№

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

MARTIN AVALOS–RICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Ryan K. Culpepper
Culpepper Law Firm, PLLC
P.O. Box 70
Hot Springs, Arkansas 71902
Telephone: (501) 620-0857

CJA Counsel for Petitioner

QUESTIONS PRESENTED

Forty-one percent of federal offenders sentenced in 2016 were noncitizens. U.S. Sentencing Commission, Quick Facts, Non-U.S. Citizen Federal Offenders FY 2017. And despite the Guidelines instruction that district courts "ordinarily should not impose a term of supervised release" on a deportable offender unless compelled by statute, U.S. Sentencing Guidelines Manual § 5D1.1(c), district courts ordinarily do impose it: Last year, 56.5% of immigration sentences included supervised release. U.S. Sentencing Commission, 2018 Annual Report and Sourcebook of Federal Sentencing Statistics, at 67 ("2018 Sourcebook"). Two-thirds of noncitizen offenders, and three-quarters of reentry offenders, were sentenced in just five of the 94 federal districts. The Petitioner was sentenced for reentry after an aggravated felony in one of the other 89. Articulating only that its sentence was "based on the Sentencing Reform Act of '84 and considering the provisions of 18 U.S.C. § 3553," the district court imposed supervised release – and a 70-month custodial sentence. The questions presented are:

1. Whether a district court that imposes supervised release on a deportable offender must specifically tie it to a need for deterrence or protection, as the Third, Sixth, and Tenth Circuits hold; whether that provision is "hortatory" with no legal force, as the Fifth and Eighth Circuits hold; or whether Guidelines § 5D1.1(c) requires findings that can be satisfied by articulated support for the broader sentence, as the Second, Fourth and Ninth Circuits seem to hold.

2. Whether a presumption of reasonableness attends a sentence within a range established by Guidelines § 2L1.2, as amended in 2016, despite (i) evidence that the ranges established by the former § 2L1.2 seldom controlled sentences actually imposed

on reentry offenders and (ii) suggestions of a longstanding and significant geographic disparity in reentry sentences that Guideline does not address.

3. Whether a district court reversibly errs at sentencing by pronouncing only that its sentence is "based on the Sentencing Reform Act of '84 and considering the provisions of 18 U.S.C. § 3553."

* * * * *

If the Court grants review, with Petitioner's consent counsel will enlist an experienced member of this Court's bar as counsel of record for merits briefing and argument.

PARTIES INVOLVED

All parties are reflected in the case caption.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Martin Avalos–Rico respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, rendered in Case No. 18-1564 on March 22, 2019, affirming the judgment of the District Court for the Eastern District of Arkansas.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Martin Avalos–Rico*, 759 F. App'x 571 (8th Cir. 2019), was issued March 22, 2019, and is attached as Appendix A to this Petition. Pet. App. 1a. The unpublished order denying rehearing was issued May 3, 2019, and is attached as Appendix B. Pet. App. 4a.

JURISDICTION

The Court of Appeals filed its opinion in this matter on March 22, 2019. Petitioner's motion for rehearing was denied May 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

GUIDELINES PROVISIONS INVOLVED

§ 5D1.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (see 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Application Notes:

1. Application of Subsection (a). Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. Application of Subsection (b). Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. Factors to Be Considered.

(A) Statutory Factors. In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) the nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).

(B) Criminal History. The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) Substance Abuse. In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. See § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(D) Domestic Violence. If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. See 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. See 18 U.S.C. § 3583(d); § 5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.

4. Community Confinement or Home Detention Following Imprisonment. A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of § 5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

5. Application of Subsection (c). In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

* * * * *

The 2015 and 2016 versions of § 2L1.2 are included as Appendices D and E, but their content is not expected to be material.

STATEMENT

The district courts processed more than 18,000 reentry offenders in 2018. 2018 Sourcebook, at 129. The five districts on the southern border do a volume business, accounting for about three-quarters of reentry sentences nationally.

And reentry sentencing has demanded special treatment in the Guidelines. When the Sentencing Commission reviewed the supervised-release guideline in 2010, 91% of sentences imposed on noncitizen offenders – half of all offenders then – included supervised release. U.S. Sentencing Guidelines App. C. vol. III amend. 756, at 410 (Nov. 1, 2011). But supervised release for a deportable offender is not truly supervised. Those offenders "are not subject to traditional supervision in the United States[.]" U.S. Sentencing Commission, Federal Offenders Sentenced to Supervised Release, at 60 n.256 (2010). Rather, supervised release was a vehicle for the statutory authority to order deportation as a condition of release, 18 U.S.C. § 3583(d)(3); and for revocation if there was an unlawful reentry during release. *Id.*at 15 & 60 n.256.

The Commission found this unnecessary. First, the Commission noted a consensus in the circuits that authority to order removal "rests solely with the Executive Branch." *Id.* & n.72. And judicial removal was unnecessary because changes in immigration law had made removal "nearly an automatic result for a broad class of noncitizen offenders." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). The Commission therefore revised the supervised-release guideline to direct that district courts "ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." U.S. Sentencing Guidelines Manual § 5D1.1(c).

Custodial sentencing was likewise upended with the dramatic 2016 revision of the reentry guideline. Before November 2016, enhancements to the base offense level depended on the character of any convictions the offender sustained before being deported. *See, e.g.*, U.S. Sentencing Guidelines Manual § 2L1.2(b)(1) & app. n. (2015). An "aggravated felony" would yield an eight-level increase; and a conviction for a "drug trafficking offense" would trigger at most a 16-level increase. *Id.* § 2L1.2(b)(1)(A)–(C). But only the highest enhancement would apply.

After years of study, the Commission decided to adopt a sentence-imposed model for predicate convictions that would be simpler to administer. Amendments to the Sentencing Guidelines, at 24 (Apr. 28, 2016) ("2016 Amendments"). It also wished to address concern, revealed in part by sentencing practice, that the 16- and 12-level enhancements in § 2L1.2 were *too severe*. *Id.* Meanwhile the study yielded surprising statistics about the "ordinary" reentry offender.

For example, 92% of reentry offenders had been convicted of at least one non-traffic offense. U.S. Sentencing Commission Report on Illegal Reentry Offenses, at 16 (2015) ("2015 Report"), Pet. App. 42a. Nearly all who received the highest offense-level enhancements had a past conviction for a crime of violence or drug trafficking offense. *Id.* at 54a. Those offenders averaged 4.4 past convictions, including drug offenses or crimes of violence. *Id.* at 48a, 54a. Yet two-thirds were sentenced below their Guidelines ranges – ranges that peaked lower than the current ones. *Id.* at 54a. The median sentence for the worst offenders under study was just 30 months; the mean was 40 months. *Id.* at 48a.

Further, the typical reentry offender had been deported more than once. Indeed, an offender like Avalos–Rico with just two deportations is seated *better* than average: In 2015, reentry offenders had been deported a mean 3.2 times. *Id.* at 40a. Forty-two percent had been deported thrice or more. *Id.* at 41a. And 4.6 percent had been deported more than ten times. *Id.* The most deportations – in a sample – was 73. *Id.* at 40a. And, as relevant to deterring reentry, the Commission found that 67% of reentry offenders had some close family in the United States. *Id.* at 51a. Half had at least one child here. *Id.* at 25.

The resulting 2016 amendment to § 2L1.2 introduced a new enhancement analysis focusing on the length and timing of past sentences, not the types of offense. 2016 Amendments, at 24. The Commission added distinct enhancements for convictions before and after first deportation. And it allowed an additional enhancement when a past conviction included a reentry offense. U.S. Sentencing Guideline Manual § 2L1.2(b)(1)(A) (2016). The highest offense level went from 24 under the 2015 version of § 2L1.2 to 26.

But the Commission did not address the geographic disparity noted by commentators – including a border-district judge – and the Department of Justice itself. Following adoption of the fast-track program for reentry defendants, the District of New Mexico "went from a typical [reentry] sentence of 27 months in early 2003 to a 15-month sentence in 2013." Hon. James O. Browning & Jason P. Kerkmans, *A Border Trial Judge Looks at Immigration: Heeding the Call to do Principled Justice to the Alien without Getting Bogged Down in Partisan Politics: Why the U.S. Immigration Laws are not Broken* (*But Could Use Some Repairs*), 25 U. Fla. J.L. & Pub. Pol'y 223,

259 (2014). But many districts (including the Eastern District of Arkansas) have not implemented that program. And "[a]s a result, sentences in the District of New Mexico tend to be lower than the sentences in those districts." *Id.*

"In fact," Judge Browning noted, "outside the border districts, such as in the Northern District of Texas, some of the judges can give sentences that are twice as long as those given out in New Mexico for similar reentry crimes." *Id.* One defendant sentenced in his court to 18 months had received a 96-month sentence for an identical offense in that Texas district. *Id.* & n.297.

Those "fast track" departures "originated in southwestern border districts with an exceptional volume of immigration cases" and were meant to "address a compelling, and otherwise potentially intractable, resource issue."[1] But that "generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced[,]" and led the circuits to divide on addressing the disparity by variance. *Id.* at 2 n.4. Where variances were permitted, the courts were left to "impose sentences that introduce additional sentencing disparities." *Id.* at 2 & n.4.

[1] U.S. Department of Justice, Memorandum to All U.S. Attorneys, at 1 (Jan. 31, 2012) ("2012 Memo"), available at https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf.

Necessarily there is also a steep contour, district to district, in reentry-sentencing expertise. In 2017 the seventeen-judge Western District of Texas sentenced 3,965 immigration offenders.[2] The seven-judge Eastern District of Arkansas sentenced nine.[3]

a. Proceedings in the Trial Court

Martin Avalos-Rico came to the attention of immigration authorities in Little Rock, Arkansas in June 2017 after a scuffle. He was charged with illegal reentry after an aggravated-felony conviction for conspiracy to possess with intent to distribute cocaine and aiding and abetting possession with intent to distribute that drug. 8 U.S.C. § 1326(a) & -(b)(2). He also had a reentry conviction and a federal conviction for purveying false identification documents. He had been deported twice.

He pleaded guilty with no plea agreement. Early in the sentencing hearing, hints of trouble emerged. When the court asked Avalos-Rico if he was satisfied with counsel, he said "Up until now, yes." Pet. App. 6a. When counsel offered no objections to the presentence report, the court asked Avalos–Rico for objections of his own. *Id.* at 7a. He replied, "I was under the understanding that my level was 46 and it went up to 70 when I pled guilty." The court confirmed that it had warned he could not withdraw his guilty plea in response to a Guidelines surprise. But it did not otherwise engage or explain the discrepancy. The court reviewed the Guidelines calculation and

[2] U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2017, Western District of Texas, at 2.

[3] U.S. Sentencing Commission, Statistical Information Packet for Fiscal Year 2017, Eastern District of Arkansas, at 2.

that custody range. *Id.* at 8a. Moving through the sentencing options, the court asked, "I believe that I should not impose a term of supervised release if he's deportable who will likely be deported after imprisonment; is that correct?" Both parties said yes.

The Eastern District of Arkansas, which sees nine immigration offenders a year, had no fast-track program for noncitizens. Avalos–Rico's counsel did not cite that as grounds for variance. Rather, she asked for a variance to 36 months in view of Avalos–Rico's hard work as a construction worker, and because he had promptly pleaded guilty and wished to spend time with his aging parents in Mexico. *Id.* at 9a–10a. No sentencing memoranda had been filed. Counsel of record for the United States was not present. Stand-in counsel responded, "I think [counsel of record] would like for the court to impose a guideline sentence and she believes that would be appropriate under the circumstances of this matter." *Id.* at 10a.

When the parties rested, the district court confirmed the Guidelines custody range and imposed sentence:

> Based on the Sentencing Reform Act of '84 and considering the provisions of 18 U.S.C. § 3553, it's the judgment of the Court that Mr. Martin is committed to the custody of the Bureau of Prisons for a term of — I have to think about this another minute. There will be a term of 70 months in the custody of the Bureau of Prisons. I recommend that he participate in educational and vocational programs in incarceration.
>
> On release from imprisonment, if he is not deported, he'll be on supervised release for three years, and he'll have to report to the probation office in the district to which he's released within 72 hours of release from the custody of the Bureau of Prisons.
>
> Of course, he'll have to comply with all mandatory and standard conditions that apply. If he's deported, the special condition of supervised release is that he will not be allowed to return to United States during the period of supervised release. If he does return, it will be considered a violation of supervised release.

Id. at 10a–11a.

The hearing had lasted 15 minutes. No one pressed the presumption against supervised release or requested a fuller explanation for the sentence.

Avalos-Rico timely noticed an appeal. With it, his lawyer informed the district court that her client was requesting she withdraw and that his grounds for appeal "exclusively consist[ed]" of ineffective assistance.

b. Briefing in the Court of Appeals

Through new counsel, Avalos-Rico argued the district court had plainly erred and departed from § 5D1.1(c) by imposing supervised release without tying that sentence to a special need to deter. By adding the special condition forbidding reentry during the release term even *with* permission from the Executive, the district court had struck a balance with the political branches that was the reverse of what the Commission intended.

Further, he argued the district court failed to explain its sentence as required by *Rita* and *Gall*. And the unexplained sentence enjoyed no saving presumption of reasonableness because the Commission's 2015 Report, Pet. App. 42a, suggested the reentry guideline did not reflect either the past or predicted actual sentences for most offenders. Rather, he argued that § 2L1.2 appeared to have been crafted to yield appropriate sentences in the high-volume border districts at the expense of offenders sentenced elsewhere. And in his reply brief, he cited two decisions from this Court issued after the Government's brief was filed.

c. This Court's Decisions from the 2018 Term

In *Rosales-Mireles v. United States*, this Court held that double-counting a conviction in a PSR was a plain error that justified remand though the petitioner's sentence fell within both the assumed Guidelines range and the correct one. 138 S. Ct. 1897, 1908 (2018). The Court observed that resentencing for a Guidelines error does not carry the adjudicative costs that have led courts to limit plain-error relief in other settings: "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* at 1908 (quotation omitted).

Avalos-Rico argued those same considerations lessened his need to show remand would produce a new result because "the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Id.* at 1908 (internal quotations omitted). The Government had argued in the Court of Appeals, as two dissenting justices contended in *Rosales–Mireles*, that an offender's history of entering the country illegally, using aliases, and committing crimes meant his sentence could remain in place despite a procedural hiccup. *Id.* at 1915 (Thomas, J., dissenting).

But the majority in *Rosales–Mireles* held that substantive reasonableness "is an entirely separate inquiry from whether an error warrants correction on plain error review." *Id.* at 1910 (majority opinion). Moreover, "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings." *Id.*

The second decision, *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018), addressed "one aspect of the judge's obligation to provide [sentencing] reasons": How

thoroughly a district court must explain its choice of a particular modified sentence when a Guidelines amendment compels a sentence reduction. *Chavez-Meza*, 138 S. Ct. at 1963; *see also* 18 U.S.C. § 3582(c)(2). That petitioner had been sentenced at the bottom of a Guidelines range. 138 S. Ct. at 1964–1965. But without a new hearing, or any particularized explanation, the district judge resentenced him in the middle of the amended range. *Id.* at 1965. The petitioner argued the district court had not adequately explained that choice.

Without deciding that *Rita*'s explanation requirement applied to a modification proceeding, the Court held the explanation was adequate on the whole sentencing record. The original sentencing hearing had included a reasoned – and articulated – review of facts embraced by § 3553(a). The judge had denied the petitioner's request for a variance and explained that his sentence would be "high in this case," though a low-end Guidelines sentence, because the defendant had distributed methamphetamine, and during the judge's long tenure he had seen that drug's potential to destroy lives and communities. *Id.* at 1966–1967.

This Court held those remarks "strongly suggest[ed] that the judge [had] originally believed" that the *particular* Guideline sentence was appropriate. *Id.* at 1967. Given the simple facts that guided the original sentence, it was within that judge's discretion to explain a modification by certifying simply that he had "'considered' [the defendant's] 'motion' and had 'tak[en] into account'" the § 3553(a) factors and Guidelines policy statements, "minimal as [that explanation] was". *Id.* at 1967–1968.

Avalos–Rico urged that by emphasizing that a § 3582(c)(2) modification "is not a plenary resentencing proceeding" and relying on the orally articulated reasons for the

original sentence, the Court implied that the district judge could not merely have certified at the original sentencing that he had considered the relevant facts and law. *See Chavez-Meza*, 138 S. Ct. at 1966–1967 (majority) & 1968 (Kennedy, J., dissenting). Moreover, Avalos-Rico argued that *Chavez-Meza* teaches that a district court's oral explanation at original sentencing can be decisive in later proceedings, where any *Rita* issues could recur. Then, as Justice Kennedy warned, "[w]hat could have taken a sentence or two at the front end now can, and likely will, produce dozens of pages of briefs, bench memoranda, orders, and judicial opinions as the case[s] make[their] way first to the appellate courts, then back down to the trial court and perhaps back to the appellate court again." 138 S. Ct. at 1971 (Kennedy, J., dissenting).

d. The Decision Below

After briefing closed, the Court of Appeals decided *United States v. Hernandez–Loera*, 914 F.3d 621 (8th Cir. 2019). The Court joined the circuits that had held § 5D1.1(c) is "hortatory, not mandatory." *Id.* at 622. And in March, a few months after removing Avalos–Rico's case from the argument calendar, the court affirmed the judgment in an unpublished per curiam opinion. *United States v. Avalos–Rico*, 759 F. App'x 571 (8th Cir. 2019), Pet. App. 1a.

Relying to an unusual degree on quotes from *Hernandez–Loera* and its sentence-explanation precedents, the court held that imposing supervised release without citing a special need for deterrence was "not reversible error" because the district court "knew that Avalos–Rico's conviction was his third federal crime, and that after each previous term of imprisonment he was deported and then illegally reentered the United States." *Id.* at 2a. It avoided the separation-of-powers issue in the special condition by assuming

the district court intended it to apply "*unless* Avalos–Rico receives permission to reenter from the Department of Homeland Security." *Id.* at 2a n.2 (emphasis original). And, acknowledging that the district court "might have said more" at sentencing, it held that court was "required only to make clear that it considered the § 3553(a) factors" and did not plainly err by failing to provide a more detailed explanation. *Id.* at 2a.

The court affirmed Avalos–Rico's sentence, including the 70-month custodial sentence, as presumptively reasonable. *Id.* at 3a. It did not address Avalos–Rico's argument that no presumption should apply. *Id.* at 3a. It did not address *Roseles–Mireles* or *Chavez–Meza* either.

The Court of Appeals denied rehearing May 3, 2019 in a one-sentence order. *Id.* at 4a. This Petition followed.

REASONS FOR GRANTING THE WRIT

Issues in reentry sentencing are meaningfully considered perhaps once in each circuit and then applied at scale in unpublished per curiam opinions, nearly always to affirm. This case presents an opportunity to address three related sentencing issues that may tend to evade review in this Court despite how often they arise in the district courts and how many people they may affect.

a. This case presents an opportunity to resolve a developed circuit split on the application of § 5D1.1(c), which is implicated nearly every time a noncitizen is sentenced.

1. The Court should resolve it now because the Fifth, Ninth, and Tenth Circuits, which hear appeals from the border districts where most noncitizens are sentenced, have reached conflicting conclusions about § 5D1.1(c)'s legal force.

There is a well developed conflict among the circuits addressing the use of supervised release on a deportable offender as a departure issue, an adequacy-of-explanation issue, an issue of error or not, and as error that does or does not affect substantial rights. The three circuits that hear appeals from the five border districts have weighed in, cementing a conflict in the circuits where most such offenders are sentenced.

At one end is the Fifth Circuit, whose decisions in reentry appeals have eroded not only the plain textual force of § 5D1.1(c), but the requirement that a district court explain any criminal sentence. In *United States v. Dominguez-Alvarado*, whose analysis the Court of Appeals adopted in *United States v. Hernandez–Loera* and applied below, Pet. App. 1a–2a, the Fifth Circuit construed § 5D1.1(c) to be "hortatory, not mandatory," unlike the instruction that a district court "ordinarily" should not impose supervised release on a deportable person to an instruction to "'increase by 16' [the defendant's] base offense level." 695 F.3d 324, 329 & n.3 (5th Cir. 2012). And it held that imposing supervised release within the lawful statutory and Guidelines range for the offense of conviction was not a departure. *Id.* at 329.

The sentencing court had imposed that sentence with a terse articulation that it did so "after looking at the factors in 3553(a), to deter future criminal conduct, his

particular background and characteristics, which apparently do not make him a welcome visitor to this country." *Id.* at 330. And the court of appeals held that expression of "particularized explanation and concern would justify imposition of a term of supervised release." *Id.*

The Fifth Circuit requires even less now. In *United States v. Becerril–Pena*, 714 F.3d 347 (5th Cir. 2013), the court noted it had been "skeptical of requests to second-guess district courts' decisions to impose terms of supervised release . . . , even where the court committed plain error by ruling contrary to § 5D1.1(c) or when the district court considers the guideline only implicitly." *Id.* It reasoned that § 5D1.1(c) "does not evince an intent to confer a benefit upon deportable aliens that is not available to other defendants." *Id.* at 350. Rather, the Commission's explanation for adding § 5D1.1(c) purportedly suggested it was "animated primarily by administrative concerns inherent in trying to administer supervised release as to someone who has been deported." *Id.* at 350 & n.5 (citing U.S. Sentencing Guidelines Manual app. C, vol. III, amend. 756 at 410 (2011)).

"Notably," the court explained, § 3553(a) already requires district courts to consider a defendant's history and characteristics, whether a sentence affords adequate deterrence, and whether it protects the public from a defendant's further crimes. *Id.* at 350–351. And in that circuit, those considerations – indeed, all pertinent sentencing considerations – are presumed to have been made when a Guidelines sentence is imposed. *Id.* at 350 (quoting *United States v. Mares*, 402 F.3d 511, 519 (5th Cir.

2005)). It therefore affirmed a 78-month reentry sentence[4] plus supervised release where the district court had "found at the sentencing hearing that [the deportable offender's] sentence 'adequately and appropriately addresse[d] all of the factors the [c]ourt should consider in sentencing,' including under § 3553(a)." *Id.* at 351.

Because the Fifth Circuit holds that § 5D1.1(c) has no legal force, any term of supervised release within the statutory range is a Guidelines sentence for a deportable person. And because the circuit law supplies every proper sentencing consideration by inference, that court has routinely affirmed imposition of supervised release on deportable offenders with nationally unremarkable records. The Fifth Circuit has cited § 5D1.1(c) in 116 opinions. *Three* of those opinions are reported. And in none of those 116 cases, so far as a keyword search reveals, has the court reversed a sentence of supervised release. Instead the court has cited *Dominguez–Alvarado*, *Becerril–Pena*, and the continuing force of those precedents in the absence of guidance from a superior court. *E.g.*, *United States v. Cancino-Trinidad*, 710 F.3d 601, 605 & n.4 (5th Cir. 2013) (citing *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir.1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.")).

The Eighth Circuit appears to have joined the Fifth. In *Hernandez–Loera*, the court echoed that § 5D1.1(c) is "hortatory, not mandatory," and held that imposing

[4] The sentence was imposed in the Northern District of Texas, the district whose harsh sentences Judge Browning contrasted with those imposed in his district.

supervised release on a deportable person without linking it to a need for deterrence "is not reversible error." 914 F.3d at 622. Neither did the court discuss any articulated findings at sentencing about a need to deter or protect. Instead the court recited facts from the record that might support those findings in a de novo analysis. *Id.* Further, as in the Fifth Circuit, the court recited that the record "reflect[ed] that the district court considered the appropriate sentencing factors, the arguments of counsel, and the specific circumstances of the case before sentencing" that offender. *Id.*

And the decision below, which relied on *Hernandez–Loera*, suggests the Court of Appeals will affirm supervised release despite § 5D1.1(c) if anything in the record could support that sentence. The Court of Appeals noted that the district court "knew that Avalos–Rico's conviction was his third federal crime, and that after each previous term of imprisonment he was deported and then illegally reentered the United States." Pet. App. 2a. It approved the district court's invocation of § 3553(a) and recited that the district court had considered those factors. *Id.* at 2a–3a. But *findings* could be implied only by the sentence the district court chose. It did not make them aloud.

Other circuits give § 5D1.1(c) some legal force and require some articulated findings about deterrence or protection, but do not require separate findings on the appropriateness of supervised release. The Ninth Circuit seems to be one. It has tended to address § 5D1.1(c) as a matter of substantive reasonableness. Iimposing supervised release on a deportable person is not substantively unreasonable, it holds, where the district court gives "a specific and particularized explanation that supervised release would provide an added measure of deterrence and protection based on the facts of [a] case." *United States v. Valdavinos-Torres*, 704 F.3d 679, 693 (9th Cir. 2012), *cert.*

denied, No. 13-7521, 134 S. Ct. 1873 (2014). The sentencing court had articulated that it meant to "make sure [the defendant] understood we mean business in this regard, [so it was] going to impose supervised release, finding the added deterrent value with [the defendant's] family members here makes it a case that is contrary to the recommendations of the advisory Guidelines." *Id.*

It is not clear whether the court would have used a departure analysis if that appellant had asserted procedural error or whether, like the Fifth Circuit analysis it quoted, even the recommendation against supervised release could be disregarded. In a later unpublished opinion, the Ninth Circuit held there was no departure where the district court "identified and explained the necessity of deterrence in [the offender's] sentence, thus there was no departure and no plain error." *United States v. Giles-Rodriguez*, 624 F. App'x 532, 533 (9th Cir. 2015) (unpublished).

The Second Circuit has likewise held that imposing supervised release despite § 5D1.1(c) "is appropriate and is not a departure" if the district court finds that supervised release would add deterrence and protection in the particular case. *United States v. Alvarado*, 720 F.3d 153, 155 (2d Cir. 2013) (per curiam). A district court "is not required explicitly to link its finding that added deterrence is needed to its decision to impose a term of supervised release," but the court "encourage[d] district courts to do so." *Id.* at 158. And the sentencing court there had "specifically noted" the § 3553(a) factors and found that specific deterrence was needed because the defendant had "demonstrated through his conduct that he's really not deterred by a significant term of imprisonment," *id.* at 159 n.6, leaving "no real hope that [the defendant was] not going to try to turn around and come right back into the United States after any term of

imprisonment that he serves," such that the defendant needed to "get the message" he could not return. *Id.* at 158.

The Fourth Circuit followed in *United States v. Aplicano-Oyuela*, 792 F.2d 416 (4th Cir. 2015). The court of appeals found no procedural error where a district court imposed supervised release without addressing §5D1.1(c). But once again, that owed to a careful statement of reasons for the whole sentence: The court quoted eight excerpts where the sentencing judge had condemned the defendant's tendency to reenter illegally and commit crimes. *Id.* at 421.

The recent and decisions have tended to require district courts to turn square corners with the text of the Guidelines. The Third Circuit concluded in 2017 that a district court must "explain and justify" imposing supervised release on a deportable offender, "directly address" the Guidelines instruction against doing so, and "provide the court's reasoning for taking a different course of action in the case before it." *United States v. Azcona-Polanco*, 865 F.3d 148, 153 (3d Cir. 2017) (quotation omitted). Doing so assures the public that imposing supervised release is "a reasoned decision rather than the force of habit." *Id.* at 154 (quotation omitted). Indeed, in that circuit deportable offenders are held "presumptively exempt from the discretionary imposition of supervised release . . . ." *Id.* at 151.

In *United States v. Solano-Rosales*, the Sixth Circuit likewise held that a sentencing court erred by imposing supervised release on a deportable person without "directly address[ing]" § 5D1.1(c)'s instruction against supervised release "and provid[ing] the court's reasoning for taking a different course of action in the case before it." 781 F.3d 345, 353–354 (6th Cir. 2015). There, the court of appeals did not

need to reverse: The sentencing judge had pointed to (1) the defendant's "pattern of rapidly returning each time he was removed from the country", (2) "the combination of [his] immigration and criminal record" which supported its finding that he had "shown no respect for the law" and (3) evidence that past judges' actions "had not been sufficient to deter him." *Id.* at 354. The court of appeals found that reasoning "explicit, grounded in the record, and clearly articulated." *Id.* at 355. So though the district court had not explicitly wrestled with § 5D1.1(c), its comments equated to a finding of special need.

The Tenth Circuit has joined the Third and Sixth Circuits in holding – on appeal from the District of New Mexico – that a district court must discuss § 5D1.1(c) and specifically tie any supervised release to the need for deterrence. *United States v. Chavez-Morales*, 894 F.3d 1206, 1216 (10th Cir. 2018). Though it concluded the sentencing court committed procedural error in failing to "acknowledge or consider the guidance in U.S.S.G. § 5D1.1(c)" when it imposed supervised release or "specifically link its imposition of supervised release to a need for deterrence or protection[,]" the district court's other comments showed the error had not affected the defendant's substantial rights. Those included statements that "[y]ou will never, ever be authorized to come to the United States legally. So unless you want to essentially spend the rest of your life sitting in a U.S. prison cell, I strongly recommend that after you serve this sentence and you're deported, you never return to the United States." *Id.* at 1217. Indeed, the § 5D1.1(c) error was a colorable point for reversal where a demonstration of prejudice was required only because circuit law forbade the court of appeals to

consult a thorough explanation of the custodial sentence. *See id.* at 1211–1212, -1216–1217 & n.9.

b. If the Court does not address the apparent disparity in reentry sentencing, reentry offenders like the Petitioner will continue to serve long sentences chiefly because of where they are sentenced.

The district court sentenced Avalos–Rico to 70 months in prison for entering the United States and living in Arkansas. That was ten months more than the sentence he received in 2009 for his aggravated felony, a connection to a drug conspiracy that triggered a mandatory minimum. And it was 30 months higher than the mean sentence (and 40 months higher than the median sentence) actually imposed on reentry offenders with the highest enhancement less than 2 years before. Pet. App. 48a.

In view of the difficulty calibrating the deterrent effect of small variations in punishment, the Commission decided early to "base the Guidelines primarily upon typical, or average, actual past practice." Hon. Stephen J. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17 (1988). Ideally, "[t]he distinctions that the Guidelines make in terms of punishment are primarily those which past practice has shown were actually important factors in pre-Guideline sentencing." *Id.*

This Court has explained that the appellate presumption of reasonableness "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Rita v. United States*, 551 U.S. 338, 351 (2007). But the Commission has deposed that in the "mine run" of reentry cases, those ranges were ignored. Pet. App. 48a. Indeed, for the worst

offenders those ranges were bypassed twice as often as they were used. *Id.* And the Commission's explanation of the 2016 amendment to that Guideline is conspicuously missing any discussion of the apparent geographic sentencing disparity, 2016 Amendments, at 24–28, though it was noted by the Justice Department in 2012 – and predicted by the Commission itself almost as soon as fast-track programs emerged. U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing, at 106 (Nov. 2004) ("The presence of fast-track programs in some districts explains a great deal of regional variation in downward departure rates.").

The presumption of appellate reasonableness for a Guidelines sentence rests on the Commission's usual practice of "bas[ing] its determinations on empirical data and national experience . . . ." *Kimbrough v. United States*, 552 U.S. 85, 109, (2007) (citing *United States* v. *Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). For reentry offenders there may be no "national experience," only (1) the experience of the three-quarters of offenders sentenced in the border districts versus elsewhere; and (2) the experience of those sentenced in districts with fast-track programs versus those sentenced in districts without them.[5]

[5] Concededly, counsel can cite no current and rigorous analysis comparing sentences across those groups. Counsel respectfully submits that it would be an appropriate subject for inquiry of the Commission, which found that "[s]ignificant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted[,]" Pet. App. 39a & 54a, amid conspicuous silence about other influences of geography.

Section 2L1.2 therefore does not "exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109. And the Commission's 2015 Report demonstrates that the offender characteristics routinely cited to justify the longest reentry sentences – multiple convictions, multiple deportations – in fact apply to many or most reentry offenders.

c. The want of any particularized explanation at sentencing makes this case an ideal vehicle for deciding Questions 1 and 2 and objectively demonstrates the importance of the perception of fair sentencing.

Booker was supposed to end sentencing hearings as spare as this. But that terseness will permit clear decision of these issues. If the Commission's instruction that district courts "ordinarily" should not impose supervised release on deportable offenders is purely hortatory, as the Fifth Circuit has held, this Court could hold that by reciting what the district court "knew" about Avalos–Rico, Pet. App. 2a, the Court of Appeals did more than it needed to affirm. If a district court amply "determines" need for supervised release merely by imposing it, as the Court of Appeals implicitly held, *id.*, no findings in the sentencing transcript will shade that holding.

If more is required – for example, a need for deterrence demonstrated by findings in support of the the broader sentence that support the supervised release sentence as well – this Court could decide whether those findings can be unpacked from a boilerplate citation to § 3553(a).[6] Pet. App. 10a. Should the Court require a specific

[6] Avalos–Rico urged the Court of Appeals to adopt the D.C. Circuit's view that impairing appellate review of reasonableness "is prejudicial in itself" and a statement

link between the need for deterrence and protection and the imposition of supervised release, as the Third, Sixth, and Tenth Circuits have done, that way too is clear.

Because the district court did not articulate any particularized reasons for the 70-month custodial sentence, the presumption of reasonableness that ordinarily attends a Guidelines sentence bears the whole weight of the judgment. But any inquiry reveals that § 2L1.2 is not an ordinary Guideline: Since the advent of fast-track sentencing, the most salient sentencing characteristic for a reentry offender may be where he is sentenced. And that disparity is not accounted for in § 2L1.2.

Finally, the sentencing transcript, spare as it is, illustrates the importance of the perception of fair sentencing. Avalos-Rico was given no explanation for the district court's decision to sentence him to a Guideline range that began 24 months higher than he expected – higher than his expected range ended – even after he conveyed his surprise. Both the majority and dissenting opinions in *Chavez-Meza* acknowledge that the quantum of analysis needed to support a sentence can depend on context. On those facts the dissent suggested that a proportional sentence reduction would require less explanation than a reduction to a new relative position in the reduced range. *Id.* at 1969. Here, Avalos-Rico's 70-month custodial sentence was within range. But that range differed dramatically from what he would have received under the 2015 Guideline, and still more from the range the court knew he had expected. Pet. App. 7a.

---

of reasons "is essential to promote the perception of fair sentencing and to allow the public to learn why the defendant received a particular sentence." *United States v. Brown*, 808 F.3d 865, 874 (D.C. Cir. 2015) (citation and internal quotations omitted).

Those circumstances imposed an extra burden to explain the sentence to preserve the appearance of fair sentencing where, "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings." *Rosales–Mireles*, 138 S. Ct. at 1910. This record proves that Avalos–Rico felt unfairly sentenced: He immediately fired his lawyer.

CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: August 1, 2019.

Respectfully submitted,

Ryan K. Culpepper
Culpepper Law Firm, PLLC
P.O. Box 70
Hot Springs, Arkansas 71902
Telephone: (501) 620-0857

Counsel for Petitioner

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 18-1564

United States of America, Plaintiff-Appellee

v.

Martin Avalos-Rico, also known as Rolando Blanco-Garcia, also known as Oscar Cruz-Tulum, also known as Alejandro Tamayo, Defendant-Appellant

Appeal from United States District Court for the Eastern District of Arkansas - Little Rock

Submitted: January 18, 2019
Filed: March 22, 2019

[Unpublished]
Before BENTON, MELLOY, and KELLY, Circuit Judges.

PER CURIAM.

Martin Avalos-Rico pled guilty to illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). The district court[1] sentenced him to 70 months' imprisonment and three years of supervised release. He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Avalos-Rico argues the district court erred by imposing supervised release on a deportable person without explanation. Avalos-Rico "did not object at sentencing to the imposition of supervised release," and this court reviews "his claim for plain error." *United States v. Hernandez-Loera*, 914 F.3d 621, 622 (8th Cir. 2019). "Under plain error review, it is the defendant's burden to prove (1) there was error, (2) that was plain . . . (3) affected substantial rights," and "affected the outcome of the district court proceedings." *United States v. Adejumo*, 772 F.3d 513, 538 (8th Cir. 2014).

Under U.S.S.G. § 5D1.1(c), "[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."

[1] The Honorable Billy Roy Wilson, United States District Judge for the Eastern District of Arkansas.

U.S.S.G. § 5D1.1(c). "But the district court retains discretion to impose supervised release where it determines that supervised release 'would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.'" *Hernandez-Loera*, 914 F.3d at 622, *quoting* U.S.S.G. § 5D1.1 comment. n.5. "[T]he term 'ordinarily' in section 5D1.1(c) is hortatory, not mandatory." *Id.* (cleaned up).

Here, the district court determined—as allowed by the guidelines—that a term of supervised release would provide an added measure of deterrence. While it "did not specifically link its imposition of supervised release to the need for added deterrence, this is not reversible error." *Id.* The court knew that Avalos-Rico's conviction was his third federal crime, and that after each previous term of imprisonment he was deported and then illegally reentered the United States. To deter him from reentering, the court also imposed a special condition of release: "If you are deported, a special condition is imposed where you will not be allowed to return to the United States during the period of your supervised release. If you do return, it will be considered a violation of your supervised release."[2] "The record reflects that the district court considered the appropriate sentencing factors, the arguments of counsel, and the specific circumstances of the case." *Hernandez-Loera*, 914 F.3d at 622. "[T]he district court's decision to impose supervised release is both consistent with the Sentencing Guidelines and an appropriate exercise of the district court's wide latitude in determining a sentence." *Id.* at 623.

Avalos-Rico believes that the district court erred in failing to explain his sentence. While the district court "might have said more," where the "matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments," the law does not require a more extensive explanation. *Rita v. United States*, 551 U.S. 338, 359, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). *See United States v. Bordeaux*, 674 F.3d 1006, 1010 (8th Cir. 2012) (holding that this court does "not require lengthy explanations from district courts in [sentencing], especially when courts elect to impose within-range sentences"). The district court is required only to make clear that it considered the § 3553(a) factors. *See United States v. Hernandez*, 518 F.3d 613, 616 (8th Cir. 2008). This court "presume[s] that district judges know the law and understand their obligation to consider all the § 3553(a) factors." *United States v. Greenwell*, 483 Fed. Appx. 305, 306 (8th Cir. 2012) (internal quotation marks omitted). Here, the district court stated it considered the § 3553(a) factors, and no one objected. It did not plainly err by failing to provide a more detailed explanation.

Avalos-Rico contends his bottom-of-the-guidelines sentence is substantively

---

[2] This court assumes the district court intended the special condition to apply *unless* Avalos-Rico receives permission to reenter from the Department of Homeland Security.

unreasonable. This court considers "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). "Sentences within the guideline range are presumed to be substantively reasonable." *United States v. Rubashkin*, 655 F.3d 849, 869 (8th Cir. 2011). Again, the district court considered the § 3553(a) factors. These included Avalos-Rico's extensive criminal history for conspiracy to make false documents; conspiracy to possess with intent to distribute cocaine; conspiracy to produce, possess, and transfer false identification documents with the intent to defraud; unlawful reentry of a previously deported alien; possession of methamphetamine; and third-degree battery. The district court did not err in sentencing him within the guidelines.

* * * *

The judgment is affirmed.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 18-1564

United States of America, Plaintiff-Appellee

v.

Martin Avalos-Rico, also known as Rolando Blanco-Garcia, also known as Oscar Cruz-Tulum, also known as Alejandro Tamayo, Defendant-Appellant

Appeal from United States District Court
for the Eastern District of Arkansas - Little Rock
(4:17-cr-00168-BRW-1)

ORDER

The petition for rehearing by the panel is denied.

May 03, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

APPENDIX C

SENTENCING HEARING,

United States District Court
for the Eastern District of Arkansas,
February 28, 2018

[For ease of reading, names of counsel are replaced in brackets.]

(Proceedings commencing in open court, defendant at 2:31 p.m.)

THE COURT: Are the parties ready?

DEFENSE COUNSEL: Yes, your Honor.

GOVERNMENT COUNSEL: Yes, your Honor.

THE COURT: All right. Will you swear the interpreter, please, ma'am. (Interpreter sworn.)

THE COURT: If you all come around, please. All right. Ms. Hernandez, if I get to going too fast, let me know.

THE INTERPRETER: I know, your Honor.

THE COURT: We're here today for sentencing against Rolando Blanco-Garcia, case No. 4:17CR00168.

Does he go by Mr. Blanco or Mr. Garcia?

DEFENSE COUNSEL: Your Honor, his true name is an alias that's listed on the presentence report of Martin Avalos-Rico.

THE COURT: Are you telling me his name is Martin?

DEFENSE COUNSEL: It's Martin Avalos-Rico. That's his true name. He can go by Mr. Martin, Mr. Avalos, or Mr. Rico.

THE COURT: All right. Mr. Martin was named in the one-count indictment on July 5 of 2017 that charged him with illegal re-entry after deportation in violation of federal law. The offense in Count 1 occurred on or about June the 19th of 2017.

On October 5 of last year, Mr. Martin pled guilty to Count 1 of the indictment without a plea agreement.

Mr. Martin, are you satisfied with your lawyer?

THE DEFENDANT: Up until now, yes.

THE COURT: 100 percent satisfied?

THE DEFENDANT: Yeah.

THE COURT: All right. Do you think there's any reason that you ought to be allowed to withdraw the plea of guilty you entered on October 5 of last year?

THE DEFENDANT: No.

THE COURT: All right. In determining a sentence, I'll consider the factors listed in 18 United States Code, Section 3553 in the sentencing guidelines. We'll work through the presentence report and come up with a guideline range. And then I'll – we're going to work through that and get the guideline range. If there's any disputes about the presentence report, I'll resolve them. And then when we get through the guideline range, I'll allow [Defense Counsel] to speak on your behalf.

You can speak on your own behalf if you want to, Mr. Martin. If you don't want to, you don't have to and I won't hold it against you. Of course, [Government Counsel] will get to close for the Government.

Have both sides had all the time they need to review the presentence report?

DEFENSE COUNSEL: Yes, your Honor.

GOVERNMENT COUNSEL: Yes, your Honor. And we have no objection from the Government.

THE COURT: Any objections?

DEFENSE COUNSEL: No objections, your Honor.

THE COURT: Do you agree with that, Mr. Martin? You don't have any objections to the presentence report?

THE DEFENDANT: I was under the understanding that my level was 46 and it went up to 70 when I pled guilty.

DEFENSE COUNSEL: Your Honor, he is basing -- what we estimated his range to be it turned out to be higher than that because of a previous illegal re-entry conviction that we had no legal objection to, but his range is higher than he wanted it to be.

THE COURT: I believe I told him when he pled guilty that if the guideline range turned out to be higher than he expected, that would not give him a right to withdraw his plea; is that correct?

DEFENSE COUNSEL: You did tell him that, your Honor, that's correct.

THE COURT: Is that correct, Mr. Martin?

THE DEFENDANT: Yes.

THE COURT: All right. I adopt the presentence report. If either side appeals my sentence, it will be released to the lawyers for the parties without further orders of the Court.

I will tell you what my outline says and you all correct me if I'm wrong.

Base offense level under the guidelines is eight. He gets a plus four since he committed this offense after sustaining a conviction for a felony that is an illegal re-

entry offense. He gets another plus four because he sustained the conviction for a felony other than one that involved illegal entry.

After he was ordered deported from the United States the first time he engaged in criminal conduct resulting in a conviction for a felony offense other than the illegal reentry offense and there was a sentence of five years or more, that gives him a plus ten.

He gets minus three for acceptance of responsibility.

According to my outline, that gives a total offense level of 23.

According to my outline, his total criminal history is eight which puts him in category IV.

The statutory imprisonment range, the maximum is not more than 20 years. The guidelines on a total offense level of 23 and a criminal history category of IV, the guideline range is 70 to 87 months.

Supervised release under 18 United States Code Section 3553, a term of supervised release of not more than three years. Under the guidelines, not less than one year or more than three years.

I believe that I should not impose a term of supervised release if he's deportable who will likely be deported after imprisonment; is that correct?

DEFENSE COUNSEL: Yes, your Honor.

GOVERNMENT COUNSEL: That's my understanding as well, your Honor.

THE COURT: All right. Probation is not applicable here under the guidelines, even though the statute would allow it, it's not less than one year but not more than five years with conditions.

Financial report indicates he can't pay a lump-sum or installment fine, so there will be no fine.

Any restitution involved?

GOVERNMENT COUNSEL: No, your Honor.

THE COURT: [Defense Counsel], have you advised Mr. Martin that he's subject to deportation?

DEFENSE COUNSEL: I have, your Honor.

THE COURT: Do you understand, Mr. Martin, that you will likely be deported when you get out of the federal correction institution?

THE DEFENDANT: Yes, sir.

THE COURT: And your lawyer told you that?

THE DEFENDANT: Yes.

THE COURT: All right. [Defense Counsel], you can speak on behalf of Mr. Martin. Mr. Martin can speak but only if he wants to. If he doesn't speak, I won't hold it against him. As I said earlier, [Government Counsel] will get to close for the Government.

DEFENSE COUNSEL: Your Honor, the defendant is seeking a variance downward from the advisory guideline range. He would like a sentence of 36 months.

In light of the factors in 18 United States Code, Section 3553(a), we will note that he had been a hard worker working in construction while he's been in the United States. His family is here. He recognizes he is going to be deported and he has aging parents in Mexico that he wants to be able to see and spend time with before they pass.

In addition, your Honor, I will note that Mr. Martin, he moved quickly. He did not want to waste the Government's time. He admitted guilt early on and wanted a change of plea scheduled as soon as practical. Based on those reasons, we would ask for a sentence that is below the guidelines range, a variance of 36 months or another sentence which the Court deems appropriate.

THE COURT: Mr. Martin, do you want to say anything?

THE DEFENDANT: No. It's okay.

THE COURT: All right. If you all will stand aside I'll have [Government Counsel] come up and tell me what she thinks I should give.

GOVERNMENT COUNSEL: Your Honor, I'll be brief. I think [Government Counsel of Record] would like for the court to impose a guideline sentence and she believes that would be appropriate under the circumstances of this matter.

THE COURT: The guideline range is 70 to 87 months; is that correct?

DEFENSE COUNSEL: Yes, your Honor.

GOVERNMENT COUNSEL: Yes, your Honor.

THE COURT: Based on the Sentencing Reform Act of '84 and considering the provisions of 18 U.S.C. 3553, it's the judgment of the Court that Mr. Martin is committed to the custody of the Bureau of Prisons for a term of -- I have to think about this another minute. There will be a term of 70 months in the custody of the Bureau of Prisons. I recommend that he participate in educational and vocational programs in incarceration.

On release from imprisonment, if he is not deported, he'll be on supervised release for three years, and he'll have to report to the probation office in the district to which he's released within 72 hours of release from the custody of the Bureau of Prisons.

Of course, he'll have to comply with all mandatory and standard conditions that apply. If he's deported, the special condition of supervised release is that he will not be allowed to return to United States during the period of supervised release. If he does return, it will be considered a violation of supervised release.

He'll have to cooperate in the collection of DNA as directed by the probation office.

No fine.

$100 special assessment is mandatory and imposed in this case.

Any objections to the form of the sentence?

DEFENSE COUNSEL: No, your Honor.

GOVERNMENT COUNSEL: No, your Honor.

THE COURT: All right. Mr. Martin, you have a right to appeal your conviction if you believe your guilty plea was somehow involuntary or if there's some other fundamental defect in the proceeding that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law.

With very few exceptions, a notice of appeal must be filed within 14 days of judgment being entered in the case.

If he decides to appeal, [Defense Counsel], will you file a notice?

DEFENSE COUNSEL: Yes, your Honor, I will.

THE COURT: Is there anything else we need to tend to?

DEFENSE COUNSEL: No, your Honor.

GOVERNMENT COUNSEL: No your Honor.

THE COURT: All right. We're in recess. You all can be at ease.

(Proceedings concluded at 2:46 p.m.)

APPENDIX D

§ 2L1.2. Unlawfully Entering or Remaining in the United States (2016)

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining--

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in--

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

COMMENTARY

*Statutory Provisions:*8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. In General.

(A) "Ordered Deported or Ordered Removed from the United States for the First Time". For purposes of this guideline, a defendant shall be considered "ordered deported or ordered 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.

(B) Offenses Committed Prior to Age Eighteen. Subsections (b)(1), (b)(2), and (b)(3) 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.

2. Definitions. For purposes of this guideline:

"Crime of violence" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or 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.

"Forcible sex offense" includes 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. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section

2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"Illegal reentry offense" means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. Criminal History Points. For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under § 4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time. There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.

5. Departure Based on Seriousness of a Prior Offense. There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the

prior offense; (B) the prior conviction is too remote to receive criminal history points (see § 4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

6. Departure Based on Time Served in State Custody. In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under § 5G1.3(b) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). See § 5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

7. Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 38); November 1, 1989 (see Appendix C, amendment 193); November 1, 1991 (see Appendix C, amendment 375); November 1, 1995 (see Appendix C, amendment 523); November 1, 1997 (see Appendix C, amendment 562); November 1, 2001 (see Appendix C, amendment 632); November 1, 2002 (see Appendix C, amendment 637); November 1, 2003 (see Appendix C, amendment 658); November 1, 2007 (see Appendix C, amendment 709); November 1, 2008 (see Appendix C, amendment 722); November 1, 2010 (see Appendix C, amendment 740); November 1, 2011 (see Appendix C, amendment 754); November 1, 2012 (see Appendix C, amendment 764); November 1, 2014 (see Appendix C, amendment 787); November 1, 2015 (see Appendix C, amendment 795); November 1, 2016 (see Appendix C, amendment 802)

APPENDIX E

§ 2L1.2. Unlawfully Entering or Remaining in the United States (2015)

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after--

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(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, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

COMMENTARY

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).

(A) In General. For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does 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.

(B) Definitions. For purposes of subsection (b)(1):

(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, 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), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or 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.

(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) "Firearms offense" means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.

(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).

(C) Prior Convictions. In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction

receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

2. Definition of "Felony". For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).

(A) Definitions. For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General. The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).

4. Application of Subsection (b)(1)(E). For purposes of subsection (b)(1)(E):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of § 4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts. Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points. A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Departure Based on Seriousness of a Prior Conviction. There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.

8. Departure Based on Time Served in State Custody. In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under § 5G1.3(b) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). See § 5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

9. Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 38); November 1, 1989 (see Appendix C, amendment 193); November 1, 1991 (see Appendix C, amendment 375); November 1, 1995 (see Appendix C, amendment 523); November 1, 1997 (see Appendix C, amendment 562); November 1,

2001 (see Appendix C, amendment 632); November 1, 2002 (see Appendix C, amendment 637); November 1, 2003 (see Appendix C, amendment 658); November 1, 2007 (see Appendix C, amendment 709); November 1, 2008 (see Appendix C, amendment 722); November 1, 2010 (see Appendix C, amendment 740); November 1, 2011 (see Appendix C, amendment 754); November 1, 2012 (see Appendix C, amendment 764); November 1, 2014 (see Appendix C, amendment 787); November 1, 2015 (see Appendix C, amendment 795)

ILLEGAL REENTRY OFFENSES

UNITED STATES SENTENCING COMMISSION

April 2015

APPENDIX F

ILLEGAL REENTRY OFFENSES

Patti B. Saris
Chair

Charles R. Breyer
Vice Chair

Dabney L. Friedrich
Commissioner

Rachel E. Barkow
Commissioner

William H. Pryor, Jr.
Commissioner

Jonathan J. Wroblewski
(Ex Officio)

ILLEGAL REENTRY OFFENSES

Table of Contents

ILLEGAL REENTRY OFFENSES

This report analyzes data collected by the United States Sentencing Commission[1] concerning cases in which offenders are sentenced under USSG §2L1.2 — commonly called "illegal reentry" cases.[2] Such cases are a significant portion of all federal cases in which offenders are sentenced under the United States Sentencing Guidelines. In fiscal year 2013, for instance, illegal reentry cases constituted 26 percent of all such cases. As part of its ongoing review of the guidelines, including the immigration guidelines,[3] the Commission examined illegal reentry cases from fiscal year 2013, including offenders' criminal histories, number of prior deportations, and personal characteristics.

Part I of this report summarizes the relevant statutory and guideline provisions. Part II provides general information about illegal reentry cases based on the Commission's annual datafiles. Part III presents the findings of the Commission's in-depth analysis of a representative sample of illegal reentry cases. Part IV presents key findings.

Among the key findings from analysis of fiscal year 2013 data: (1) the average sentence for illegal reentry offenders was 18 months; (2) all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without "aggravated felony" convictions); (3) the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to §2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under §2L1.2(b) (92.7%); (4) significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most

---

[1] The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues. *See* 28 U.S.C. § 995(a)(14), (15) and (20).

[2] In addition to illegal reentry in violation of 8 U.S.C. § 1326, offenses punishable under this guideline include three related offenses: 8 U.S.C. § 1185(a)(1) (aliens departing from or entering the United States contrary to regulation), 8 U.S.C. § 1253 (failure to depart), and 8 U.S.C. § 1325(a) (second or subsequent offense of improper entry by alien). Of all offenses punished under §2L1.2 during fiscal year 2013, 95 percent were illegal reentry offenses prosecuted under 8 U.S.C. § 1326. Throughout this Report, "illegal reentry" will be used as shorthand to refer collectively to all of the related offenses punished under §2L1.2.

[3] One of the Commission's policy priorities during the amendment cycle ending May 1, 2015 is "Study of the guidelines applicable to immigration offenses and related criminal history rules, and consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study." 79 Fed. Reg. 49378-01, 49379 (Aug. 20, 2014).

illegal reentry offenders were prosecuted; (5) the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction; (6) 61.9 percent of offenders were convicted of at least one criminal offense *after* illegally reentering the United States; (7) 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions; and (8) most illegal reentry offenders were apprehended by immigration officials at or near the border.

In 2013, there were approximately 11 million non-citizens illegally present in the United States, and the federal government conducted 368,644 deportations.[4] The information contained in this report does not address the larger group of non-citizens illegally present in the United States and, instead, solely concerns the 18,498 illegal reentry offenders sentenced under §2L1.2 of the United States Sentencing Guidelines in fiscal year 2013. Therefore, the information should not be interpreted as representative of the characteristics of illegal immigrants generally.

I. RELEVANT STATUTORY AND GUIDELINE PROVISIONS

A. The Illegal Reentry Statute — 8 U.S.C. § 1326

The offense of illegal reentry is set forth in 8 U.S.C. § 1326. Subsection (a) provides that any alien who "enters, attempts to enter, or is at any time found in the United States" without permission of the Attorney General, after previously having been deported from the United States, faces imprisonment for up to two years upon conviction. If the defendant was previously deported from the United States after sustaining three or more misdemeanor convictions "involving drugs, crimes against the person, or both," or a conviction for a felony offense (other than an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)), the statutory maximum penalty increases to 10 years under section 1326(b)(1). Where the deportation occurred after an "aggravated felony" conviction, section 1326(b)(2) provides for a 20-year statutory maximum penalty. A conviction for any type of offense that occurred *after* a defendant was last deported from the United States (and subsequently illegally reentered) has no additional bearing on the defendant's statutory penalty range under section 1326.[5]

---

[4] *See* Pew Research Center, *5 Facts About Illegal Immigration in the United States*, http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/ (last accessed on April 2, 2015); Bureau of Immigration and Customs Enforcement, *News Release: ICE Announces FY 2013 Removal Numbers*, http://www.ice.gov/news/releases/ice-announces-fy-2013-removal-numbers (Dec. 19, 2013).

[5] *See*, *e.g.*, United States v. Rojas-Luna, 522 F.3d 502, 504 (5th Cir. 2008) ("As noted above, the statute under which Rojas-Luna was convicted, 8 U.S.C. § 1326(a), provides for a maximum penalty of two years' imprisonment for illegal reentry. However, pursuant to § 1326(b)(2), the maximum penalty is increased to twenty years in prison for an alien whose prior removal 'was subsequent to a conviction for commission of an aggravated felony . . . . ' At his rearraignment, Rojas-Luna pleaded guilty to reentering the country after having been removed in 1988. Because he was not convicted of aggravated assault until 2003, his 1988 removal, although sufficient to convict him of violating § 1326(a), could not form the basis of the enhancement in § 1326(b)(2), because it was not 'subsequent to' his conviction.") (citations omitted).

Table 1
Relevant Illegal Reentry Statutory Penalties

Statutory Provision	Criminal History Requirement	Maximum Penalty
8 U.S.C. § 1326(a)	No significant criminal history	2 years
8 U.S.C. § 1326(b)(1)	"whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)"	10 years
8 U.S.C. § 1326(b)(2)	"whose removal was subsequent to a conviction for commission of an aggravated felony"	20 years

The original version of section 1326 was enacted in 1952 as part of the Immigration and Nationality Act. It provided for a statutory maximum of two years of imprisonment for the crime of illegal reentry but did not provide for enhanced statutory maximums for aliens who were convicted of predicate offenses before being deported.[6] The penalty scheme remained unaltered for more than 35 years, until a 1988 amendment provided for an enhanced penalty of up to five years of imprisonment for an alien who had been deported after a felony conviction and up to 15 years for an alien who had been deported after an "aggravated felony" conviction.[7] Congress increased these maximum penalties again in 1994, to 10 and 20 years, respectively, where they remain today, and also applied the 10-year maximum to those convicted of three or more misdemeanors "involving drugs, crimes against the person, or both" prior to deportation.[8]

[6] Act of June 27, 1952, title II, ch. 8, § 276, 66 Stat. 163, 229 (1952).

[7] Pub. L. No. 100-690, title VII, § 7345(a), 102 Stat. 4181, 4471 (1988).

[8] Pub. L. No. 103-322, title XIII, § 130001, 108 Stat. 1796, 2023 (1994). The Anti-Terrorism and Effective Death Penalty Act of 1996 added a provision applying the enhanced 10-year maximum to those who had been deported under terrorism-related provisions of the immigration code, even if they had been convicted of no criminal offense. *See* Pub. L. No. 104-132, title IV, §§ 401(c); 438(b); 441(a), 110 Stat. 1214, 1267, 1276, 1279 (1996). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 similarly extended the 10-year maximum to aliens who had been deported prior to completing a term of imprisonment. Pub. L. No. 104-208, div. C, title III, § 305(b), 110 Stat. 3009 (1996). The 1996 statutes also contained a number of less substantive amendments, such as updating the statute's language to refer to "removal" as well as "deportation" and "exclusion." For purposes of simplicity, in this report all types of removal or exclusion of aliens will be referred to as "deportations."

A related offense is illegal entry, which is found in 8 U.S.C. § 1325.[9] Commission of a first illegal entry offense is a petty misdemeanor punishable by no more than six months of incarceration. A second or subsequent illegal entry offense is a felony and, upon conviction, a defendant may be sentenced to up to two years of imprisonment. The sentencing guidelines do not apply to petty misdemeanor convictions under section 1325 but do apply to felony convictions under section 1325.[10]

B. The "Aggravated Felony" Statute — 8 U.S.C. § 1101(a)(43)

As noted above, the maximum term of imprisonment for illegal reentry increases from two to 20 years if the defendant was previously deported after a conviction for an "aggravated felony." In addition to its relevance in the criminal context, the definition of aggravated felony also determines substantive and procedural rights for non-citizens regarding deportation from the United States.[11]

The first definition of "aggravated felony" was enacted in 1988, simultaneously with the amendment to section 1326(b) increasing sentences for illegal reentry offenders with prior felony or aggravated felony convictions.[12] The original definition included only murder, "drug trafficking" crimes as defined in 18 U.S.C. § 924(c), and illicit trafficking in firearms or destructive devices as defined in 18 U.S.C. § 921.[13] Since 1988, Congress has repeatedly expanded the definition to include several other crimes.[14]

---

[9] Under section 1325, it is unlawful for any alien to: (1) enter or attempt to enter the United States at any time or place other than as designated by immigration officers; (2) elude examination or inspection by immigration officers; or (3) attempt to enter or obtain entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact. 8 U.S.C. § 1325. Although related to section 1326, section 1325 is not a lesser-included offense. *See* United States v. Flores-Peraza, 58 F.3d 164, 167-68 (5th Cir. 1995).

[10] *See* USSG §1B1.9 ("The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.").

[11] *See* Moncrieffe v. Holder, 133 S.Ct. 1678, 1682 (2013) ("[I]f a noncitizen has been convicted of [an] . . . 'aggravated felon[y],' then he is not only deportable, [8 U.S.C.] § 1227(a)(2)(A)(iii), but also ineligible for [various] discretionary forms of relief [from deportation]. *See* §§ 1158(b)(2)(A)(ii), (B)(i); §§ 1229b(a)(3), (b)(1)(C).").

[12] *See supra* note 7.

[13] Pub. L. No. 100-690, title VII, § 7342, 102 Stat. 4181, 4469-70 (1988).

[14] *See, e.g.*, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (adding money laundering, all drug trafficking offenses, and crimes of violence, and eliminating a requirement that the crime have been committed within the United States); Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994) (significantly expanding the definition); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277 (1996) (substantially expanding the definition to near its current form); Pub. L. No. 104-208, div. C, title III, § 321, 110 Stat. 3009-627-28 (1996) (reducing the triggering fraud and tax evasion amounts to $10,000 from $100,000, reducing the minimum requirement sentence to trigger some subsections from five to one years, and making other changes); Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2879 (2003) (adding human trafficking offenses).

Today, section 1101(a)(43) of title 8 defines "aggravated felony" in 21 subsections. Covered offenses range from murder, to failing to protect the identity of intelligence agents, to tax evasion over $10,000, to failure to appear in court to answer for a felony for which a sentence of two or more years may be imposed.[15] Among the many offenses listed as aggravated felonies, subsection (f) also includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[16]

C. The Illegal Reentry Guideline — USSG §2L1.2

In its current form, §2L1.2 provides as follows:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(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, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

---

[15] 8 U.S.C. § 1101(a)(43)(A), (L), (M), & (T).

[16] 8 U.S.C. § 1101(a)(43)(F).

The guideline provides a base offense level of 8, which has remained unchanged since January 1988. The guideline also contains a specific offense characteristic ("SOC") that provides for graduated enhancements based on a defendant's pre-deportation criminal history. Under §2L1.2(b)(1)(A), 16 levels are added if a defendant previously was deported following a conviction "for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense." That enhancement decreases to 12 levels if the prior conviction does not receive criminal history points under Chapter Four of the *Guidelines Manual* because the age of the prior conviction did not fall within the time periods set forth in USSG §4A1.2(e). Where the prior conviction was for a felony drug trafficking offense for which the sentence imposed was 13 months or less, 12 levels are added under §2L1.2(b)(1)(B), or 8 levels where that prior conviction does not receive criminal history points because of the age of the conviction. A prior aggravated felony conviction (other than one that also qualifies for a 12- or 16-level enhancement) results in an 8-level increase under §2L1.2(b)(1)(C). All other prior felony convictions, or three or more convictions for misdemeanor crimes against the person or drug trafficking offenses, result in a 4-level increase under §2L1.2(b)(1)(D) & (E).

A defendant may receive only a single enhancement from §2L1.2(b) — whichever is the highest applicable to his criminal record. For each of these possible enhancements, the sentencing court is instructed to consider only those convictions that occurred *prior* to the defendant's most recent deportation from the United States. Just as under section 1326, convictions that occurred since the defendant last illegally reentered the United States (that is, after the last prior deportation) have no bearing on the defendant's offense level under §2L1.2. Such post-deportation convictions may, however, receive criminal history points under §4A1.1.

To understand the potential impact of the enhancements set forth in §2L1.2(b), it is helpful to consider the case of a defendant who has been convicted of illegal reentry and is situated at Criminal History Category ("CHC") III in the sentencing table (the most common CHC for illegal reentry offenders, as discussed *infra*). If such a defendant has no prior convictions triggering a §2L1.2(b) enhancement, he will have a base offense level of 8 under §2L1.2(a), which may be further reduced to 6 if he receives credit for acceptance of responsibility pursuant to §3E1.1. The guideline range for offense level 6, at CHC III, is 2-8 months.[17] Each additional increase of 2 offense levels will increase the sentencing range by approximately 25 percent. If the defendant has a felony conviction resulting in the application of the 4-level enhancement, he will have an offense level 10 with credit for acceptance of responsibility; at CHC III, the corresponding guideline range is 10-16 months. If the defendant receives the 8-level increase for a prior aggravated felony, he will have an offense level of 13 after credit for acceptance of responsibility, resulting in a guideline range of 18-24 months. If a defendant receives the 12-level enhancement, he will have an offense level 17 after credit for acceptance of responsibility, with a guideline range of 30-37 months.

[17] Because this range is in Zone B of the Sentencing Table, the defendant legally would be eligible for a probationary sentence, with certain restrictions, under §5B1.1(a). As a practical matter, however, illegal immigrants who have previously been deported and who illegally reentered the United States are very unlikely to receive a sentence of probation because they almost certainly will again be deported.

Finally, a defendant who receives the 16-level enhancement and a reduction for acceptance of responsibility will be at offense level 21, with a range of 46-57 months. Thus, a CHC III defendant who receives the 16-level enhancement for a predicate conviction will face a guideline range with a minimum term of imprisonment 23 times higher than the minimum applicable to a CHC III defendant with no predicate convictions.

D. The "Fast Track" Program

Another major factor affecting sentencing under §2L1.2 is the early disposition program ("EDP" or "fast track" program) used by the Department of Justice and the courts in sentencing many illegal reentry offenders. Such programs began in the 1990s in high-volume southwestern border districts as a means of efficiently processing the large number of immigration offenders encountered there; "[t]hey are based on the premise that a defendant who promptly agrees to participate in such a program saves the government significant and scarce resources that can be used to prosecute other defendants," and, accordingly, should be granted additional reductions at sentencing beyond the ordinary reduction for acceptance of responsibility.[18] The 2003 PROTECT Act established a statutory basis for EDP departures[19] and directed the Commission to incorporate EDP departures into the guidelines, which the Commission did by adopting the policy statement at §5K3.1, providing for a downward departure of up to 4 levels pursuant to a fast track program. Subsequently, districts outside the southwestern border region were made eligible to participate in the fast track program at their discretion, and, in 2012, the Department of Justice mandated that all offenders, regardless of district, receive the benefit of EDP if otherwise eligible.[20]

According to current DOJ guidance, fast track eligibility requires that an illegal reentry defendant enter a guilty plea within 30 days of being taken into custody, agree to a factual basis accurately describing his conduct, and waive arguments for a variance from the applicable guideline range (along with a waiver of appellate and certain other rights). In return, the government will move for a downward departure of four levels, except for defendants with particularly serious criminal histories, who may receive only a 2-level departure. United States Attorneys retain discretion to exclude a defendant from the fast track program based on aggravating factors such as prior criminal or immigration history, other ongoing criminal investigations or prosecutions involving the defendant, and the defendant's conduct at arrest.[21] As noted below (at Figure 5), 28.9 percent of illegal reentry offenders in fiscal year 2013 received an EDP departure, resulting in an

---

[18] *See* Mem. from Deputy Attorney General James M. Cole to U.S. Attorneys (Jan. 31, 2012) ("Cole Memorandum"), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf.

[19] Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003).

[20] *See* Cole Memorandum, *supra* note 18.

[21] *Id*.

average sentence reduction of 39.9 percent from the otherwise applicable range.

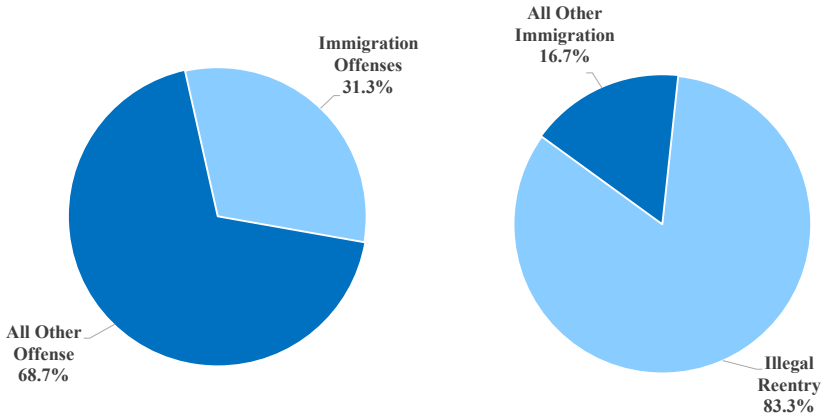
II. DATA REGARDING ILLEGAL REENTRY CASES

A. General Data About Illegal Reentry Cases

There were 80,035 federal criminal cases reported to the Commission during fiscal year 2013. Of those cases, 71,004 had sufficient documentation for purposes of the analyses in this report.[22] Of the 71,004, 22,209 (31.3%) involved immigration offenses.[23] Among those immigration cases, 18,498 (83.3%) were illegal reentry cases, which constituted 26 percent of all federal criminal cases reported to the Commission.

The number of illegal reentry cases increased from 2009 to 2013, from 16,921 cases in fiscal year 2009, to 18,498 cases in fiscal year 2013, an increase of 9.3 percent.

Figure 1
Immigration and Illegal Reentry Caseload
Fiscal Year 2013



The top five districts in terms of number of illegal reentry cases in fiscal year 2013 all were located along the southwestern border of the United States: Southern Texas (N=3,853), Western Texas (N=3,200), New Mexico (N=2,837), Arizona (N=2,387), and Southern California (N=1,460).

---

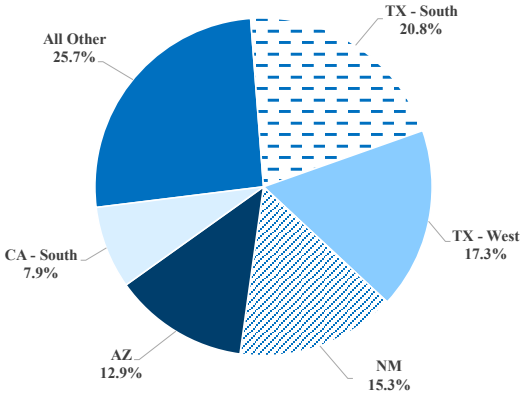
[22] Of the 9,031 cases with insufficient documentation, 2,204 cases involved convictions under 8 U.S.C. §§ 1253 (failure to depart), 1325 (illegal entry), or 1326 (illegal reentry). In the remaining 6,827 cases, the offenses of conviction were not ones referenced to the illegal reentry guideline, §2L1.2. *See generally* USSG App. A. Because the sentencing documentation in those 2,204 cases was incomplete, the Commission was not able to determine the courts' guideline applications, and, therefore, those cases were excluded from the analyses contained in this report.

[23] Immigration cases include cases with complete guideline application information in which offenders were sentenced under §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L1.2 (Illegal Reentry), 2L2.1 (Trafficking in Documents Relating to Citizenship), 2L2.2 (Fraudulently Acquiring Documents Related to Citizenship), and 2L2.5 (Failure to Surrender Canceled Naturalization Certificate).

Figure 2 below depicts the illegal reentry caseload nationally.

In fiscal year 2013, the vast majority of illegal reentry offenders were male (96.8%). The vast majority were Hispanic (98.1%), followed by White (1.0%), and Black (0.8%). The average age of illegal reentry offenders was 36 years. The most common Criminal History Category ("CHC") for illegal reentry offenders was Category III (28.6%). The proportion of offenders in other CHCs was as follows: CHC I (20.4%), CHC II (22.4%), CHC IV (15.5%), CHC V (7.9%), and CHC VI (5.2%).

Figure 2
District of Illegal Reentry Offenders
Fiscal Year 2013



As shown in Figure 3, in fiscal year 2013, approximately one-quarter of illegal reentry offenders were sentenced for "simple" illegal reentry (*i.e.*, they were not enhanced based on predicate convictions and thus faced a two-year statutory maximum under 8 U.S.C. § 1326(a)); one-third of illegal reentry offenders faced a 10-year statutory maximum sentence under § 1326(b)(1) (*i.e.*, they had predicate felony convictions, other than aggravated felonies, or they had three or more misdemeanor convictions involving drugs, crimes against the person, or both); and slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2) (*i.e.*, they had predicate aggravated felony convictions). Less than one percent of offenders sentenced under §2L1.2 faced statutory maximums other than two, 10, or 20 years (*e.g.*, they were convicted of failure to depart under 8 U.S.C. § 1253, which has a four-year statutory maximum).

The average sentence length for illegal reentry offenders was 18 months in fiscal year 2013 (with a median sentence of 12 months). This represents a 14.3 percent decrease since 2009, when the average sentence for illegal reentry offenders was 21 months. The average guideline minimum in fiscal year 2013 was 21 months (with a median guideline minimum of 15 months).

Figure 3
Illegal Reentry Offenders with Two, 10, and 20 Year Statutory Maximums Under 8 U.S.C. § 1326(a), (b)(1), and (b)(2)
Fiscal Year 2013

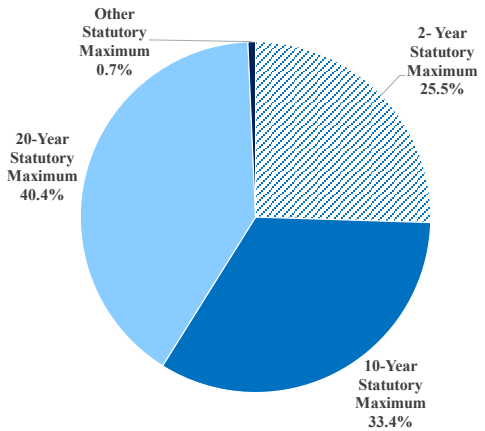
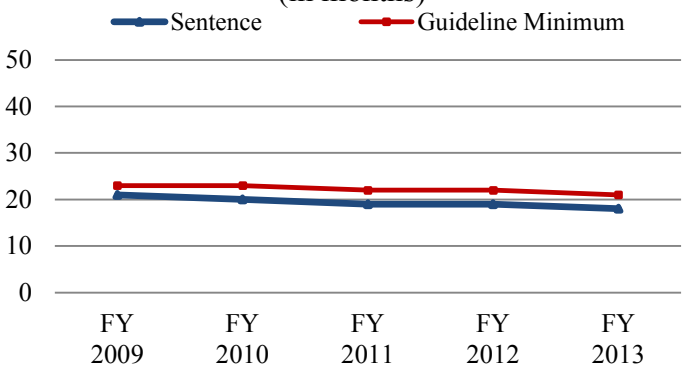


Figure 4 shows the average sentence and average guideline minimum from fiscal year 2009 to fiscal year 2013.

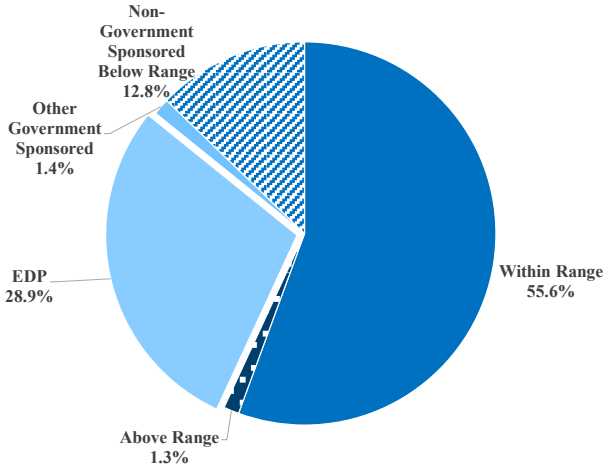
Figure 4
Average Sentence and Average Guideline Minimum
(in months)



Notably, virtually all illegal reentry offenders — including the 40.4 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years (240 months) under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the *ten*-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without "aggravated felony" convictions). Only two of the 18,498 illegal reentry offenders sentenced in fiscal year 2013 received a sentence above ten years. This result appears consistent with §2L1.2, as the maximum guideline range for illegal reentry offenders—absent any adjustment from Chapter Three of the *Guidelines Manual*—is 100-125 months.[24]

As shown in Figure 5, which depicts sentences relative to the guideline range, the overall within-range rate of all §2L1.2 cases was 55.6 percent; 28.9 percent received early disposition program downward departures pursuant to §5K3.1; 1.4 percent received other government sponsored downward departures (pursuant to §5K1.1 or for other reasons); 12.8 percent had non-government sponsored below-range sentences; and 1.3 percent had above-range sentences.

Figure 5
Place in Range for Illegal Reentry Offenders
Fiscal Year 2013

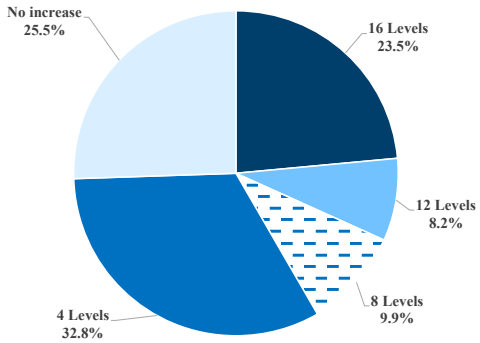


[24] A defendant who is in Criminal History Category VI, who receives the maximum 16-level enhancement under §2L1.2(b)(1), and who does not receive a reduction for acceptance of responsibility under §3E1.1, will be at offense level 24, with a resulting guideline range of 100-125 months. With credit for acceptance of responsibility, the guideline range for such an offender would be 77-96 months. Only 28 offenders in fiscal year 2013 had a guideline minimum above 77 months.

B. Guideline Enhancements Under USSG §2L1.2(b)

As discussed above, illegal reentry offenders can receive enhancements from 4 to 16 levels under §2L1.2(b) depending on their criminal history. In fiscal year 2013, one-quarter (25.5%) of illegal reentry offenders received no enhancement under §2L1.2(b)(1), while nearly one-quarter (23.5%) received a 16-level enhancement. Approximately one-third received a 4-level enhancement (32.8%), while one-tenth received an 8-level enhancement (9.9%), and nearly one-tenth received a 12-level enhancement (8.2%). Figure 6 shows the distribution of enhancements. Notably, the distribution of the guideline enhancements generally corresponds to the distribution of the statutory enhancements under § 1326, depicted in Figure 3, *supra*.

Figure 6
Illegal Reentry Specific Offense Characteristic Levels
Fiscal Year 2013



As noted above, the overall within-range rate of all §2L1.2 cases was 55.6 percent. As Table 2 below shows, however, the rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1) — from 92.7 percent for cases with no enhancement to 31.3 percent for cases with the 16-level enhancement. Moreover, offenders who received a 16-level enhancement had the highest rate of non-government below-range sentences (29.4%), followed by offenders who received a 12-level enhancement (21.2%). Both groups of offenders also had higher rates of EDP departures (36.4% and 42.2%, respectively) than illegal reentry offenders generally (28.9%).

Table 2
Place in Range by §2L1.2(b)(1) Enhancement Level
Fiscal Year 2013

	TOTAL		Within-Range		Above Range		Substantial Assistance		Early Disposition Program		Other Government Below		Other Below Range	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	**18,498**	**100.0**	**10,280**	**55.6**	**248**	**1.3**	**76**	**0.4**	**5,349**	**28.9**	**180**	**1.0**	**2,365**	**12.8**
No Increase	**4,724**	**25.5**	4,377	92.7	99	2.1	0	0.0	139	2.9	3	0.1	106	2.2
4 Levels	**6,068**	**32.8**	3,188	52.5	98	1.6	7	0.1	2,292	37.8	43	0.7	440	7.3
8 Levels	**1,828**	**9.9**	854	46.7	22	1.2	16	0.9	691	37.8	28	1.5	217	11.9
12 Levels	**1,526**	**8.3**	500	32.8	17	1.1	13	0.8	644	42.2	29	1.9	323	21.2
16 Levels	**4,352**	**23.5**	1361	31.3	12	0.3	40	0.9	1,583	36.4	77	1.8	1,279	29.4

Table 3 below shows the types of prior offenses for which illegal reentry offenders received enhancements pursuant to §2L1.2(b).

Table 3
Types of Predicate Offenses For §2L1.2(B)(1) Enhancements
Fiscal Year 2013

		Applied	Percent
	§2L1.2 Unlawfully Entering or Remaining in the United States	18,498	100.0
	Chapter 2 Specific Offense Characteristic Adjustments	13,774	74.5
Previously deported after a conviction for:	(b)(1)(A)(i) Drug trafficking offense with sentence that exceeded 13 months (16 levels)	1,810	9.8
	(b)(1)(A)(i)(2) Drug trafficking offense with sentence that exceeded 13 months – no criminal points (12 levels)	281	1.5
	(b)(1)(A)(ii) Crime of violence (16 levels)	2,189	11.8
	(b)(1)(A)(ii) Crime of violence – no criminal history points (12 levels)	439	2.4
	(b)(1)(A)(iii) Firearms offense (16 levels)	27	0.1
	(b)(1)(A)(iii) Firearms offense – no criminal history points (12 levels)	8	0.0
	(b)(1)(A)(iv) Child pornography offense (16 levels)	4	0.0
	(b)(1)(A)(v) National security/terrorism offense (16 levels)	0	0.0
	(b)(1)(A)(vi) Human trafficking offense (16 levels)	12	0.1
	(b)(1)(A)(vi) Human trafficking offense – no criminal history points (12 levels)	5	0.0
	(b)(1)(A)(vii) Alien smuggling offense (16 levels)	309	1.7
	(b)(1)(A)(vii) Alien smuggling offense – no criminal history points (12 levels)	83	0.4
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less (16 levels)[25]	1	0.0
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less (12 levels)	710	3.8
	(b)(1)(B) Drug trafficking offense with sentence of 13 months or less – no criminal history points (8 levels)	330	1.8
	(b)(1)(C) "Aggravated felony" (8 levels)	1,498	8.1
	(b)(1)(D) Any other felony (4 levels)	6,046	32.7
	(b)(1)(E) Three or more misdemeanor crimes against the person or drug trafficking offenses (4 levels)	22	0.1

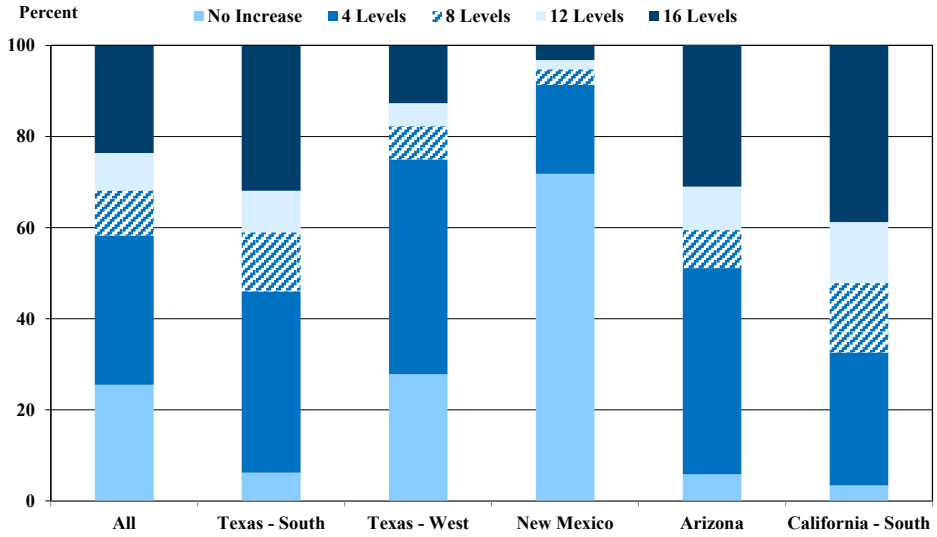
Notably, of the offenders receiving 16- or 12-level enhancements, the vast majority — 92.4 percent — received an enhancement for a prior conviction for either a "crime of violence" or a "drug-trafficking offense" within the meaning of §2L1.2(b)(1)(A) and Application Note 1(B) following §2L1.2. There were slightly more cases with drug-trafficking convictions (47.7%) than

[25] This enhancement was not available under the guidelines, but court documents reflected the court's finding that this was the proper level for this offense.

cases with convictions for crimes of violence (44.7%). Only a small percentage (7.6%) of illegal reentry offenders who received a 16- or 12-level enhancement received such an enhancement for one of the other predicate offenses (*e.g.*, firearms offenses, alien smuggling offenses) listed in §2L1.2(b)(1)(A).

Figure 7 below shows the geographic distribution of the different levels of enhancements in §2L1.2(b)(1) using data from the five districts that handle the most illegal reentry cases. As the data shows, the frequency of the various levels of enhancement apply at different rates across the districts. For instance, in fiscal year 2013, in the District of New Mexico, the majority of illegal reentry offenders received no enhancement and less than 10 percent of offenders received an enhancement of 8, 12, or 16 levels, while in the Southern District of Texas less than ten percent received no enhancement and a majority received an enhancement of 8, 12, or 16 levels.

Figure 7
SOC Level Distribution for Selected Districts
Fiscal Year 2013



III. SPECIAL CODING PROJECT OF ILLEGAL REENTRY CASES

A. Methodology

The data reported in Part II above was derived by analyzing the Commission's electronic database of information that is routinely collected by the Commission on an annual basis, for all federal cases for which the Commission receives full documentation in accordance with 28 U.S.C. § 994(w).[26] Such routinely collected data primarily concerns information about applicable statutory

[26] Pursuant to 28 U.S.C. § 994(w), a district court is directed to submit to the Commission the following sentencing documents in each felony or Class A misdemeanor case: the presentence report, the judgment, the statement of reasons form, the indictment or other charging instrument, and any plea agreement.

penalty ranges, sentencing guidelines calculations, certain information about offenders' criminal histories, and basic demographic information about offenders. In order to examine additional relevant data, it was necessary for the Commission to conduct a "special coding project," in which the relevant sentencing documents (particularly the presentence reports) were individually reexamined, and the desired information was collected ("coded") and entered into a database.

Because, as discussed above, the current illegal reentry guideline has enhancements based on the existence or non-existence of a single qualifying prior conviction, a special coding project was necessary to analyze the full criminal history of offenders. In addition to offenders' complete criminal histories, the Commission also collected information about offenders' prior deportations and certain personal characteristics such as their educational backgrounds, work histories, and substance abuse histories (information not routinely collected by the Commission). The Commission conducted this special coding project by examining a representative random sample (1,897 cases) of all 18,498 illegal reentry cases in which offenders were sentenced under §2L1.2 (and for which the Commission received full documentation) in fiscal year 2013 (referred to as the "coding sample" below). The results are set forth below.

B. Prior Deportations

Both 8 U.S.C. § 1326(b) and USSG §2L1.2(b) provide for enhanced penalties solely based on certain types of predicate convictions that an illegal reentry offender obtained before being deported. They do not account for the number of times an offender was previously deported and thereafter illegally reentered (except that prior convictions for illegal reentry or felony illegal entry would count to the same extent as any other "felony"). For the purposes of the Commission's report, "deportations" include references in presentence reports to prior "deportations," "exclusions," and "removals."[27]

With respect to the 1,894 cases in which the exact number of prior deportations was known, the average offender was deported 3.2 times (with a median of two deportations). The most common number of prior deportations was one (34.8% of cases). The highest number of deportations for any offender was 73. Offenders deported 10 or more times made up 4.6 percent of the sample. These offenders averaged 17.1 deportations. Figures 8 and 9 below summarize the Commission's findings regarding offenders' prior deportations.

[27] *See* 8 U.S.C. § 1326(a) (referring to illegal reentry by "any alien who . . . has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding"). Information concerning the number of deportations was available in all but one of the 1,897 cases coded. The exact number of deportations was not known in two other cases. In one case, the offender was deported more than once, but the exact number was unknown and, in another case, the offender was deported more than five times but the exact number was unknown.

Figure 8
Number of Deportations Per Offender
Fiscal Year 2013 Coding Sample

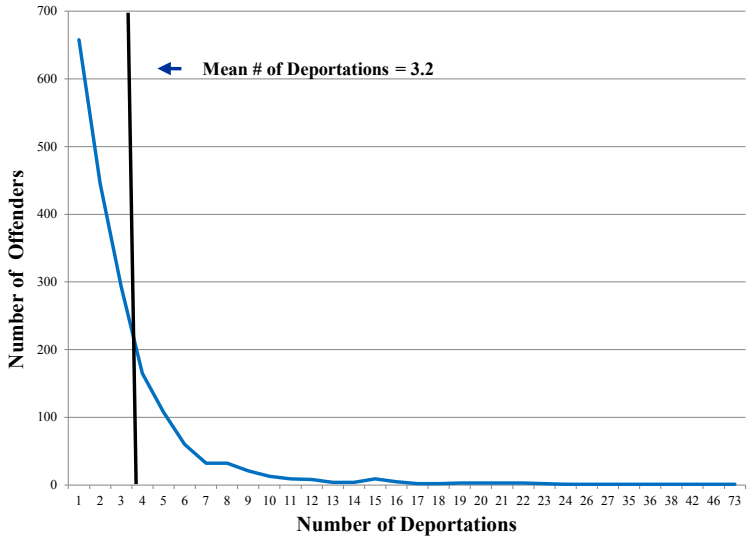
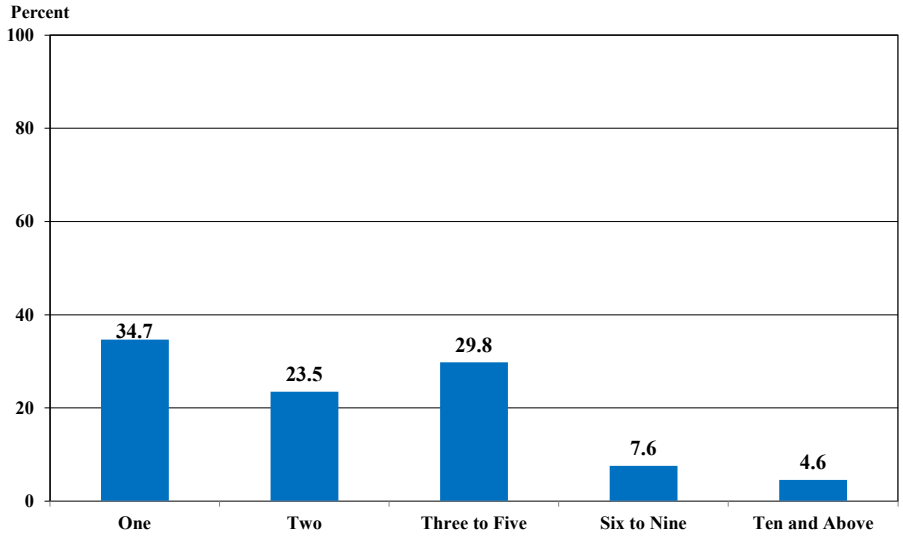


Figure 9
Number of Deportations Per Offender
Fiscal Year 2013 Coding Sample



Notably, 38.1 percent of offenders were deported and subsequently illegally reentered at least one time *after* being convicted and sentenced for either a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326).

C. Offenders' Criminal Histories

1. Prior Convictions

a. Prior Convictions Generally

With one exception, every prior conviction was coded, regardless of whether it received criminal history points under §4A1.1 or was the basis for an enhancement under §2L1.2(b)(1).[28] That exception was prior traffic offenses for which an offender did not receive any criminal history points.[29] Based on separately coded data concerning offenders' first and — in the case of multiple deportations — most recent deportations (discussed above), the data collected in the special coding project allowed the Commission to identify which prior convictions occurred *before* an offender was first deported and which convictions occurred *after* an offender was deported from (and subsequently illegally reentered) the country, both for the first and most recent times. Because many offenders were deported on multiple occasions, some offenders had prior convictions that qualified as both pre-deportation and post-reentry convictions.

The vast majority of illegal reentry offenders in the coding sample (92.0%) had at least one prior conviction for a non-traffic offense.[30] Only 151 offenders (8.0%) in the coding sample had no prior convictions. Of those 151 offenders, 90 (or 4.7% of all illegal reentry offenders in the coding sample) had only a single prior deportation before their instant illegal reentry prosecutions.[31] The 1,746 offenders with at least one prior non-traffic conviction had a total of 7,683 prior convictions, with an average of 4.4 prior convictions per offender[32] (median of three). The highest number of prior convictions for any single offender was 41. The 1,746 offenders with at least one prior non-

---

[28] For purposes of this special coding project, the Commission used a list of offense codes originally created for a prior Commission recidivism project conducted in 2004-05.

[29] Because it was frequently difficult to determine whether a prior conviction was a felony or a misdemeanor offense from the information provided in the presentence report ("PSR") — for example, with respect to offenses such as theft, assault, drug possession, and some DUIs, which are treated differently from jurisdiction to jurisdiction — it was impossible to determine the percentage of prior convictions that were felonies versus misdemeanor offenses.

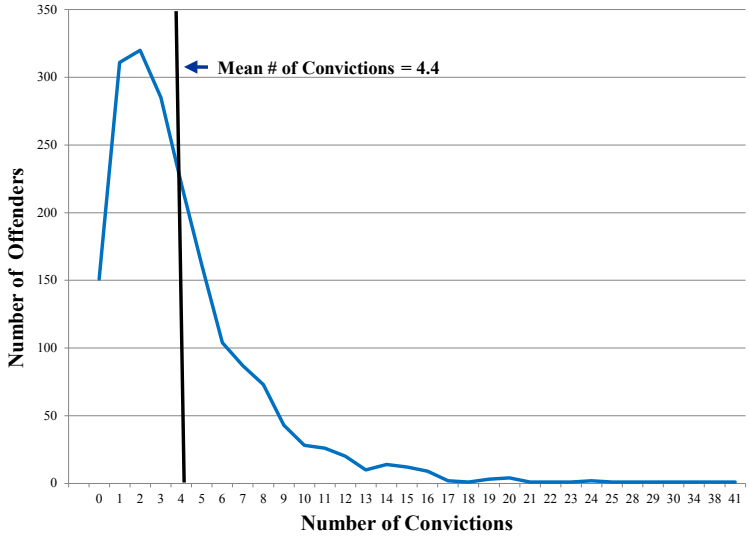
[30] For the purposes of this project, DUI-type offenses were considered "non-traffic" offenses. Of the 151 offenders (8% of all offenders) who did not have a prior conviction for a non-traffic offense, four (2.6% of the 151) had a conviction for a traffic offense that received criminal history points after their first deportation.

[31] Offenders with no prior convictions had an average of 1.9 prior deportations (ranging among the cases from a low of one deportation to a high of eight).

[32] If all offenders are included, each offender had an average of 4.0 convictions (median of three).

traffic conviction had 6,529 prior "sentencing events,"[33] with an average of 3.7 prior sentencing events per offender[34] (median of three prior sentencing events). The highest number of prior sentencing events for any single offender was 32.

Figure 10
Number of Convictions Per Offender
Fiscal Year 2013 Coding Sample



The most common prior offense type was driving under the influence ("DUI") or a related offense (*e.g.,* driving while intoxicated), with 30.8 percent of offenders having at least one prior DUI-type conviction (16.7 percent had multiple DUI-type convictions). Next in frequency rate were "other offenses,"[35] illegal entry, illegal reentry, and simple possession of drugs. The average sentence imposed for prior convictions (for cases in which an exact sentence was noted in a presentence report) was 14 months (median of six months). The highest sentence for a prior conviction was 420 months.

[33] A prior "sentencing event" refers to a situation when an offender was sentenced for multiple convictions by the same court at a single sentencing hearing. All sentences imposed by the same court on the same date were counted as a single sentencing event.

[34] If all offenders are included, the average number of sentencing events per offender was 3.4 (median of three).

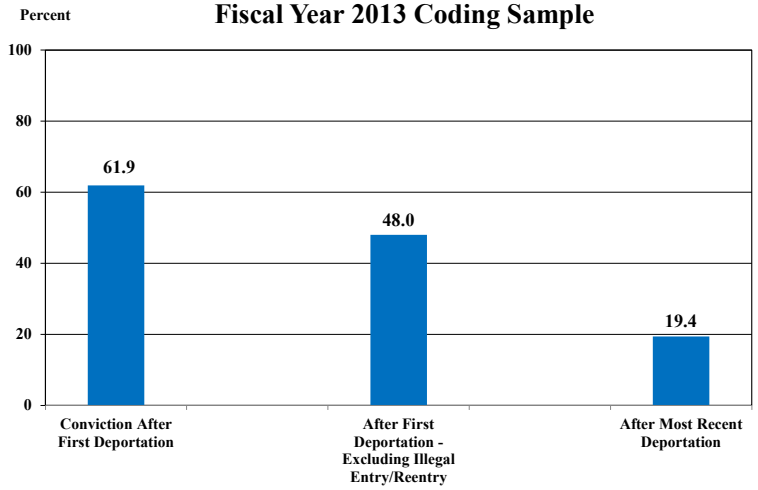
[35] This was a catchall category for both felony and misdemeanor offenses (non-traffic offenses) that were not more specifically described by another offense code.

b. Post-Reentry Convictions[36]

Both 8 U.S.C. § 1326(b) and USSG §2L1.2(b) provide sentencing enhancements for offenders' pre-deportation convictions but do not provide for enhancements based on convictions for offenses committed *after* an offender illegally reentered the country. The latter type of convictions are only factored into offenders' guideline ranges through the criminal history calculations in Chapter Four of the *Guidelines Manual*. As part of the special coding project, the Commission examined offenders' criminal histories to identify convictions occurring after offenders were deported (excluding their instant illegal reentry convictions). Such convictions necessarily occurred after the offenders had illegally reentered the United States and, thus, will be referred to as "post-reentry convictions."

As depicted in Figure 11, the Commission determined that 61.9 percent of offenders were convicted of at least one offense (other than their instant illegal reentry conviction) *after* their first (and, in some cases, only) deportation.[37] A subset of that group — 19.4 percent of all illegal reentry offenders in the sample — were convicted of at least one offense after their most recent deportation. There were some cases in which the only offense (other than the instant illegal reentry offense) for which an offender was convicted after his or her first deportation was a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326). If those two prior offense types are excluded from the analysis, 48.0 percent of all offenders in the sample were convicted of at least one post-reentry offense.

Figure 11
Convictions after Deportation
Fiscal Year 2013 Coding Sample



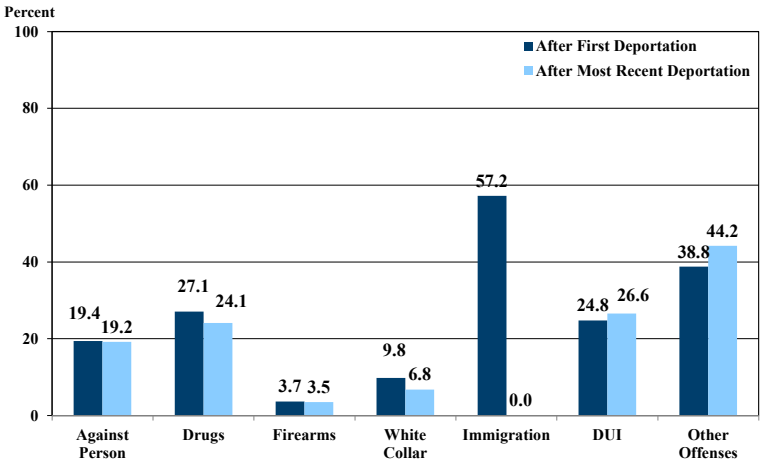
[36] Only post-reentry *convictions* were coded. There were also cases where offenders were *arrested* for state offenses after illegally reentering, but the state charges were dismissed when the federal government filed charges under 8 U.S.C. § 1326.

[37] In 82.8 percent of cases in which the offender committed at least one offense after their most recent deportation (other than the instant illegal reentry offense), the offender was apprehended by immigration officials for the instant illegal reentry offense in connection with that other offense (*e.g.*, the offender was found by immigration officials in prison or jail where the offender was awaiting prosecution or serving a sentence on a state charge).

With respect to offenses committed by offenders following their first and, in some cases, most recent deportations, Figure 12 includes a breakdown of the offense types.[38]

As Figure 12 shows, a significant proportion of illegal reentry offenders committed serious offenses — including drug-trafficking and violent offenses — between the time that they were initially deported and when they were ultimately arrested for their instant illegal reentry offense.

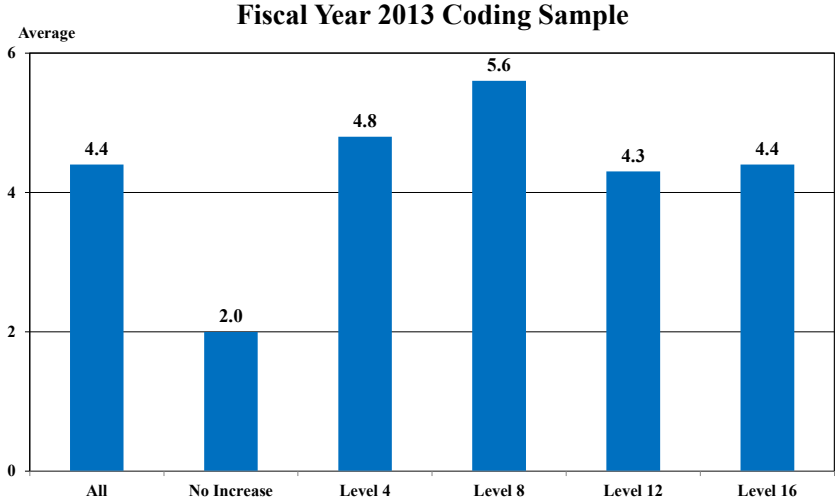
Figure 12
Offenses of Conviction after Deportation
Fiscal Year 2013 Coding Sample



c. The §2L1.2(b)(1) Enhancement Received for Defendants' Prior Convictions

The analysis that follows concerns offenders' complete criminal histories in relation to their level of enhancement under §2L1.2(b)(1). As a preliminary matter, Figure 13 shows the average number of prior convictions for each level of enhancement.

Figure 13
Average Number of Convictions by § 2L1.2(b)(1) Level
Fiscal Year 2013 Coding Sample



[38] Because some offenders were convicted of multiple offenses after illegally reentering the United States, the chart's statistical breakdown of different offense types exceeds the 61.9% figure that represents the percentage of all offenders who committed one or more post-reentry offenses.

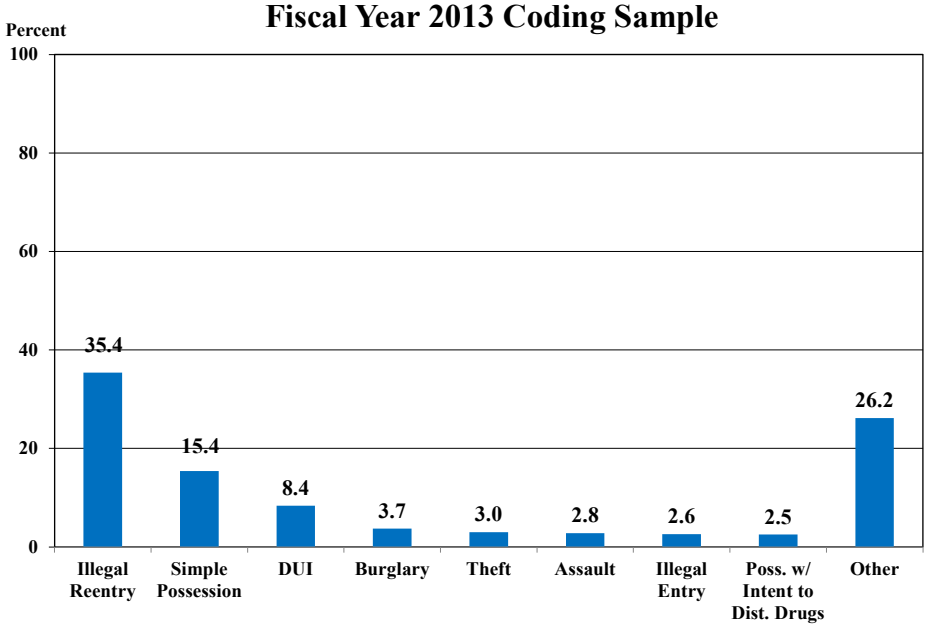
i. No Enhancement Under §2L1.2(b)(1)

Offenders with no enhancement under §2L1.2(b)(1) had an average of 2.0 prior convictions and 1.8 prior sentencing events. Those prior convictions did not qualify for enhancement for one of three reasons: (1) the convictions did not meet the legal criteria for enhancement under §2L1.2(b)(1); (2) the convictions occurred *after* the most recent illegal reentry; or (3) the parties entered into a plea agreement accepted by the court that exempted an eligible prior conviction from an enhancement that otherwise would have applied.

ii. 4-Level Enhancement Under §2L1.2(b)(1)(D) or (E)

Offenders with a 4-level enhancement under §2L1.2(b)(1)(D) or (E) had an average of 4.8 prior convictions and 4.2 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 4-level enhancements ranged from probation (12.1% of such cases) to 300 months of imprisonment.[39] There was a prison sentence of one month or greater imposed for 85.3 percent of these convictions, and the average sentence was 13 months (median of six months). As shown in Figure 14, the most frequent conviction triggering the 4-level enhancement was illegal reentry (which triggered the enhancement in 35.4% of cases), followed by simple possession of drugs (15.4%), and DUI (8.4%).

Figure 14
Offenses Triggering the Four-Level Enhancement
Fiscal Year 2013 Coding Sample

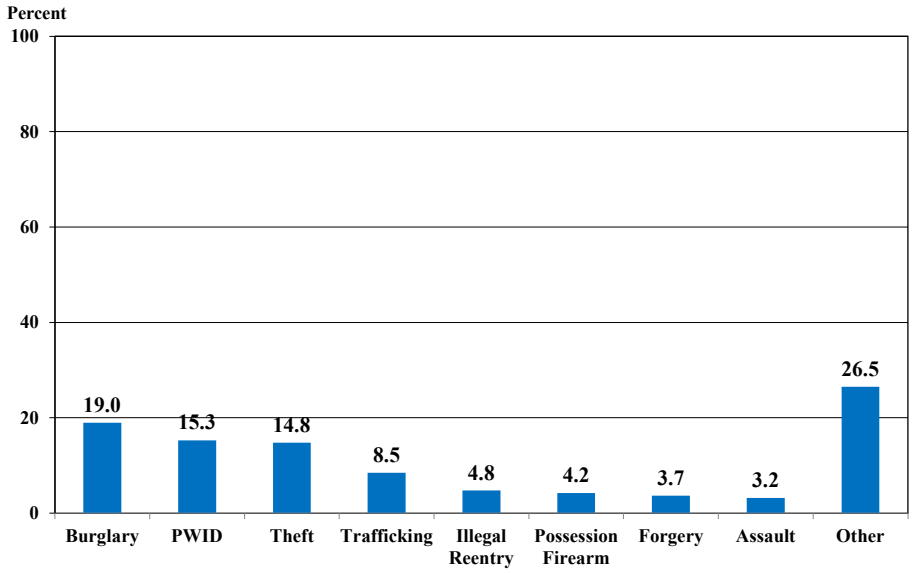


[39] The sentences mentioned above were imposed for the offenders' prior convictions (as opposed their instant federal illegal reentry conviction).

iii. 8-Level Enhancement Under §2L1.2(b)(1)(C)

Offenders with an 8-level enhancement under §2L1.2(b)(1)(C) had an average of 5.6 prior convictions and 4.7 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 8-level enhancement ranged from probation (14.8% of such cases) to 144 months. There was a prison sentence of one month or more imposed for 94.1 percent of these convictions, and the average sentence was 21 months (median of 13 months). As shown in Figure 15, the most frequent conviction triggering the 8-level enhancement was burglary (19.0%), followed by possession with intent to distribute drugs ("PWID") (15.3%), and larceny and theft (14.8%).

Figure 15
Offenses Triggering the Eight-Level Enhancement
Fiscal Year 2013 Coding Sample

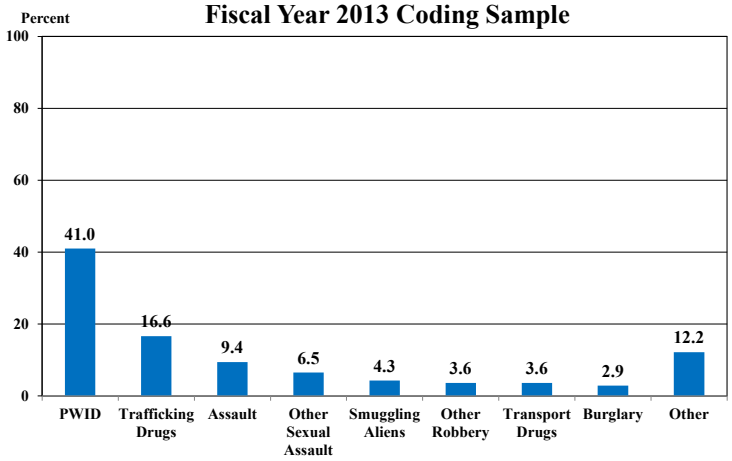


iv. 12-Level Enhancement Under §2L1.2(b)(1)(B)

Offenders with a 12-level enhancement under §2L1.2(b)(1)(B) had an average of 4.3 prior convictions and 3.7 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 12-level enhancement ranged from probation (10.9% of such cases) to 144 months. There was a prison sentence of one month or more imposed for 89.1 percent of these convictions, and the average sentence was 20 months (median of 12 months).

As shown in Figure 16 below,[40] the most frequent conviction triggering the 12-level enhancement was possession with the intent to distribute drugs (41.0%), followed by trafficking or distribution of drugs (16.6%), and assault (9.4%).

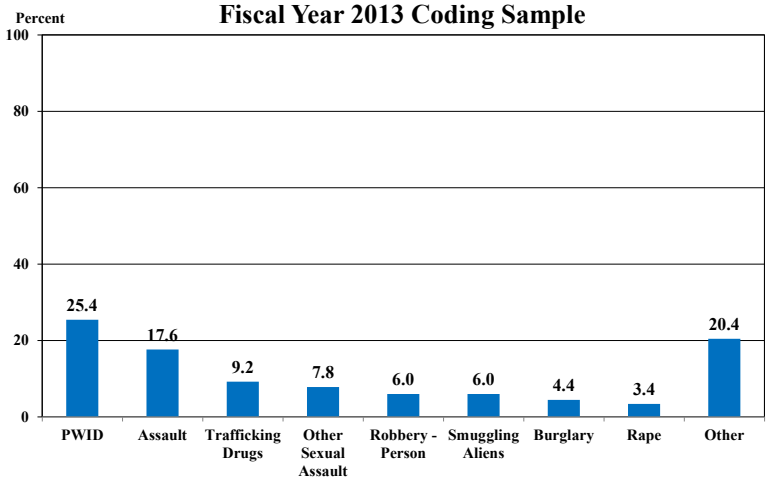
Figure 16
Offenses Triggering the 12 Level Enhancement
Fiscal Year 2013 Coding Sample



v. 16-Level Enhancement Under §2L1.2(b)(1)(A)

Offenders with a 16-level enhancement under §2L1.2(b)(1)(A) had an average of 4.4 prior convictions and 3.6 prior sentencing events. The sentences imposed for the prior convictions which resulted in the 16-level enhancement ranged from probation (2.7% of such cases) to 420 months. There was a prison sentence of one month or more imposed for 97.0 percent of these convictions, and the average sentence was 40 months (median of 30 months). As shown in Figure 17 below, the most frequent conviction triggering the 16-level enhancement was possession with the intent to distribute drugs ("PWID") (25.4%), followed by assault (17.6%), and trafficking or distribution of drugs (9.2%).

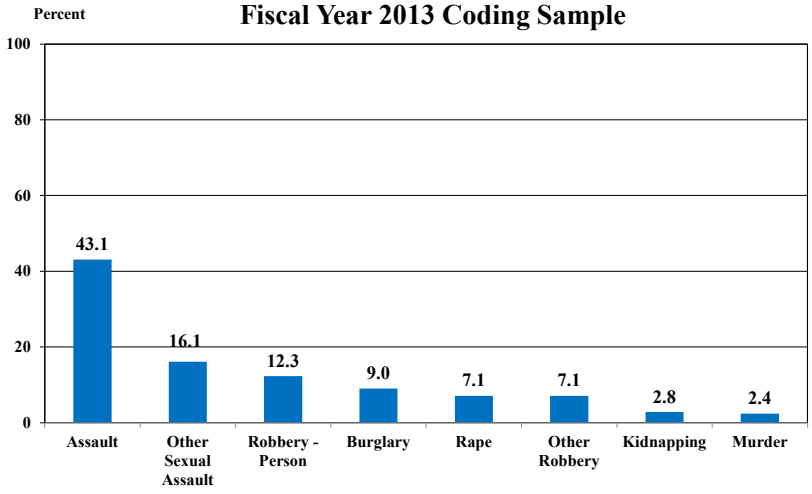
Figure 17
Offenses Triggering the 16 Level Enhancement
Fiscal Year 2013 Coding Sample



[40] "Other Sexual Assault" and "Other Robbery" are offense type codes from the Commission's list of offense types.

As shown in Figure 18, among crimes of violence that triggered the 16-level enhancement, the most frequent type of offense was assault (43.1%), followed by other sexual assault (16.1%), and robbery (12.3%).

Figure 18
Crimes of Violence Triggering the 16-Level Enhancement
Fiscal Year 2013 Coding Sample



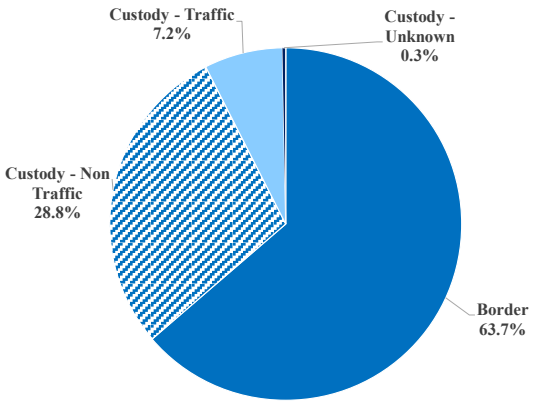
D. Offender Characteristics and Circumstances Related to Their Offenses

The special coding project also examined several characteristics of offenders and circumstances related to the commission of their illegal reentry offenses.

1. Location of Apprehension

As shown in Figure 19, the majority of offenders (63.7%) were apprehended for the instant offense at or near an international border. An additional 28.8 percent were first found by immigration officials while in custody for a non-traffic offense, while 7.2 percent were in custody for a traffic offense. In a small number of cases, it could not be determined whether the offender was in custody for a traffic or non-traffic offense.

Figure 19
Where Apprehended for Instant Offense
Fiscal Year 2013 Coding Sample



2. United States Residence

Most offenders (64.1%) did not have an established residence within the United States at the time of apprehension for the instant illegal reentry offense. Offenders who had an established United States residence at the time of the instant offense made up 35.9 percent of the sample.

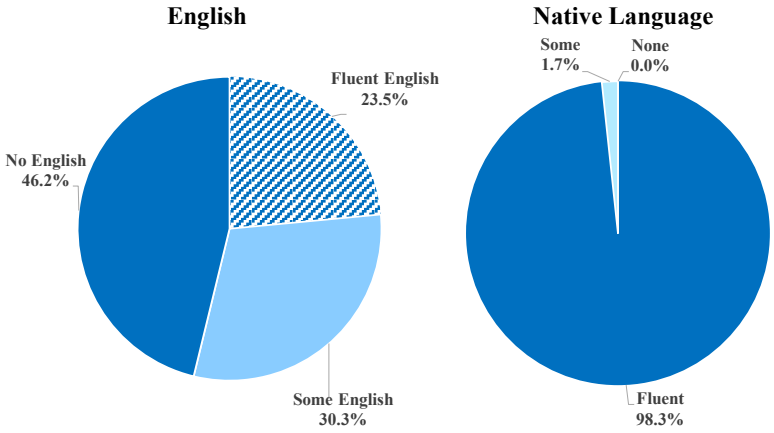
3. Schooling in the United States

The clear majority (82.0%) of offenders did not receive any schooling (primary, secondary, post-secondary school or college) within the United States. Offenders who did attend at least one of these types of educational institutions made up 18.0 percent of the sample.

4. Language(s) Spoken

As shown in Figure 20, the majority of offenders (53.8%) spoke at least some English. Offenders who spoke fluent English made up 23.5 percent of the sample, while offenders who spoke some English, but were not fluent speakers, made up 30.3 percent of the sample. Offenders who spoke no English were 46.2 percent of the sample. Almost all offenders spoke the language of their native country[41] fluently (98.3%) and another 1.7 percent spoke their native language, but not fluently. No offenders reported that they were totally unable to speak the language of their native country.

Figure 20
Language(s) Spoken
Fiscal Year 2013 Coding Sample



[41] There were some cases in which the offender's native country's language was English (for example, Canada or Jamaica). These cases are included in the total of those who speak their native language. Native language was determined to be the predominant language of the offender's country of citizenship.

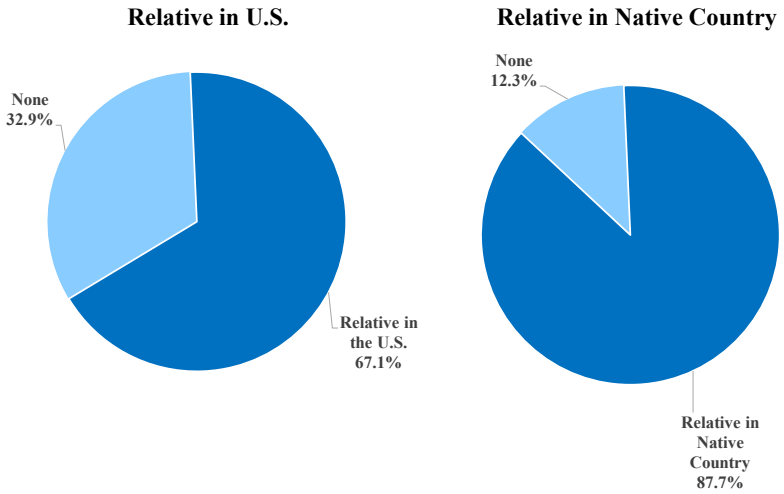
5. Location of Relatives and Children

Most offenders (67.1%) had relatives (other than their children) in the United States[42] at the time of the instant offense, while 32.9 percent did not have such relatives in the United States. Of the offenders who did not have relatives in their native country, 95.8 percent had relatives in the United States, while of the offenders who did not have relatives in the United States, 98.4 percent had relatives in their native country.

The Commission also collected information regarding whether offenders had at least one child (either a minor or an adult) living in the United States or living in the offender's native country, regardless of whether the child lived with the offender.[43] Offenders who had at least one child living in the United States (49.5%) made up the largest single percentage of the sample.

Figures 21a[44] and 21b[45] summarize the Commission's findings concerning offenders' relatives, including their children.

Figure 21a
Location of Relatives Other than Children
Fiscal Year 2013 Coding Sample



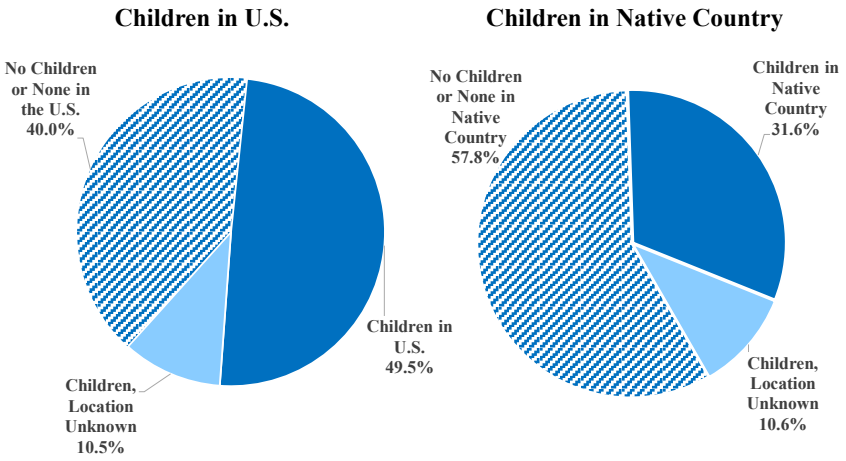
[42] A relative was considered to be a spouse, sibling, parent, grandparent, aunt, uncle, or cousin. As discussed below, offenders' children were analyzed separately.

[43] The child/children did not have to be citizens of the United States. Where an offender had at least one child in both the United States and his or her native country, he or she would be included in both data categories.

[44] Totals do not include the 17.4% of cases for which it could not be determined whether the offender had relatives in the United States, or the 17.3% of cases for which it could not be determined whether the offender had relatives in his or her native country.

[45] Totals do not include the 5.0% of cases for which it could not be determined whether an offender had children in the United States, or the 5.2% of cases for which it could not be determined whether an offender had children in his or her native country.

Figure 21b
Location of Children
Fiscal Year 2013 Coding Sample



6. Age at First Entry Into the United States

The age at which the offender first entered the United States[46] could be determined in 73.5 percent of the cases. The average age at the time of initial entry in those cases was 17 years (median of 17 years). Offenders who first entered the United States before the age of 18 were 53.1 percent of the sample, while those who were 18 years or older were 46.9 percent.

7. Work History in the United States

Most illegal reentry offenders (74.5%) had worked in the United States for more than one year[47] at some time prior to being arrested for the instant offense. Offenders who had no work history in the United States accounted for 9.8 percent of the sample, while those who had less than one year of work were 2.6 percent of the sample, and those who did work, but for an undetermined length of time, were 13.2 percent of the sample.

[46] The age at which an offender first entered the United States (whether legally or illegally) should be contrasted with the age at which an offender last illegally *reentered* the United States. As noted above, the average age of illegal reentry offender (at the time of their sentencing) was 36 years old.

[47] This work history included full-time and part-time employment, as well as "off the books" employment. The totals do not include the 21.6% of cases in which the information on the work histories the offenders could not be determined.

8. Substance Abuse

A majority of offenders (64.2%) reported no substance abuse problems, as reflected in their answers to the presentence report writers' questions about their substance abuse history, whether they had been to a rehabilitation facility, and whether they had ever been clinically diagnosed with a substance abuse problem (questions typically posed during the presentence interview). Offenders who reported attending a rehabilitation facility made up 7.6 percent of the sample, while those who were diagnosed by a professional were 1.1 percent of the sample, those who self-reported some level of prior substance abuse were 22.1 percent of the sample, and those who admitted a history of "daily abuse" were 5.0 percent of the sample.[48]

There were offenders who reported no substance abuse history but who had been convicted of DUI or a related offense. Of the offenders who reported no substance abuse history, 27.3 percent had been convicted of a DUI-type offense (13.6 percent had multiple convictions, 13.7 percent had one conviction). Of the offenders whose substance abuse history could not be determined,[49] 23.3 percent had a conviction for a DUI-type offense (10.6 percent had multiple convictions and 12.7 percent had one conviction).

Combining the information on reported substance abuse histories and DUI-type convictions, 56.1 percent of all illegal reentry offenders in the coding sample either had reported substance abuse issues or had been convicted of a DUI-type offense, or both.

IV. CONCLUSION

The Commission analyzed all 18,498 illegal reentry cases in fiscal year 2013 and also conducted a special coding project of a representative sample of those cases. Based on these analyses, the Commission reports the following key findings:

- Among all types of federal cases reported to the Commission in fiscal year 2013, 26 percent were illegal reentry cases.
- The number of illegal reentry cases rose from 2009 to 2013, with the majority of cases occurring in five districts located along the southwestern border of the United States.
- The vast majority of illegal reentry offenders were male (96.8%) and Hispanic (98.1%). The average age of such offenders was 36 years.
- In fiscal year 2013, all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory

[48] The totals do not include the 21.3% of cases in which a determination of the offender's substance abuse could not be determined from the PSR.

[49] *See id*.

maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (*i.e.*, those without "aggravated felony" convictions).

- Regarding sentences relative to the guideline range, the overall within-range rate for all illegal reentry cases was 55.6 percent. The rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1) — from 92.7 percent for cases with no enhancement to 31.3 percent for cases with the 16-level enhancement. Among offenders receiving 16- or 12-level enhancements, 92.4 percent received the enhancement because of a prior conviction that was either a crime of violence or a drug-trafficking offense.

- Significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted.

- The average offender was previously deported 3.2 times. Notably, 38.1 percent of offenders were deported and subsequently illegally reentered at least once after being convicted and sentenced for a prior conviction under 8 U.S.C. § 1325 (illegal entry) or 8 U.S.C. § 1326 (illegal reentry).

- The vast majority of illegal reentry offenders (92.0%) had at least one prior conviction for a non-traffic offense, with an average of 4.4 prior convictions per offender.

- The Commission determined that 61.9 percent of offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first (and, in some cases, only) deportation. If prior convictions under 8 U.S.C. §§ 1325 or 1326 are excluded from the analysis, 48.0 percent of all offenders in the sample were convicted of at least one post-reentry offense. A significant proportion of illegal reentry offenders committed serious offenses — including drug-trafficking and violent offenses — between the time that they were first deported and their arrest for the instant illegal reentry offense. Among all convictions that occurred after a prior deportation, 19.4 percent involved a crime against the person, and 27.1 percent involved a drug crime.

- Only 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions.

- The special coding project revealed the following data concerning illegal reentry offenders' personal characteristics and the circumstances of their offenses:

    - The majority of offenders (63.7%) were apprehended for the instant illegal reentry offense at or near the border.

    - Most offenders (64.1%) did not have an established residence within the United States at the time of apprehension for the instant offense.

    - The vast majority (82.0%) of offenders did not receive any schooling (primary, secondary, post-secondary school or college) within the United States.

- A majority of offenders (53.8%) spoke at least some English. No offenders reported that they were totally unable to speak the language of their native country.
- Most offenders (67.1%) had relatives in the United States at the time of the instant offense. Nearly half (49.5%) had children in the United States.
- When an exact age could be determined, the average age at which offenders first entered the United States was 17 years.
- Most offenders (74.5%) had worked in the United States for more than one year at some time prior to being arrested for the instant offense.
- A majority of offenders (64.2%) reported no substance abuse histories, although 56.1 percent of all offenders either had a reported substance abuse history or had been convicted of a DUI-type offense, or both.