Less = Success
Strategies to Get Less Time for the Reentry Client

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This paper is intended as an introduction to the operation of the reentry guideline, U.S.S.G. § 2L1.2, the categorical and modified categorical analyses, and some arguments for a below-guideline sentence.

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A. How U.S.S.G. § 2L1.2 Works.

U.S.S.G. § 2L1.2[1] provides that the base offense level for the offense of reentering the United States after deportation is eight. U.S.S.G. § 2L1.2(a). It further provides for enhancements to that base offense level based on the most severe prior conviction the defendant has. U.S.S.G. § 2L1.2(b). The enhancement can range from 16 (for an adjusted offense level of 24) to 4 (for felonies not subject to a greater enhancement or three prior misdemeanor drug-trafficking or crime of violence convictions).

Some key definitions include:

"Crime of violence" for the purposes of the 16-level bump is defined in two parts: the enumerated offenses of "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling" and the catchall "any offense ... that has as an element the use ... use of physical force against the person of another." U.S.S.G. § 2L1.2, Application Note 1(B)(iii).

"Drug trafficking offense" for purposes of the 12-level and 16-level enhancement must include an element of trafficking, e.g., "manufacture, import, export, distribution, or dispensing of a controlled substance" or "intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 2L1.2, Application Note 1(B)(iv). Prior convictions based on possession should not qualify.

"Felony" is defined as "any ... offense punishable by imprisonment for a term exceeding one year." U.S.S.G. § 2L1.2, Application Note 2.

Aggravated felonies are those defined in 8 U.S.C. § 1101(a)(43). U.S.S.G. § 2L1.2, Application Note 3(A).

B. Challenging the Enhancement.

The use of a prior conviction can be challenged on a number of bases, including: 1) Has the government proven the existence of the prior conviction for purposes of using it for enhancing the sentence? 2) Is there a jurisdictional defect in the prior, such as lack of counsel? 3) Was the defendant a juvenile improperly prosecuted as an adult? 4) Was the conviction not final at the time of the defendant's removal?

Once it has been determined that the conviction can be used for purposes of the enhancement, the issue is whether it is actually a qualifying conviction for the enhancement using the categorical or modified categorical approach.

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[1] U.S.S.G. § 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;
(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;
(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.

1. Challenges to the Prior Conviction.

a. Sufficient, Reliable Evidence of the Existence of the Conviction.

The government must be required to provide sufficient, reliable evidence proving that the defendant actually has the conviction before it can be used to enhance the defendant's sentence. U.S.S.G. § 6A1.3(a) provides that:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The government must prove a sentence enhancement by the preponderance of the evidence." *United States v. Hill,* 53 F.3d 1151, 1153 (10th Cir. 1995) (*en banc*). "When the government seeks to have a prior conviction included in the [defendant's criminal history] score, it bears an initial burden of proving the conviction. This burden will ordinarily be satisfied by production of a certified copy of the conviction or an equivalent proffer." *United States v. Unger*, 915 F.2d 759, 761 (1st Cir. 1990) (citation omitted). When a defendant challenges the factual basis of his sentence, the government has the burden of proving the disputed fact by a preponderance of the evidence. *United States v. Ndiaye*, 434 F.3d 1270, 1300 (11th Cir. 2006).

> Due process requires that a defendant not be sentenced on the basis of "misinformation of a constitutional magnitude." This right is protected by the requirement that the defendant be given adequate notice of and an opportunity to rebut or explain information that is used against him. As it pertains to hearsay information, due process requires that the information used have "some minimal indicium of reliability beyond mere allegation."

United States v. Beaulieu, 893 F.2d 1177, 1181 (10th Cir. 1990). The "sufficient indicia of reliability" standard in § 6A1.3(a) "should be applied rigorously." *United States v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993).

Information in a presentence report must be based upon reliable information sufficient to satisfy due process of law. *United States v. Patterson*, 962 F.2d 409, 414-15 (5th Cir. 1992) (remand required where court applied enhancement based on recommendation in PSR addendum, that relied on government's attorney's unsworn statement). A presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact. *United States v. Hammer*, 3 F.3d 266, 272 (8th Cir. 1993). *See also United States v. Hanna*, 49 F.3d 572 (9th Cir. 1995); *United States v. Lewis*, 237 Fed.Appx. 607 (11th Cir. 2007) (error for district court to rely on disputed statement in PSR to include prior conviction in criminal history); *United States v. Floyd*, 343 F.3d 363, 373 (5th Cir. 2003) (unsworn statements of probation officer were insufficient basis to support district court's conclusion that the defendant had the prior conviction); *United States v. Matthews*, 240 F.3d 806, 820-21 (9th Cir. 2001) (district court's use of prior convictions to support ACCA enhancement was error where certified copies of the conviction records were not before the court and the presentence report simply summarized facts from unspecified court documents and police records). However, in the absence of evidence demonstrating the defendant is not the person referred to in the documents, items such as certified docket sheets, certified copies of abstracts of judgment, court case summaries, and certified journal entries have been found sufficiently reliable to prove the *existence* of a prior conviction. *See United States v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006); *see also United States v. Martinez-Jimenez*, 464 F.3d 1205 (10th Cir. 2006) (NCIC report and letter from state court clerk); *United States v. Dyer*, 186 Fed.Appx. 866 (11th Cir. 2006) (NCIC report). If the defendant admits to the prior convictions or fails to object to them, the government does not need to prove the convictions. *United States v. Ruff*, 154 Fed. Appx. 807 (11th Cir. 2005).

b. Uncounseled Convictions.

Uncounseled convictions are not scorable, because a violation of the right to counsel is tantamount to a jurisdictional defect, rendering the conviction null and void for all purposes. *See Custis v. United States*, 511 U.S. 485 (1994) (uncounseled convictions cannot serve as basis for statutory enhancement); *United States v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996) (applying *Custis* to Guidelines, and noting that other circuits have overwhelmingly adopted this approach). The 11th Circuit has stated that "[a]s a general rule,we do not allow a defendant to collaterally attack in the sentence proceeding convictions being used to enhance his sentence. However, a defendant may collaterally attack convictions that are presumptively void. Applying this standard, we have held that [c]ollateral attacks on prior convictions are allowed in federal sentencing proceedings in one narrow circumstance only: when the conviction was obtained in violation of the defendant's right to counsel. If a defendant knowingly, intelligently, and voluntarily waives his right to counsel, any resulting conviction is not presumptively void." *United States v. Steverson*, 131 Fed.Appx. 140, 143-44 (11th Cir. 2005) (internal quotations and brackets and citations omitted).

Therefore, the government must either prove that the client was represented in the proceedings which led to the conviction used for enhancement, or prove that the right was voluntarily waived. *See United States v. Cruz-Alcala,* 338 F.3d 1194 (10th Cir. 2003) (holding that defendant failed to prove that he unknowingly waived his right to counsel and concluding that prior uncounseled misdemeanor convictions were properly used to calculated criminal history). Once the Government proves a valid conviction, the burden is on the defendant to show, by a preponderance of the evidence, that the conviction is constitutionally invalid. *United States v. Osborne*, 68 F.3d 94, 100 (5th Cir. 1995); *United States v. Windle*, 74 F.3d 997, 1001 (10th Cir. 1996); *Steverson*, *supra*. The defendant must make an affirmative showing that the prior conviction is constitutionally invalid. *United States v. Krejcarek,* 453 F.3d 1290, 1298 (10th Cir. 2006). Self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded prior convictions. *Id.*

In general, most of the core documents in the case -- the judgment, the plea agreement, and other similar documents – should have counsel's signature or name. In other cases, there will be a waiver of the right to counsel which the client has signed or initialed. If no such proof exists, the enhancement should be rejected. One should not assume that the client was represented merely because the right to counsel is generally guaranteed whenever a defendant receives any time in prison or jail; in practice many people are sentenced to jail time without receiving counsel, despite the constitutional rule. It can also be fruitful to examine the state's statute regarding when a defendant is entitled to receive counsel.

c. Juvenile Prosecuted in Adult Court.

Like a violation of the right to counsel, a violation involving a defendant's age usually creates a defect in the convicting court's jurisdiction, although this may vary depending on the state law governing juveniles. If the convicting court lacked jurisdiction, the conviction is null and void for all purposes. *See, e.g., Bannister v. State*, 552 S.W.2d 124 (Tex.Crim.App. 1977) (conviction void for lack of jurisdiction where Defendant was tried in adult court because she gave false birth date); *Custis v. United States*, 511 U.S. 485, 496 (1994) (authorizing collateral attack on sentence imposed in violation of right to counsel because *Gideon* violation "rises to the level of a jurisdictional defect"); *Johnson v. Zerbst*, 304 U.S. 458, 468 n.23 (1938) (holding that jurisdictional defect renders conviction void, and that violation of right to counsel is jurisdictional defect); *In re Nielsen*, 131 U.S. 176, 182 (1889) ("[i]t is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, *or for any other reason*, the judgment is void and may be questioned collaterally.").(emphasis added). However, the Tenth Circuit has held that a defendant could not collaterally attack his prior conviction on the basis that he was incorrectly sentenced in state court as an adult when he was actually a juvenile at the time. *United States v. Millan-Torres*, 139 Fed.Appx. 105 (10th Cir. 2005).

This issue often arises because clients have lied about their age in order to get processed through adult rather than juvenile court in the state system. To spot this issue, check the date of the prior conviction against the client's date of birth to determine his age at the time of conviction. If the client was a minor, but the conviction was obtained in adult court, then check the applicable state law to determine what procedures were required for the adult court to obtain jurisdiction. In many states the adult court cannot obtain jurisdiction without first going through a transfer proceeding. It is important to note that the court may require, we believe wrongly, that defendant would be required to seek post-conviction relief for uncertified adult convictions before finding the prior conviction null and void.

d. Non-final Convictions.

Non-final convictions can be used to enhance criminal history, but it can be argued that they cannot be used to increase the defendant's offense level under U.S.S.G. § 2L1.2. This situation can arise when the defendant's conviction is on appeal or when the defendant was removed from the United States before sentencing on the prior conviction. It can be argued that, although the term "felony" is defined for purposes of applying U.S.S.G. § 2L1.2(b)(1)(D), see Application Note 1(B)(2), the term "conviction" is not similarly defined. However, the application notes do define the term "aggravated felony," stating that "'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)...." Application Note 1(B)(3)(A). For purposes of the INA, a conviction must include a sentence in the form of punishment or some form of restraint and be final. *See* 8 U.S.C. § 1101(a)(48)(A)(ii). *See also Pino v. Landon,* 349 U.S. 901 (1955); *Morales-Alvarado v. INS,* 655 F.2d 172, 174-75 (9th Cir. 1981). The definition of "conviction" in 8 U.S.C. § 1101(a)(48) also applies to the term "felony" as used in 8 U.S.C. § 1326(b)(1). Accordingly, for purposes of 8 U.S.C. § 1326, the defendant was not removed "subsequent to a conviction ... for a felony". Logic and consistency require that a "felony", like an "aggravated felony," be final and have a sentence imposed before an offense-level increase under U.S.S.G. § 2L1.2 can be assessed. *See also United States v. Garcia-Lopez*, 375 F.3d 586, 587-88 (8th Cir. 2004) (plain language of § 2L1.2 "indicates that the appropriate inquiry is whether the defendant had been convicted of a crime of violence *at the time of deportation*." (italics original)); *United States v. Sanchez-Mota*, 319 F.3d 1 (1st Cir. 2002) (enhancement based on prior conviction improperly applied where conviction occurred after defendant's removal from US).

2. Determining Whether the Prior Qualifies as a Predicate Offense.

a. Sufficiency of the Evidence to Support the Enhancement.

The first step is to make the government provide sufficient evidence to support the enhancement. Note that evidence that is sufficient to prove the *existence* of a prior conviction may nonetheless be insufficient to prove the *nature* of the conviction. The general rule continues to be that, to determine the *existence* of a prior conviction for purposes of criminal history calculation, the district court may rely on "any information ··· so long as it has sufficient indicia of reliability to support its probable accuracy." *See United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir.1998) (internal alterations omitted). Nonetheless, in order to meet its burden of proof for an *enhancement*, we believe the government has to have a judgment of conviction (or the indictment and jury instructions or plea agreement).

Shepard v. United States, 544 U.S. 13 (2005), held that when a court determines whether a crime constitutes a violent felony under the Armed Career Criminal Act, the Sixth Amendment requires it to take "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600. Unlike the prior convictions in *Taylor v. United States*, 495 U.S. 575 (1990), which followed jury trials, the prior convictions at issue in *Shepard* were the result of guilty pleas. The Court found "*Taylor*'s reasoning controls the identification of ··· convictions following pleas, as well as convictions on verdicts." *Shepard*, 544 U.S. at 19. As a consequence, when determining whether a prior conviction resulting from a guilty plea is a violent felony for purposes of the ACCA, a court is limited to an examination of the language of the statute of conviction, "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant..., or to some comparable judicial record of this information." *Id.* at 1262. *See also Taylor*, 495 U.S. at 600 (rejecting the view that the sentencing court may consider extrinsic evidence when determining whether enhancement applies, and instead requiring judgment or combination of indictment and jury instructions); *United States v. Barney,* 955 F.2d 635, 639 (10th Cir. 1992) (holding that extrinsic evidence, i.e., relying solely on convictions mentioned in presentence report, cannot support enhancement); *United States v. Martinez-Villalva*, 232 F.3d 1329 (10th Cir. 2000) (holding that state court journal entry by itself insufficient to support enhancement).

At sentencing, the district court may rely on facts in the presentence report unless the defendant objected to them. *See United States v. Shinault*, 147 F.3d 1266, 1277 (10th Cir.1998). However, upon a proper objection by the defendant, the government must prove the disputed fact by a preponderance of the evidence, *see id.* at 1278, and the presentence report itself is insufficient to prove facts contained therein, *see United States v. Farnsworth*, 92 F.3d 1001, 1011 (10th Cir. 1996); *United States v. Lewis*, 237 Fed.Appx. 607 (11th Cir. 2007). The mere fact that the government presents an official report does not mean that all the government's contentions relating to that report are true. *See United States v. Cataldo*, 171 F.3d 1316, 1321 (11th Cir. 1999) (holding that a computer printout indicating that the defendant

had been arraigned and convicted was insufficient evidence that the defendant had also been arrested on that charge, as the inference, while reasonable, required too much speculation). Thus, computer printouts, abstracts of judgments, evidence from other PSRs, and other "extrinsic" evidence alone are not sufficient to prove the enhancement. *See United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005) (California abstract of judgment could not be used to determine that defendant's prior California drug conviction was a "drug trafficking offense" that could be used to enhance his federal sentence); *United States v. Medina-Covos*, 200 Fed. Appx. 362 (5th Cir. 2006) (minute entry stating that defendant pleaded guilty to "violations of section [s] § 11352.A Health and Safety Code in count II" of indictment did not establish prior conviction was for drug trafficking offense, as required to support sentence enhancement for illegal reentry following deportation, where only first paragraph of count II charged violation, which paragraph tracked language of statute, and which language contained acts not encompassed by sentencing guidelines enhancements); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004) (California abstract of judgment insufficient to prove that prior conviction was for a drug trafficking offense where statute covered non-trafficking conduct).

While the government or the probation office may try to rely on case law stating that any "reliable evidence" can be used at sentencing, the case law cited above is controlling because it is specific to enhancements, which typically involve a more precise inquiry than other kinds of determinations made at sentencing, in part because the consequences are often very severe. *See United States v. Martinez-Hernandez*, 422 F.3d 1084 (10th Cir. 2005) (applying categorical approach in determining that prior California conviction for weapons possession under Calif. Penal Code § 12020(a)(1) was not a firearms offense for purposes of U.S.S.G. § 2L1.2 enhancement, and rejecting argument that description of prior conduct included in PSR and based on arrest reports could be considered); *United States v. Henao-Malo*, 591 F.3d 798 (5th Cir. 2009) (government failed to provide sufficient information from reliable documents to establish that defendant's prior conviction for use of a telephone to facilitate commission of a narcotics offense was a drug trafficking charge to impose enhancement under USSG § 2L1.2; government provided only judgment that tracked language of statute and PSR; however, error was not plain).

b. Categorical Approach.

Generally, in determining whether a prior conviction is a qualifying offense for enhancement purposes, a "categorical" approach is used: "that is, we look no further than the fact of conviction and the statutory definition of the prior offense." *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1196 (11th Cir. 2007); *see also United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1273 (11th Cir. 2006) (categorical approach "generally applies" to determining whether prior offense qualifies for enhancement purposes under reentry guideline); *United States v. Laurico-Yeno*, 590 F.3d 818, 820-21 (9th Cir. 2010); *United States v. Gomez-Gomez*, 547 F.3d 242, 244 (5th Cir. 2008) (en banc). The district court must look at the version of the statute that was in effect at the time the defendant committed the prior offense, and it may only look at the facts underlying the prior offense if the statute of conviction is ambiguous. *United States v. Krawczak*, 331 F.3d 3102 (11th Cir. 2003).

The procedure is to obtain the actual statute of the prior conviction and compare the elements of that statute with the elements of the generic offense. Sources for the elements of the generic offense include case law, treatises, the Model Penal Code, and similar sources. The actual conduct underlying the prior conviction is irrelevant to the determination. The name given to the offense should also be irrelevant, though unfortunately some courts have improperly relied on the name given to the offense by the state and failed to do the proper categorical analysis. In such a situation, the court may nonetheless recognize that the result is incongruous and grant a variance. *See, e.g., United States v. Apodaca-Leyva*, 2008 WL 2229550 (D.N.M. 2008) (unpub'd) (imposing 16-level enhancement for prior conviction for Arizona aggravated assault conviction, but because the offense could occur by causing injury to another as the result of a drunk driving accident, and that was the basis for the prior conviction, the court granted a variance to 10 months imprisonment).

c. Modified Categorical Approach.

A "modified" categorical approach applies where the judgment of conviction and the statute are ambiguous and the district court cannot determine whether the prior conviction qualifies. This approach is used when the statute of conviction is divisible and it is not clear which subsection applies to the defendant. Under the modified categorical analysis, the district court may look to the facts underlying the state conviction to determine whether the defendant was necessarily convicted of qualifying conduct. *Aguilar-Ortiz*, 450 F.3d at 1273, 1275-76 (concluding that Florida statute is ambiguous and looking to facts of case to determine whether prior conviction qualified for 12-level enhancement in

§ 2L1.2(b)(1)(A)(i) for drug trafficking offenses). In so doing, the district court is generally limited to "relying only on the charging document[s], written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Llanos-Agostadero*, 486 F.3d at 1196-97.

d. Enhancement for Felony Drug Trafficking Crime.

Under § 2L1.2, the defendant receives a substantial enhancement if convicted of a felony "drug trafficking crime." If the defendant has such a conviction and received a sentence of greater than 13 months actual imprisonment for it, he or she receives a 16-level enhancement, while a sentence of 13 months or less for a drug trafficking crime triggers a 12-level increase. For an offense to be a drug trafficking crime under the Guidelines, the statute of conviction under federal or state law must contain as an element the "manufacturing, importing, exporting, distributing, or dispensing" of a controlled substance. *See* Application Note (1)(B)(iv); *United States v. Herrera-Roldan*, 414 F.3d 1238 (10th Cir. 2005) (Texas conviction for mere possession of, and not possession with intent to manufacture, import, export, distribute or dispense, a controlled substance, was not "drug trafficking offense," that would support 12-level increase in defendant's offense level, regardless of whether amount possessed, i.e., more than 50 pounds of marijuana, was indicative of intent to distribute; but conviction was an aggravated felony); *United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11th Cir. 2006) (solicitation to buy personal use amount of drugs not a drug-trafficking offense under reentry guideline). This requirement – that the statute contain one of these as an element – is the key to defenses under the categorical approach for the 12- and 16-level enhancements.

The other issue to look for is whether the state felony drug conviction could be prosecuted as a federal felony drug offense. The Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006), held that, although South Dakota treated alien's conviction for aiding and abetting another person's possession of cocaine as equivalent of possessing the drug, and thus a felony under that state's law, the offense was misdemeanor under Controlled Substances Act, and thus not an "aggravated felony". Thus, generally, simple possession offenses will not qualify as aggravated felonies or drug trafficking crimes. However, the Court noted that some possession crimes will qualify, stating: "Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base and recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)[.]" 127 S.Ct. at 630 n.6. *See case list United States v. Cepeda-Rios in citing pre-Lopez case United States v. Sanchez-Villalobos applying federal recidivist statute.* Additionally, felony possession offenses qualify as aggravated felonies for the 8-level enhancement. *United States v. Herrera*, 140 Fed. Appx. 58 (11th Cir. 2005).

There is presently a split in the circuits on the issue of whether a defendant with two or more prior simple possession convictions can be given a sentencing enhancement even though those prior offenses were not treated as recidivist crimes. In *United States v. Santana-Illan*, 2009 WL 5103592 (10th Cir. 2009) (unpublished), the Tenth Circuit held that the district court erred by concluding the defendant second state simple possession conviction was an aggravated felony because it could have been prosecuted as a felony under the federal Controlled Substances Act. Other circuits have reached the same conclusion. *See also Alsol v. Mikasey*, 548 F.3d 207, 219 (2d Cir.2008) (holding second simple possession conviction was not an aggravated felony because it was not prosecuted as recidivist possession); *Rashid v. Mukasey*, 531 F.3d 438, 442-48 (6th Cir. 2008) (same); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006) (same); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001) (same). However, other circuits have held that such convictions are aggravated felonies regardless of whether they were actually treated as recidivist crimes. *See United States v. Cepeda-Rios*, 530 F.3d 333, 335-36 (5th Cir. 2008) (holding second simple possession conviction qualifies as an aggravated felony regardless of whether it was actually prosecuted as recidivist possession), and *United States v. Pacheco-Diaz*, 513 F.3d 776, 778-79 (7th Cir. 2008) (same). The Supreme Court has granted certiorari on this issue. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 1012 (Dec. 14, 2009).

e. Enhancement for Felony Crime of Violence.

The Guidelines and federal criminal code contain many different definitions of "crime of violence." Under Section 2L1.2, a "crime of violence" is *either* one of a set of listed crimes which are not themselves defined (murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling) or any crime which has as an element the use, attempted use, or threatened use of physical force against the person of another. *See* Application Note (1)(B)(iii).

To determine whether any given prior conviction qualifies as a "crime of violence," consider first if the crime has, as an element, the attempted, threatened, or actual use of force. Examine the elements of the statute of conviction. To qualify as a crime of violence under this part of the definition, the crime must be defined such that the state could not obtain a conviction without proving that the defendant used, threatened, or attempted to use force against a person. *See United States v. Esquivel-Arellano*, 208 Fed.Appx. 758 (11th Cir. 2006) (error to enhance defendant's sentence based solely on conviction under Georgia aggravating stalking statute where statute could be violated without element of use of force). The force required should be violent and intentional. See *Johnson v. United States*, --- S.Ct. ----, 2010 WL 693687 *6 (Mar. 2, 2010) (in ACCA context, "physical force" is given its ordinary meaning and "in the context of a statutory definition of ' violent felony,' the phrase 'physical force' means violent force-that is, force capable of causing physical pain or injury to another person").

If the crime does not have as an element the attempted, threatened, or actual use of force, it may still qualify as a 16-level crime of violence if it qualifies as one of the listed crimes. To see if the crime qualifies under this part of the definition, first compare the prior conviction to the listed offenses, and determine if the offense appears to be one of them (i.e., murder, manslaughter, etc.).

To determine if the statute of conviction contains the elements of the generic definition, first determine its elements. Then examine the "generic" definition of the listed offense. In general, the "generic" definition mirrors the common law definition; but determining the generic definition may be difficult, as there is often no federal case law or other source definitively establishing it. Apart from the common law, helpful sources include the Model Penal Code, dictionary definitions, and the general practice of different states.

After determining what elements must be present under the generic definition, compare the elements of the statute of conviction to the elements of the generic definition. If the statute of conviction contains all elements contained in the generic definition, the conviction qualifies as a crime of violence.

Here, it is worth noting that there is still some confusion in the case law concerning how to apply the categorical approach to the differing definitions of "crime of violence." It is important not to be deterred simply because the Probation Office cites a case that appears to be on point. If the categorical approach method suggests the enhancement may not apply, you generally should object. Additionally, note the aggravated felony crime of violence definition is broader than that for the 16-level enhancement under § 2L1.2 because the aggravated felony crime of violence definition includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). The Eleventh Circuit recently concluded that, under this definition, a Texas conviction for auto burglary was an aggravated felony. *United States v. Alfaro-Gramajo*, 2008 WL 331176 (11th Cir. 2008) (court also held that it qualified as an attempted theft aggravated felony).

f. Enhancement for Prior Aggravated Felony Conviction.

Any conviction which qualifies as an "aggravated felony" under the long list of enumerated offenses in 8 U.S.C. 1101(a)(43) triggers an eight-level enhancement. Although we will not list or comment upon each of the many classes of offenses described in that section, in general the same mode of analysis used above should be employed. Find the statute under which your client was convicted, including any subsection listed in the charging instrument. Using the categorical approach, determine whether the statute of conviction contains all elements contained in the definition listed in Section 1101(a)(43). Where the definition simply lists an offense (e.g., "theft offense" in § 1101(a)(43)(G)), find the "generic" offense's definition and use that as the basis for comparison.

Some cautionary points should be noted here. First, note that the definition of "crime of violence" in this section is broader than the definition in U.S.S.G. § 2L1.2, because it includes any crime which "by its nature," involves a "substantial risk" that physical force will be used, and also includes crimes which harm the "property of another" not just those which harm "the person of another." *See* § 1101(a)(43)(F) (incorporating definition from 18 U.S.C. § 16). The "substantial risk" in § 16(b) refers to the intentional use of force, not to the possible effect of a person's conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (in the context of a DUI offense). A *mens rea* of recklessness is insufficient to support a finding that particular crime is a crime of violence. *See, e.g., Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005). Causation of injury should also be insufficient to make a prior offense a crime of violence. *See e.g. Chrzanoski v. Ashcroft,* 327 F.3d 188 (2d Cir. 2003); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004); *but see United States v. Llanos-Agostadero*, 486 F.3d 1194 (11th Cir. 2007) (holding that Florida conviction for aggravated battery on a pregnant woman that can be committed either by

intentionally touching or striking another person *or* by intentionally causing bodily harm to another was a crime of violence; court apparently equated "[i]ntentionally causes bodily harm" with use of force).

Second, note that the definition of "drug trafficking" is also broader than the one in U.S.S.G. § 2L1.2, and that it includes any drug crime which is a felony under either federal or state law. Formerly, courts had held that drug possession offenses were aggravated felonies. However, the Supreme Court has held that simple possession offenses are not aggravated felonies because they are punishable as misdemeanors under the Controlled Substances Act. *Lopez v. Gonzales*, 549 U.S. 47 (2006). Thus, even if the client received a felony state conviction for the possession, it should only qualify for a 4-point enhancement.

Third, make sure to check the sentence your client received against the sentence required under the definition in § 1101(a)(43), including whether your client received "straight" probation (as opposed to a term of imprisonment suspended to a term of probation). If your client received "straight" probation, then the sentence did not include a term of imprisonment and for that reason may not be an aggravated felony. *See, e.g.*, § 1101(a)(43)(R) (defining as aggravated felony an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in VIN numbers if the term of imprisonment is at least one year); *United States v. Martinez-Villalva,* 232 F.3d 1329 (10th Cir. 2000) (noting parties' agreement that legal effect of state court's probation sentence was not an aggravated felony under federal law); *United States v. Arguijo-Lucio*, 71 Fed. Appx. 441 (5th Cir. June 04, 2003) (unpublished disposition) (a sentence of deferred or straight probation with no subsequent revocation is not an aggravated felony, but still could be a crime of violence under the Guidelines). However, just because a prior conviction does not qualify as an aggravated felony, it may still qualify for the 16-level § 2L1.2 enhancement. *See United States v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005) (defendant properly given 16-level crime-of-violence enhancement for prior Kansas conviction for attempted aggravated assault even though he received probation; court observed that "unlike 8 U.S.C. § 1326(b)(2)'s requirement that an aggravated felony must result in a sentence of at least one year, U.S.S.G. § 2L1.2(b)(1)(A)(ii) does not require that, to be a 'crime of violence,' a prior conviction result in a sentence of any particular length."). Under such situations, consider an over-breadth or variance argument. *See infra*.

Fourth, check to see if the state offense was enhanced pursuant to a recidivist statute. If so, check to what the current possible state sentence is. *See United States v. Darden*, 539 F.3d 116 (2d Cir. 2008). The Supreme Court held in *United States v. Rodriquez*, 553 U.S. 377 (2008), that, for purposes of determining whether a prior conviction qualified as a serious drug offense under the ACCA, the maximum term of imprisonment prescribed by law was to be determined with reference to any applicable recidivist enhancements. Thus, where the defendant had three prior convictions for delivery of a controlled substance under Washington state law, and state law provided for a five-year maximum sentence for the first offense and a ten-year maximum for second and subsequent offenses, the defendant had two qualifying "serious drug offenses." The Eighth Circuit applied *Rodriquez* to § 2L1.2 enhancements in *United States v. Rincon-Nieto,* 281 Fed.Appx. 643 (8th Cir. 2008) (unpublished). However, *Darden* distinguished *Rodriquez*. *Darden* noted that the term "serious drug offense" is defined using the present tense in referring to applicable state law. Thus, the Second Circuit held that where New York's Rockefeller drug laws prescribed a maximum sentence of at least ten years for the offense at the time it was committed, but where New York non-retroactively amended the Rockefeller drug laws, prior to the federal sentencing, to reduce the maximum sentence for the same offense conduct to less than ten years, the conviction did not qualify as a predicate conviction for ACCA enhancement.

Fifth, in case of California convictions, see if the statute was a "wobbler." These California offenses are misdemeanors or felonies based on the sentence imposed by the judge. Whether a "wobbler" is a felony or a misdemeanor is controlled by Cal. Penal Code § 17(b), which states the range of judgments by which an offense is categorized "for all purposes" following judgment. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). If punished by time in the state prison, the crime is a felony. However, "[a] wobbler offense is treated as a misdemeanor '[a]fter a judgment [imposes] a punishment other than imprisonment in the state prison.'" *Garcia-Lopez*, 334 F.3d at 844 (quoting Cal. Penal Code § 17(b)(1)). Furthermore, "[i]mposition of a sentence other than imprisonment in a state prison automatically converts a felony to a misdemeanor." *Id.* (citing *People v. Glee*, 82 Cal.App.4th 99, 102 (2000)).

The government should have to prove that the conviction was actually for a felony. *United States v. Viezcas-Soto*, 562 F.3d 903 (8th Cir. 2009) (plain error to impose 16-level enhancement for prior crime of violence where defendant's **California unlawful sexual intercourse conviction** (statutory rape) was under a wobbler statute and government failed to prove it was a felony conviction). However, if the state court has not properly converted the offense to a misdemeanor, it may be deemed to still be a felony. *See United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (Defendant's prior California conviction for wobbler offense of having unlawful sexual intercourse with a minor was not converted to a misdemeanor, even though he received probation and suspended sentence of 157 days

in county jail amounting to time served, for purposes of Sentencing Guideline applicable to sentencing for illegal reentry; neither probation nor suspended sentence was deemed to be a judgment under California law and thus did not convert conviction to misdemeanor, and state court did not declare offense to be misdemeanor). *See also United States v. Solorio-Nunez*, 287 Fed.Appx. 13 (9th Cir. 2008) (unpublished) (where state court imposed a prison sentence but suspended its execution, defendant was convicted of a felony). The *Hernandez-Castillo* court strongly observed that such a situation was suitable for a sentencing variance.

C. Common Departures and Variances.

The district court is supposed to impose a sentence that is sufficient but not greater than necessary to comply with the sentencing goals of 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220, 245 (2005). The Court must consider all the § 3553(a) factors, including the advisory guideline range, in determining the appropriate sentence for the defendant, so that the sentence imposed is "sufficient, but not greater than necessary" to further the following goals:

> [t]o impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed education or vocational training and medical care.

Booker, 220 U.S. at 260. Other § 3553(a) factors that should be considered, when relevant, include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," and the "nature and circumstances of the offense and the history and characteristics of the defendant." *United States v. Trujillo-Terrazas,* 405 F.3d 814, 819 (10th Cir. 2005). The First Circuit recently acknowledged in *United States v. Rodriguez* that "the *Kimbrough* Court's organic reading of section 3553(a) suggests that a sentencing judge should engage in a more holistic inquiry." 527 F.3d 221, 228 (1st Cir. 2008).

The following are some arguments that can be made for a lesser sentence, including some of the more common guideline-departure arguments that have been successful and some newer ones that may at least convince the sentencing court to grant a variance. A great resource for variance and departure arguments and case law is the paper *Departures and Variances* by David Hemingway and Janet Vinton. It can be downloaded from fd.org at http://nce.fd.org/Hemingway%20&%20Hinton%20Departures%20and%20Variances%20Sept%2021.pdf.

1. Criminal History Category Is Over-Representative.

Quite often the reentry defendant will have significant criminal history. It can be argued that the defendant's criminal history category significantly over-represents the seriousness of his criminal history as well as the likelihood he will commit additional crimes. *See* U.S.S.G. § 4A1.3. Look especially for situations such as: the priors are not serious; little or no history of violent conduct; a single conviction accounts for all or most of the criminal history points (such as where defendant reentered within two years of prior conviction for reentry); defendant was young, defendant was convicted of a felony but actual time spent in jail was minimal or probation was granted. In *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), the Ninth Circuit held that a within-Guidelines sentence of 52 months for illegal reentry of an aggravated felon, which included a 16-level enhancement under § 2L1.2(b)(1)(A)(i) for a 1981 conviction on assault with great bodily injury and attempted voluntary manslaughter charges, was substantively unreasonable "because of the staleness of Amezcua's prior [enhancing] conviction and his subsequent history showing no convictions for harming others or committing other crimes listed in Section 2L1.2." 567 F.3d at 1055. The court concluded that because of their age, the prior convictions were "unrepresentative of Amezcua's characteristics during the past many years." *Id.* at 1056.

Other cases include: *United States v. Tzep-Mejia,* 461 F.3d 522, 526 (5th Cir. 2006) (in illegal reentry case, below-guideline sentence upheld in part "because all of the defendant's criminal history points arose out of one incident, the district court concluded that the defendant's criminal history category overstated the seriousness of the defendant's record"); *United States v. Diaz-Gutierrez*, 2010 WL 653315 (10th Cir. 2010) (variance from category IV to III); *United States v. Cuevas-Mendoza*, 2008 WL 4120060 (D.Kan. 2008) (prior cases old and relatively minor); *United States v. Wyne*, 41 F.3d 1405, 1408 (10th Cir. 1994) (court can determine the seriousness of criminal conduct by the length of the sentence imposed; fact the defendant had never received a sentence of imprisonment exceeding one year and one month indicated that his prior criminal conduct should not be considered "serious");*United States v. Brown*, 985 F.2d 478, 482

(9th Cir. 1993) (defendant's age at time of prior convictions and nature of those convictions are proper factors to consider);*United States v. Bowser*, 941 F.2d 1019, 1024 (10th Cir. 1991) (defendant's age at time of prior conviction could be considered when considering over-representation departure);*United States v. Anderson*, 955 F. Supp. 935, 937 (N.D. Ill. 1997) (finding criminal history category III significantly over-represented defendant's prior convictions, for drunk driving and domestic battery, such that downward departure to criminal history category II was warranted; defendant was in category III because current offenses were committed while defendant was on conditional discharge); *United States v. Ellis*, 376 F.Supp.2d 1177 (D.N.M. 2004) (reducing criminal history category from IV to III for defendant whose priors included imprisonment for failure to pay traffic fines and one drug distribution conviction); *United States v. Hammond*, 240 F.Supp.2d 872, 880-81 (E.D. Wisc. 2003) (reducing criminal history category of III to II where one charge was drunk driving; priors for criminal damage to property and reckless use of a weapon were more serious but no one was injured and defendant apparently did not intend to harm anyone; prior burglary conviction involved attempt to steal cigarettes; and prior convictions occurred when defendant was a young man and intoxicated); *United States v. Baker*, 804 F. Supp. 19, 22 (N.D. Cal. 1992) (reducing criminal history category from III to I for defendant with prior convictions for giving false information and grand theft auto, and two additional points for committing offense of conviction while on probation).

2. The Guideline Itself is Unreasonable.

a. No Empirical Data.

Like the crack guideline at issue in *Kimbrough v. United States*, 552 U.S. 85 (2007), U.S.S.G. § 2L1.2 is another guideline in which the Commission did not rely on empirical data in setting the initial 16-level increase in offense level for having a prior aggravated felony. Thus, there is no basis for concluding that applying U.S.S.G. § 2L1.2 results in a presumptively reasonable sentencing range. The First Circuit recognized in *United States v. Rodriguez,* 527 F.3d 221 (1st Cir. 2008), that *Kimbrough* "makes plain that a sentencing court can deviate from the guidelines based on general policy considerations." *Id.* at 227.

As pointed out in *United States v. Galvez-Barrios*, 355 F.Supp.2d 958 (E.D. Wisconsin 2005):

> As its reason for the amendment, the Commission stated only:
>
> > This amendment adds a specific offense characteristic providing an increase of 16 levels above the base offense level under § 2L1.2 for defendants who reenter the United States after having been deported subsequent to conviction for an aggravated felony. Previously, such cases were addressed by a recommendation for consideration of an upward departure.... The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.
>
> U.S. Sentencing Guidelines Manual app. C-Vol. I 241 (2003) (Amendment 375).

Id. at 962. The amendment was passed with little discussion. *Id.* However, despite the alleged "seriousness," the minor nature of the actual conduct is shown by the fact that an unlawful entry without inspection is a simple misdemeanor on the first offense. *See* 8 U.S.C. § 1325(a). *See also United States v. Zapata-Trevino*, 378 F.Supp.2d 1321 (D.N.M. 2005).

b. The Reentry Guideline Offense Levels are Often Disproportionate to the Seriousness of the Offense Conduct.

A reentry defendant can receive a base offense level as high as 24, comparable to:

a) U.S.S.G. § 2A2.2, assault with a dangerous weapon with serious bodily injury, level 23;

b) U.S.S.G. § 2B3.1, robbery with serious bodily injury, level 24;

c) U.S.S.G. § 2G1.3(a), sex trafficking of children, level 24;

d) U.S.S.G. § 2P1.3, inciting a prison riot with serious risk of death, level 22;

e) U.S.S.G. § 2K1.4(a)(1), arson by explosives, including bombing an airport or mass transit facility, level 24;

f) U.S.S.G. § 2A1.4, reckless manslaughter, level 18, or involuntary manslaughter involving reckless use of a means of transportation, level 22; and

g) U.S.S.G. § 2A3.2(a), sexual abuse of a minor under age 16, level 18.

It is unreasonable for the base offense level of a nonviolent crime that is essentially a trespass to be enhanced to the same extent as offenses that result in injury or death or involve sexual abuse.

Other courts have recognized the mismatch between the actual conduct of a reentry offense and the 16-level enhancement. "To put the Commission's action into perspective, the theft guideline called for a 16 level enhancement if the defendant stole $5,000,000 to $10,000,000, and the fraud guideline provided for a 16 level enhancement if the defendant's conduct caused a loss of $20,000,000 to $40,000,000." *United States v. Galvez-Barrios*, 355 F.Supp.2d 958, 961 (E.D. Wisconsin 2005) (citing James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing,* 8 Fed. Sen. Rep. 264, 268 (Mar./Apr.1996)). *See also United States v. Zapata-Trevino*, 378 F.Supp.2d 1321 (D.N.M. 2005)

The dramatic increase in sentences created by the application of § 2L1.2 undermines the statutory goal of imposing unwarrantedly disparate sentences for similar conduct. *See* 18 U.S.C. § 3553(a)(6) (the Guidelines seek "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"), especially since, as discussed below, the guidelines increase a reentry defendant's potential sentence twice for the same criminal history.

c. Double-counting of Criminal History Without Empirical Basis.

The operation of Section 2L1.2 is further rendered unreasonable because it counts criminal history twice. The Tenth Circuit has upheld Section 2L1.2's "double counting" on the basis that "the Guidelines authorize it." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1204 (10th Cir. 2007). The Court has reasoned that:

> In the context of illegal-reentry crimes, not only has the Sentencing Commission declined to forbid double counting expressly, it has expressly approved of it.

United States v. Montero-Montero, 220 Fed.Appx. 759, 760 (10th Cir. 2006) (citations omitted). Courts have rationalized the double-counting by asserting that considering a prior conviction in the context of criminal history serves the purpose of punishing recidivism, while including the same conviction in the offense level punishes the perceived severity of the instant offense. *See, e.g., United States v. Adeleke*, 968 F.2d 1159, 1161 (11th Cir. 1992) (viewing the use of the same conviction for "conceptually separate notions" about sentencing to be permissible, explaining that the criminal history adjustment is "designed to punish likely recidivists more severely, while the [offense level] enhancement ... is designed to deter aliens who have been convicted of a felony from re-entering the United States.").

However, other courts have recognized the unreasonableness of the double-counting. *See United States v. Evangelista*, 2008 WL 5057862 (S.D.N.Y. 2008); *United States v. Carballo-Arguelles*, 446 F. Supp. 2d 742, 744 (E.D. Mich. 2006); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wisc. 2005); *United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y.,2005). As pointed out by the Court in *Galvez-Barrios*,

> It may be that severely punishing those convicted of re-entering after committing a serious felony will protect the public because such persons may reasonably be considered more dangerous. It may also be that such persons should be subject to a greater penalty as a deterrent to re-entry. Nevertheless, such justifications substantially overlap with those the Commission uses to justify increasing the defendant's criminal history score. See U.S.S.G. ch. 4, pt. A, introductory cmt. (2004) (stating that the guidelines enhance sentences based on the defendant's criminal history in part to serve the goals of deterrence and protection of the public). Although it is sound policy to increase a defendant's sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis. Further, imposing a 16 level enhancement (which in the present case increased the low end of the range from 4 to 57 months) seems far out of proportion to any reasonable assessment of dangerousness.

355 F.Supp.2d at 962-63. These courts recognize that the mere fact that the Sentencing Commission has authorized this double-counting in Section 2L1.2 does not make the process reasonable. *See Santos*, 406 F.Supp.2d at 327 (guideline range "particularly unreasonable given the non-violent nature of the [instant] offense."); *Carballo-Arguelles*, 446 F. Supp. 2d at 745 ("'[n]owhere but in the illegal re-entry Guidelines is a defendant's offense conduct increased threefold based solely on a prior conviction.'" (quoting *United States v. Santos-Nuez*, 2006 WL 1409106, *6 (S.D. N.Y. 2006)).

Furthermore, there is no *empirical* basis for concluding that the longer guidelines sentence created by the criminal history enhancement by itself is not sufficient to deter aliens with prior felony convictions from reentering the

United States. *See* Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases,* 8 Fed. Sent. R. 275, 1996 WL 671556, at *1 (April 1, 1996) (Vera Inst. Just.) (discussing history of the amendments to § 2L1.2). "In response to criticism, Amendment 632 changed the Guideline in 2001 by establishing 'more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant.'" *United States v. Zapata-Treviño*, 378 F.Supp. 2d 1321, 1324 (D.N.M. 2005) (citing U.S.S.G. supp. to app. C, amend. 632 (2001)). This "graduated" version of the guideline suffers from flaws of its own. *See, e.g., United States v. Trujillo-Terrazas*, 405 F.3d 814, 819-20 (10th Cir. 2005) (recognizing the overbroad nature of the 16-level crime of violence enhancement).

Nonetheless, despite the Commission's tinkering, the basic flaw of Section 2L1.2 remains: The Guideline increases a defendant's offense level based solely on prior convictions, rather than on conduct inherent in the instant offense, and these prior convictions also increase the defendant's criminal history score.

3. Fast-Track Disparity.

The First Circuit recently held that the district court could consider the absence of a fast-track sentencing option could be considered at sentencing to avoid unwarranted disparity, abrogating *United States v. Andujar-Arias,* 507 F.3d 734 (1st Cir. 2007), in *United States v. Rodriguez,* 527 F.3d 221 (1st Cir. 2008). The Court observed that:

> Like the crack/powder ratio, fast-track departure authority has been both blessed by Congress and openly criticized by the Sentencing Commission. *See*United States Sentencing Commission, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines* 66-67 (2003) (criticizing fast-track programs for creating a "type of geographical disparity"). Like the crack/powder ratio, the fast-track departure scheme does not "exemplify the [Sentencing] Commission's exercise of its characteristic institutional role." *Kimbrough,* 128 S.Ct. at 575. In other words, the Commission has "not take [n] account of empirical data and national experience" in formulating them. *Id.* (citations omitted). Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract. *See id.*

Id. at 227.

4. Actual Circumstances of Prior Conviction Not Actually Very Serious.

The definitions for the enhancement, especially the crime of violence and drug-trafficking, have been criticized as over-broad, and variances have been granted based on the actual circumstances of the prior conviction not actually being serious enough to warrant a steep enhancement. *See, e.g., United States v. Trujillo-Terrazas*, 405 F.3d 814, 819-20 (10th Cir. 2005) (recognizing the overbroad nature of the 16-level crime of violence enhancement and stating that "[t]he relatively trivial nature of Mr. Trujillo's criminal history is at odds with the substantial 16-level enhancement recommended by the Guidelines for this conduct."). In *Trujillo-Terrazas*, the defendant had a prior felony conviction for third-degree arson. It did qualify as arson under the categorical approach. However, his actual conduct was throwing a match into a vehicle owned by his former girlfriend's new boyfriend and causing about $35 worth of damage. *See also United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (three level departure where prior aggravated conviction was a $20 drug sale and delay in bringing federal charges prevented defendant from having a concurrent sentence with state charge); *United States v. Cruz-Guevara*, 209 F.3d 644 (7th Cir. 2000) (prior conviction of "aggravated sexual abuse of a minor" was based on consensual sex between the then-18-year-old defendant and his 16-year-old girlfriend and 116-day sentence was imposed); *United States v. Diaz-Diaz*, 135 F.3d 572 (8th Cir. 1998) (prior conviction was a sale of 8.3 grams of marijuana for which defendant was sentenced to 22 days; departure from 63 to 10 months affirmed); *United States v. Zapata-Treviño*, 378 F.Supp.2d 1321 (D.N.M. 2005) (in reentry case, departing 42 months (to 15 months) based on actual circumstances of prior conviction); *United States v. Perez-Nuñez*, 368 F.Supp.2d 1265 (D.N.M. 2005) (in reentry case, departing 33 months based on actual circumstances of prior conviction).

Sometimes the defendant's prior conviction technically qualifies as a 16-level crime of violence even though it would not qualify as an aggravated felony. This can occur because the definition of felony for purposes of the 16-level

enhancement only requires that the prior offense have been *punishable* by a year or more, where the aggravated felony crime of violence requires that the *actual sentence imposed* be at least one year. *Compare* U.S.S.G. § 2L1.2, application note 2 with 8 U.S.C. § 1101(a)(43). Imposition of a one-year sentence is also required for many other felonies to qualify as aggravated felonies.[2] Thus, offenses categorized as misdemeanors by the jurisdiction of conviction may be "felonies" for purposes of U.S.S.G. § 2L1.2. The use of the word "punishable" makes clear that the definition of felony turns on the maximum sentence that could result from a conviction for that offense, "irrespective of the actual sentence imposed." *United States v. Hernandez-Garduno*, 460 F.3d 1287, 1293 (10th Cir. 2006); *see also United States v. Murillo*, 422 F.3d 1152, 1153-54, 1155 (9th Cir. 2005) (continuing to hold, after *Blakely*, that "in determining whether a state conviction is punishable for more than one year's imprisonment for purposes of a federal criminal statute predicated on a prior felony conviction or for federal sentencing purposes, we look to the maximum penalty allowed by statute"); *United States v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. 2003) (holding that "a crime is a 'felony' for purposes of U.S.S.G. § 2L1.2(b)(1) ... if, by the terms of the criminal statute, a conviction exposes a defendant to a sentence of imprisonment of more than one year," regardless whether defendant was sentenced to more than one year). In such a situation, the actual offense conduct – as shown by the imposition of a sentence of less than one year – is arguably less serious and does not warrant a 16-level enhancement.

5. Client is Culturally Assimilated into the United States.

In cases where the client's history indicates long-term ties to the United States, the circumstances may support a departure based on the fact that the client's family and cultural ties are to the United States, and the client's motivation for returning was primarily familial and cultural, rather than economic. *See United States v. Castillo*, 386 F.3d 632 (5th Cir. 2004) (affirming cultural assimilation departure where defendant arrived in the United States at age three, grew up in Houston, and lived in the US continuously for 18 years until deported to Mexico; he had no significant ties to Mexico; his parents, siblings, and children lived in the United States; and he spoke fluent English); *United States v. Tejeda-Baltazar*, 2004 WL 1427117 (N.D. Ill. 2004) (departure granted where defendant's mother brought him to the US as a small child; he had lived here ever since, attending school and becoming a permanent resident; defendant had no experience living in Mexico; and he returned within a month of being deported and began working to support his family); *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917 (E.D. Wis. 2003) (departure granted where defendant's motivation for returning was that he had spent virtually his entire life here and because most of his relatives live here; defendant had lived in the US since he was six months old, attended public schools in Chicago, and had had permanent-resident status); *United States v. Hernandez-Garcia*, 97 Fed. Appx. 119 (9th Cir. 2004) (affirming cultural assimilation departure where defendant arrived in the United States at age six, lived here continuously for 28 years, defendant graduated from high school here, and his three children, who were American citizens, also lived here; additionally, he worked here legally for many years, and he spoke English fluently); *United States v. Paniagua-Ortiz*, 91 Fed. Appx. 575 (9th Cir. 2004) (affirming cultural assimilation departure where defendant had lived in the United States for 27 years, attended school in California, read and wrote English, and had a parent, siblings, and two children who were legal residents of the United States); *United States v. Reyes-Campos*, 293 F. Supp. 2d 1252 (M.D. Ala. 2003) (departure granted where defendant had lived in the United States from ages 9 to 17 and his immediate family lived here; and the defendant's familial motivation for returning was demonstrated by the fact that, upon reentering, he went to South Carolina to find his wife and child, after which he and his wife traveled to her parents' home in Alabama, where he planned to work).

6. Older Convictions.

Older convictions that were not aggravated felonies at the time of conviction but now are can be the basis for an argument that they should not receive the offense level enhancement: *Pradith v Ashcroft*, CV 03-1304-BR (D.C. Ore. 2003) (unpublished) (where the noncitizen pled guilty to felony simple possession before May 13, 2002, based on correct advice that the offense was not then an aggravated felony under immigration law, the conviction was held not to be an

[2] *See* 8 U.S.C. § 1101(a)(43)(F) (crime of violence); (G) (theft or burglary offense); (P) (false passport); (R) (commercial bribery, counterfeiting, forgery, trafficking in vehicles with altered VINs); (S) (obstruction of justice, perjury, subornation of perjury, bribery of a witness).

aggravated felony for purposes of serving as a bar to cancellation of removal); *see I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *see also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (stating in dicta that "a rule that classifies state drug offenses punished as felonies under state but not federal law as aggravated felonies for immigration purposes is inequitable to aliens who committed minor drug offenses prior to 2002").

7. Additional Sample Cases Affirming or Granting A Sentence Below the Advisory Guidelines.

United States v. Krutsinger, 449 F.3d 827 (8th Cir.2006) (affirming co-defendants' sentences of 21 and 24 months that were below the 100 to 125 and 70 to 87 advisory guideline ranges respectively).

United States v. Gray, 453 F.3d 1323 (11th Cir. 2006) (affirming 72-month sentence that was below the advisory range of 151 to 188 months).

United States v. Halsema, 2006 WL 1229005 (11th Cir. May 9, 2006) (unpublished) (affirming 24-month sentence that was below the advisory range of 57 to 71 months as reasonable).

United States v. Baker, 445 F.3d 987 (7th Cir. 2006) (affirming 87-month sentence that was below the advisory range of 108 to 135 months as reasonable).

United States v. Montgomery, 165 Fed.Appx. 840 (11th Cir. Feb.7, 2006) (unpublished) (affirming 8-month sentence that was below the advisory range as reasonable).

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) (in crack cocaine case, affirming a 90-month sentence that was below the advisory range of 188 to 235 months as reasonable).

United States v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006) (Defendant's 30-month sentence for illegal reentry after deportation was reasonable; sentence was below advisory sentencing guidelines range of 41-51 months, district court carefully considered statutory sentencing factors and imposed sentence below guidelines range to make defendant's sentence consistent with that of another defendant sentenced that day, and court's decision not to impose even lower sentence because of defendant's alleged inadequate medical care during pre-sentence incarceration did not render sentence unreasonable).

United States v. Pahua-Martinez, 2009 WL 2003241 (D.Neb. 2009) (unpub'd) (departure from 46-57 month guideline range to 21-month sentence for reentry charge and consecutive 6-month sentence for supervised violation for reentry defendant).

United States v. Todd, 618 F.Supp.2d 1349 (M.D.Ala. 2009) (Kenyan defendant convicted after jury trial of perjury, fraud, misuse of visa, permits and other documents given variance to probation in part because of defendant's cultural assimilation and family ties and detention in ICE custody).

United States v. Andrade-Torres, 2009 WL 3207781 (D.N.M. 2009) (variance granted because guideline range substantially increased because of single prior conviction).

United States v. Carillo-Romo, 2009 WL 5220329 (D.N.M. 2009) (reentry defendant granted variance based on reason for returning to the US - to care for sick mother - combined with minimal, old criminal history; sentence of 12-months and a day imposed).

United States v. Garcia-Ruiz, 2009 WL 3319789 (D.N.M. 2009) (reentry defendant with lengthy but largely nonviolent history granted criminal history category departure from VI to V and then further variance from guideline range of 30-37 months to sentence of 21 months).

United States v. Ramirez, 2009 WL 4722237 (S.D.N.Y. 2009) (reentry defendant with advisory guideline range of 41-51 months sentenced to 18 months because of double-counting of criminal history and fast-track disparity).

United States v. Gutierrez-Hernandez, 2009 WL 812265 (S.D.N.Y. 2009) (reentry defendant with advisory range of 9-15 months sentenced to time-served (0-6 months)).

United States v. Urena, 2006 WL 755962 (2d Cir. 2006) (72-month sentence for reentry defendant was reasonable, where defendant had lengthy criminal history following other prior illegal entries and sentence imposed was five months below recommended guidelines range).

United States v. Thomas, 2006 WL 584281 (3d Cir. 2006) (reentry defendant's 75-month sentence was reasonable; district court considered sentencing guidelines range of 77 to 96 months, its discretion to depart from that range, role of statutory sentencing factors in directing its exercise of that discretion, and goals to be served by choice of sentence, and court found that defendant's extensive history of theft convictions required lengthy prison term for protection of society and as appropriate punishment).

United States v. Martinez-De Loza, 192 Fed.Appx. 666 (9th Cir. 2006) (for reentry defendant, affirming sentence of 40 months, 17 months less than minimum advisory guideline range, as reasonable)..

United States v. Constantine, 417 F.Supp.2d 337 (S.D.N.Y.,2006) (27 month sentence was appropriate for illegal reentry defendant who did not return to United States for purpose of engaging in criminal conduct, was arrested 12 years after he reentered, and, subsequent to reentry, maintained steady employment, paid taxes, and contributed to support of his family. Advisory range was 30-37 months.).

United States v. Santos, 406 F.Supp.2d 320 (S.D.N.Y. 2005) (non-Guidelines sentence was warranted, upon conviction of defendant of illegal reentry after deportation subsequent to aggravated felony conviction, based on several considerations, including geographical sentencing disparities created by fast-track, early disposition programs in illegal reentry cases in some jurisdictions, inappropriate double-counting of criminal history points, and undue delay in transferring defendant from state to federal custody; after adjustments, defendant's offense level of 14, with further consideration of the transfer delay, warranted sentence of twenty-four months incarceration and three years supervised release), *but see United States v. Galicia-Cardenas*, 2006 WL 751349 (7th Cir. 2006) (27-month prison sentence for reentry defendant, which reflected equivalent of four level downward departure because district did not have fast-track program for immigration offenses, was not reasonable).