Primer

Immigration Offenses

Prepared by the
Office of the General Counsel

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This document was produced and published at U.S. taxpayer expense.

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I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law relating to criminal immigration offenses. This primer focuses primarily on application of the immigration guidelines and related sentencing issues. Although the primer identifies some of the key cases and concepts related to the sentencing of immigration offenses, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

Effective November 1, 2016, the 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.

II. 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.

A. 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.[2] Section 1327 makes it a crime to knowingly aid or assist an inadmissible alien to enter the United States where that alien has been convicted of an aggravated felony.[3]

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

Section 1324(a)(1)(A) is a felony offense that 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

[1] *See* U.S. SENT'G COMM'N, *Guidelines Manual*, App. C, amend. 802 (effective Nov. 1, 2016) (Nov. 2018) [hereinafter USSG].

[2] 8 U.S.C. § 1324(a)(1)–(3).

[3] *Id.* § 1327.

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.[4]

Bringing or attempting to bring an alien into the United States carries a ten-year statutory maximum.[5] Transporting, harboring, or encouraging entry without financial gain has a five-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 the life of another person in jeopardy, the statutory maximum increases to 20 years.[8] And where the crime causes the death of another, the statutory maximum becomes life in prison or death.[9]

For a defendant who brought an alien into the United States, the maximum penalty may be enhanced an additional ten years in cases of commercial transportation of large groups if the aliens were transported in a life-threatening manner or presented a life-threatening health risk to people in the United States.[10] A defendant who aids and abets another in the commission of one of these offenses is subject to a five-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 admitted by the defendant or found by a jury beyond a reasonable doubt.[12]

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4 *Id.* § 1324(a)(1)(A). In *United States v. Sineneng-Smith*, 910 F.3d 461, 470–71 (9th Cir. 2018), the Ninth Circuit 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," violates the First Amendment's protection of free speech. The Ninth Circuit concluded that it restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits. Holding that the Ninth Circuit abused its discretion by considering a First Amendment issue not raised by the parties and "depart[ing] so drastically from the principle of party presentation," the Supreme Court vacated and remanded "for reconsideration shorn of the overbreadth inquiry." 140 S. Ct. 1575, 1578, 1582 (2020). On remand, the Ninth Circuit affirmed the defendant's convictions and rejected the defendant's as-applied First Amendment challenges. 982 F.3d 766 (9th Cir. 2020).

5 8 U.S.C. § 1324(a)(1)(B)(i).

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)(B)(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'[.]").

2. 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 immediate presentation to immigration officials or ultimate admission.[13] Pursuant to section 1324(a)(2)(B), where the alien is brought into the United States but is not immediately presented to immigration officials, a first or second offense is a felony and carries a ten-year maximum.[14]

Where a violation of section 1324(a)(2) is committed for profit or with reason to believe that the alien will commit a felony, for a first and second violation, the defendant is subject to a three-year mandatory minimum and a ten-year statutory maximum.[15] Subsequent violations of section 1324(a)(2) committed for profit or with reason to believe that the alien will commit a felony carry a five-year mandatory minimum and a 15-year statutory maximum.[16] "[T]he sentence is calculated 'for each alien with respect to whom a violation . . . occurs.' "[17] Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.[18]

Finally, as with section 1324(a)(1), the statutory maximums also may be enhanced an additional ten years for commercial transportation of large groups in a life-threatening manner or creating a life-threatening health risk to the people of the United States.[19]

3. 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 brought in groups of ten or more and the manner of transportation endangered the aliens' lives or presented a life-threatening health risk to people in the United States.[20]

13 8 U.S.C. § 1324(a)(2)(A).

14 *Id.* § 1324(a)(2)(B)(iii).

15 *Id.* § 1324(a)(2)(B).

16 *Id.*

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

18 *See, e.g.*, *id.*

19 8 U.S.C. § 1324(a)(4).

20 *Id.*

4. 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, section 1327 does "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."[21]

B. Guideline Overview: §2L1.1—Smuggling, Transporting, or Harboring an Unlawful Alien

The guidelines instruct users to determine the applicable Chapter Two offense guideline 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).[22] For violations of the alien smuggling, transporting, or harboring statutes, Appendix A specifies the offense guideline at §2L1.1.

1. 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).[23] 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.[24]

2. 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, transported, or harbored;

(3) the defendant's prior record of immigration crimes;

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21 United States v. Lopez, 590 F.3d 1238, 1254 (11th Cir. 2009).

22 USSG §1B1.2.

23 USSG §2L1.1(a)(3).

24 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).

(4) involvement 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; or harboring an alien for the purpose of prostitution; and

(9) commercial transportation of large groups in a life-threatening manner.[25]

Of note, 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 also addressed offenses in which an alien (whether a minor or not) is sexually abused and applies a 4-level "serious bodily injury" enhancement in such a case.[26]

3. 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.[27]

[25] USSG §2L1.1(b).

[26] USSG App. C, amend. 802 (effective Nov. 1, 2016).

[27] USSG §2L1.1(c)(1). *See also* United States v. Escobedo-Moreno, 781 Fed. App'x 312, 314–18 (5th Cir. 2019) (per curiam) (cross reference under §2L1.1(c) to §2A1.2 for second-degree murder proper where the defendant's conduct crossed the extreme recklessness threshold: alien suffocated while hiding inside a compartment in the cab of the commercial vehicle, compartment was barely large enough to hold a human, and there was a substantial possibility the alien would not be able to contort his body as needed to escape or move enough to access the cellphone in the compartment for assistance).

C. Specific Guideline Application Issues

1. Section 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).[28] 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.[29] 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.' "[30] Further, as discussed in Application Note 1, committing the offense "other than for profit" means both that there was no payment and no expectation of payment.[31]

2. Section 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 for increases of three, six, or nine levels based on the number of aliens smuggled, transported, or harbored.[32] Consistent with this graduated scheme, Application Note 7 provides that an upward departure may be warranted where the offense involved substantially more than 100 aliens.[33] The Second Circuit has upheld an upward departure where nearly 300 aliens were packed into 800 square feet of cargo

[28] *See, e.g.*, United States v. Al Nasser, 555 F.3d 722, 732–33 (9th Cir. 2009) (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, 90–91 (1st Cir. 2000) (affirming district court's finding that defendants failed to establish lack of profit motive); United States v. Kim, 193 F.3d 567, 576–78 (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 and noting that the defendant usually bears the burden of proving punishment should be decreased).

[29] *See* United States v. McClure-Potts, 908 F.3d 30, 36 (3d Cir. 2018).

[30] United States v. Juan-Manuel, 222 F.3d 480, 485 (8th Cir. 2000) (quoting language in predecessor version of the commentary that was removed) (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").

[31] USSG §2L1.1, comment. (n.1).

[32] USSG §2L1.1(b)(2).

[33] USSG §2L1.1, comment. (n.7(C)).

space for a voyage lasting more than three months.[34] 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."[35]

The number of aliens involved includes relevant conduct under §1B1.3. Because §2L1.1 is listed in §3D1.2(d), the relevant conduct includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[36] Thus, a court may determine the number of aliens based on all related 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.[37] The district court had 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.[38] Noting the numerous ways that conduct can be considered "relevant conduct" for sentencing and the specific relationship between §3D1.2(d) and §2L1.1,[39] 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":

> Ample evidence supports a conclusion that the two trips were part of a common scheme or plan. The same accomplices . . .were involved in both trips, and . . . testimony established the number of aliens transported during the first trip. Both trips were for the purpose of transporting aliens and were undertaken with the same modus operandi—unlawful aliens were loaded into [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).[40]

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[34] United States v. Moe, 65 F.3d 245, 250 (2d Cir. 1995); *see also* United States v. Shan Wei Yu, 484 F.3d 979, 987–88 (8th Cir. 2007) (affirming upward departure based on transporting 1,000 aliens).

[35] United States v. Nagra, 147 F.3d 875, 886 (9th Cir. 1998). A previous version of Section 2L1.1(b)(2) provided a 2-, 4-, or 6-level increase in the *Guidelines Manual* applied at sentencing in *Nagra*. *See* 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. *Nagra*, 147 F.3d at 886. 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. *See* USSG App. C, amend. 543 (effective May 1, 1997).

[36] USSG §1B1.3(a)(2).

[37] United States v. Williams, 610 F.3d 271, 274–75, 292–94 (5th Cir. 2010).

[38] *Id.* at 293.

[39] *Id.* at 292 n.28 ("Section 3D1.2(d) includes offenses covered by §2L1.1.").

[40] *Id.* at 293–94 (internal citations and quotation omitted).

Courts occasionally have addressed the type 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."[41] In another case, the court affirmed the application of the enhancement based on an estimate of the total number of aliens smuggled, assuming that on each of 15 trips, defendants used children to smuggle in two aliens posing as the children's parents.[42]

3. Section 2L1.1(b)(3)—Prior Immigration 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.

This enhancement also implicates the calculation of criminal history under the guidelines. 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*.[43] In *United States v. Cortez-Gonzalez*, the Fifth Circuit held there is no temporal limitation to determine which predicate offenses can invoke the enhancement.[44] The court noted that Application Note 2 does not require that prior felony convictions that are ineligible for criminal history points due to the passage of time cannot serve as predicate offenses for an enhancement under §2L1.1(b)(3).[45]

4. Section 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.[46] The definition of "minor" includes an individual under the age of 18.[47]

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41 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).

42 United States v. Cabrera, 288 F.3d 163, 170–73 (5th Cir. 2002) (per curiam).

43 USSG §2L1.1, comment. (n.2).

44 United States v. Cortez-Gonzalez, 929 F.3d 200, 204 (5th Cir. 2019).

45 *Id.* (differentiating §2L1.1(b)(3) from the guideline at §2L1.2(b), where Application Note 3 to §2L1.2 specifically states courts are to "use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c)."). USSG §2L1.2, comment. (n.3).

46 USSG §2L1.1(b)(4).

47 USSG §2L1.1, comment. (n.1).

Because this specific offense characteristic was amended effective November 1, 2016,[48] it may raise *ex post facto* issues for defendants whose offenses occurred before that date.[49] 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."[50]

5. Section 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.[51] Specifically, if a firearm was discharged, the base offense level is to be increased by six levels, with a minimum offense level of 22. Further, if a dangerous weapon was brandished or otherwise used, the base offense level is to be increased by four levels, with a minimum offense level of 20. Finally, if a dangerous weapon (including a firearm) was possessed, the base offense level is to be increased by two levels, with a minimum offense level of 18.[52]

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).[53]

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."[54] For example, in *United States v. Olarte-Rojas*, the Fifth Circuit held that caltrops, which were

[48] 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).

[49] *See* Peugh v. United States, 569 U.S. 530, 550–51 (2013) (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).

[50] USSG §1B1.11(b).

[51] USSG §2L1.1(b)(5).

[52] *Id.*

[53] USSG §1B1.1, comment. (n.1(E)).

[54] United States v. Olarte-Rojas, 820 F.3d 798, 801–02 (5th Cir. 2016) ("[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.") (citations and quotations omitted).

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.[55] 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.[56]

6. Section 2L1.1(b)(6)—Creating Risk of Death or 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.[57]

Application Note 3 states that §2L1.1(b)(6) applies to "a wide variety of conduct" for offenses involving reckless conduct.[58] 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, the adjustment at §3C1.2 (Reckless Endangerment) does not apply. Further, the application note instructs that §2L1.1(b)(6) does not apply if the only reckless conduct is conduct for which the defendant has received an enhancement under §2L1.1(b)(5) (relating to dangerous weapons).[59]

Although §2L1.1(b)(6) applies to varied conduct, courts have avoided bright-line rules in applying the enhancement and instead engage in a fact-specific inquiry.[60] The application 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.[61]

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55 *Id.* at 803.

56 *Id.*

57 USSG §2L1.1(b)(6).

58 USSG §2L1.1, comment. (n.3).

59 *Id.*

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

61 USSG §2L1.1, comment. (n.3).

To qualify for this enhancement, either the defendant must have *created* the risk of danger,[62] or the risk must have been "reasonably foreseeable in connection with that criminal activity."[63] The enhancement "requires only that *some* risk of death or serious bodily injury be foreseeable, not the specific harm that actually occurred."[64] Risk that an alien faced prior to joining a transporting conspiracy will not be imputed to 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."[65]

a. Non-vehicle risk of injury

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] Courts have applied the enhancement in various risky transit situations where no vehicles were involved. 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 three-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

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[62] *See* United States v. Rodriguez-Lopez, 363 F.3d 1134, 1137–39 (11th Cir. 2004) (defendant created the risk where he drove boat in hazardous manner); United States v. Yeh, 278 F.3d 9, 13–14 (D.C. Cir. 2002) (although defendant did not create conditions on boat at the outset, he acted as "enforcer" in keeping order on boat carrying over 200 aliens).

[63] USSG §1B1.3, comment. (n.3(D)) (describing what is reasonably foreseeable in the context of jointly undertaken criminal activity); *see also* United States v. De Jesus-Ojeda, 515 F.3d 434, 442–46 (5th Cir. 2008) (defendant was liable for risk of injury created by co-conspirators who had aliens walk through the brush to avoid detection).

[64] United States v. Ruiz-Hernandez, 890 F.3d 202, 212 (5th Cir. 2018).

[65] United States v. Garza, 541 F.3d 290, 293 (5th Cir. 2008) ("Although it may be reasonably foreseeable to Garza what actions members of his conspiracy might take, it could not be foreseeable that an alien traveling with another group would become separated from his original group, sleep in the brush, and meet up with the group guided by Garza's co-conspirator.").

[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] *Garza*, 541 F.3d at 293–95.

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

spring weather, and proper equipment through a dangerous and rugged terrain as appropriate reasons to apply the enhancement.[71]

b. Vehicle risk of injury

Courts also have applied the enhancement in various circumstances where defendants have transported aliens in vehicles in dangerous and reckless ways. For example, the enhancement is appropriate where defendants transport 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."[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 bodily 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]

Recently, in *United States v. Luyten*, the Fifth Circuit upheld application of the enhancement where the defendant—an 81-year-old pilot whose license was permanently revoked 11 years earlier—on multiple occasions transported five passengers in a plane equipped for only four passengers.[77] The court explained that this additional passenger was "necessarily unrestrained" and therefore faced a substantial risk of serious bodily injury or death that was "heightened in the event of an accident or crash." The court also noted that the additional passenger created a risk because of the weight of the plane.[78]

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71 *Id.* at 1059.

72 298 F.3d 387, 390 (5th Cir. 2002).

73 844 F.3d 534, 538 (5th Cir. 2016).

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

75 *Id.* at 890.

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, 1231 (10th Cir. 2004) (transporting six aliens lying on floor of minivan that was altered to remove the seats and seatbelts qualified for enhancement).

77 966 F.3d 329, 333–35 (5th Cir. 2020).

78 *Id.*

As discussed below, some courts have articulated several factors to consider when applying this enhancement in vehicle cases.

i. Fifth Circuit's case-specific analysis

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.' "[79] 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."[80] The court also has held that the 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."[81]

Additional facts that have supported the enhancement, in both vehicle and non-vehicle related cases, 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 over the Rio Grande in very deep water.[82]

ii. 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

[79] United States v. Garza, 541 F.3d 290, 294 (5th Cir. 2008) (quoting *Solis-Garcia*, 420 F.3d at 516).

[80] United States v. Zuniga-Amezquita, 468 F.3d 886, 889 (5th Cir. 2006). These factors are not exhaustive. *See* United States v. Garcia-Solis, 927 F.3d 308, 312–13 (5th Cir. 2019) (concluding factors listed in *Zuniga-Amezquita* are not exhaustive and noting reckless driving can be basis for enhancement because Application Note 3 of §2L1.1 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.").

[81] *Zuniga-Amezquita*, 468 F.3d at 889 (citing *Solis-Garcia*, 420 F.3d at 516).

[82] *See, e.g.*, United States v. Najera, 915 F.3d 997, 1002 (5th Cir. 2019) (crossing deep water); United States v. Cardona-Lopez, 602 Fed. App'x 191, 192 (5th Cir. 2015) (per curiam) (14 passengers in vehicle rated for seven); United States v. Chapa, 362 Fed. App'x 411, 413 (5th Cir. 2010) (per curiam) (harsh conditions and inadequately prepared); United States v. De Jesus-Ojeda, 515 F.3d 434, 443 (5th Cir. 2008) (same); United States v. Hernandez-Pena, 267 Fed. App'x 367, 368–369 (5th Cir. 2008) (per curiam) (through brush without access to water).

> of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger traveling on our streets and highways.[83]

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).[84]

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."[85]

iii. 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."[86] Under this analysis, the court "must disregard the 'baseline risk . . . inherent in all vehicular travel,' delving instead into whether the defendant's conduct or his chosen method of transportation 'increase[d] the risk [of] an accident' and whether the method of transportation exacerbated the risk of death or injury in the event of an accident."[87]

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[83] 502 F.3d 885, 889 (9th Cir. 2007). *Compare* 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), *with* United States v. Bernardo, 818 F.3d 983, 987 (9th Cir. 2016) (applying enhancement where woman was transported strapped inside dashboard compartment with cargo strap).

[84] *Torres-Flores*, 502 F.3d at 889–90.

[85] *Id.* at 890*; see also* United States v. Rivera, 768 F. App'x 665, 666–69 (9th Cir. 2019) (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). *But see* United States v. Castellanos, 803 F. App'x 90, 91–92 (9th Cir. 2020) (rejecting enhancement because although the defendant's transport of two individuals in a trunk without seatbelts "fast and recklessly" was an act of endangerment, the record did not establish that the defendant understood the associated risks).

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

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

7. Section 2L1.1(b)(7)—Death or Bodily Injury

If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury[.][88]

Section 2L1.1(b)(7) provides for 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 (Application Instructions).[89] 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."[90]

There is no consensus among the circuits about the type of causal connection, if any, between the defendant's actions and a death or bodily injury that is necessary to trigger an enhancement under §2L1.1(b)(7).[91] At one end of the spectrum, the Eighth and Ninth Circuits require direct or proximate causation to apply the enhancement.[92] At the other end of the spectrum, the Tenth Circuit does not impose any causation requirement, instead looking to whether the death or injury was reasonably foreseeable.[93] Similarly, the Fifth Circuit held that the enhancement "contains no causation requirement" and "the only causation requirement is that contained in [the relevant conduct provision of the guidelines at] [§]1B1.3."[94] 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

[88] USSG §2L1.1(b)(7). 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)).

[89] USSG §2L1.1, comment. (n.1).

[90] USSG §2L1.1, comment. (n.4).

[91] *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) (same).

[92] *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.").

[93] *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").

[94] United States v. Ramos-Delgado, 763 F.3d 398, 401 (5th Cir. 2014) (quotations omitted); *see also* United States v. Salinas, 918 F.3d 463, 466–67 (5th Cir. 2019) (per curiam) (enhancement appropriately applied where alien died of heart attack when running to evade police after a crash in chase with law enforcement).

guideline range."[95] The Eleventh Circuit likewise rejected a proximate cause standard, concluding instead 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."[96] 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 test.[97]

Regardless of the causation standard, the enhancement does not require intent to cause injury or death[98] nor is it necessary for the defendant to be the driver of a vehicle that crashes and injures smuggled aliens.[99]

Courts have upheld the application of both §2L1.1(b)(6) (creating risk of death or injury) and §2L1.1(b)(7) (death or 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 for an enhancement based upon the '*outcome* . . . with no consideration of the defendant's intentional or reckless conduct.' "[100]

8. Section 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

95 *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 a shipping channel).

96 *Zaldivar*, 615 F.3d at 1350–51.

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

98 United States v. Garcia-Guerrero, 313 F.3d 892, 898 (5th Cir. 2002); *see also* 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)].").

99 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. Mares-Martinez, 329 F.3d 1204, 1207 (10th Cir. 2003) (affirming enhancement where defendant was not present when tire blowout on overcrowded van caused injury and death to passengers).

100 United States v. Cardena-Garcia, 362 F.3d 663, 667 (10th Cir. 2004) (quoting United States v. Herrera-Rojas, 243 F.3d 1139, 1144 (9th Cir. 2001)).

level 18. Application Note 5 further instructs that an adjustment under §3A1.3 (Restraint of Victim) is not to apply if §2L1.1(b)(8)(A) applies.[101]

The Tenth Circuit affirmed a 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, keeping them in a van, and making them urinate in a bottle.[102]

The court must apply the greater of §2L1.1(b)(8)(A) and (b)(8)(B).

9. Section 2L1.1(b)(8)(B)—Alien Harboring (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*, 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—the prostitution of minor aliens—constituted impermissible double counting because "the enhancements d[id] not necessarily implicate the same conduct."[103] The court explained that five harbored illegal female aliens were coerced or otherwise forced into prostitution and four of them were minors.[104] Therefore, the court upheld the §2L1.1(b)(6) enhancement based 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.[105]

10. Section 2L1.1(b)(9)—Commercial Transportation of Large Groups

If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

Subsection 1324(a)(4) increases the maximum penalty an additional ten years for cases of commercial transportation of large groups if the aliens were transported in a life-threatening manner or presented a life-threatening health risk to people in the United States. This enhancement also increases the offense level in such cases.

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101 USSG §2L1.1, comment. (n.5).

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

103 714 F.3d 306, 315 (5th Cir. 2013).

104 *Id.*

105 *Id.*

11. Section 2L1.1(c)—Cross Reference

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

D. Chapter Three Adjustments

1. Section 3A1.1—Vulnerable Victim

Section 3A1.1 provides an increase of two or three levels if the court finds a victim was selected as the object of the offense because of (a) actual or perceived characteristics, including race, color, national origin, or ethnicity, or if (b) the defendant knew or should have known the victim of the offense was a vulnerable victim.[106] 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."[107]

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."[108] In other words, the relevant question is whether a particular victim of the smuggling offense is "more unusually vulnerable" than any other such victim.[109] 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."[110] The "general characteristics commonly held by aliens seeking to be illegally smuggled" do not create a vulnerability that warrants the enhancement.[111] However, smuggled aliens "detained against their will after being transported" can be considered "victims" for purposes of §3A1.1(b)(1).[112] Moreover, "an undocumented alien's illegal status could be

106 USSG §3A1.1.

107 USSG §3A1.1, comment. (n.2).

108 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)).

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

110 *Angeles-Mendoza*, 407 F.3d at 747 (citing United States v. Velasquez-Mercado, 872 F.2d 632, 636 (5th Cir. 1989)) (smuggled aliens "might be more properly characterized as 'customers' than 'victims' ").

111 *Id.* at 747–48 ("the *inherent* vulnerability of smuggled aliens" has been "adequately taken into account in establishing the base offense level").

112 *Id.* at 747.

the basis for a 'vulnerable victim' finding for offenses that do not necessarily involve illegal aliens."[113]

2. Sections 3B1.1 and 3B1.2—Role in the Offense

Application Note 6 to §2L1.1 invites consideration of a defendant's role in the offense under §3B1.1 (Aggravating Role). Section 3B1.1 provides adjustments to the offense level of 2 to 4 levels if the defendant was an organizer, leader, manager, or supervisor, depending on the number of participants involved in the offense.[114] The application 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."[115] Some courts apply §3B1.1 to increase sentences for defendants with an aggravating role in the offense;[116] other courts routinely deny reductions for minor participants under §3B1.2 (Mitigating Role).[117]

3. Section 3B1.3—Special Skill

Section 3B1.3 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

[113] 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).

[114] USSG §3B1.1.

[115] USSG §2L1.1, comment. (n.6).

[116] *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").

[117] *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, 1056–60 (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).

qualify as a special skill under §3B1.3.[118] 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.[119]

4. Section 3C1.2—Reckless Flight

Section 3C1.2 provides for 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.[120] 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.' "[121]

E. Departures and Variances

1. Multiple Deaths

The Tenth Circuit has affirmed upward departures in §2L1.1 cases where multiple deaths resulted from the defendant's conduct.[122]

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

[119] United States v. De La Cruz Suarez, 601 F.3d 1202, 1219 (11th Cir. 2010); *see also* United States v. Ibarguen Palacios, 815 F. App'x 481, 486 (11th Cir. 2020) (per curiam) ("[The] boat's lack of technological sophistication does not negate the skill used to operate it; it might even make [defendant's] handling of it all the more impressive."); United States v. Manso, 767 F. App'x 747, 749 (11th Cir. 2019) (per curiam) (not clear error to apply adjustment and collecting cases discussing level of skill required to warrant adjustment).

[120] 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 at §2L1.1(b)(5) in the 2003 *Guidelines Manual*).

[121] *Id*. at 970 (internal citations omitted); *see also* United States v. Castellanos, 803 F. App'x 90, 91 (9th Cir. 2020) (district court erred in "dividing [the defendant's] continuous flight from border patrol into two segments and applying" the §2L1.1(b)(6) enhancement for highway segment and §3C1.2 adjustment for "surface-street segment").

[122] *See* United States v. Munoz-Tello, 531 F.3d 1174, 1190 (10th Cir. 2008); United States v. Jose-Gonzalez, 291 F.3d 697, 701–08 (10th Cir. 2002).

2. Duration of Harboring

The Fourth Circuit affirmed an upward departure in a §2L1.1 case involving a harboring conspiracy that lasted for 15 years.[123]

3. Extent of Detention

The Tenth Circuit affirmed a variance above a guideline range that included an enhancement under §2L1.1(b)(8), finding that an alien had been 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."[124]

III. UNLAWFUL ENTRY OR STAY—§2L1.2

Federal law prohibits foreign nationals from entering and remaining in the United States without permission. A conviction for a first illegal entry offense is a misdemeanor that is not covered by the guidelines.[125] Subsequent entries,[126] reentry after removal,[127] and remaining in the United States after being ordered removed[128] 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 guideline application issues for offenses sentenced under §2L1.2.

A. STATUTORY SCHEME

Illegal reentry offenses refer to failure to depart (8 U.S.C. § 1253), illegal reentry (8 U.S.C. § 1326), and 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.

123 United States v. Bonetti, 277 F.3d 441, 450–51 (4th Cir. 2002).

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

125 8 U.S.C. § 1325(a).

126 *Id.*

127 *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. *See* 8 U.S.C. § 1229a [INA § 240]; RICHARD D. STEEL, STEEL ON IMMIGRATION LAW §§ 11:1, 13:1 (2020–2021 ed. 2020).

128 8 U.S.C. § 1253.

1. 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 carries a four-year statutory maximum penalty, although prior convictions under certain specified statutes will invoke a ten-year statutory maximum.[129]

2. 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 two-year maximum.[130] Under section 1326(b), a ten-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.[131] If the prior conviction was an "aggravated felony," as defined by 8 U.S.C. § 1101(a)(43), the statutory maximum is 20 years.[132]

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.[133] However, sentencing enhancements based on a defendant's prior deportation must be found by a jury.[134] Under *Apprendi*, for a defendant to be eligible for an enhanced statutory maximum

[129] *Id.* § 1253(a)(1). The ten-year statutory maximum applies to individuals deported pursuant to 8 U.S.C. § 1227(a)(1)(E) (for helping an alien enter the United States), § 1227(a)(2) (for certain criminal offenses), § 1227(a)(3) (for failure to register and falsification of documents), and § 1227(a)(4) (for security threats). One subsection of this statute, § 1253(b), prohibits false statements 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.

[130] *Id.* § 1326(a)(2).

[131] *Id.* § 1326(b)(1), (3), (4).

[132] *Id.* § 1326(b)(2).

[133] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (fact of a prior conviction need not be found by a jury); Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998) (prior felony is not an element of the offense and need not be charged in the indictment).

[134] *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)

under section 1326(b), the indictment must allege not only a prior removal and subsequent reentry, but also the date of that removal or the fact that it occurred after a qualifying prior conviction.[135] But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.[136]

The Ninth Circuit has concluded that an indictment will support a section 1326(b) sentencing enhancement if it alleges a removal date because the sentencing court can "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."[137] The Ninth Circuit also held that an indictment need not include the removal date if it otherwise alleges facts establishing that the removal occurred after a qualifying conviction.[138] 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.[139]

Courts have held that it does not violate the Equal Protection Clause to enhance a defendant's illegal reentry sentence based on prior convictions.[140]

3. 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 or subsequent violation of section 1325(a). For offenders violating the statute for the first time, the statute carries a six-month maximum penalty, and the guidelines do not apply. Subsequent violations of section 1325(a) carry a two-year maximum penalty and are

(citation omitted) (*Almendarez-Torres* exception is "limited to prior convictions" and does not apply to the fact or date of the prior removal).

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

136 *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").

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

138 *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.").

139 *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).

140 *See* 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).

sentenced under §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.[141]

B. Guideline Overview: §2L1.2—Unlawfully Entering or Remaining in the United States

For violations of the illegal entry and reentry statutes, Appendix A specifies the offense guideline at §2L1.2. This section of the primer provides background and legal analysis of §2L1.2, as amended, effective November 1, 2016.[142]

1. Base Offense Level

Section 2L1.2 has a base offense level of 8.[143]

2. Specific Offense Characteristics

Prior to 2016, certain enhancements under §2L1.2(b) were based on whether the defendant had prior convictions for drug offenses or "crimes of violence." The Commission amended §2L1.2(b) to address the "categorical approach" courts used to determine whether a prior offense was a "crime of violence" for purposes of applying enhancements.[144] The Commission had—

> 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]

As amended in 2016, sentencing enhancements under §2L1.2(b) 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

[141] *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (fact of a prior conviction need not be found by a jury); Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998) (prior felony is not an element of the offense and need not be charged in the indictment).

[142] *See* USSG App. C, amend. 802 (effective Nov. 1, 2016).

[143] USSG §2L1.2(a).

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

[145] *Id.*

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

a. Section 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.[146] "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).[147]

b. Section 2L1.2(b)(2) and (b)(3)—Other prior convictions

Subsections (b)(2) and (b)(3) account for prior convictions (other than illegal entry or reentry offenses) 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*—both are 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 exceeded one year and one month;
- 4 levels for any other prior felony conviction; or

[146] USSG §2L1.2(b)(1)(A)–(B).

[147] USSG §2L1.2, comment. (n.2).

- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.[148]

"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), 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."[149]

c. *Ex Post Facto* considerations

The 2016 Amendment to §2L1.2 may raise *ex post facto* issues.[150] 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.[151]

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 when the alien reentered the United States, without violating the *Ex Post Facto* Clause.[152] For example, 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."[153] An alien also can be "found" in the United States when a law

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[148] USSG §2L1.2(b)(2)–(3). The Commission amended §2L1.2 again effective November 1, 2018, to address scenarios 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).

[149] USSG §2L1.2, comment. (n.2).

[150] *See, e.g.*, United States v. Martinez-Ovalle, 956 F.3d 289, 294–95 (5th Cir. 2020) (violation of the *ex post facto* clause to apply 2018 guidelines where it increased the defendant's guideline range). 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. USSG §1B1.11(b)(1).

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

[152] *See, e.g.*, United States v. Lennon, 372 F.3d 535, 539–42 (3d Cir. 2004); United States v. Rodriguez, 26 F.3d 4, 7–8 (1st Cir. 1994); United States v. Whittaker, 999 F.2d 38, 40–42 (2d Cir. 1993); United States v. Gonzales, 988 F.2d 16, 18 (5th Cir. 1993).

[153] United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996); *see also* United States v. Romero-Lopez, 981 F.3d 803, 807 (10th Cir. 2020) (not plain error to apply 2018 guidelines where evidence demonstrated that the defendant was "found" by local law enforcement prior to amendment but not found by

enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) issues an immigration detainer.[154]

C. Specific Guideline Application Issues

1. Prior Convictions

a. Ordered deported or removed

In assessing the timing of prior criminal conduct, Section 2L1.2(b) looks to the date of 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 such an order was "based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction." "For the first time" means "the first time the defendant was ever the subject of such an order."[156]

Federal law authorizes immigration authorities to reinstate prior removal orders.[157] 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.[158] Voluntary returns do not count as an order of removal.[159]

b. Timing of final convictions

Convictions that were final before and after the first order of removal are counted.[160] A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is pending when the defendant is deported.[161]

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federal law enforcement until later); United States v. Bencomo-Castillo, 176 F.3d 1300, 1303–05 (10th Cir. 1999) ("found" is synonymous with "discovered "); *Whittaker*, 999 F.2d at 42 (same).

154 United States v. Sosa-Carabantes, 561 F.3d 256, 259–61 (4th Cir. 2009).

155 *See* 8 C.F.R. § 1241.1 (Final order of removal).

156 USSG §2L1.2, comment. (n.1(A)).

157 *See* 8 U.S.C. § 1231(a)(5).

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

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

160 USSG §2L1.2(b)(2) & (b)(3) (providing for enhancement if the defendant engaged in criminal conduct that "at any time" resulted in conviction).

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

c. Qualifying 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 was convicted."[162] Separately, 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 the specific offense characteristics under §2L1.2(b)(1)–(3), prior convictions should be counted only if they 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] Subsequently, the First Circuit found plain error when a 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 . . . 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] Application Note 3 further 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).[169]

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162 USSG §2L1.2, comment. (n.1(B)).

163 *See* USSG §2L1.2(b)(2)–(3) (instructing the court to "[a]pply the [g]reatest" enhancement based on the defendant's prior convictions).

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

165 *See* USSG §2L1.2, comment. (n.3) (instructing 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).

169 *Id.*

d. Deferred adjudications

A deferred adjudication can qualify as a prior conviction under §2L1.2.[170] A guilty plea held in abeyance also can qualify as a "conviction" under §2L1.2.[171]

e. Vacated convictions

Section 2L1.2 does not expressly address expunged or vacated convictions. Some courts have held that a conviction that was vacated prior to sentencing should be considered under §2L1.2.[172] An enhancement, however, would not apply if the conviction was vacated on "a showing of actual innocence"[173] or a showing "that the conviction had been improperly obtained."[174]

f. Burden of proof and notice

The fact of a prior conviction need not be pled or proven beyond a reasonable doubt.[175] 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.[176]

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[170] *See, e.g.*, United States v. Medina, 718 F.3d 364, 368 (4th Cir. 2013) (collecting cases); 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").

[171] *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"). *But see* United States v. Canelas-Amador, 837 F.3d 668, 670–75 (6th Cir. 2016) (guilty plea alone, without entry of judgment of conviction, does not qualify as a prior offense and discussing circuit disagreement over definition of "conviction").

[172] *See* 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. Luna-Diaz, 222 F.3d 1, 6 (1st Cir. 2000) (district court abused its discretion in refusing to impose the enhancement where, after pleading guilty to illegal reentry, defendant's prior aggravated felony conviction was 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. Cisneros-Cabrera, 110 F.3d 746, 747–48 (10th Cir. 1997) (district court did not err in applying the enhancement based on a vacated conviction that was in place at the time of illegal entry).

[173] *Garcia-Lopez*, 375 F.3d at 589; *Luna-Diaz*, 222 F.3d at 6 n.5.

[174] *Campbell*, 167 F.3d at 98; *Luna-Diaz*, 222 F.3d at 6 n.5. *But see Cisneros-Cabrera*, 110 F.3d at 748 (affirming application of enhancement where prior state conviction was later vacated based on ineffective assistance of counsel).

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

[176] This rule does not apply to the fact of deportation. 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 or proved to a jury beyond a reasonable doubt. *See, e.g.*, United States v. Rojas-Luna, 522 F.3d 502, 505–06 (5th Cir. 2008) (conclusory statement that plaintiff was removed

g. Definition of felony

The enhancements provided for at §2L1.2 are triggered by a defendant's previous conviction(s), primarily for felony offenses.[177] Because §2L1.2 defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year,"[178] this definition can include qualifying state misdemeanor offenses that are punishable by more than one year. Such misdemeanor convictions may qualify for an enhancement under §2L1.2(b)(2) or (3) depending on the sentence imposed.[179] For the same reasons, a prior state court misdemeanor conviction can trigger section 1326(b)(1)'s enhanced ten-year statutory maximum if, under federal law, it is considered a felony, *i.e.*, "an offense punishable by a maximum term of imprisonment of more than one year."[180]

Determining how an offense is punishable may require looking beyond a general statutory maximum. 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.[181] 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.[182] 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.[183] It overruled its past precedent to the contrary.[184]

h. 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

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without evidence did not support statutory sentence enhancement); United States v. Covian-Sandoval, 462 F.3d 1090, 1097–98 (9th Cir. 2006) (*Almendarez-Torres* exception is "limited to prior convictions" and does not apply to the fact or date of the prior removal).

177 USSG §2L1.2(b)(1)–(3).

178 USSG §2L1.2, comment. (n.2).

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

180 18 U.S.C. § 3156(a)(3).

181 912 F.3d 1215, 1222–24 (9th Cir. 2019).

182 *Id.*

183 *Id.*

184 *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."[185]

In addition, multiple prior sentences sometimes are counted only once when determining sentence length. The Fifth Circuit upheld, on plain error review, application of the §2L1.2(b)(2) enhancement based on the "single-sentence 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.[186] 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).[187] The Ninth Circuit agreed, finding that prior sentences should be treated the same way when used to determine the offense level under §2L1.2 as when used to determine criminal history.[188]

i. Simultaneous convictions

Application Note 4 to §2L1.2 addresses situations where a defendant was sentenced simultaneously 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).[189]

2. Misdemeanors—Crimes of Violence or Drug Trafficking Offenses

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.[190]

[185] USSG §2L1.2, comment. (n.2).

[186] *See* United States v. Ponce-Flores, 900 F.3d 215, 218–19 (5th Cir. 2018); *see also* USSG §4A1.2(a)(2) (Definitions and Instructions for Computing Criminal History).

[187] United States v. Garcia-Sanchez, 916 F.3d 522, 527 (5th Cir. 2019) (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 the 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).

[188] United States v. Cuevas-Lopez, 934 F.3d 1056, 1062–68 (9th Cir. 2019).

[189] USSG §2L1.2, comment. (n.4).

[190] *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 344, 110 Stat. 3009.

The definition of "crime of violence" in Application Note 2 to §2L1.2 mirrors the definition in the career offender guideline, §4B1.2(a).[191] 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."[192]

A "drug trafficking offense" is defined in Application Note 2 to §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 a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[193]

Courts have interpreted these terms by applying the "categorical approach" mandated by the Supreme Court in *Taylor v. United States*[194] and its progeny.[195] 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.[196]

D. CHAPTER FOUR CRIMINAL HISTORY AND STATUS POINTS

In addition to prompting an enhancement under §2L1.2(b), a prior conviction also may increase a defendant's sentence due to the application of criminal history points under §4A1.1(a)–(c), and "status" points under §4A1.1(d).[197] Courts consistently have rejected the argument that considering a defendant's prior convictions in calculating both the offense level and criminal history constitutes impermissible double counting.[198] In some cases, courts have relied on §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to impose an upward departure based on under-represented

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

192 USSG §2L1.2, comment. (n.2).

193 *Id.*

194 495 U.S. 575 (1990).

195 *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). The Commission's 2016 Amendment implementing a sentence-imposed approach did not amend these particular provisions and, as a result, the categorical approach may still be required in some cases. *See* USSG App. C, amend. 809 (effective Nov. 1, 2018).

196 *See* U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH, https://www.ussc.gov/guidelines/primers/categorical-approach.

197 *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, imprisonment, work release, or escape status.").

198 *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).

criminal history.[199] However, courts have found that an upward departure or variance based on a prior illegal entry is error, because there was nothing "unusual" about the illegal entry.[200]

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 evidence standard in an illegal reentry case. In *United States v. Valle*, the court stated the higher standard is necessary because prior convictions counted under the rules in §4A1.1 can have "an extremely disproportionate impact on the sentence."[201] Moreover, 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.[202]

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. Section 4A1.1 provides for a 2-level increase "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."[203] 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.[204] 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 is subject to a 2-level increase under §4A1.1(d).[205] However, the court may consider a downward departure based on time in state custody.[206]

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[199] *See* United States v. Zuniga-Peralta, 442 F.3d 345, 347–48 (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).

[200] *See* United States v. Perez-Rodriguez, 960 F.3d 748, 754–58 (6th Cir. 2020) (district court's upwardly variant sentence was substantively unreasonable where defendant's only prior conviction was for illegal reentry and counts in instant offense were consistent with typical illegal reentry offense); United States v. Figaro, 935 F.2d 4, 7 (1st Cir. 1991) (upward departure could not properly be based on prior uncharged illegal entry because there is nothing "unusual" about illegal entry but affirming on other grounds).

[201] 940 F.3d 473, 479 (9th Cir. 2019) (quoting United States v. Jordan, 256 F.3d 922, 930 (9th Cir. 2001)).

[202] *Id.* at 477–80 (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).

[203] USSG §4A1.1(d).

[204] United States v. Cano-Rodriguez, 552 F.3d 637, 639 (7th Cir. 2009) (per curiam) (quoting United States v. Rodriguez-Rodriguez, 453 F.3d 458, 460 (7th Cir. 2006)).

[205] *See, e.g.*, *id.*; 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).

[206] *See* USSG §2L1.2, comment. (n.7).

E. DEPARTURES

1. Section 5K3.1—"Fast Track" Early Disposition Programs

The most frequent departure granted to defendants sentenced under §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 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."[207] However, the First Circuit has held that a plea agreement in which the government agreed to recommend a 2-level downward fast-track adjustment did not obligate the district court to sentence the defendant in accordance with the government's recommendation.[208]

2. Collateral Consequences

Another issue that confronts many illegal reentry defendants is the collateral consequences of their convictions. Because of their immigration status, undocumented aliens are ineligible for placement in minimum security facilities and certain BOP programs, and to finish their sentence in a halfway house. Courts generally have rejected these collateral consequences as grounds for a sentence reduction,[209] although a downward departure based on collateral consequences of deportation may be justified if the circumstances of the case are extraordinary.[210]

The *Guidelines Manual* does not specifically address whether or how a sentencing court should consider a defendant's stipulation to an administrative or judicial order of removal as a consequence of the conviction. However, various circuits have considered whether the defendant's stipulation to removal is a permissible ground for a downward departure. These circuits have recognized the possibility that a district court may grant a departure in some circumstances based on the defendant's stipulation to removal.[211] 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.[212] This requirement

[207] USSG §5K3.1.

[208] United States v. Cueto-Nunez, 869 F.3d 31, 35–36 (1st Cir. 2017).

[209] *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).

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

[211] *See, e.g.*, United States v. Jauregui, 314 F.3d 961, 963–64 (8th Cir. 2003); United States v. Galvez-Falconi, 174 F.3d 255, 260 (2d Cir. 1999); United States v. Rodriguez-Lopez, 198 F.3d 773, 777 (9th Cir. 1999); United States v. Mignott, 184 F.3d 1288, 1291 (11th Cir. 1999) (per curiam); 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).

[212] *See* United States v. Gomez-Sotelo, 18 F. App'x 690, 692 (10th Cir. 2001); United States v. Marin-Castenada, 134 F.3d 551, 555 (3d Cir. 1998).

flows from the "judiciary's limited power with regard to deportation."[213] The Second, Eighth, and Ninth Circuits have reached the opposite conclusion. These courts have reasoned that requiring the government's agreement would create a condition for departure not required by the *Guidelines Manual*.[214]

3. Motive and Cultural Assimilation

Courts generally have held that the defendant's motive for illegal reentry is not a basis for a downward departure.[215] Courts have recognized, however, that the defendant's motivation to care for a family member could be relevant, although such circumstances generally must be exceptional.[216]

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 resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or 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.[217]

In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court's refusal to grant this departure due to the defendant's likelihood of recidivism (*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.[218] In *United States v. Rodriguez*, the

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[213] *Marin-Castenada*, 134 F.3d at 555.

[214] *See Galvez-Falconi*, 174 F.3d at 260; *Jauregui*, 314 F.3d at 963 n.3; *Rodriguez-Lopez*, 198 F.3d at 778.

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

[216] *See, e.g.*, United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006) (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) (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 her); *Saucedo-Patino*, 358 F.3d at 794 (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) (departure not warranted where defendant was separated from his wife and the provision of financial support for three children was not an exceptional circumstance).

[217] 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).

[218] 656 F.3d 563, 567 (7th Cir. 2011).

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 accord it dispositive weight."[219]

4. Seriousness of Prior Offense

Application Note 6 provides that the court may depart if an 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.[220]

5. 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).[221] The application note provides, therefore, that the court may consider a departure to reflect all or part of the time served in state custody, if appropriate, to achieve a reasonable punishment.[222]

IV. IMMIGRATION FRAUD OR MISCONDUCT—§§2L2.1, 2L2.2

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.

A. STATUTORY SCHEME

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

[219] 660 F.3d 231, 234–35 (5th Cir. 2011) (citation and quotation omitted).

[220] USSG §2L1.2 comment. (n.6).

[221] Section 5G1.3 provides for an adjustment to the term of imprisonment imposed on the instant offense to reflect time the defendant has served on an undischarged term of imprisonment for another offense that is relevant conduct to the instant offense of conviction. USSG §5G1.3. Section 5K2.23 provides that a "downward departure may be appropriate if the defendant has [] completed serving a term of imprisonment" or if §5G1.3(b) "would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense." USSG §5K2.23.

[222] USSG §2L1.2 comment. (n.7).

1. 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.

2. 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 immigration status. The statutory maximum for such an offense is five years.

3. 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.

4. 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.

B. Guideline Overview: §§2L2.1, 2L2.2—Immigration Fraud

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). The main difference between the guidelines is whether the fraud involved others or only involved the defendant.

A number of statutes are covered by both §2L2.1 and §2L2.2.[223] Other crimes are covered only by §2L2.1.[224] Still other crimes are covered only by §2L2.2.[225] Of note, convictions under 18 U.S.C. § 1028, which prohibits fraud in connection with identification documents, are sentenced under §§2L2.1 and 2L2.2, rather than §2B1.1 (covering fraud offenses), when "the primary purpose of the offense . . . was to violate . . . the law pertaining

[223] 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.

[224] 8 U.S.C. § 1185(a)(4) and 18 U.S.C. §§ 1427 and 1541.

[225] 8 U.S.C. § 1185(a)(5) and 18 U.S.C. §§ 911, 1423, and 1424.

to naturalization, citizenship, or legal resident status."[226] Courts have used this same reasoning to apply §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.[227]

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.[228]

1. Section 2L2.1—Immigration Fraud (Trafficking)

a. Base offense level

The base offense level for immigration fraud offenses under §2L2.1 is 11.[229]

b. Specific offense characteristics

As with smuggling offenses, §2L2.1 provides for (1) a 3-level reduction where "the offense was committed other than for profit"[230] or involved only the defendant's family. The offense level is 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 or four levels for a prior conviction for a felony immigration offense; and (5) two or four levels for fraudulent use of a passport.[231] Some of these specific offense characteristics are discussed in more detail below.

i. Section 2L2.1(b)(2)—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

[226] USSG §2B1.1 comment. (n.10(B)); *see also* United States v. Shi, 317 F.3d 715, 718 (7th Cir. 2003) (§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").

[227] *See, e.g.*, United States v. Kuku, 129 F.3d 1435, 1439 (11th Cir. 1997) (per curiam) (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.").

[228] *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).

[229] USSG §2L2.1(a).

[230] USSG §2L2.1, comment. (n.1).

[231] USSG §2L2.1(b)(1)–(5).

only "those documents that relate to naturalization, citizenship, or legal resident status," but also any "identification document."[232]

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."[233] 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."[234] For example, a set might include "a counterfeit passport, phony green card, and forged work papers."[235] In contrast, some documents are not a set, even though they will be used only one time by the same person.[236]

Application Note 5 provides that an upward departure may be warranted "[i]f the offense involved substantially more than 100 documents."[237]

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.' "[238]

ii. Section 2L2.1(b)(3)—Use of passport or visa to commit a felony

Section 2L2.1(b)(3) provides for a 4-level enhancement 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 law." 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

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232 United States v. Singh, 335 F.3d 1321, 1323–24 (11th Cir. 2003) (per curiam) (driver's licenses, military identification cards, and United States government identification cards were "documents" under §2L2.1); *see also* United States v. Castellanos, 165 F.3d 1129, 1131–32 (7th Cir. 1999) (counting all resident alien and Social Security cards in defendant's possession, including those that were still blank).

233 USSG §2L2.1, comment. (n.2); *see also* United States v. Torres, 81 F.3d 900, 903–04 (9th Cir. 1996) (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).

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

235 *Id.*

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

237 USSG §2L2.1, comment. (n.5).

238 United States v. Viera, 149 F.3d 7, 8–9 (1st Cir. 1998) (per curiam) (affirming 6-level enhancement where defendants had over 600 blank Social Security cards); *see also* United States v. Salazar, 70 F.3d 351, 352–53 (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 (guideline applies to "blank" documents).

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.[239]

iii. Section 2L2.1(b)(5)—Fraudulently obtained or used a passport

Section 2L2.1(b)(5) provides for a 4-level enhancement if the defendant obtained or used a United States passport and a 2-level enhancement if the defendant obtained or a used a foreign passport. 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).[240]

2. Section 2L2.2—Immigration Fraud (Personal Use)

a. Base offense level

The base offense level for immigration fraud offenses under §2L2.2 is 8.[241]

b. Specific offense characteristics

The following enhancements apply: (1) a 2-level increase if the defendant was previously deported; (2) two or four levels if the defendant has a record of prior immigration offenses; (3) two or four levels if the defendant fraudulently obtained or used a passport; and the greater of (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 13; *or* six or 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 25.[242] Some of these specific offenses characteristics are discussed in more detail below.

i. Section 2L2.2(b)(1)—Prior deportation

Section 2L2.2(b)(1) provides for a 2-level enhancement if "the defendant is an unlawful alien who has been deported (voluntarily or involuntarily)." Of note, a defendant who voluntarily leaves the country while an appeal of their deportation order is pending qualifies for the enhancement under §2L2.2(b)(1).[243]

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[239] 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)).

[240] United States v. Torres, 920 F.3d 1215, 1216–18 (8th Cir. 2019) (citing 22 C.F.R. § 51.3(e)).

[241] USSG §2L2.2(a).

[242] USSG §2L2.2(b)(1)–(4).

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

ii. Section 2L2.2(b)(3)—Fraudulently obtained or used a passport

Section 2L2.2(b)(3) provides for a 4-level enhancement if the defendant obtained or used a United States passport and a 2-level enhancement if the defendant obtained or a used a foreign passport. It applies to defendants fraudulently obtaining or using "regular passports" and also extends to "passport cards."[244] In addition, Application Note 3 provides that the term "use" is to be construed broadly and the term includes attempted renewal of passports that have been previously issued.[245]

c. Cross reference

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. [246] If death resulted, the homicide guidelines (§§2A1.1–2A1.5) apply.[247] 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.[248]

3. Departures and Variances

a. National security

Application Note 6 to 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."[249]

Without relying on this provision, courts have increased sentences based on national security and terrorism concerns in both §2L2.1 and §2L2.2 cases. 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."[250] In another case, the Second Circuit affirmed a 36-

[244] *See* 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).

[245] USSG §2L2.2, comment. (n.3).

[246] USSG §2L2.2(c).

[247] *Id.*

[248] United States v. Ayodele, 785 Fed. App'x 225, 225–26 (5th Cir. 2019) (per curiam).

[249] USSG §2L2.2, comment. (n.6).

[250] United States v. Valnor, 451 F.3d 744, 747, 749 (11th Cir. 2006).

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.[251]

b. Facilitating another offense

Section 5K2.9 authorizes an upward departure "[i]f the defendant committed the offense in order to facilitate or conceal the commission of another offense . . . to reflect the actual seriousness of the defendant's conduct."[252] One court affirmed a 24-month sentence for making false statements on a passport application, based on an upward departure from base offense level 6 to 15 and from Criminal History Category I to II, where evidence established that the crime was committed to facilitate another offense for which the defendant had never been convicted—the abduction of his children.[253]

c. Motive

One court reversed an upward departure based on the defendant's motive to escape punishment for sexual misconduct, reasoning that motive already had been adequately taken into account by the guidelines.[254]

[251] United States v. Khalil, 214 F.3d 111, 125–26 (2d Cir. 2000).

[252] USSG §5K2.9.

[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).