PRIMER

IMMIGRATION GUIDELINES

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TABLE OF CONTENTS

INTRODUCTION

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

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

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

I. STATUTORY SCHEME

The primary offenses sentenced under §2L1.1 are those prosecuted under 8 U.S.C. §§ 1324(a) and 1327.

8 U.S.C. § 1324 Bringing in and Harboring Certain Aliens

As explained by the Ninth Circuit, in § 1324, "Congress created several discrete immigration offenses, including: (1) bringing an alien to the United States; (2) transporting or moving an illegal alien within the United States; (3) harboring or concealing an illegal alien within the United States; and (4) encouraging or inducing an illegal alien to enter the United States."[2] The statute also criminalizes engaging in conspiracy to commit any of these acts or the aiding and abetting of any of them. *See* § 1324(a)(1)(v)(I and II).[3]

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

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

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

[2] United States v. Lopez, 484 F.3d 1186, 1190-1191 (9th Cir. 2007) (en banc).

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

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

Transporting, harboring, or encouraging entry without financial gain has a statutory 5-year maximum penalty.[4] Conspiring to commit any of these crimes, or committing any of these crimes, for financial gain, and bringing aliens to the United States have 10-year statutory maximum penalties.[5] Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum increases to 20 years.[6] And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.[7] All of these maximum penalties may be enhanced an additional 10 years in cases of commercial transportation of large groups in a life-threatening manner.[8] Furthermore, a defendant who aids and abets another in the commission of one of these offenses is subject to a 5-year statutory maximum.[9] Because these statutory enhancements are based on facts other than the defendant's criminal record, they must be charged in the indictment and either pleaded to or found beyond a reasonable doubt by a jury.[10]

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

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

4 8 U.S.C. § 1324(a)(1)(B)(ii).

5 8 U.S.C. § 1324(a)(1)(B)(i).

6 8 U.S.C. § 1324(a)(1)(B)(iii).

7 8 U.S.C. § 1324(a)(1)(B)(iv).

8 8 U.S.C. § 1324(a)(4).

9 8 U.S.C. § 1324(a)(1)(A)(v)(II); *see also* United States v. Hilario-Hilario, 529 F.3d 65, 69 (1st Cir. 2008) ("One who aids and abets is normally liable as a principal, 18 U.S.C. § 2 (2000), but the smuggling statute prescribes in certain cases a lower sentence for mere aiders and abettors. 8 U.S.C. § 1324(a)(1)(B).").

10 *See id*. ("Each one of these characteristics raises the maximum sentence available. 8 U.S.C. §§ 1324(a)(1)(B)(i), (iii), (iv). Although pertinent only to sentencing, a jury determination typically is required to invoke the higher sentences under familiar precedent.") (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)). *See also* United States v. Williams, 449 F.3d 635 (5th Cir. 2006) ("It is plain that, following *Apprendi*, the 'injury factors' in 8 U.S.C. §§ 1324(a)(1)(B)(iii) and (iv) are 'elements' of greater aggravated offenses . . . .").

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

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

Multiple violations of § 1324(a)(2) committed for profit or with reason to believe that the alien will commit a felony invoke further enhancements, including a mandatory minimum 3- or 5-year penalty.[14] Note that "the sentence is calculated 'for each alien with respect to whom a violation . . . occurs.'"[15] Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.[16] Although this recidivist provision raises the statutory maximum, because the increase is based on criminal history, it need neither be pleaded in the indictment nor found beyond a reasonable doubt by a jury.[17]

Finally, as with § 1324(a)(1), the statutory maximums set forth here may also be enhanced an additional 10 years for commercial transportation of large groups in a life-threatening manner.[18]

8 U.S.C. § 1324(a)(3) Employing Aliens, and Bringing in Aliens for Employment

This statute prohibits hiring at least ten aliens during any 12-month period with actual knowledge that they are aliens.

This offense has a 5-year maximum penalty. As with the sections described above, the statutory maximums set forth here may also be enhanced up to 10 years for an offense that was part of ongoing commercial organization in which aliens were transported in groups of 10 or more and the manner of transportation endangered the aliens' lives.[19] The enhancement also applies where the aliens in question presented a life threatening health risk to people in the United States.[20]

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

13 8 U.S.C. § 1324(a)(2)(B)(i), (ii).

14 8 U.S.C. § 1324(a)(2)(B)(i), (ii) (imposing 3-10 year range for first or second violation and 5-15 year range for any further violations).

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

16 *See, e.g., id.*

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

18 8 U.S.C. § 1324(a)(4).

19 8 U.S.C. § 1324(a)(4).

20 8 U.S.C. § 1324(a)(4).

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

This statute prescribes a 10-year statutory maximum penalty for knowingly aiding certain aliens (previously convicted for aggravated felonies) to enter the United States. To be convicted, a defendant need not know that the alien in question had a prior felony conviction. As the Eleventh Circuit has observed: "[T]he district court properly instructed the jury that § 1327 did not require [defendant] to know that the alien . . . had a prior felony conviction but only that the alien he aided or assisted in entering the United States was inadmissible . . . . § 1327 requires only that [a defendant] knew the alien he aided or assisted was inadmissible at some point before the alien sought to enter the United States."[21]

II. GUIDELINE OVERVIEW: §2L1.1

A. Base Offense Level

The base offense level for alien smuggling offenses depends on the statute of conviction. Violations of § 1324 have a base offense level of 12.[22] Violations of § 1327 have a base level of 23 or 25, depending on the immigration status and/or criminal history of the alien being smuggled.[23]

B. Specific Offense Characteristics

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

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

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

[22] USSG §2L1.1(a)(3).

[23] USSG §2L1.1(a)(1) (base offense level of 25 if alien was inadmissible under 18 U.S.C. § 1182(a)(3)), §2L1.1(a)(2) (base offense level of 23 if alien was previously deported after aggravated felony conviction).

[24] USSG §2L1.1(b)(1).

[25] USSG §2L1.1(b)(2).

[26] USSG §2L1.1(b)(3).

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

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

C. CROSS REFERENCE

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

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

[28] USSG §2L1.1(b)(5).

[29] USSG §2L1.1(b)(6).

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

[31] USSG §2L1.1(b)(8)(A).

[32] USSG §2L1.1(b)(8)(B).

[33] USSG §2L1.1(b)(9).

[34] USSG §2L1.1(c)(1).

III. SPECIFIC GUIDELINE APPLICATION ISSUES

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

> *If (a) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child . . . , and (b) the base offense level is determined under subsection (a)(2), decrease by 3 levels.*

The defendant has the burden of establishing that he is entitled to this reduction.[35] For example, the reduction may not apply where the defendant's only compensation was free transportation: "[A] defendant who commits the relevant offense 'solely in return for his own entry' may nevertheless be found to have committed the offense 'for profit.'" [36]

B. NUMBER OF ALIENS - §2L1.1(B)(2)

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

The table in §2L1.1(b)(2) provides increases of 3, 6, or 9 levels based on the number of aliens smuggled, harbored, or transported. Consistent with this graduated scheme, Application Note 7 provides that "[a]n upward departure may be warranted [where] . . . [t]he offense involved substantially more than 100 aliens."[37] The Second Circuit has upheld

[35] *See, e.g.,* United States v. Al Nasser, 555 F.3d 722 (9th Cir. 2009) (holding that reduction did not apply even though defendant did not personally profit since he was part of scheme to transport aliens for money and knew aliens had paid someone to transport them); United States v. Li, 206 F.3d 78 (1st Cir. 2000) (affirming district court finding that defendants failed to establish lack of profit motive); United States v. Kim, 193 F.3d 567 (2d Cir. 1999) (rejecting reduction where defendant harbored undocumented aliens by employing them in his business and relied on one to assist him in running his business); United States v. Krcic, 186 F.3d 178 (2d Cir. 1999) (holding that district court permissibly inferred a profit motive where defendant made repeated trips and long distance calls between Montreal and the United States, did not have any other job, and conspired with others whose prior smuggling operations were for compensation).

[36] United States v. Juan-Manuel, 222 F.3d 480, 485 (8th Cir. 2000) (affirming denial of reduction where defendant drove van carrying aliens to pay off debt to coyote who brought him to U.S.); *see also* United States v. Perez-Ruiz, 169 F.3d 1075, 1076 (7th Cir. 1999) (affirming denial of enhancement where defendant "received in-kind compensation—transportation from Arizona to Chicago—for his role in the offense"). The holding in *Juan-Manuel* is in contrast to pre-1997 commentary, which stated that "'[f]or profit' means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation."

[37] USSG §2L1.1, comment. (n.7(C)).

an upward departure based on 300 aliens.[38] Based upon its observation that the guideline's incremental punishment enhancements relied on a geometric exponential of four, the Ninth Circuit has held that 180 aliens were not "substantially more than 100 aliens."[39]

Because this guideline is listed in §3D1.2(d), the relevant conduct for this guideline includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[40] Thus, a court may determine the number of aliens based on all acts. For example, the Fifth Circuit reviewed a case in which a commercial truck driver smuggled 74 aliens in his tractor-trailer during which 19 aliens died from dehydration and asphyxiation.[41] The district court had applied a 9-level §2L1.1(b)(2) enhancement ("100 or more aliens") based on the defendant's earlier transportation of approximately 60 additional aliens.[42] Noting the numerous ways that conduct can be considered "relevant conduct" for sentencing[43] and the specific relationship between §3D1.2(d) and §2L1.1,[44] the Fifth Circuit concluded that the district court did not clearly err when including the earlier transportation (of the 60-odd aliens) as relevant conduct as part of a "common scheme or plan":

> It was not clear error for the district court to include [defendant's] first trip, during which he transported approximately 60 unlawful aliens, as part of the relevant conduct for applying §2L1.1(b)(2). Ample evidence supports a conclusion that the two trips were part of a common scheme or plan. The same accomplices . . . were involved in both trips, and . . . testimony established the number of aliens transported during the first trip. Both trips were for the purpose of transporting aliens and were undertaken with the same modus operandi—unlawful aliens were loaded into Williams's trailer . . . . The [g]uidelines['] requirement to establish a common scheme or plan is satisfied here because the offenses are "substantially connected to each other by at least one common factor." Accordingly, the district court did not commit clear error in enhancing [defendant's] sentences by nine levels under §2L1.1(b)(2)(C).[45]

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

[39] United States v. Nagra, 147 F.3d 875, 886 (9th Cir. 1998). The court reasoned that the guideline's stated enhancement would apply to 100-399 aliens.

[40] USSG §1B1.3(a)(2).

[41] United States v. Williams, 610 F.3d 271, 274-75 (5th Cir. 2010).

[42] *Id*. at 292.

[43] *Id*.

[44] *Id*. ("§3D1.2(d) includes offenses covered by §2L1.1.").

[45] *Id*. at 293-294 (internal citations omitted).

Courts have occasionally addressed the quantum of evidence needed to establish the enhancement. In one case, the circuit court affirmed an enhancement based on a list of names in a ledger found in a "stash house."[46] In another case, the circuit court affirmed the application of the enhancement based on an estimate of the total number of aliens smuggled based on the assumption that, on each of 15 trips, defendants used children to smuggle in two aliens posing as the children's parents.[47]

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

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

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

As noted, this version was amended effective November 1, 2016.[48] The Commission's amendment to §2L1.1 may raise *ex post facto* issues.[49] In general, "[t]he court shall use the *Guidelines Manual* in effect on the date that the defendant is sentenced" unless doing so "would violate the *ex post facto* clause of the United States Constitution," in which case, "the court shall use the *Guidelines Manual* in effect on the date that the offense of conviction was committed."[50]

[46] United States v. Angeles-Mendoza, 407 F.3d 742 (5th Cir. 2005) (applying enhancement for transporting over 100 aliens where ledger found at stash house had 114 unique names, some of which were names of illegal aliens found at the residence).

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

[48] *See supra* note 27 for changes made on November 1, 2016.

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

[50] USSG §1B1.11.

D. CREATING RISK OF INJURY - §2L1.1(B)(6)

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

This enhancement "includes a wide variety of conduct."[51] Application Note 3 lists a number of examples: "transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements."[52] This enhancement "is not limited to the examples provided in the commentary."[53] The Ninth Circuit explained that in each of these situations, "the means of travel either exacerbates the *likelihood* of an accident, subjects the passenger to a risk of injury even during an accident-free ride, or both."[54] While many of these cases arise when defendants transport aliens in vehicles, this enhancement applies to any situation where the offense creates risks of death, injury, starvation, dehydration, or exposure.[55] A number of circuit opinions considering the application of this enhancement are discussed below.

Courts have disagreed as to whether unrestrained passengers lying on the floor of an enclosed van satisfy this enhancement.[56] Also, to qualify for this enhancement, either the defendant must have *created* the risk of danger,[57] or the risk must have, at least, been

[51] USSG §2L1.1, comment. (n.3).

[52] *Id.*

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

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

[55] *Compare* United States v. Garza, 541 F.3d 290 (5th Cir. 2008) (holding that guiding aliens on foot through desert-like brush of South Texas in June, by itself, did not qualify for enhancement in the absence of evidence that the aliens were inadequately prepared), *with* United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) (holding that application of enhancement was proper where defendant led aliens through desert-like brush without adequate water supply); United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002) (leading aliens on 3-day trek through desert without adequate food, water, and rest periods qualified for enhancement); United States v. Rodriguez-Cruz, 255 F.3d 1054, 1056 (9th Cir. 2001) (enhancement proper where defendants guided through the mountains between Mexico and San Diego a group of "aliens who were obviously woefully under-equipped for the potential hazards that were known prior to departure").

[56] *Compare* United States v. Solis-Garcia, 420 F.3d 511 (5th Cir. 2005) (transporting aliens lying down in cargo area of minivan did not qualify for enhancement), *with* United States v. Maldonado-Ramires, 384 F.3d 1228 (10th Cir. 2004) (transporting aliens lying on floor of minivan qualified for enhancement).

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

"reasonably foreseeable in connection with that criminal activity."[58] It does not matter that an alien faced great risk prior to joining a transporting conspiracy involving the defendant —"only that part of [the alien's] experience after he joined [the defendant's] group can properly be assigned to [the defendant] for purposes of sentencing."[59]

Notably, although "[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,"[60] courts have identified factors to consider when applying this enhancement in vehicle cases.

1. Fifth Circuit

The Fifth Circuit has made clear that this enhancement creates no *per se* rules; instead, "'[d]efining the contours of this enhancement is dependent upon carefully applying the words of the guideline in a case-specific analysis.'"[61] As a result, the court has articulated several factors to consider when applying the §2L1.1(b)(6) enhancement for vehicle passengers, including "the availability of oxygen, exposure to temperature extremes, the aliens' ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs."[62] The court has also held that the risk of injury enhancement does not apply when "[t]he only dangers were the same dangers arising from a passenger not wearing a seatbelt in a moving vehicle."[63] Additional facts that have supported the enhancement include the severity of vehicle overcrowding, whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey.[64]

58 USSG §1B1.3, comment. (n.2); *see also* United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) (holding that defendant was liable for risk of injury created by coconspirators who had aliens walk through the brush to avoid detection).

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

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

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

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

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

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

2. Ninth Circuit

The Ninth Circuit noted:

> Every passenger traveling on our highways faces a small, but non-trivial, risk of death or injury. This baseline risk is inherent in all vehicular travel and must therefore be disregarded in determining whether the offense was committed in a manner that involved a "substantial risk of death or serious bodily injury to another person." We focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger traveling on our streets and highways.[65]

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

> (1) Taking a dangerous route (e.g., off-road) or driving in a dangerous manner (e.g., recklessly or drunk); (2) using a method of transportation that increases the likelihood of an accident (e.g., a severely overloaded vehicle); (3) using a method of transportation that increases the risk of an injury even in the absence of an accident (e.g., passengers transported with insufficient ventilation or subject to injury from moving mechanical parts); or (4) using a method of transportation that increases the risk that an accident would cause injury or death (e.g., passengers transported in a manner that makes them more likely to be injured by crumpled metal or shattered glass than if they had been seated normally).[66]

Thus, it will apply the enhancement "only when the circumstances increased the likelihood of an accident or the chance of injury without an accident."[67]

3. Tenth Circuit

The Tenth Circuit reasoned that the inquiry under this enhancement "essentially equates to a totality of the circumstances test."[68] 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

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

[66] *Id.* at 889-90.

[67] *Id.* at 890.

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

accident' and whether the method of transportation exacerbated the risk of death or injury in the event of an accident."[69]

E. BODILY INJURY - §2L1.1(B)(7)

If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury.[70]

Although "the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct,"[71] courts have typically not required that the defendant be the direct cause of the injury or death.[72] For example, it is not necessary for the defendant to be the driver of a vehicle that crashes, injuring smuggled aliens.[73] Neither does enhancement require intent to cause injury or death.[74] The Eleventh Circuit held that the §2L1.1(b)(7) enhancement is limited to where it was "reasonably foreseeable to a defendant that his actions or the actions of any other member of the smuggling operation could create the sort of dangerous circumstances that would be likely to result in serious injury or death," but specifically rejected requiring the defendant's individual actions be the proximate cause of the death or serious injury.[75] However, the court noted a circuit split exists on the requirement of proximate cause.[76] The Fifth Circuit also recognized that there was a split among the circuit courts, and held that the enhancement "contains no causation requirement" and "the only causation requirement is that contained in 1B1.3".[77] The Fifth

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

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

[71] United States v. Flores-Flores, 356 F.3d 861, 862 (8th Cir. 2004).

[72] United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008) (holding that death caused by defendant's coconspirators was reasonably foreseeable and, thus, a proper basis for enhancement); United States v. Flores-Flores, 356 F.3d 861 (8th Cir. 2004) (applying enhancement where defendant was not driving the overloaded van at the time it collided with another car because he was tired and had switched with another driver); United States v. Miguel, 368 F.3d 1150 (9th Cir. 2004) (affirming enhancement where child was found unconscious, notwithstanding the possibility that unconsciousness could have been caused by trek through the desert before getting in defendant's car); United States v. Cardena-Garcia, 362 F.3d 663, 665-66 (10th Cir. 2004) (stating that "[a] sufficient nexus would exist [between the defendant's conduct and the resultant injury] if the death or injury was reasonably foreseeable and [his] conduct was a contributing factor" and applying enhancement where defendant's van was hit from behind, killing the passengers).

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

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

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

[76] *Id*. at 1350, n.2 and 1351.

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

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."[78]

Courts have upheld the application of both §2L1.1(b)(6) (Creating Risk of Injury) and §2L1.1(b)(7) (Bodily Injury) in a single case over claims that applying both enhancements reflects impermissible double counting. The Tenth Circuit stated: "[§2L1.1(b)(6)] allows for an enhancement based upon 'the defendant's intentional or reckless conduct, with no consideration of the outcome;' whereas [§2L1.1(b)(7)] provides for an enhancement based upon the 'outcome . . . with no consideration of the defendant's intentional or reckless conduct.'" [79]

F. Involuntary Detention - §2L1.1(b)(8)(A)

> *If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.*

The Tenth Circuit approved the application of §2L1.1(b)(8) where an armed defendant participated in taking the immigrants' shoes and personal belongings, forcing them to call family members or friends to ask for more money under the threat of dismemberment, and keeping them in a van and making them urinate in a bottle.[80]

IV. CHAPTER THREE ADJUSTMENTS

A. Vulnerable Victim - §3A1.1(b)(1)

An increase under §3A1.1 (Vulnerable Victim) may be appropriate in alien smuggling cases, but courts generally require additional factors beyond the immigration status of the persons smuggled. The Eighth Circuit observed that "the victims of the crime of harboring illegal aliens are, by definition, illegal aliens, and as such, [their] immigration status does not distinguish them from other potential victims of the crime. Thus, [their] immigration status did not alone make them more vulnerable in this case."[81] In other words, the

78 *Id*.

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

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

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

relevant question is whether a particular victim of the smuggling offense is "more unusually vulnerable" than any other such victim.[82] 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."[83] The "general characteristics commonly held by aliens seeking to be illegally smuggled" do not create a vulnerability that warrants an upward departure.[84] However, smuggled aliens "detained against their will after being transported" can be considered "victims" for purposes of §3A1.1(b)(1).[85] 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."[86]

B. Role in the Offense - §§3B1.1, 3B1.2

Commentary to §2L1.1 invites consideration of a defendant's aggravating role in the offense, but states that for purposes of §3B1.1 (leadership role), the smuggled aliens are not considered "participants" "unless they actively assisted in the smuggling, transporting, or harboring of others."[87] Some courts apply §3B1.1 to increase sentences,[88] and others routinely deny reductions for minor participant under §3B1.2.[89]

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

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

84 *Id*. at 747-78 (stating that "the *inherent* vulnerability of smuggled aliens" has been "adequately taken into account in establishing the base offense level in USSG §2L1.1").

85 *Id.* at 747.

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

87 USSG §2L1.1, comment. (n.6).

88 *See, e.g.,* United States v. Caraballo, 595 F.3d 1214, 1232 (11th Cir. 2010) (affirming enhancement where defendant recruited a co-defendant to participate in the smuggling operation; hosted the other smugglers; specifically instructed co-defendants on how to commit the crime; required co-defendants to sign a contract agreeing to tell a fabricated story to the authorities if they were caught; financed the smuggling trip; and agreed to pay a co-defendant for his role in the venture). *See also* United States v. Villanueva, 408 F.3d 193, 204 (5th Cir. 2005) (applying adjustment where "[defendant's] house in El Salvador was the assembly point for many of the aliens; his wife collected the initial payments for the smuggling fees for many of the aliens; the 'pollo' list for this and other smuggling trips was found in [his] house in El Salvador; he recruited and hired the driver of the tractor-trailer; and he was in charge of this particular smuggling expedition").

89 *See, e.g., Villanueva*, 408 F.3d at 204 (defendant did not qualify for minor role reduction where he "acted as a guide in multiple countries, over an extended period of time"); United States v. Angeles-Mendoza, 407 F.3d 742, 754 (5th Cir. 2005) (defendant was not a minor participant where he was an enforcer at the stash house and "had knowledge of the scope and structure of the enterprise"); United States v. Rodriguez-Cruz, 255 F.3d 1054, 1060 (9th Cir. 2001) (affirming decision not to award minor role reduction where defendant acted as "guide in training" and had been paid for guiding aliens); United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000) (reduction did not apply where defendant was convicted of smuggling aliens

C. Special Skill - §3B1.3

The First Circuit held that piloting a simple wooden boat without benefit of navigation aids on choppy seas under the direction of another does not qualify as a special skill.[90] 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.[91]

D. Reckless Flight - §3C1.2

The Ninth Circuit explained that a §3C1.2 reckless flight enhancement does not apply where the conduct receives enhancement under §2L1.1 (creating a risk of injury to others).[92] 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 an Interstate median. She ran from the car but was arrested after a brief foot chase. The Ninth Circuit reversed the district court's application of both §2L1.1 "substantial risk of death or bodily injury" and §3C1.2 "reckless endangerment during flight" enhancements. Both enhancements were based solely on the defendant's flight. Therefore, the court held, "[w]e are bound to follow the application notes . . . and the directive is clear: "If [a substantial risk of serious bodily injury" enhancement] applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2."[93]

E. Departures and Variances

1. Multiple Deaths

The Tenth Circuit affirmed an upward departure where multiple deaths resulted from defendant's conduct.[94]

twice within 16 days); United States v. Hernandez-Franco, 189 F.3d 1151, 1160 (9th Cir. 1999) ("[T]he mere fact that appellant was to transport the aliens north does not entitle him to a minor role adjustment."); United States v. Uresti-Hernandez, 968 F.2d 1042 (10th Cir. 1992) (rejecting reduction where defendant left aliens outside checkpoint, drove through, and waited for them on the other side).

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

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

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

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

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

2. Duration of the Harboring

The Fourth Circuit affirmed an upward departure for a harboring conspiracy that went on for 19 years.[95]

3. Extent of Detention

The Tenth Circuit affirmed a variance above a guideline range that included an enhancement under §2L1.1(b)(8) because the defendant created an extreme "four-day-long hostage situation," rather than "an isolated, minor detention of limited duration."[96]

ILLEGAL ENTRY OR REENTRY - §2L1.2

Federal law prohibits foreign nationals from entering the United States without permission. A conviction for a first offense of illegal entry is a misdemeanor that is not covered by the guidelines.[97] Subsequent entries,[98] reentry after removal,[99] and remaining in the United States after being ordered removed[100] are felonies covered by §2L1.2. This guideline provides for enhanced sentences for criminal conduct before and after first order of removal was final. This section addresses application issues arising under §2L1.2.

I. STATUTORY SCHEME

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

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

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

97 8 U.S.C. § 1325(a).

98 *Id.*

99 8 U.S.C. § 1326. Changes to the Immigration and Naturalization Act effective April 1, 1997, replaced deportation and exclusion proceedings with a single process, termed "removal." Unless specifically noted, the terms "deportation" and "removal" are generally used interchangeably in this primer, but practitioners should be aware of the technical differences. 8 U.S.C. § 1229a [INA § 240]; Richard Steel, STEEL ON IMMIGRATION LAW § 13:1 (2d ed. 2012).

100 8 U.S.C. § 1253.

8 U.S.C. § 1325(a) Improper Entry By Alien (Illegal Entry)

This statute prohibits entry (1) at an improper time or place, (2) without inspection, or (3) based on a false or misleading statement.

The penalty range for this offense depends on whether it is the defendant's first violation of § 1325(a). If so, then the statute carries a 6-month maximum penalty, and the guidelines do not apply. If this is a subsequent violation of § 1325(a), then the statute carries a 2-year maximum penalty, and the court should apply §2L1.2. Because the enhanced penalty is based on a defendant's prior criminal record, it does not need to be indicted or found by a jury.[101]

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

This statute prohibits an alien's unauthorized return to the United States after deportation, removal, exclusion, or denial of admission.

The statutory maximum term of imprisonment for illegal reentry depends on the defendant's prior criminal record. In general, an alien who has no criminal history is subject to a 2-year maximum.[102] A 10-year maximum applies if the defendant's deportation was (a) preceded by a conviction for "three or more misdemeanors involving, drugs, crimes against the person, or both"; (b) preceded by any felony; or (c) based on certain, specified grounds.[103] If the prior conviction was an "aggravated felony" as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.[104]

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.[105] This is not the case for enhancements based on a defendant's prior deportation, which must be found by a jury.[106] Under *Apprendi*, for a defendant to be eligible for an enhanced statutory

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

102 8 U.S.C. § 1326(a)(2).

103 8 U.S.C. § 1326(b)(1), (3), (4).

104 8 U.S.C. § 1326(b)(2).

105 *Almendarez-Torres*, 523 U.S. at 226-27 (holding that the prior felony is not an element of the offense and need not be charged in the indictment); Apprendi v. New Jersey, 530 U.S. 466 (2000) (stating that the fact of a prior conviction need not be found by a jury); *see also* United States v. Aparco-Centeno, 280 F.3d 1084 (6th Cir. 2002) (holding that prior convictions were not elements but were sentencing factors for enhancement that did not have to be set forth in the indictment); United States v. Velasquez-Reyes, 427 F.3d 1227 (9th Cir. 2005).

106 *See, e.g.,* United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008); United States v. Covian-Sandoval, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding that the *Almendarez-Torres* exception is "limited to prior

maximum under § 1326, the government's indictment must allege not only a prior removal and subsequent reentry, but also the date of that removal or the fact that it occurred after a qualifying prior conviction.[107] But an indictment's failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.[108]

Thus, the Ninth Circuit has concluded that an indictment will support a § 1326(b) sentencing enhancement if it alleges a removal date because this action will allow a sentencing court to "to compare that date to the dates of any qualifying felony convictions to determine whether the sentence-enhancing sequence [whereby that removal must follow the earlier qualifying conviction] is satisfied."[109] That court also held that the indictment need not include the removal date if the indictment language otherwise alleges facts establishing that the removal occurred after a qualifying conviction.[110]

Furthermore, the Fifth Circuit has concluded that, when an indictment is silent as to a removal date but a defendant admits PSR facts that establish the critical "sequencing" information, the resulting sentencing enhancement survives even plain error review.[111]

Courts have held that it does not violate the Equal Protection Clause to enhance a defendant's sentence based on prior convictions.[112]

8 U.S.C. § 1253 Failure to Depart[113]

This statute makes it a crime for an alien who has been ordered to depart the country to (A) remain in the country after the removal order is entered, (B) fail to arrange for

convictions" and does not apply to the fact or date of the prior removal); United States v. Zepeda-Martinez, 470 F.3d 909 (9th Cir. 2006).

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

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

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

110 *Calderon-Segura*, 512 F.3d at 1111 ("[I]n order for a defendant to be eligible for an enhanced statutory maximum under § 1326(b), the indictment must allege, in addition to the facts of prior removal and subsequent reentry, either the date of the prior removal or that it occurred *after* a qualifying prior conviction.") (emphasis in original) (citing *Salazar-Lopez*, 506 F.3d at 752).

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

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

113 One subsection of this statute, 8 U.S.C. § 1253(b), prohibits a false statement or failure to comply with an investigation during the period following an alien's removal order while he is still in the United States under supervision. This crime is a misdemeanor, punishable by up to a year in prison.

departure, (C) prevent or hamper departure, or (D) fail to appear as required by the departure removal order.

This statute generally imposes a 4-year statutory maximum penalty, although prior convictions under certain specified statutes will invoke a 10-year statutory maximum.[114]

II. GUIDELINE OVERVIEW: §2L1.2

A. INTRODUCTION

This section provides background and legal analysis of §2L1.2, as amended effective November 1, 2016.[115] Section 2L1.2 was significantly changed based on the Commission's 2015 report and extensive public testimony and comment. The new guideline accounts for criminal conduct before and after the first order of removal. Another significant change is that only prior convictions that receive criminal history points are counted for purposes of an enhancement.

B. *EX POST FACTO* CONSIDERATIONS

The Commission's amendment to §2L1.2 may raise *ex post facto* issues.[116] In general, "[t]he court shall use the *Guidelines Manual* in effect on the date that the defendant is sentenced" unless doing so "would violate the *ex post facto* clause of the United States Constitution," in which case, "the court shall use the *Guidelines Manual* in effect on the date that the offense of conviction was committed."[117] Notably, courts have held that illegal reentry is a continuing offense that continues until the alien is "found" in the United States, and that, therefore, a court can apply the *Guidelines Manual* in effect when the alien is "found," as opposed to the Manual in effect when the alien reenters the United States,

[114] 8 U.S.C. § 1253(a)(1). The 10-year statutory maximum applies to individuals deported pursuant to 8 U.S.C. § 1227(a)(1)(E) (for helping an alien enter the United States), § 1227(a)(2) (for certain criminal offenses), § 1227(a)(3) (for failure to register and falsification of documents), and § 1227(a)(4) (for security threats).

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

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

[117] USSG §1B1.11. The previous version of the Immigration Guidelines primer – Illegal Entry-Reentry Offenses section is attached as Appendix A as an aid to the guideline's computation in effect prior to November 1, 2016.

without violating the *ex post facto* clause.[118] 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."[119] An alien also can be "found in" the United States when a law enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) (the 287(g) program) issues an immigration detainer.[120]

C. Base Offense Level

§2L1.2 has a base offense level of 8.[121]

D. Specific Offense Characteristics

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

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

The enhancement at subsection (b)(1) provides a tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of 4 levels. "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. § 1253(failure to depart after an order of removal) and § 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under 8 U.S.C. § 1325(a) will receive an increase of 2 levels.[122] This is the only section of the guidelines where illegal

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

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

[120] United States v. Sosa-Carabantes, 561 F.3d 256 (4th Cir. 2009) (holding sentence enhancement under §4A1.1(e) did not apply to defendant because law enforcement officer did not issue immigration detainer until March 3, 2007, and defendant had not yet been sentenced at that time).

[121] USSG §2L1.2(a).

[122] USSG §2L1.2, comment, (n. 2).

reentry/ entry prior convictions are used to increase the offense level. Other sections consider other types of prior convictions.

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

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

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

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

III. PRIOR CONVICTIONS

A. General Principles

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

The guideline looks to the first final order of deportation or removal,[123] not the physical removal of the defendant. A defendant is considered "ordered deported or ordered

[123] *See* Final order of removal at 28 CFR §1241.

removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation or removal, regardless of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.[124]

Federal law authorizes immigration authorities to reinstate prior removal orders.[125] Although this statute states that a "prior order of removal is reinstated from its original date," a removal based on the reinstatement is treated as a separate removal for purposes of determining whether a conviction happened prior to deportation under § 1326.[126] The enhancements apply in relation to the first order of removal, not to the reinstated order of removal. In addition, for purposes of the guidelines, an order of expedited removal done by an immigration officer[127] is also considered an order of removal. Voluntary returns do not count as an order of removal.

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

A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is still pending when the defendant is deported.[128]

3. Qualifying adult convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points.[129] This marks a significant change. Before November 1, 2016, the enhancements applied without regard to whether the conviction received criminal history points.[130]

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

125 8 U.S.C. § 1231(a)(5).

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

127 *See* 8 U.S.C. § 1228.

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

129 USSG §2L1.2, comment. (n.3).

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

An offense committed before the defendant was eighteen 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."[131] The conviction for which the defendant receives an enhancement need not be the most recent conviction,[132] nor must the defendant have been ordered removed as a result of that conviction.[133]

4. Delayed adjudications may qualify as convictions

A deferred adjudication qualifies as a prior conviction under §2L1.2.[134] A guilty plea held in abeyance qualifies as a "conviction" under §2L1.2.[135]

5. Vacating a conviction may disqualify it from consideration

The guidelines do not expressly address expunged or vacated convictions. Some courts have held that a conviction that was vacated prior to sentencing on technical grounds should be considered under §2L1.2.[136] The enhancement, however, would not apply if the conviction was vacated on "a showing of actual innocence"[137] or a showing "that the conviction had been improperly obtained."[138]

[131] USSG §2L1.2, comment. (n.1(B)).

[132] United States v. Soto-Ornelas, 312 F.3d 1167 (10th Cir. 2002) (affirming enhancement based on conviction other than most recent conviction or the one named in indictment).

[133] USSG §2L1.2, comment. (n.1(A)).

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

[135] United States v. Zamudio, 314 F.3d 517 (10th Cir. 2002) (holding a plea in abeyance was a "conviction" under 8 U.S.C. § 1101(a)(48)(A), which includes a situation where "the alien has entered a plea of guilty . . . and the judge has ordered some form of punishment").

[136] United States v. Luna-Diaz, 222 F.3d 1 (1st Cir. 2000) (applying enhancement where defendant, after pleading guilty to illegal reentry, was successful at having prior aggravated felony conviction vacated); United States v. Campbell, 167 F.3d 94 (2d Cir. 1999) (affirming enhancement based on prior conviction that was set aside because terms of probation had been satisfied); United States v. Garcia-Lopez, 375 F.3d 586, 588 (7th Cir. 2004) (applying enhancement where prior conviction was vacated "based upon a technicality"); United States v. Cisneros-Cabrera, 110 F.3d 746 (10th Cir. 1997) (applying enhancement where vacated conviction was in place at the time of illegal entry); United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005) (stating conviction vacated after illegally returning to United States should still be considered under §2L1.2).

[137] *Garcia-Lopez*, 375 F.3d at 589.

[138] *Campbell*, 167 F.3d at 98.

6. Prior convictions need not be charged to qualify for enhancement

The fact of a prior conviction need not be pled or proven beyond a reasonable doubt.[139] Thus, a prior conviction that would support an enhanced sentence under either the statutes or the guidelines does not need to be identified until the time of sentencing.[140] Of course, as in any case, a defendant's sentence is circumscribed by any statutory maximum applicable to the statute charged in the indictment.

7. Is the prior conviction a felony?

The enhancements called for in §2L1.2 are triggered by a defendant's previous conviction(s).[141] Because §2L1.2 defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year,"[142] this definition can include qualifying state misdemeanor offenses that are punishable by more than one year. If a state misdemeanor is punishable by more than a year in prison, §2L1.2's definition of felony may well treat that conviction as qualifying for a guideline felony enhancement.[143] For the same reasons, a prior state court misdemeanor conviction can trigger § 1326(b)(1)'s 10-year statutory maximum if, under federal law, it is a felony, *i.e.*, "an offense punishable by a maximum term of imprisonment of more than one year."[144]

8. Sentence imposed

The length of the sentence imposed in a prior conviction is determined by the rules set forth in Chapter Four for criminal history category calculation. Sentence imposed has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2. Application Note 2 provides that "[t]he length of the sentence imposed

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

140 Note this rule does not apply to the fact of deportation, so that a statutory enhancement based on a finding that a defendant had been removed on a particular date may violate the Sixth Amendment if the date of deportation was not admitted by the defendant in the plea. *See, e.g.*, United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008); United States v. Covian-Sandoval, 462 F.3d 1090, 1097 (9th Cir. 2006) (holding the *Almendarez-Torres* exception is "limited to prior convictions" and does not apply to the fact or date of the prior removal).

141 USSG §2L1.2(b)(1)(A), (b)(2)(A)-(D) and (b)(3)(A)- (D). Section 2L1.2(b)(2)(E) and (b)(3)(E)–allow for a 4-level upward adjustment when a defendant's previous convictions include "three or more misdemeanors for convictions that are crimes of violence or drug trafficking offenses."

142 USSG §2L1.2, comment. (n.2).

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

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

includes any term of imprisonment given upon revocation of probation, parole, or supervised release."[145] At least two circuits – the Fifth and Ninth Circuits – have held that the "sentence imposed" for purposes of determining the applicability of the amended §2L1.2(b)(2) enhancement is limited to the term of imprisonment imposed *before* the defendant's first order of deportation or removal and, therefore, would not apply to a term of imprisonment imposed upon revocation where the revocation occurred after the defendant's first order of deportation or removal.[146]

9. Simultaneous convictions

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

B. MISDEMEANORS – CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSES

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

1. The Categorical and Modified Categorical Approach

While not required for other enhancements, the categorical approach and the modified categorical approach continue to apply to misdemeanor offenses pursuant to §2L1.2(b)(2)(E) and §2L1.2(b)(3)(E).[147] These subsections reflect a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses.[148] The courts must decide if the defendant has three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses to apply the enhancement.

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

[146] *See* United States v. Martinez, __F.3d __, 2017 WL 4080481 (9th Cir. Sept. 15, 2017) (§2L1.2(b)(2)(B) enhancement applies only to a defendant who sustained a conviction and received a two-year sentence before his first order of deportation or removal), and United States v. Franco-Galvan, 864 F.3d 338, 343 (5th Cir. 2017)(§2L1.2(b)(2) enhancement applies to term of imprisonment imposed upon revocation of supervised release only if revocation occurred before the defendant's first order of removal).

[147] Parties must still use the categorical, or modified categorical, approach in determining whether the defendant illegally reentered following a conviction of an "aggravated felony" under the statutory penalty structure. The term "aggravated felony" is defined by 8 U.S.C. § 1101(43). *See supra* section I, at p. 17.

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

Taylor v. United States,[149] *Shepard v. United States,*[150] *Descamps v. United States*[151] and *Mathis v. United States*[152] define the application of the categorical and modified categorical approaches. Although these cases dealt with statutory enhancements at 18 U.S.C. § 924(e), lower courts have applied their categorical approach in other contexts where a sentencing enhancement is based on a prior conviction, including §2L1.2.[153]

a. The Categorical Approach

The categorical approach was first adopted in *Taylor v. United* States.[154] Taylor held that, when deciding whether a prior conviction falls within a certain class of crimes, a sentencing court may "look only to the fact of conviction and the statutory definition of the prior offense."[155] A court is *not* concerned with the "facts underlying the prior convictions;" in other words, the court may not focus on the underlying criminal conduct itself.[156]

In *Descamps v. United States,* 133 S. Ct. 2276 (2013), the Supreme Court explained that in the categorical approach, the comparison is between the prior conviction's elements of the offense with the elements of the generic offense. *Id*. 2285. If the "relevant statute has the same elements of the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate, so too if the statute defines the crime more narrowly"[157] But, a "state crime cannot qualify as ACCA if its elements are broader than those of a listed generic offense" *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016)[158]

Descamps held that "the sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set

[149] 495 U.S. 575 (1990).

[150] 544 U.S. 13 (2005).

[151] 133 S. Ct. 2276 (2013).

[152] 136 S. Ct. 2243 (2016).

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

[154] 495 U.S. 575 (1990).

[155] *Taylor*, 495 U.S. at 602.

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

[157] *Taylor,* 495 U.S. at 599.

[158] *Id.* at 602.

of elements."[159] In other words, the sentencing court cannot look at the documents as defined in *Taylor* in a trial conviction, or the documents set forth in *Shepard* in the context of a conviction upon a plea, in the categorical approach. It clarified that "Taylor recognized a 'narrow range of cases' in which sentencing courts – applying what we would later dub the 'modified categorical approach' -may look beyond the statutory elements to 'the charging paper and jury instructions' used in a case."[160]

In *Mathis*, the Court held that when the predicate conviction statute enumerates factual means of committing a single element of an offense, those alternative factual means are not elements of the offense. The sentencing court cannot use the modified categorical approach, *i.e.*, it cannot look beyond the fact of conviction to establish the defendant's conduct in the prior offense. Therefore, the "first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."[161] The Court went further and identified aids to be used to determine if the statute is defining elements or means, i.e., the use of State Supreme Court opinions, to review if the statute provides different punishments for each alternative, to review if the drafted statute "offer illustrative examples", and if the "state law fails to provide clear answers", the sentencing court may take a "peek at the record documents" to determine if the "listed items are elements of the offense."[162]

b. The Modified Categorical Approach

"When a prior conviction is for violating a 'divisible statute'—one that sets out one or more of the elements in the alternative, *e.g.,* burglary involving entry into a building *or* an automobile—a 'modified categorical approach' is used. That approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant's prior conviction."[163] "The modified approach serves – and serves solely – as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque."[164]

"Taylor and *Shepard* developed the modified categorical approach."[165] *Taylor* defined the approved documents for verdicts convictions, and *Shepard* applied *Taylor* to a case in

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

160 *Id*. at 2283-84.

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

162 *Id*.

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

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

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

which the prior conviction was the result of a guilty plea. In trial convictions the court is allowed to consult judicial records such as the indictment and jury instructions. In guilty plea convictions, the court's review is "limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[166]

The Fifth Circuit extended this list of judicial records to include New York Certificates of Disposition if it specifies the subsection under which the defendant was convicted,[167] and the Ninth Circuit included California Minute Entries.[168] On the other hand, courts typically may not rely on the description in a federal PSR,[169] California abstracts,[170] or police reports.[171]

The Fifth Circuit has allowed use of a police record from a state that allows "a complaint written by a police officer [to] be the charging document,"[172] and the Ninth Circuit has authorized courts to look at police records "to determine that [a] prior conviction was for selling marijuana" because the defendant had "stipulated during the plea colloquy that the police reports contained a factual basis for his guilty plea."[173] Similarly, while abstracts cannot be used to determine the nature of a prior conviction under the modified categorical

166 *Shepard*, 544 U.S. at 26.

167 United States v. Neri-Hernandes, 504 F.3d 587, 592 (5th Cir. 2007) (holding district court may rely on a New York Certificate of Disposition "to determine the nature of a prior conviction," but this evidence "is not conclusive and may be rebutted," such as "where the defendant shows a likelihood of human error in the preparation of the Certificate").United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008) (holding certificate of disposition did not support enhancement because it did not specify which subsection of a statute with multiple parts was the basis of conviction);

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

169 *See, e.g.*, United States v. Garza-Lopez, 410 F.3d 268, 274 (5th Cir. 2005) (holding the court may not "rely on the PSR's characterization of the [prior] offense in order to make its determination of whether it [fit within one of the categories in §2L1.2]").

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

171 *See, e.g.*, *Shepard*, 544 U.S. at 16; United States v. Almazan-Becerra, 482 F.3d 1085, 1090 (9th Cir. 2007) (noting "[t]he Supreme Court appears to have foreclosed the use of police reports in a *Taylor* analysis" but that such reports may be used when stipulated to by defendant).

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

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

approach, they may be used to establish the fact of conviction or the length of a prior sentence.[174]

In the absence of supporting documents that limit the scope of a conviction under an overbroad statute, the enhancement does not apply.[175]

2. Crime of Violence

The guideline continues to use the term "crime of violence,"[176] although now solely in reference to the 2-level enhancement for three or more misdemeanors convictions at subsections(b)(2)(E) and (b)(3)(E). The definition of "crime of violence" in Application Note 2 conforms with the definition adopted in the career offender guideline effective August 1, 2016.[177]

The guidelines define crime of violence as a set of enumerated offenses, or a crime that has as an element the use, threat of use, or attempted use of physical force against a person. Courts have held that a conviction need not fit within both groups in order to qualify for an enhancement.[178] In general, the inquiry for the first set of crimes is simply whether the offense of conviction can properly be classified as one of the enumerated offenses.[179] For

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

[175] *See, e.g.,* United States v. Pimentel-Flores, 339 F.3d 959 (9th Cir. 2003) (holding conviction for "assault in violation of a court order" could not categorically be a crime of violence where the government did not provide statute of conviction).

[176] For statutory purposes, the definition of crime of violence continues to rely on the definition in 18 U.S.C. § 16. We note there is a circuit conflict as to the residual clause in § 16(b). *See*, *e.g.*, United States v. Vivas-Ceja, 808 F.3d 719, 723 (7th Cir. 2015) (applying *Johnson* to invalidate the § 16(b) residual clause in a case arising under §2L1.2); Dimaya v. Lynch, 803 F.3d 1110, 1118-19 (9th Cir. 2015) (invalidating the § 16(b) residual clause in an administrative immigration case); United States v.Hernandez-Lara, No. 13-10637, 2016 WL 1239199, at *1 (9th Cir. Mar. 29, 2016) (extending *Dimaya* to the criminal context). *But see* United States v. Taylor, 814 F.3d 340, 379 (6th Cir. 2016) (declining to invalidate the residual clause at 18 U.S.C. § 924(c)(3)(B), while noting that it "appears identical . . . in all material respects" to the § 16(b) clause); and *See* United States v. Gonzalez-Longoria, *reh'g en banc,* 831 F.3d 670 (2016), holding that § 16(b) clause was not unconstitutionally vague on its face and as applied to the defendant.

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

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

[179] Only the Fifth Circuit uses a "common sense approach" in connection with the categorical approach when interpreting a guideline's enumerated offense category that is based on common law crimes. *See* United

the second group, the court must look at the specific elements of the offense and determine whether one of those establishes "the use, attempted use, or threatened use of physical force against the person of another."[180]

3. What Convictions Constitute A "Drug Trafficking Offense"

Application note 2 to §2L1.2 defines a drug trafficking offense as "any offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[181] This definition is slightly different from the one described in the career offender guideline. The career offender guideline's drug trafficking offense definition does not include an offer to sale controlled substance offense.

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

To qualify for enhancement under the "categorical approach" as a "drug-trafficking" conviction, all of the conduct covered by the statute of conviction must fit within this definition of drug trafficking. If some of the conduct does not, the conviction does not qualify for an enhancement.[182] For statutes that include trafficking and non-trafficking

States v. Martinez-Flores, 720 F.3d 293 (5th Cir. 2013); United States v. Tellez-Martinez, 517 F.3d 813, 814 (5th Cir. 2008); United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005). To determine the generic, contemporary meaning of non-common-law enumerated offenses, the Fifth Circuit employs a "plain meaning" approach, as recently set forth in *United States v. Rodriguez,* 711 F.3d 541 (5th Cir. 2013) (en banc). The plain meaning approach relies only on legal and other well-accepted dictionaries and does not require a survey of statutes. *Id.* at 552-53. No other circuit court follows the Fifth Circuit's common sense approach, except to the extent that certain courts exhort the use of "common sense" as a general matter in determining whether a conviction fits within a category of crimes. *See, e.g.,* United States v. Johnson, 417 F.3d 990, 999 (8th Cir. 2005) (utilizing categorical approach and indicating that circuit's prior cases "teach that we must take a common sense approach in evaluating the risks created by, and the likely consequences in the commission of, the crime"), *overruled on other grounds by* United States v. Lee, 553 F.3d 598 (8th Cir. 2009); United States v. Griffith, 455 F.3d 1339, 1345 (11th Cir. 2006) (employing a modified categorical approach; faulting Ninth and Seventh Circuits for illogical results in similar cases; and stating "[w]e will stick to the common sense approach and result where we can, and here we can"). and, in fact, the Ninth Circuit has expressly foreclosed resort to the Fifth Circuit's common sense approach. United States v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009); *see also* United States v. Baza-Martinez, 464 F.3d 1010 (9th Cir. 2006) (faulting Fifth Circuit's use of common sense approach in case involving sexual abuse of a minor).

[180] USSG §2L1.2, comment. (n.2).

[181] *Id*.

[182] *See, e.g.,* United States v. Maroquin-Bran, 587 F.3d 214 (4th Cir. 2009) (holding conviction for selling or transporting marijuana, in violation of Cal. Health & Safety Code § 11360(a), is not categorically drug trafficking, because transporting marijuana would not trigger the sentencing enhancement); United States v.

offenses (such as selling and transporting), the modified categorical approach is used, and the court can examine the *Taylor-Shepard*-approved documents to identify the offense of prior conviction and then compare the elements of such offense to the drug trafficking definition. If the documents are ambiguous or silent, no drug trafficking enhancement applies.

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

Under the plain language of § §2L1.2(b)(1)(A)(i) and its application note, and applying the categorical approach, the offense of "possession with intent to distribute" qualifies for a "drug trafficking offense" enhancement.[183]

IV. CRIMINAL HISTORY

Under §2L1.2, a single prior conviction may increase a defendant's sentence in three ways: (1) an enhancement under §2L1.2(b)(1); (2) criminal history points under §4A1.1(a), (b), or (c); and (3) status points under §4A1.1(d). Courts have consistently rejected the argument that considering a defendant's prior convictions in calculating both offense level and criminal history is impermissible double counting.[184] In some cases, courts have relied on §4A1.3 to increase a sentence based on underrepresented criminal history.[185] In contrast, one court held that, to the extent that an upward departure was

Almazan-Becerra, 482 F.3d 1085 (9th Cir. 2007) (holding conviction for transporting methamphetamine in violation of Cal. Health & Safety Code § 11379 was not drug trafficking because it could be based on transportation of personal use quantity); United States v. Garza-Lopez, 410 F.3d 268 (5th Cir. 2005) (holding conviction for transporting drugs in violation of Cal. Health & Safety Code § 11379(a) was not categorically drug trafficking because § 11379(a) included offers to transport for personal use and offers to distribute a controlled substance). Note that Application Note 1(b)(iv) has since been amended to include an offer to sell. USSG App. C, amend. 722 (eff. Nov. 1, 2008).

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

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

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

based on a prior, uncharged illegal entry, the sentencing court erred because there was nothing "unusual" about the illegal entry.[186]

A related issue deals with the application of §4A1.1(d) to defendants who are "found" while serving a jail sentence on an unrelated state matter. Courts have held that illegal reentry is a continuing offense that "tracks the alien 'wherever he goes,'" including into state custody following conviction for a crime committed after returning to the United States.[187] Thus, courts have held that an alien who is "found" by immigration officials while in state custody has committed the § 1326 offense "while under a sentence of imprisonment" and thus subject to a two-point increase under §4A1.1(d).[188] But, the court may consider a downward departure based on time in state custody.[189]

Note also that the cross-designation program (the 287(g) program) may affect the "found in" date, and thus whether or not the defendant was "under a sentence of imprisonment" when he committed the § 1326 offense. Specifically, the Fourth Circuit has held that immigration authorities have actual knowledge of an immigrant's presence in the United States when a law enforcement officer participating in the cross-designation program issues an immigration detainer.[190] In *Sosa-Carabantes*, the Fourth Circuit concluded that, since the defendant had not yet been sentenced prior to issuance of the immigration detainer, the district court erroneously applied the two-point increase under §4A1.1(d).[191]

V. DEPARTURES

Courts have discussed several grounds for imposing a sentence outside the guideline range established by §2L1.2.

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

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

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

[189] *See* §2L1.2 comment. (n. 6).

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

[191] *Id.*

A. EARLY DISPOSITION PROGRAMS - §5K3.1: "FAST TRACK"

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

Because these programs have not been available in all districts, defendants have argued that the unavailability of fast track programs constitutes an unwarranted disparity. Although the circuit courts have uniformly rejected claims that the unavailability of fast track programs violates equal protection,[192] the circuits have split over whether *Kimbrough* permits district courts to consider purported disparities created by the unavailability of such a program in some districts. The Fifth, Ninth, and Eleventh Circuits have held that district courts may not consider disparities created by the unavailability of fast-track programs,[193] while the First, Third, Sixth, Seventh, Eight, and Tenth Circuits have concluded that a district court may consider these disparities.[194] The Second Circuit has held that defendants in non-fast-track districts are not "similarly situated" to defendants in fact-track districts, and thus, "sentencing disparities resulting from the existence of fast-track districts are not *per se* unwarranted."[195]

In 2012, the Department of Justice issued a policy memorandum for the purpose of establishing fast track programs in every district.[196] Because fast track programs have not yet been established pursuant to the policy memorandum, it is unclear how this policy change will affect sentencing arguments predicated on the availability and administration of fast track programs.

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

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

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

[195] United States v. Hendry, 522 F.3d 239, 241-42 (2d Cir. 2008).

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

B. COLLATERAL CONSEQUENCES

Another issue that confronts many reentry defendants is the collateral consequences of a reentry conviction. Because of their immigration status, undocumented aliens are ineligible for minimum security facilities and certain BOP programs, including the ability to finish their sentence in a halfway house. Courts generally have rejected these collateral consequences as grounds for a sentence reduction,[197] although one court has stated that "a downward departure based on collateral consequences of deportation is justified if the circumstances of the case are extraordinary."[198]

The *Guidelines Manual* does not specifically address whether or how a sentencing court should consider a defendant-alien's stipulation to an administrative or judicial order of removal. However, various circuits have considered whether the defendant's stipulation to removal is a permissible ground for downward departure. These circuits have uniformly concluded, or have at least recognized the possibility, that a district court may grant a departure in some circumstances based on the defendant-alien's stipulation to removal; no circuit has categorically barred a stipulation to removal as a basis for departure.[199]

In *Clase-Espinal*, the First Circuit held that a stipulation to deportation is insufficient as a matter of law to support a departure in the absence of a "colorable, nonfrivolous defense to deportation."[200] The Second, Third, Ninth, and Eleventh Circuits have similarly held that a stipulation to removal is a permissible ground for departure, though only when the defendant had a "colorable, nonfrivolous" defense to removal.[201]

The Eighth Circuit has focused on whether the defendant surrendered procedural rights and protections in stipulating to the removal, rather than looking only to whether the defendant forfeited non-frivolous defenses to removal. In *Jauregui*, the defendant was a lawful permanent resident who was convicted of possession with intent to distribute methamphetamine.[202] The defendant moved for, and received, a four-level departure for

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

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

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

[200] *Clase-Espinal*, 115 F.3d at 1059.

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

[202] *Jauregui*, 314 F.3d at 962.

stipulating to removal.[203] On the government's appeal, the Eighth Circuit affirmed and explained that the defendant, "as a resident alien, gave up substantial rights in waiving the administrative deportation hearing, and it was within the sound discretion of the district court to conclude that in doing so he has substantially assisted in the administration of justice."[204] The Eighth Circuit did not specifically analyze or discuss whether the defendant might have succeeded in opposing removal.[205]

Although the circuits generally agree that the defendant-alien must sacrifice *something* by stipulating to removal before receiving a departure, they are split on whether the district court may grant a departure over the government's objection. The Third and Tenth Circuits have held that a district court may not depart based on a stipulation to removal unless the government agrees to the departure.[206] This requirement flows from the "judiciary's limited power with regard to deportation."[207] The Second and Ninth Circuits have reached the opposite conclusion.[208] These courts have reasoned that requiring the government's agreement would create a condition for departure not required by the Guidelines.

C. Motive and Cultural Assimilation

Courts have generally held that the defendant's motive for reentry is not a basis for a downward departure.[209] Courts have recognized, however, that the defendant's motivation to care for a family member could mitigate his return, although such circumstances must

203 *See id.*

204 *Id.* at 964.

205 *See id.* at 962-63.

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

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

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

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

generally be exceptional.[210] Notably, one court upheld a sentence *increase* where the reentry was committed to facilitate the commission of another offense.[211]

The commentary to §2L1.2 provides that a departure based on the defendant's cultural assimilation may be appropriate, but only "where (A) the defendant formed cultural ties primarily to the United States from having continuously resided in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry and continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant."[212] In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court's refusal to grant this departure, where the district court found that the defendant was likely to recidivate (i.e., that the departure would likely "increase the risk to the public from further crimes of the defendant") given his past cocaine use, the seriousness of his criminal history, and his commission of criminal offenses after illegally reentering the United States.[213] In *United States v. Rodriguez*, the Fifth Circuit affirmed the district court's refusal to depart based on cultural assimilation, concluding that "[a]lthough cultural assimilation can be a mitigating factor and form the basis of a downward departure, nothing requires that a sentencing court must accord it dispositive weight."[214]

D. Seriousness of Prior Offense

The court may depart if the applicable enhancement substantially understates or overstates the seriousness of the prior conviction. The length of the sentence imposed for the prior conviction, the remoteness of prior conviction and not receiving criminal history

[210] *See, e.g.*, United States v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006) (finding motivation to be reunited with family and fact that prior conviction was 14 years old, though relevant, did not require a nonguideline sentence); United States v. Sierra-Castillo, 405 F.3d 932 (10th Cir. 2005) (holding departure based on family circumstances was not appropriate where defendant returned to care for his sick wife but did not show that he was the only person capable of caring for his wife); *Saucedo-Patino*, 358 F.3d at 794 (holding defendant did not qualify for a departure under §§5H1.5 & 5H1.6 where none of the specific aspects of his employment history or family responsibilities were so exceptional as to take his case outside the heartland); United States v. Carrasco, 313 F.3d 750 (2d Cir. 2002) (finding departure not warranted where defendant was separated from his wife; provision of financial support for three children was not exceptional circumstance); United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995) (stating defendant's motivation to reenter to visit his family, absent extraordinary circumstances, may not justify downward departure).

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

[212] *See* USSG §2L1.2 comment. (n. 7). See also USSG App. C, amend. 740 (eff. Nov. 1, 2010) (explaining the guideline amendment).

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

[214] United States v. Rodriguez, 660 F.3d 231 (5th Cir. 2011) (quotations omitted).

points, and the actual time served for the prior conviction are factors that may be taken into consideration for purposes of the departure.[215]

IMMIGRATION FRAUD OR MISCONDUCT

This section of the primer provides a general overview of the statutes, sentencing guidelines, and case law related to fraud or misconduct during the immigration process.

I. STATUTORY SCHEME

The most common offenses in this category typically carry a 5-year maximum and are sentenced under §§2L2.1 or 2L2.2.

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

This statute prohibits knowingly and willfully making false statements in applications for adjustment of status.

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

This statute also prohibits knowingly and willfully making false statements in an application to adjust status.

8 U.S.C. § 1325(c) Marriage Fraud

This statute prohibits marrying a person for the purpose of evading immigration laws.

[215] USSG §2L1.2 comment. (n. 5).

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

This statute prohibits establishing a commercial enterprise for the purpose of evading any provision of the immigration laws.

II. GUIDELINE OVERVIEW

Immigration fraud crimes can fall under two guidelines: §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

A. IMMIGRATION FRAUD - §2L2.1

1. ***Base Offense Level:*** 11.[216]

2. ***Specific Offense Characteristics:*** As with smuggling offenses, a reduction applies where (1) "the offense was committed other than for profit" or involved only the defendant's family.[217] The offense level is also increased based on (2) the number of documents, (3) reason to believe the documents would be used to facilitate a felony, (4) prior conviction for a felony immigration offense, and (5) fraudulent use of a passport.[218]

B. IMMIGRATION FRAUD - §2L2.2

1. ***Base Offense Level:*** 8.[219]

2. ***Specific Offense Characteristics:*** Enhancements apply if the defendant was (1) previously deported, (2) has a record of prior immigration offenses, (3) fraudulently obtained or used a passport, or (4) concealed his/her membership in, or authority over, a military

[216] USSG §2L2.1(a).

[217] USSG §2L2.1(b)(1).

[218] USSG §2L2.1(b)(2)-(5).

[219] USSG §2L2.2(a).

organization that was involved in serious human right offense; or committed the offense to conceal his/her participation in genocide or other serious human right offense.[220]

3. ***Cross reference:*** If the passport or visa was used in the commission of another felony (other than a violation of immigration laws), the guideline for attempt, solicitation, or conspiracy (§2X1.1) applies.[221] If death resulted, the homicide guidelines (§2A1.1–1.5) apply.[222]

C. SCOPE OF COVERAGE

A number of statutes are covered by both §2L2.1 and §2L2.2: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), 1255(a)(c)(6), 1325(b), and 1325(c); 18 U.S.C. §§ 1015(a)-(e), 1028, 1425, 1426, 1542, 1543, 1544, and 1546.

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

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

Regarding convictions under 18 U.S.C. § 1028, which prohibits fraud in connection with identification documents, §§2L2.1 and 2L2.2 apply, rather than §2B1.1, when "the primary purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status."[223] Courts have used this same reasoning to apply §2L2.1, instead of §2F1.1, to convictions for making a false statement under 18 U.S.C. § 1001 when the false statement is made in the immigration context.[224]

220 USSG §2L2.2(b)(1)-(4).

221 USSG §2L2.2(c).

222 *Id.*

223 USSG §2B1.1 comment. (n.9(B)); *see also* United States v. Shi, 317 F.3d 715, 718 (7th Cir. 2003) (holding §2L2.1 applied to a conviction under 18 U.S.C. § 1028 where "the immediate purpose of the offense was to violate a law pertaining to legal resident status").

224 *See, e.g.*, United States v. Kuku, 129 F.3d 1435, 1439 (11th Cir. 1997) (remanding conviction under 18 U.S.C. § 1001 for resentencing under §2L2.1 where "(1) the descriptive language of §2L2.1 more specifically characterizes [the defendant's] offense conduct than does §2F1.1; (2) Comment 11 to §2F1.1 suggests that [the defendant's] offense conduct is more aptly covered by §2L2.1; and (3) the loss-based method of sentence enhancement used by §2F1.1 does not suit the nature of [the defendant's] offense conduct").

Notably, 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.[225]

III. SPECIFIC GUIDELINE APPLICATION ISSUES

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

If the offense was committed other than for profit, or the offense involved . . . only the defendant's spouse or child . . . decrease by 3 levels.

One court refused this reduction where defendants' employment included preparing false asylum applications, despite the fact that their compensation was not specifically tied to specific illegal acts.[226] Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.[227]

Conversely, one court held it was inappropriate to depart upward based on a profit motive "unless there was a finding that the profit involved in the offense of conviction was of such a magnitude that the three-step increase in the offense level already added did not properly reflect the offense level of the offense of conviction."[228]

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

If the offense involved six or more documents or passports, increase by . . .

1. Number

The enhancement under this provision increases with the number of documents. The application notes explain that "[w]here it is established that multiple documents are part of

[225] *See, e.g.*, United States v. Principe, 203 F.3d 849 (5th Cir. 2000) (remanding sentence imposed under §2L2.1 for resentencing under §2L2.2 where defendant possessed three identification cards with her picture under different names).

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

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

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

a set of documents intended for use by a single person, treat the set as one document."[229] One court explained that documents will "constitute only one document even if used many times, by one individual, to perpetuate the same identity fraud."[230] For example, a set might include "a counterfeit passport, phony green card, and forged work papers."[231] In contrast, some documents are not a set, even though they will be used only one time by the same person.[232]

The application notes also provide that an upward departure may be warranted "[i]f the offense involved substantially more than 100 documents."[233]

2. Documents

Another issue deals with the scope of the term "documents." The guideline does not define "document," but courts have relied on the definition in 18 U.S.C. § 1028(d), concluding that the term "documents" includes not only "those documents that relate to naturalization, citizenship, or legal resident status" but also any "identification document."[234]

3. Involved

A final issue is whether certain documents were "involved" in the offense. One court reasoned that "'involved' does not mean 'produced,'" nor does it "refer[] only to completed documents"; rather, it "refer[s] to items 'draw[n] in,' 'implicated' or 'entangled.'"[235]

[229] USSG §2L2.2, comment. (n.2); *see also* Torres, 81 F.3d at 903-04 (holding the number of separate documents is not the same as the number of "sets of documents" and remanding for resentencing where the government did not establish how many sets were contained in the many separate documents it discovered).

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

[231] *Id.*

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

[233] USSG §2L2.1, comment. (n.5).

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

[235] United States v. Viera, 149 F.3d 7, 8-9 (1st Cir. 1998) (affirming 6-level enhancement where defendants had over 600 blank Social Security cards); *see also* United States v. Salazar, 70 F.3d 351 (5th Cir. 1995) (affirming enhancement based on hundreds of blank I-94 cards where defendant intended to use them to manufacture fake documents); *Castellanos*, 165 F.3d at 1131-32 (holding guideline applies to "blank" documents).

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

If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.

In deciding what constitutes "immigration laws" for purposes of this section, the Eleventh Circuit cited the definition in 8 U.S.C. § 1101(a)(17) to conclude that fraudulently obtaining a Social Security Card in violation of 42 U.S.C. § 408(a)(6) was not a violation of immigration laws, therefore allowing application of the 4-level enhancement.[236]

D. PRIOR DEPORTATION - §2L2.2(B)(1)

If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

A defendant who voluntarily leaves the country while the appeal is pending qualifies for this enhancement.[237]

E. DEPARTURES AND VARIANCES

1. National Security

§ 2L2.2 specifically authorizes an upward departure "[i]f the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity."[238]

Without relying on this provision, two cases have increased sentences based on national security/terrorism concerns. In one case, the Eleventh Circuit affirmed a 28-month sentence for conspiracy to produce identification documents, despite a guideline range of 15-21 months under §2L2.1, where the offense was linked to "widespread corruption" within the Florida Department of Motor Vehicles that "impact[ed] national security.[239] In

[236] 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)).

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

[238] USSG §2L2.2, comment. (n.5).

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

another case, the Second Circuit affirmed a 36-month sentence for possessing a counterfeit green card, despite a guideline range of 0-6 months under §2L2.2, where the defendant was involved in a bombing plot.[240]

2. Facilitating Another Offense - §5K2.9

One court affirmed a 24-month sentence for making false statements on a passport application, based on an upward departure from base offense level 6 to 15 and from criminal history category I to II, where evidence established that the crime was committed to facilitate another offense for which the defendant had never been convicted: the abduction of his children.[241]

3. Motive

One court reversed an upward departure based on the defendant's motive to escape punishment for sexual misconduct, reasoning that motive had already been adequately taken into account by the guidelines.[242]

[240] United States v. Khalil, 214 F.3d 111 (2d Cir. 2000).

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

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

APPENDIX A - ILLEGAL REENTRY PRE-NOVEMBER 2016