

PRIMER



IMMIGRATION GUIDELINES

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INTRODUCTION

This primer is intended to provide a general overview of the statutes, sentencing guidelines, and relevant case law relating to criminal immigration offenses. This primer focuses primarily on application of immigration guidelines and related sentencing issues. Although the primer identifies some of the issues and cases related to the sentencing of immigration offenses, it is not a comprehensive compilation of case law and is not intended to be a substitute for independent research and analysis of primary authority.

Effective November 1, 2016, the Sentencing Commission promulgated a multi-part amendment following its multi-year study of immigration offenses and related guidelines (the “2016 Amendment”).¹ The first part of the amendment made several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revised the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States). This primer discusses the 2016 Amendment as well as the relevant case law that both pre-dates and post-dates the amendment.

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

This section of the primer discusses the statutes, sentencing guidelines, and case law related to alien smuggling, transporting, and harboring offenses.²

I. STATUTORY SCHEME

Immigration offenses sentenced under §2L1.1 stem from violations of 8 U.S.C. §§ 1324 and 1327. Section 1324 prohibits (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; (4) encouraging or inducing an illegal alien to enter or reside in the United States (or engaging in conspiracy to commit any of these acts), and (5) hiring at least ten aliens for employment.³ Section 1327 makes it a

¹ See U.S. SENTENCING COMM’N, *Guidelines Manual*, App. C, amend. 802 (effective Nov. 1, 2016).

² The 2016 Amendment increased the specific offense characteristic under §2L1.1(b)(4) for smuggling, transporting, or harboring an unaccompanied minor from two levels to four levels. The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused and ensures that a 4-level “serious bodily injury” enhancement will apply in such a case. See *id.*

³ 8 U.S.C. § 1324(a)(1)–(3).

crime to knowingly aid or assist an inadmissible alien to enter the United States where that alien has been convicted of an aggravated felony.⁴

8 U.S.C. § 1324(a)(1)(A) – BRINGING IN, TRANSPORTING, AND HARBORING ALIENS

Section 1324(a)(1)(A) 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 or inducing aliens to enter or reside in the United States without official permission; and (v) conspiracy to commit, and aiding and abetting the commission of, any of these acts.⁵

Transporting, harboring, or encouraging entry without financial gain has a 5-year statutory maximum penalty.⁶ The statutory maximum increases to ten years for conspiring to commit any of these crimes or committing any of these crimes for financial gain.⁷ Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum increases to 20 years.⁸ And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.⁹ All of these maximum penalties may be enhanced an additional ten years in cases of commercial transportation of large groups in a life-threatening manner.¹⁰ Furthermore, a defendant who aids and abets another in the commission of one of these offenses is subject to a 5-year statutory maximum.¹¹ 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.¹²

⁴ *Id.* § 1327.

⁵ *Id.* § 1324(a)(1)(A).

⁶ *Id.* § 1324(a)(1)(B)(ii).

⁷ *Id.* § 1324(a)(1)(B)(i).

⁸ *Id.* § 1324(a)(1)(B)(iii).

⁹ *Id.* § 1324(a)(1)(B)(iv).

¹⁰ *Id.* § 1324(a)(4).

¹¹ *Id.* § 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.”).

¹² *See Hilario-Hilario*, 529 F.3d at 69 (“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, 644 (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 . . .”).

In *United States v. Sineneng-Smith*,¹³ the Ninth Circuit recently held that section 1324(a)(1)(A)(iv), which prohibits “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law”¹⁴ violates the First Amendment’s protection of free speech. In *Sineneng-Smith*, the defendant performed immigration consultancy work for citizens of the Philippines who were working in the United States illegally. The defendant argued that section 1324(a)(1)(A)(iv) “criminalizes speech through its use of the term ‘encourages or induces,’ and that the speech restriction is content-based and viewpoint-discriminatory, because it criminalizes only speech *in support* of aliens coming to or remaining in the country.”¹⁵ The Ninth Circuit agreed, holding that the only reasonable construction of section 1324(a)(1)(A)(iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits.¹⁶ The court explained that section 1324(a)(1)(A)(iv) is susceptible to regular application in a manner that would infringe on recognized First Amendment protections, and thus was overbroad under the First Amendment.¹⁷ The court rejected arguments that section 1324(a)(1)(A)(iv) could be upheld under the “incitement” exception¹⁸ or the “speech integral to criminal conduct” exception¹⁹ to the First Amendment.

Although not ruling on constitutional grounds, “other circuits have rejected arguments that a conviction under section 1324(a)(1)(A)(iv) cannot be sustained where the illegal aliens in question already resided in the United States at the time of the alleged wrongful encouragement or inducement occurred.”²⁰

¹³ 910 F.3d 461, 470–71 (9th Cir. 2018), *cert. granted* 140 S. Ct. 36 (Oct. 4, 2019) (wherein the Question Presented is “[w]hether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.” See Brief for Petitioner at I, *United States v. Sineneng-Smith*, 910 F.3d 461 (2019) (No. 19-67), 2019 WL 6524882).

¹⁴ 8 U.S.C. § 1324(a)(1)(A)(iv).

¹⁵ *Sineneng-Smith*, 910 F.3d at 470 (emphasis in original).

¹⁶ *Id.* at 471.

¹⁷ *Id.* at 483–84.

¹⁸ *Id.* at 480 (“Under the incitement exception to the First Amendment, the government may not ‘proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

¹⁹ *Id.* (“[S]peech or writing used as an integral part of conduct in violation of a valid criminal statute’ does not enjoy First Amendment protection.” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))).

²⁰ *United States v. Martinez*, 900 F.3d 721, 731 n.8 (5th Cir. 2018) (citing *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295–96 (11th Cir. 2010); *United States v. Oloyede*, 982 F.2d 133, 136–38 (4th Cir. 1993)).

8 U.S.C. § 1324(a)(2) – BRINGING IN ALIENS

Section 1324(a)(2)(A) is a misdemeanor offense that prohibits bringing aliens to the United States without “prior authorization” despite their presentation to immigration officials or ultimate admission. Pursuant to section 1324(a)(2)(B), where the alien is brought into the United States but is not presented to immigration officials, a first or second offense is a felony and carries a 10-year maximum.²¹ 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.²²

Multiple violations of section 1324(a)(2) committed for profit or with reason to believe that the alien will commit a felony invoke a mandatory minimum 3- or 5-year penalty.²³ Note that “the sentence is calculated ‘for each alien with respect to whom a violation . . . occurs.’”²⁴ Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.²⁵ Although this recidivist provision raises the statutory maximum, because the increase is based on criminal history, it need neither be charged in the indictment nor found beyond a reasonable doubt by a jury.²⁶

Finally, as with section 1324(a)(1), the statutory maximums may also be enhanced an additional ten years for commercial transportation of large groups in a life-threatening manner.²⁷

8 U.S.C. § 1324(a)(3) – EMPLOYING ALIENS, AND BRINGING IN ALIENS FOR EMPLOYMENT

Section 1324(a)(3), punishable by a maximum of five years in prison, prohibits hiring at least ten aliens during any 12-month period with actual knowledge that they are aliens.

The statutory maximum in section 1324(a)(3) may be increased to ten years for an offense that was part of an ongoing commercial organization in which aliens were transported in groups of ten or more and the manner of transportation endangered the

²¹ 8 U.S.C. § 1324(a)(2)(B)(iii).

²² *Id.* § 1324(a)(2)(B).

²³ *Id.*

²⁴ *United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002) (quoting 8 U.S.C. § 1324(a)(2)).

²⁵ *See, e.g., id.*

²⁶ *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

²⁷ 8 U.S.C. § 1324(a)(4).

aliens' lives.²⁸ The enhanced penalty also applies where the aliens in question presented a life-threatening health risk to people in the United States.²⁹

8 U.S.C. § 1327 – AIDING OR ASSISTING CERTAIN ALIENS TO ENTER

Knowingly aiding certain aliens who were previously convicted of aggravated felonies to enter the United States is punishable by a maximum of ten years in prison pursuant to 8 U.S.C. § 1327. To be convicted, a defendant need not know that the alien in question had a prior felony conviction. As the Eleventh Circuit has observed: “the 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 . . . [section] 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.”³⁰

II. GUIDELINE OVERVIEW: §2L1.1 – SMUGGLING, TRANSPORTING, OR HARBORING AN UNLAWFUL ALIEN

The guidelines instruct users to determine the applicable Chapter Two offense by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).³¹ For violations of the alien smuggling, transporting, or harboring statutes, Appendix A specifies the offense guideline at §2L1.1.

A. BASE OFFENSE LEVEL

The base offense level for alien smuggling offenses depends on the statute of conviction. Violations of section 1324 have a base offense level of 12 under §2L1.1(a)(3).³² Violations of section 1327 have a base offense level of 23 or 25, under §2L1.2(a)(1) or (a)(2), depending on the immigration status and criminal history of the alien being smuggled.³³

²⁸ *Id.*

²⁹ *Id.*

³⁰ *United States v. Lopez*, 590 F.3d 1238, 1254 (11th Cir. 2009) (internal citations omitted).

³¹ U.S. SENTENCING COMM'N, *Guidelines Manual*, §1B1.2 (Nov. 2018) [hereinafter USSG].

³² USSG §2L1.1(a)(3)

³³ USSG §2L1.1(a)(1) (base offense level of 25 if alien was inadmissible under 18 U.S.C. § 1182(a)(3), relating to seeking to enter the United States to engage in espionage, sabotage, or the overthrow of the government); §2L1.1(a)(2) (base offense level of 23 if alien was previously deported after aggravated felony conviction).

B. SPECIFIC OFFENSE CHARACTERISTICS

Section 2L1.1 has several specific offense characteristics that may increase or decrease the base offense level:

- (1) whether the offense lacked a profit motive or involved only the defendant's spouse or child;
- (2) the number of aliens smuggled, harbored, or transported;
- (3) the defendant's prior record of immigration crimes;
- (4) transportation of an unaccompanied minor;
- (5) the discharge, use, or possession of a firearm or other dangerous weapon;
- (6) intentionally or recklessly creating a substantial risk of death or serious bodily injury;
- (7) death or bodily injury of any person;
- (8) involuntary detention of an alien through coercion or threat in connection with a demand for payment;
- (9) harboring an alien for the purpose of prostitution; and
- (10) commercial transportation of large groups in a life-threatening manner.³⁴

C. CROSS REFERENCE

Section 2L1.1(c)(1) provides that if the conduct resulted in the death of another, the appropriate homicide guideline should be applied.³⁵

³⁴ USSG §2L1.1(b).

³⁵ USSG §2L1.1(c)(1). *See* United States v. Escobedo-Moreno, No. 18-40375, 2019 WL 3051297 (5th Cir. July 11, 2019) (finding cross reference under §2L1.1(c) to §2A1.2 for second-degree murder proper where the defendant's conduct crossed the extreme recklessness threshold when the alien suffocated while hiding inside a compartment in the cab of the commercial vehicle, when the compartment was barely large enough to hold a human and there was a substantial possibility the alien would likely not be able to contort his body as needed to escape or move enough to access the cellphone in the compartment for assistance).

III. SPECIFIC GUIDELINE APPLICATION ISSUES

A. §2L1.1(B)(1) – LACK OF PROFIT MOTIVE

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)(3), decrease by 3 levels.

The defendant has the burden of establishing that he is entitled to a reduction under §2L1.1(b)(1).³⁶ Courts have declined to apply the 3-level reduction even when there is no evidence of a monetary payment from the alien. For example, the reduction may not apply where the defendant did not receive payment from the alien, but received government benefits based on representations that the illegal alien was her child and the alien performed household work in the defendant’s home.³⁷ Likewise, 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.’”³⁸ Further, as discussed in Application Note 1, committing the offense other than for profit includes both a lack of payment made and no expectation of payment.³⁹

B. §2L1.1(B)(2) – NUMBER OF ALIENS

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

Section 2L1.1(b)(2) provides increases of three, six, or nine levels based on the number of aliens smuggled, harbored, or transported. Consistent with this graduated

³⁶ 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 because 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).

³⁷ *United States v. McClure-Potts*, 908 F.3d 30, 36 (3d Cir. 2018).

³⁸ *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 the United States); see also *United States v. Perez-Ruiz*, 169 F.3d 1075, 1076 (7th Cir. 1999) (affirming denial of reduction where defendant “received in-kind compensation—transportation from Arizona to Chicago—for his role in the offense”).

³⁹ USSG §2L1.1, comment. (n.1).

scheme, Application Note 7 provides that an upward departure may be warranted where the offense involved substantially more than 100 aliens.⁴⁰ The Second Circuit has upheld an upward departure where nearly 300 aliens were packed into 800 square feet of cargo space for a voyage lasting more than three months.⁴¹ Conversely, the Ninth Circuit has held that an upward departure was unreasonable based on 180 aliens because it was not “substantially more than 100 aliens.”⁴²

Because §2L1.1 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.”⁴³ Thus, a court may determine the number of aliens based on all acts. For example, the Fifth Circuit upheld a 9-level enhancement (for transporting 100 or more aliens) in a case in which a commercial truck driver smuggled 134 aliens in his tractor-trailer during separate trips, even though only one trip with 74 aliens was alleged in the indictment.⁴⁴ The district court applied the 9-level enhancement under §2L1.1(b)(2) because it also accounted for the defendant’s earlier transportation of approximately 60 additional aliens.⁴⁵ Noting the numerous ways that conduct can be considered “relevant conduct” for sentencing and the specific relationship between §3D1.2(d) and §2L1.1,⁴⁶ the Fifth Circuit concluded that the district court did not clearly err when including the earlier transportation of approximately 60 aliens as relevant conduct as part of a “common scheme or plan”:

It was not clear error for the district court to include [the defendant’s] first trip, during which he transported approximately 60 unlawful aliens, as part of the relevant conduct for applying §2L1.1(b)(2). Ample evidence supports a conclusion that the two trips were part of a common scheme or plan. The same accomplices . . . were involved in both trips, and . . . testimony established the number of aliens transported during the first trip. Both trips were for the purpose of transporting aliens and were undertaken with the same modus

⁴⁰ USSG §2L1.1, comment. (n.7(C)).

⁴¹ *United States v. Moe*, 65 F.3d 245, 250 (2d Cir. 1995); *see also United States v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (affirming upward departure based on transporting 1,000 aliens).

⁴² *United States v. Nagra*, 147 F.3d 875, 886 (9th Cir. 1998). Section 2L1.1(b)(2) provided a 2-, 4-, or 6-level increase in the *Guidelines Manual* applied at sentencing in *Nagra*. *See, e.g.*, USSG §2L1.1(b)(2) (Nov. 1994). The court reasoned that the guideline’s stated 6-level enhancement for more than 100 aliens would apply to 100–399 aliens based on its observation that the guideline’s incremental enhancements relied on a geometric exponential of four. The specific offense characteristic was amended to its current structure in 1997 to provide a 3-, 6-, or 9-level increase based on the number of aliens. USSG, App. C, amend. 543 (effective May 1, 1997).

⁴³ USSG §1B1.3(a)(2).

⁴⁴ *United States v. Williams*, 610 F.3d 271, 274–75 (5th Cir. 2010).

⁴⁵ *Id.* at 292.

⁴⁶ *Id.* (“[Section] 3D1.2(d) includes offenses covered by §2L1.1.”).

operandi—unlawful aliens were loaded into [the defendant’s] trailer The Guidelines[’] requirement to establish a common scheme or plan is satisfied here because the offenses are substantially connected to each other by at least one common factor. Accordingly, the district court did not commit clear error in enhancing [the defendant’s] sentences by nine levels under §2L1.1(b)(2)(C).⁴⁷

Courts have occasionally addressed the quantum of evidence needed to apply the enhancement. In one case, the Fifth Circuit affirmed the district court’s application of the enhancement based on a list of names in a ledger found in a “stash house.”⁴⁸ In another case, the 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.⁴⁹

C. §2L1.1(B)(3) – PRIOR FELONY CONVICTIONS

If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.

Application Note 2 instructs that “[p]rior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four” of the *Guidelines Manual*.⁵⁰ In *United States v. Cortez-Gonzalez*, the Fifth Circuit held there is no temporal limitation to determine which predicate offenses can invoke the enhancement. The court noted that Application Note 2 does not require that prior felony convictions that have been found to be ineligible for criminal history points cannot serve as predicate offenses for an enhancement under §2L1.1(b)(3).⁵¹

⁴⁷ *Id.* at 293–94 (internal citations and quotation omitted).

⁴⁸ *United States v. Angeles-Mendoza*, 407 F.3d 742, 750 (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).

⁴⁹ *United States v. Cabrera*, 288 F.3d 163 (5th Cir. 2002).

⁵⁰ USSG §2L1.1, comment. (n.2).

⁵¹ *United States v. Cortez-Gonzalez*, 929 F.3d 200, 204 (5th Cir. 2019) (differentiating §2L1.1(b)(3) from the guideline at §2L1.2(b) where Application Note 3 of §2L1.2 specifically states courts are to “use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c).”).

D. §2L1.1(B)(4) – UNACCOMPANIED MINORS

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 2016 Amendment increased the enhancement under §2L1.1(b)(4) for smuggling, transporting, or harboring an unaccompanied minor from two levels to four levels.⁵² The definition of “minor” includes an individual under the age of 18.⁵³

Because the specific offense characteristic was amended effective November 1, 2016,⁵⁴ it may raise *ex post facto* issues.⁵⁵ 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 Constitution, in which case, “the court shall use the *Guidelines Manual* in effect on the date that the offense of conviction was committed.”⁵⁶

E. §2L1.1(B)(5) – DANGEROUS WEAPONS

If a firearm was discharged, increase by 6 levels, . . . if a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, . . . if a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Section 2L1.1(b)(5) provides an enhancement to the base offense level if a firearm was discharged or a dangerous weapon (including a firearm) was brandished or possessed during the offense.⁵⁷ Specifically, if a firearm was discharged, the base offense level is to be increased by six levels, but if the resulting offense level is less than level 22, the court is to increase the offense level to level 22. Further, if a dangerous weapon was brandished or otherwise used, the base offense level is to be increased by four levels, but if the resulting offense level is less than level 20, the court is to increase the offense level to level 20. Finally, if a dangerous weapon (including a firearm) was possessed, the base offense level is to be increased by two levels, but if the resulting offense level is less than level 18, the court is to increase the offense level to level 18.⁵⁸

⁵² USSG §2L1.1(b)(4).

⁵³ USSG §2L1.1, comment. (n.1).

⁵⁴ The 2016 Amendment also broadened the scope of subsection (b)(4) to offense-based rather than defendant-based. USSG App. C, amend. 802 (effective Nov. 1, 2016).

⁵⁵ See *Peugh v. United States*, 569 U.S. 530, 550–51 (2013) (holding that 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 if the later version produces a higher guideline range).

⁵⁶ USSG §1B1.11.

⁵⁷ USSG §2L1.1(b)(5).

⁵⁸ *Id.*

The guidelines define “dangerous weapon” as (i) an instrument capable of inflicting death or serious bodily injury, or (ii) an object that is not an instrument that is capable of inflicting death or serious bodily injury but that closely resembles such an instrument or was used in a manner that created the impression that the object was such an instrument (*e.g.*, the defendant, while committing a bank robbery, wrapped his hand in a towel to create the appearance of a gun).⁵⁹

Courts construe “dangerous weapon” broadly to include “virtually any item that has the capacity, given the manner of its use, to endanger life or inflict great bodily injury.”⁶⁰ In *United States v. Olarte-Rojas*, the Fifth Circuit held that caltrops, which were used to puncture tires in a high-speed chase, fit the definition of a “dangerous weapon” under both the case law and the *Guidelines Manual’s* broad interpretation.⁶¹ Although the caltrops did not cause death or serious bodily injury, the court explained that a tire blowout at a high speed *could* cause such harm, which was sufficient to establish the caltrops were a dangerous weapon.⁶²

F. §2L1.1(B)(6) – CREATING RISK OF INJURY

If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels.

In addition to providing a 2-level increase, this enhancement also provides a minimum offense level of 18 if the resulting offense level after application of the enhancement is less than 18.

Application Note 3 states that §2L1.1(b)(6) applies to “a wide variety of conduct” for offenses involving reckless conduct.⁶³ Additionally, Application Note 3 instructs that if the enhancement applies solely on the basis of conduct that is related to fleeing from a law enforcement officer, courts are not to apply an adjustment under §3C1.2 (Reckless Endangerment). Further, the note instructs that §2L1.1(b)(6) is not to apply if the only reckless conduct is conduct for which the defendant has received an enhancement under §2L1.1(b)(5).

⁵⁹ USSG §1B1.1, comment. (n.1(E)).

⁶⁰ *United States v. Olarte-Rojas*, 820 F.3d 798, 801–02 (5th Cir.), *cert. denied*, 137 S. Ct. 232 (Oct. 3, 2016) (citations omitted) (“[I]n the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs.”).

⁶¹ *Id.* at 803.

⁶² *Id.*

⁶³ USSG §2L1.1, comment. (n.3).

Although §2L1.1(b)(6) applies to varied conduct, courts have avoided bright-line rules in applying the enhancement and must engage in a fact-specific inquiry.⁶⁴ The note lists the following examples of conduct to which the enhancement applies:

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.⁶⁵

1. Non-Vehicle Risk of Injury Considerations

Although Application Note 3 provides some examples of conduct covered by the enhancement, courts have found that §2L1.1(b)(6) “is not limited to the examples provided in the commentary.”⁶⁶ For example, the Fifth Circuit held that the enhancement was proper where the defendant led aliens through desert-like brush without an adequate water supply.⁶⁷ In an earlier case, it found that leading aliens on a 3-day trek through the desert without adequate food, water, or rest periods qualified for the enhancement.⁶⁸ In another case, however, it held that guiding aliens through the desert-like brush in South Texas in June, in and of itself, did not qualify for the enhancement without any evidence that the aliens were inadequately prepared.⁶⁹

The Ninth Circuit held that the enhancement was proper where the aliens were guided by the defendants through the mountains between Mexico and San Diego when the aliens were “obviously woefully under-equipped for the potential hazards that were known prior to departure.”⁷⁰ The court pointed to the lack of food, proper clothing for the early spring weather, and proper equipment through a dangerous and rugged terrain as appropriate reasons to apply the enhancement.

2. Vehicle Risk of Injury Considerations

Courts have applied the enhancement in various circumstances where defendants have transported aliens in vehicles in dangerous and reckless ways. For example, the

⁶⁴ See, e.g., *United States v. Maldonado-Ochoa*, 844 F.3d 534, 537 (5th Cir. 2016) (citation omitted).

⁶⁵ USSG §2L1.1, comment. (n.3).

⁶⁶ *United States v. Zuniga-Amezquita*, 468 F.3d 886, 888–89 (5th Cir. 2006).

⁶⁷ *United States v. De Jesus-Ojeda*, 515 F.3d 434, 443–44 (5th Cir. 2008).

⁶⁸ *United States v. Garcia-Guerrero*, 313 F.3d 892, 897 (5th Cir. 2002).

⁶⁹ *United States v. Garza*, 541 F.3d 290 (5th Cir. 2008).

⁷⁰ *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1056 (9th Cir. 2001).

enhancement is appropriate where defendants transported unrestrained aliens in the bed of a pickup truck. In *United States v. Cuyler*, the Fifth Circuit held that transporting aliens in the bed of a pickup is inherently dangerous because in the event of an accident aliens “easily could [be] thrown from the truck and almost certainly would [be] injured.”⁷¹ In *United States v. Zuniga-Amezquita*, the Fifth Circuit also articulated five factors that must be considered when applying §2L1.1(b)(5): “the availability of oxygen, exposure to temperature extremes, the alien’s 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.”⁷²

Likewise, in *United States v. Maldonado-Ochoa*, the Fifth Circuit explained that a vehicle does not need to be driving at high speeds for a long period of time to put those in the bed of a pickup truck at “substantial risk of death or serious injury.”⁷³ However, the Ninth Circuit found the district court erred in applying the enhancement in a situation where the “extended-cab pickup truck defendant was driving had been modified to create additional space for a passenger to hide behind the back seat.”⁷⁴ The court explained that in the situations described in Application Note 3, unlike the facts before the court, “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.”⁷⁵

Courts have disagreed as to whether unrestrained passengers lying on the floor of an enclosed van justifies application of this enhancement.⁷⁶ Also, to qualify for this enhancement, either the defendant must have *created* the risk of danger,⁷⁷ or the risk must have at least been “reasonably foreseeable in connection with that criminal activity.”⁷⁸ The

⁷¹ 298 F.3d 387, 390 (5th Cir. 2002).

⁷² 468 F.3d 886, 889 (5th Cir. 2006). *See also* *United States v. Garcia-Solis*, 927 F.3d 308, 313 (5th Cir. 2019) (concluding factors listed in *Zuniga-Amezquita* not exhaustive and noting reckless driving can be basis for enhancement because Application Note 3 of §2L1.2 implies “fleeing from law enforcement may warrant application,” by instructing §3C1.2 should not apply if §2L1.1(b)(6) applies “solely on the basis of conduct related to fleeing from a law enforcement officer.”).

⁷³ 844 F.3d 534, 538 (5th Cir. 2016).

⁷⁴ *United States v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007) (emphasis in original).

⁷⁵ *Id.* at 890 (emphasis in original).

⁷⁶ *Compare* *United States v. Solis-Garcia*, 420 F.3d 511, 516 (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 six aliens lying on floor of minivan that was altered to remove the seats and seatbelts qualified for enhancement).

⁷⁷ *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1137–39 (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).

⁷⁸ USSG §1B1.3, comment. (n.3(D)); *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 co-conspirators who had aliens walk through the brush to avoid detection).

enhancement “requires only that *some* risk of death or serious bodily injury be foreseeable, not the specific harm that actually occurred.”⁷⁹ 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.”⁸⁰ Although “[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,”⁸¹ some courts have articulated several factors to consider when applying this enhancement in vehicle cases.

3. Fifth Circuit’s case-specific analysis approach

The Fifth Circuit has made clear that the enhancement under §2L1.1(b)(6) 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.”⁸² As a result, the court has articulated several factors to consider when applying §2L1.1(b)(6) when aliens are transported in vehicles, 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.”⁸³ The court has also held that the risk of injury enhancement does not apply when “[t]he only dangers were the same dangers arising from a passenger not wearing a seatbelt in a moving vehicle.”⁸⁴ Additional facts that have supported the enhancement include the severity of vehicle overcrowding, whether the aliens were abandoned, the time of year during which the journey took place, the distance traveled, whether the aliens were fed, hydrated, and adequately clothed for the journey, and crossing illegal aliens over the Rio Grande when they could not swim.⁸⁵

⁷⁹ *United States v. Ruiz-Hernandez*, 890 F.3d 202, 212 (5th Cir.) (emphasis in original), *cert. denied*, 139 S. Ct. 278 (Oct. 1, 2018).

⁸⁰ *United States v. Garza*, 541 F.3d 290, 293 (5th Cir. 2008).

⁸¹ *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)).

⁸² *Garza*, 541 F.3d at 294 (quoting *Solis-Garcia*, 420 F.3d at 516).

⁸³ *United States v. Zuniga-Amezquita*, 468 F.3d 886, 889 (5th Cir. 2006).

⁸⁴ *Id.* (citing *Solis-Garcia*, 420 F.3d at 516).

⁸⁵ *See, e.g.*, *United States v. Najera*, 915 F.3d 997 (5th Cir. 2019); *United States v. Cardona-Lopez*, No. 14-40847, 2015 WL 2151780 (5th Cir. May 8, 2015); *United States v. Chapa*, No. 09-40112, 2010 WL 271425 (5th Cir. Jan. 22, 2010); *United States v. De Jesus-Ojeda*, 515 F.3d 434, 443 (5th Cir. 2008); *United States v. Hernandez-Pena*, No. 06-51499, 2008 WL 510485 (5th Cir. Feb. 27, 2008).

4. Ninth Circuit's factors for increased risk

In *United States v. Torres-Flores*, the Ninth Circuit noted the following:

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.⁸⁶

Following this observation, the Ninth Circuit identified the following 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).⁸⁷

Thus, the Ninth Circuit explained that the enhancement applies “only when the circumstances increased the likelihood of an accident or the chance of injury without an accident.”⁸⁸

5. Tenth Circuit's totality of the circumstances test

The Tenth Circuit reasoned that determining whether the enhancement applies “essentially equates to a totality of the circumstances test.”⁸⁹ Under this analysis, the court

⁸⁶ *United States v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007). *See also* *United States v. Dixon*, 201 F.3d 1223, 1233 (9th Cir. 2000) (court looked to whether the means of transportation increased the likelihood of an accident and declined to apply the enhancement based on a hatchback car).

⁸⁷ *Torres-Flores*, 502 F.3d at 889–90.

⁸⁸ *Id.* at 890. *See also* *United States v. Rivera*, No. 17-10556, 2019 WL 1763238 (9th Cir. Apr. 19, 2019) (finding the enhancement was properly applied when the offense involved transporting an alien inside the trunk of a car, when the alien admitted he was in fear, and the alien could not easily escape because the defendant did not alert him to the ability to use an emergency lever to escape the trunk).

⁸⁹ *United States v. Munoz-Tello*, 531 F.3d 1174, 1183 (10th Cir. 2008).

“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.”⁹⁰

G. §2L1.1(B)(7) – BODILY INJURY

*If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury.*⁹¹

Section 2L1.1(b)(7) provides a 2-level increase if any person sustained bodily injury; a 4-level increase if any person sustained serious bodily injury; a 6-level increase if there was permanent or life-threatening bodily injury; and a 10-level increase if any person died. The terms used in subsection (b)(7) have the meaning given in §1B1.1.⁹² In addition, Application Note 4 provides 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.”

There is no consensus among the circuits about the type of causal connection, if any, between the defendant’s actions and injury that is necessary to trigger an enhancement under §2L1.1(b)(7) if any person died or sustained bodily injury.⁹³ At one end of the spectrum, the Eighth and Ninth Circuits require direct or proximate causation to apply the enhancement.⁹⁴ At the other end of the spectrum, the Tenth Circuit does not impose any causation requirement.⁹⁵ Similarly, the Fifth Circuit held that the enhancement “contains

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

⁹¹ The 2016 Amendment changed the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the commentary to §1B1.1 (Application Instructions). See USSG App. C, amend. 802 (effective Nov. 1, 2016); USSG §1B1.1, comment, (n.1(M)).

⁹² USSG §2L1.1, comment. (n.1).

⁹³ See *United States v. De La Cruz-García*, 842 F.3d 1, 2 (1st Cir. 2016) (noting circuit split and collecting cases); *United States v. Zaldivar*, 615 F.3d 1346, 1350 n.2 (11th Cir. 2010).

⁹⁴ See *United States v. Flores-Flores*, 356 F.3d 861, 862 (8th Cir. 2004) (holding that “the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct” in affirming the enhancement); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144–45 n.1 (9th Cir. 2001) (“We assume, however, that for [§2L1.1(b)(7)] to apply, the relevant death or injury must be causally connected to dangerous conditions created by the unlawful conduct, as it was in this case.”); see also *United States v. Miguel*, 368 F.3d 1150 (9th Cir. 2004), *overruled on other grounds by* *United States v. Gasca-Ruiz*, 852 F.3d 1167 (9th Cir. 2017) (affirming the enhancement based on the totality of the circumstances, including the number of passengers in a trunk, without restraints, on a hot day).

⁹⁵ See *United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004) (holding that “[t]he guideline contains no causation requirement and we have no license to impose one” while noting that “a sufficient nexus would exist if the death or injury was reasonably foreseeable and Appellants’ conduct was a contributing factor”).

no causation requirement” and “the only causation requirement is that contained in [the relevant conduct provision of the guidelines at] [§]1B1.3.”⁹⁶ Thus, 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.”⁹⁷ The Eleventh Circuit likewise rejected a proximate cause standard, concluding that the enhancement applies where it is “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.”⁹⁸ The First Circuit has not adopted a causation standard, but when reviewing application of the enhancement for clear error, it applied the foreseeability requirement rather than the government preferred but-for causation requirement.⁹⁹

Regardless of the standard of review, the enhancement does not require intent to cause injury or death.¹⁰⁰ For example, it is not necessary for the defendant to be the driver of a vehicle that crashes and injures smuggled aliens.¹⁰¹

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 constitutes impermissible double counting. The Tenth Circuit stated: “[section] 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

⁹⁶ *United States v. Ramos-Delgado*, 763 F.3d 398, 401 (5th Cir. 2014); *United States v. Salinas*, 918 F.3d 463 (5th Cir. 2019) (enhancement appropriately applied where alien died of heart attack when running to evade police after a crash in chase with law enforcement); *see also* *United States v. De Jesus-Ojeda*, 515 F.3d 434, 444–45 (5th Cir. 2008) (holding that death caused by defendant’s coconspirators was reasonably foreseeable and, thus, a proper basis for enhancement).

⁹⁷ *Ramos-Delgado*, 763 F.3d at 401. *See also* *United States v. Ruiz-Hernandez*, 890 F.3d 202, 207–08 (5th Cir. 2018) (enhancement applied where the death of the alien was caused by a Coast Guard vessel when the defendant transported the alien at night in an inner tube across the shipping channel).

⁹⁸ *Zaldivar*, 615 F.3d at 1350–51.

⁹⁹ *United States v. De La Cruz-García*, 842 F.3d 1, 2-3 (1st Cir. 2016).

¹⁰⁰ *United States v. Garcia-Guerrero*, 313 F.3d 892, 897 (5th Cir. 2002); *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).”).

¹⁰¹ *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (affirming enhancement where defendant was not present when blowout on overcrowded van caused injury and death to passengers); *United States v. Flores-Flores*, 356 F.3d 861, 863 (8th Cir. 2004) (affirming the 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. 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).

for an enhancement based upon the ‘*outcome . . . with no consideration of the defendant’s intentional or reckless conduct.*’¹⁰²

H. §2L1.1(B)(8)(A) – INVOLUNTARY DETENTION (COERCION OR THREATS)

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.

The enhancement under §2L1.1(b)(8)(A) also provides that if the resulting offense level with the enhancement is less than level 18, the offense level is to be increased to level 18. Application Note 5 further instructs that §3A1.3 (Restraint of Victim) is not to apply if §2L1.1(b)(8)(A) applies.

The Tenth Circuit affirmed the district court’s application of §2L1.1(b)(8)(A) where an armed defendant participated in taking the aliens’ 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.¹⁰³

I. §2L1.1(B)(8)(B) – INVOLUNTARY DETENTION (PROSTITUTION)

If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.

In *United States v. Garcia-Gonzalez*,¹⁰⁴ the Fifth Circuit rejected the argument that applying both a 2-level enhancement pursuant to §2L1.1(b)(6) for creating a substantial risk of serious injury or death and a 6-level enhancement under §2L1.1(b)(8)(B) to the defendant’s alien-harboring offenses based on the same alleged conduct—the prostitution of minor aliens—constitutes impermissible double counting because “the enhancements d[id] not necessarily implicate the same conduct.”¹⁰⁵ The court explained that five of the harbored illegal female aliens were coerced or otherwise forced into prostitution and four of them were minors.¹⁰⁶ Therefore, the court upheld the §2L1.1(b)(6) enhancement based

¹⁰² *Cardena-Garcia*, 362 F.3d at 667 (emphasis in original) (quoting *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001)).

¹⁰³ *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1218–19 (10th Cir. 2008).

¹⁰⁴ 714 F.3d 306 (5th Cir. 2013).

¹⁰⁵ *Id.* at 315.

¹⁰⁶ *Id.*

on the prostitution of the sole adult female and the §2L1.1(b)(8)(B) enhancement based on acts of prostitution involving the four female victims who were minors.¹⁰⁷

J. §2L1.1(c) – CROSS REFERENCE

Section 2L1.1(c)(1) contains a cross reference if death results, instructing courts to apply the appropriate homicide guideline from Chapter Two, if the resulting offense level is greater than that determined under §2L1.1.

IV. CHAPTER THREE ADJUSTMENTS

A. §3A1.1(B)(1) – VULNERABLE VICTIM

Section 3A1.1 (Vulnerable Victim) provides an increase of two or three levels if the court finds a victim was selected as the object of the offense of conviction because of actual or perceived characteristics including race, color, national origin, or ethnicity, or if the defendant knew or should have known the victim of the offense was a vulnerable victim.¹⁰⁸ Application Note 2 defines a “vulnerable victim” as a person who is “unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible.”¹⁰⁹

An increase under §3A1.1 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.”¹¹⁰ In other words, the relevant question is whether a particular victim of the smuggling offense is “more unusually vulnerable” than any other such victim.¹¹¹ 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.”¹¹² The “general characteristics commonly held by aliens seeking to be illegally smuggled” do

¹⁰⁷ *Id.*

¹⁰⁸ USSG §3A1.1.

¹⁰⁹ *Id.*, comment. (n.2).

¹¹⁰ *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)).

¹¹¹ *Id.*; *see also* *United States v. Angeles-Mendoza*, 407 F.3d 742, 748 (5th Cir. 2005).

¹¹² *Angeles-Mendoza*, 407 F.3d at 747 (emphasis in original) (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’”).

not create a vulnerability that warrants the enhancement.¹¹³ However, smuggled aliens “detained against their will after being transported” can be considered “victims” for purposes of §3A1.1(b)(1).¹¹⁴ 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.”¹¹⁵

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

Application Note 6 to §2L1.1 invites consideration of a defendant’s aggravating role in the offense under §3B1.1 (Aggravating Role). Section 3B1.1 provides adjustments to the offense level from 2 to 4 levels if the defendant was an organizer, leader, manager, or supervisor, depending on the number of participants involved in the offense.¹¹⁶ The note states that for purposes of §3B1.1, the smuggled aliens are not considered “participants” in the crime “unless they actively assisted in the smuggling, transporting, or harboring of others.”¹¹⁷ Some courts apply §3B1.1 to increase sentences for defendants with an aggravating role in the offense,¹¹⁸ and other courts routinely deny reductions for minor participants under §3B1.2.¹¹⁹

¹¹³ *Id.* at 747–48 (stating that “the *inherent* vulnerability of smuggled aliens” has been “adequately taken into account in establishing the base offense level”).

¹¹⁴ *Id.* at 747.

¹¹⁵ *United States v. Cedillo-Narvaez*, 761 F.3d 397, 404 (5th Cir. 2014) (finding application of §3A1.3 appropriate because illegal status is not a prerequisite to the offense of hostage taking and therefore not already accounted for in the base offense level for the offense of conviction).

¹¹⁶ USSC §3B1.1.

¹¹⁷ USSG §2L1.1, comment. (n.6).

¹¹⁸ *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); *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.”).

¹¹⁹ *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, 1056 (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, 1091–92 (9th Cir. 2000) (reduction did not apply where defendant was convicted of smuggling aliens twice within 16 days); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1047 (10th Cir. 1992) (rejecting reduction where defendant left aliens outside checkpoint, drove through, and waited for them on the other side).

C. §3B1.3 – SPECIAL SKILL

Section 3B1.3 (Special Skill) applies a 2-level increase where a defendant abused a position of trust or used a special skill in a manner that significantly facilitated either the commission or concealment of the offense. 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 under §3B1.3.¹²⁰ 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.¹²¹

D. §3C1.2 – RECKLESS FLIGHT

Section 3C1.2 applies a 2-level increase if the defendant recklessly created a substantial risk of death or serious bodily injury to another while fleeing from a law enforcement officer. The Ninth Circuit explained that a §3C1.2 reckless flight enhancement does not apply where the defendant receives an enhancement under §2L1.1 for creating a risk of injury to others.¹²² A defendant, in the course of smuggling two aliens across the border in the back of a hatchback, fled from a checkpoint to avoid inspection and evaded pursuit until stalling the car near a highway median. The defendant ran from the car but was arrested after a brief foot chase. The Ninth Circuit reversed the district court’s application of both the §2L1.1(b) “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.’”¹²³

V. DEPARTURES AND VARIANCES

A. MULTIPLE DEATHS

The Tenth Circuit has affirmed upward departures in a §2L1.1 case where multiple deaths resulted from the defendant’s conduct.¹²⁴

¹²⁰ United States v. Hilario-Hilario, 529 F.3d 65, 78–79 (1st Cir. 2008).

¹²¹ United States v. De La Cruz Suarez, 601 F.3d 1202, 1219 (11th Cir. 2010).

¹²² United States v. Lopez-Garcia, 316 F.3d 967, 970–72 (9th Cir. 2003) (court applied the enhancement for creating a risk of injury then under §2L1.1(b)(5) in the 2003 *Guidelines Manual*).

¹²³ *Id.* at 970 (internal citations omitted).

¹²⁴ See United States v. Munoz-Tello, 531 F.3d 1174, 1190 (10th Cir. 2008); United States v. Jose-Gonzalez, 291 F.3d 697 (10th Cir. 2002).

B. DURATION OF HARBORING

The Fourth Circuit affirmed an upward departure in a §2L1.1 case for a harboring conspiracy that lasted for 19 years.¹²⁵

C. EXTENT OF DETENTION

The Tenth Circuit affirmed a variance above the guideline range that included an enhancement under §2L1.1(b)(8) because it found an alien was involuntarily detained through coercion or threat or in connection with a demand for payment when the defendant created an extreme “four-day-long hostage situation,” rather than “an isolated, minor detention of limited duration.”¹²⁶

ILLEGAL ENTRY OR REENTRY – §2L1.2

Federal law prohibits foreign nationals from entering the United States without permission. A conviction for a first illegal entry offense is a misdemeanor that is not covered by the guidelines.¹²⁷ Subsequent entries,¹²⁸ reentry after removal,¹²⁹ and remaining in the United States after being ordered removed¹³⁰ are felonies covered by §2L1.2. This guideline provides for enhanced sentences if the defendant engaged in criminal conduct before or after the first order of removal was final. This section of the primer addresses the statutory scheme and 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.

¹²⁵ United States v. Bonetti, 277 F.3d 441, 451 (4th Cir. 2002).

¹²⁶ United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1220, 1223 (10th Cir. 2008).

¹²⁷ 8 U.S.C. § 1325(a).

¹²⁸ *Id.*

¹²⁹ *Id.* § 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).

¹³⁰ 8 U.S.C. § 1253.

8 U.S.C. § 1325(a) – IMPROPER ENTRY BY ALIEN (ILLEGAL ENTRY)

Section 1325(a) 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). For offenders violating the statute for the first time, the statute carries a 6-month maximum penalty, and the guidelines do not apply. Subsequent violations of section 1325(a) carry 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.¹³¹

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.¹³² 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.¹³³ If the prior conviction was an "aggravated felony," as defined by 8 U.S.C. § 1101(a)(43), the statutory maximum is 20 years.¹³⁴

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.¹³⁵ However, sentencing enhancements based on a defendant's prior deportation must be found by a jury.¹³⁶ 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

¹³¹ See *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998) (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, 490 (2000) (stating that the fact of a prior conviction need not be found by a jury).

¹³² 8 U.S.C. § 1326(a)(2).

¹³³ *Id.* § 1326(b)(1), (3), (4).

¹³⁴ *Id.* § 1326(b)(2).

¹³⁵ See *Almendarez-Torres*, 523 U.S. at 226–27; *Apprendi*, 530 U.S. at 490.

¹³⁶ See, e.g., *United States v. Rojas-Luna*, 522 F.3d 502, 505–06 (5th Cir. 2008) (“[W]hile a court may use a prior conviction with knowledge that the defendant was given multiple constitutional protections, the same cannot be said for prior removals.”); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (citation omitted) (holding that the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

subsequent reentry, but also the date of that removal or the fact that it occurred after a qualifying prior conviction.¹³⁷ But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.¹³⁸

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 compare that date to the dates of any qualifying felony convictions to determine whether the sentence-enhancing sequence [whereby that removal must follow the earlier qualifying conviction] is satisfied."¹³⁹ The Ninth Circuit 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.¹⁴⁰ Furthermore, the Fifth Circuit has concluded that, when an indictment is silent as to a removal date, but a defendant admits facts contained in the PSR establishing the critical sequencing information, the resulting sentencing enhancement survives plain error review.¹⁴¹

Courts have held that it does not violate the Equal Protection Clause to enhance an illegal reentry defendant's sentence based on prior convictions.¹⁴²

8 U.S.C. § 1253 – FAILURE TO DEPART

Section 1253 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.¹⁴³

¹³⁷ *United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008).

¹³⁸ *See, e.g., United States v. Salazar-Lopez*, 506 F.3d 748, 753–54 (9th Cir. 2007) (rejecting a "structural error" analysis and instead concluding that such error "can be adequately handled under the harmless error framework").

¹³⁹ *United States v. Mendoza-Zaragoza*, 567 F.3d 431, 434 (9th Cir. 2009).

¹⁴⁰ *Calderon-Segura*, 512 F.3d at 1111 (citing *Salazar-Lopez*, 506 F.3d at 752) ("[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.").

¹⁴¹ *See United States v. Ramirez*, 557 F.3d 200, 204 (5th Cir. 2009) (not plain error for court to enhance sentence based on uncharged date of removal acknowledged by defendant in PSR).

¹⁴² *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1090–91 (9th Cir. 2007); *United States v. Adeleke*, 968 F.2d 1159, 1160–61 (11th Cir. 1992).

¹⁴³ 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

II. GUIDELINE OVERVIEW: §2L1.2 – UNLAWFULLY ENTERING OR REMAINING IN THE UNITED STATES

A. BACKGROUND

This section of the primer provides background and legal analysis of §2L1.2, as amended, effective November 1, 2016.¹⁴⁴ The Commission amended §2L1.2 to address the “categorical approach” courts used to determine whether a prior offense was a “crime of violence” for purposes of applying enhancements under §2L1.2:

[T]he Commission has received significant comment over several years from courts and stakeholders that the ‘categorical approach’ used to determine the particular level of enhancement under the existing guideline is overly complex Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted.¹⁴⁵

Furthermore, only prior convictions that receive criminal history points are counted for purposes of §2L1.2 enhancements after the 2016 Amendment.

B. *EX POST FACTO* CONSIDERATIONS

The Commission’s 2016 Amendment to §2L1.2 may raise *ex post facto* issues.¹⁴⁶ However, due to the substantive, rather than clarifying nature of the amendment, the amendment does not apply retroactively on appeals from sentences imposed using the previous version of the guideline.¹⁴⁷

Notably, courts have held that illegal reentry is a continuing offense that continues until the alien is “found” in the United States. Therefore, a court can apply the *Guidelines Manual* in effect when the alien is “found,” as opposed to the *Guidelines Manual* in effect

threats). One subsection of this statute, § 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 that is punishable by up to a year in prison.

¹⁴⁴ See USSG App. C, amend. 802 (effective Nov. 1, 2016).

¹⁴⁵ *Id.*

¹⁴⁶ See USSG §1B1.11. Section 1B1.11 states that if the court determines it would violate the *ex post facto* clause to use the *Guidelines Manual* in effect on the date of sentencing, use the *Guidelines Manual* in effect on the date the offense was committed.

¹⁴⁷ See *United States v. Morales-Alonso*, 878 F.3d 1311, 1313 n.2 (11th Cir. 2018).

when the alien reentered the United States, without violating the *Ex Post Facto* Clause.¹⁴⁸ 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.”¹⁴⁹ An alien can also be “found” in the United States when a law enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) issues an immigration detainer.¹⁵⁰

C. BASE OFFENSE LEVEL

Section 2L1.2 has a base offense level of 8.¹⁵¹

D. SPECIFIC OFFENSE CHARACTERISTICS

As amended in 2016, sentencing enhancements under §2L1.2 are based on three factors: (1) defendant’s prior illegal entry/reentry 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. §2L1.2(b)(1) – Prior Illegal Reentry Offenses

The enhancement at subsection (b)(1) provides a tiered increase to the offense level based on prior convictions for offenses under 8 U.S.C. §§ 1253 (failure to depart after an order of removal), 1325 (improper entry), and 1326 (illegal reentry). A defendant who has one or more felony illegal reentry convictions will receive a 4-level increase and a defendant with two or more convictions for a misdemeanor under 8 U.S.C. § 1325(a) will receive a 2-level increase.¹⁵² “Illegal reentry offense” is defined at Application Note 2 to include all convictions under 8 U.S.C. §§ 1253 and 1326, as well as second or subsequent illegal entry convictions under 8 U.S.C. § 1325(a).¹⁵³

¹⁴⁸ 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).

¹⁴⁹ 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 (stating that “found” is synonymous with “discovered in”).

¹⁵⁰ United States v. Sosa-Carabantes, 561 F.3d 256 (4th Cir. 2009).

¹⁵¹ USSG §2L1.2(a).

¹⁵² USSG §2L1.2(b)(1)(A)–(B).

¹⁵³ USSG §2L1.2, comment. (n.2).

2. §2L1.2(b)(2) and (b)(3) – Other Prior Convictions

Subsections (b)(2) and (b)(3) of the guideline account for prior convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach. The sentence-imposed approach is similar to how a defendant’s criminal history score is calculated in Chapter Four of the *Guidelines Manual* based on the sentence length of his or her prior convictions. The two subsections are intended to divide the defendant’s criminal history into two time periods. Subsection (b)(2) provides an enhancement if, *before* the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction. Subsection (b)(3) provides an enhancement if *after* the defendant was ordered deported or removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction.

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

- 10 levels for a prior felony conviction for which the sentence imposed was five years or more;
- 8 levels for a prior felony conviction for which the sentence imposed was two years or more
- 6 levels for a prior felony conviction for which the sentence imposed was exceeding one year and one month;
- 4 levels for any other prior felony conviction; or
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.¹⁵⁴

“Sentence imposed” is defined in Application Note 2 as having the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

¹⁵⁴ USSG §2L1.2(b)(2)–(3). The Commission amended §2L1.2 again effective November 1, 2018 to address a scenario in which a felony would not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occurred when a defendant committed a crime before being ordered removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal. The amendment addressed this issue by establishing that application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying “criminal conduct,” and not on the timing of the resulting conviction. See USSG App. C, amend. 809 (effective Nov. 1, 2018).

III. PRIOR CONVICTIONS

A. GENERAL PRINCIPLES

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

Section 2L1.2 looks to the first final order of deportation or removal,¹⁵⁵ not the physical removal of the defendant. Application Note 1 provides that 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.¹⁵⁶ “For the first time” refers to the first time the defendant was ever the subject of such an order.¹⁵⁷

Federal law authorizes immigration authorities to reinstate prior removal orders.¹⁵⁸ Although the alien removal statute, 8 U.S.C. § 1231(a)(5), 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 1326.¹⁵⁹ In addition, for purposes of the guidelines, an order of expedited removal done by an immigration officer¹⁶⁰ 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 after the first order of removal

A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is pending when the defendant is deported.¹⁶¹

3. Qualifying adult convictions

Application Note 1 provides that an offense committed before the defendant was 18 years of age 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

¹⁵⁵ See Final order of removal at 8 C.F.R. § 1241.

¹⁵⁶ See USSG §2L1.2, comment. (n.1(A)).

¹⁵⁷ *Id.*

¹⁵⁸ 8 U.S.C. § 1231(a)(5).

¹⁵⁹ 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).

¹⁶⁰ See 8 U.S.C. § 1228.

¹⁶¹ *United States v. Saenz-Gomez*, 472 F.3d 791, 793–94 (10th Cir. 2007).

was convicted.”¹⁶² The conviction for which the defendant receives an enhancement need not be the most recent conviction,¹⁶³ nor must the defendant have been ordered removed as a result of that conviction.¹⁶⁴

Since 2016, Application Note 3 specifies that for all three specific offense characteristics under §2L1.2(b)(1), (b)(2), and (b)(3), the amended guideline considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four.¹⁶⁵ The Commission amended the guideline to “[c]ount only convictions that receive criminal history points [to] address[] 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.”¹⁶⁶ Accordingly, the First Circuit found plain error when the district court applied the enhancement based on convictions that did not receive criminal history points, explaining that the “Probation Office, the prosecution, and defense counsel” all missed the significance of Application Note 3.¹⁶⁷

In addition, the application note provides that convictions taken into account under those subsections are not excluded from consideration for purposes of determining criminal history points.¹⁶⁸ Further, Application Note 3 specifies that for enhancements under §2L1.2(b)(1)(B) (for two or more misdemeanors under section 1325(a)) or §2L1.2(b)(2)(E) or (b)(3)(E) (for three or more misdemeanors that are crimes of violence or drug trafficking offenses), courts are to use only those convictions that are counted separately under §4A1.2(a)(2).

¹⁶² USSG §2L1.2, comment. (n.1(B)).

¹⁶³ See USSG §2L1.2(b)–(c) (noting to “[a]pply the [g]reatest” enhancement based on the defendant’s prior convictions).

¹⁶⁴ USSG §2L1.2, comment. (n.1(A)).

¹⁶⁵ See USSG §2L1.2, comment, (n.3) (instructing instructs that “only those convictions that receive criminal history points” should be used when applying any of the specific offense characteristics).

¹⁶⁶ USSG App. C, amend. 802 (effective Nov. 1, 2016).

¹⁶⁷ United States v. Romero, 896 F.3d 90, 93 (1st Cir. 2018).

¹⁶⁸ USSC §2L1.2, comment. (n.3).

4. *Delayed adjudications may qualify as convictions*

A deferred adjudication can qualify as a prior conviction under §2L1.2.¹⁶⁹ A guilty plea held in abeyance also can qualify as a “conviction” under §2L1.2.¹⁷⁰

5. *Vacating a conviction may disqualify it from consideration*

Section 2L1.2 does 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 §2L1.2.¹⁷¹ An enhancement, however, would not apply if the conviction was vacated on “a showing of actual innocence”¹⁷² or a showing “that the conviction had been improperly obtained.”¹⁷³

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.¹⁷⁴ Thus, a prior conviction that would support an enhanced sentence under either the relevant statutes or the guidelines does not need to be identified until the time of sentencing.¹⁷⁵

¹⁶⁹ See, e.g., *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009) (explaining that “Federal law counts Texas’s deferred adjudication probation as a conviction.”); *United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004) (citation omitted) (explaining that the “term ‘conviction’ is now defined as a formal judgment of guilt entered by the court or, if an adjudication of guilt has been withheld, where the judge has imposed some form of punishment, penalty, or restraint on the alien’s liberty” and that “Congress intentionally broadened the scope of the definition of ‘conviction’ to include cases in which adjudication was deferred.”).

¹⁷⁰ See *United States v. Zamudio*, 314 F.3d 517, 521–22 (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”).

¹⁷¹ See *United States v. Luna-Diaz*, 222 F.3d 1, 6 (1st Cir. 2000) (holding that the district court abused its discretion in refusing to impose the 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, 98 (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) (affirming enhancement where prior conviction was vacated “based upon a technicality”); *United States v. Cisneros-Cabrera*, 110 F.3d 746, 747–48 (10th Cir. 1997) (explaining that the district court did not err in applying the enhancement based on a vacated conviction that was in place at the time of illegal entry).

¹⁷² *Garcia-Lopez*, 375 F.3d at 589.

¹⁷³ *Campbell*, 167 F.3d at 98.

¹⁷⁴ See *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998).

¹⁷⁵ 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, 505–06 (5th Cir. 2008); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097–98 (9th Cir. 2006)

7. *Is the prior conviction a felony?*

The enhancements called for in §2L1.2 are triggered by a defendant’s previous conviction(s).¹⁷⁶ Because §2L1.2 defines “felony” as “any federal, state, or local offense punishable by imprisonment for a term exceeding one year,”¹⁷⁷ 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, that conviction may qualify for an enhancement under §2L1.2(b)(2) or (3) depending on the sentence imposed.¹⁷⁸ For the same reasons, a prior state court misdemeanor conviction can trigger section 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.”¹⁷⁹

In *United States v. Valencia-Mendoza*, the Ninth Circuit vacated and remanded the defendant’s sentence, holding that, in determining whether a crime is “punishable” by more than one year, the court must consider both the elements of the offense *and* sentencing factors that correspond to the crime of conviction.¹⁸⁰ The district court had applied a 4-level increase under §2L1.2, finding that the defendant had been convicted of a Washington state offense *punishable* by imprisonment for a term exceeding one year. Although the defendant’s offense carried a general maximum term of five years, the Washington statutes also prescribed a binding sentencing range under which the defendant could have been sentenced to no more than six months.¹⁸¹ The Ninth Circuit held that, where the actual maximum term a defendant could receive under state law is less than the general statutory maximum, it was error to look only to the general statutory maximum.¹⁸² It overruled its past precedent to the contrary.¹⁸³

8. *Determining the length of prior sentence imposed*

The length of the sentence imposed for a prior conviction is determined by the rules set forth in Chapter Four for calculating criminal history points. “Sentence imposed” has

(holding the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

¹⁷⁶ USSG §2L1.2(b)(1)–(3).

¹⁷⁷ USSG §2L1.2, comment. (n.2).

¹⁷⁸ See, e.g., *United States v. Hernandez-Garduno*, 460 F.3d 1287, 1293 (10th Cir. 2006) (holding misdemeanor assault conviction under Colo. Rev. Stat. § 18-3-204 was treatable as a felony under an earlier version of §2L1.2).

¹⁷⁹ 18 U.S.C. § 3156(a)(3).

¹⁸⁰ 912 F.3d 1215 (9th Cir. 2019).

¹⁸¹ See *id.* at 1222–24.

¹⁸² See *id.*

¹⁸³ See *id.* at 1222.

the meaning given to the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2, providing that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.”¹⁸⁴

The Fifth Circuit upheld, on plain error review, application of the (b)(2) enhancement based on the “sentence-aggregation rule” in §4A1.2(a)(2), which instructs courts to “use the aggregate sentence of imprisonment” if a prior sentence is treated as a single sentence and the court imposed the sentences consecutively.¹⁸⁵ The Fifth Circuit recently upheld, on de novo review, an 8-level enhancement under §2L1.2(b)(3)(B) that was applied based on the single sentence rule under §4A1.2(a)(2).¹⁸⁶ The Ninth Circuit agreed, finding that prior sentences should be treated the same when used to determine the offense level under §2L1.2 as when used to determine criminal history.¹⁸⁷

9. Simultaneous convictions

Application Note 4 to §2L1.2 addresses the situation where 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)(2) or (b)(3).¹⁸⁸

B. MISDEMEANORS – CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSE

Subsections (b)(2) and (b)(3) provide for a 2-level enhancement for offenders with three or more prior convictions for misdemeanors that are crimes of violence or drug trafficking offenses. These subsections reflect a congressional directive from 1996 requiring inclusion of an enhancement for certain types of misdemeanor offenses.¹⁸⁹

¹⁸⁴ USSG §2L1.2, comment. (n.2).

¹⁸⁵ *United States v. Ponce-Flores*, 900 F.3d 215, 218–19 (5th Cir. 2018).

¹⁸⁶ *United States v. Garcia-Sanchez*, 916 F.3d 522 (5th Cir. 2019) (stating Application Note 2 to §2L1.2 refers the court to Application Note 2 and subsection (b) of §4A1.2, and although Application Note 2 to §4A1.2 does not specifically cross-reference single sentence rule under §4A1.2(a)(2), the guidelines are to be applied as a “cohesive and integrated whole” rather than in a piecemeal fashion,” citing §1B1.11, background).

¹⁸⁷ *United States v. Cuevas-Lopez*, 934 F.3d 1056 (9th Cir. 2019).

¹⁸⁸ USSG §2L1.2, comment. (n.4).

¹⁸⁹ *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 344, 110 Stat. 3009.

The definition of “crime of violence” in §2L1.2, Application Note 2, mirrors the definition in the career offender guideline, §4B1.2(a), effective August 1, 2016.¹⁹⁰ It provides that a “crime of violence” is one of the enumerated offenses (*e.g.*, murder, robbery, extortion, etc.) or any offense that has as an element “the use, attempted use, or threatened use of physical force against the person of another.”¹⁹¹

A “drug trafficking offense” is defined in Application Note 2 of §2L1.2 as “an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, 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.”¹⁹²

Courts have interpreted these terms by applying the “categorical approach” mandated by the Supreme Court in *Taylor v. United States*¹⁹³ and its progeny.¹⁹⁴ Although an exhaustive treatment of the categorical approach is beyond the scope of this primer, the Commission has published a separate primer that provides a more detailed analysis of the history and case law regarding the categorical approach.¹⁹⁵

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).¹⁹⁶ Courts have consistently rejected the argument that considering a defendant’s prior convictions in calculating both the offense level and criminal history constitutes impermissible double counting.¹⁹⁷ In some cases, courts have relied on §4A1.3 to impose an upward departure based on under-

¹⁹⁰ See USSG App. C, amend. 798 (effective Nov. 1, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the *Guidelines Manual*.

¹⁹¹ USSG §2L1.2, comment. (n.2).

¹⁹² *Id.*

¹⁹³ 495 U.S. 575 (1990).

¹⁹⁴ See *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Shepard v. United States*, 544 U.S. 13 (2005).

¹⁹⁵ See U.S. SENTENCING COMM’N, PRIMER ON CATEGORICAL APPROACH, <https://www.ussc.gov/guidelines/primers>.

¹⁹⁶ See USSG §4A1.1(d) (“Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, work release, or escape status.”).

¹⁹⁷ See, *e.g.*, *United States v. Garcia-Cardenas*, 555 F.3d 1049, 1050 (9th Cir. 2009); *United States v. Torres-Echavarria*, 129 F.3d 692, 699–700 (2d Cir. 1997); *United States v. Crawford*, 18 F.3d 1173, 1180 (4th Cir. 1994); *United States v. Zapata*, 1 F.3d 46, 49–50 (1st Cir. 1993).

represented criminal history.¹⁹⁸ 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.¹⁹⁹

The Ninth Circuit recently held that for criminal history purposes, the government must establish an alien’s continuous presence in the United States by the higher clear and convincing standard in an illegal reentry case. In *United States v. Valle*, the court stated the higher standard is necessary because counting prior convictions under the rules in §4A1.1 can lead to “an extremely disproportionate impact on the sentence.”²⁰⁰ Such a standard is necessary because the date when the defendant is “found” in the United States determines how far back a court can go to count prior convictions for §§2L1.2(b)(2) and 2L1.2(b)(3), potentially leading to more than doubling the sentencing range.²⁰¹

A related issue deals with the application of “status” points under §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.²⁰² 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 was subject to a 2-level increase under §4A1.1(d).²⁰³ However, the court may consider a downward departure based on time in state custody.²⁰⁴

¹⁹⁸ *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).

¹⁹⁹ *United States v. Figaro*, 935 F.2d 4, 7 (1st Cir. 1991) (holding upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).

²⁰⁰ 940 F.3d 473, 479 (9th Cir. 2019) (quoting *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001)).

²⁰¹ *Id.* at 477–80 (noting the defendant’s offense level under §2L1.2 would have been offense level 8 but was raised to offense level 17 based on two prior convictions that occurred more than fifteen years before the instant offense).

²⁰² *See, e.g., United States v. Cano-Rodriguez*, 552 F.3d 637, 639 (7th Cir. 2009) (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)).

²⁰³ *See, e.g., id.* at 639; *United States v. Hernandez-Noriega*, 544 F.3d 1141, 1143 (10th Cir. 2008); *United States v. Coeur*, 196 F.3d 1344, 1346 (11th Cir. 1999); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996).

²⁰⁴ *See* USSG §2L1.2, comment. (n.7).

V. DEPARTURES

In addition to the departures discussed in section IV, courts have discussed several other grounds for departing from the applicable guideline range established by §2L1.2.

A. §5K3.1 – “FAST TRACK” EARLY DISPOSITION PROGRAMS

The most frequent reason for granting a departure for defendants sentenced pursuant to §2L1.2 is §5K3.1, which permits a reduction pursuant to an early disposition program (commonly known as “fast track”). Section 5K3.1 authorizes the court to depart downward up to four 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.”²⁰⁵ However, a plea agreement struck with the government, in which the government agreed to recommend a 2-level downward fast-track adjustment, does not obligate the district court to sentence the defendant in accordance with the government's recommendation.²⁰⁶

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 placement in 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,²⁰⁷ 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.”²⁰⁸

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 recognized the possibility that a district court may grant a departure in some circumstances based on the defendant-alien's stipulation to removal.²⁰⁹

²⁰⁵ USSG §5K3.1.

²⁰⁶ *United States v. Cueto-Nunez*, 869 F.3d 31, 35–36 (1st Cir.), *cert. denied*, 138 S. Ct. 368 (2017).

²⁰⁷ *See, e.g., United States v. Vasquez*, 279 F.3d 77, 80–81 (1st Cir. 2002); *United States v. Martinez-Carillo*, 250 F.3d 1101, 1106–07 (7th Cir. 2001).

²⁰⁸ *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).

²⁰⁹ *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*

In *United States v. 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.”²¹⁰ The Second, Ninth, and Eleventh Circuits have similarly held that a stipulation to removal may be a permissible ground for departure, but only when the defendant had a “colorable, nonfrivolous” defense to removal.²¹¹

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 *United States v. Jauregui*, the defendant was a lawful permanent resident who was convicted of possession with intent to distribute methamphetamine.²¹² The defendant moved for, and received, a 4-level departure for stipulating to removal.²¹³ 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.”²¹⁴

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.²¹⁵ This requirement flows from the “judiciary’s limited power with regard to deportation.”²¹⁶ The Second and Ninth Circuits have reached the opposite conclusion.²¹⁷ These courts have reasoned that requiring the government’s agreement would create a condition for departure not required by the *Guidelines Manual*.

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).

²¹⁰ *Clase-Espinal*, 115 F.3d at 1059.

²¹¹ See *Rodriguez-Lopez*, 198 F.3d at 777; *Mignott*, 184 F.3d at 1290; *Galvez-Falconi*, 174 F.3d at 260.

²¹² *Jauregui*, 314 F.3d at 962.

²¹³ See *id.*

²¹⁴ *Id.* at 964.

²¹⁵ See *United States v. Gomez-Sotelo*, 18 F. App’x 690, 692 (10th Cir. 2001); *United States v. Marin-Castaneda*, 134 F.3d 551, 555 (3d Cir. 1998).

²¹⁶ *Marin-Castaneda*, 134 F.3d at 555.

²¹⁷ See *United States v. Rodriguez-Lopez*, 198 F.3d 773, 778 (9th Cir. 1999); *United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999).

C. MOTIVE AND CULTURAL ASSIMILATION

Courts have generally held that the defendant's motive for reentry is not a basis for a downward departure.²¹⁸ Courts have recognized, however, that the defendant's motivation to care for a family member could be relevant, although such circumstances must generally be exceptional.²¹⁹

Application Note 8 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."²²⁰ In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court's refusal to grant this departure where the district court found 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.²²¹ 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."²²²

²¹⁸ See, *e.g.*, *United States v. Saucedo-Patino*, 358 F.3d 790, 794–95 (11th Cir. 2004); see also *United States v. Dyck*, 334 F.3d 736, 741–42 (8th Cir. 2003) (stating purported lack of criminal intent in reentering the country is not basis for downward departure).

²¹⁹ See, *e.g.*, *United States v. Montes-Pineda*, 445 F.3d 375, 379 (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 non-guideline sentence); *United States v. Sierra-Castillo*, 405 F.3d 932, 938 (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 and 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, 756–57 (2d Cir. 2002) (finding departure not warranted where defendant was separated from his wife and the provision of financial support for three children was not an exceptional circumstance); *United States v. Abreu-Cabrera*, 64 F.3d 67, 77 (2d Cir. 1995) (stating defendant's motivation to re-enter to visit his family, absent extraordinary circumstances, may not justify downward departure).

²²⁰ See USSG §2L1.2 comment. (n.8). See also USSG App. C, amend. 740 (effective Nov. 1, 2010) (explaining the reason for amending §2L1.2 to provide that a downward departure may be appropriate in an illegal reentry case on the basis of the defendant's cultural assimilation to the United States).

²²¹ 656 F.3d 563, 567 (7th Cir. 2011).

²²² 600 F.3d 231, 234–35 (5th Cir. 2011) (citation and quotation omitted).

D. SERIOUSNESS OF PRIOR OFFENSE

Application Note 6 provides that 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 convictions too old to receive 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.²²³

E. TIME SERVED IN STATE CUSTODY

Application Note 7 provides that when a defendant is located by immigration authorities while the defendant is serving time in state custody for a state offense, the time served in state custody is not covered by an adjustment under §5G1.3(b) (Undischarged Term of Imprisonment) and is therefore not covered under §5K2.23 (Discharged Terms of Imprisonment). The note provides, therefore, that the court may consider a departure if appropriate, to achieve a reasonable punishment.²²⁴

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 immigration fraud offenses typically carry a 5-year statutory maximum and are sentenced under §§2L2.1 or 2L2.2.

8 U.S.C. § 1160(b)(7)(A) – FALSE STATEMENTS IN APPLICATIONS

8 U.S.C. § 1160(b)(7)(A) prohibits knowingly and willfully making false statements in applications for adjustment of alien status. The statutory maximum for such an offense is five years.

8 U.S.C. § 1255a(c)(6) – FALSE STATEMENTS IN APPLICATIONS

8 U.S.C. § 1255a(c)(6) also prohibits knowingly and willfully making false statements in an application to adjust status. The statutory maximum for such an offense is five years.

²²³ USSG §2L1.2 comment. (n.6).

²²⁴ USSG §2L1.2 comment. (n.7).

8 U.S.C. § 1325(c) – MARRIAGE FRAUD

8 U.S.C. § 1325(c) prohibits marrying a person to evade immigration laws. The statutory maximum for such an offense is five years.

8 U.S.C. § 1325(d) – IMMIGRATION-RELATED ENTREPRENEURSHIP FRAUD

8 U.S.C. § 1325(d) prohibits establishing a commercial enterprise to evade any provision of the immigration laws. The statutory maximum for such an offense is five years.

II. GUIDELINE OVERVIEW – §§2L2.1, 2L2.2

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. §2L2.1 – IMMIGRATION FRAUD

1. **Base Offense Level:** 11.²²⁵
2. **Specific Offense Characteristics:** As with smuggling offenses, a 3-level reduction applies where (1) “the offense was committed other than for profit” or involved only the defendant’s family. The offense level is also increased (2) three to nine levels based on the number of documents; (3) four levels if the defendant knew or had reason to believe the documents would be used to facilitate a felony; (4) two to four levels for a prior conviction for a felony immigration offense; and (5) two levels for fraudulent use of a passport.²²⁶

²²⁵ USSG §2L2.1(a).

²²⁶ USSG §2L2.1(b)(1)–(5).

B. §2L2.2 – IMMIGRATION FRAUD

1. **Base Offense Level:** 8.²²⁷
2. **Specific Offense Characteristics:** The following enhancements apply: (1) a two level increase if the defendant was previously deported; (2) two to four levels if the defendant has a record of prior immigration offenses, (3) two to four levels if the defendant fraudulently obtained or used a passport, or (4) two levels if the defendant concealed his or her membership in, or authority over, a military organization that was involved in a serious human rights offense, with a minimum offense level of level 13; or (5) six to ten levels if the defendant committed the offense to conceal his or her participation in genocide or any other serious human rights offense, with a minimum offense level of level 25.²²⁸
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.²²⁹ If death resulted, the homicide guidelines (§§2A1.1–2A1.5) apply.²³⁰

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), 1255a(c)(6), 1325(c), and 1325(d); and 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); 18 U.S.C. §§ 1427, and 1541. Still other crimes are covered only by §2L2.2: 8 U.S.C. § 1185(a)(5) and 18 U.S.C. §§ 1423 and 1424.

Regarding convictions under 18 U.S.C. § 1028, which prohibits fraud in connection with identification documents, §§2L2.1 and 2L2.2 apply, rather than §2B1.1, when “the primary purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status.”²³¹ Courts have used this same reasoning to apply

²²⁷ USSG §2L2.2(a).

²²⁸ USSG §2L2.2(b)(1)–(4).

²²⁹ USSG §2L2.2(c).

²³⁰ *Id.*

²³¹ USSG §2B1.1 comment. (n.10(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”).

§2L2.1, instead of §2B1.1's predecessor (§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.²³²

When “a defendant is convicted of the possession of a relatively minor number of false or fraudulent immigration documents,” a court will have to choose whether the conduct reflects trafficking under §2L2.1 or personal use under §2L2.2.²³³

III. SPECIFIC GUIDELINE APPLICATION ISSUES

A. §2L2.1(B)(1) – LACK OF PROFIT MOTIVE

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 declined to grant the reduction under §2L2.1(b)(1) where defendants' employment included preparing false asylum applications, even though their compensation was not tied to specific illegal acts.²³⁴ Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.²³⁵

Conversely, one court held it was inappropriate to depart upward based on a profit motive “unless there was a finding that the profit involved in the offense of conviction was of such a magnitude that the 3-step increase in the offense level already added did not properly reflect the offense level of the offense of conviction.”²³⁶

²³² 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.”).

²³³ See, e.g., *United States v. Principe*, 203 F.3d 849, 854 & n.3 (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).

²³⁴ *United States v. Torres*, 81 F.3d 900, 902 (9th Cir. 1996).

²³⁵ See, e.g., *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1175 (9th Cir. 1994); *United States v. White*, 1 F.3d 13, 18 (D.C. Cir. 1993).

²³⁶ *United States v. Mendoza*, 890 F.2d 176, 180 (9th Cir. 1989), *withdrawn by* 902 F.2d 15 (9th Cir. 1990).

B. §2L2.1(B)(2) – NUMBER OF DOCUMENTS INVOLVED

If the offense involved six or more documents or passports, increase by 3, 6, or 9 levels depending on the number of documents involved

The enhancement under §2L2.1(b)(2) increases with the number of documents involved in the offense. The guideline does not define “document,” but courts have relied on the definition in 18 U.S.C. § 1028(d), concluding that the term “documents” includes not only “those documents that relate to naturalization, citizenship, or legal resident status,” but also any “identification document.”²³⁷

Application Note 2 explains 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.”²³⁸ One court explained that multiple documents that form a set “constitute only one document even if used many times, by one individual, to perpetuate the same false identity fraud.”²³⁹ For example, a set might include “a counterfeit passport, phony green card, and forged work papers.”²⁴⁰ In contrast, some documents are not a set, even though they will be used only one time by the same person.²⁴¹

Application Note 5 provides that an upward departure may be warranted “[i]f the offense involved substantially more than 100 documents.”²⁴²

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.’”²⁴³

²³⁷ United States v. Singh, 335 F.3d 1321, 1323–24 (11th Cir. 2003) (holding driver’s licenses, military identification cards, and United States government identification cards were “documents” under §2L1.2); see also United States v. Castellanos, 165 F.3d 1129, 1131–32 (7th Cir. 1999).

²³⁸ USSG §2L2.2, comment. (n.2); see also United States v. Torres, 81 F.3d 900, 903–04 (9th Cir. 1996) (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).

²³⁹ United States v. Badmus, 325 F.3d 133, 140 (2d Cir. 2003).

²⁴⁰ *Id.*

²⁴¹ *Id.* (holding multiple visa lottery entries constituted individual documents); *Castellanos*, 165 F.3d at 1132–33 (holding sheet of blank documents was not a set and counting each blank document individually).

²⁴² USSG §2L2.1, comment. (n.5).

²⁴³ 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).

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

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 §2L2.1(b)(3), 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.²⁴⁴

D. §2L2.1(B)(5) – FRAUDULENTLY OBTAINED OR USED A PASSPORT

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.

The Fifth Circuit recently held that a passport card that allows travel by land or sea between the United States and a limited number of foreign countries is a “passport” for purposes of §2L2.1(b)(5)(A).²⁴⁵

E. §2L2.2(B)(1) – PRIOR DEPORTATION

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 the enhancement under §2L2.2(b)(1).²⁴⁶

F. §2L2.2(B)(3) – FRAUDULENTLY OBTAINED OR USED A PASSPORT

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.

Section 2L2.2(b)(3) applies to defendants fraudulently obtaining or using “regular passports” and also extends to “passport cards.”²⁴⁷ In addition, Application Note 3

²⁴⁴ 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)).

²⁴⁵ United States v. Torres, 920 F.3d 1215 (8th Cir. 2019) (citing 22 C.F.R. § 51.3(e)).

²⁴⁶ United States v. Blaize, 959 F.2d 850, 851–52 (9th Cir. 1992) (interpreting same language in former §2L2.4).

²⁴⁷ United States v. Casillas-Casillas, 845 F.3d 623, 626–27 (5th Cir. 2017) (rejecting defendant’s argument that the enhancement only applied to “regular passports,” but not passport cards).

provides that the term “use” is to be construed broadly and the term includes attempted renewal of passports that have been previously issued.²⁴⁸

G. CROSS REFERENCE – §2L2.2(c)(1)

Section 2L2.2(c)(1) instructs courts to apply §2X1.1 (Attempt, Solicitation, or Conspiracy) if the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than for an offense involving a violation of the immigration laws, if the resulting offense level is greater than determined under §2L2.2. The Fifth Circuit found application of the cross reference appropriate where the defendant committed passport fraud because the offense level under §2B1.1 produced a higher offense level.²⁴⁹

H. DEPARTURES AND VARIANCES

1. National Security

Section 2L2.2 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.”²⁵⁰

Without relying on this provision, courts have increased sentences based on national security and 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.”²⁵¹ In another case, the Second Circuit affirmed a 36-month sentence for possessing a counterfeit green card, despite a guideline range of zero to six months under §2L2.2, where the defendant was involved in a bombing plot.²⁵²

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

²⁴⁸ USSG §2L2.2, comment. (n.3).

²⁴⁹ *United States v. Ayodele*, No. 18-20803, 2019 WL 6048976 (5th Cir. Nov. 14, 2019).

²⁵⁰ USSG §2L2.2, comment. (n.6).

²⁵¹ *United States v. Valnor*, 451 F.3d 744, 747, 749 (11th Cir. 2006).

²⁵² *United States v. Khalil*, 214 F.3d 111, 125–26 (2d Cir. 2000).

to facilitate another offense for which the defendant had never been convicted—the abduction of his children.²⁵³

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.²⁵⁴

²⁵³ United States v. Lazarevich, 147 F.3d 1061, 1063–64 (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).

²⁵⁴ United States v. Donaghe, 50 F.3d 608, 613 (9th Cir. 1994) (construing former §2L2.3).