How a Sentence for an Immigration Offense May be Lower if Imposed Today

Immigration offenses include illegally entering the United States,[1] illegally reentering the United States after deportation or removal,[2] smuggling or harboring undocumented immigrants,[3] passport or immigration documents fraud or mishandling of information,[4] unauthorized travel by immigrants or citizens of the United States,[5] marriage fraud,[6] importing immigrants for immoral purposes,[7] aiding the entry of certain classes of immigrants,[8] engaging in a pattern of unlawful employment of immigrants,[9] and failing to depart the United States.[10]

This section offers guidance for two of these offenses, illegally reentering the United States after deportation or removal (8 U.S.C. § 1326) and smuggling or harboring undocumented immigrants (8 U.S.C. § 1324). Most persons convicted of immigration-related crimes are sentenced to less than 10 years in custody. This is true even of individuals convicted of illegal reentry and smuggling offenses.[11] However, some people have received sentences of incarceration in excess of 10 years for these offenses.

For an individual who was sentenced to more than 10 years, you must determine whether he or she would likely receive a lower sentence if imposed today. A sentence for illegal reentry or

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[1] 8 U.S.C. § 1325; maximum imprisonment sentences of 6 months or 2 years.

[2] 8 U.S.C. § 1326; maximum imprisonment sentences of 2, 10, or 20 years, and the possibility of a 10 year consecutive sentence.

[3] 8 U.S.C. § 1324; maximum imprisonment sentences of 1, 5, 10, 15 or 20 years, or life, or death; some provisions require a 3 or 5 year mandatory minimum sentence.

[4] 8 U.S.C. §§ 1160 (fine or maximum of 5 years), 1255a (fine or maximum of 5 years), 1324c (5 or 15 year sentences).

[5] 8 U.S.C. § 1185; penalty provision struck in 1978. Pub. L. No. 95-426, § 707(d).

[6] 8 U.S.C. § 1324; maximum imprisonment sentence of 5 years.

[7] 8 U.S.C. § 1328; maximum imprisonment sentence of 10 years.

[8] 8 U.S.C. § 1327; maximum imprisonment sentence of 10 years.

[9] 8 U.S.C. § 1324a; maximum imprisonment sentence of 6 months.

[10] 8 U.S.C. § 1253; maximum imprisonment sentence of 4 years or 10 years.

[11] The United States Sentencing Commission publishes data concerning sentencing. According to their data, in 2013, the average sentence imposed for illegal reentry was 19 months. http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf. In 2014, the average sentence length for immigrant smuggling was 17 months. http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Alien_ Smuggling.pdf.

smuggling immigrants could be lower today because of (1) ameliorating amendments to the United States Sentencing Guidelines that were not made retroactive (or not applied retroactively in an individual case), (2) favorable changes in case law concerning application of the guidelines, or (3) discretion to vary from the guideline range afforded by the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005) and its progeny.[12]

I. Illegal Reentry after Deportation or Removal

A. Ameliorating Amendments Not Made Retroactive

On November 1 of each year, a new Guidelines Manual is issued reflecting changes since the previous version.[13] To determine when the Sentencing Commission amended either guideline,[14] look at the "Historical Note" at the end of the guideline. To review the actual amendment and how it changed the guideline, read the amendment in Appendix C of the United States Sentencing Guidelines. To determine whether or not a given amendment was given retroactive effect, see USSG § 1B1.10(c). For further discussion of ameliorating amendments, see Ameliorating Amendments to the U.S. Sentencing Guidelines.

In any case, compare the version of the guideline used to sentence the client with the version in effect today. The guideline used to sentence the client should have been the least severe of the version in effect at the time of sentencing or at the time the offense was committed.[15] If not, this is another reason the sentence would be lower today. *See* Mistakes and Oversights Not Caught at the Time and Never Corrected.

The guideline applicable to illegal reentry after deportation or removal is USSG § 2L1.2. Since publication of the original Guidelines Manual in 1987, § 2L1.2 has been amended thirteen times. Three of these amendments lessened the impact of an individual's criminal history on the base offense level calculation, and three more added downward departure provisions. None of the amendments was made retroactive.

The first ameliorating amendment to § 2L1.2 was also the most radical amendment to this guideline.[16] It took effect in 2001, and completely replaced the guideline with a graduated

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[12] *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

[13] *See* http://www.ussc.gov/guidelines-manual/guidelines-manual.

[14] Amendments promulgated by the United States Sentencing Commission become effective unless disapproved by Congress. 28 U.S.C. § 994(p).

[15] *See* USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987).

[16] USSG App. C, amend. 632 (2001).

enhancement scheme based on types of prior convictions. It also amended guideline commentary by adding and modifying various definitions of offenses of conviction sustained prior to deportation, removing an upward departure ground, and limiting the definition of "sentence imposed." Prior to this amendment, prison terms imposed under § 2L1.2 had been repeatedly increased, such that any prior "aggravated felony"[17] supported a 16-level enhancement of the base offense level.[18] This amendment retained the severe 16-level increase for crimes involving violence, firearms, child pornography, terrorism, human trafficking, immigrant smuggling, and drug trafficking, but called for 12- or 8-level (rather than 16-level) increases for other "aggravated felony" convictions.

In 2011, the Commission further reduced the impact of prior convictions by applying the two most severe enhancements (16 and 12 levels) only when the prior conviction also receives criminal history points.[19] For example, a prior conviction for immigrant smuggling that does not receive criminal history points under Chapter 4 of the Guidelines because it is too old to count, *see* USSG § 4A1.2(e), will not support a 16-level increase; instead, it results in a 12-level increase. *See* USSG § 2L1.2(b)(1)(A).

In 2012, the Commission amended § 2L1.2's definition of "sentence imposed" so that imprisonment assessed upon revocation of probation, parole, or supervised release for a prior enhancing conviction counts toward calculation of sentence length only if the revocation term was imposed prior to deportation.[20] The 2012 amendment, like the 2011 one, reduces the impact of an individual's prior criminal record on the calculation of sentence length under § 2L1.2.

Three amendments to § 2L1.2 added downward departure provisions. The first invited a downward departure where the individual had only one prior felony conviction which was neither a crime of violence nor a firearms offense.[21] The second added a departure ground (downward or upward) based on the seriousness of a prior conviction.[22] The third added a downward departure for an undocumented immigrant who has "culturally assimilated" to life in the United States.[23]

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[17] "Aggravated felony" is defined at 8 U.S.C. § 1101(a)(43) and includes non-violent offenses such as money laundering, racketeering, fraud, and failure to appear.

[18] Section 2L1.2's base offense level was increased from 6 to 8 in 1988, and has remained there since. USSG App. C, amend. 38 (1988).

[19] USSG App. C, amend. 754 (2011).

[20] USSG App. C, amend. 764 (2012).

[21] USSG App. C, amend. 562 (1997). This departure ground was deleted in 2001. *See* USSG App. C, amend. 632.

[22] USSG App. C. amend. 722 (2008).

[23] USSG App. C. amend. 740 (2010).

B. Favorable Changes in the Law

To determine whether a client could receive a lower sentence today, examine favorable changes in case law since the client was originally sentenced. The section below provides a sampling of case law developments within the past 10 years. The area of heaviest litigation has been in determining what constitutes a "crime of violence" in illegal reentry cases.

1. What constitutes a "crime of violence"

USSG § 2L1.2(b)(1)(A) provides for an enhancement when an individual has a prior conviction for a "crime of violence." The commentary to § 2L1.2 provides a definition for "crime of violence" which includes a number of enumerated offenses in addition to crimes whose elements include the use or threatened use of force against a person. Whether or not a prior conviction constitutes a "crime of violence" is a complicated question which requires case law analysis interpreting this and other guideline and statutory provisions. Case law on this issue has developed over a series of years. In preparing a clemency petition, attorneys must research favorable case law changes regarding whether a client's offense of conviction is a "crime of violence."

When evaluating whether a client's sentence for illegal reentry after deportation would be different today based on a determination that his prior conviction is not a crime of violence, first look to the statutory definition of the prior crime at the time of conviction and determine whether it either: (1) has as an element the use or threatened use of force, or (2) fits within the enumerated list found at Application Note 1(B)(iii) of § 2L1.2.[24] The elements of the offense of conviction are controlling, not the underlying facts of the case. *Sykes v. United States*, 131 S. Ct. 2267, 2272 (2011); *Taylor v. United States*, 495 U.S. 575, 602 (1990). The name of the prior conviction is not relevant.[25] *Taylor*, 495 U.S. at 588-89. In other words, what matters when determining whether a client's prior conviction constitutes a crime of violence is the offense of which she was actually convicted, not what was only alleged, for example in a police report. Even where a statute is written in such a way that sentencing courts need to look beyond the judgment to determine which of alternative elements constituted the prior offense of conviction,

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[24] The enumerated offenses are "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." USSG § 2L1.2, comment. (n. 1(B)(iii)).

[25] For example, "aggravated assault" convictions in certain jurisdictions are not crimes of violence. *See, e.g., United States v. Rede-Mendez*, 680 F.3d 552, 557 (6th Cir. 2012) (aggravated assault in New Mexico only requires general criminal intent instead of a specific intent to injure or to frighten the victim and therefore did not meet the generic definition of aggravated assault).

documents that do not establish the elements of the offense of which the client was convicted may not be used. *Shepard v. United States*, 544 U.S. 13, 21-23 (2005). The court is permitted to look at the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial, *Taylor*, 495 U. S. at 602, and the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant pled guilty, *Shepard*, 544 U. S. at 25-26.

This analysis required by Supreme Court precedent is often referred to as the "categorical approach" or the "modified categorical approach." Circuit and district court case law applying this analysis to specific statutes has resulted in a number of holdings that certain prior convictions are not crimes of violence.[26] In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court recently clarified the proper application of the categorical and modified categorical approaches, which may now demonstrate that the district court misapplied either or both at the original sentencing.

You must also be mindful that "crime of violence" is defined differently in the code section that defines "aggravated felony" (8 U.S.C. § 1101(a)(43))[27] than the term is defined in the guideline, § 2L1.2(b)(1)(A)(ii). In illegal reentry cases, an individual's *statutory* punishment range is determined by 8 U.S.C. § 1326 and 8 U.S.C. § 1101(a)(43). Whether a person's prior conviction exposes him to a 16-level *guideline* increase rests on the more narrow definition in § 2L1.2(b)(1)(A)(ii). While there is some overlap between definitions, they are not coextensive. Under § 2L1.2(b)(1)(A)(ii), crime of violence includes an offense that is one of the enumerated offenses, such as murder or manslaughter. USSG § 2L1.2, comment. (n. 1(B)(iii)). An offense would also be a crime of violence if it has an element the "use, attempted use, or threatened use of physical force against the person of another." *Id*.[28]

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[26] For an extensive analysis of specific offenses courts have found to be, or not to be, "crimes of violence" in various federal districts, refer to: Kurtis A. Kemper and Kimberly J. Winbush, *Comment Note: Construction and Application of "Crime of Violence" Provision of U.S.S.G. § 2L1.2 Pertaining to Unlawfully Entering or Remaining in the United States After Commission of Felony Offense*, 68 A.L.R. Fed. 2d 55 (originally published in 2012).

[27] 8 U.S.C. § 1101(a)(43)(F) refers to the definition found in 18 U.S.C. § 16: The term "crime of violence" means--
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) 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.

[28] For a comprehensive analysis of crimes of violence refer to: Timothy Crooks and Margaret A. Katze, *Begay and Beyond: Chipping Away at "Crimes of Violence"*, National Seminar for Federal Defenders, New Orleans, Louisiana, May 29, 2008, available at http://www.fd.org/docs/select-topics/common-offenses/firearms/begay_and_beyond.pdf?sfvrsn=4.

When analyzing whether a client's prior conviction is one of the enumerated offenses or has as a necessary element the use, attempted use, or threatened use of force, employ the categorical or modified categorical approach as recently clarified by the Supreme Court in *Descamps*. Obtain a copy of the statute of conviction in effect at the time the offense occurred. Determine whether this statute either: (1) has as a necessary element the use or threatened use of force against another person, or (2) is one of the offenses enumerated at § 2L1.2 application note 1(b)(iii). Research circuit case law regarding these two inquiries. When analyzing whether a client's prior conviction matches one of the enumerated offenses, do not rely upon its name. Rather, compare the statute of conviction (again, using the version in effect at the time of the offense) with definitions of the enumerated offenses found in the Model Penal Code, at common law, or as reflected in surveys of state law. The results can seem counterintuitive at first glance;[29] predicate offenses which have most successfully been found not to be "crimes of violence" include simple assault or battery,[30] statutory rape of a person over age 16,[31] certain motor vehicle offenses,[32] and manslaughter.[33]

When the Supreme Court or at least one court of appeals has held that a prior offense, or one materially identical to it, does not by its elements qualify as a "crime of violence" under § 2L1.2 under the categorical approach, you can argue that the applicant would not receive the adjustment, and her sentence would likely be lower today.

If the court of appeals in the circuit in which the applicant was sentenced has held that the prior offense always qualifies as a "crime of violence" under § 2L1.2 under the categorical approach, or may qualify under the modified categorical approach depending on which alternative elements constituted the offense of conviction, you may still be able to argue that the applicant would not be subject to the adjustment today, depending on the timing of that holding and later clarifying Supreme Court law, including *Descamps*. If another circuit has since applied the clarifying

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[29] For a list of case law by state specifying instances where the court determined an offense to be a crime of violence, not a crime of violence, an aggravated felony, or a drug trafficking offense, *see* http://www.fd.org/docs/select-topics/common-offenses/immigration/rev_cov_list.pdf?sfvrsn=36.

[30] *United States v. Fierro-Reyna*, 466 F.3d 324 (5th Cir. 2006) (Texas aggravated assault on a police officer used the elements of simple assault where the victim was a peace officer and therefore did not fit within the generic, contemporary meaning of aggravated assault and was not a crime of violence).

[31] *United States v. Perez-Aguilar*, 282 F. App'x 516 (9th Cir. 2008) (California offense of "sodomy with another person who is under 18 years of age" under Cal. Penal Code § 286(b)(1) did not categorically constitute statutory rape where California age of consent is 18 years old and "minor" in the context of a statutory rape law means a person under 16 years of age).

[32] *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (Florida DUI causing serious bodily injury was not a crime of violence).

[33] *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1127 (8th Cir. 2013) (Nebraska "sudden quarrel" manslaughter was not a crime of violence where the Nebraska statute did not match the generic federal crime of manslaughter).

Supreme Court law in the applicant's favor but the applicant's circuit has not yet revisited the issue, acknowledge the old law but explain that the sentence would be lower under later Supreme Court law, as demonstrated by the law of the other circuit.

IF YOU NEED HELP DETERMINING WHETHER A PRIOR CONVICTION WOULD STILL QUALIFY UNDER CURRENT LAW:

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.
- If you are a Federal Defender, contact abaronevans@gmail.com.

2. What constitutes a "drug-trafficking offense"

The decision in *Lopez v. Gonzales* is the most significant case defining drug trafficking. 549 U.S. 47 (2006). Prior to *Lopez*, several circuits treated simple drug possession as an "aggravated felony" under the Immigration and Nationality Act (INA). The INA defines aggravated felonies to include "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). The general phrase "illicit trafficking" is left undefined by the statute, but 18 U.S.C. § 924(c)(2) defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" (CSA). The CSA punishes possession as a misdemeanor. 21 U.S.C. § 844(a). In *Lopez*, the Government argued that because § 924(c)(2) requires only that the offense be punishable under the CSA, not that it be punishable as a federal felony, simple possession could meet the definition of aggravated felony where states treat possession as a felony.

The Court in *Lopez* focused on the "commonsense conception of illicit trafficking" interpreting ordinary "trafficking" to mean a form of commercial dealing. *Id.* at 53. The Court found that this "commercial" element was not present in simple possession offenses. It held that a "state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60; *see also Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (defendant's second offense of simple drug possession was not an "aggravated felony" which would preclude cancellation of removal, where second conviction was not based on fact of prior conviction); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (a conviction under a statute that criminalizes conduct described by both § 841's felony and misdemeanor provisions, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is not a felony conviction under the CSA).

3. Basis for deportation

Your client may have been originally deported based on a conviction that is no longer considered a ground for deportation, or at least not a ground for virtually automatic deportation. For example, some circuits considered simple possession of drugs an aggravated felony, and a conviction for this resulted in deportation, even of a person with legal resident status in the United States. The Supreme Court changed this in 2006, holding that simple drug possession is

not an aggravated felony. *Lopez v. Gonzales*, 549 U.S. 47, 59 (2006). The Supreme Court recently granted certiorari to determine whether the government must prove a relationship between drug paraphernalia and a specific drug listed in the Controlled Substances Act in order to deport a person based on a conviction for possessing paraphernalia. *Mellouli v. Holder*, No. 13-1034.

4. Fast-track departures and variances based on fast-track disparity

On April 30, 2003, the PROTECT Act ordered the Sentencing Commission to create a new "early disposition" (or "fast-track") downward departure, solely in districts designated by the Attorney General and solely upon motion of the prosecutor.[34] The Commission promulgated USSG § 5K3.1, which authorized the court to depart by not more than 4 levels "pursuant to an early disposition program authorized by the Attorney General … and the United States Attorney" solely "[u]pon motion of the Government."[35] At the same time, the Commission submitted a report to Congress predicting that this departure would create unwarranted geographical sentencing disparity.[36]

As the Commission predicted, individuals in districts without a fast-track program received substantially higher sentences than those in other districts, and even in adjoining districts. After *Booker* and *Kimbrough* were decided in 2005 and 2007 respectively, judges in districts without a fast-track program began to vary from the guideline range to correct this disparity. Most circuits approved.[37]

In response to these variances by the courts, on January 31, 2012, the Department of Justice directed United States Attorneys in all districts to implement a fast-track program, noting that the availability of such departures in some districts but not others had generated concern about

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[34] PROTECT Act, Pub. L. No. 108-21, §401(m), 117 Stat. 650, at 675.

[35] For a summary of requirements for fast track departures in various districts through December 2013, see http://www.fd.org/docs/select-topics/sentencing-resources/fast-track-policies-for-illegal-reentry-cases-by-district-and-circuit-(december-2013).pdf?sfvrsn=4.

[36] *See* U.S. Sent'g Comm'n, Report to the Congress on Downward Departures from the United States Sentencing Guidelines at 66-67 (2003), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/departures/200310-rtc-downward-departures/ch4fnl.pdf.

[37] *See, e.g.*, *United States v. Anaya-Aguirre*, 704 F.3d 514, 518 (7th Cir. 2013); *United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011); *United States v. Jimenez-Perez*, 659 F.3d 704, 707-10 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008). *But see United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1239 (11th Cir. 2009); *United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008).

unwarranted disparity. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys 2 (Jan. 31, 2012), available at http://www.justice.gov/dag/fast-track-program.pdf.

If your client did not receive a fast-track departure or a variance based on fast-track disparity when s/he was originally sentenced, you should assert that s/he would receive one or the other today. Note that in fiscal year 2013, the median percent decrease for departures under USSG § 5K3.1 in immigration cases was 35.1%.[38]

5. Cultural assimilation

Certain individuals convicted of illegal reentry were brought to the United States at such a young age, and have so many ties to this society, that they are considered to be "culturally assimilated" into the fabric of this country. Recognition of this fact has served as a basis for a lower sentence for many years. Cultural assimilation was first recognized as a ground for departure by the Ninth Circuit in 1998[39] and lower sentences based on this factor were generally accepted by 2003.[40] No circuit currently refuses to consider cultural assimilation as a basis for a lower sentence,[41] although some circuits have not explicitly recognized it as a mitigating ground[42] or have limited its application.[43]

In 2010, the Commission incorporated cultural assimilation as a basis for downward departure. USSG § 2L1.2 comment. (n.8).[44] The departure ground recognizes that an immigrant may be motivated to return to the United States following a deportation based on family ties and other non-economic factors that separate him or her from the typical reentry defendant, but includes several reasons to limit its application.

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[38] *See* U.S. Sent'g Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, tbl. 30A, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/ Table30a.pdf.

[39] *United States v. Lipman*, 133 F.3d 726, 729-31 (9th Cir.1998).

[40] *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917, 918 (E.D. Wis. 2003).

[41] Circuits which recognize cultural assimilation as grounds for imposing a lower sentence include the Fifth, Ninth, and Eleventh circuits. *See United States v. Sanchez-Valencia*, 148 F.3d 1273 (11th Cir. 1998); *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 433 (5th Cir. 2001).

[42] *See, e.g.*, *United States v. Melendez-Torres*, 420 F.3d 45 (1st Cir. 2005); *United States v. Ticas*, 219 F. App'x 44 (2d Cir. 2007); *United States v. Braxton*, 175 F. App'x 380 (2d Cir. 2006).

[43] *See, e.g.*, *United States v. Galarza-Payan*, 441 F.3d 885 (10th Cir. 2006); *United States v. Casas-Tapia*, 445 F. App'x 145 (10th Cir.).

[44] USSG App. C, amend. 740 (2010).

Eligibility for a departure based on cultural assimilation is entirely a factual matter. Determine whether circuit law allowed for a lower sentence based on this ground at the time of the original sentencing. If not, or if the case law limited consideration of cultural assimilation factors, make the argument now. Keep in mind that the Commission's departure ground is narrow and does not include the broad considerations under 18 U.S.C. § 3553(a) which would make cultural assimilation grounds for variance today.

C. Favorable Discretion Afforded District Courts by *United States v. Booker*

Prior to *Booker*, sentencing courts were not allowed to consider an individual's socio-economic status, national origin, religious and personal beliefs, or race in making sentencing decisions.[45] Courts were discouraged from considering age,[46] educational and vocational skills,[47] mental and emotional conditions,[48] physical conditions,[49] military service,[50] family ties,[51] employment record,[52] and disadvantaged youth.[53] Yet, these "prohibited" and "discouraged" factors are often highly relevant to a person's decision to take the risk of returning to the United States illegally after deportation. Consideration of these factors is especially critical because § 2L1.2 does not take into account any motivation for illegal reentry after deportation, other than in a very limited way as part of a cultural assimilation downward departure ground.[54] After *Booker*, sentencing courts consider all of these factors as part of the requirement that they fashion a sentence which

[45] USSG § 5H1.10.

[46] USSG § 5H1.1; see USSG App. C, amend. 739 (2010) for a post-*Booker* softening of this policy statement.

[47] USSG § 5H1.2; see USSG App. C, amend. 739 (2010) for a post-*Booker* softening of this policy statement.

[48] USSG § 5H1.3; see USSG App. C, amend. 739 (2010) for a post-*Booker* softening of this policy statement.

[49] USSG § 5H1.4; see USSG App. C, amend. 739 (2010) for a post-*Booker* softening of this policy statement.

[50] USSG § 5H1.11; see USSG App. C, amend. 739 (2010) for a post-*Booker* softening of this policy statement.

[51] USSG § 5H1.6; no post-*Booker* amendment was made to this guideline provision.

[52] USSG § 5H1.5; no post-*Booker* amendment was made to this guideline provision.

[53] USSG § 5H1.12; no post-*Booker* amendment was made to this guideline provision.

[54] USSG § 2L1.2, comment. (n. 8); *see* Parts I.A and I.B.4 above.

is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a).

You should discover the reasons for a client's return:

- Is she paid so inadequately in her home country for her work skill that she is compelled to come to the United States to support her large family?
- Did he flee a war-torn region as a young teenager?
- Did he grow up in a gang-controlled neighborhood in Central America with little or no parental guidance?
- Did she serve as an "alien" in the United States military?
- Is he seeking political asylum based on his religious beliefs?
- Did he return to the United States because he cannot obtain adequate mental or physical health treatment in his home country?

Where such factors exist, a client would likely receive a lower sentence today than he received prior to *Booker*. For more information about the advisory guideline system, see How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

II. Immigrant Smuggling or Harboring

A. Ameliorating Amendments Not Made Retroactive

The guideline applicable to immigrant smuggling is USSG § 2L1.1. Since publication of the original Guidelines Manual in 1987, none of the amendments to § 2L1.1 have decreased imprisonment ranges. However, among the significant increases to § 2L1.1 made in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[55] the Commission slightly expanded the 3-level decrease under § 2L1.1 to include offenses that involved smuggling only the defendant's spouse or child. A later amendment corrected a typographical error related to this decrease.[56] The Commission made this later amendment retroactive to ensure correct application of the downward adjustment if the offense was committed other than for profit or if it involved only his or her spouse or child. It is unknown whether any person's sentence was reduced due to the retroactive application of this amendment. If your client was sentenced under § 2L1.1, and should have received a downward adjustment for immigrant smuggling for no profit, or for smuggling a spouse or child, but did not receive it at the original sentencing and did not receive a retroactive reduction (because no one moved for the reduction), this is one reason the sentence would be lower today.

[55] USSG App. C. amend. 543 (1997).

[56] USSG App. C. amend. 702 (2007).

Effective November 1, 2014, a potentially ameliorating amendment will be added and will not be made retroactive. This amendment adds to Application Note 5 another example of when the reckless conduct enhancement at § 2L1.1(b)(6) might apply. Specifically, it adds as an example "guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements."[57] While including new examples of when an upward adjustment might apply is not typically considered ameliorating, the Commission's reason for amendment states that it is being added in response to case law that, among other things, holds that simply traversing a dangerous or remote geographic area is not in and of itself reckless conduct.[58] An applicant may have received the upward adjustment for reckless conduct before some courts of appeals expressly narrowed its application, which the Commission has now adopted as the rule. Attorneys preparing clemency petitions should assess whether their client's upward adjustment for reckless conduct was based on facts too attenuated or broad, facts that would not be considered to merit the adjustment after this amendment.

B. Favorable Changes in the Law

Two enhancements in § 2L1.1 require intensive fact-finding by the sentencing judge. These are the enhancement for intentional or reckless creation of substantial risk of death or bodily injury at § 2L1.1(b)(6), or the enhancement for involuntary detention through coercion or threat at § 2L1.1(b)(8). If the client's guideline range was enhanced on either of these two grounds at his or her original sentencing, check case law in your circuit to determine whether definitions have changed favorably. Additionally, circuit law may have changed regarding definitions of injury under § 2L1.1(b)(7), or the mental state required to support a cross reference under § 2L1.1(c). Individuals convicted of transporting undocumented immigrants are often immigrants themselves who do not have permission to be in the United States and who are driving in exchange for a reduction in their own transportation fees. Some are transporting cousins or friends from their own neighborhoods. In such cases, personal and socioeconomic factors may motivate them to come to the United States and transport other immigrants. These motivations are not considered under § 2L1.1 and were prohibited factors pre-*Booker*. *See* Part I.C above.

IF YOU NEED HELP DETERMINING WHAT FACT-SPECIFIC ARGUMENTS TO RAISE FOR A CLIENT SERVING OVER TEN YEARS FOR TRANSPORTING OR HARBORING IMMIGRANTS:

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.
- If you are a Federal Defender, contact abaronevans@gmail.com.

[57] U.S. Sent'g Comm'n, "Reader-Friendly" Version of Final Amendments (Eff. November 1, 2014), found on page 72 at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.

[58] The Reason for Amendment cites Fifth and Ninth circuit cases, but specifically discusses the Fifth Circuit's holding in *United States v. Mateo Garza*, 541 F.3d 290 (5th Cir. 2008).