Primer

Immigration Offenses

Prepared by the
Office of the General Counsel

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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.

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 sentenced under §2L1.1.

A. STATUTORY SCHEME

Immigration offenses sentenced under §2L1.1 stem from violations of 8 U.S.C. §§ 1324 and 1327.[1] 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 enter or reside in the United States without official permission; and (v) attempts or conspiracy to commit, and aiding and abetting the commission of, any of these acts.[4]

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1 *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL §2L1.1 (Nov. 2025) [hereinafter USSG].

2 8 U.S.C. § 1324(a)(1)–(3).

3 *Id.* § 1327.

4 *Id.* § 1324(a)(1)(A). The Supreme Court held that 8 U.S.C. § 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," is not constitutionally overbroad and does not violate the First Amendment's protection of free speech because, "[p]roperly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts." United States v. Hansen, 599 U.S. 762, 766–67 (2023).

The penalties under section 1324 are with respect to "each alien in respect to whom such a violation occurs."[5] Bringing or attempting to bring an alien into the United States carries a ten-year statutory maximum.[6] Transporting, harboring, or encouraging entry without financial gain has a five-year statutory maximum penalty.[7] The statutory maximum increases to ten years for conspiring to commit any of these crimes or committing any of these crimes for commercial advantage or financial gain.[8] Where a defendant causes serious bodily injury or places the life of another person in jeopardy for any of these crimes the statutory maximum increases to 20 years.[9] And where any of these crimes causes the death of another, the statutory maximum becomes life in prison or death.[10] A defendant who conspires or aids and abets another in the commission of one of these offenses is subject to a five-year statutory maximum, unless the person causes serious bodily injury, in which case the statutory maximum is 20 years.[11] A defendant who conspires or aids and abets another and the death of another results, the statutory maximum becomes life in prison or death.[12]

For a defendant who brought an alien into the United States, the maximum penalty may be enhanced up to 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.[13] 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.[14]

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.[15] Pursuant to section 1324(a)(2)(B), where the

5 8 U.S.C. § 1324(a)(1)(B).

6 *Id*. § 1324(a)(1)(B)(i).

7 *Id.* § 1324(a)(1)(B)(ii).

8 *Id.* § 1324(a)(1)(B)(i).

9 *Id.* § 1324(a)(1)(B)(iii).

10 *Id.* § 1324(a)(1)(B)(iv).

11 *Id.* § 1324(a)(1)(B)(ii), (iii); *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 8 U.S.C. § 1324(a)(1)(B)(iv).

13 *Id.* § 1324(a)(4).

14 *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))).

15 8 U.S.C. § 1324(a)(2)(A).

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 statutory maximum.[16]

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.[17] 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.[18] "[T]he sentence is calculated 'for each alien with respect to whom a violation . . . occurs.' "[19] Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.[20]

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.[21]

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 individuals during any 12-month period with actual knowledge that they are aliens.[22] An "alien" for purposes of section 1324(a)(3) is an individual who is an unauthorized alien and who has been brought into the United States in violation of section 1324(a).[23]

4. 8 U.S.C. § 1324(a)(4)—Bringing in Aliens; Ongoing Commercial Organization

Section 1324(a)(4) provides that if a person has brought aliens into the United States in violation of this subsection, the statutory maximum otherwise provided for may be increased to ten years, if the offense was part of an ongoing commercial organization in

16 *Id.* § 1324(a)(2)(B)(iii).

17 *Id.* § 1324(a)(2)(B).

18 *Id.*

19 United States v. Tsai, 282 F.3d 690, 697 (9th Cir. 2002) (quoting 8 U.S.C. § 1324(a)(2), that the defendant was charged with three separate transactions makes plain the third instance of smuggling is a third violation under § 1324(a)(2)(B)(ii) for 5-year mandatory minimum); United States v. Ortega-Torres, 174 F.3d 1199, 1201 (8th Cir. 1999) (use of the term "each alien" "make[s] clear that courts should count each alien as a separate violation for sentencing purposes").

20 *See, e.g.*, *Tsai*, 282 F.3d at 697.

21 8 U.S.C. § 1324(a)(4).

22 *Id*. § 1324(a)(3)(A).

23 *Id*. § 1324(a)(3)(B); *see also id.* § 1324a(h)(3) (defining "unauthorized alien").

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.[24]

5. 8 U.S.C. § 1327—Aiding or Assisting Certain Aliens to Enter

Knowingly aiding or assisting certain inadmissible aliens who were previously convicted of aggravated felonies to enter the United States, or conspiring to do so, 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."[25]

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).[26] 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).[27] 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.[28]

2. Specific Offense Characteristics

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

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24 *Id.* § 1324(a)(4).

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

26 USSG §1B1.2.

27 USSG §2L1.1(a)(3).

28 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 previously was deported after aggravated felony conviction).

(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;

(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.[29]

Each specific offense characteristic is discussed further below.

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.[30]

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.*[31]

The defendant has the burden of establishing that he is entitled to a reduction under §2L1.1(b)(1).[32] Courts have declined to apply the 3-level reduction even when there is no

[29] USSG §2L1.1(b).

[30] USSG §2L1.1(c)(1); *see also* United States v. Escobedo-Moreno, 781 F. 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).

[31] USSG §2L1.1(b)(1).

[32] *See, e.g.*, United States v. Zaldivar, 615 F.3d 1346, 1352 (11th Cir. 2010).

evidence of a monetary payment from the alien.[33] 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.[34] 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.[35]

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 . . . .[36]

Section 2L1.1(b)(2) provides for increases of three, six, or nine levels based on the number of aliens smuggled, transported, or harbored.[37]

The number of aliens involved includes relevant conduct under §1B1.3. Because §2L1.1 offenses are groupable under §3D1.2(d) (which covers guidelines that rely on aggregate amounts to determine culpability), 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,"[38] often referred to as "expanded relevant conduct." Thus, a court may determine the number of aliens based on related acts beyond the offense of conviction. For example, the Fifth Circuit upheld a 9-level enhancement under §2L1.1(b)(2) (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.[39] The district court applied the 9-level enhancement to account for the defendant's earlier transportation of approximately 60 additional aliens.[40] The Fifth Circuit held 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" given that both trips involved the same accomplices, "were

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33 *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).

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

35 USSG §2L1.1, comment. (n.1); *see also* United States v. Borroto Gil, No. 22-12653, 2023 WL 2733508, at *5 (11th Cir. Mar. 31, 2023) (the court's interpretation that §2L1.1(b)(1) considers whether the defendant received substantial benefit or gain is overly broad; the text of the guideline instead considers whether the offense was committed other than for profit).

36 USSG §2L1.1(b)(2).

37 *Id.*

38 USSG §1B1.3(a)(2). *See generally* U.S. SENT'G COMM'N, PRIMER ON RELEVANT CONDUCT (2026), https://www.ussc.gov/guidelines/primers/relevant-conduct.

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

40 *Id.* at 293.

for the purpose of transporting aliens and were undertaken with the same *modus operandi*."[41]

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.[42]

This enhancement 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 prohibit using prior felony convictions that are ineligible for criminal history points due to the passage of time 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.[46]

The definition of "minor" includes an individual under the age of 18.[47] The defendant does not have to know that the individual involved in the offense was a minor for the enhancement to apply.[48]

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

42 USSG §2L1.1(b)(3).

43 USSG §2L1.1, comment. (n.2).

44 929 F.3d 200, 204 (5th Cir. 2019).

45 *Id.* (differentiating §2L1.1(b)(3) from the guideline at §2L1.2(b), because 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)" (emphasis omitted)).

46 USSG §2L1.1(b)(4).

47 USSG §2L1.1, comment. (n.1).

48 *See, e.g.*, United States v. Corona-Montano, 168 F.4th 349, 352, 354 (5th Cir. 2026) (per curiam) ("the plain language of §2L1.1(b)(4) does not impose a knowledge requirement" (citation omitted)).

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.[49]

Section 2L1.1(b)(5) provides for graduated increases to the base offense level if a firearm was discharged or a dangerous weapon (including a firearm) was brandished or possessed during the offense.[50] Specifically, if a firearm was discharged, the base offense level is to be increased by six levels, with a minimum offense level of 22.[51] 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.[52] 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.[53]

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 capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g*. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).[54]

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."[55] For example, in *United States v. Olarte-Rojas*, the Fifth Circuit held that caltrops, which were used to puncture tires in a high-speed chase, fit the definition of a "dangerous weapon" under both the case law and the *Guidelines Manual's* broad interpretation.[56] 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 that the caltrops were a dangerous weapon.[57]

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49 USSG §2L1.1(b)(5).

50 *Id.*

51 USSG §2L1.1(b)(5)(A).

52 USSG §2L1.1(b)(5)(B).

53 USSG §2L1.1(b)(5)(C).

54 USSG §1B1.1, comment. (n.1(E)).

55 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))

56 *Id.* at 803.

57 *Id.*

Courts have observed that while "[t]he plain text of §2L1.1(b)(5)(C) does not require a nexus between possession of a weapon and commission of the crime," when "read together, §1B1.3 and §2L1.1(b) require at least that the court find that the defendant possessed a dangerous weapon during the commission of the offense."[58]

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 . . . .[59]

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.[60]

Application Note 3 states that §2L1.1(b)(6) applies to "a wide variety of conduct" for offenses involving reckless conduct.[61] 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.[62] 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).[63]

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58 United States v. Klensch, 87 F.4th 1159, 1166 (9th Cir. 2023) (declining to resolve whether §2L1.1(b)(5)(C) requires a "nexus standard" like §2D1.1(b)(1), under which a firearms enhancement applies "where 'the weapon was present, unless it is clearly improbable that the weapon was connected with the offense' " (citation omitted)).

59 USSG §2L1.1(b)(6).

60 *Id.*

61 USSG §2L1.1, comment. (n.3); *see, e.g.*, United States v. Hernandez, 167 F.4th 1113, 1133 (5th Cir.) (§2L1.1(b)(6) applied although the defendant was not involved in smuggling the migrants; he piloted stolen vessels with a co-conspirator on board from Florida to the Yucatán Peninsula that were used by other co-conspirators in the smuggling effort), *petition for cert. filed*, No. 25-7421 (U.S. May 20, 2026); United States v. Hernandez, 48 F.4th 367, 373–74 (5th Cir. 2022) (affirming enhancement where aliens in the cargo area of defendant's sport utility vehicle were too tightly packed into the cargo area to exit the vehicle quickly and the back door would not open even with the key); *cf.* United States v. Castelo-Palma, 30 F.4th 284, 289 (5th Cir. 2022) ("Without other aggravating factors, nonsubstantial overcrowding [(*i.e.*, 'more people beyond the vehicle's capacity')] alone is not enough to justify application of §2L1.1(b)(6).").

62 USSG §2L1.1, comment. (n.3); *see, e.g.*, United States v. Ramirez, 37 F.4th 233, 236 (5th Cir. 2022) (§2L1.1(b)(6) cannot be solely based on the defendant's conduct while fleeing from Customs and Border Protection agents because that conduct supported the defendant's §3C1.2 adjustment); United States v. Lopez-Garcia, 316 F.3d 967, 973–74 (9th Cir. 2003) (district court erred in imposing enhancements under both former §2L1.1(b)(5) [now (b)(6)] and §3C1.2 because the commentary "precludes the imposition of an enhancement under section 3C1.2 in cases, like that here, where an enhancement under section 2L1.1(b)(5) is based solely on conduct performed while fleeing from law enforcement officials").

63 USSG §2L1.1, comment. (n.3).

Because §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."[64] 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.[65]

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] To qualify for this enhancement, either the defendant must have *created* the risk of danger,[67] or the risk must have been "reasonably foreseeable in connection with that criminal activity."[68] The enhancement "requires only that *some* risk of death or serious bodily injury be foreseeable, not the specific harm that actually occurred."[69] 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."[70]

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

65 USSG §2L1.1, comment. (n.3); *see also* United States v. Bernardo, 818 F.3d 983, 987 (9th Cir. 2016) ("stashing a person in a dashboard compartment is analogous to 'transporting persons in the trunk or engine compartment of a motor vehicle' " because like a trunk or engine, the dashboard "is not meant to hold a human body," where escape into the passenger compartment would not be easy (citation omitted)).

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

67 *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 was responsible for distributing food and water and acted as an "enforcer" in keeping order on boat carrying over 200 aliens who were without food or water).

68 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. Hernandez, 167 F.4th 1113, 1133 (5th Cir.) (§2L1.1(b)(6) applied because although the defendant was only responsible for stealing and piloting boats for use in the subsequent smuggling activity, he was aware of the extortionate threats to the migrants and that some female migrants were forced to work in a strip club to pay off their smuggling debt), *petition for cert. filed*, No. 25-7421 (U.S. May 20, 2026); 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).

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

70 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.").

a. Non-vehicle risk of injury

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.[71] 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.[72] 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.[73]

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."[74] The court pointed to the lack of food, proper clothing for the early spring weather, and proper equipment through a dangerous and rugged terrain as appropriate reasons to apply the enhancement.[75] In addition, the Eighth Circuit held that the enhancement was warranted where there were over 25 aliens living in two residences designed for no more than ten people, without heat or furnishings, which "present[ed] an inherent health-and-safety risk."[76]

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."[77] 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."[78]

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71 *De Jesus-Ojeda*, 515 F.3d at 443–44.

72 United States v. Garcia-Guerrero, 313 F.3d 892, 897 (5th Cir. 2002); *see also* United States v. Muniz, 803 F.3d 709, 712–13 (5th Cir. 2015) (enhancement was properly applied where an alien was left unresponsive at a rest stop).

73 *Garza*, 541 F.3d at 293–95.

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

75 *Id.* at 1059.

76 United States v. De Oliveira, 623 F.3d 593, 597 (8th Cir. 2010) ("Indeed, the risk of death or injury, while perhaps more remote, is similar to that in an overcrowded vehicle.").

77 298 F.3d 387, 390 (5th Cir. 2002).

78 844 F.3d 534, 538 (5th Cir. 2016).

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."[79] 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."[80] Courts have disagreed as to whether unrestrained passengers lying on the floor of an enclosed van justifies application of this enhancement.[81]

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.[82] 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."[83] The court also noted that the additional passenger created a risk because of the weight of the plane.[84]

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."[85] 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."[86] The court also has

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

80 *Id.* at 890.

81 *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; dangers from riding in cargo area of a minivan are generally same dangers arising from any individual not wearing a seatbelt in a moving vehicle), *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).

82 966 F.3d 329, 333–35 (5th Cir. 2020).

83 *Id.*

84 *Id.*

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

86 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

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."[87]

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, crossing over the Rio Grande in very deep water, and whether the aliens could easily extricate themselves.[88]

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 of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger traveling on our streets and highways.[89]

Following this observation, the Ninth Circuit identified the following factors that increase risk: (1) a dangerous route (*e.g.*, off-road) or driving in a dangerous manner (*e.g.*, recklessly or drunk); (2) a method of transportation that increases the likelihood of an accident (*e.g.*, "a severely overloaded vehicle"); (3) a method of transportation that increases the risk of an injury even absent an accident (*e.g.*, "passengers transported with insufficient ventilation or subject to injury from moving mechanical parts"); or (4) a method of transportation that increases the risk that an accident would cause injury or death (*e.g.*, passengers more likely to be "injured by crumpled metal or shattered glass" than if seated normally).[90]

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").

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

[88] *See, e.g.*, United States v. Najera, 915 F.3d 997, 1002 (5th Cir. 2019) (crossing deep water); United States v. Cardona-Lopez, 602 F. App'x 191, 192 (5th Cir. 2015) (per curiam) (14 passengers in vehicle rated for seven); United States v. Chapa, 362 F. 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 F. App'x 367, 368–69 (5th Cir. 2008) (per curiam) (through brush without access to water); United States v. Rodriguez-Mesa, 443 F.3d 397, 403 (5th Cir. 2006) (per curiam) (compartment built in center console with inability to extricate).

[89] 502 F.3d 885, 889 (9th Cir. 2007); *see also* 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).

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

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."[91]

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."[92] 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."[93]

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 . . . . [94]

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.[95] The terms used in subsection (b)(7) have the meaning given in §1B1.1 (Application Instructions).[96] 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."[97]

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).[98] At one end of the spectrum, the Eighth and Ninth

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[91] *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).

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

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

[94] USSG §2L1.1(b)(7).

[95] *Id.*

[96] USSG §2L1.1, comment. (n.1).

[97] USSG §2L1.1, comment. (n.4).

[98] *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).

Circuits require direct or proximate causation to apply the enhancement.[99] 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.[100] 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."[101] Thus, the Fifth Circuit concluded that "the defendants['] relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range."[102]

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."[103] 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's preferred but-for causation test.[104]

Regardless of the causation standard, the enhancement does not require intent to cause injury or death[105] nor is it necessary for the defendant to be the driver of a vehicle that crashes and injures smuggled aliens.[106]

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99 *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 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.").

100 *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").

101 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).

102 *Ramos-Delgado*, 763 F.3d at 401; *see also* United States v. Gaspar-Felipe, 4 F.4th 330, 335, 343 (5th Cir. 2021) (enhancement applied where, in effort to disable vehicle fleeing at a high rate of speed near a school zone, law enforcement shot and killed an alien being transported on a trip from Mexico guided by the defendant); 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).

103 *Zaldivar*, 615 F.3d at 1350–51.

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

105 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)].").

106 *Gaspar-Felipe*, 4 F.4th at 343 (affirming enhancement where defendant was in a separate vehicle and not the driver); 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.

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 constituted impermissible double counting. The Tenth Circuit stated: §2L1.1(b)(6) "allows for an enhancement based upon 'the defendant's intentional or reckless *conduct*, with no consideration of the outcome;' whereas [§2L1.1(b)(7)] provides for an enhancement based upon the '*outcome* . . . with no consideration of the defendant's intentional or reckless conduct.' "[107]

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.[108]

The enhancement under §2L1.1(b)(8)(A) provides that if the resulting offense level with the enhancement is less than level 18, the offense level is to be increased to level 18.[109] 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.[110]

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.[111] By contrast, the Fifth Circuit held that the district court erred in applying the enhancement where the defendant fled from law enforcement, drove erratically, and told an alien to "shut up and stay quiet" when he asked the defendant to stop the vehicle.[112] The Fifth Circuit reasoned that the defendant "did not communicate any intent to inflict harm if [the alien] failed to heed his command, so his conduct did not amount to a threat," and his continued driving "did not amount to coercion" because its purpose was to "avoid apprehension" rather than to prevent the alien from escaping.[113]

2003) (affirming enhancement where defendant was not present when tire blowout on overcrowded van caused injury and death to passengers).

[107] United States v. Cardena-Garcia, 362 F.3d 663, 667 (10th Cir. 2004) (quoting *Herrera-Rojas*, 243 F.3d at 1144).

[108] USSG §2L1.1(b)(8)(A).

[109] *Id.*

[110] USSG §2L1.1, comment. (n.5).

[111] United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1218–19 (10th Cir. 2008); *see also* United States v. Reyes, 772 F.3d 1152, 1160–61 (9th Cir. 2014) (affirming enhancement and collecting cases describing conditions at stash houses that warrant enhancement).

[112] United States v. Buendia, 73 F.4th 336, 338 (5th Cir. 2023).

[113] *Id*. at 339–40 (concluding the alien "was involuntarily detained, but he was not involuntarily detained through threat or coercion").

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.[114]

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."[115] The court explained that five harbored illegal female aliens were coerced or otherwise forced into prostitution and four of them were minors.[116] 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.[117]

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.[118]

Section 1324(a)(4) increases the statutory 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.[119] This enhancement also increases the offense level in such cases.

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.[120]

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[114] USSG §2L1.1(b)(8)(B).

[115] 714 F.3d 306, 315 (5th Cir. 2013).

[116] *Id.*

[117] *Id.*

[118] USSG §2L1.1(b)(9).

[119] 18 U.S.C. § 1324(a)(4).

[120] USSG §2L1.1(c)(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.[121] 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 to the criminal conduct."[122]

An increase under §3A1.1 may be appropriate in alien smuggling cases, but courts generally require additional factors to show vulnerability 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."[123] In other words, the relevant question is whether a particular victim of the smuggling offense is "more unusually vulnerable" than any other such victim.[124] 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."[125] The "general characteristics commonly held by aliens seeking to be illegally smuggled" do not create a vulnerability that warrants the enhancement.[126] However, smuggled aliens "detained against their will after being transported" can be considered "victims" for purposes of §3A1.1(b)(1).[127] Moreover, "an undocumented alien's illegal status could be the basis for a 'vulnerable victim' finding for offenses that do not necessarily involve illegal aliens."[128]

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[121] USSG §3A1.1.

[122] USSG §3A1.1, comment. (n.2).

[123] 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)).

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

[125] *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' ").

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

[127] *Id.* at 747.

[128] United States v. Cedillo-Narvaez, 761 F.3d 397, 404 (5th Cir. 2014) (finding application of §3A1.1 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).

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).[129] Section 3B1.1 provides adjustments to the offense level of two to four levels if the defendant was an organizer, leader, manager, or supervisor of criminal activity, depending on the number of participants involved in the offense.[130] For purposes of §3B1.1, smuggled aliens are not considered "participants" in the crime "unless they actively assisted in the smuggling, transporting, or harboring of others."[131] Some courts apply §3B1.1 to increase sentences for defendants with an aggravating role in the offense.[132] Other courts routinely deny reductions for minor participants under §3B1.2 (Mitigating Role).[133]

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 the commission or concealment of the offense."[134] 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

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[129] USSG §2L1.1, comment. (n.6).

[130] USSG §3B1.1.

[131] USSG §2L1.1, comment. (n.6).

[132] *See, e.g.*, United States v. Peña-Rodriguez, No. 23-40476, 2024 WL 4471735, at *4 (5th Cir. Oct. 11, 2024) (per curiam) (affirming application of the enhancement where the defendant "directed indicted and unindicted co-conspirators to transport undocumented aliens for payment, transported aliens to [her] own home, harbored them there, [and] used a brush guide and other individuals to transport aliens"); 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").

[133] *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). *But cf.* United States v. Klensch, 87 F.4th 1159, 1164 & n.1 (9th Cir. 2023) (district court erred in denying defendant a minor role reduction simply because he "drove the two men," indicating "that the district court improperly relied 'on courier conduct as dispositive,' despite the Guidelines' clarification 'that performance of an essential role . . . is not dispositive' " (quoting United States v. Diaz, 884 F.3d 911, 917 (9th Cir. 2018))).

[134] USSG §3B1.3.

qualify as a special skill under §3B1.3.[135] 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.[136] Similarly, the Fifth Circuit held that piloting a vessel from the Southwest Coast of Florida four hundred miles across the Gulf to the Yucatán Peninsula in Mexico during a "very treacherous" journey through choppy water with rapidly changing weather qualified as a special skill.[137]

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 person in the course of fleeing from a law enforcement officer."[138] 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.[139] 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 serious bodily injury" and §3C1.2 "reckless endangerment during flight" enhancements.[140] Both enhancements were based solely on the defendant's flight. Therefore, the court held, "[w]e are bound to follow the application notes . . . and here, 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.' "[141]

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

136 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).

137 United States v. Hernandez, 167 F.4th 1113, 1134 (5th Cir.), *petition for cert. filed*, No. 25-7421 (U.S. May 20, 2026).

138 USSG §3C1.2.

139 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*); *see also* USSG §2L1.1, comment. (n.3).

140 *Lopez-Garcia*, 316 F.3d at 973–74.

141 *Id.* at 970 (internal citations omitted); *see also* United States v. Ramirez, 37 F.4th 233, 236 (5th Cir. 2022) (cannot apply both §2L1.1(b)(6) and §3C1.2 based solely on the defendant's flight); 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").

E. Variances

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."[142]

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.[143] Subsequent entries,[144] reentry after removal,[145] and remaining in the United States after being ordered removed[146] 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 deportation or removal. This section of the primer addresses the statutory scheme and guideline application issues for offenses sentenced under §2L1.2, often referred to as the "illegal reentry guideline."

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.

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 United States 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.[147]

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

143 8 U.S.C. § 1325(a).

144 *Id.*

145 *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 id.* § 1229a [INA § 240]; Richard D. Steel, Steel on Immigration Law §§ 12:1, 13:1 (2024–2025 ed. 2024).

146 8 U.S.C. § 1253.

147 *Id.* § 1253(a)(1).

This statute generally carries a four-year statutory maximum penalty, although prior convictions under certain specified statutes will invoke a ten-year statutory maximum.[148]

2. 8 U.S.C. § 1326—Reentry of Removed Aliens (Illegal Reentry)

Section 1326 prohibits an alien's unauthorized return to the United States after deportation, removal, exclusion, or denial of admission.[149] Under section 1326(a), a previously deported alien who illegally enters and remains in the United States can violate the section at three different points: (1) at the time of the alien's entry into the United States; (2) when the alien attempt to enter the United States; and (3) at any time the alien is "found in" the United States.[150]

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.[151] A ten-year maximum applies if the defendant's removal 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.[152] If the prior conviction before removal was an "aggravated felony," as defined by 8 U.S.C. § 1101(a)(43), the statutory maximum is 20 years.[153]

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.[154] However, sentencing enhancements based on a defendant's prior deportation must be found by a

148 *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, section 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. *Id.* § 1253(b).

149 *Id.* § 1326(a).

150 *Id.*; *see also* United States v. Rosales-Garay, 283 F.3d 1200, 1202 (10th Cir. 2002).

151 *Id.* § 1326(a).

152 *Id.* § 1326(b)(1), (4). A ten-year mandatory consecutive sentence applies to defendants who were excluded or removed for terrorist activities. *Id*. § 1326(b)(3).

153 *Id.* § 1326(b)(2). Parties have litigated whether the enhanced statutory penalty under section 1326(b)(2) applies when intervening case law renders a prior conviction no longer an "aggravated felony." In *United States v. Huerta-Rodriguez*, 64 F.4th 270, 278 (5th Cir. 2023), the Fifth Circuit held that "[w]hen a defendant has a prior illegal-reentry conviction under § 1326(b)(2) that came *before* any intervening change in law calling into question the aggravated-felony status of the predicate offense, a district court does not err in sentencing the defendant under § 1326(b)(2)" for the new illegal-reentry conviction because, "[u]nder these circumstances, the prior illegal-reentry conviction is *itself* an aggravated felony that supports a subsequent § 1326(b)(2) sentence."

154 *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).

jury.[155] Under *Apprendi*, for a defendant to be eligible for an enhanced statutory maximum 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.[156] But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.[157]

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."[158] 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.[159] 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.[160]

Courts have held that it does not violate the Equal Protection Clause to enhance a defendant's illegal reentry sentence based on prior convictions.[161]

3. 8 U.S.C. § 1325(a)—Improper Entry by Alien (Illegal Entry)

Section 1325(a) prohibits entry or attempted entry (1) at an improper time or place, (2) without examination or inspection, or (3) based on a false or misleading statement.[162]

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

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

[157] *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").

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

[159] *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.").

[160] *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).

[161] *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).

[162] 18 U.S.C. § 1325(a).

The penalty range for this offense depends on whether it is the defendant's first or subsequent violation of section 1325(a).[163] For defendants 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 sentenced under §2L1.2.[164] 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.[165]

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.[166]

1. *Base Offense Level*

Section 2L1.2 has a base offense level of 8.[167]

2. *Specific Offense Characteristics*

Prior to 2016, certain enhancements under §2L1.2(b) were based on whether the defendant had sustained various types of convictions before a previous deportation. The Commission amended §2L1.2(b) to address the "categorical approach" courts used to determine whether a prior offense was, for example, a "drug trafficking offense" or a "crime of violence" for purposes of applying enhancements.[168] The amendment introduced a simpler approach to assessing prior convictions based on the length of the sentence imposed for convictions both before and after a prior order of deportation or removal.[169] The guideline was amended again in 2018 to address certain application issues related to the sentence-imposed approach.[170]

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[163] *Id.*

[164] *Id.*

[165] *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).

[166] USSG App. A.

[167] USSG §2L1.2(a).

[168] *See* USSG App. C, amend. 802 (effective Nov. 1, 2016); *see generally* U.S. Sent'g Comm'n, Primer on Categorical Approach (2026), https://www.ussc.gov/guidelines/primers/categorical-approach [hereinafter Categorical Approach Primer].

[169] USSG App. C, amend. 802 (effective Nov. 1, 2016); *see also* U.S. Sent'g Comm'n, Guidelines Manual §2L1.2(b)(2)–(3) (Nov. 2016).

[170] 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

Sentencing enhancements under §2L1.2(b) are now based on three factors: (1) defendant's prior illegal entry/reentry convictions, (2) length of sentence for criminal conduct before first order of deportation, and (3) length of sentence for criminal conduct after first order of deportation.[171] Only prior convictions that receive criminal history points are counted for purposes of §2L1.2 enhancements.[172]

a. Section 2L1.2(b)(1)—Prior illegal entry/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).[173] A defendant who has one or more felony illegal reentry convictions will receive a 4-level increase under §2L1.2(b)(1)(A) and a defendant with two or more convictions for a misdemeanor under 8 U.S.C. § 1325(a) will receive a 2-level increase under §2L1.2(b)(1)(B).[174] However, the Seventh Circuit held that because §2L1.2(b)(1)(A) applies if a defendant has "*a* conviction for" a felony that is for an "illegal reentry" offense, it did not fully account for repeating the same illegal reentry offense multiple times and thus an upward variance was appropriate.[175] "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).[176]

When a sentence for both an illegal reentry offense and another felony offense were imposed at the same time and were treated as a single sentence, the illegal reentry offense is to be used in determining whether to use the enhancement at §2L1.2(b)(1)(A) or §2L1.2(b)(1)(B), "if it independently would have received criminal history points."[177]

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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 enhancements 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).

[171] USSG §2L1.2(b)(1)–(3).

[172] USSG §2L1.2, comment. (n.3).

[173] *See also* United States v. Cordova-Lopez, 34 F.4th 442, 445 (5th Cir. 2022) ("[Section 2L1.2(b)] prescribes a higher offense level for illegal reentry if the defendant illegally enters the country after sustaining certain, more-serious felony convictions [and] accords with the text of 8 U.S.C. § 1326, which makes the crime of illegal reentry a more serious offense if the offender has a felony conviction. *See* 8 U.S.C. § 1326(b).").

[174] USSG §2L1.2(b)(1)(A)–(B).

[175] United States v. De Leon, 140 F.4th 920, 923 (7th Cir. 2025) (defendant had repeated the same offense four times and the "prescribed [g]uidelines range did not fully capture his repeated reentries").

[176] USSG §2L1.2, comment. (n.2).

[177] USSG §2L1.2, comment. (n.4); *see also* United States v. Torres-Gonzalez, 169 F.4th 1129, 1133 (9th Cir. 2026) (noting the Commission "explained that it sought to ensure that 'illegal reentry offenses and other types of offenses . . . are separately accounted for under the applicable specific offense characteristics' " at §2L1.2) (citing USSG App. C, amend. 802 (effective Nov. 1, 2016).

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.[178] 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.[179] The two subsections 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.[180] 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.[181]

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
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.[182]

"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).[183] Notably, "[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred."[184] When a defendant is sentenced simultaneously for an illegal reentry offense and another felony offense that were treated as a single sentence, the prior sentence for the other felony

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178 USSG §2L1.2(b)(2)–(3).

179 *See* USSG §4A1.1.

180 USSG §2L1.2(b)(2).

181 USSG §2L1.2(b)(3).

182 USSG §2L1.2(b)(2)–(3).

183 USSG §2L1.2, comment. (n.2).

184 *Id.*

offense is used in determining the appropriate enhancement under §2L1.2(b)(2) or §2L1.2(b)(3), "if it independently would have received criminal history points."[185]

The Eleventh Circuit upheld these enhancements against equal protection and procedural due process challenges, reasoning that the proper universe of defendants for an equal protection challenge is not "*all* noncitizens convicted of any crime" but rather "noncitizens who both have illegally reentered the United States and have been convicted of other crimes."[186] It noted that "Congress has determined that illegally reentering the United States after being deported following conviction on another crime is a more serious offense than simply illegally reentering the United States, and that conduct should be deterred."[187] The Eleventh Circuit concluded that "subsections 2L1.2(b)(2) and (3) are rationally related to the Commission's stated interests in issuing them."[188]

c. *Ex post facto* considerations

The 2016 and 2018 amendments to §2L1.2 may raise *ex post facto* issues.[189] However, due to the substantive, rather than clarifying, nature of the amendments, they do not apply retroactively on appeals from sentences imposed using the previous version of the guideline.[190]

Notably, courts have held that illegal reentry is a continuing offense that continues until the alien is "found" in the United States.[191] Therefore, a court can apply the *Guidelines Manual* in effect when the alien is "found," as opposed to the *Guidelines Manual* in effect

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185 USSG §2L1.2, comment. (n.4); *see also* United States v. Torres-Gonzalez, 169 F.4th 1129, 1133-34 (9th Cir. 2026) (8-level enhancement at §2L1.2(b)(3)(B) was properly applied based on the defendant's prior sentence of two years for a false statement offense and not the sentence of 27 months he received for his prior reentry conviction).

186 United States v. Osorto, 995 F.3d 801, 808 (11th Cir. 2021).

187 *Id.*

188 *Id.*

189 *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). *But see* United States v. Reyna-Aragon, 992 F.3d 381, 386–89 (5th Cir. 2021) (district court erred by applying the 2018 guidelines but error was harmless because the court justified the sentence based "on factors independent from the erroneous Guidelines range" and clearly stated that the "sentence was appropriate regardless of any *ex post facto* error"). 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, it should instead use the *Guidelines Manual* in effect on the date the offense was committed. USSG §1B1.11(b)(1).

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

191 *See, e.g.*, United States v. Ayon-Brito, 981 F.3d 265, 270 (4th Cir. 2020) ("it is apparent that Congress included the term [found] to extend the scope of the conduct element 'entry' to when and where the alien is found, thus creating a continuing offense centered on the alien's entry into the United States and presence therein until found"); United States v. Arias-Quijada, 926 F.3d 1257, 1260 (10th Cir. 2019) (same).

when the alien reentered the United States, without violating the *ex post facto* clause.[192] 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."[193] An alien also can be "found" in the United States when a law enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) issues an immigration detainer.[194]

C. Specific Guideline Application Issues

1. *Prior Convictions*

a. Ordered deported or removed

In assessing the timing of prior criminal conduct, §2L1.2(b) looks to the date of the first final *order* of deportation or removal,[195] not the physical removal of the defendant.[196] 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."[197] "For the first time" means "the first time the defendant was ever the subject of such an order."[198]

Federal law authorizes immigration authorities to reinstate prior removal orders.[199] 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

[192] *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).

[193] 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 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).

[194] United States v. Sosa-Carabantes, 561 F.3d 256, 259–61 (4th Cir. 2009); *see also* United States v. Alas, 63 F.4th 269, 274 (4th Cir. 2023) ("Conversely, an alien found by a state officer not designated and trained under Section [1357(g)] is not 'found' under § 1326(a)(2).").

[195] *See* 8 C.F.R. § 1241.1 (Final order of removal).

[196] *See* USSG §2L1.2(b)(2)–(3).

[197] USSG §2L1.2, comment. (n.1(A)).

[198] *Id.*

[199] *See* 8 U.S.C. § 1231(a)(5).

separate removal for purposes of determining whether a conviction happened prior to deportation under section 1326.[200] Voluntary returns do not count as an order of removal.[201]

b. Timing of final convictions

Convictions that were final before and after the first order of removal are counted.[202] A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is pending when the defendant is deported.[203]

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."[204] Separately, the conviction for which the defendant receives an enhancement need not be the most recent conviction,[205] nor must the defendant have been ordered removed as a result of that conviction.[206]

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.[207] 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."[208]

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.[209] Application Note 3 further specifies that for enhancements under §2L1.2(b)(1)(B) (for two or more misdemeanors under section 1325(a)) or

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200 *Id.*; *see also, e.g.*, United States v. Nava-Perez, 242 F.3d 277, 279 (5th Cir. 2001) ("[T]he statute plainly contemplates, *after* the reentry, a *second removal*, under the reinstated prior order.").

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

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

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

204 USSG §2L1.2, comment. (n.1(B)).

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

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

207 *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 at §4A1.1).

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

209 USSC §2L1.2, comment. (n.3).

§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) (which outlines when multiple prior sentences should be counted separately or treated as a single sentence).[210]

d. Deferred adjudications

A deferred adjudication can qualify as a prior conviction under §2L1.2.[211] A guilty plea held in abeyance also can qualify as a "conviction" under §2L1.2.[212]

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.[213] In *United States v. Moreno-Tapia*, the Fourth Circuit found that the relevant time in a determination of whether a prior conviction would qualify for an enhancement is the date of deportation and not the date of the illegal reentry charge or sentencing.[214] An enhancement, however, would not apply if the conviction were vacated

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210 *Id.*; *see also* USSG §4A1.2(a)(2).

211 *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").

212 *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" (emphasis omitted)); *see also* United States v. Anderson, 328 F.3d 1326, 1328 (11th Cir. 2003) (per curiam) (*nolo contendere* plea and time served sentence qualified as a "conviction"). *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").

213 *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).

214 848 F.3d 162, 172 (4th Cir. 2017); *see also* United States v. Orduno-Mireles, 405 F.3d, 960, 961 n.1 (11th Cir. 2005) ("[b]y its plain language, the Guideline's relevant time period is the time of deportation, not the time of sentencing for an illegal reentry conviction").

on "a showing of actual innocence"[215] or a showing "that the conviction had been improperly obtained."[216]

f. Burden of proof and notice

The fact of a prior conviction need not be pled or proven beyond a reasonable doubt.[217] 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.[218]

g. Definition of felony

The enhancements provided for at §2L1.2 are triggered by a defendant's previous conviction(s), primarily for felony offenses.[219] Because §2L1.2 defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year,"[220] 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.[221] 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."[222]

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

216 *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).

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

218 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 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).

219 USSG §2L1.2(b)(1)–(3).

220 USSG §2L1.2, comment. (n.2).

221 *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).

222 United States v. Cordova-Arevalo, 456 F.3d 1229, 1232–34 (10th Cir. 2006) (quoting the definition of "felony" in 18 U.S.C. § 3156(a)(3) but looking to "the common understanding and historical use of the word" to "determine what is meant by 'felony' in the specific context of subsection 1326(b)(1)"); *see also* United States v. Figueroa-Alvarez, 795 F.3d 892, 895 (8th Cir. 2015) (noting although Iowa classifies third-degree attempted burglary as an aggravated misdemeanor, because the offense has a 2-year statutory maximum, it constitutes a "felony" as the term is used in § 1326(b)(1)); United States v. Savillon-Matute, 636 F.3d 119, 122

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.[223] 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.[224] 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.[225] It overruled its past precedent to the contrary.[226]

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.[227]

Multiple prior sentences counted as a single sentence under §4A1.2(a)(2) may be aggregated when determining sentence length. The "single-sentence rule" in §4A1.2(a)(2) instructs courts to "use the aggregate sentence of imprisonment" if prior sentences were treated as a single sentence and the court imposed the sentences consecutively.[228] The Fifth Circuit upheld an 8-level enhancement under §2L1.2(b)(3)(B) that was applied based on the single-sentence rule under §4A1.2(a)(2).[229] 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.[230]

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n.5 (4th Cir. 2011) (noting that second-degree assault, which is classified as a misdemeanor in Maryland, constitutes a "felony" for purposes of § 1326(b)(1)).

[223] 912 F.3d 1215, 1222–24 (9th Cir. 2019) (citing Carachuri-Rosendo v, Holder, 560 U.S. 563 (2010); Moncrieffe v. Holder, 569 U.S. 184 (2013)).

[224] *Id.*

[225] *Id.*

[226] *Id.* at 1222.

[227] USSG §2L1.2, comment. (n.2).

[228] USSG §4A1.2(a)(2).

[229] 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 USSG §1B1.11, comment. (backg'd.)).

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

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).[231]

2. Misdemeanors—Crimes of Violence or Drug Trafficking Offenses

Subsections (b)(2) and (b)(3) provide for a 2-level enhancement for defendants with three or more prior convictions for misdemeanors that are "crimes of violence" or "drug trafficking offenses."[232] These subsections reflect a congressional directive from 1996 requiring inclusion of an enhancement for certain types of misdemeanor offenses.[233]

The definition of "crime of violence" in Application Note 2 to §2L1.2 mirrors the definition in the career offender guideline, §4B1.2(a).[234] It provides that a "crime of violence" includes various enumerated offenses (*e.g.*, murder, robbery, extortion) or any offense that has as an element "the use, attempted use, or threatened use of physical force against the person of another."[235]

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."[236]

Courts have interpreted these terms by applying the "categorical approach" mandated by the Supreme Court in *Taylor v. United States*[237] and its progeny.[238] Although an exhaustive treatment of the categorical approach is beyond the scope of this primer, the

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231 USSG §2L1.2, comment. (n.4).

232 USSG §2L1.2(b)(2)(E), (b)(3)(E).

233 *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 334, 110 Stat. 3009.

234 *See* USSG App. C, amend. 798 (effective Nov. 1, 2016).

235 USSG §2L1.2, comment. (n.2). In a 2023 amendment, the Commission added a specific definition of robbery to Application Note 2. USSG App. C, amend. 822 (effective Nov. 1, 2023).

236 USSG §2L1.2, comment. (n.2); *see also* United States v. Garcia-Vasquez, 70 F.4th 177, 180–83 (3d Cir. 2023) (prior conviction for conspiracy to distribute cocaine qualified as a "drug trafficking offense" because the text of §2L1.2 did not define the term and its plain meaning includes conspiracy offenses).

237 495 U.S. 575 (1990).

238 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).

Commission has published a separate primer that provides a more detailed analysis of the history and case law regarding the categorical approach.[239]

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 for prior convictions under §4A1.1(a)–(d), and a "status point" under §4A1.1(e).[240] 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.[241] However, courts have found that an upward variance based on a prior illegal entry is error where there was nothing "unusual" about the illegal entry.[242]

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.[243] A related issue deals with the application of "status points" to defendants who are "found" while serving a jail sentence on an unrelated state matter.[244] 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.[245] Thus, courts have held that an alien who is "found" by immigration officials while in state custody

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239 *See* Categorical Approach Primer, *supra* note 168.

240 *See* USSG §4A1.1(e) ("Add 1 point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.").

241 *See, e.g.*, United States v. Osorto, 995 F.3d 801, 823 (11th Cir. 2021); United States v. Garcia-Cardenas, 555 F.3d 1049, 1050 (9th Cir. 2009) (per curiam); 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).

242 *See, e.g.*, 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).

243 *See, e.g.*, United States v. Valle, 940 F.3d 473, 476–77 (9th Cir. 2019) (district court erred in calculating increased offense level based on two prior convictions, where government failed to prove by clear and convincing evidence that defendant was "found" within 15 years of the convictions), *overruled by* United States v. Lucas, 101 F.4th 1158, 1159 (9th Cir. 2024) (en banc) (overruling prior precedent requiring clear and convincing evidence to apply certain sentencing enhancements and "fully adopt[ing] the 'preponderance of the evidence' standard").

244 Before November 1, 2023, §4A1.1(d) provided 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." U.S. Sent'g Comm'n, Guidelines Manual §4A1.1(d) (2021). A 2023 amendment redesignated subsection (d) as subsection (e), reduced the points assessed from two points to one point, and limited the potential application of the provision to defendants with seven or more criminal history points. USSG App. C, amend. 821 (effective Nov. 1, 2023).

245 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)).

has committed the section 1326 offense "while under a sentence of imprisonment" and thus is subject to the application of status points.[246]

E. EARLY DISPOSITION PROGRAMS

Section 3F1.1 authorizes the court to decrease the defendant's offense level 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."[247] This reduction had been at §5K3.1 until 2025 when the Commission promulgated an amendment deleting §5K3.1 and adding a new §3F1.1 (Early Disposition Program).[248]

The First Circuit has held that a plea agreement in which the government agreed to recommend a 2-level downward fast-track adjustment under the previous §5K3.1 did not obligate the district court to sentence the defendant in accordance with the government's recommendation.[249] In addition, the Tenth Circuit reasoned that district courts can consider fast-track sentencing disparities under the previous §5K3.1 but do not need to do so if there is an absence of "a minimum showing that a defendant charged with the same crime in a fast-track district would qualify for fast-track treatment."[250]

F. 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.[251] Courts generally have rejected these collateral consequences as grounds for a sentence reduction.[252]

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246 *See, e.g.*, *id.*; United States v. Reyes-Ceja, 712 F.3d 1284, 1286–90 (9th Cir. 2013) (collecting circuit cases); 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) (per curiam); United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996).

247 USSG §3F1.1.

248 USSG App. C, amend. 836 (effective Nov. 1, 2025); *see also* U.S. SENT'G COMM'N, QUICK FACTS on ILLEGAL REENTRY OFFENSES (2026).

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

250 United States v. Ventura-Perez, 666 F.3d 670, 677 (10th Cir. 2012) (quoting United States v. Lopez-Macias, 661 F.3d 485, 494 (10th Cir. 2011)).

251 *See, e.g.*, 28 C.F.R. § 345.35 (providing that inmates subject to an order of deportation, exclusion, or removal are ineligible to participate the Federal Prison Inmate Work programs); U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5325.07, CN-1: RELEASE PREPARATION PROGRAM 4 (2019) (inmates with deportable alien status not eligible to participate); U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5330.11, CN-1: PSYCHOLOGY TREATMENT PROGRAMS Ch. 2, at 9 (2016) (deportable inmate is unqualified for Residential Drug Abuse Treatment Program).

252 *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); *see also* United States v. Petrus, 588 F.3d 347, 356 (6th Cir. 2009) (a

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.

1. *8 U.S.C. § 1160(b)(7)(A)—False Statements in Applications*

Section 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.[253]

2. *8 U.S.C. § 1255a(c)(6)—False Statements in Applications*

Section 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.[254]

3. *8 U.S.C. § 1325(c)—Marriage Fraud*

Section 1325(c) prohibits knowingly marrying a person to evade immigration laws. The statutory maximum for such an offense is five years.[255]

4. *8 U.S.C. § 1325(d)—Immigration-Related Entrepreneurship Fraud*

Section 1325(d) prohibits knowingly establishing a commercial enterprise to evade any provision of the immigration laws. The statutory maximum for such an offense is five years.[256]

defendant's "immigration status could lead a sentencing court to two opposite conclusions, one being that potential deportation and fewer prison opportunities should be a reason for a downward variance . . . the other [] that a person granted the benefit of entry to the country should be subject to an upward variance for abusing the privilege," and reasoning in "different factual contexts, either approach is within the discretion of the sentencing court").

[253] 8 U.S.C. § 1160(b)(7)(A).

[254] *Id.* § 1255a(c)(6).

[255] *Id.* § 1325(c).

[256] *Id.* § 1325(d).

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).[257] The main difference between the guidelines is whether the fraud involved others (§2L2.1) or only involved the defendant (§2L2.2).

A number of statutes are covered by both §2L2.1 and §2L2.2.[258] Other crimes are covered only by §2L2.1.[259] Still other crimes are covered only by §2L2.2.[260] 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 to naturalization, citizenship, or legal resident status."[261] 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.[262]

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

a. Base offense level

The base offense level for immigration fraud offenses under §2L2.1 is 11.[263]

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257 USSG §§2L2.1; 2L2.2.

258 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.

259 8 U.S.C. § 1185(a)(4) and 18 U.S.C. §§ 1427 and 1541.

260 8 U.S.C. § 1185(a)(5) and 18 U.S.C. §§ 911, 1423, and 1424.

261 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"); *cf.* United States v. Wang, 944 F.3d 1081, 1082–92 (9th Cir. 2019) (district court plainly erred in applying §2B1.1 to defendant's mail fraud conviction (18 U.S.C. § 1341) where "the allegations underlying this count established an immigration visa fraud offense expressly covered by § 2L2.1").

262 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).

263 USSG §2L2.1(a).

b. Specific offense characteristics

As with smuggling offenses, §2L2.1(b)(1) provides for a 3-level reduction where "the offense was committed other than for profit" or involved only the defendant's family.[264] The offense level is increased three to nine levels based on the number of documents;[265] four levels if the defendant knew or had reason to believe the documents would be used to facilitate a felony other than a felony immigration offense;[266] two or four levels for a prior conviction for a felony immigration offense;[267] and two or four levels if the defendant fraudulently obtained or used a passport.[268] 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.[269] The guideline does not define "document," but courts have relied on the definition in 18 U.S.C. § 1028(d), concluding that the term "documents" includes not only "those documents that relate to naturalization, citizenship, or legal resident status," but also any "identification document."[270]

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."[271] 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."[272] For example, a set might include "a counterfeit passport, phony green card, and forged work papers."[273] In contrast, some documents are not a set, even though they will be used only one time by the same person.[274]

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264 USSG §2L2.1(b)(1).

265 USSG §2L2.1(b)(2).

266 USSG §2L2.1(b)(3).

267 USSG §2L2.1(b)(4).

268 USSG §2L2.1(b)(5).

269 USSG §2L2.1(b)(2).

270 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. Proshin, 438 F.3d 235, 238 (2d Cir. 2006) (per curiam) (federal tax identification cards were "documents" under §2L2.1); 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).

271 USSG §2L2.1, comment. (n.2).

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

273 *Id.*

274 *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).

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."[275] In deciding what constitutes "immigration laws" for purposes of §2L2.1(b)(3), the Eleventh Circuit cited the definition in 8 U.S.C. § 1101(a)(17) to conclude that fraudulently obtaining a Social Security card in violation of 42 U.S.C. § 408(a)(6) was not a violation of immigration laws, therefore allowing application of the 4-level enhancement.[276]

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 used a foreign passport.[277] The Fifth Circuit has 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).[278]

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.[279]

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 (4) the greater of 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.[280] Some of these specific offenses characteristics are discussed in more detail below.

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[275] USSG §2L2.1(b)(3).

[276] 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)).

[277] USSG §2L2.1(b)(5).

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

[279] USSG §2L2.2(a).

[280] USSG §2L2.2(b)(1)–(4).

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) on one or more occasions prior to the instant offense."[281]

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 used a foreign passport.[282] It applies to defendants fraudulently obtaining or using "regular passports" and also extends to "passport cards."[283] In addition, Application Note 3 provides that the term "used" is to be construed broadly and the term includes attempted renewal of passports that have been previously issued.[284]

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.[285] If death resulted, the homicide guidelines (§§2A1.1–2A1.5) apply.[286]

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281 USSG §2L2.2(b)(1).

282 USSG §2L2.2(b)(3).

283 *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).

284 USSG §2L2.2, comment. (n.3); *see also* United States v. Houtar, 980 F.3d 268, 278 (2d Cir. 2020) (the 4-level enhancement was properly applied when the defendant "used" his passport by fraudulently applying for a replacement after surrendering his original passport to a state family court).

285 USSG §2L2.2(c)(1)(A).

286 USSG §2L2.2(c)(1)(B).