

Immigration

March 23, 2012

Unlawfully Entering or Remaining in the United States

2L1.2

and

8 U.S.C. 1325 and 1326

Statutory Penalties for Illegal Reentry

8 U.S.C. 1326

- With no prior 2 years
- With prior felony 10 years
- With “aggravated felony” 20 years

Note: These determinations are based on
statutory definitions

“Aggravated Felony”

- Defined at 8 U.S.C. 1101(a)(43)
- Only used in guideline for illegal reentry at 2L1.2(b)(1)(C)

Illegal Reentry - 2L1.2

(a) Base Offense Level

8

(b) Specific Offense Characteristics

(1) Apply the Greatest: If the Δ previously was deported, or unlawfully remained in the U.S. after –

(A) a conviction for a felony that was a (i) drug trafficking offense with sentence imposed > 13 mos., (ii) crime of violence, (iii) firearms offense, (iv) child porn offense, (v) national security or terrorism offense, (vi) human trafficking offense, (vii) alien smuggling offense **increase by 16 levels if conviction receives criminal history points under Chapter Four or by 12 levels if conviction did not receive criminal history points**

Illegal Reentry - 2L1.2 (cont.)

(b) Specific Offense Characteristics (cont.)

(1) (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less **increase by 12 levels** *if the conviction receives criminal history points under Chapter Four* or **by 8 levels** *if the conviction does not receive criminal history points*

(C) a conviction for an aggravated felony, + 8

(D) a conviction for any other felony, + 4

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, + 4

Guideline Terms
Defined at 2L1.2

“Felony”

§2L1.2, App. Note 2

- Any federal, state, or local offense punishable by imprisonment exceeding one year
- Does not matter that the offense may be classified as a misdemeanor in its respective jurisdiction

“Misdemeanor”

§2L1.2, App. Note 4(A)

Any federal, state, or local offense
punishable by imprisonment of
one year or less

Guideline Definitions for Prior Offenses

Listed at 2L1.2(b)(1)(A)

- Crime of violence
- Drug trafficking offense
- Firearms offense
- Child pornography offense
- National security or terrorism offense
- Human trafficking offense
- Alien smuggling offense

“Crime of Violence”

§2L1.2, App. Note 1(B)(iii)

- Means any of the following offenses under federal, state, or local law:
 - murder
 - manslaughter
 - kidnapping
 - aggravated assault
 - forcible sex offenses
 - statutory rape
 - sex abuse of a minor
 - robbery
 - arson
 - extortion
 - extortionate extension of credit
 - burglary of a dwelling

OR

“Crime of Violence” (cont.)

- Any **other** offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another

“Categorical Approach”

Categorical Approach

Taylor v. U.S.
495 U.S. 575 (1990)

Shepard v. U.S.
544 U.S. 13 (2005)

Conducting a Categorical Approach Analysis

1. Obtain and review statute of prior conviction

By examining the elements of the conviction, determine if ALL sections under the statute meet the definition in question

NOTE: Do not rely on title of statute of conviction alone!

Conducting a Categorical Approach Analysis (cont.)

2. If the statute has certain subsections that do not meet the definition in question, the court may look to appropriate court records to determine the subsection of the statute of which the defendant was convicted

NOTE: Examine mental states closely (*e.g.*, negligent, reckless)

Conducting a Categorical Approach Analysis (cont.)

3. To determine if the subsection of which the defendant was convicted meets the definition in question, the court will look to certain documents

These documents include:
charging instrument, jury instructions,
plea agreements, or any judicially ruled
documents

“Crime of Violence”

§2L1.2

- **Does not include** “substantial risk of physical force against the person or property”
- No requirement of “imprisonment for at least one year”
- May not be an “aggravated felony”

8 U.S.C. § 1101

- References 18 U.S.C. § 16, which includes “substantial risk of physical force against the person or property”
- “Imprisonment for at least one year”

“Drug Trafficking Offense”

- Means an offense under federal, state, or local law that prohibits the:
 - Manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or counterfeit substance) or
 - Possession of a controlled substance (or counterfeit substance) with intent to do any of the above
 - Note: simple possession does not meet this definition

“Simple Possession” and “Aggravated Felony”

- Simple possession offenses are not aggravated felonies
 - *See Lopez v. Gonzales*, 549 U.S. 47 (2006)
- An alien’s second or subsequent crime of state simple drug possession does not qualify as an aggravated felony
 - *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010)

Relationship of 2L1.2 and Chapter Four (Criminal History)

§2L1.2, App. Notes 1(A)(vii) & 6

- Prior convictions considered under 2L1.2 may also receive criminal history points under 4A1.1
- Juvenile adjudications cannot be used at §2L1.2 but can be used at Chapter Four

Departure Considerations at 2L1.2

- Seriousness of prior conviction (Application Note 7)
- Cultural assimilation (Application Note 8)

“Fast Track” Departures

§5K3.1

Early Disposition Programs

Smuggling, Transporting, or Harboring an Unlawful Alien

2L1.1

and

8 U.S.C. 1324(a) & 1326

Relevant Conduct & Multiple Counts

§ 2L1.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of 2L1.1, based on all relevant conduct

2L1.1(b)(2)

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

# of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
6 - 24	+ 3
25 - 99	+ 6
100 or more	+ 9

§2L1.1(b)(6)

- 2 level increase, with floor of 18, if offense involved intentionally or recklessly creating a substantial risk of death or bodily injury to another
- App. Note 6 provides examples
 - *e.g.*, carrying excess passengers

2L1.1(b)(7)

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

Death or Degree of Injury	Increase in Level
Bodily Injury	+ 2
Serious Bodily Injury	+ 4
Permanent or Life-Threatening Bodily Injury	+ 6
Death	+ 10

§2L1.1(b)(7) (cont.)

- Strict liability: Does not require that the injury or death be intended
 - *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002)
- Can apply both (b)(6) and (b)(7)

END