

FOURTH REVISED PROPOSED AMENDMENT: CULTURAL ASSIMILATION

Synopsis of Proposed Amendment: *This proposed amendment addresses when a downward departure may be warranted in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States. Several courts of appeals have upheld such departures. See, e.g., United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998); United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998). Other courts of appeals have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Melendez-Torres, 420 F.3d 45, 51 (1st Cir. 2005); United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) (noting that post-Booker, "'family and cultural ties', however the factor is characterized, will still be part of tailoring an appropriate sentence"); United States v. Ticas, 219 F. App'x 44 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Even those courts of appeals that have not explicitly foreclosed cultural assimilation departures have acknowledged that district courts are within their discretion to deny such a departure in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also United States v. Galarza-Paya, 441 F.3d 885, 889-890 (10th Cir. 2006) ("a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law. § 3553(a)(2), (6)."); United States v. Maturin-Barraza, 2010 WL 517630 (10th Cir. February 2010) ("As the court indicated, many defendants explain their motivation to reenter this country illegally as predicated upon their family ties in this country. We have repeatedly rejected that explanation, standing by itself, as a basis to vary from the advisory guidelines sentence, provided the sentence imposed is otherwise consistent with the sentencing factors of § 3553(a).").*

In order to promote uniform consideration of cultural assimilation by courts, the proposed amendment adds a new application note to §2L1.2 to provide that a downward departure based on cultural assimilation may be warranted in an illegal reentry case. The application note provides that such a departure may be appropriate if (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. The application note also provides factors for the court to consider.

Proposed Amendment:

§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.

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.

(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).

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 counted 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 Consideration 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 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 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.

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