Immigration Primer: A Defender's Perspective

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I. INTRODUCTION

The Office of General Counsel for the United States Sentencing Commission has created an outstanding product in its Immigration Primer, which is provided as a resource in the training material for this seminar. In an effort to minimize redundancies with the Commission's comprehensive product, the following is tailored to provide a perspective on the issues discussed therein.

Should a defense counsel read the *Immigration Primer* and come away with a sense of despair, it is worth discussing the role of the Commission in sentencing and the purpose of its primary work product, the *Guideline Manual*. Prior to adoption of the *Guidelines*, a national study revealed "great variation among sentences imposed by different judges upon similarly situated offenders." *Mistretta v. United States*, 488 U.S. 361, 366 (1989). As observed in *United States v. Booker*, 543 U.S. 220, 253-54 (2005), "Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity." Presented with scenarios in which defendants received terms of imprisonment at the statutory maximum based on the mere fact of conviction, this uniformity in reigning in abusive use of judicial discretion would seem appropriate. This quest for uniformity known as the *Guidelines Manual* may have started with a notion of "fair sentencing" based on national norms, but few defense counsel would celebrate the outcome of sentencing under the mandatory Guidelines as fair. The uniformity found was oftentimes uniformly harsh. Such is not to impugn the motives of the Sentencing Commission as commands to punish defendants more severely often arrived in the form of Congressional mandates to increase offense levels or directives to reign in the exercise of prosecutorial discretion resulting in lenient sentences. In no area was this more true than it was in the evolution of immigration guidelines.

This result should come as no great surprise given the basic premise that the 'variation' referred to above includes sentences characterized as too lenient, too harsh, and everything in between. The uniformity sought through the application of the *Guidelines* is simply predictability — define certain offender and offense facts as relevant and discount the rest with phrases like "ordinarily not relevant". Upward and downward departures were viewed with disfavor, limited to the truly exceptional case. *See Koon v. United States,* 518 U.S. 81, 95 (1996)(discussing departure standard). The *Guidelines* became a model of unwavering predictability. Whether those Guidelines result in 'fair' sentences, in the sense of an absence of injustice, is another question entirely. When a defendant's story is coldly and clinically reduced to finite data points, much of the surplus represents the very facts found most sympathetic in traditional discretionary sentencing, facts such as motive for committing a crime. These facts do not lend themselves to quantification and thus are discarded for purposes of uniformity in sentencing. This represents a major failure in determinate sentencing.

Such is not to say the Sentencing Commission did not aspire toward a goal of fairness in sentencing. The men and women comprising the Commission warehouse and analyze sentencing data, thereby providing an invaluable resource in the form of a work product generated through exercise of the Commission's institutional role. *See Kimbrough v. United States*, 552 U.S. 85, 110 (2007)(discussing value of empirical data supporting individual guidelines). Individual guidelines and amendments are often produced through feedback from representatives of all members of the legal community. While it is important to acknowledge the importance of the Guidelines as a guide to sentencing courts rather than a mandate, it is equally important for practitioners to remember that many guidelines do not reflect an assimilation of national sentencing data but rather reflect policy directives or logical approximations of statutes ungrounded in data. Every defense counsel representing a client in federal court should know the nature of a guideline, including the basis for numeric values used to establish base offense levels or adjustments. For example, a few initial considerations should be are those numbers the product of national sentencing data applicable to similarly situated defendants, are those numbers simply numbers derived from a line drawn between statutory sentencing data points, or are those numbers the product of a Congressional "call to arms" directing the Commission to increase sentences as a harsher deterrent to crime?

In the latter two cases, opinions are injected into what is otherwise a relatively scientific process. After the *Guidelines* were reduced to an advisory role by the United States Supreme Court in *Booker*, such opinions provide ample grounds to reject guideline formulae. *Kimbrough* reflects approval of such objections. The immigration guidelines are not immune from these considerations. As such, in approaching sentencing on immigration offenses, (1) calculate the sentence under the *Guidelines* as required, (2) consider any possible grounds for departure, then (3) question the validity of the calculations. Ultimately the *Guidelines* are simply a tool in the overall sentencing procedure, a text to be consulted by a sentencing court. As a form of advice to a court, it may be accepted or rejected as reasonable or unreasonable, wise or unwise, given the circumstances of an individual defendant. As no weight is legally accorded the *Guidelines*

calculations in sentencing, a practitioner should view the *Immigration Primer* as a correct application of the *Guidelines* prior to *Booker*, but far from definitive as far as sentences that may be imposed post-*Booker*.

Rather than proceed directly to an analysis of the immigration guidelines discussed in the Immigration Primer, it would seem useful to put those guidelines in a historical context through a discussion of the illegal reentry guideline, U.S.S.G. § 2L1.2, and the departure provided for early disposition programs, U.S.S.G. § 5K3.1.

II. EVOLUTION OF THE ILLEGAL REENTRY GUIDELINE

The original illegal reentry guideline in 1987 had a base offense level of 6 and a 2-level upward adjustment if the defendant had previously unlawfully entered or remained in the United States. This guideline was developed based on analysis of past sentencing practices. *See United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961 (E.D. Wis. 2005). In 1988, the base offense level was increased to 8. *Id.* In 1989, a 4-level increase for having a prior felony conviction was added. *Id.* at 962.

Then, in 1991, the Commission added a 16-level increase applicable to those with a prior aggravated felony conviction. *See* 8 U.S.C. § 1101(a)(43)(defining aggravated felony). The 16-level enhancement is viewed as "one of the most severe in the entire Guideline scheme." *See* James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation*, 9 GEO. IMMIGR. L.J. 451, 476 (Summer 1995). The Commission's stated reason for the enhancement was that:

> Previously, such cases were addressed by a recommendation for consideration of an upward departure . . . The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.

U.S.S.G., App C (amend. 375). But there is no evidence that any study or research recommended or supported "such a drastic upheaval" to §2L1.2. *Galvez-Barrios*, 355 F. Supp. 2d at 962. No study had been done to determine if such sentences were necessary or desirable. *Id.* Apparently, the 16-level increase was selected because one Commissioner, Michael Gelacak, suggested it, and the suggestion was adopted with relatively little debate. *See id.*

At the time the term "aggravated felony" was incorporated into §2L1.2, relatively few crimes fell within that definition in the immigration context. The statute included only murder, specified types of drug trafficking, specified types of illicit trafficking in firearms or destructive devices, and any attempt or conspiracy to commit such acts. *See* Linda Drazga Maxfield, *Aggravated Felonies and §2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 529 (Spring 2003); *see also* 8 U.S.C. § 1101(a)(43) (1990). But Congress added crimes to the term in 1990 and 1994, and, with the passage of the Illegal Immigration Reform and Immigration Responsibility

Act, the term was "expanded to include some crimes that might not be classified as a 'felony' . . . and might not convey the common expectation of especially dangerous 'aggravated' behavior." *See* Drazga Maxfield, at 529. Each time the term "aggravated felony" was expanded in the immigration context, the number of defendants subject to the 16-level adjustment under §2L1.2 increased.

Then, in 2001, the Sentencing Commission amended §2L1.2 to provide for graduated enhancements. This amendment was in response to the general dissatisfaction with the 16-level aggravated felony enhancement, especially among judges in southwest border districts. *Id.* at 530. The definition was too broad and captured many relatively minor, nonviolent offenses "motivated by family separation circumstances rather than sinister criminal intentions." *Id.* But even though the Commission amended the guideline in response to information on current sentencing practices, the starting point was the 16-level enhancement, introduced in 1991 without any empirical basis.

The Sentencing Commission has acknowledged the harsh effects of the enhancements. The guideline's enhancements have resulted in excessive sentences for immigration offenses. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 47 (2004) (guideline ranges for immigration offenses set above historical imprisonment levels). Given a history of escalating punishments for an offense susceptible to characterization as a form of criminal trespass, it is doubtful many in the defense community lamented the Supreme Court's decision in *Booker*.

III. OFFENSE LEVEL COMPARISON BETWEEN ILLEGAL REENTRY AND OTHER GUIDELINES

A guideline offense level is supposed to reflect the seriousness of that offense. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3 (1998). It is therefore a useful exercise to assess how the Guidelines characterization of illegal reentry, that is the base offense level of 8 and the base offense level modified by the adjustments of 16, 12 , 8 and 4, compares to other base offense levels assigned to other offenses defined by the *Guidelines*. In attempting to simplify this comparison, individual guidelines with multiple base offense levels were assigned the highest base offense level available. Guidelines requiring tabular references were not assigned values as the fact-specific nature of those determinations typically involves sentences based on actual offense conduct rather than recidivism and thus cannot reasonably be limited to a value. In such case, the *Guidelines* are said not to define a specific base offense level.

With the aforementioned constraints, if one were to consider each of the individual guidelines for each of the adjusted offense levels, one would find that (1) 57% of offenses exceed a base offense level of 8; (2) 41% of offenses exceed a base offense level of 12; (3) 33% of offenses exceed a base offense level of 16; (4) 30% of offenses exceed a base offense level of 20; and (4) 24% of offenses exceed a base offense level of 24. These results indicate the offense of

illegal reentry with a prior conviction is characterized by the Guidelines as more serious, more worthy of imprisonment, than 76% of the Guideline offenses.

This outcome appears unreasonable considering the offenses to which the Guidelines assign a lower base offense level. The resulting offense level of 24 after adding the 16-level upward adjustment, when compared to the base offense levels of other offenses, belies the irrational characterization of this offense in light of the inherent dangerousness of other offenses with lesser offense levels. The offense level of 24 exceeds the base offense level for involuntary manslaughter, U.S.S.G. §2A1.4, aggravated assault, U.S.S.G. §2A2.2, abusive sexual contact, U.S.S.G. §2A3.4, stalking or domestic violence, U.S.S.G. §2A6.2, and robbery, U.S.S.G. §2B3.1, to name only a few offenses. As such, the Sentencing Commission through these offense levels asks sentencing courts to conclude that a purely administrative, non-violent violation, entry without authorization of a United States official, poses a greater threat than approximately three-fourths of the offenses addressed by federal criminal law.

This offense level comparison further conflicts with traditional sentencing theory. Turning to classic criminal law theory, "[a]n offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute." *State v Horton*, 51 S.E. 945, 946 (N.C. 1905). Traditionally in sentencing, a *malum in se* crime, for example murder, rape and arson, received harsher punishments while *mala prohibita* crimes, or public welfare offenses, carried lesser penalties. Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 B.Y.U.L. REV. 521, 553 (1994). The sentences meted out by §2L1.2 do not recognize this practice. It has been noted "[i]llegal immigration appears to be the ultimate *malum prohibitum* offense; a person who, without force, disobeys a law she had no voice in making so that she can work hard at low wages to provide subsistence for herself and her family hardly seems culpable." Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 244 (2002). As noted above, the *Guideline* sentences for illegal reentry are severe, even when compared to offenses typically classified as *malum in se*.

As acknowledged by the Sentencing Commission and recounted in the history of §2L1.2 above, increased penalties defined by the guideline appear to be tied to Congressional calls to "get tough" on offenders unaccompanied by the traditional measures to guarantee such a result, such as mandatory minimum sentences. As one criminal law professor notes

> From 1992 to 2006 there was a 187% increase in immigration charges. From a small number to a bigger number, the numbers are still not overwhelming but the increase is quite dramatic. Today, 11.2% of the total federal inmate population - or 20,970 of the 187,241 inmates - consists of immigration offenders. Most of these inmates are not smugglers or terrorists. They are mostly people who came initially looking for work and then established their homes and families in this country. In addition to a large percentage of the corrections budget, significant federal prosecution resources have been used to target this group of people. As of 2004, immigration crimes

represented the single largest group of all federal prosecutions at thirty-two percent.

Sandra Guerra Thompson, *Latinas and Their Families in Detention: the Growing Intersection of Immigration Law and Criminal Law*, 14 WM. & MARY J. WOMEN & L. 225, 241(2008).

Regardless of the purported justifications for the higher sentences, whether terrorism concerns or failed attempts to restrict unsanctioned immigration into the United States, the burgeoning prison population and the character of the current inmates comprising that population stands as evidence of a system in which the criminal justice system is turned on its head. Regardless of the justification, a form of trespassing does not merit sentences greater than traditional *mala in se* crimes.

IV. OTHER PROBLEMS WITH THE ILLEGAL REENTRY GUIDELINE

The following subjects typically appear as grounds for variance requests. Acknowledging that variances may be outside the discussion topic, these concepts are nevertheless provided for purposes of addressing the structure of § 2L1.2 and further as a response to the Immigration Primer's rejection of many of the following as grounds for departures under the mandatory *Guidelines* regime. In reading the *Primer*, it is worthwhile to remember that precedent disfavoring departures does not apply to requests for variances. As such, these issues are very much alive in current sentencing practices.

A. DOUBLE COUNTING

Double counting occurs when a defendant's prior conviction is used both to enhance his offense level and to calculate his criminal history score. Most guidelines in Chapter 2 of the GUIDELINES MANUAL establish offense levels based on defendant's offense conduct. Guideline §2L1.2 bases the offense level on the defendant's criminal history. But that criminal history is already taken into account in calculating the defendant's criminal history category in Chapter 4. *See* U.S.S.G. §2L1.2, comment. (n.6). In this way, §2L1.2 double counts a defendant's criminal history. This double counting, while permitted by the guidelines, could be the basis for a below-guideline sentence.

"Although it is sound policy to increase a defendant's sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis." *Galvez-Barrios*, 355 F. Supp. 2d at 963. While it may be that illegal reentry defendants with serious felonies should be punished more severely—to protect the public from such dangerous persons or as a deterrent to reentry—these reasons "substantially overlap with those the Commission uses to justify increasing the defendant's criminal history score." *Id.* at 962.

Some illegal reentry defendants' prior convictions may subject them to even more than double counting. A prior conviction can be counted in the offense level, under §2L1.2(b), counted for criminal history points, under §4A1.1(a), (b) & (c), counted for criminal history

recency points, under §4A1.1(d) & (e), and result in a revocation sentence that may be run consecutively to the illegal reentry sentence, under §5G1.3.

Courts have given below-guideline sentences based on double counting. *See United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321 (N.M. 2005) (below-guideline sentence imposed, in part, to offset prior conviction being used to enhance both offense level and criminal history score); *United States v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005) (same).

B. NO REMOTENESS LIMITATION

A prior conviction can be used to enhance a defendant's offense level in §2L1.2 even if it is too old to be used in criminal history computation. *Compare* U.S.S.G. §2L1.2 *with* §4A1.1, comment. (n. 1, 2 & 3). So while a prior conviction may be too old to add months to a sentence through the criminal history calculation, it can still be used to add years to the sentence through the §2L1.2 offense level adjustments. The age of a prior conviction used for enhancement purposes in §2L1.2 could be the basis for a below-guideline sentence.

The Sentencing Commission has provided no explanation for this treatment of old prior convictions in §2L1.2. Numerous courts have simply accepted the guidelines' differing treatment of stale convictions without questioning the rationale for it. *See, e.g., United States v. King*, 516 F.3d 425, 428–32 (6th Cir. 2008) (discussing Chapter 2 and 4 treatment of stale convictions). The Seventh Circuit has suggested that "[t]he criminal history section is designed to punish likely recidivists more severely, while the enhancement under §2L1.2 is designed to deter aliens who have been convicted of a felony from re-entering the United States." *United States v. Gonzalez*, 112 F.3d 1325, 1330 (7th Cir. 1997).

Recently, however, the Ninth Circuit held that a within-guideline §2L1.2 sentence was substantively unreasonable because of the age of the prior conviction. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1052 (9th Cir. 2009). "Although it may be reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country, it does not follow that it is inevitably reasonable to assume that a decades-old prior conviction is deserving of the same severe additional punishment as a recent one." *Id.* at 1055–56. The court held that, while the "staleness of the conviction does not affect the Guidelines calculation, [ ] it does affect the § 3553(a) analysis." *Id.* at 1056.

Courts have given below-guideline sentences based on the age of the prior conviction. See *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (Neb. 2005) (sentence reduced, in part, because conduct resulting in +16 occurred almost 10 years before).

C. OVERBREADTH OF ENHANCEMENT CATEGORIES

Some of the enhancement categories under §2L1.2 are very broad. *See, e.g.*, U.S.S.G. §2L1.2(b)(1)(A)(I)–(vii) (16-level enhancement for prior convictions coming within certain

categories including "crimes of violence"); §2L1.2(b)(1)(C) (8-level enhancement for prior "aggravated felony" convictions). Many disparate offenses can come within the definitions. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A)–(U) (defining "aggravated felony" offenses). There are cases in which the defendant's prior conviction comes within the enhancement category, but the actual conduct involved does not merit such an extensive enhancement. *See, e.g., Zapata-Trevino*, 378 F. Supp. 2d at 1326–27 (holding that although 16-level enhancement applied, defendant's actual conduct underlying prior conviction was "trivial in nature"). The defendant's actual conduct underlying a prior conviction could be the basis for a below-guideline sentence.[1]

The 16-level enhancement includes a broad range of offenses, from terrorism offenses to a nonviolent alien-smuggling offense. *See, e.g., United States v. United States v. Tapia-Leon*, 193 Fed. Appx. 818 (10th Cir. 2006) (prior alien-smuggling conviction of defendant, an illegal alien, involved transporting illegal aliens within the United States by taking a turn driving). An offense can qualify for the 16-level increase even though it does not qualify as an aggravated felony and, therefore, would not merit the 8-level increase. *Compare* §2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(3)) (crime of violence definition for 16-level enhancement has no requirement for any minimum term of imprisonment to have been imposed) *with* 8 U.S.C. § 1101(a)(43)(F) (crime of violence definition for 8-level enhancement in §2L1.2(b)(1)(C) requires at least one year of imprisonment imposed).[2] In fact, this is a suggested departure ground in the guideline commentary. U.S.S.G. §2L1.2, comment. (n.7). The broad categories can lead to sentencing enhancement differences that are clearly without any empirical basis.

Courts have given below-guideline sentences based on the overbreadth of the enhancement category, after considering the actual conduct underlying a prior conviction. *See Zapata-Trevino*, 378 F. Supp. at 1326–27 (below-guideline sentence imposed because defendant's actual conduct in prior assault conviction did not warrant greater sentence);*United States v. Perez-Nunez*, 368 F. Supp. 2d 1265 (NM 2005) (same).

D. ILLEGAL REENTRY DEFENDANTS DO HARDER TIME

Being an illegal alien in U.S. prison system can create stricter circumstances of confinement. Frequently, illegal aliens spend time in immigration custody before charges are

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[1] There is also the danger that, in some cases, the defendant's actual conduct could be the basis for an above-guideline sentence. *See, e.g., United States v. Lemus-Vasquez*, 323 Fed. Appx. 343 (5th Cir. 2009) (district court imposed above-guideline sentence because 8-level enhancement was not sufficient to capture the seriousness of the prior offense).

[2] This situation arises not infrequently when the prior conviction is from a Texas state court because Texas has two forms of probation—"straight" in which a sentence of imprisonment is imposed and then suspended, TEX. CODE CRIM. PROC. ANN. § 42.12, §3 (2009); and "deferred adjudication" in which a sentence of imprisonment is not imposed, TEX. CODE CRIM. PROC. ANN. § 42.12, §5 (2009).

brought and after their sentence is served. The Bureau of Prisons (BOP) does not give the defendant credit for time spent in immigration detention. Illegal alien inmates "shall be housed in at least a Low security level institution." Bureau of Prisons, Program Statement, Inmate Security Designation and Custody Classification, P5100.08 Ch. 5, page 9 (9/12/2006). Illegal alien defendants are also ineligible for halfway house. *See* Chapter 4: Description of Drug Treatment Programs and Services, page 70, available at http://www.bop.gov/policy. In prison, they cannot participate in many of the programs available to U.S. citizens. They are often warehoused in private facilities that have harsh conditions and no programs whatsoever.

Courts have given below-guideline sentences because of the extra harsh treatment an illegal alien inmate will face. *See Zapata-Trevino*, 378 F. Supp. 2d at 1328 ("Because of his immigration status, Defendant may not be eligible for certain Bureau of Prisons programming, and must be placed, at the minimum, in a low-security facility rather than at a more relaxed 'camp.' Additionally, Defendant will not be eligible for early release.").

This can also be the basis for an argument against imposing a term of supervised release. Many courts impose a term of supervised release in illegal reentry cases but these terms are unsupervised. The primary purpose of supervised release is to ease a defendant's transition into the community and provide post-confinement rehabilitation assistance. *See United States v. Johnson*, 529 U.S. 53, 59 (2000). The illegal alien defendant gets none of the intended benefits of supervised release.

V. EARLY DISPOSITION PROGRAMS

Early disposition programs are now sanctioned as a possible basis for downward departure pursuant to § 5K3.1 of the *Guidelines*. This section provides for a downward departure of "not more than 4 levels" 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." *Id.*

The genesis of § 5K3.1 was the 2003 PROTECT Act. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, § 401(m)(2)(B), 28 U.S.C.A. § 994 (West 2009); U.S.S.G.§ 5K3.1 cmt. background (2009). The text of the policy statements mirrors the Congressional directive with no substantive change. See PROTECT Act § 401(m)(2)(B) ("the United States Sentencing Commission shall . . . promulgate, pursuant to section 994 of title 28, United States Code . . . a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney"). Given the source of this policy statement, an Act receiving widespread criticism for its treatment of courts and defendants alike, one can quickly assume § 5K3.1 was not good news. History confirms this assumption.

In reviewing the history of the early disposition departure, it is clear that Congress did not

invent the procedure in immigration cases. Early disposition programs, referred to colloquially as "fast track" programs, were utilized in San Diego in the mid-1990s, more than a decade before the PROTECT Act became law. *See United States v. Estrada-Plata*, 57 F.3d 757, 759 (9th Cir. 1995)(indicating fast track program was implemented by the U.S. Attorney's Office for the Southern District of California on July 22, 1993). This program permitted that U.S. Attorney's Office to manage the burgeoning caseload of immigrations cases threatening to overwhelm the judicial system as a result of Operation Gatekeeper in 1994. Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301-302 (Winter 1998)(offering insight on prosecution policy of the former U.S. Attorney for the Southern District of California). The fast track agreements produced sentences capped at 24 months for defendants "fac[ing] substantially more time under the Sentencing Guidelines" but who previously were convicted under misdemeanor sentences carrying terms of imprisonment of 60 to 180 days. *Id.* at 302. The original fast track program was undone by the Supreme Court's decision in *Almandarez-Torres v. United States*, 523 U.S. 224, 239-40 (1998), which characterizes prior convictions as sentence enhancements rather than elements of the offense, thus the effect of prior convictions could not be avoid by charge manipulation. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. AT 302 n.26. The fast track policy was modified in 1998 to reflect the effect of *Almandarez-Torres* in the Ninth Circuit by requiring a plea to two counts of 8 U.S.C. § 1325, resulting in a combined maximum of 30 months.

Congress chafed under what it perceived to be lenient sentencing by federal judges and sought to restrict the ability of those judges to deviate from the *Guidelines*. Its response was the PROTECT Act. Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: a Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517, 525-26 (Summer 2006). Attorney General John Ashcroft separately restricted the discretion of local agreements in the nature of the Southern District's fast-track agreement by requiring approval for "fast track" agreements contemplated by the policy as well as alternative agreements such as charge bargaining. Memorandum from Attorney General John Ashcroft to Federal Prosecutors (Sept. 22, 2003) (regarding department principles for implementing an expedited disposition or "fast-track" prosecution program in a district), *reprinted in* 16 FED. SENT'G. REP. 134 (Dec. 2003).

The effect of these changes was to confer a maximum of 4 levels in exchange for early plea agreements, which in the case of a 16-level adjustment represents an approximate difference of between 10 and 33 months, with a resulting term of imprisonment, assuming no criminal history, of 33 months prior to acceptance of responsibility and 24 to 30 months after factoring in acceptance. As noted previously, the 4 level adjustment is a maximum, thus programs may offer 1, 2 or 3 level reductions, further minimizing the possible benefit. It is further improbable that a defendant facing substantial adjustments would not face additional escalators through criminal history.

In its current form, some districts but not all use fast-track programs to induce quick guilty pleas in illegal reentry cases. These programs allow for up to a four-level downward departure to give defendants sentencing concessions in exchange for a prompt guilty plea and the waiver of procedural rights such as the right to appeal. *See* U.S.S.G. §5K3.1. As of March 2006, the Attorney General had approved programs in only 16 of 94 federal districts. *See* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 777 (2008). In districts with a "fast track" program, a defendant may receive a sentence on the average 17 months shorter, with a substantially greater prospect of a sentencing departure, than would a comparable defendant appearing in a district without such a program. *See United States v. Ramirez-Ramirez*, 365 F. Supp 2d 728, 732 (E.D. Va. 2005).

One of the stated purposes of the Sentencing Commission is to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). Despite the conclusion of the various Circuit Courts of Appeals cited in the *Immigration Primer*, the lack of "fast track" programs in certain districts contributes to he type of unwarranted disparity that the sentencing guidelines were meant to eliminate.

It should be noted that sentencing disparity in illegal reentry prosecutions was not created simply by "fast track" programs alone. Prior to the PROTECT Act, there was ample evidence of dissimilar sentencing outcomes for similar offenders attributable to "differing prosecution and plea practices in the districts." *See, e.g.*, Linda Drazga Maxfield, *Fiscal Year 2000 Update of Unlawful Entry Offenses*, 14 Fed. Sentencing Rep. 267, 269 (2002).

Courts have given below-guideline sentences based on the lack of a fast track program in their district. *See United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1030-31 (D. Neb. Feb 1, 2005) (imposing sentence below guideline range based in part on the "regional sentencing disparities that occur in the prosecution and charging of immigration offenses and [on the fact] that in other districts a similar defendant would not be prosecuted for illegal entry, but would be simply deported").

At present, there is a Circuit split as to whether the lack of a fast track program represents an appropriate ground on which to vary from a *Guideline* sentence. The Fifth Circuit has held that the sentencing disparities resulting from fast track do not reflect the sort of disparity by which a sentencing court may vary from the guideline range. *United States v. Gomez-Herrera*, 523 F.3d 554, 562 (5th Cir. 2008). In contrast, the First and Third Circuits have held that the fast track disparity is precisely the sort of disparity permitting a below-guideline sentence. *See United States v. Arrelucea-Zamudio*, No. 08-4397, 2009 WL 2914495 (3d Cir. Sept. 14, 2009); *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008) (holding that "consideration of

fast-track disparity is not categorically barred as a sentence-evaluating datum within the overall ambit of 18 U.S.C. § 3553(a)").

VI. ALIEN SMUGGLING, TRANSPORTING, AND HARBORING - U.S.S.G. §2L1.1

Turning now to commentary on topics offered in the Immigration Primer, the following observations are offered as to the alien smuggling guideline, U.S.S.G. §2L1.1.

A. Intentionally/Recklessly Creating Substantial Risk of Death/Serious Bodily Injury

The adjustment provided in *Guidelines* § 2L1.1(b)(6) requires a fact-specific assessment in determining "[i]f the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person." Application Note 5 provides illustrations of conduct qualifying for the adjustment, specifically "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, or harboring persons in a crowded, dangerous, or inhumane condition." These illustrations are not intended to be exhaustive of conduct qualifying for the adjustment.

As an illustration of this concept, it is not infrequent to see this adjustment proposed in a PSR in the Western District of Texas in cases involving aliens crossing the Rio Grande. Presented with this adjustment, defense counsel would be wise to consider the date of the offense conduct and review the climate data for El Paso on the day in question. As El Paso is not known for heavy rainfall, and the Rio Grande is less than grand during certain seasons (one can literally cross a dry river bed in certain areas), the act of crossing cannot be characterized as *per se* carrying a substantial risk of death or serious bodily injury. The same may not be true during the infrequent heavy rainfall when water drains rapidly from mountain ranges into the Rio, creating depth and current not typically present. All precedent cited in the *Immigration Primer* must be viewed through a fact-specific lens if not identical to the illustrative examples. Precedent may help frame an argument, but it likely will not be dispositive. As a matter of common sense, if you do not have a strong reaction to the factual scenario presented, the adjustment may well be inappropriate under the circumstances.

B. Resulting death or bodily injury

In contrast to§ 2L1.1(b)(6), which assesses a risk of injury or death, whether realized or not, § 2L1.1(b)(7) provides an adjustment specific to the degree of injury actually realized. The adjustment provides as follows: "If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury," followed by a table of offense level adjustments specific to the severity of injury received. It is worth noting that the adjustments are directed to "any person," implying injury to a co-defendant may support an adjustment. *Cf.* USSG, § 2H4.1(1)(A) ("[i]f *any victim* sustained permanent or life-threatening bodily injury,

increase by 4 levels" (emphasis added)).

VII. ILLEGAL ENTRY OR REENTRY - USSG §2L1.2

A. *Ex Post Facto* Considerations

Although addressed in the Immigration Primer under its §2L1.2 discussion, this concern reflects a concern applicable to a variety of Guidelines provisions and is not limited to this specific guideline. It is expected the *ex post facto* issue was raised in this context given the frequent amendments to § 2L1.2 that tend to implicate *ex post facto* concerns. The problem typically arises in cases which the current version of the *Guidelines* is applied as directed, *see* U.S.S.G. § 1B1.11(a)("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced"), when that defendant could have been sentenced under an earlier version that would have resulted in a lesser sentence. According to U.S.S.G. § 1B1.11(b)(1), "*If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause* of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." The *ex post facto* reference in this prefatory clause require a sentencing court to first determine if application of the current version of the Guidelines would violate the *ex post facto* clause. As *Booker* rendered the Guidelines advisory rather than mandatory, it is worth noting a line of decisions holding or suggesting that no ex post facto problem arises under the advisory regime. *See, e.g.*, *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006)(holding no ex post facto violation under non-binding *Guidelines*); *United States v. Castillo-Estevez*, 597 F.3d 238, 241 (5th Cir. 2010)(suggesting same without deciding). This analysis is thus no longer as straightforward as it was under mandatory *Guidelines* sentencing.

B. Adult Convictions

Presented with a Presentence Investigation Report in which criminal history is provided in chronological order likely accompanied by the age of the particular defendant at the time of the offense, this would appear to be a simple matter. Not necessarily. Application Note 1(A)(iv) provides that the adjustments based on prior convictions do "not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted." Thus, if a defendant is under 18, the conviction presumptively may not be used for purposes of an adjustment. However, if the Government comes forward with sufficient evidence that the applicable state law convicted the juvenile as an adult under state procedures, the presumption can be defeated. *See, e.g.*, *United States v. Pereira*, 465 F.3d 515, 517-18 (2d Cir. 2006). This requires an understanding of state juvenile law and review of documentary evidence supporting the conviction. It further requires that counsel consider that client's occasionally tell untruths as to their ages to avoid extended juvenile detention, thus the mere fact that a defendant is convicted as an adult when the PSR suggests otherwise does not require the conclusion that he or she proceeded through appropriate juvenile procedures to arrive at an adult conviction.

C. Delayed Adjudications

The Primer notes delayed adjudication "may qualify" as convictions for purposes of adjustments. The Fifth Circuit case relied on in this discussion observes a conviction, as required for any adjustment, requires "a formal judgment of guilt entered by the court or, if an adjudication of guilt has been withheld, where the judge has imposed some form of punishment, penalty, or restraint on the alien's liberty." *United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004). Not all deferred adjudication provisions require a formal declaration of guilt. Similarly, the alternative to a declaration of guilt, that a court impose "some kind of punishment" is sufficiently vague to preclude many adjudications. It is thus advisable to review the specific form of adjudication involved as states may have a variety of possibilities, with some qualifying as convictions and others not qualifying.

D. Categorical Approach

As discussed extensively in the *Immigration Primer*, *Taylor v. United States*, 495 U.S. 575 (1990), defines the categorical approach applicable to assessing whether a prior conviction qualifies under the *Guidelines* definitions. The Fifth Circuit has derived a "common sense" approach[3] from this categorical approaches specific to enumerated offenses within *Guidelines* definitions, while applying the *Taylor* categorical approach to virtually all other adjustment predicates. If an offense of conviction prohibits conduct that both would and would not qualify for a specific adjustment, then a limited universe of documentary evidence, specifically charging documents, plea agreements, plea hearing transcripts, or to some comparable judicial record, may be used to narrow the offense conduct consistent with *Shepard v. United States*, 544 U.S. 13 (2005). Use of these documents typically arises under the modified categorical analysis.

The basic approach of this analysis, however it is labeled, requires (1) review of documents supporting the conviction, eliminating those characterized as unreliable under Shepard, (2) review of the statute of conviction in the form it appeared at the time of the offense conduct, (3) review of the applicable Guidelines definition on which an adjustment is proposed, and (4) comparison of the Guidelines definition to the statute to determine if the Guidelines definition includes all conduct prohibited by the statute. If the Guidelines definition includes all prohibited conduct, the adjustment stands. If the *Guidelines* definition does not include all prohibited conduct, the adjustment does not apply unless the *Shepard* documents include sufficient evidence to prove that actual offense conduct falls within the *Guidelines* definition.

As with any legal research problem, it is tempting to simply find precedent concluding whether a particular statute has been held to be, or not to be, a "crime of violence," a "drug

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[3] *But see United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009)("We do not use the common sense approach. Instead, we must apply the categorical approach even when the object offense is enumerated as a *per se* crime of violence under the Guidelines. " (Internal quotation marks omitted).).

trafficking offense," etc. for purposes of the adjustments. The definition of "crime of violence" has evolved significantly since the inception of the *Guidelines*, even as to § 2L1.2. Prior to 2001, the 16-level adjustment for "crime of violence" was defined according to 18 U.S.C. § 16, which includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" and "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." By way of contrast, the current version of the definition of "crime of violence" set forth in Application Note 1(B)(iii) provides a list of enumerated offenses followed by the residual clause "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." The current version is distinct from § 16 as it does not consider force against property and does not contain the broad "substantial risk" determination of § 16(b). Section 16 is not, however, irrelevant to current sentencing practices as it stills applies to 8-level adjustments applicable to aggravated felonies by virtue of 8 U.S.C. § 1101(a)(43)(F).

The current definitions of "drug trafficking offense" and "crime of violence" have evolved substantially since 2001 in response to Circuit Court decisions. It is therefore worthwhile to verify the "crime of violence" definition considered in a decision does not exclude language that would affect the outcome of your case as modified to its current form. For example, state controlled substance offenses prohibiting "offers to sell" once fell outside the definition of "drug trafficking offense" set forth in Application Note 1(B)(iv). That is no longer the case. Similarly, Circuit Courts wrestled with the unqualified enumerated offense of "forcible sex offenses" on the question of consent crimes. The definition has recently been modified to "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced)." These amendments to *Guidelines* definitions obviously diminish the value of earlier precedent interpreting the adjustments.

If the evolution of a single definition were not enough, the Guidelines contain multiple definitions for "crime of violence." *See* U.S.S.G. §§ 2K1.3, 2K2.1, 2S1.1 (applying "crime of violence" definition applicable to career offenders of U.S.S.G. § 4B1.2); U.S.S.G. § 2L1.2 (independent "crime of violence" definition and § 16 through "aggravated felony" provision); U.S.S.G. § 2X6.1 (statutory definition); U.S.S.G. § 3B1.5 (§ 16 definition). Without setting forth the history of these various definitions, it suffices to say at one point in history the "crime of violence" definition of § 2L1.2 and § 4B1.2 relied on 18 U.S.C. § 16, then both section evolved toward substantially different definitions independent of § 16. This evolution unsurprisingly led to appellate decisions relating now distinct definitions, followed by attempts to reconcile differences between the definitions, concluding with cautions to avoid comparisons altogether. For purposes of reliance on precedent that conducts a categorical analysis, knowledge of this history can serve a helpful role in distinguishing unfavorable precedent but can be frustrating if a quick search disclosed a favorable case on the precise statute you are researching for purposes of an adjustment.

In discussing *Guidelines* definitions, it is worth noting that state labels are irrelevant in determining whether an offense satisfies the requirements of an adjustment. The majority of adjustments require conviction of a felony. According to Application Note 2, a felony is defined as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." As the definition considers only the maximum possible punishment under state law, it is entirely irrelevant whether the state considers the violation a misdemeanor or felony under its law. *See Burgess v. United States*, 553 U.S. 124, 129 (2008)(characterizing state labels as irrelevant in determining whether offense qualified as felony under Controlled Substance Act). It is thus impossible to ascertain whether an offense qualifies as a felony unless one first researches the maximum possible term of imprisonment under state law then compares that term to the felony definition provided in Note 2.

The problem of labels extends to the offense of conviction as well. For example, the fact a state may classify as a particular offense as manslaughter, an offense that would typically seem to qualify as a crime of violence, does not make it such. *See, e.g.*, *United States v. Dominguez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004)(declining to characterize state manslaughter offense permitting conviction on mens rea of criminal negligence as enumerated offense of manslaughter). *Taylor* makes it clear that not all burglaries qualify as generic burglary for purposes of enhancements. The common sense or generic definitions applicable to the enumerated offenses serving as the basis for adjustments under the *Guidelines* should be considered an approximation of the requirements for that offense nationwide. Prior to researching the definition of an enumerated offense under relevant Circuit law and comparing that definition to the elements of the applicable statute of conviction, the name assigned to a statute in an NCIC database query result should thus not be taken as dispositive in sentencing.

Finally, it is worth discussing the Immigration Primer's reference to *Lopez v. Gonzales*, 549 U.S. 47, 50 (2006), as its significance touches on the significance of labels. *Lopez* involved an immigration proceeding in which the respondent was found to have committed an aggravated felony involving "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)" pursuant to 8 U.S.C. § 1101(a)(43)(B), based on a conviction for possession of a controlled substance. The Supreme Court held that simple possession does not qualify as a felony, as required to satisfy the definition of "drug trafficking crime," but offered in a note the following statement: "[o]f course, we must acknowledge that Congress did counterintuitively define some possession offenses as 'illicit trafficking.'" *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006). This note has been taken by some Courts of Appeals to embrace a hypothetical application of the enhancement procedures under 21 U.S.C. § 851 to multiple simple possession convictions in elevating an offense from misdemeanor to felony. *See, e.g.*, *United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008). Unlike the typical analysis, this approach assumes the validity of state convictions through a hypothetical exercise of procedural safeguards, then compares the requirements for conviction to a federal definition. This peculiar approach is worth noting as it represents a collective application of the categorical approach. The approach has, however, been rejected in a majority of Circuits. *See United States v. Ayon-Robles*, 557 F.3d 110 (2d Cir. 2009); *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008);

Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

VIII. CONCLUSION

It is hoped that the foregoing provides useful guidance to those faced with immigration violations. The *Immigration Primer* provided by the Sentencing Commission offers an excellent compendium of the law of various Circuits, but law governing the interpretation of individual guidelines no longer stands as the final word in sentencing post-*Booker*. It is thus useful to know the basis for this law for purposes of questioning the validity of the presumptive sentences recommended by *Guidelines* calculations. If presumptive sentences reflect only the individual opinions of drafters unsupported by empirical sentencing data, then advocates may freely question the validity of the proposed sentence.