while evading a Coast Guard vessel did qualify as a special skill.⁸⁷

D. RECKLESS FLIGHT - §3C1.2

The Ninth Circuit explained that a §3C1.2 reckless flight enhancement does not apply where the conduct receives enhancement under §2L1.1 (creating a risk of injury to others).⁸⁸ A defendant, in the course of smuggling two aliens across the border in the back

⁸³ USSG §2L1.1, comment. (n.6).

⁸⁴ 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 *United States 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 was 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”).

⁸⁵ 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”); *United States 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”); *United States 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); *United States 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); *United States 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.”); *United States 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). §3B1.2 was amended in 2015 (Amendment 794) as a result of the Commission’s study of mitigating role, which found that mitigating role was applied inconsistently. The amendment provides additional guidance to sentencing courts for determining whether a mitigating role adjustment applies.

⁸⁶ *United States v. Hilario-Hilario*, 529 F.3d 65 (1st Cir. 2008).

⁸⁷ *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1219 (11th Cir. 2010).

⁸⁸ *United States v. Lopez-Garcia*, 316 F.3d 967 (9th Cir. 2003).

of a hatchback, fled from a checkpoint to avoid inspection and evaded pursuit until stalling the car near an Interstate median. She ran from the car but was arrested after a brief foot chase. The Ninth Circuit reversed the district court's application of both §2L1.1 "substantial risk of death or bodily injury" and §3C1.2 "reckless endangerment during flight" enhancements. Both enhancements were based solely on the defendant's flight. Therefore, the court held, "[w]e 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.'"⁸⁹

E. DEPARTURES AND VARIANCES

1. Multiple Deaths

The Tenth Circuit affirmed an upward departure where multiple deaths resulted from defendant's conduct.⁹⁰

2. Duration of the Harboring

The Fourth Circuit affirmed an upward departure for a harboring conspiracy that went on for 19 years.⁹¹

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."⁹²

⁸⁹ *Id.* at 970 (internal citations omitted).

⁹⁰ *United States v. Munoz-Tello*, 531 F.3d 1174 (10th Cir. 2008); *United States v. Jose-Gonzalez*, 291 F.3d 697 (10th Cir. 2002).

⁹¹ *United States v. Bonetti*, 277 F.3d 441 (4th Cir. 2002).

⁹² *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1220, 1223 (10th Cir. 2008).

ILLEGAL ENTRY OR REENTRY - §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.⁹³ Subsequent entries,⁹⁴ reentry after removal,⁹⁵ and remaining in the United States after being ordered removed⁹⁶ are felonies covered by §2L1.2. This guideline provides for enhanced sentences for criminal conduct before and after first order of removal was final. This section addresses application issues arising under §2L1.2.

I. STATUTORY SCHEME

Illegal reentry offenses refer to failure to depart (8 U.S.C. § 1253), illegal reentry (8 U.S.C. § 1326) or subsequent Illegal entry (8 U.S.C. § 1325.) Enhancements for illegal entry and reentry—under both the statute and the guidelines—are based on a defendant’s criminal history.

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 so, 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.⁹⁷

⁹³ 8 U.S.C. § 1325(a).

⁹⁴ *Id.*

⁹⁵ 8 U.S.C. § 1326. Changes to the Immigration and Naturalization Act effective April 1, 1997, replaced deportation and exclusion proceedings with a single process, termed “removal.” Unless specifically noted, the terms “deportation” and “removal” are generally used interchangeably in this primer, but practitioners should be aware of the technical differences. 8 U.S.C. § 1229a [INA § 240]; Richard Steel, STEEL ON IMMIGRATION LAW § 13:1 (2d ed. 2012).

⁹⁶ 8 U.S.C. § 1253.

⁹⁷ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

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.

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.⁹⁸ 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.⁹⁹ If the prior conviction was an "aggravated felony" as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.¹⁰⁰

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.¹⁰¹ This is not the case for enhancements based on a defendant's prior deportation, which must be found by a jury.¹⁰² Under *Apprendi*, for a defendant to be eligible for an enhanced statutory maximum under § 1326, 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.¹⁰³ But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.¹⁰⁴

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 qualifying felony convictions to determine whether the sentence-enhancing sequence [whereby that removal must

⁹⁸ 8 U.S.C. § 1326(a)(2).

⁹⁹ 8 U.S.C. § 1326(b)(1), (3), (4).

¹⁰⁰ 8 U.S.C. § 1326(b)(2).

¹⁰¹ *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* *United States 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); *United States v. Velasquez-Reyes*, 427 F.3d 1227 (9th Cir. 2005).

¹⁰² *See, e.g.*, *United States v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *United States 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); *United States v. Zepeda-Martinez*, 470 F.3d 909 (9th Cir. 2006).

¹⁰³ *United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008).

¹⁰⁴ *See, e.g.*, *United States 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").

follow the earlier qualifying conviction] is satisfied.”¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷

Courts have held that it does not violate the Equal Protection Clause to enhance a defendant’s sentence based on prior convictions.¹⁰⁸

8 U.S.C. § 1253 Failure to Depart¹⁰⁹

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.¹¹⁰

¹⁰⁵ United States v. Mendoza-Zaragoza, 567 F.3d 431, 434 (9th Cir. 2009).

¹⁰⁶ *Calderon-Segura*, 512 F.3d at 1111 (“[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 *Salazar-Lopez*, 506 F.3d at 752).

¹⁰⁷ See *United States 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).

¹⁰⁸ *United States v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007); *United States v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

¹⁰⁹ 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.

¹¹⁰ 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: §2L1.2

A. INTRODUCTION

This section provides background and legal analysis of §2L1.2, as amended effective November 1, 2016.¹¹¹ Section 2L1.2 was significantly changed based on the Commission’s 2015 report and extensive public testimony and comment. The new guideline accounts for criminal conduct before and after the first order of removal. Another significant change is that only prior convictions that receive criminal history points are counted for purposes of an enhancement.

B. *EX POST FACTO* CONSIDERATIONS

The Commission’s amendment to §2L1.2 may raise *ex post facto* issues.¹¹² 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.”¹¹³ 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.¹¹⁴ 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.”¹¹⁵ An alien also can be “found in” the United

¹¹¹ See USSG App. C, amend. 802 (effective Nov. 1, 2016).

¹¹² See *Peugh v. United States*, __ U.S. __, 133 S. Ct. 2072 (June 10, 2013) (whether a sentencing court violates the *ex post facto* clause by using the guidelines in effect at the time of sentencing rather than those in effect at the time of the offense).

¹¹³ USSG §1B1.11. An earlier version of the Immigration Guidelines primer – Illegal Entry-Reentry Offenses section is attached as Appendix A as an aid to the guideline’s computation in effect prior to November 1, 2016.

¹¹⁴ *United States v. Lennon*, 372 F.3d 535 (3d Cir. 2004); *United States v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994); *United States v. Whittaker*, 999 F.2d 38 (2d Cir. 1993); *United States v. Gonzales*, 988 F.2d 16 (5th Cir. 1993).

¹¹⁵ *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); see also *United States v. Bencomo-Castillo*, 176 F.3d 1300 (10th Cir. 1999); *Whittaker*, 999 F.2d at 42 (2d Cir. 1993) (stating that “found” is synonymous with “discovered in”).

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.¹¹⁶

C. BASE OFFENSE LEVEL

§2L1.2 has a base offense level of 8.¹¹⁷

D. SPECIFIC OFFENSE CHARACTERISTICS

As amended in 2016, enhancements are provided for three factors: 1) defendant's prior illegal reentry/entry convictions, 2) length of any prior sentence before first order of deportation, and 3) length of any prior sentence after the first order of deportation.

1. Prior Illegal Reentry Offenses- 2L1.2(b)(1)

The enhancement at subsection (b)(1) provides a tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of four levels. "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. § 1253 (failure to depart after an order of removal), 8 U.S.C. § 1326 (illegal reentry), and 8 U.S.C. § 1325(a) (second or subsequent illegal entry). A defendant who has two or more misdemeanors convictions under 8 U.S.C. 1325(a) will receive an increase of two levels.¹¹⁸

2. Other prior convictions - 2L1.2(b)(2) and (b)(3)

Subsections (b)(2) and (b)(3) of the guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence imposed approach, which is similar to how Chapter Four of the *Guidelines Manual* determines a defendant's criminal history score based on his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection b(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any,

¹¹⁶ United States v. Sosa-Carabantes, 561 F.3d 256 (4th Cir. 2009) (holding 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).

¹¹⁷ USSG §2L1.2(a).

¹¹⁸ USSG §2L1.2, comment, (n. 2).

that the defendant sustained after that event (but only in the criminal conduct that resulted in the conviction took place after that event).

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

- 10 levels for a prior felony conviction that receive a sentence of imprisonment of five years or more;
- 8 levels of enhancement for a prior felony conviction that received a sentence of imprisonment of two years or more
- 6 levels of enhancement for a prior felony conviction that received a sentence exceeding one year and one month;
- 4 levels for any other prior felony conviction
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.

III. PRIOR CONVICTIONS

A. GENERAL PRINCIPLES

1. Ordered deported or ordered removed from the United States for the first time

The guideline looks to the first final order of deportation or removal,¹¹⁹ not the physical removal of the defendant. A defendant is considered “ordered deported or ordered removed from the United States” if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation or removal, regardless of whether the order was in response to a conviction. “For the first time” refers to the first time the defendant was ever the subject of such an order.¹²⁰

Federal law authorizes immigration authorities to reinstate prior removal orders.¹²¹ 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

¹¹⁹ See Final order of removal at 8 C.F.R. § 1241.1.

¹²⁰ See USSG §2L1.2, comment. (n. 1(A)).

¹²¹ 8 U.S.C. § 1231(a)(5).

of determining whether a conviction happened prior to deportation under § 1326.¹²² The enhancements apply in relation to the first order of removal, not to the reinstated order of removal. In addition, for purposes of the guidelines, an order of expedited removal done by an immigration officer¹²³ is also considered an order of removal. Voluntary returns do not count as an order of removal.

2. Count convictions that were final before and/or after the first order of removal

A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is still pending when the defendant is deported.¹²⁴

3. Qualifying adult convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points.¹²⁵ This marks a significant change. Before November 1, 2016, the enhancements applied without regard to whether the conviction received criminal history points.¹²⁶

An offense committed before the defendant was 18 does not qualify for an enhancement under §2L1.2 “unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”¹²⁷ The conviction for which the defendant receives an enhancement need not be the most recent conviction,¹²⁸ nor must the defendant have been ordered removed as a result of that conviction.¹²⁹

¹²² See, e.g., *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (the court stated “the statute plainly contemplates, *after* the reentry, a *second removal* under the reinstated prior order”) (emphasis in original).

¹²³ See 8 U.S.C. § 1228.

¹²⁴ *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007).

¹²⁵ USSG §2L1.2, comment. (n.3).

¹²⁶ USSG §2L1.2, comment (n.3) (2015).

¹²⁷ USSG §2L1.2, comment. (n.1(B)).

¹²⁸ *United States 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).

¹²⁹ USSG §2L1.2, comment. (n.1(A)).

4. Delayed adjudications may qualify as convictions

A deferred adjudication qualifies as a prior conviction under §2L1.2.¹³⁰ A guilty plea held in abeyance qualifies as a “conviction” under §2L1.2.¹³¹

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 §2L1.2.¹³² The enhancement, however, would not apply if the conviction was vacated on “a showing of actual innocence”¹³³ or a showing “that the conviction had been improperly obtained.”¹³⁴

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.¹³⁵ Thus, a prior conviction that would support an enhanced sentence under either the statutes or the guidelines does not need to be identified until the time of sentencing.¹³⁶ Of course, as

¹³⁰ *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009); *United States v. Ramirez*, 367 F.3d 274 (5th Cir. 2004).

¹³¹ *United States v. Zamudio*, 314 F.3d 517 (10th Cir. 2002) (holding 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”).

¹³² *United States 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); *United States 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); *United States v. Garcia-Lopez*, 375 F.3d 586, 588 (7th Cir. 2004) (applying enhancement where prior conviction was vacated “based upon a technicality”); *United States v. Cisneros-Cabrera*, 110 F.3d 746 (10th Cir. 1997) (applying enhancement where vacated conviction was in place at the time of illegal entry); *United States v. Orduño-Mireles*, 405 F.3d 960 (11th Cir. 2005) (stating conviction vacated after illegally returning to United States should still be considered under §2L1.2).

¹³³ *Garcia-Lopez*, 375 F.3d at 589.

¹³⁴ *Campbell*, 167 F.3d at 98.

¹³⁵ *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224 (1995).

¹³⁶ Note 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., United States v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

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?

The enhancements called for in §2L1.2 are triggered by a defendant's previous conviction(s).¹³⁷ Because §2L1.2 defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year,"¹³⁸ this definition can include qualifying state misdemeanor offenses 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.¹³⁹ 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."¹⁴⁰

8. Sentence imposed

The length of the sentence imposed in a prior conviction is determined by the criminal history rules set forth in Chapter Four. "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.¹⁴¹ This marks a significant change. Before November 1, 2016, the length of the sentence included any term of imprisonment for a revocation if it occurred before the defendant was deported or unlawfully remained in the United States.¹⁴²

¹³⁷ USSG §2L1.2(b)(1)(A), (b)(2)(A)-(D) and (b)(3)(A)-(D). §2L1.2(b)(2)(E) and (b)(3)(E)—allow 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."

¹³⁸ USSG §2L1.2, comment. (n.2).

¹³⁹ See *e.g.*, *United States v. Hernandez-Garduno*, 460 F.3d 1287 (10th Cir. 2006) (holding misdemeanor assault conviction under Colo. Rev. Stat. § 18-3-204 was treatable as a felony under §2L1.2).

¹⁴⁰ *United States v. Cordova-Arevalo*, 456 F.3d 1229 (10th Cir. 2006) (holding misdemeanor conviction under Colo. Rev. Stat. § 18-3-204 was a felony for purposes of § 1326(b)).

¹⁴¹ See USSG §2L1.2, comment. (n.2).

¹⁴² USSG §2L1.2, comment (n. 1(b)(vii)) (2015).

9. Simultaneous convictions

Application note 4 addresses the situation when a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).

B. MISDEMEANORS – CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSES

Subsections (b)(2) and (b)(3) provide for a 2-level enhancement for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.

1. The Categorical and Modified Categorical Approach

While not required for other enhancements, the categorical approach and the modified categorical approach continue to apply to misdemeanor offenses pursuant to §2L1.2(b)(2)(E) and §2L1.2(b)(3)(E).¹⁴³ These subsections reflect a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses.¹⁴⁴ The courts must decide if the defendant has three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses to apply the enhancement.

Taylor v. United States,¹⁴⁵ *Shepard v. United States*,¹⁴⁶ *Descamps v. United States*¹⁴⁷ and *Mathis v. United States*¹⁴⁸ define the application of the categorical and modified categorical approaches. Although these cases 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 §2L1.2.¹⁴⁹

¹⁴³ Parties must still use the categorical, or modified categorical, approach in determining whether the defendant illegally reentered following a conviction of an “aggravated felony” under the statutory penalty structure. The term “aggravated felony” is defined by 8 U.S.C. § 1101(43). *See supra* section I, subsection 8 U.S.C. § 1326 offenses.

¹⁴⁴ *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 344, 110 Stat. 3009.

¹⁴⁵ 495 U.S. 575 (1990).

¹⁴⁶ 544 U.S. 13 (2005).

¹⁴⁷ 133 S. Ct. 2276 (2013).

¹⁴⁸ 136 S. Ct. 2243 (2016).

¹⁴⁹ *See, e.g.,* *United States v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008); *United States v. Otero*, 502 F.3d 331 (3d Cir. 2007); *United States v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007); *United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006); *United States v. Turbides-Leonardo*, 468 F.3d 34 (1st Cir. 2006); *United*

a. The Categorical Approach

The categorical approach was first adopted in *Taylor v. United States*.¹⁵⁰ Taylor held 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.”¹⁵¹ A court is *not* concerned with the “facts underlying the prior convictions;” in other words, the court may not focus on the underlying criminal conduct itself.¹⁵²

In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court explained that in the categorical approach, the comparison is between the prior conviction’s elements of the offense with the elements of the generic offense. *Id.* 2285. If the “relevant statute has the same elements of the ‘generic’ ACCA crime, then the prior conviction can serve as an ACCA predicate, so too if the statute defines the crime more narrowly”¹⁵³ But, a “state crime cannot qualify as ACCA if its elements are broader than those of a listed generic offense” *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016)¹⁵⁴

Descamps held that “the sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.”¹⁵⁵ In other words, the sentencing court cannot look at the documents as defined in *Taylor* in a trial conviction, or the documents set forth in *Shepard* in the context of a conviction upon a plea, in the categorical approach. It clarified that “Taylor recognized a ‘narrow range of cases’ in which sentencing courts – applying what we would later dub the ‘modified categorical approach’ -may look beyond the statutory elements to ‘the charging paper and jury instructions’ used in a case.”¹⁵⁶

In *Mathis*, the Court held that when the predicate conviction statute enumerates factual means of committing a single element of an offense, those alternative factual means are not elements of the offense. The sentencing court cannot use the modified categorical approach, *i.e.*, it cannot look beyond the fact of conviction to establish the defendant’s conduct in the prior offense. Therefore, the “first task for a sentencing court faced with an

States v. Torres-Diaz, 438 F.3d 529 (5th Cir. 2006); *United States v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006); *United States v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002).

¹⁵⁰ 495 U.S. 575 (1990).

¹⁵¹ *Taylor*, 495 U.S. at 602.

¹⁵² *Id.* at 600-02; *see also* *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (“[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime.”).

¹⁵³ *Taylor*, 495 U.S. at 599.

¹⁵⁴ *Id.* at 602.

¹⁵⁵ *Descamps*, 133 S. Ct. 2276 at 2282.

¹⁵⁶ *Id.* at 2283-84.

alternatively phrased statute is thus to determine whether its listed items are elements or means.”¹⁵⁷ The Court went further and identified aids to be used to determine if the statute is defining elements or means, i.e., the use of State Supreme Court opinions, to review if the statute provides different punishments for each alternative, to review if the drafted statute “offer illustrative examples”, and if the “state law fails to provide clear answers”, the sentencing court may take a “peek at the record documents” to determine if the “listed items are elements of the offense.”¹⁵⁸

b. The Modified Categorical Approach

“When a prior conviction is for violating a ‘divisible statute’—one that sets out one or more of the elements in the alternative, *e.g.*, burglary involving entry into a building *or* an automobile—a ‘modified categorical approach’ is used. That approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant’s prior conviction.”¹⁵⁹ “The modified approach serves – and serves solely – as a tool to identify the elements of the crime of conviction when a statute’s disjunctive phrasing renders one (or more) of them opaque.”¹⁶⁰

“*Taylor* and *Shepard* developed the modified categorical approach.”¹⁶¹ *Taylor* defined the approved documents for verdicts convictions, and *Shepard* applied *Taylor* to a case in which the prior conviction was the result of a guilty plea. In trial convictions, the court is allowed to consult judicial records such as the indictment and jury instructions. In guilty plea convictions, 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.”¹⁶²

The Fifth Circuit extended this list of judicial records to include New York Certificates of Disposition if it specifies the subsection under which the defendant was convicted,¹⁶³ and

¹⁵⁷ *Mathis*, 136 S. Ct. 2243 at 2256.

¹⁵⁸ *Id.*

¹⁵⁹ *Descamps*, 133 S. Ct. 2276 at 2279.

¹⁶⁰ *Mathis*, 136 S. Ct. 2243 at 2253, citing *Descamps*, 133 S. Ct. 2276 at 2285.

¹⁶¹ *Descamps*, 133 S. Ct. 2276 at 2284.

¹⁶² *Shepard*, 544 U.S. at 26.

¹⁶³ *United States v. Neri-Hernandes*, 504 F.3d 587, 592 (5th Cir. 2007) (holding 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”). *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding certificate of

the Ninth Circuit included California Minute Entries.¹⁶⁴ On the other hand, courts typically may not rely on the description in a federal PSR,¹⁶⁵ California abstracts,¹⁶⁶ or police reports.¹⁶⁷

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,”¹⁶⁸ 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.”¹⁶⁹ 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.¹⁷⁰

In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.¹⁷¹

disposition did not support enhancement because it did not specify which subsection of a statute with multiple parts was the basis of conviction);

¹⁶⁴ *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008); *overruled on other grounds by* *Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) (when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes conviction under at least one of those theories, but not necessarily all of them).

¹⁶⁵ *See, e.g., United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (holding 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]”).

¹⁶⁶ *See, e.g., United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

¹⁶⁷ *See, e.g., Shepard*, 544 U.S. at 16; *United States v. Almazan-Becerra*, 482 F.3d 1085, 1090 (9th Cir. 2007) (noting “[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).

¹⁶⁸ *United States v. Rosas-Pulido*, 526 F.3d 829, 832 (5th Cir. 2008) (citing Minnesota law), *superseded on other grounds by guideline amendment*.

¹⁶⁹ *United States v. Almazan-Becerra*, 537 F.3d 1094, 1098, 1100 (9th Cir. 2008).

¹⁷⁰ *See, e.g., United States v. Sandoval-Sandoval*, 487 F.3d 1278 (9th Cir. 2007) (length of sentence); *United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (fact of conviction); *United States v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006) (fact of conviction).

¹⁷¹ *See, e.g., United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding 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).

2. Crime of Violence

The guideline continues to use the term “crime of violence,”¹⁷² although now solely in reference to the 2-level enhancement for three or more misdemeanors convictions at subsections(b)(2)(E) and (b)(3)(E). The definition of “crime of violence” in Application Note 2 conforms with the definition adopted in the career offender guideline effective August 1, 2016.¹⁷³

The guidelines define crime of violence as a set of enumerated offenses, or a crime that has as an element the use, threat of use, or attempted use of physical force against a person. Courts have held that a conviction need not fit within both groups in order to qualify for an enhancement.¹⁷⁴ 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.¹⁷⁵ For

¹⁷² For statutory purposes, the definition of crime of violence continues to rely on the definition in 18 U.S.C. § 16. There is a circuit conflict, however, as to the residual clause in § 16(b). *See, e.g.*, *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015) (applying *Johnson* to invalidate the § 16(b) residual clause in a case arising under §2L1.2); *Dimaya v. Lynch*, 803 F.3d 1110, 1118-19 (9th Cir. 2015) (invalidating the § 16(b) residual clause in an administrative immigration case); *United States v. Hernandez-Lara*, No. 13-10637, 2016 WL 1239199, at *1 (9th Cir. Mar. 29, 2016) (extending *Dimaya* to the criminal context). *But see* *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016) (declining to invalidate the residual clause at 18 U.S.C. § 924(c)(3)(B), while noting that it “appears identical . . . in all material respects” to the § 16(b) clause); and *See United States v. Gonzalez-Longoria, reh’g en banc*, 831 F.3d 670 (2016), holding that § 16(b) clause was not unconstitutionally vague on its face and as applied to the defendant. On January 17, 2017, the Supreme Court heard oral arguments in *Lynch v. Dimaya*, No. 15-1498. The question presented is “Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, is unconstitutionally vague.”

¹⁷³ *See* Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 FR 4741 (Jan. 27, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the *Guidelines Manual*.

¹⁷⁴ *See, e.g.*, *United States v. Rayo-Valdez*, 302 F.3d 314 (5th Cir. 2002); *United States v. Vargas-Garnica*, 332 F.3d 471 (7th Cir. 2003); *United States v. Gomez-Hernandez*, 300 F.3d 974 (8th Cir. 2002); *United States v. Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. 2003); *United States v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003); *United States v. Munguia-Sanchez*, 365 F.3d 877 (10th Cir. 2004); *United States v. Wilson*, 392 F.3d 1243 (11th Cir. 2004).

¹⁷⁵ Only the Fifth Circuit uses a “common sense approach” in connection with the categorical approach when interpreting a guideline’s enumerated offense category that is based on common law crimes. *See United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013); *United States v. Tellez-Martinez*, 517 F.3d 813, 814 (5th Cir. 2008); *United States v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005). To determine the generic, contemporary meaning of non-common-law enumerated offenses, the Fifth Circuit employs a “plain meaning” approach, as recently set forth in *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (en banc). The plain meaning approach relies only on legal and other well-accepted dictionaries and does not require a survey of statutes. *Id.* at 552-53. 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. *See, e.g.*, *United States 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

the second group, the court must look at the specific elements of the offense and determine whether one of those establishes “the use, attempted use, or threatened use of physical force against the person of another.”¹⁷⁶

3. What Convictions Constitute A “Drug Trafficking Offense”

Application Note 2 to §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.”¹⁷⁷ This definition is slightly different from the definition of “drug trafficking offense” in the career offender guideline, which does not include an offer to sell a controlled substance.

a. All of the conduct covered by the statute of conviction must be a drug trafficking offense

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 enhancement.¹⁷⁸ For statutes that include trafficking and non-trafficking offenses (such as selling and transporting), the modified categorical approach is used, and the court can examine the *Taylor-Shepard*-approved documents to identify the offense of

crime”), *overruled on other grounds by* United States v. Lee, 553 F.3d 598 (8th Cir. 2009); United States 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 “[w]e will stick to the common sense approach and result where we can, and here we can”). and, in fact, the Ninth Circuit has expressly foreclosed resort to the Fifth Circuit’s common sense approach. United States v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009); *see also* United States 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).

¹⁷⁶ USSG §2L1.2, comment. (n.2).

¹⁷⁷ *Id.*

¹⁷⁸ *See, e.g.,* United States v. Maroquin-Bran, 587 F.3d 214 (4th Cir. 2009) (holding conviction for selling or transporting marijuana, in violation of Cal. Health & Safety Code § 11360(a), is not categorically drug trafficking, because transporting marijuana would not trigger the sentencing enhancement); United States v. Almazan-Becerra, 482 F.3d 1085 (9th Cir. 2007) (holding 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); United States v. Garza-Lopez, 410 F.3d 268 (5th Cir. 2005) (holding 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). Note that Application Note 1(b)(iv) has since been amended to include an offer to sell. USSG App. C, amend. 722 (effective Nov. 1, 2008).

prior conviction and then compare the elements of such offense to the drug trafficking definition. If the documents are ambiguous or silent, no drug trafficking enhancement applies.

b. “Drug trafficking offense” includes the offense of “possession with intent to distribute”

Under the plain language of § 2L1.2(b)(1)(A)(i) and its application note, and applying the categorical approach, the offense of “possession with intent to distribute” qualifies for a “drug trafficking offense” enhancement.¹⁷⁹

IV. 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.¹⁸⁰ In some cases, courts have relied on §4A1.3 to increase a sentence based on underrepresented criminal history.¹⁸¹ 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.¹⁸²

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

¹⁷⁹ See, e.g., *United States v. Martinez-Lugo*, 782 F.3d 198, 202-04 (5th Cir. 2015). This is despite the Supreme Court’s statement that “[s]haring a small amount of marijuana for no remuneration, let alone possession with intent to do so, does not fit easily into the everyday understanding of ‘trafficking,’ which ordinarily means some sort of commercial dealing.” *Moncrieffe v. Holder*, 133 S. Ct 1678, 1693 (2013).

¹⁸⁰ See, e.g., *United States v. Garcia-Cardenas*, 555 F.3d 1049 (9th Cir. 2009) (reaffirming rule established in *United States v. Luna-Herrera*, 149 F.3d 1054 (9th Cir. 1998)); *United States v. Torres-Echavarria*, 129 F.3d 692 (2d Cir. 1997); *United States v. Crawford*, 18 F.3d 1173 (4th Cir. 1994); *United States v. Zapata*, 1 F.3d 46 (1st Cir. 1993).

¹⁸¹ *United States v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2006) (affirming departure under §4A1.3 from Category II to Category VI based on prior uncounted offenses, four deportations, and use of eleven aliases); *United States v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where criminal history did not include prior, uncharged act of alien smuggling).

¹⁸² *Figaro*, 935 F.2d at 7 (holding upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).

States.¹⁸³ 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).¹⁸⁴ But, the court may consider a downward departure based on time in state custody.¹⁸⁵

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.¹⁸⁶ 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).¹⁸⁷

V. 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 granting a departure to defendants sentenced pursuant to this guideline is §5K3.1, which permits a reduction pursuant to an early disposition (commonly known as “fast track”) program. §5K3.1 authorizes the court to depart downward up to 4 levels based on a government motion “pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”

Because these programs have not been available in all districts, defendants have argued that the unavailability of fast track programs constitutes an unwarranted disparity. Although the circuit courts have uniformly rejected claims that the unavailability of fast

¹⁸³ *United States v. Cano-Rodriguez*, 552 F.3d 637, 639 (7th Cir. 2009).

¹⁸⁴ *See, e.g., Cano-Rodriguez*, 552 F.3d at 639; *United States v. Hernandez-Noriega*, 544 F.3d 1141 (10th Cir. 2008); *United States v. Coeur*, 196 F.3d 1344 (11th Cir. 1999); *United States v. Santana-Castellano*, 74 F.3d 593 (5th Cir. 1996).

¹⁸⁵ *See* §2L1.2 comment. (n. 6).

¹⁸⁶ *United States v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009).

¹⁸⁷ *Id.*

track programs violates equal protection,¹⁸⁸ the circuits have split over whether *Kimbrough* permits district courts to consider purported disparities created by the unavailability of such a program in some districts. The Fifth, Ninth, and Eleventh Circuits have held that district courts may not consider disparities created by the unavailability of fast-track programs,¹⁸⁹ while the First, Third, Sixth, Seventh, Eighth, and Tenth Circuits have concluded that a district court may consider these disparities.¹⁹⁰ The Second Circuit has held that defendants in non-fast-track districts are not “similarly situated” to defendants in fact-track districts, and thus, “sentencing disparities resulting from the existence of fast-track districts are not *per se* unwarranted.”¹⁹¹

In 2012, the Department of Justice issued a policy memorandum for establishing fast track programs in every district.¹⁹² Because fast track programs have not yet been established pursuant to the policy memorandum, it is unclear how this policy change will affect sentencing arguments predicated on the availability and administration of fast track programs.

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,¹⁹³ although one court has stated that “a

¹⁸⁸ *United States v. Rodriguez*, 523 F.3d 519 (5th Cir. 2008); *United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006); *United States v. Campos-Diaz*, 472 F.3d 1278 (11th Cir. 2006); *United States v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005), *abrogated on other grounds by* *United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010).

¹⁸⁹ *See United States v. Gonzalez-Sotelo*, 556 F.3d 736, 739-41 (9th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 562-63 (5th Cir. 2008); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008).

¹⁹⁰ *See United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011); *United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

¹⁹¹ *United States v. Hendry*, 522 F.3d 239, 241-42 (2d Cir. 2008).

¹⁹² *See* Memorandum from James M. Cole, Deputy Att’y Gen., United States Dep’t of Justice, to All United States Attorneys (Jan. 31, 2012) (“Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326) – the largest category of cases authorized for fast-track treatment – shall implement an early disposition program . . .”), *available at* <http://www.justice.gov/dag/fast-track-program.pdf> (last visited June 17, 2014).

¹⁹³ *See, e.g., United States v. Vasquez*, 279 F.3d 77 (1st Cir. 2002); *United States v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001).

downward departure based on collateral consequences of deportation is justified if the circumstances of the case are extraordinary.”¹⁹⁴

The *Guidelines Manual* does not specifically address whether or how a sentencing court should consider a defendant-alien’s stipulation to an administrative or judicial order of removal. However, various circuits have considered whether the defendant’s stipulation to removal is a permissible ground for downward departure. These circuits have uniformly concluded, or have at least recognized the possibility, that a district court may grant a departure in some circumstances based on the defendant-alien’s stipulation to removal; no circuit has categorically barred a stipulation to removal as a basis for departure.¹⁹⁵

In *Clase-Espinal*, the First Circuit held that a stipulation to deportation is insufficient as a matter of law to support a departure in the absence of a “colorable, nonfrivolous defense to deportation.”¹⁹⁶ The Second, Third, Ninth, and Eleventh Circuits have similarly held that a stipulation to removal is a permissible ground for departure, though only when the defendant had a “colorable, nonfrivolous” defense to removal.¹⁹⁷

The Eighth Circuit has focused on whether the defendant surrendered procedural rights and protections in stipulating to the removal, rather than looking only to whether the defendant forfeited non-frivolous defenses to removal. In *Jauregui*, the defendant was a lawful permanent resident who was convicted of possession with intent to distribute methamphetamine.¹⁹⁸ The defendant moved for, and received, a four-level departure for stipulating to removal.¹⁹⁹ On the government’s appeal, the Eighth Circuit affirmed and explained that the defendant, “as a resident alien, gave up substantial rights in waiving the administrative deportation hearing, and it was within the sound discretion of the district court to conclude that in doing so he has substantially assisted in the administration of justice.”²⁰⁰ The Eighth Circuit did not specifically analyze or discuss whether the defendant might have succeeded in opposing removal.²⁰¹

¹⁹⁴ United States v. Bautista, 258 F.3d 602, 607 (7th Cir. 2001) (holding separation from family, without more, is not sufficiently extraordinary to warrant a downward departure).

¹⁹⁵ See, e.g., United States v. Jauregui, 314 F.3d 961, 963-64 (8th Cir. 2003); United States v. Galvez-Falconi, 174 F.3d 255, 260 (2d Cir. 1999); United States v. Rodriguez-Lopez, 198 F.3d 773, 777 (9th Cir. 1999); United States v. Mignott, 184 F.3d 1288, 1291 (11th Cir. 1999); United States v. Marin-Castaneda, 134 F.3d 551, 555 (3d Cir. 1998); United States v. Clase-Espinal, 115 F.3d 1054, 1059 (1st Cir. 1997).

¹⁹⁶ *Clase-Espinal*, 115 F.3d at 1059.

¹⁹⁷ See *Rodriguez-Lopez*, 198 F.3d at 777; *Mignott*, 184 F.3d at 1291; *Galvez-Falconi*, 174 F.3d at 260; *Martin-Castaneda*, 134 F.3d at 555.

¹⁹⁸ *Jauregui*, 314 F.3d at 962.

¹⁹⁹ See *id.*

²⁰⁰ *Id.* at 964.

²⁰¹ See *id.* at 962-63.

Although the circuits generally agree that the defendant-alien must sacrifice *something* by stipulating to removal before receiving a departure, they are split on whether the district court may grant a departure over the government's objection. The Third and Tenth Circuits have held that a district court may not depart based on a stipulation to removal unless the government agrees to the departure.²⁰² This requirement flows from the "judiciary's limited power with regard to deportation."²⁰³ The Second and Ninth Circuits have reached the opposite conclusion.²⁰⁴ These courts have reasoned that requiring the government's agreement would create a condition for departure not required by the Guidelines.

C. MOTIVE AND CULTURAL ASSIMILATION

Courts have generally held that the defendant's motive for reentry is not a basis for a downward departure.²⁰⁵ Courts have recognized, however, that the defendant's motivation to care for a family member could mitigate his return, although such circumstances must generally be exceptional.²⁰⁶ Notably, one court upheld a sentence *increase* where the reentry was committed to facilitate the commission of another offense.²⁰⁷

The commentary to §2L1.2 provides that a departure based on the defendant's cultural assimilation may be appropriate, but only "where (A) the defendant formed cultural ties primarily to the United States from having continuously resided in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's

²⁰² See *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001); *Martin-Castenada*, 134 F.3d at 555.

²⁰³ *Marin-Castenada*, 134 F.3d at 555.

²⁰⁴ See *Rodriguez-Lopez*, 198 F.3d at 778; *Galvez-Falconi*, 174 F.3d at 260.

²⁰⁵ *United States v. Saucedo-Patino*, 358 F.3d 790 (11th Cir. 2004); see also *United States v. Dyck*, 334 F.3d 736 (8th Cir. 2003) (stating purported lack of criminal intent in reentering the country is not basis for downward departure).

²⁰⁶ See, e.g., *United States v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (finding motivation to be reunited with family and fact that prior conviction was 14 years old, though relevant, did not require a nonguideline sentence); *United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005) (holding 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 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); *United States v. Carrasco*, 313 F.3d 750 (2d Cir. 2002) (finding departure not warranted where defendant was separated from his wife; provision of financial support for three children was not exceptional circumstance); *United States v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995) (stating defendant's motivation to reenter to visit his family, absent extraordinary circumstances, may not justify downward departure).

²⁰⁷ *United States v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where reentry was committed to facilitate the commission of alien smuggling).

illegal reentry and continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.”²⁰⁸ In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court’s refusal to grant this departure, where the district court found that the defendant was likely to recidivate (i.e., that the departure would likely “increase the risk to the public from further crimes of the defendant”) given his past cocaine use, the seriousness of his criminal history, and his commission of criminal offenses after illegally reentering the United States.²⁰⁹ In *United States v. Rodriguez*, the Fifth Circuit affirmed the district court’s refusal to depart based on cultural assimilation, concluding that “[a]lthough cultural assimilation can be a mitigating factor and form the basis of a downward departure, nothing requires that a sentencing court must accord it dispositive weight.”²¹⁰

D. SERIOUSNESS OF PRIOR OFFENSE

The court may depart if the applicable enhancement substantially understates or overstates the seriousness of the prior conviction. The length of the sentence imposed for the prior conviction, the remoteness of prior conviction and not receiving criminal history points, and the actual time served for the prior conviction are factors that may be taken into consideration for purposes of the departure.²¹¹

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.

²⁰⁸ See USSG §2L1.2 comment. (n. 7). See also USSG App. C, amend. 740 (effective Nov. 1, 2010) (explaining the guideline amendment).

²⁰⁹ *United States v. Lua-Guizar*, 656 F.3d 563, 567 (7th Cir. 2011).

²¹⁰ *United States v. Rodriguez*, 660 F.3d 231 (5th Cir. 2011) (quotations omitted).

²¹¹ USSG §2L1.2 comment. (n. 5).

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 (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) or §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).

A. IMMIGRATION FRAUD - §2L2.1

- 1. Base Offense Level:** 11.²¹²
- 2. Specific Offense Characteristics:** As with smuggling offenses, a reduction applies where (1) “the offense was committed other than

²¹² USSG §2L2.1(a).

for profit” or involved only the defendant’s family.²¹³ 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.²¹⁴

B. IMMIGRATION FRAUD - §2L2.2

- 1. Base Offense Level:** 8.²¹⁵
- 2. Specific Offense Characteristics:** Enhancements apply if the defendant was (1) previously deported, (2) has a record of prior immigration offenses, (3) fraudulently obtained or used a passport, or (4) concealed his/her membership in, or authority over, a military organization that was involved in serious human right offense; or committed the offense to conceal his/her participation in genocide or other serious human right offense.²¹⁶
- 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.²¹⁷ If death resulted, the homicide guidelines (§2A1.1–1.5) apply.²¹⁸

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), and 1325(c); 18 U.S.C. §§ 1015(a)-(e), 1028, 1425, 1426, 1542, 1543, 1544, and 1546.

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

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

²¹³ USSG §2L2.1(b)(1).

²¹⁴ USSG §2L2.1(b)(2)-(5).

²¹⁵ USSG §2L2.2(a).

²¹⁶ USSG §2L2.2(b)(1)-(4).

²¹⁷ USSG §2L2.2(c).

²¹⁸ *Id.*

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 purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status.”²¹⁹ 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.²²⁰

Notably, when “a defendant is convicted of the possession of a relatively minor number of false or fraudulent immigration documents,” a court must choose whether the conduct reflects trafficking under §2L2.1 or personal use under §2L2.2.²²¹

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, even though their compensation was not specifically tied to specific illegal acts.²²² Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.²²³

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

²¹⁹ USSG §2B1.1 comment. (n.9(B)); *see also* United States v. Shi, 317 F.3d 715, 718 (7th Cir. 2003) (holding §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”).

²²⁰ *See, e.g.,* United States 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”). Note that §2F1.1 is no longer in effect, and it was consolidated with §2B1.1.

²²¹ *See, e.g.,* United States 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).

²²² United States v. Torres, 81 F.3d 900 (9th Cir. 1996).

²²³ *See, e.g.,* United States v. Buenrostro-Torres, 24 F.3d 1173 (9th Cir. 1994); United States v. White, 1 F.3d 13 (D.C. Cir. 1993).

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.”²²⁴

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.”²²⁵ One court explained that documents will “constitute only one document even if used many times, by one individual, to perpetuate the same identity fraud.”²²⁶ For example, a set might include “a counterfeit passport, phony green card, and forged work papers.”²²⁷ In contrast, some documents are not a set, even though they will be used only one time by the same person.²²⁸

The application notes also provide that an upward departure may be warranted “[i]f the offense involved substantially more than 100 documents.”²²⁹

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

²²⁴ United States v. Mendoza, 890 F.2d 176, 180 (9th Cir. 1989), *withdrawn by* 902 F.2d 15 (9th Cir. 1990).

²²⁵ USSG §2L2.2, comment. (n.2); *see also* Torres, 81 F.3d at 903-04 (holding 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).

²²⁶ United States v. Badmus, 325 F.3d 133, 140 (2d Cir. 2003).

²²⁷ *Id.*

²²⁸ *Id.* (holding multiple visa lottery entries constituted individual documents); United States v. Castellanos, 165 F.3d 1129 (7th Cir. 1999) (holding sheet of blank documents was not a set and counting each blank document individually).

²²⁹ USSG §2L2.1, comment. (n.5).

naturalization, citizenship, or legal resident status” but also any “identification document.”²³⁰

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.’”²³¹

C. USE OF PASSPORT OR VISA TO COMMIT A FELONY - §2L2.1(B)(3)

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 constitutes “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.²³²

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.²³³

²³⁰ United States v. Singh, 335 F.3d 1321, 1324 (11th Cir. 2003) (holding driver’s licenses, military identification cards, and United States government identification cards were “documents” under §2L1.2); see also *Castellanos*, 165 F.3d at 1131-32.

²³¹ United States 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 United States v. Salazar, 70 F.3d 351 (5th Cir. 1995) (affirming enhancement based on hundreds of blank I-94 cards where defendant intended to use them to manufacture fake documents); *Castellanos*, 165 F.3d at 1131-32 (holding guideline applies to “blank” documents).

²³² United States v. Polar, 369 F.3d 1248, 1256-57 (11th Cir. 2004) (affirming enhancement where defendant knew or should have known that his counterfeiting operation would facilitate fraudulently obtaining a Social Security Card in violation of 42 U.S.C. § 408(a)(6)).

²³³ United States v. Blaize, 959 F.2d 850 (9th Cir. 1992) (interpreting same language in former §2L2.4).

E. PRIOR DEPORTATION - §2L2.2(B)(3)

If the defendant fraudulently obtained or used (A) a United States Passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.

A defendant who uses a passport card qualifies for this enhancement. A passport card is a type of passport issued by the Secretary of State.²³⁴

F. DEPARTURES AND VARIANCES

1. National Security

§ 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.”²³⁵

Without relying on this provision, two cases have increased sentences based on national 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.”²³⁶ 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.²³⁷

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

²³⁴ United States v. Casillas-Casillas, 845 F.3d 623 (5th Cir. 2017).

²³⁵ USSG §2L2.2, comment. (n.5).

²³⁶ United States v. Valnor, 451 F.3d 744 (11th Cir. 2006).

²³⁷ United States v. Khalil, 214 F.3d 111 (2^d Cir. 2000).

to facilitate another offense for which the defendant had never been convicted: the abduction of his children.²³⁸

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.²³⁹

²³⁸ United States v. Lazarevich, 147 F.3d 1061 (9th Cir. 1998). Note that §2L2.2 includes a cross-reference when a passport or visa is used "in the commission or attempted commission of a felony offense." USSG §2L2.2(c)(1).

²³⁹ United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994) (construing former §2L2.3).

Appendix A



2L1.2 Illegal Reentry Pre-November 2016

Prepared by the Office of General Counsel, U.S. Sentencing Commission

Disclaimer: This document provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive. The information in this document is not binding upon the Commission, courts, or the parties in any case. Pursuant to Fed. R. App. P. 32.1 (2007), some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.

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ILLEGAL ENTRY OR REENTRY - §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.¹ Subsequent entries,² reentry after removal,³ and remaining in the United States after being ordered removed⁴ are felonies covered by §2L1.2.⁵ 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

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 section 1325(a). If so, then the statute carries a 6-month maximum penalty, and the guidelines do not apply. If this is a subsequent violation of section 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.⁶

¹ 8 U.S.C. § 1325(a).

² *Id.*

³ 8 U.S.C. § 1326. Changes to the Immigration and Naturalization Act effective April 1, 1997, replaced deportation and exclusion proceedings with a single process, termed “removal.” Unless specifically noted, the terms “deportation” and “removal” are generally used interchangeably in this primer, but practitioners should be aware of the technical differences. 8 U.S.C. § 1229a [INA § 240]; Richard Steel, STEEL ON IMMIGRATION LAW § 13:1 (2d ed. 2012).

⁴ 8 U.S.C. § 1253.

⁵ This guideline has been applied to a conviction for false claim of citizenship in the course of reentering the country. *See United States v. Castaneda-Gallardo*, 951 F.2d 1451 (5th Cir. 1992).

⁶ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

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.

As with section 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.⁷ 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.⁸ If the prior conviction was an "aggravated felony" as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.⁹

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.¹⁰ This is not the case for enhancements based on a defendant's prior deportation, which must be found by a jury.¹¹ Under *Apprendi*, for a defendant to be eligible for an enhanced statutory maximum under section 1326, 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.¹² But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.¹³

Thus, the Ninth Circuit has concluded that an indictment will support a section 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 qualifying felony convictions

⁷ 8 U.S.C. § 1326(a)(2).

⁸ 8 U.S.C. § 1326(b)(1), (3), (4).

⁹ 8 U.S.C. § 1326(b)(2).

¹⁰ *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* *United States 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); *United States v. Velasquez-Reyes*, 427 F.3d 1227 (9th Cir. 2005).

¹¹ *See, e.g.*, *United States v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *United States 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); *United States v. Zepeda-Martinez*, 470 F.3d 909 (9th Cir. 2006).

¹² *United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008).

¹³ *See, e.g.*, *United States 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").

to determine whether the sentence-enhancing sequence [whereby that removal must follow the earlier qualifying conviction] is satisfied.”¹⁴ 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.¹⁵

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.¹⁶

Courts have held that it does not violate the Equal Protection Clause to enhance a defendant’s sentence based on prior convictions.¹⁷

8 U.S.C. § 1253 Failure to Depart¹⁸

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.¹⁹

¹⁴ United States v. Mendoza-Zaragoza, 567 F.3d 431, 434 (9th Cir. 2009).

¹⁵ *Calderon-Segura*, 512 F.3d at 1111 (“[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 *Salazar-Lopez*, 506 F.3d at 752).

¹⁶ See *United States 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).

¹⁷ *United States v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007); *United States v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

¹⁸ 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.

¹⁹ 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: §2L1.2

PROMULGATED AMENDMENT TO §2L1.2

*The following section provides background and legal analysis regarding §2L1.2 as it currently exists in the guidelines. On April 15, 2016, the Commission promulgated an amendment to §2L1.2, which will take effect on November 1, 2016 unless rejected by Congress. The promulgated amendment makes significant changes to the structure and operation of §2L1.2 based on the Commission’s 2015 report, *Illegal Reentry Offenses*, its previous consideration of the “categorical approach” in the context of the definition of “crimes of violence,” and extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.*

Among other changes, the promulgated amendment modifies the existing guideline by (1) eliminating the “categorical approach,” which has been a source of widespread complaints by judges, the Department of Justice, and others; and (2) recalibrating the guideline to account for prior criminal conduct in a more proportionate manner. The newly adopted amendment adds a new tiered enhancement specifically aimed at criminal conduct occurring after a defendant reentered the country illegally and also adds an enhancement to account for the number of times a defendant has been convicted of illegal reentry. The current base offense level for illegal reentry offenders will remain the same.

For further information on the promulgated amendment, see Amendment 4 of the amendments submitted by the Commission to Congress on April 28, 2016, 81 FR 27261 (May 5, 2016), available at: http://www.uscourts.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160415_RF_Prelim.pdf.

A. *EX POST FACTO* CONSIDERATIONS

The Commission’s amendment to §2L1.2 may raise *ex post facto* issues.²⁰ 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

²⁰ See *Peugh v. United States*, __ U.S. __, 133 S. Ct. 2072 (June 10, 2013) (whether a sentencing court violates the *ex post facto* clause by using the guidelines in effect at the time of sentencing rather than those in effect at the time of the offense).

that the offense of conviction was committed.”²¹ 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.²² 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.”²³ An alien also 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.²⁴

B. BASE OFFENSE LEVEL

Section 2L1.2 has a base offense level of 8.²⁵

C. SPECIFIC OFFENSE CHARACTERISTIC

The specific offense characteristic at §2L1.2(b)(1) is based upon a defendant’s criminal history that predates his removal order.²⁶ This “tiered” enhancement assigns a 16-, 12-, 8-, or 4-level increase, depending on the nature and quantity of the defendant’s prior convictions. Convictions are enhanced under subsections (b)(1)(A) and (B) by 16- and 12-levels respectively if the predicate prior conviction qualifies for criminal history points under Chapter IV (Criminal History and Criminal Livelihood); if the prior conviction cannot be counted towards criminal history points, then the enhancements are reduced to 12- and 8-levels, respectively.²⁷ Because an applicable offense level may substantially overstate or

²¹ USSG §1B1.11.

²² *United States v. Lennon*, 372 F.3d 535 (3d Cir. 2004); *United States v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994); *United States v. Whittaker*, 999 F.2d 38 (2d Cir. 1993); *United States v. Gonzales*, 988 F.2d 16 (5th Cir. 1993).

²³ *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *see also United States v. Bencomo-Castillo*, 176 F.3d 1300 (10th Cir. 1999); *Whittaker*, 999 F.2d at 42 (2d Cir. 1993) (stating that “found” is synonymous with “discovered in”).

²⁴ *United States v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009) (holding 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).

²⁵ USSG §2L1.2(a).

²⁶ USSG §2L1.2(b).

²⁷ The Commission proposed this amendment on April 6, 2011, and the amendment became effective on November 1, 2011.

understate the seriousness of a previous conviction, an upward or downward departure may be warranted.²⁸

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.²⁹ A prior drug trafficking offense also receives a 16-level enhancement if the sentence imposed was greater than 13 months.³⁰

A felony drug trafficking offense that received a sentence of less than 13 months qualifies for a 12-level enhancement.³¹

1. Certain temporal limitations on the 16- and 12-level enhancements

Generally speaking, §2L1.2 looks to the *nature* of 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 sentence is greater than 13 months, the 16-level enhancement may apply; where an imposed sentence 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; or his earlier probation is revoked and a sentence is imposed. The circuit courts split over whether such a sentence—which occurs *after* the deportation or removal—“relates back” to the date of the initial (pre-deportation or removal) conviction so as to support the 16- or 12-level enhancements. The Second Circuit held that the enhancements apply in those circumstances.³² while the Fifth, Seventh, Tenth, and Eleventh Circuits held that they do not.³³ Recognizing this ambiguity, the Sentencing Commission clarified the interpretation in Amendment 764 to the Guidelines, which became effective November 1, 2012. The commentary to §2L1.2 now states: “The

²⁸ See USSG §2L1., comment., (n.2) (providing non-exhaustive examples where upward and downward departures might be warranted).

²⁹ USSG §2L1.2(b)(1)(A)(ii)-(vii).

³⁰ USSG §2L1.2(b)(1)(A)(i).

³¹ USSG §2L1.2(b)(1)(B).

³² *United States v. Compres-Paulino*, 393 F.3d 116, 118 (2d Cir. 2004).

³³ *United States v. Rosales-Garcia*, 667 F.3d 1348 (10th Cir. 2012); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011); *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000).

length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.”³⁴

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).³⁵ 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.³⁶

A 4-level enhancement also applies where the defendant has had three prior misdemeanor convictions for drug trafficking offenses or crimes of violence.³⁷

III. IDENTIFYING PRIOR CONVICTIONS

A. GENERAL PRINCIPLES

Enhancements for reentry offenses are based on a defendant’s criminal history; therefore the court must determine if any prior convictions trigger guideline enhancements. Several considerations apply, but as a general proposition: 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.³⁸ 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

³⁴ USSG §2L1.2, comment. (n.1(B)(vii)).

³⁵ USSG §2L1.2(b)(1)(C).

³⁶ USSG §2L1.2(b)(1)(D).

³⁷ USSG §2L1.2(b)(1)(E).

³⁸ 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.,* United States 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).

enhancement.³⁹ A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is still pending when the defendant is deported.⁴⁰

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

Federal law authorizes immigration authorities to reinstate prior removal orders.⁴¹ 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 section 1326.⁴² Thus, the enhancement applies where a conviction follows the original deportation order but precedes a subsequent reinstatement of that order.⁴³ For purpose of criminal sanctions, “what matters” is “the alien’s *physical* removal.”⁴⁴ 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 §2L1.2.⁴⁵

3. Qualifying adult convictions

Chapter Four (Criminal History and Criminal Livelihood) excludes certain older convictions from receiving criminal history points.⁴⁶ Prior to November 1, 2011, §2L1.2 contained no such limitation.⁴⁷ Following the 2011 amendment, convictions are enhanced under subsections (b)(1)(A) and (B) with 16- and 12-level enhancements only if they

³⁹ United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008) (holding conviction after deportation did not trigger statutory enhancement); United States v. Sanchez-Mota, 319 F.3d 1 (1st Cir. 2002).

⁴⁰ United States v. Saenz-Gomez, 472 F.3d 791 (10th Cir. 2007).

⁴¹ 8 U.S.C. § 1231(a)(5).

⁴² See, e.g., United States v. Nava-Perez, 242 F.3d 277, 279 (5th Cir. 2001) (holding 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 “the statute plainly contemplates, *after* the reentry, a *second removal* under the reinstated prior order”) (emphasis in original).

⁴³ See, e.g., United States v. Diaz-Luevano, 494 F.3d 1159 (9th Cir. 2007) (holding 1998 conviction that followed 1996 deportation but preceded 2000 reinstatement was “prior” to deportation for purpose of 2004 reentry prosecution).

⁴⁴ Diaz-Luevano, 494 F.3d at 1161.

⁴⁵ United States v. Gomez-Leon, 545 F.3d 777, 783 (9th Cir. 2008).

⁴⁶ USSG §4A1.2(e).

⁴⁷ Prior USSG §2L1.2, comment. (n.1(a)(ii), n.6); see also, e.g., United States v. Olmos-Esparza, 484 F.3d 1111 (9th Cir. 2007) (superseded by guideline amendment).

receive criminal history points; if they do not, reduced enhancements of 12- and 8-levels apply.⁴⁸ In contrast to criminal history guidelines (which count juvenile convictions within the past five years⁴⁹), “a conviction for an offense committed before the defendant was eighteen years of age” does not qualify for a §2L1.2 enhancement “unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”⁵⁰ The conviction for which the defendant receives an enhancement need not be the most recent conviction,⁵¹ nor must the defendant have been deported as a result of that conviction.⁵²

4. Delayed adjudications may qualify as convictions

A deferred adjudication qualifies as a prior conviction under §2L1.2.⁵³ A guilty plea held in abeyance qualifies as a “conviction” under §2L1.2.⁵⁴

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 §2L1.2.⁵⁵ The enhancement, however, would not

⁴⁸ The Commission proposed this amendment on April 6, 2011, and it became effective on November 1, 2011.

⁴⁹ USSG §4A1.2(d).

⁵⁰ USSG §2L1.2, comment. (n.1(A)(iv)).

⁵¹ *United States 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).

⁵² USSG §2L1.2, comment. (n.1(A)(ii), (iii)); *see also* *United States v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

⁵³ *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009); *United States v. Ramirez*, 367 F.3d 274 (5th Cir. 2004).

⁵⁴ *United States v. Zamudio*, 314 F.3d 517 (10th Cir. 2002) (holding 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”).

⁵⁵ *United States 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); *United States 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); *United States v. Garcia-Lopez*, 375 F.3d 586, 588 (7th Cir. 2004) (applying enhancement where prior conviction was vacated “based upon a technicality”); *United States v. Cisneros-Cabrera*, 110 F.3d 746 (10th Cir. 1997) (applying enhancement where vacated conviction was in place at the time of illegal entry); *United States v. Orduno-Mireles*, 405 F.3d 960 (11th Cir. 2005) (stating conviction vacated after illegally returning to United States should still be considered under §2L1.2).

apply if the conviction was vacated on “a showing of actual innocence”⁵⁶ or a showing “that the conviction had been improperly obtained.”⁵⁷

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.⁵⁸ Thus, a prior conviction that would support an enhanced sentence under either the statutes or the guidelines does not need to be identified until the time of sentencing.⁵⁹ 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).⁶⁰ But while §2L1.2 unremarkably defines “felony” as “any federal, state, or local offense punishable by imprisonment for a term exceeding one year,”⁶¹ 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:

- a. 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.⁶² For the same reasons,

⁵⁶ *Garcia-Lopez*, 375 F.3d at 589.

⁵⁷ *Campbell*, 167 F.3d at 98.

⁵⁸ *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224 (1995).

⁵⁹ Note 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., United States v. Rojas-Luna*, 522 F.3d 502 (5th Cir. 2008); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

⁶⁰ 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.”

⁶¹ USSG §2L1.2, comment. (n.2).

⁶² *See e.g., United States v. Hernandez-Garduno*, 460 F.3d 1287 (10th Cir. 2006) (holding misdemeanor assault conviction under Colo. Rev. Stat. § 18-3-204 was treatable as a felony under §2L1.2).

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."⁶³

- b. **"Aggravated felony" as used in §2L1.2(b)(1)(C) and 8 U.S.C. § 1101(a)(43) can encompass misdemeanor offenses.** Section 2L1.2 levies an 8-level enhancement where a defendant's previous conviction qualifies as an "aggravated felony" pursuant to 8 U.S.C. § 1101(a)(43).⁶⁴ 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*."⁶⁵ Thus, as numerous circuits have noted, this definition may encompass state misdemeanor offenses that are themselves also punishable by up to a year's imprisonment.⁶⁶

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.⁶⁷ In these cases, courts will examine the court record to determine whether the crime—often known as a "wobbler"⁶⁸—was a felony or misdemeanor.⁶⁹ Sometimes, the length of sentence imposed may provide a clue.⁷⁰ In one

⁶³ United States v. Cordova-Arevalo, 456 F.3d 1229 (10th Cir. 2006) (holding misdemeanor conviction under Colo. Rev. Stat. § 18-3-204 was a felony for purposes of § 1326(b)).

⁶⁴ USSG §2L1.2(b)(1)(C) and comment. (n.3(A)).

⁶⁵ 8 U.S.C. § 1101(43)(F) and note (3) (explaining Congress likely excluded the word "is" when drafting the statute.) (*italics added*).

⁶⁶ See, *e.g.*, United States v. Saenz-Mendoza, 287 F.3d 1011, 1013-14 (10th Cir. 2002) (collecting cases and observing "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).").

⁶⁷ See, *e.g.*, United States v. Hernandez-Castillo, 449 F.3d 1127 (10th Cir. 2006).

⁶⁸ See, *e.g.*, United States v. Melchor-Meceno, 620 F.3d 1180, 1184 n.4 (9th Cir. 2010) (observing various California statutes are "wobbler" provisions because they permit charging as a felony or a misdemeanor).

⁶⁹ *Id.*

⁷⁰ United States v. Simo-Lopez, 471 F.3d 249 (1st Cir. 2006) (holding state court's imposition of a 6-month sentence was evidence that defendant previously pled guilty to a misdemeanor, not a felony).

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.⁷¹

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*⁷² and *Shepard v. United States*,⁷³ 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.”⁷⁴ A court is *not* concerned with the “facts underlying the prior convictions;” in other words, the court may not focus on the underlying criminal conduct itself.⁷⁵

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.”⁷⁶

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.⁷⁷

⁷¹ *Hernandez-Castillo*, 449 F.3d at 1131 (holding 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).

⁷² 495 U.S. 575 (1990).

⁷³ 544 U.S. 13 (2005).

⁷⁴ *Taylor*, 495 U.S. at 602.

⁷⁵ *Id.* at 600-02; *see also* *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (“[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime.”).

⁷⁶ *Id.* at 602.

⁷⁷ *Id.*

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.”⁷⁸

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.”⁷⁹

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 §2L1.2.⁸⁰ 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.⁸¹

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.”⁸² For example, the Ninth Circuit considers “whether the ‘full range of conduct encompassed’ or

⁷⁸ *Id.*

⁷⁹ *Shepard*, 544 U.S. at 26.

⁸⁰ *See, e.g.*, *United States v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008); *United States v. Otero*, 502 F.3d 331 (3d Cir. 2007); *United States v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007); *United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006); *United States v. Turbides-Leonardo*, 468 F.3d 34 (1st Cir. 2006); *United States v. Torres-Diaz*, 438 F.3d 529 (5th Cir. 2006); *United States v. Lopez-Zepeda*, 466 F.3d 651 (8th Cir. 2006); *United States v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002).

⁸¹ *United States v. Rodriguez-Guzman*, 506 F.3d 738, 744 (9th Cir. 2007); *see also* *United States 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 715 (8th Cir. 2005); *United States v. Romero-Hernandez*, 505 F.3d 1082 (10th Cir. 2007).

⁸² *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

‘prohibited’” by the underlying statute fits within the definition of the category at issue.⁸³ “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.”⁸⁴ However, as the Supreme Court recently held in *Descamps v. United States*, the modified categorical approach is meant to be used only in a “narrow range of cases,” and not where the statute of conviction contained a single, indivisible set of elements, even though the statute may encompass conduct that is broader than the generic, enumerated offense.⁸⁵

Under this limited review, the court may consider only those sources approved by *Shepard*.⁸⁶ These sources include the charging document, jury instructions, any plea statement or admissions, or “some comparable judicial record of this information.”⁸⁷ The Fifth Circuit has extended this list to include New York Certificates of Disposition⁸⁸ and the

⁸³ See *United States 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* *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007).

⁸⁴ *Reina-Rodriguez*, 468 F.3d at 1153.

⁸⁵ *Descamps v. United States*, 133 S. Ct. 2276, 2283-84 (2013) (quoting *Taylor*, 495 U.S. at 602). *Descamps* describes this category as statutes that set forth a crime with “alternative elements,” and gives the example of a hypothetical burglary statute that otherwise conforms to the generic crime and prohibits entry of an automobile and a building. In such cases, the statute is “divisible,” and a sentencing court is permitted to review a limited set of documents to determine which alternative element (*e.g.*, entry of an automobile or a building) formed the basis of the defendant’s prior conviction. *Id.* at 2284. In *Mathis v. United States*, the Court further clarified that the “categorical approach” requires that a sentencing court look only to the elements of the statute of conviction. It held that courts may not decide whether to count a conviction by determining which of multiple alternative “means of commission” a defendant used to commit an offense, even if those means are listed explicitly in the statute of conviction. See *Mathis v. United States*, 136 S. Ct. 2243 (2016).

⁸⁶ *Id.* at 1154.

⁸⁷ *Shepard*, 544 U.S. at 26; *Taylor*, 495 U.S. at 602.

⁸⁸ *United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding certificate of disposition did not support enhancement because it did not specify which subsection of a f a statute with multiple parts was the basis of conviction); *United States v. Neri-Hernandes*, 504 F.3d 587, 592 (5th Cir. 2007) (holding 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”).

Ninth Circuit has included California Minute Entries.⁸⁹ On the other hand, courts typically may not rely on the description in a federal PSR,⁹⁰ California abstracts,⁹¹ or police reports.⁹²

For some of these documents, the result depends on how the document will be used. Courts cannot look at allegations in a charging document that were not established at trial or acknowledged in a guilty plea.⁹³ 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,”⁹⁴ 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.”⁹⁵ 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.⁹⁶

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

⁸⁹ *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008); *overruled on other grounds by* *Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) (when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes conviction under at least one of those theories, but not necessarily all of them).

⁹⁰ *See, e.g., United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (holding 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]”).

⁹¹ *See, e.g., United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

⁹² *See, e.g., Shepard*, 544 U.S. at 16; *United States v. Almazan-Becerra*, 482 F.3d 1085, 1090 (9th Cir. 2007) (noting “[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).

⁹³ *See, e.g., United States v. Bonilla*, 524 F.3d 647 (5th Cir. 2008) (holding court could not use criminal information to identify statute of conviction because it charged crime for which defendant was not convicted); *United States v. Neri-Hernandes*, 504 F.3d 587, 590 (5th Cir. 2007) (holding “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).

⁹⁴ *United States v. Rosas-Pulido*, 526 F.3d 829, 832 (5th Cir. 2008) (citing Minnesota law), *superseded on other grounds by guideline amendment*.

⁹⁵ *United States v. Almazan-Becerra*, 537 F.3d 1094, 1098, 1100 (9th Cir. 2008).

⁹⁶ *See, e.g., United States v. Sandoval-Sandoval*, 487 F.3d 1278 (9th Cir. 2007) (length of sentence); *United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (fact of conviction); *United States v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006) (fact of conviction).

elements.”⁹⁷ In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.⁹⁸ “[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.”⁹⁹

D. COMMON SENSE APPROACH

Only when interpreting enumerated offense categories that are based on common law crimes, the Fifth Circuit uses a “common sense approach” in connection with the categorical approach.¹⁰⁰ To determine the generic, contemporary meaning of non-common-law enumerated offenses, the Fifth Circuit employs a “plain meaning” approach, as recently set forth in *United States v. Rodriguez*.¹⁰¹

Under the common sense approach, the court takes an undefined guideline term and articulates the “ordinary, contemporary, [and] common” meaning of that term.¹⁰² The “primary source for the generic contemporary meaning of [a category of offenses] is the Model Penal Code,”¹⁰³ as well as “treatise[s], modern state cases, and dictionaries.”¹⁰⁴

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.”¹⁰⁵ If the statute is broader than the definition, then the court looks at the sources approved by *Shepard* to decide whether

⁹⁷ *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008) (quoting *United States v. Mendoza-Sanchez*, 456 F.3d 479, 482 (5th Cir. 2006)). *See also Descamps*, 133 S. Ct. 2276 (2013).

⁹⁸ *See, e.g., United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding 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).

⁹⁹ *United States v. Zuniga-Soto*, 527 F.3d 1110, 1120 (10th Cir. 2008) (quoting *United States v. Lewis*, 405 F.3d 511, 515 (7th Cir. 2005) (emphasis in original)).

¹⁰⁰ *See United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013); *United States v. Tellez-Martinez*, 517 F.3d 813, 814 (5th Cir. 2008); *United States v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005).

¹⁰¹ *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (en banc). The plain meaning approach relies only on legal and other well-accepted dictionaries and does not require a survey of statutes. *Id.* at 552-53.

¹⁰² *Izaguirre-Flores*, 405 F.3d at 274-75.

¹⁰³ *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006).

¹⁰⁴ *United States v. Sanchez-Ruedas*, 452 F.3d 409, 412 (5th Cir. 2006).

¹⁰⁵ *United States v. Ramirez*, 557 F.3d 200, 205 (5th Cir. 2009).

the prior conviction falls within the categorical definition.¹⁰⁶ In this way, it appears the Fifth Circuit’s “common sense approach” is used in tandem with the “categorical approach.”¹⁰⁷

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.¹⁰⁸

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.”¹⁰⁹

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

¹⁰⁶ 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”).

¹⁰⁷ See, e.g., *United States 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.”).

¹⁰⁸ *United States v. Rojas-Gutierrez*, 510 F.3d 545, 548 (5th Cir. 2007) (citations and quotations omitted).

¹⁰⁹ *Rojas-Gutierrez*, 510 F.3d. at 549-50.

determining whether a conviction fits within a category of crimes¹¹⁰ and, in fact, the Ninth Circuit has expressly foreclosed resort to the Fifth Circuit's common sense approach.¹¹¹

IV. DRUG TRAFFICKING OFFENSE - §2L1.2(b)(1)(A)(i)

A. WHAT CONVICTIONS CONSTITUTE A “DRUG TRAFFICKING OFFENSE”?

Application note to Section 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.”¹¹² A few highlights of the interplay between this definition and various statutes are noted below.

1. *All conduct under the statute of conviction must be a drug trafficking offense*

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 enhancement.¹¹³ For statutes that include trafficking and non-trafficking

¹¹⁰ See, e.g., *United States 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* *United States v. Lee*, 553 F.3d 598 (8th Cir. 2009); *United States 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 “[w]e will stick to the common sense approach and result where we can, and here we can”).

¹¹¹ *United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009); see also *United States 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).

¹¹² USSG §2L1.2, comment. (n.1(b)(iv)).

¹¹³ See, e.g., *United States v. Maroquin-Bran*, 587 F.3d 214 (4th Cir. 2009) (holding conviction for selling or transporting marijuana, in violation of Cal. Health & Safety Code § 11360(a), is not categorically drug trafficking, because transporting marijuana would not trigger the sentencing enhancement); *United States v. Almazan-Becerra*, 482 F.3d 1085 (9th Cir. 2007) (holding 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); *United States v. Garza-Lopez*, 410 F.3d 268 (5th Cir. 2005) (holding 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). Note that Application Note 1(b)(iv) has since been amended to include an offer to sell. USSG App. C, amend. 722 (effective Nov. 1, 2008).

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;¹¹⁴ if the documents are ambiguous or silent, no drug trafficking enhancement applies.

2. “Drug trafficking offense” includes the offense of “possession with intent to distribute”

Under the plain language of §2L1.2(b)(1)(A)(i) and its application note, and applying the categorical approach, the offense of “possession with intent to distribute” qualifies for a “drug trafficking offense” enhancement.¹¹⁵

3. 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.”¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ In 2008, the Commission adopted an upward departure provision for

¹¹⁴ See, e.g., *United States v. Rodriguez-Duberney*, 326 F.3d 613 (5th Cir. 2003) (relying on indictment to conclude 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).

¹¹⁵ See, e.g., *United States v. Martinez-Lugo*, 782 F.3d 198, 202-04 (5th Cir. 2015). This is despite the Supreme Court’s statement that “[s]haring a small amount of marijuana for no remuneration, let alone possession with intent to do so, does not fit easily into the everyday understanding of ‘trafficking,’ which ordinarily means some sort of commercial dealing.” *Moncrieffe v. Holder*, 133 S. Ct 1678, 1693 (2013).

¹¹⁶ See, e.g., *United States 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); *United States v. Herrera-Roldan*, 414 F.3d 1238 (10th Cir. 2005) (holding conviction for possession of a controlled substance in violation of Tex. Health & Safety Code § 481.121 was not a drug trafficking offense).

¹¹⁷ *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003) (holding 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 *United States v. Gutierrez-Bautista*, 507 F.3d 305 (5th Cir. 2007) (same).

¹¹⁸ See, e.g., *United States v. Herrera-Garduno*, 519 F.3d 526, 530-31 (5th Cir. 2008) (holding above-guideline sentence 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”); *United States v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008) (recognizing upward variance may be appropriate

simple possession convictions in which the defendant possessed a large quantity of drugs.¹¹⁹

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.¹²⁰ A 12-level enhancement applies to felony convictions that received a sentence of 13 months or less.¹²¹

The rules for this determination are currently similar to the rules for calculating sentence length under Chapter Four.¹²² Consistent with Chapter Four, the sentence length is “based on the sentence pronounced, not the length of time actually served.”¹²³ It does not include any portion that was suspended,¹²⁴ but it does include “any term of imprisonment given upon revocation of probation, parole, or supervised release.”¹²⁵ 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.¹²⁶

where conviction for simple possession of large quantity of drugs did not qualify as a drug trafficking offense).

¹¹⁹ USSG §2L1.2, comment. (n.7).

¹²⁰ USSG §2L1.2(b)(1)(A)(i).

¹²¹ USSG §2L1.2(b)(1)(B).

¹²² 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 Four 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. *United States v. Martinez-Varela*, 531 F.3d 298 (4th Cir. 2008).

¹²³ 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. *United States v. D’Oliveira*, 402 F.3d 130 (2d Cir. 2005).

¹²⁴ USSG §4A1.2(b)(2) (adopted by §2L1.2, comment. (n.1(B)(7))).

¹²⁵ USSG §2L1.2, comment. (n.1(B)(vii)); *see also* *United States v. Moreno-Cisneros*, 319 F.3d 456, 457 (9th Cir. 2003) (holding “the length of the ‘sentence imposed’ for a prior state conviction includes the prison sentence the defendant received after his probation was revoked”); *United States v. Ruiz-Gea*, 340 F.3d 1181 (10th Cir. 2003) (holding “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); *United States v. Compian-Torres*, 320 F.3d 514 (5th Cir. 2003) (holding the length of the “sentence imposed” included sentence imposed on revocation of probation).

¹²⁶ USSG §4A1.2, comment. (n.2) (adopted by §2L1.2, comment. (n.1(B)(vii))); *see also* *United States v. Frias*, 338 F.3d 206, 212 (3d Cir. 2003) (holding “the term ‘sentence imposed’ in §2L1.2 means the maximum term of imprisonment in an indeterminate sentence”).

A “sentence imposed” under §2L1.2 has the same meaning as a “sentence of imprisonment” under Chapter Four.¹²⁷ Chapter Four states that “[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence.”¹²⁸ Thus, a sentence that did not result in any term of imprisonment is not a “sentence imposed” under §2L1.2.¹²⁹ 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.”¹³⁰

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.”¹³¹ 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.¹³² Likewise, deportation prior to expiration of a defendant’s sentence does not constitute a suspension, even when the sentencing court

¹²⁷ USSG §2L1.2, comment. (n.1(B)(7)).

¹²⁸ USSG §4A1.2, comment. (n.2).

¹²⁹ See, e.g., *United States v. Alvarez-Hernandez*, 478 F.3d 1060 (9th Cir. 2007) (holding 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* are based on a 2003 amendment to §2L1.2. USSG App. C, amend. 658 (effective Nov. 1, 2003). 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., *United States 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 *United States v. Mullings*, 330 F.3d 123 (2d Cir. 2003); *United States v. Garcia-Rodriguez*, 415 F.3d 452 (5th Cir. 2005).

¹³⁰ USSG §2L1.2(b)(1)(A) and (B).

¹³¹ *United States v. Garcia-Gomez*, 380 F.3d 1167, 1172 (9th Cir. 2004).

¹³² See, e.g., *United States 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); *United States v. Frias*, 338 F.3d 206 (3d Cir. 2003) (holding “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); *United States v. Mendez-Villa*, 346 F.3d 568, 570 (5th Cir. 2003) (per curiam) (holding “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 USSG §2L1.2(b)(1)”; *United States v. Rodriguez-Arreola*, 313 F.3d 1064 (8th Cir. 2002) (holding parole did not constitute a suspension); *United States v. Garcia-Gomez*, 380 F.3d 1167 (9th Cir. 2004) (holding participation in a work ethic camp that resulted in early release did not “suspend” sentence imposed); *United States v. Benitez-Perez*, 367 F.3d 1200 (9th Cir. 2004) (holding release on parole 13 months early did not constitute a reduction in the sentence imposed).

authorized immediate deportation.¹³³ However, a judicial order reducing a sentence can change the length of the “sentence imposed.”¹³⁴

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 than the 13-month threshold above which a 16-level enhancement otherwise applies.¹³⁵ 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.¹³⁶

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),¹³⁷ statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling.”¹³⁸ 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.”¹³⁹

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 involve[] conduct that presents a serious potential risk of physical injury to another.”¹⁴⁰ The §2L1.2 definition lacks this (“residual”) clause.

¹³³ See *United States v. Chavez-Diaz*, 444 F.3d 1223, 1226 (10th Cir. 2006) (holding 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”).

¹³⁴ See *United States v. Landeros-Arreola*, 260 F.3d 407 (5th Cir. 2001) (holding 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).

¹³⁵ *United States v. Gomez-Leon*, 545 F.3d 777, 785 (9th Cir. 2008).

¹³⁶ *Id.* at 785.

¹³⁷ The definition of “forcible sex offenses” took effect on November 1, 2008.

¹³⁸ USSG §2L1.2, comment. (n.1(B)(iii)).

¹³⁹ *Id.*

¹⁴⁰ USSG §4B1.2(a)(2).

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.¹⁴¹ In general, the inquiry for the first set of crimes is simply whether the offense of conviction can properly be classified as one of the enumerated offenses. For the second group, the court must look at the specific elements of the offense and determine whether one of those establishes “the use, attempted use, or threatened use of physical force against the person of another.”¹⁴²

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.¹⁴³

¹⁴¹ See, e.g., *United States v. Rayo-Valdez*, 302 F.3d 314 (5th Cir. 2002); *United States v. Vargas-Garnica*, 332 F.3d 471 (7th Cir. 2003); *United States v. Gomez-Hernandez*, 300 F.3d 974 (8th Cir. 2002); *United States v. Pereira-Salmeron*, 337 F.3d 1148 (9th Cir. 2003); *United States v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003); *United States v. Munguia-Sanchez*, 365 F.3d 877 (10th Cir. 2004); *United States v. Wilson*, 392 F.3d 1243 (11th Cir. 2004).

¹⁴² USSG §2L1.2, comment. (n.1(b)(iii)); see also, e.g., *United States 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); *United States 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 than the definition at common law); *United States 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).

¹⁴³ The statutory term in section 16 is similar to the “use of force” provision under the guideline, but this too differs in important ways. First, the guideline requires 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

Because of these definitional differences, a conviction could trigger the 16-level enhancement without being an aggravated felony.¹⁴⁴ 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.¹⁴⁵ A 2008 guideline amendment provides that in such circumstances, a downward departure may be warranted.¹⁴⁶

B. ENUMERATED OFFENSES

This section identifies several specific issues that have been raised in deciding how to apply the enumerated categories.

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.¹⁴⁷ 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.¹⁴⁸

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).

¹⁴⁴ See, e.g., *United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003) (holding a conviction need not be an aggravated felony in order to qualify for a 16-level enhancement); *United States v. Gonzalez*, 550 F.3d 1319 (11th Cir. 2008).

¹⁴⁵ *United States v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005) (holding 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).

¹⁴⁶ USSG §2L1.2, comment. (n.7).

¹⁴⁷ See, e.g., *United States v. Sanchez-Ruedas*, 452 F.3d 409 (5th Cir. 2006) (holding conviction for assault with a deadly weapon in violation of Cal. Pen. Code § 245(a)(1) was aggravated assault under §2L1.2); *United States v. Torres-Diaz*, 438 F.3d 529 (5th Cir. 2006) (holding conviction for second degree assault in violation of Conn. Gen. Stat. § 53a-60(a)(2) was aggravated assault under §2L1.2).

¹⁴⁸ *United States v. Fierro-Reyna*, 466 F.3d 324 (5th Cir. 2006) (holding 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); *United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009) (holding 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).

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.”¹⁴⁹ 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”¹⁵⁰ 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.”¹⁵¹

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 issue, the Fifth Circuit has held that the term “minor” means a person under the age of majority, or eighteen years of age for purposes of the “generic, contemporary” meaning.¹⁵²

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.”¹⁵³ 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*,¹⁵⁴ 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.”¹⁵⁵ The court then considered how contemporary

¹⁴⁹ *United States v. Gomez-Gomez*, 547 F.3d 242, 244-45 (5th Cir. 2008), *superseded on other grounds by guideline amendment*.

¹⁵⁰ USSG App. C, amend. 722 (effective Nov. 1, 2008).

¹⁵¹ USSG §2L1.2, comment. (n.1(B)(iii)).

¹⁵² *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (holding that a Texas conviction for sexual abuse of a child is a crime of violence).

¹⁵³ *United States v. Ortiz-Delgado*, 451 F.3d 752, 757 (11th Cir. 2006) (quoting *United States v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001)).

¹⁵⁴ *United States v. Izaguirre-Flores*, 405 F.3d 270 (5th Cir. 2005).

¹⁵⁵ *Id.* at 275.

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.”¹⁵⁶ 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.¹⁵⁷

In *United States v. Baza-Martinez*,¹⁵⁸ 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.¹⁵⁹ For the Ninth Circuit, the question turned on the meaning of “abuse,” which it defined as “physical or psychological harm.”¹⁶⁰ 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.”¹⁶¹ 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.¹⁶² The court noted that under North Carolina caselaw, a conviction under this statute could be sustained where the defendant “secretly set up a video camera in an office and asked a minor to undress for the purpose of filming her without her knowledge,” and she did not learn of the video until after she was 21.¹⁶³ Because this scenario caused no harm to a minor, the Ninth Circuit concluded that the statute was not categorically “sexual abuse of a minor.”¹⁶⁴

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,”¹⁶⁵ 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.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 276-77; *see also* *United States v. Ayala*, 542 F.3d 494 (5th Cir. 2008) (holding 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).

¹⁵⁸ *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006).

¹⁵⁹ *Id.* at 1015.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1017.

¹⁶⁴ *Id.*

¹⁶⁵ *Izaguirre-Flores*, 405 F.3d at 277.

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 entry¹⁶⁶ or of unprivileged or unlawful entry.¹⁶⁷ It also does not apply if the statute of conviction does not require proof that the building was a dwelling or home.¹⁶⁸ 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."¹⁶⁹

C. "USE OF FORCE"

In addition to these enumerated categories, the enhancement for a crime of violence applies to "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another."¹⁷⁰

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

¹⁶⁶ *United States v. Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007) (holding 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).

¹⁶⁷ *United States v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007) (holding 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).

¹⁶⁸ *United States v. Rodriguez-Rodriguez*, 388 F.3d 466 (5th Cir. 2004) (holding burglary of building in violation of Tex. Pen. Code Ann. § 30.02 (1974) was not a burglary of a dwelling).

¹⁶⁹ *Compare* *United States v. Gomez-Guerra*, 485 F.3d 301 (5th Cir. 2007) (holding Florida burglary statute did not constitute burglary of a dwelling), *with* *United States v. Castillo-Morales*, 507 F.3d 873 (5th Cir. 2007) (holding that same statute constituted burglary of a dwelling after looking at judicial record).

¹⁷⁰ USSG §2L1.2, comment. (n.1(B)(iii)).

conduct, is the proper focus.”¹⁷¹ 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.¹⁷²

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].”¹⁷³ 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.”¹⁷⁴

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 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.”¹⁷⁵ 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.”¹⁷⁶ Specifically, the Tenth

¹⁷¹ United States v. Calderon-Pena, 383 F.3d 254, 257 (5th Cir. 2004); *see also* United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005) (stating the inquiry under this provision is “whether the state crime has the use or threat of ‘physical force’ as an element of the offense”).

¹⁷² *See, e.g.*, United States v. Gamez, 577 F.3d 394 (2d Cir. 2009) (finding 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); United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) (holding 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).

¹⁷³ United States 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).

¹⁷⁴ *Id.* at 1118 (quoting United States v. Maldonado-Lopez, 517 F.3d 1207, 1211 (10th Cir. 2008) (McConnell, J., concurring)).

¹⁷⁵ United States v. Lopez-Hernandez, 112 F. App’x 984, 985 (5th Cir. 2004) (holding conviction for family violence battery in violation of Ga. Code Ann. § 16-5-23.1 was not a crime of violence). *See also* United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010) (holding the Texas offense of injury to a child does not meet the definition of crime of violence for purposes of the 16-level enhancement).

¹⁷⁶ United States v. Zuniga-Soto, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (emphasis in original).

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.’”¹⁷⁷

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*,¹⁷⁸ 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.”¹⁷⁹ 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.¹⁸⁰ Several of these cases have arisen in the context of vehicular homicide and drunken driving cases.

4. Force must be used against a person

In contrast to the statutory definition of crime of violence at 18 U.S.C. § 16, the guideline definition does not include the use of force against another’s property. This point is illustrated by shooting cases. In a number of recent cases, courts have held that a conviction for shooting at a building did not qualify for a 16-level enhancement because the statute of conviction did not require proof that the building was occupied.¹⁸¹ Thus,

¹⁷⁷ United States v. Rodriguez-Enriquez, 518 F.3d 1191, 1194 (10th Cir. 2008) (emphasis in original).

¹⁷⁸ *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

¹⁷⁹ *Id.* at 9.

¹⁸⁰ See, e.g., *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006); *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008); see also *United States 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”).

¹⁸¹ *United States 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); *United States v. Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005) (finding 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 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); *United States v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (holding 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).

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 “aggravated felony” is defined at 8 U.S.C. § 1101(a)(43).¹⁸² 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.¹⁸³

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.”¹⁸⁴ In contrast to the guideline definition of felony, which is based on an offense being punishable by imprisonment exceeding one year,¹⁸⁵ this statute includes a number of convictions “for which the term of imprisonment [is] at least one year.”¹⁸⁶

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.¹⁸⁷ For others, the focus is on the length of the “term of imprisonment” that was actually imposed.¹⁸⁸ Under this definition, however, the method for determining sentence length differs from §2L1.2. In contrast to the guidelines, the “term of imprisonment” under section 1101 does

¹⁸² USSG §2L1.2, comment. (n.3(A)).

¹⁸³ 8 U.S.C. § 1101(a)(43)(U).

¹⁸⁴ United States v. Saenz-Mendoza, 287 F.3d 1011, 1014 (10th Cir. 2002).

¹⁸⁵ USSG §2L1.2, comment. (n.2).

¹⁸⁶ 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

¹⁸⁷ 8 U.S.C. § 1101(a)(43)(J), (Q), (T).

¹⁸⁸ 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S).

not exclude time that was suspended.¹⁸⁹ A sentence of probation, on the other hand, is not a suspended sentence and, thus, cannot be an aggravated felony under such a provision.¹⁹⁰

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

In *Lopez v. Gonzales*,¹⁹¹ 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.”¹⁹² 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.¹⁹³

Recidivist provisions in § 844(a) (“Possession” offenses) require actual previous state convictions to trigger the “aggravated felony” enhancement.

Title 21, United States Code, 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 section 844(a) punishment ranges. And, this fact 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 section 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

¹⁸⁹ 8 U.S.C. § 1101(a)(48)(B); *see also* United States v. Demirbas, 331 F.3d 582 (8th Cir. 2003) (holding suspended 4-year term of incarceration, imposed on probation violation, qualified conviction for “stealing” as aggravated felony); United States v. Garza-Mendez, 735 F.3d 1284 (11th Cir. 2013) (holding a prior Georgia conviction for family violence battery was an aggravated felony notwithstanding the fact that the defendant was sentenced to 12 months of “confinement” with all but 30 hours suspended).

¹⁹⁰ *See, e.g.*, United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000) (holding sentence of probation was not suspended sentence under section 1101 and that sentence imposed after returning to the United States based on probation violation did not convert conviction into aggravated felony).

¹⁹¹ 549 U.S. 47 (2006).

¹⁹² *Id.* at 60.

¹⁹³ *See, e.g.*, United States v. Matamoros-Modesta, 523 F.3d 260 (4th Cir. 2008); United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007); United States v. Figueroa-Ocampo, 494 F.3d 1211 (9th Cir. 2007). *See also* Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (holding a prior conviction for marijuana distribution that does not involve either remuneration or more than a small amount of marijuana is not an aggravated felony).

Substances Act [CSA].”¹⁹⁴ And, by definition, if the offense is not a “felony” under the CSA, it is not a felony under § 1101(a)(43)’s definition of ‘aggravated felony.’¹⁹⁵

VII. OTHER CATEGORIES (+16)

The other categories of offenses listed in §2L1.2(b)(1)(A)¹⁹⁶ are used less frequently. Most of these categories are defined by reference to specific federal statutes.¹⁹⁷

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.¹⁹⁸ There has been little appellate caselaw discussing these enhancements.

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.¹⁹⁹ A firearms offense may also be any state or federal offense that “prohibits the importation, distribution, transportation, or trafficking” of certain, specified firearms.²⁰⁰

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.²⁰¹

¹⁹⁴ Carachuri-Rosendo v. Holder, 560 U.S. 563, 130 S. Ct. 2577, 2589-90 (2010).

¹⁹⁵ See 8 U.S.C. § 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.”).

¹⁹⁶ 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).

¹⁹⁷ 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”).

¹⁹⁸ See USSG §2L1.2, comment. (n.1(B)(ii), (v), (vi), (viii)).

¹⁹⁹ USSG §2L1.2, comment. (n.1(b)(v)).

²⁰⁰ USSG §2L1.2, *Id.*, comment. (n.1(b)(v)(I)).

²⁰¹ USSG §2L1.2, comment. (n.1(B)(ii)).

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).”²⁰²

D. HUMAN TRAFFICKING OFFENSE

Human trafficking offenses are convictions under specified federal statutes or under state laws whose elements satisfy any of those statutes.²⁰³

E. ALIEN SMUGGLING OFFENSE

Alien smuggling offenses are only those that are specified as such in 8 U.S.C. § 1101(a)(43)(N).²⁰⁴ 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.”²⁰⁵ The defendant has the burden of showing that his conviction falls within this exception.²⁰⁶

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.”²⁰⁷ 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.²⁰⁸ In contrast, the Eleventh

²⁰² USSG §2L1.2, comment. (n.1(B)(viii)).

²⁰³ USSG §2L1.2, comment. (n.1(B)(vi)).

²⁰⁴ USSG §2L1.2, comment. (n.1(B)(i)).

²⁰⁵ 8 U.S.C. § 1101(a)(43)(N).

²⁰⁶ *United States v. Rabanal*, 508 F.3d 741 (5th Cir. 2007).

²⁰⁷ USSG §2L1.2, comment. (n.5). Compare this definition with 8 U.S.C. § 1101(a)(43)(U), which criminalizes and makes it an aggravated felony to commit an “attempt or conspiracy” to commit an aggravated felony.

²⁰⁸ *United States v. Cornelio-Pena*, 435 F.3d 1279 (10th Cir. 2006) (holding conviction for solicitation to commit burglary of a dwelling under Ariz. Rev. Stat. § 13-1002 was crime of violence).

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.²⁰⁹

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.²¹⁰ In some cases, courts have relied on §4A1.3 to increase a sentence based on underrepresented criminal history.²¹¹ 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.²¹²

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.²¹³ Thus, courts have held that an alien who is "found" by immigration officials while in state custody has committed the section 1326 offense "while under a sentence of imprisonment" and thus subject to a two-point increase under §4A1.1(d).²¹⁴

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 section 1326 offense. Specifically, the Fourth Circuit has held that immigration authorities have actual knowledge of an immigrant's

²⁰⁹ United States v. Aguilar-Ortiz, 450 F.3d 1271 (11th Cir. 2006).

²¹⁰ See, e.g., United States v. Garcia-Cardenas, 555 F.3d 1049 (9th Cir. 2009) (reaffirming rule established in United States v. Luna-Herrera, 149 F.3d 1054 (9th Cir. 1998)); United States v. Torres-Echavarria, 129 F.3d 692 (2d Cir. 1997); United States v. Crawford, 18 F.3d 1173 (4th Cir. 1994); United States v. Zapata, 1 F.3d 46 (1st Cir. 1993).

²¹¹ United States v. Zuniga-Peralta, 442 F.3d 345 (5th Cir. 2006) (affirming departure under §4A1.3 from Category II to Category VI based on prior uncounted offenses, four deportations, and use of eleven aliases); United States v. Figaro, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where criminal history did not include prior, uncharged act of alien smuggling).

²¹² Figaro, 935 F.2d at 7 (holding upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).

²¹³ United States v. Cano-Rodriguez, 552 F.3d 637, 639 (7th Cir. 2009).

²¹⁴ See, e.g., Cano-Rodriguez, 552 F.3d at 639; United States v. Hernandez-Noriega, 544 F.3d 1141 (10th Cir. 2008); United States v. Coeur, 196 F.3d 1344 (11th Cir. 1999); United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996).

presence in the United States when a law enforcement officer participating in the cross-designation program issues an immigration detainer.²¹⁵ 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).²¹⁶

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 granting a departure to defendants sentenced pursuant to this guideline is §5K3.1, which permits a reduction pursuant to an early disposition (commonly known as “fast track”) program. Section 5K3.1 authorizes the court to depart downward up to 4 levels based on a government motion “pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”

Because these programs have not been available in all districts, defendants have argued that the unavailability of fast track programs constitutes an unwarranted disparity. Although the circuit courts have uniformly rejected claims that the unavailability of fast track programs violates equal protection,²¹⁷ the circuits have split over whether *Kimbrough* permits district courts to consider purported disparities created by the unavailability of such a program in some districts. The Fifth, Ninth, and Eleventh Circuits have held that district courts may not consider disparities created by the unavailability of fast-track programs,²¹⁸ while the First, Third, Sixth, Seventh, Eighth, and Tenth Circuits have concluded that a district court may consider these disparities.²¹⁹ The Second Circuit has held that

²¹⁵ *United States v. Sosa-Carabantes*, 561 F.3d 256 (4th Cir. 2009).

²¹⁶ *Id.*

²¹⁷ *United States v. Rodriguez*, 523 F.3d 519 (5th Cir. 2008); *United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006); *United States v. Campos-Diaz*, 472 F.3d 1278 (11th Cir. 2006); *United States v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005), *abrogated on other grounds by* *United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010).

²¹⁸ *See United States v. Gonzalez-Sotelo*, 556 F.3d 736, 739-41 (9th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 562-63 (5th Cir. 2008); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2008).

²¹⁹ *See United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011); *United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v.*

defendants in non-fast-track districts are not “similarly situated” to defendants in fast-track districts, and thus, “sentencing disparities resulting from the existence of fast-track districts are not *per se* unwarranted.”²²⁰

In 2012, the Department of Justice issued a policy memorandum for the purpose of establishing fast track programs in every district.²²¹ Because fast track programs have not yet been established pursuant to the policy memorandum, it is unclear how this policy change will affect sentencing arguments predicated on the availability and administration of fast track programs.

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,²²² 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.”²²³

The *Guidelines Manual* does not specifically address whether or how a sentencing court should consider a defendant-alien’s stipulation to an administrative or judicial order of removal. However, various circuits have considered whether the defendant’s stipulation to removal is a permissible ground for downward departure. These circuits have uniformly concluded, or have at least recognized the possibility, that a district court may grant a departure in some circumstances based on the defendant-alien’s stipulation to removal; no circuit has categorically barred a stipulation to removal as a basis for departure.²²⁴

Camacho-Arellano, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008).

²²⁰ *United States v. Hendry*, 522 F.3d 239, 241-42 (2d Cir. 2008).

²²¹ See Memorandum from James M. Cole, Deputy Att’y Gen., United States Dep’t of Justice, to All United States Attorneys (Jan. 31, 2012) (“Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326) – the largest category of cases authorized for fast-track treatment – shall implement an early disposition program . . .”), available at <http://www.justice.gov/dag/fast-track-program.pdf> (last visited June 17, 2014).

²²² See, e.g., *United States v. Vasquez*, 279 F.3d 77 (1st Cir. 2002); *United States v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir. 2001).

²²³ *United States v. Bautista*, 258 F.3d 602, 607 (7th Cir. 2001) (holding separation from family, without more, is not sufficiently extraordinary to warrant a downward departure).

²²⁴ See, e.g., *United States v. Jauregui*, 314 F.3d 961, 963-64 (8th Cir. 2003); *United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999); *United States v. Rodriguez-Lopez*, 198 F.3d 773, 777 (9th Cir. 1999); *United States v. Mignott*, 184 F.3d 1288, 1291 (11th Cir. 1999); *United States v. Marin-Castaneda*, 134 F.3d 551, 555 (3d Cir. 1998); *United States v. Clase-Espinal*, 115 F.3d 1054, 1059 (1st Cir. 1997).

In *Clase-Espinal*, the First Circuit held that a stipulation to deportation is insufficient as a matter of law to support a departure in the absence of a “colorable, nonfrivolous defense to deportation.”²²⁵ The Second, Third, Ninth, and Eleventh Circuits have similarly held that a stipulation to removal is a permissible ground for departure, though only when the defendant had a “colorable, nonfrivolous” defense to removal.²²⁶

The Eighth Circuit has focused on whether the defendant surrendered procedural rights and protections in stipulating to the removal, rather than looking only to whether the defendant forfeited non-frivolous defenses to removal. In *Jauregui*, the defendant was a lawful permanent resident who was convicted of possession with intent to distribute methamphetamine.²²⁷ The defendant moved for, and received, a four-level departure for stipulating to removal.²²⁸ On the government’s appeal, the Eighth Circuit affirmed and explained that the defendant, “as a resident alien, gave up substantial rights in waiving the administrative deportation hearing, and it was within the sound discretion of the district court to conclude that in doing so he has substantially assisted in the administration of justice.”²²⁹ The Eighth Circuit did not specifically analyze or discuss whether the defendant might have succeeded in opposing removal.²³⁰

Although the circuits generally agree that the defendant-alien must sacrifice *something* by stipulating to removal before receiving a departure, they are split on whether the district court may grant a departure over the government’s objection. The Third and Tenth Circuits have held that a district court may not depart based on a stipulation to removal unless the government agrees to the departure.²³¹ This requirement flows from the “judiciary’s limited power with regard to deportation.”²³² The Second and Ninth Circuits have reached the opposite conclusion.²³³ These courts have reasoned that requiring the government’s agreement would create a condition for departure not required by the Guidelines.

²²⁵ *Clase-Espinal*, 115 F.3d at 1059.

²²⁶ See *Rodriguez-Lopez*, 198 F.3d at 777; *Mignott*, 184 F.3d at 1291; *Galvez-Falconi*, 174 F.3d at 260; *Martin-Castaneda*, 134 F.3d at 555.

²²⁷ *Jauregui*, 314 F.3d at 962.

²²⁸ See *id.*

²²⁹ *Id.* at 964.

²³⁰ See *id.* at 962-63.

²³¹ See *United States v. Gomez-Sotelo*, 18 F. App’x 690, 692 (10th Cir. 2001); *Martin-Castaneda*, 134 F.3d at 555.

²³² *Martin-Castaneda*, 134 F.3d at 555.

²³³ See *Rodriguez-Lopez*, 198 F.3d at 778; *Galvez-Falconi*, 174 F.3d at 260.

C. MOTIVE AND CULTURAL ASSIMILATION

Courts have generally held that the defendant's motive for reentry is not a basis for a downward departure.²³⁴ Courts have recognized, however, that the defendant's motivation to care for a family could mitigate his return, although such circumstances must generally be exceptional.²³⁵ Notably, one court upheld a sentence *increase* where the reentry was committed to facilitate the commission of another offense.²³⁶

The commentary to §2L1.2 provides that a departure based on the defendant's cultural assimilation may be appropriate, but only "where (A) the defendant formed cultural ties primarily to the United States from having continuously resided in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry and continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant."²³⁷ In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court's refusal to grant this departure, where the district court found that the defendant was likely to recidivate (i.e., that the departure would likely "increase the risk to the public from further crimes of the defendant") given his past cocaine use, the seriousness of his criminal history, and his commission of criminal offenses after illegally reentering the United States.²³⁸ In *United States v. Rodriguez*, the Fifth Circuit affirmed the district court's refusal to depart based on cultural assimilation, concluding that "[a]lthough cultural assimilation can be a mitigating factor and form the basis of a downward departure, nothing requires that a sentencing court must accord it dispositive weight."²³⁹

²³⁴ *United States v. Saucedo-Patino*, 358 F.3d 790 (11th Cir. 2004); *see also* *United States v. Dyck*, 334 F.3d 736 (8th Cir. 2003) (stating purported lack of criminal intent in reentering the country is not basis for downward departure).

²³⁵ *See, e.g.*, *United States v. Montes-Pineda*, 445 F.3d 375 (4th Cir. 2006) (finding motivation to be reunited with family and fact that prior conviction was 14 years old, though relevant, did not require a nonguideline sentence); *United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005) (holding 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 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); *United States v. Carrasco*, 313 F.3d 750 (2d Cir. 2002) (finding departure not warranted where defendant was separated from his wife; provision of financial support for three children was not exceptional circumstance); *United States v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995) (stating defendant's motivation to reenter to visit his family, absent extraordinary circumstances, may not justify downward departure).

²³⁶ *United States v. Figaro*, 935 F.2d 4 (1st Cir. 1991) (affirming upward departure where reentry was committed to facilitate the commission of alien smuggling).

²³⁷ *See* USSG §2L1.2 comment. (n.8) (2010). *See also* USSG App. C, amend. 740 (effective Nov. 1, 2010) (explaining the guideline amendment).

²³⁸ *United States v. Lua-Guizar*, 656 F.3d 563, 567 (7th Cir. 2011).

²³⁹ *United States v. Rodriguez*, 660 F.3d 231 (5th Cir. 2011) (quotations omitted).

D. SERIOUSNESS OF PRIOR OFFENSE

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,²⁴⁰ 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.²⁴¹

Since *Booker*, however, courts have held that an upward departure or variance may be appropriate based on a conviction that did not “‘technically’ qualify[y]” for an enhancement under §2L1.2.²⁴² One case has suggested that a guideline sentence would be unreasonable based on the nature of the prior crime.²⁴³ Another recent opinion reversed a below-guideline sentence, reasoning that the underlying facts were not so different from a typical case under that enhancement.²⁴⁴

Because an applicable offense level may substantially overstate or understate the seriousness of a previous conviction, an upward or downward departure may be warranted.²⁴⁵ Effective November 1, 2011, §2L1.2 was amended to limit enhancements

²⁴⁰ *United States v. Stultz*, 356 F.3d 261, 268 (holding 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; *United States v. Maul-Valverde*, 10 F.3d 544 (8th Cir. 1993) (holding 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).

²⁴¹ *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (finding, 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”); *Montes-Pineda*, 445 F.3d at 379 (4th Cir. 2006) (holding the fact that prior conviction was 14 years old, though relevant, did not require a nonguideline sentence).

²⁴² *United States v. Herrera-Garduno*, 519 F.3d 526, 530 (5th Cir. 2008) (holding above-guideline sentence 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]”); *United States 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* *United States 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).

²⁴³ *United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (suggesting 16-level enhancement based on consensual sexual relations between two teenagers was unreasonable).

²⁴⁴ *United States 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).

²⁴⁵ *See* USSG §2L1.2, comment. (n.7) (providing non-exhaustive examples where upward and downward departures might be warranted).

under subsections (b)(1)(A) or (b)(1)(B).²⁴⁶ An upward departure may be warranted where any such limited enhancement does not adequately account for the seriousness or extent of the underlying previous conviction.²⁴⁷

²⁴⁶ This amendment took effect on November 1, 2011. Convictions can now 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.

²⁴⁷ *See id.*