

Prosecuting Criminal Immigration Offenses

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Monty Wilkinson
Director

Contributors' opinions and statements should not be considered an endorsement by EOUSA for any policy, program, or service.

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Prosecuting Criminal Immigration Offenses

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Introduction

Jeff Sessions

Attorney General of the United States

One of the Department's top priorities is criminal immigration enforcement. Enforcement of our immigration laws is not only a fundamental issue of sovereignty but is essential to ensuring public safety for all Americans. To reinforce this priority, I issued a Memorandum to all federal prosecutors on April 11, 2017, advising them of the Department's charging practices for criminal immigration offenses and directing each United States Attorney's Office to designate a Border Security Coordinator to oversee the investigation and prosecution of immigration offenses. Federal prosecutors, together with our law enforcement partners, are uniquely qualified to fulfill the Department's mission of preventing and combatting crime and seeing that, whenever possible, justice is obtained for victims.

To that end, the Executive Office for United States Attorneys, Office of Legal Education, has dedicated this issue of the United States Attorneys' Bulletin to the prosecution of criminal immigration offenses. Subject matter experts from the U.S. Attorney community; the Office of Legal Education; the Criminal Division; the Executive Office for Immigration Review; the Bureau of Alcohol, Tobacco, and Firearms; and our colleagues at the Department of Homeland Security have collaborated to produce a valuable resource that will enable prosecutors and law enforcement to ensure lawfulness in our immigration system.

As you know, criminal immigration prosecutions are challenging and oftentimes complicated. The effective investigation and prosecution of criminal immigration offenses requires a thorough familiarity with the Immigration and Nationality Act, the National Firearms Act, the NICS Improvement Amendments Act of 2007, the Controlled Substances Act, and many other statutory provisions pertaining to fraud, human trafficking, national security, and asset forfeiture.

Criminal immigration law practitioners are responsible for incorporating a wide variety of legal, forensic, and analytical tools into their investigations and prosecutions. I am grateful that so many of our talented colleagues have dedicated their time and expertise to creating this wide-ranging issue of the United States Attorneys' Bulletin. Together, we can secure our borders, protect our country from enemies, foreign and domestic, and safeguard the public safety of all Americans. Thank you for all that you do.

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Prosecuting 8 U.S.C. § 1253(a): When Your Defendant Resists Removal

Dominic Rossetti
Assistant United States Attorney
Western District of Louisiana

I. Introduction

Most of us can recognize 18 U.S.C. § 1343 as the wire fraud statute.¹ The same is true for 18 U.S.C. § 922(g)(1) as felon in possession,² or 8 U.S.C. § 1326 as illegal re-entry.³ These are bread-and-butter charges for federal prosecutors; we see them almost every day. But how many of us can recognize 8 U.S.C. § 1253 for failure to depart?⁴ Probably not many and with good reason—it takes a rare set of circumstances for this crime to even occur, let alone for it to get charged.

Failure to depart makes it a crime for any individual—against whom a valid order of removal is outstanding—to prevent her own departure.⁵ In other words, once an Immigration Judge (IJ) has ordered someone removed from the United States, this statute criminalizes any action taken by that person that hampers the removal process.

In the vast majority of cases, it is nearly impossible for a person to prevent her own removal. Homeland Security Investigations (HSI) removes thousands of people from the United States every year. In 2016, there were 240,255 removals, and more than ninety-five percent of them were removed to just four countries: Mexico, Guatemala, Honduras, and El Salvador.⁶ In these cases, HSI transports individuals back to their home countries on contract flights or busses. Sometimes, HSI allows these individuals to voluntarily depart and return to their respective home countries on their own accord. These individuals will never get the chance to hamper the removal process.

Some removals, however, are more complicated. For example, when HSI removes a person who came to the United States from overseas, it often does so via commercial flight. The United States is simply not removing enough people to small, faraway countries to justify contract flights with the sole purpose of transporting one or two individuals. In these cases, HSI agents will board a commercial flight, along with the person being removed, and escort the individual back to the country of origin. This presents a unique opportunity for an individual to obstruct the process.

Typically, defendants fail to depart in two ways: (1) physical resistance, or (2) refusal to cooperate. Using physical resistance, a person might kick, scream, spit, punch, or otherwise cause a ruckus at the airport. Because these flights depart from public airports, the person has to be screened by security like everyone else. Pilots also retain authority to exclude anyone from their plane whom they deem to be a safety risk. When security cannot screen the person, or the pilot refuses to allow the person to board the flight, the removal cannot go forward. Similarly, in a case of lack of cooperation, the person

¹ 18 U.S.C. § 1343 (2012).

² *Id.* § 922(g)(1).

³ 8 U.S.C. § 1326 (2012).

⁴ *Id.* § 1253.

⁵ *See id.* § 1252(a)(1)(A)–(C). The focus of this article is 8 U.S.C. § 1253(a)(1)(A), (B), and (C). Subsection (D) addresses voluntary removals where the individual fails to appear at a scheduled place and time for removal. *See id.* § 1253(a)(1)(D).

⁶ *See* FISCAL YEAR 2016 ICE ENFORCEMENT & REMOVAL OPERATIONS REPORT 2, 11 (2016).

may refuse to sign travel documents necessary to transit to the country of origin. Without signed travel documents, the person cannot be transported back home, and has again prevented removal. In both cases, the person has failed to depart.

These cases can also raise some tricky legal issues. First, defendants often want to present their immigration case in federal court. Many of these defendants come to the United States from countries such as Rwanda, Angola, Albania, or other countries with complicated pasts. Some grew up in the midst of protracted civil wars, genocides, and oppressive regimes, and came to the United States as refugees. They want to present their immigration history as a necessity defense, or they see their federal prosecution as a second chance at the asylum process. While such evidence may hold weight in immigration court, it is irrelevant, misleading, and highly prejudicial in the context of a federal criminal prosecution. Second, some of these defendants have spent long periods in immigration custody. It takes time to move through the immigration process. Once a judge has ordered removal, it takes even more time to arrange for the actual, physical removal. All told, it could take years. These lengthy pretrial detentions can diminish jury appeal (i.e., “if he has already been in custody for four years, what are we doing here?”). Third, proving intent can be challenging. Some of these defendants struggle to speak English, so it can be hard to pin down what they actually understood or what their true intentions were. On top of all this, it seems like every one of these cases goes to trial.

The purpose of this article is to shed some light on these obscure prosecutions by discussing a recent failure-to-depart case that I tried in the Western District of Louisiana. My plan is to move through the prosecution more or less chronologically. First, I will discuss the facts of the case, the law and the evidence, and finally, my strategy at trial. My hope is that this article can serve as a guide for future failure-to-depart prosecutions (and be at least a mildly entertaining read for everyone else).

II. The Facts of the Case⁷

Innocent Safari Nzamubereka (IN-ZAM-OO-BEAR-EH-KA) was born in Rwanda in 1979. He came to the United States in March of 1995 in order to escape the ongoing conflict in his home country.⁸ Shortly after arriving in Washington D.C., he was granted asylum.⁹ He eventually settled in Tennessee, where he had numerous and escalating run-ins with the law.

In May 2008, Nzamubereka’s criminal history culminated with a conviction for aggravated assault. This would be his last and most serious conviction in the state, and the one that ultimately would jeopardize his asylum status. Although asylum status is permanent once granted, it is still conditional, which means that it can be revoked under certain circumstances, including being convicted of an aggravated felony.¹⁰ As a result, after serving three years of a six-year sentence, Nzamubereka was turned over to immigration authorities, who served him with both a notice to terminate his asylum status and a notice to appear for removal proceedings.

The notices explained why the government was seeking to terminate Nzamubereka’s asylum

⁷ The facts are based on evidence presented at trial. Thanks are due to AUSA Camille Domingue, who drafted the United States’ response to Nzamubereka’s appeal. I used portions of her appeal to draft this article.

⁸ There can be no doubt that conditions in Rwanda were very dangerous at that time. Nzamubereka would have been about fifteen years old in 1995, and what would eventually become known as the Rwandan genocide had just begun. The decades-long ethnic conflict between the Hutus and the Tutsis flared into an all-out war after the assassination of Rwanda’s president in 1994. To be sure, Nzamubereka witnessed brutal violence on a very personal level. In fact, he testified about it when he took the stand, but I will discuss this later in the article.

⁹ Asylum status may be granted to a person who can establish past persecution or a “well-founded fear” of future persecution in the home country on account of race, religion, nationality, political opinion, or membership in a particular social group. [Immigration and Nationality Act \(INA\) § 101\(a\)\(42\)](#), 8 U.S.C. § 1101(a)(42).

¹⁰ [INA § 208\(c\)\(2\)\(B\)](#), 8 U.S.C. § 1158(c)(2)(B).

status and why it was trying to remove him from the country.¹¹ Both notices advised him that he would have the opportunity to present evidence in connection with those proceedings and that he could retain counsel if he wished. An immigration official explained both notices at the time Nzamubereka was served.

After a hearing on the asylum issue, an IJ issued a written order terminating his asylum status in June 2012. In short, Nzamubereka's Tennessee conviction for aggravated assault was a "crime of violence," and, thus, an "aggravated felony" for purposes of the INA. After a separate hearing regarding removal in December 2012, the immigration court ordered Nzamubereka removed. Nzamubereka declined to engage counsel at either hearing.

Nzamubereka was provided with ample opportunity to legally delay or even prevent his removal to Rwanda. After the removal hearing, immigration officers asked Nzamubereka if he would like to designate an alternate destination country for removal purposes. He declined to do so. Nzamubereka could have also pursued relief under the Convention Against Torture (CAT), and he was repeatedly urged to do so by the IJ.¹² The court's written order even included the judge's handwritten notation that "relief of deferral of removal under [the Convention Against Torture] deemed abandoned for failure to prosecute his claim." The written order of removal also reflected that Nzamubereka had "reserved" his right to appeal, and the order specifically noted the deadline for filing an appeal. No such appeal was ever filed. Further, Nzamubereka never moved to have his case re-opened and re-examined, even though immigration law would have afforded him the right to file such a motion. In short, Nzamubereka could have pursued many, many alternatives to being removed to Rwanda. He simply failed to do so.

After the removal order was issued, immigration officers began the process of actually, physically removing Nzamubereka to Rwanda. In January 2013, an immigration officer met with the defendant at a detention facility in what would be the first of many similar meetings. Using a detailed instruction sheet, the officer explained the things Nzamubereka was required to do to facilitate his removal. Among them was a requirement that he "comply with all instructions from all embassies or consulates requiring completion of documentation for issuance of a travel document." Nzamubereka refused to sign the travel documents, refused to permit the officer to take required photographs, and refused to sign the form advising him of his responsibility to cooperate in the removal process.¹³ Before ending that visit, the officer explained to Nzamubereka the consequences of refusing to cooperate, which included criminal prosecution.

Immigration officers met with Nzamubereka six more times between February and April 2013. Each of the meetings was substantially the same as the first. Officers would explain to Nzamubereka his obligation to cooperate in the removal process, and he would refuse to do so. Officers would also formally warn Nzamubereka that he would face criminal consequences if he did not cooperate. Sometimes, he would not allow his photograph to be taken. Other times, he would refuse to sign documents. Still others, he would prevent officers from taking his fingerprints. At each meeting, he took actions that prevented his removal.

During some of the meetings, Nzamubereka provided his rationale for not cooperating. He said he would be killed if he returned. He talked about the horrors he witnessed in Rwanda two decades ago. He discussed his children in the United States and said he refused to leave them here alone. He also

¹¹ The government sought to terminate his asylum status because of the aggravated assault conviction. Without asylum, Nzamubereka had no legal status in the United States and therefore was subject to removal.

¹² The Convention Against Torture is an international human rights treaty codified into U.S. law. *See* 8 CFR § 208.16–.18 (2017). If Nzamubereka had applied for and been granted relief under this provision, he may have been able to prevent removal to Rwanda legally.

¹³ Immigration authorities needed a travel document so Nzamubereka could transit through South Africa on his way to his final destination in Rwanda. At least at that time, there were no direct flights to Rwanda.

complained about the years he spent in immigration custody. He argued his asylum status was indefinite and could not be terminated. He claimed the IJ had erroneously revoked his status under the wrong section of the law.¹⁴ Despite his regular and repeated pleas, he never pursued any legal avenues of relief that were available.

Immigration officers set a final meeting with Nzamubereka for April 11, 2013. This meeting was video recorded and later became the basis for Count 2 of the indictment. This exchange echoed the others. Officers gave Nzamubereka an opportunity to cooperate, and he refused. He made repeated claims about the length of his incarceration, his American children, and the grave dangers awaiting him in Rwanda. Before concluding the interview, the officers gave Nzamubereka a final opportunity to sign the application for a travel document to South Africa, noting that if he did not, his case would be presented for prosecution. He refused to sign, and HSI referred the case to my office for prosecution.

Based on these facts, I indicted Nzamubereka with two counts of failure to depart in violation of 8 U.S.C. § 1253(a)(1)(C).¹⁵

III. The Law and the Evidence

The challenge in this case had little to do with proving the charged crime. The elements for failure to depart are straightforward: (1) the defendant must be a removable alien; (2) with a valid order of removal outstanding; and (3) who knowingly took steps to prevent his own removal. I called two witnesses, both immigration officers who had worked on Nzamubereka's removal and were familiar with his immigration history. The first witness educated the jury on the immigration system in general and then discussed Nzamubereka's progress through that system. The second witness testified about his numerous in-person meetings with Nzamubereka and the specific actions he took that prevented his removal.

As far as the elements are concerned, Nzamubereka was a removable alien. He once had asylum status but lost it due to his assault conviction. Without asylum, he had no right to remain in the United States and he became a removable alien. My first witness testified to the process of terminating asylum and the reasons why Nzamubereka lost his status. We then moved the IJ's written decision terminating his asylum status into evidence and published it to the jury.

Second, there was a valid order of removal against Nzamubereka. He had a hearing on the issue, and an IJ issued a written order. Again, my first witness testified to the process, and again, we moved the order into evidence and published it to the jury.

Third, Nzamubereka had taken numerous steps to prevent his removal. He refused to sign travel documents and would not allow immigration officers to take his fingerprints or his photograph. Immigration officers repeatedly warned him about the consequences of his actions, but he persisted. Moreover, he made it clear in the video that he did not want to return to Rwanda. We also played the video of one meeting and published all the documents relating to his failure to cooperate. The documents included the instruction forms that explained what he needed to do to cooperate, the warning sheets that advised him of the consequences if he failed to depart, and the travel documents he failed to sign. In sum, the testimony, the documents, and the video showed Nzamubereka did not want to go back to Rwanda and that he knew exactly what he was doing by refusing to cooperate.

IV. The Elephant in the Room

The problem with the case was Nzamubereka's history in Rwanda and his fear of returning to his

¹⁴ To be clear, he was mistaken about his legal arguments, and immigration officers repeatedly told him so.

¹⁵ 8 U.S.C. § 1253(a)(1)(C) (2012).

home country.¹⁶ His experiences there were truly terrifying, so much so that he was granted asylum in the United States. The worry was that if the jury heard about these emotional and prejudicial facts, they would return a verdict inconsistent with the law and the facts (also known as jury nullification). The challenge was figuring out how to address the elephant in the room.

My first attempt was strictly legal; I wrote a motion in limine. The motion sought to prevent the introduction of any evidence related to: (1) Nzamubereka's history in Rwanda and his fear of returning; (2) the five years he spent in immigration custody; and (3) his children in the United States. I argued that the evidence was irrelevant and therefore inadmissible under Federal Rules of Evidence 401 and 402.¹⁷ I also argued that even if the evidence was relevant, the court should still exclude it under Rule 403 because its probative value would be substantially outweighed by the danger of confusing the issues and misleading the jury. The judge granted the motion from the bench on the morning of trial.

Still, I knew that the evidence was going to get to the jury in some way or another (and it did—defense counsel mentioned it obliquely in his opening statement, and Nzamubereka testified about it). As a result, I shifted my efforts toward trial strategy by preempting the argument during my case in chief. I intended to place responsibility for removal on the defendant. My plan was to put on evidence about all the opportunities the defendant had to *legally* prevent or delay his own removal. He could have applied for CAT relief, as the IJ recommended. He could have appealed or moved to re-open his case. He could have hired a lawyer to assist him in his case. He could have designated an alternate country for removal, and so on and so forth.

My opening statement, and really the whole trial, focused on one theme: rule-following. This theme worked well because it encapsulated all of his behavior, including the criminal conviction in Tennessee. Here is the beginning of my opening:

May it please the Court, ladies and gentlemen of the jury, this is a case about an individual who has repeatedly chosen not to follow the rules.

You're going to hear evidence that the defendant was granted asylum status in 1995, but lost that status as a result of a criminal conviction. He couldn't follow the rules. You're going to hear evidence that he had multiple opportunities to argue against that removal, to put his case on and make his argument, and he failed to do so.

And you're going to hear that he faced removal as a result of all this, and now is refusing to cooperate. Immigration is trying to get him back to the country he came from. And he is refusing to sign documents, and refused to sign his visa application . . . and has prevented his removal.

Defense counsel's opening admitted the first two elements of failure to depart and mentioned Nzamubereka's past. Counsel later said he was attempting to lay the basis for a justification defense:

The evidence will show, as Mr. Rossetti told you, that he had asylum status at one point. He was here legally. He was in fact a minor. He was granted political asylum [from] Rwanda, a place where they had a terrible genocide. So they will show you that. They will show you that he isn't a United States citizen, and they will show you that he is under Order of Removal.

. . . .

What they're not worried about is what the consequences to him will be if he goes

¹⁶ To a lesser degree, the five years he spent in immigration custody and his American-born children were also problematic.

¹⁷ More specifically, the evidence has no tendency to make a fact of consequence to the action more or less probable, and is irrelevant and, therefore, inadmissible.

back to Rwanda; and, quite frankly, they don't care. So that is what Mr. Nzamubereka was worried about. He wasn't trying to hamper his removal. What he was trying to do is make certain that he survived. He has a survival instinct, just like we all do. And I think that at the end of this trial, you'll see that that's all that was going on, and return a verdict of not guilty.

My two witnesses testified regarding the elements of the crime, but also about all of the ways Nzamubereka legally could have prevented or delayed his own removal. They testified about how the IJ granted Nzamubereka several continuances so he could hire an attorney. They talked about the judge's recommendation to apply for CAT relief and Nzamubereka's decision not to pursue an appeal. They testified about the numerous meetings they had with him and all the chances they gave him to cooperate. In short, we put on evidence showing that only Nzamubereka was responsible for his removal, and he had many opportunities to change the situation, but simply failed to do so.

I rested my case and the defense called Nzamubereka. Rather than trying to narrate the direct examination by defense counsel, what follows are some relevant portions and my commentary:

Q. Mr. Nzamubereka, how old are you?

A. I was born in 1974 -- I mean, 1979. So I'm 37.

Q. You're 37 years old?

A. Yes, sir.

Q. And there is no doubt that you're from Rwanda.

A. Yes.

Q. You don't deny that, do you?

A. No, I don't deny that.

Q. Nor do you deny that Judge Duck entered an order removing you in December of 2012, do you?

A. No, sir. I don't deny that.

With those few introductory questions, the defendant admitted the first two elements of failure to depart. Defense counsel continued, trying to get Nzamubereka to explain why he did not hire an attorney and to explain his (mistaken) understanding that he still had asylum. This went on for a few minutes, then defense counsel asked:

Q. How old were you when you left Rwanda?

A. About 14, 15, in '94, going to '95.

Q. Was there at one time a dispute or a civil war in Rwanda between the Hutus and the Tutsi?

A. It was a genocide.

Q. A genocide?

A. Yes, sir.

I let this go because my witnesses already had testified the defendant was granted asylum from Rwanda in the mid-1990s, so everyone in the room was already aware of the genocide. Defense counsel went on:

Q. Now, is your father alive?

- A. No, sir.
- Q. Was your father Hutu or Tutsi?
- A. He was Hutu.
- Q. He was a Hutu, you said?
- A. They chopped his head off.
- Q. Was your mother --
- A. My mom -- {crying}-- My mom [got] raped because she was a Hutu, in front of us. Seeing a lot of kids getting their head[s] chopped off. The only thing that saved me is I covered myself up with a whole bunch of dead kids. That's why I'm alive today[,] and that's why I'm not going back over there. I [saw] enough. Please have mercy on me. I'm not going -- if -- I would rather spend the rest of my life in jail than going over there and [getting] my head chopped off . . .

Now, that looks like a lot of text, but it came out very quickly. I objected, but the defendant continued talking over my objection. The judge sustained the objection and struck the testimony from the record, but defense counsel started in again with a similar line of questioning. I again objected and requested a sidebar. Defense counsel argued that he wanted to lay a factual foundation for a justification defense, in effect, that the defendant's actions in preventing removal were justified by his fear of death. The problem with a justification defense in this context was that Nzamubereka had an array of legal alternatives that he failed to pursue. The judge told defense counsel he had already ruled on the motion in limine on this issue, that he would not give a justification instruction, and to move on to another topic. Defense counsel returned to the podium and said, "I'm sorry, Mr. Nzamubereka. I can't ask you any more questions. Would you answer any questions that the government asks you?"

I asked for a brief recess to let the defendant compose himself because he was relatively upset after his direct examination. When I approached, I moved through the elements of the crime and got him to admit to each one. He admitted that he had lost his asylum status, that there was an order of removal against him, and that he would not sign the travel documents to facilitate his travel to Rwanda. He also admitted the somewhat obvious fact that he did not want to return to Rwanda.

In my closing, I returned to the theme of rule-following:

May it please the Court, ladies and gentlemen of the jury When I made my opening statement yesterday, I told you that this was a case about a person who chose to repeatedly not play by the rules, and I submit to you that that is exactly what the evidence has shown.

The defendant received asylum status in the [mid-90s], but he failed to play by the rules. He got a felony conviction; it was aggravated, and he lost that status. He had multiple opportunities to present his case, to make his pitch, and he simply refused to do so. He did not play by the rules.

And now he faces removal as a result. And he refuses to cooperate. He is preventing his removal. He's taken multiple deliberate steps to prevent himself from going back to Rwanda because he will not play by the rules.

The jury deliberated for about fifteen minutes and came back with a guilty verdict on both counts. The defendant ultimately was sentenced to seventy months, but was given credit for the time he had spent in immigration custody (which was substantial). He appealed, making a sufficiency-of-the-evidence

argument, but the conviction was affirmed.¹⁸

Nzamubereka is scheduled to be released in August of 2018, which begs the question—what next? What happens at the end of his sentence? Well, he will still have an immigration detainer because there will still be a valid order of removal against him. He will be transferred into immigration custody, and it seems very likely that the whole process will begin again. HSI will attempt to remove him, and in all likelihood, he will hamper the process again. This makes a person wonder if there might be a better way to effect these removals, but that is another topic for another day.

V. Conclusion

These are unusual cases. The statute is rarely charged, and the facts are well outside of the norm. I suspect that most federal prosecutors will not see a failure to depart case over the course of an entire career. Still, the lessons learned from these cases are applicable regardless of the specific charge. There will always be some facts we do not want the jury to hear, and defendants will almost uniformly try to get those facts to the jury. That is just the nature of the case. The lesson is how to effectively manage the issue. One straightforward solution is a motion in limine, and that strategy works in many cases. Even when those motions are granted, though, the facts can sometimes sneak into the record. When that happens, it is best to have a plan. My strategy is to tailor my theory of the case to the issue, and close the door before the defendant has the opportunity to walk through it.

ABOUT THE AUTHOR

Dominic Rossetti is an Assistant United States Attorney in the Western District of Louisiana. He has been a federal prosecutor since January 2014.

¹⁸ The indictment alleged he had “knowingly and willfully” prevented removal. We almost certainly did not need to include “willfully,” but the Fifth Circuit did not address what mens rea the statute requires. Instead, they held that under either standard, the evidence was sufficient for a jury to have found Nzamubereka guilty.

Using the Alien File in the Prosecution of Immigration Crimes

Sebastian Kielmanovich
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I. Introduction

On April 11, 2017, the Attorney General announced the Department of Justice's renewed commitment to criminal immigration enforcement.¹ Consistent with this priority, this article's intent is to provide some advice on the use of documents from an Alien File (A-File) in criminal immigration prosecutions.

A-Files are individual files identified by the subject's Alien Registration Number (A-number). An A-Number is a unique personal identifier assigned to an alien. An alien is any person who is not a natural-born or naturalized citizen or a national of the United States.²

A-Files became the official file for all immigration and naturalization records, created or consolidated, since April 1, 1944.³ A-Files are maintained by United States Citizenship and Immigration Services (USCIS) for each alien on record.⁴ While USCIS is the custodian of the A-file, two additional components of the Department of Homeland Security—Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)—create and use A-Files as well.⁵

A-Files contain information regarding all transactions involving aliens as they pass through the U.S. immigration and inspection process.⁶ Thus, an A-File contains immigration-related records, which may contain forms, applications, petitions, attachments and supporting materials, photographs, identification documents, birth certificates, passports, fingerprints, court records, deportation warrants, reports of investigations, statements, and correspondence.⁷ Although an increasing number of A-Files have been digitized, many are still maintained in paper form.⁸ Occasionally, a temporary A-File (commonly called a T-File) is created when an alien has contact with more than one DHS component at a time. A-Files are critical in criminal prosecutions under a variety of criminal statutes.

¹ Memorandum from U.S. Att'y Gen. Jeff Sessions, U.S. Dep't of Justice, to All Fed. Prosecutors, U.S. Dep't of Justice 1 (Apr. 11, 2017).

² See *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996); Leonard B. Sand, et. al, 2-33A MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL P 33A.06 (2017).

³ *What are A-Files?*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last visited May 9, 2017).

⁴ Previously, legacy Immigration and Naturalization Services (INS) handled all of these transactions. See *United States v. de Jesus-Concepcion*, 652 F. App'x 134 (3d Cir. 2016), cert. denied sub nom. *De Jesus-Concepcion v. United States*, 137 S. Ct. 519 (2016).

⁵ See *Dent v. Holder*, 627 F.3d 365, 368 n.4 (9th Cir. 2010).

⁶ *Id.*

⁷ Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755-02, 1757 (proposed Jan. 16, 2007); see also *Dent*, 627 F.3d at 368 n.4.

⁸ See Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. at 1757; see also *USCIS Response to the Citizenship and Immigration Service Ombudsman's 2009 Annual Report*, U.S. CITIZENSHIP & IMMIGR. SERVICES, (last visited May 9, 2017).

II. Different Types of Immigration Cases and the Use of A-Files

A. Reentry of Removed Aliens

Section 1326 of Title 8 of the United States Code provides that aliens who have previously been deported commit a criminal act by entering or being found in the United States, unless the Attorney General has expressly consented to such aliens' reapplying for admission to the country.⁹ The Ninth Circuit stated:

The elements of illegal reentry after deportation are: (1) the defendant is an alien; (2) he was previously deported or removed from the United States; (3) he was voluntarily present or found in the United States; and (4) he had not sought or received permission from the Attorney General [or Secretary of Homeland Security] to reapply for admission.¹⁰

When prosecuting illegal reentry cases, prosecutors should review the A-File and determine whether the following documents are present:

- Foreign identity documents such as national identity cards, voting cards, birth certificates, and passports
- Immigration applications and supporting evidence
- Order of an Immigration Judge (EOIR-7)¹¹
- Warrant of deportation or removal (I-205)¹²
- Warning to Alien Ordered Removed or Deported (I-294)¹³
- Notice to Alien Ordered Removed/Departure Verification (I-296)¹⁴
- Notice to Appear (I-862)¹⁵
- Notice of Intent/Decision to Reinstate Prior Order (I-871)¹⁶

⁹ *United States v. Flores-Rodriguez*, 236 F. App'x 338, 339–40 (9th Cir. 2007) (quoting 8 U.S.C. § 1326(a)).

¹⁰ *See United States v. Pineda-Lorenzana*, 289 F. App'x 219, 221–22 (9th Cir. 2008).

¹¹ 8 C.F.R. § 1240.50(b) (2017) (“[T]he immigration judge may enter a summary decision on Form EOIR-7, Summary Order of Deportation, if deportation is ordered.”).

¹² *See id.* § 1241.32 (“A Form I-205, Warrant of Deportation, based upon the final administrative order of deportation in the alien’s case shall be issued by a district director.”).

¹³ When executed, this form acknowledges the alien was “prohibited from entering, attempting to enter, or being in the United States at any time[, and it also acknowledges] that he must obtain permission from the Attorney General to reapply for admission to the United States.” *See United States v. Mendoza-Torres*, No. 06–2200, 2007 WL 1300694, at *2 (10th Cir. 2007).

¹⁴ “The form is used to record the removal of an individual from the United States during the expedited removal process.” *United States v. Lopez*, 762 F.3d 852, 855–56 (9th Cir. 2014); *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

¹⁵ “[I]mmigration law requires immigration officers to prepare a Notice to Appear . . . the Notice to Appear must include charges against the alien (including of course his alienage)” *United States v. Albino-Loe*, 747 F.3d 1206, 1210 (9th Cir. 2014) (citing 8 U.S.C. § 1229(a)(1) (2012)).

¹⁶ “That form is presented to an alien when an immigration officer determines that she has re-entered the United States after being subject to a prior order of removal.” *Villegas de la Paz v. Holder*, 640 F.3d 650, 653 (6th Cir. 2010); *see also* 8 C.F.R. § 241.8 (2017).

- Application for Permission to Reapply for Admission into the United States after Deportation or Removal (I-212)¹⁷

Documents such as birth certificates, travel documents, foreign identity cards, and immigration applications will help to prove alienage. Immigration orders and duly executed deportation warrants will prove that the alien has been previously removed from the United States.¹⁸ Absence of express government permission to reenter will be proven based on the nonexistence of records of the alien requesting such authorization.¹⁹

Courts have upheld the admissibility of most A-File documents.²⁰ An alien’s immigration applications containing admissions and supporting evidence about foreign citizenship constitute non-hearsay statements of a party opponent.²¹ Additionally, although certain documents in an alien’s A-File are hearsay, they are analogous to admissible nontestimonial business records.²²

“A statement must be ‘testimonial’ to be excludable under the Confrontation Clause.”²³ “Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”²⁴ Records are “testimonial” when they are created for the purpose of establishing or proving some fact at trial.²⁵ Business and public records are generally admissible absent confrontation because they are not created for purposes of litigation and, thus, are not testimonial.²⁶

Federal Rule of Evidence 803(8)(B) creates an exception to the hearsay rule for public records and reports when they reflect matters observed pursuant to a duty imposed by law as to which matters there was an obligation to report.²⁷ This excludes, however, matters both observed by law enforcement officers in criminal cases and in anticipation of litigation.²⁸

“Warrant[s] of deportation . . . [are] ‘simply a routine, objective cataloging of unambiguous factual matters.’”²⁹ They are not “made in anticipation of litigation.”³⁰ Thus, they are “nontestimonial and

¹⁷ The lack of permission to reapply for admission is an element of the offense. The presence of this form should prompt immediate further investigation to determine if the alien received an I-212 waiver. *See I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last visited May 9, 2017) (“A foreign national who is inadmissible under section 212(a)(9)(A) or (C) of the Immigration and Nationality Act (INA) [8 U.S.C. § 1182(a)(9)(A) or (C)] must file Form I-212 to obtain consent to reapply for admission to the United States (consent to reapply) before the foreign national can lawfully return to the United States.”).

¹⁸ *See Leonard B. Sand, et. al, 2-33A MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL P 33A.06, Instruction 33A-35* (2017).

¹⁹ *Id.* at Instruction 33A-37.

²⁰ *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006) (per curiam); *United States v. Salinas-Valenciano*, 220 F. App’x 879, 882 (10th Cir. 2007).

²¹ *See* FED. R. EVID. 801(d)(2)(A).

²² *Valdez-Maltos*, 443 F.3d at 911.

²³ *United States v. Udeozor*, 515 F.3d 260, 268 (4th Cir. 2008) (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)).

²⁴ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

²⁶ *Id.*

²⁷ *United States v. Fernandez-Gomez*, 341 F. App’x 949, 950 (4th Cir. 2009) (quoting FED. R. EVID. 803(8)(B)).

²⁸ *Id.*

²⁹ *United States v. Palacios-Herrera*, 403 F. App’x 825, 826 (4th Cir. 2010) (quoting *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005) (“[T]he notation on an I-205 form [warrant of deportation] indicating that an alien has left the country is a routine, objective, indeed mechanical recording of an unambiguous factual matter.”).

³⁰ *See United States v. Diaz-Gutierrez*, 354 F. App’x 774, 775 (4th Cir. 2009) (quoting *Bahena-Cardenas*, 411 F.3d at 1075).

therefore not subject to the requirements of the Confrontation Clause.”³¹ “Warrants of deportation are public records within the meaning of Rule 803(8).”³²

Moreover, statements made in a Notice to Appear are not testimonial because they are not created for the purpose of establishing or proving some fact at trial.³³ Likewise, Immigration Judges’ memoranda of oral decisions and warnings to aliens ordered removed are non-testimonial because they are prepared routinely and not made in anticipation of litigation.³⁴

Finally, the absence of any record in the A-File, including an approved Form I–212 indicating that the alien obtained express permission to re-apply for admission, is critical. Because this is an element of the offense, searches should also be performed in every relevant database, including the Enforcement Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), and the Central Index System (CIS).

B. False Statements and Fraud in Immigration Proceedings

Section 1015(a) of Title 18 of the United States Code criminalizes any false statement under oath in an immigration proceeding.³⁵ In an 8 U.S.C. § 1325(c) marriage fraud case, the government is required to prove that the defendant entered into a marriage for the purpose of evading immigration laws.³⁶ Under 18 U.S.C. § 1425(a), “whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship” has committed naturalization fraud.³⁷

In the context of the above immigration fraud cases, prosecutors should identify the following documents:

- Petition for Alien Relative (I–130)³⁸
- Immigrant Visa and Alien Registration Application (DS-230 or DS-260)³⁹

³¹ *United States v. Burgos*, 539 F.3d 641, 645 (7th Cir. 2008) (citing *United States v. Torres-Villalobos*, 477 F.3d 978, 982–84 (8th Cir. 2007); and citing *United States v. García*, 452 F.3d 36, 41–42 (1st Cir. 2006); also citing *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006); and citing *United States v. Cantellano*, 430 F.3d 1142, 1144–46 (11th Cir. 2005); also citing *Bahena-Cardenas*, 411 F.3d at 1074–75; and citing *United States v. Urqhart*, 469 F.3d 745, 748–49 (8th Cir. 2006); also citing *United States v. Cervantes-Flores*, 421 F.3d 825, 830–34 (9th Cir. 2005); further citing *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005)); *see also* *United States v. Ellis*, 460 F.3d 920, 924–25 (7th Cir. 2006); *Fernandez-Gomez*, 341 F. App’x 949 (4th Cir. 2009).

³² *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997); FED. R. EVID. 803(8).

³³ *See United States v. Albino-Loe*, 747 F.3d 1206, 1211 (9th Cir. 2014).

³⁴ *See United States v. Valdovinos-Mendez*, 641 F.3d 1031, 1034 (9th Cir. 2011) (citing *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163 (9th Cir. 2010)).

³⁵ 18 U.S.C. § 1015(a) (2012); *see also United States v. Maslenjak*, 821 F.3d 675, 687 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *United States v. Ali*, 557 F.3d 715, 717 (6th Cir. 2009).

³⁶ *United States v. Ortiz-Mendez*, 634 F.3d 837, 839–40 (5th Cir. 2011); 8 U.S.C. § 1325(c) (2012).

³⁷ *United States v. Nguyen*, 829 F.3d 907, 915 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 689 (2017); 18 U.S.C. § 1425(a).

³⁸ “The citizen seeking ‘immediate relative’ status for his or her spouse, parent, or child must file a so-called Form I–130 petition with the Attorney General.” *Fiallo v. Bell*, 430 U.S. 787, 804 n.5 (1977); *see also Richardson v. Kerry*, No. H-14-0742, 2014 WL 4385995, at *3 (S.D. Tex. Sept. 4, 2014) (“The Form I–130 is used to ‘establish the existence of a relationship to certain alien relatives who wish to immigrate to the United States.’”).

³⁹ 22 C.F.R. § 42.63(a)(1) (2012) (“Every alien applying for an immigrant visa must make application, as directed by the consular officer, on Form DS-230, Application for Immigrant Visa and Alien Registration, or on Form DS-260, Electronic Application for Immigrant Visa and Alien Registration.”).

- Application to Register Permanent Residence or Adjust Status (I-485)⁴⁰
- Fingerprints
- Biographic Information (G-325A)
- Affidavit of Support (I-864)⁴¹
- Naturalization Application (N-400)⁴²
- Notice of Oath Ceremony (N-445)

As discussed above, courts have upheld the admissibility of most A-File documents. Consequently, the above documents should be admissible at trial. Comparing the information provided by the alien in the A-File with the results of the criminal investigation is critical in proving the fraud case. For example, fingerprints provided by the alien during a biometric appointment with USCIS could help to prove that an alien had sustained criminal convictions she failed to disclose. In addition, address information provided in immigration forms may establish, through interviews with a rental manager, that the alien has not lived at the declared address with the individual that petitioned for the alien’s adjustment of status based on marriage. Thus, at trial, A-File documents containing false statements, such as absence of criminal and immigration history, omission of family history and names, or fabrication of bona fide marital relationship, can be introduced to establish fraud.

C. Possession of Firearms

Section 922(g)(5) of Title 18 of the United States Code provides that any alien illegally or unlawfully present in the United States must not possess or receive a firearm that has been transported in interstate commerce.⁴³ An alien illegally or unlawfully in the United States is an alien whose presence within the United States is without authorization.⁴⁴

In cases in which an alien entered the United States without inspection and was not previously encountered by ICE and CBP, no A-File would exist. In such cases, an A-Number and A-File will be assigned when the alien is arrested by immigration officials. Any Mirandized statements and seized identification documents would be extremely helpful in establishing alienage. Additionally, the absence of any record indicating lawful entry into the United States and immigration status is critical. Searches must be performed in every relevant database, including the Enforcement Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), and the Central Index System (CIS), to determine whether the alien made a legal or lawful entry pursuant to any of the immigration provisions under Title 8 of the United States Code.

In cases in which an alien had previous encounters leading, for example, to a removal, deportation warrant paperwork located in the A-File should be introduced at trial to prove unlawful

⁴⁰ *Masih v. Mukasey*, 536 F.3d 370, 373–74 (5th Cir. 2008) (“[A]n I-485 application for adjustment of status . . . if approved . . . result[s] in the adjustment of the alien’s status to lawful permanent resident.”).

⁴¹ *Younis v. Farooqi*, 597 F. Supp. 2d 552, 557 n.5 (D. Md. 2009) (“The affidavit is enforceable by the government as well as the alien, and the purpose of the affidavit—to ensure that an immigrant does not become a public charge—suggests that in such a scenario, the sponsor’s support is more likely necessary to keep the immigrant from seeking public assistance.”).

⁴² *United States v. Posada Carriles*, 541 F.3d 344, 349 (5th Cir. 2008) (“The Form N-400, although obviously adapted to its stated purpose as a naturalization application, is a form of the type familiar to anybody who has ever applied for a government job or sought a government benefit.”).

⁴³ 18 U.S.C. § 922(g)(5) (2012); *see also* *United States v. Landeros-Mendez*, 206 F.3d 1354, 1358 n.5 (10th Cir. 2000).

⁴⁴ *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006).

immigration status. This would be essential when there is an illegal reentry charge in the indictment. Otherwise, a superseding indictment or Federal Rule of Evidence 404(b) notice⁴⁵ should be considered. Finally, in cases in which an alien previously applied for immigration benefits, such as Temporary Protected Status (TPS),⁴⁶ the A-File may contain valuable evidence concerning alienage and adverse decisions by immigration authorities. This information is useful to prove the alien did not have legal immigration status at the time he possessed a firearm.

III. Conclusion

Immigration criminal prosecutions are important to the national security of the United States. Moreover, the Attorney General has recently expressed the Department's renewed commitment to prosecuting immigration crime. As such, utilizing A-Files during the investigation and trial of immigration prosecutions is key. The Constitution and the Rules of Evidence provide for an A-File's admissibility at trial because most of the contents are nontestimonial or otherwise constitute opposing party's statements. When considering whether to charge immigration crime, prosecutors should fully review the A-File. It will most likely have all the necessary information to make a charging decision and secure a conviction.

ABOUT THE AUTHOR

□ **Sebastian Kielmanovich** has seven years of experience prosecuting immigration crime for the United States Attorney's Office in the Eastern District of North Carolina. His work has included prosecuting reentry cases, marriage fraud, unlawful possession of firearms, false claims of citizenship with intent to engage unlawfully in employment and register to vote in the United States, drug trafficking offenses, and naturalization fraud. Prior to joining the Department of Justice, he served as an Assistant Attorney General in the North Carolina Department of Justice and as an Assistant District Attorney in the Fifth and Tenth Judicial Districts of North Carolina.

⁴⁵ The Supreme Court said the following:

“[FED. R. EVID. 404\(b\)](#)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.”

[Huddleston v. United States](#), 485 U.S. 681, 685 (1988).

⁴⁶ “The Immigration Act of 1990 established a procedure whereby the government could provide temporary protection to aliens in the U.S. who were forced to flee their homelands because of natural disaster, civil strife and armed conflict, or other extraordinary and temporary conditions.” [Bautista-Perez v. Mukasey](#), No. C 07-4192TEH, 2008 WL 314486, at *1 (N.D. Cal. Feb. 4, 2008).

Prosecuting Illegal Reentry Cases Where Evidentiary Documents Are Missing or Incomplete: Everything You Never Wanted to Know About A-Files and Removal Documents and Were Not Afraid Not to Ask

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I. Introduction—Illegal Reentry of Removed Alien

The first version of Title 8 United States Code (U.S.C.) § 1326, Reentry of Removed Alien, was codified by the seventy-first Congress on March 4, 1929.¹ Over time, the rate of prosecutions under the statute fluctuated. However, prosecutions over the last several decades have spiked dramatically, “from 690 cases in 1992 to 19,463 in 2012.”² The five southern border districts¹⁹³ have predictably seen the highest volume of Illegal Reentry prosecutions. In 2016, the District of Arizona saw the highest number of Illegal Reentry prosecutions, followed by the District of New Mexico, the Southern and Western Districts of Texas, and the Southern District of California.⁴ However, even in a non-border district like the District of Oregon, nearly one of six federal prosecutions in 2014 was for Illegal Reentry.⁵

A. Illegal Reentry Elements

Illegal Reentry prosecutions rely heavily upon documentary evidence and tend to be relatively simple. The statute consists of the following elements: that the defendant: (1) “is an alien”; (2) “had [previously] been removed”; (3) “was subsequently found in the United States”; and (4) “did not have the Attorney General’s permission to reapply for admission.”⁶ Illegal Reentry cases can be prosecuted under three theories: “‘enter,’ [‘found in,’ and] ‘attempt to enter,’” the latter of which encompasses the

¹ Act of Mar. 4, 1929, Pub. L. No 70-1018, ch. 690, § 2, 45 Stat 1551 (codified at 8 U.S.C. § 180 (1929 sup. III)) (repealed 1952).

² Michael T. Light, et al., *The Rise of Federal Immigration Crimes*, PEW RES. CTR.: HISP. TRENDS (Mar. 18, 2014).

³ The Southern District of California and the District of Arizona are in the Ninth Circuit; the District of New Mexico is in the Tenth Circuit, and the Western and Southern Districts of Texas are in the Fifth Circuit. While Illegal Reentry cases are obviously tried nation-wide, the border Districts predictably see the highest volume.

⁴ See Barbara Hollingsworth, *Criminal Prosecutions for Illegal Entry Up 7.7% in 2016*, CNSNEWS.COM (Aug. 10, 2016, 10:41 AM).

⁵ See Andrew Clevenger, *Illegal Reentry Prosecutions Increase*, THE BULLETIN (Sept. 4, 2014).

⁶ *United States v. Parga-Rosas*, 238 F.3d 1209, 1211 (9th Cir. 2001).

additional element of an overt act toward the goal of reentry.⁷ Because so many Illegal Reentry cases occur in bulk in the southern border districts and are relatively simple to prove, the overwhelming majority are resolved by a plea of guilty. By one 2014 estimate, “in cases where Illegal Reentry was the lead charge, [99.8%] of those convicted pled guilty, [waiving their right] to trial.”⁸

B. Common Illegal Reentry Issues

Illegal Reentry prosecutions can present challenges. Perhaps, the most common hurdle arises when a defendant moves to dismiss the indictment and argues that it is based upon a defective removal order.⁹ Such motions, enmeshed as they are in the byzantine world of immigration law, can become quite complex and involved. Other issues tend to relate to either proof of the defendant’s alienage (an element that can become mired in the equally complex area of derived citizenship) or proof of the defendant’s intent to actually enter the United States (an issue generally arising when an alien is encountered at or just near the border). Aside from these defenses or substantive issues, a far more mundane but equally challenging obstacle can arise—when documents integral to the successful prosecution of Illegal Reentry cases are lost or missing. This article is meant to provide insight, guidance, and strategy for a prosecutor facing this challenge. Prosecuting Illegal Reentry cases is not particularly glamorous. Doing so when key documents are missing or lost can prove a slog. A working knowledge of the removal process is instrumental to successfully prosecute an Illegal Reentry case where important documents are lost or missing. Stitching together evidence can be a down and dirty, squint-eyed, sleeves rolled-up, nuts-and-bolts look under the hood of the process of removing hundreds of thousands of illegal aliens from the United States a year. The Immigration and Customs Enforcement (ICE) alone removed a total of 240,255 aliens in Fiscal Year 2016.¹⁰

C. Creation and Organization of the Department of Homeland Security (DHS)

First, a cursory explanation of some of the different government agencies and organizations referenced in this article is in order. Upon the post-9/11 shock to the United States’ internal defense system, the 107th Congress created the Department of Homeland Security (DHS) with the passage of the Homeland Security Act on November 25, 2002.¹¹ The fledgling agency commenced operations on March 1, 2003.¹²

Subordinate agencies of DHS include Customs and Border Protection (CBP), which, in turn, is the parent agency of the United States Border Patrol (USBP) (which patrols the border and the interior of the United States adjacent to the border) and the Office of Field Operations (OFO) (which operates the ports of entry along the nation’s borders and at international airports). Also falling under the DHS umbrella is the United States Customs and Immigration Service (USCIS), which essentially shoulders the same responsibilities, functions, and duties of the former Immigration and Naturalization Service (INS), dissolved in the wake of the post-9/11 restructuring. Another subordinate organization is ICE. ICE is further divided into different components, including Enforcement and Removal Operations (ERO). “ERO’s mission is to identify[,] arrest[,] and remove aliens who present a danger to national security or

⁷ *United States v. Pacheco-Medina*, 212 F.3d 1162, 1165 (9th Cir. 2000) (citing *United States v. Hernandez*, 189 F.3d 785, 789 (9th Cir. 1999); and citing *United States v. Santana-Castellano*, 74 F.3d 593, 597 (5th Cir. 1996); also citing *United States v. Rodriguez*, 26 F.3d 4, 8 (1st Cir. 1994)).

⁸ TRAC Immigration, *Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors*, TRAC (June 26, 2014).

⁹ See 8 U.S.C. § 1326(d)(3) (2012).

¹⁰ *FY 2016 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last visited July 17, 2017).

¹¹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

¹² *Creation of the Department of Homeland Security*, DEP’T HOMELAND SECURITY (Sept. 24, 2015).

are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts.”¹³ A sub-unit of ERO is the ICE Air Operations (IAO), which “provid[es] air transportation services to ERO’s [twenty-four] field offices[] to facilitate the movement of aliens within the United States and the removal of aliens to destinations worldwide.”¹⁴

D. Databases and Forms

Several DHS agencies use their own databases. Border Patrol uses the E3 database, OFO uses Sigma, and ICE uses Eagle. However, these systems provide access to the same information, and are a trove of information, warehousing such documents as the G-166 (Report of Investigation), the I-44 (Report of Apprehension or Seizure), and the I-213 (Record of Deportable Alien). These forms, in turn, can help piece together missing parts of an alien’s immigration chronology. Any alien encountered by DHS officials will be identified in a G-166, even if that alien was never criminally prosecuted or even arrested (for example, the identity of a smuggled alien can be included as part of a G-166 created for the smuggler). The I-44 details DHS seizures of contraband and the identity of aliens arrested in conjunction with those seizures, even if the seizure led to no prosecutions or even arrests. For Illegal Reentry prosecutions, many case agents, combing through these databases, learn that an alien was previously encountered—even if not arrested—by Border Patrol agents while the alien was smuggling aliens or contraband. Details gleaned from these documents may also help identify the agent or officer who witnessed or verified the defendant’s removal—information which, under the right circumstances, may be admissible as proof of the defendant’s lack of mistake or his *modus operandi* under Federal Rule of Evidence 404(b). There is more on that below.¹⁵

II. Alien Files (A-Files)

Proof of all elements comprising Illegal Reentry (except the alien’s entry, for reasons discussed below) heavily rely upon the evidence compiled in the defendant’s Alien File (A-File). A-Files are individual files identified by the subject’s Alien Registration Number (A-Number). “An A-Number is a unique personal identifier assigned to a non-citizen.”¹⁶ Trying an Illegal Reentry case without these A-File documents requires at least a general understanding of the process of A-File construction, transportation, and maintenance. Assistant United States Attorneys (AUSA) in high-volume Illegal Reentry districts are more familiar with A-Files than they would ever have dreamed while in law school. Upon the filing of an Illegal Reentry complaint, the archive seems to magically appear from the case agent, wholly intact and ready for use, like the morning newspaper on a driveway at dawn. But even prosecutors who juggle a heavy Illegal Reentry caseload generally have little reason or opportunity to know much about the creation, storage, and maintenance of these files that are so integral to the successful resolution of their Illegal Reentry caseload.

A. Purpose, Creation, and Maintenance of A-Files

Every alien encountered by DHS (or its predecessor agencies) is issued an A-Number. An alien’s A-Number is a unique personal identifier assigned to that alien only, and is affixed to the alien’s A-File. A-Files hold a historical wealth of data, including visas, photographs, applications, affidavits, correspondence, and more.¹⁷ Indeed, A-Files for older aliens with significant immigration and criminal histories in the United States chronicle literally entire decades of their lives. Because Illegal Reentry

¹³ *ICE Air Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last visited June 20, 2017).

¹⁴ *Id.*

¹⁵ FED. R. EVID. 404(b).

¹⁶ *A-Files Numbered Below 8 Million*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last updated Feb. 9, 2016).

¹⁷ *About A-Files*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last updated Feb. 9, 2016).

prosecutions are so reliant upon this archived evidence, an A-File is crucial for successful Illegal Reentry prosecutions. But what options are available to a prosecutor when a defendant's A-File is lost or missing? Or (more commonly) when the file is available but lacks vital documents?

While the process of ordering A-Files may differ within the various sub-units of DHS, generally, USCIS creates blank files with pre-designated A-Numbers and bar codes and disburses them as needed to DHS facilities (such as Border Patrol Stations, Ports of Entry, and ICE field offices). Agents handle these blank A-Files with extreme care. Border Patrol stations store blank A-Files along with the station's firearms and ammunition in their locked station armories, indicating the files' important and sensitive nature. DHS personnel create an alien's A-File upon that alien's first encounter with immigration officials. For example, Border Patrol agents who are assigned to screening recently arrested aliens, and who find that an alien has no previous immigration contacts in the United States, will retrieve a blank A-File from the armory and begin the process of creating that alien's A-File. Thus, while all aliens are issued A-Numbers and A-Files, more accurately, all A-Numbers and A-Files are subsequently issued aliens. When the arresting agency that created or last possessed the A-File no longer needs it, it is transported to National Records Center (NRC), which is the main storage facility for archived A-Files.

Upon the decision to criminally prosecute a recently arrested alien, the alien's A-File is ordered from NRC. The prosecutions unit for a Border Patrol Sector will normally designate an agent or a Mission Support Specialist as a Responsible Party Code (RPC), whose duties include ordering A-Files from File Control Offices (FCOs). Every FCO is able to transfer files between RPCs. Once a case agent receives and possesses the A-File, the agent can scour it for relevant documents. Processing agents or officers will also prepare the requisite documents related to the alien's instant arrest, such as the verification or witnessing document to be completed at the time of the alien's future removal and the FD-249 (fingerprint card) from the instant arrest. Generally, documents relating to the instant arrest (or ensuing prosecution) will be affixed to the left side of the A-File. However, as with all routine administrative and clerical functions, this procedure is not scrupulously followed.

B. Temporary Files (T-Files)

Upon the arrest of an alien, agents create Temporary Files (T-Files), which contain the current event's paperwork (including the field addenda of arresting agents, the reports of processing agents, record checks, and removal documents to be completed and served in the future). This is standard operating procedure for Border Patrol prosecutions units because Border Patrol nearly always arrests aliens at or near their point of entry along the border, and have no reason to have a recently arrested alien's A-File in their custody. The A-File for an alien just arrested, if one already exists, will be stored at NRC, as explained above. The alien's removal document will be transported with the T-File to the port of entry of the alien's pending removal. Upon the signing and execution of the relevant documents, the T-File will then be sent back to the processing station until a future request for transfer. From there, NRC staff in Missouri logs each T-File into the National File Tracking System (NFTS) and monitors its physical location on a national level. When the A-File and T-File cross paths, either with ICE or at a Border Patrol prosecutions unit when the A-File is requested from NFTS, the current case agent receives the T-File and merges its contents with the A-File. Therefore, if a removal document (particularly a very recent removal) cannot be found, it very well could still be in the T-File.

III. Pursuing Alternate Courses of Action When the A-File or Removal Documents Are Unavailable

Imagine now that the complaint for an Illegal Reentry case has been initialed and filed, and it looks to be a relatively simple matter. But the case agent delivers grim tidings to the prosecuting AUSA: the defendant's A-File is unavailable. It is either lost or missing, or more commonly, the defendant's removal document is not part of the A-File. USCIS designates different definitions for "lost" and

“missing.” “Lost” A-Files are those destroyed, not received after transit, or not verifiably under government control. “Missing” A-Files cannot be located but are presumed to be within government control.¹⁸ These are distinctions without differences for our purposes. A lost or missing A-File is unavailable for prosecution and leads the prosecuting AUSA to important decisions: whether to pursue alternate charges or to pursue the illegal reentry charge, and if so, how to go about piecing together the case.

Prosecuting an Illegal Reentry case without an A-File or removal documents can prove extremely time-consuming and difficult. Therefore, depending upon the severity, length, and context of an alien’s criminal and immigration history, the prosecutor may search for alternate charging options. Such decisions are situationally dependent upon the alien’s criminal and immigration history, the circumstances of the alien’s arrest or encounter with local authorities or DHS officials, and the prosecuting office’s contacts and relationships with local law enforcement and local county or district attorneys.

A. State or Local Charges

State or local charges may provide a tidy resolution. An alien in possession of fraudulent documents (especially documents issued by the state of the alien’s arrest, such as a driver’s license or state-issued identification) can face stiff penalties under local or state law. For example, in Arizona, forgery is a Class 4 felony with the possibility of 2.5 years in prison. If the alien was encountered by local law enforcement while engaged in other illegal activity (such as DUI, domestic violence, burglary, etc.,) the local district or county attorney’s office can dispose of the matter. In such cases, local criminal charges may be the easiest resolution and will also allow DHS to obtain a fresh removal of the alien and begin reconstructing the alien’s A-File.

B. Illegal Entry

Should a state or local prosecution prove unavailable, prosecution under 8 U.S.C. § 1325 may be an option, although one with limitations.¹⁹ Like its Illegal Reentry counterpart, the first version of the Illegal Entry statute was enacted by Congress on March 4, 1929.²⁰ Importantly, Illegal Entry, unlike its Illegal Reentry counterpart, is not a “continuing offense,” meaning that the five-year statute of limitation begins to toll upon the defendant’s entry, regardless of whether the government has reason to know of that entry.²¹ For this reason, Illegal Entry is almost exclusively applied to aliens encountered within border districts at or immediately near or after entry. Proving the entry of an alien encountered far into the interior of the United States is, for practical purposes, exceedingly difficult.

Relying upon Illegal Entry can prove a weak balm when the defendant’s criminal history is rife with felony convictions or past illegal reentry convictions (a very common occurrence). The relatively nominal cap of six months of imprisonment may fail to reflect the seriousness of the defendant’s immigration or criminal histories.²² Nevertheless, depending upon the circumstances, a charge of Illegal Entry may be the only way to salvage criminal prosecution of a defendant whose A-File or removal

¹⁸ USUC Memorandum HQREC160/8 P, Feb. 27, 2017.

¹⁹ 8 U.S.C. § 1325 (2012).

²⁰ Act of March 4, 1929, Pub. L. No 70-1018, ch. 690, § 2, 45 Stat 1551 (codified at 8 U.S.C. § 180 (1929 sup. III)).

²¹ See *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979).

²² A first conviction under Illegal Entry is a petty offense punishable by six months’ imprisonment, while a subsequent Illegal Entry charge can be prosecuted as a Class E felony with the sentence of imprisonment increasing to two years. 8 U.S.C. § 1325(a) (2012). Because a removal is not a necessary element of an Illegal Entry prosecution and most aliens amenable to the charge are encountered at or near the border, a felony Illegal Entry prosecution for a qualifying alien can prove the best solution when the defendant’s A-File, or removal documents, are missing or lost.

documents are lost or missing.

C. Alternate Federal Charges to Illegal Entry and Illegal Reentry

Several other federal statutes can roughly apply to the same conduct giving rise to an Illegal Reentry prosecution. Aliens attempting to obtain entry by false or misleading statements or documents often falsely claim U.S. citizenship or lawful permanent resident alien status, allowing for a justifiable prosecution under 18 U.S.C. § 911, Citizen of the United States (for aliens falsely claiming U.S. citizenship),²³ or 18 U.S.C. § 1001, Statements of entries generally (for those falsely claiming lawful permanent resident alien status).²⁴ An alien attempting entry at a port of entry and providing a false or fraudulent document may be amenable to a wide array of charges. Title 18 U.S.C. § 1546, Fraud and misuse of visas, permits, and other documents, applies to the fraudulent use of several immigration-related documents and visas.²⁵ Title 18 U.S.C. § 1543, Forgery or false use of passport, criminalizes the use of a false, mutilated, counterfeited or altered passport.²⁶ Prosecutors can use 18 U.S.C. § 1544, Misuse of passport, to prosecute an alien who presents a passport issued to another person or who uses a passport in violation of the terms of that passport.²⁷ Title 18 U.S.C. § 1028A²⁸ or 1028²⁹ can be used to prosecute an alien's presentation of any false document. If accurately reflecting the defendant's criminal conduct, prosecutors can use any of the above charges in lieu of an Illegal Reentry prosecution of an alien whose A-File or removal documents are lost or missing.

D. No Prosecution

Finally, if it is determined that the above options are not available or not worth pursuing, the last remaining option is to simply forego criminal prosecution of any kind and allow DHS to obtain a fresh removal and create a new A-File for the alien.

IV. Determining Whether the Prosecution of Illegal Reentry Without an A-File or Removal Document Is Warranted

What if none of the above options are available, but it is still determined that an Illegal Reentry prosecution is worth pursuing? For example, an alien's criminal history may consist of several aggravated felonies or crimes of violence. Perhaps an alien has several Illegal Entry and Reentry convictions, or the instant offense also constitutes a supervised release violation. To determine if conviction is worth the requisite expenditure of resources, the defendant's United States Sentencing Guidelines (U.S.S.G.) sentence should be calculated based upon the defendant's criminal history and where in the U.S.S.G. the defendant falls.

Armed with all of the relevant facts, the justification for going forward with the prosecution, and a realistic estimate of the time and resources needed to go forward, the prosecuting AUSA should confer with supervisors before deciding to prosecute an Illegal Reentry conviction without an A-File or removal documents. No real "check list" exists for this process (the checklist for an Illegal Reentry prosecution comes, of course, from the A-File itself). Once the decision to prosecute without an A-File or removal documents is made, this must be communicated to defense counsel, and it should be assumed that trial will commence at the earliest date possible. Therefore, there is little time to waste.

²³ 18 U.S.C. § 911 (2012).

²⁴ *Id.* § 1001.

²⁵ *Id.* § 1546.

²⁶ *Id.* § 1543.

²⁷ *Id.* § 1544.

²⁸ *Id.* § 1028A.

²⁹ *Id.* § 1028.

A. Alien's Criminal History

Determining whether to continue with prosecution of an Illegal Reentry without an A-File or a removal document begins with the defendant's criminal history. Over time, AUSAs in high-volume Illegal Reentry districts recognize patterns in the criminal histories of Illegal Reentry defendants by studying, comparing, and contrasting countless pretrial service reports. Recognizing these patterns is vital in determining whether and how to prosecute an alien whose A-File or removal documents are lost or missing.

For example, some illegal aliens have held and lost lawfully admitted permanent resident status, yet continue to illegally reenter the country. Others never held such status, but grew up in the United States and are unwilling to leave their former life behind. Some illegal aliens are fifty years of age (or even older) and are late middle-aged drifters with a criminal history spanning states and decades; yet upon closer notice, this criminal history consists of relatively minor infractions, most of which have long gone stale. Others are young men in Criminal History Category IV (or even higher) due to amassing a condensed history of misdemeanor convictions within a ten-year span. Some aliens' criminal histories are limited to only one conviction, but that conviction could be an aggravated felony with truly horrifying underlying facts and a lengthy sentence of imprisonment. Still other aliens may have serious and troubling convictions in their past, but these convictions may have gone stale and no longer count for criminal history points, placing them in the lower rungs of the U.S.S.G., and perhaps pointing against what may be a time-consuming prosecution. These nuances are vital in determining whether and how to proceed with an Illegal Reentry prosecution when faced with an unavailable A-File or removal documents.

B. Alien's Immigration History

A complete knowledge of an alien's immigration history is necessary in determining what strategy to employ when an alien's A-File or removal documents are lost or missing. A pretrial service report does not contain all of a defendant's removals, immigration hearings, or voluntary returns or departures. But, matching the pretrial report with information located in DHS databases can reveal an alien's immigration history, which can be as unique as her criminal history. Some aliens have been removed only once. That removal could be several years old, or it could be so recent (sometimes mere days prior to the alien's instant arrest and, in more than one case, the very same day of the instant arrest) that it has yet to be entered into DHS's internal databases. Other aliens have been removed on multiple occasions. Others have been granted Voluntary Returns (VRs) on multiple occasions. Proving the lone removal of an alien that occurred several years prior to the alien's instant arrest will pose a serious (and perhaps intractable) obstacle if the removal document is lost or missing. The more recent the removal, the easier it is to piece together if the removal document is unavailable.

V. Proving the Elements of Illegal Reentry Without the A-File or Removal Documents

A. Reentry

Proving the element of reentry should pose the least hurdles because its proof does not rely upon the A-File. If not arrested at or near the border, an illegal alien is likely to be encountered by ICE ERO officers in a local jail or prison or subsequent to an arrest by local law enforcement in the interior of the country. Agents who arrested aliens in border districts at or near their points of entry (almost always a port of entry or by Border Patrol agents) must be prepared to testify as to the circumstances of the defendant's encounter and arrest. Issues of intent, constant surveillance, and official restraint regarding the alien's entry may arise, but these factors are not generally independent of information in the defendant's A-File and are outside the realm of this discussion.

B. Alienage

Proving alienage should be relatively simple as well. Any admissions made to officers or agents regarding alienage are usually admissible at trial via the interviewing officials. To supplement such admissions (or if the alien did not provide them), determine if the alien appeared at immigration court. If so, the tapes of all immigration hearings, as well as the order of the alien's removal, must be ordered from the Executive Office of Immigration Review (EOIR). Upon receipt, the tapes should be officially transcribed for use at trial. The transcript will almost certainly contain an alien's admission to the IJ that he is not a U.S. citizen and an affirmation of the alien's country of citizenship.

If the alien has been subject to an Expedited Removal (ER), the case agent should search all relevant databases for the Forms I-860 (Notice of Intent to Expedited Remove) and I-867A and B, for these forms should contain a sworn admission as to the alien's country of citizenship as well as other incriminating admissions. These databases are a trove of information, warehousing such documents as the G-166 (Report of Investigation), the I-44 (Report of Apprehension or Seizure), and the I-213 (Record of Deportable Alien). An alien encountered by DHS may be identified in a G-166 even if that alien was never criminally prosecuted or even arrested (for example, a smuggled alien). The I-44 details DHS seizures of contraband, as well as the identity of aliens arrested in conjunction with those seizures, even if the seizure led to no prosecutions or arrests. Many Illegal Reentry case agents combing through their agencies' databases find that a current Illegal Reentry defendant has previously been encountered by Border Patrol agents who caught the defendant smuggling aliens or narcotics, even if the alien was never arrested.

If the defendant has been previously convicted of Illegal Entry or Illegal Reentry (or any other federal statute concerning alienage), the prosecutor can order certified copies of the conviction documents from the district court of conviction. The case agent who ordered the original documents can admit properly redacted and sanitized copies into evidence at trial. Finally, the case agent or officer can also order a certified birth certificate. Better yet, the agent can obtain an apostilled birth certificate from the Department of State:

An apostille is a certificate issued by a designated authority in a country where the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents, Apostille Convention, is in force. . . . Apostilles authenticate the seals and signatures of officials on public documents such as birth certificates, notarials, court orders, or any other document issued by a public authority, so that they can be recognized in foreign countries that are parties to the Convention.³⁰

C. No Permission to Reenter

No permission to reenter, too, should be easily disposed of because it does not depend upon the availability of the defendant's A-File. The case agent or officer simply conducts a complete examination of all relevant databases to determine if the alien has received permission to reenter the United States from the Attorney General of the United States or the Secretary of the Department of Homeland Security. The case agent then testifies as to these findings at trial.

D. Removal

Without a removal document, proving a defendant's removal beyond a reasonable doubt becomes the most problematic aspect of an Illegal Reentry prosecution. There are two types of removal documents: the form I-205 (Warrant of Removal) and the form I-296 (Verification of Removal). Both have been held as routine, non-testimonial documents not prepared in anticipation of criminal litigation and, thus,

³⁰ Notarial and Authentication (Apostille), Travel.State.Gov (last visited June 20, 2017).

admissible at trial.³¹ Normally, of course, the removal document is in the alien's A-File, and the case agent simply transports it to the nearest USCIS office to obtain a certified copy. Although the removal officer or agent who signed and witnessed or verified the alien's removal document usually testifies at trial, the prosecutor can admit the USCIS-certified removal document through the case agent because the original is maintained in the A-File. But if the removal document is missing or lost, alternate means of proof for that removal must be found.

Here begins the reconstruction of an alien's removal. An alien's apprehension by DHS triggers the creation of an "event" in the subordinate agency's specific database. This event contains the alien's biographical information, fingerprint, and photograph. Databases can be searched to match prior Alien Numbers and Federal Bureau of Investigation (FBI) numbers. After an event is created and all biographical information is captured and input, a system called Enforce Alien Removal Module (EARM) is used by DHS to investigate an alien's immigration history. EARM is a master database containing all of an alien's documented encounters with DHS. It contains narratives of prior apprehensions, and most importantly, it usually provides information of where and when an alien was ordered removed, when the alien was actually removed, and which agency and port of entry were involved in the alien's removal. ERO updates and closes out removals in EARM. All DHS agents, officers, and civilian support staff authorized to enter information into EARM possess an identifying number, referred to as a hash ID, which is associated with each entry that employee inputs into EARM. For all of the useful information EARM contains, it does not include, unfortunately, the name of the agent or officer who witnessed an alien's removal from the United States and signed the relevant I-205 or I-296.

United States Visitor and Immigrant Status Indicator Technology (U.S. Visits) is another of the many databases used by CBP and can be helpful in the prosecution of an alien without an A-File or removal documents. U.S. Visits collects and compiles biometric data of all known contacts between an alien and immigration officials. While U.S. Visits, like EARM, cannot identify a removal agent or officer, the database will identify the DHS official who encountered an alien during each of that alien's encounters with immigration officials. Information compiled from U.S. Visits, therefore, can be instrumental for several reasons.

First, locating the immigration official via U.S. Visits who most recently encountered the alien allows the prosecution team to contact and question that official, who may recall details of the alien's subsequent removal or could suggest another official who might know more. Second, illegal aliens, like the rest of us, tend to be creatures of habit. Some have amassed multiple entries in the same approximate area or via the same smuggling routes. Prior to the mid-2000s, illegal aliens encountered by USBP agents in high-volume alien-trafficking sectors and who lacked a serious criminal history were simply granted what is called a Voluntary Return (VR).³² Evidence of encounters leading to VRs can be of use in an

³¹ Both the Form I-205 and I-296 have been held admissible by the Ninth Circuit Court of Appeals—the I-205 in *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005) and the I-296 in *United States v. Lopez*, 747 F.3d 1141, 1148 (9th Cir. 2014), *opinion amended and superseded on denial of reh'g*, 762 F.3d 852 (9th Cir. 2014). This latter case poses an interesting wrinkle much more common than missing removal documents—illegible or unidentifiable signatures on removal documents. *Id.* at 1144. The I-296 is one page and contains two officer signatures: that of the agent taking the alien's fingerprints and that of the agent witnessing the defendant's removal. *See id.* However, both signatures on the I-296 at issue were illegible, and the prosecution did not call either DHS official to testify. *Id.* In commentary, the Court noted the weakness of the government's proof of the removal element. *Id.* at 1154 n.7. The lesson is clear: although a removal document can be admitted into evidence through the case agent, it is much better practice—when at all possible—to admit the removal document via the DHS official who actually verified and signed it. This will preclude any confusion regarding the removal process in the jurors' minds and prevent the defense from successfully creating an issue where none should exist.

³² A Voluntary Return is not to be confused or conflated with a Voluntary Departure (VD), a form of relief which can only be granted by an Immigration Judge.

Illegal Reentry prosecution.

A VR is not a removal and cannot be used to prove the removal element of an Illegal Reentry prosecution; also, it should not be confused with an ER. Only citizens of Mexico can be granted a VR. A VR is accomplished by a simple entering of the alien's biometrics (including fingerprints) into relevant DHS databases (i.e., U.S. Visits), followed by a quick turn-about to Mexico. During the late 1990s until the middle of the last decade, VRs were common. The immigration courts were overloaded, and because the criminal and immigration histories of aliens eligible for a VR were relatively minor, immigration detention was highly unlikely; these aliens' immigration court dates could be years away. If not for VRs, these aliens would have simply been served with a Form I-862 (Notice to Appear before an Immigration Judge) and released. Predictably, very few of these released aliens appear for their hearings; in 2012 alone, ICE searched for more than 469,000 aliens who had missed their immigration court dates.³³ VRs were a practical tool for Border Patrol agents struggling to manage the high volume of illegal aliens during the late 1990s and the earlier years of this century.

Because VRs practically offer little effect, several illegal aliens currently in their thirties or older, whose only consequence for several years was a VR, have compiled several of them. Evidence of the encounters preceding VRs can be useful for prosecution purposes. Under the right circumstances, prosecutors may be able to introduce evidence of these encounters under Federal Rule of Evidence 404(b),³⁴ especially if EARM confirms that the alien's most recent removal occurred via a port of entry in roughly the same area as the alien's VR and the instant encounter with immigration officials. Prosecutors must identify the encountering agent or officer for each encounter preceding a VR, and the agent or officer must be available to testify at trial. As a practical matter, the mass practice of granting VRs to illegal aliens abated between 2004 and 2007 after the introduction of Expedited Removals to the entire border.³⁵

The Form I-216 (Record of Persons and Property Transfer) can be another important tool in piecing together an alien's removal. This form is essentially a manifest of aliens transported to any number of the approximately forty-eight ports of entry along the border between the United States and Mexico³⁶ and ports of entry in international airports. Unlike the other "I" forms discussed above, the I-216 is not usually included in an alien's A-File.³⁷ Rather, it is simply a log of aliens to be transported from a detention center, Border Patrol station, or some other DHS facility, to the port of entry of an alien's ultimate removal. DHS facilities differ in their practice of maintaining I-216s. Locating I-216s more than three years old can prove exceedingly difficult. But because an I-216 is normally signed in the regular course of business by the officers or agents who both approved the transport of the alien and received the alien for removal, the I-216 can be admitted into evidence at trial under Fed. R. Evid. 803(6) under the business record exception to the Hearsay Rule.³⁸ However, I-216s contain information totally irrelevant to the alien being tried, including the names of all aliens to be transported, sensitive information

³³ [Christina London & Bridget Naso, ICE: Many Immigrants Skip Court Hearings, NBC: SAN DIEGO \(July 2, 2014\)](#).

³⁴ [FED. R. EVID. 404\(b\)](#).

³⁵ Section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 amended section 235(b) of the Immigration and Nationality Act (INA), introducing the practice of allowing immigration officials to remove qualifying aliens from the United States in lieu of simply serving them NTAs. [Omnibus Consolidated Appropriations Act, 110 Stat. 3009 \(1996\)](#) (codified as amended). Via a systematic expansion of the program, by 2004, any alien encountered by immigration officials within 14 days and 100 miles of entry was amenable to ER, thus negating the logic of granting VRs.

³⁶ [MPI Staff, The U.S.-Mexico Border, MPI \(June 1, 2006\)](#).

³⁷ Thus, the Form I-216 cannot simply be copied and certified by USCIS and admitted into evidence by the case agent, even if the A-File is available. However, in some instances, the form is actually included in the A-File, in which case a certified copy of the document is admissible through the case agent as the custodian of the file.

³⁸ [FED. R. EVID. 803\(6\)](#).

regarding each alien, and in some instances, the various criminal convictions of all aliens listed on the document. Thus, the document must be heavily redacted before admission into evidence.

An I-216 can be instrumental; however, it cannot be used as a substitute for an actual removal document. Its relevance is two-fold. First, if properly admitted into evidence, it can reinforce the already existing evidence of an alien's removal—edging closer to the “beyond a reasonable doubt” burden of proof. Second, it can greatly assist the prosecution team's quest to identify and locate the removal agent or officer. The transport agents or officers may personally know their counterpart who removed the alien in question, or they may have kept internal notes that can assist in identifying them. An alien's removal date and port (obtained from EARM) and information from the I-216 can sometimes be matched with internal time and attendance records of a particular port to determine exactly which DHS officials were conducting removals on any given day.

Title 8 Section 1326 provides that an alien who “has departed the United States while an order of exclusion, deportation, or removal is outstanding” can be charged with Illegal Reentry.³⁹ However, this is rare and generally concerns cases in which the defendant is a citizen from a country which does not accept its criminal aliens for repatriation (most notably—at least until recently—Cuba). Because proof of the alien's departure is a necessary element, such cases almost exclusively occur in districts along the northern and southern borders. If the alien does not admit to having departed the United States, then circumstantial evidence must prove a departure, which is why such cases generally only occur when the alien is encountered at or near the border.

VI. Air Removal

Due to the size of Mexico's population and its vast border with the United States, the majority of removable aliens have hailed from that country.⁴⁰ However, the proportion of removed Mexican aliens has steadily decreased with the influx of Central Americans in recent years. From 2013 to 2014, “ICE removals of Mexican nationals decreased from [66% to 56%] of total . . . removals.”⁴¹ All non-Mexican removable aliens (except for Canadian citizens, who are generally removed via the land ports of entry along the border between the United States and Canada) are removed via air to their countries of origin.⁴²

A. Mexican Interior Repatriation Program (MIRP)

At various times, ICE has conducted removals of Mexican citizens via air as well. One such program was the Mexican Interior Repatriation Program (MIRP).⁴³ First initiated in the Yuma and Tucson Border Patrol sectors (encompassing the entire state of Arizona and a small sliver of the easternmost portion of the Southern District of California) in 2004 during the brutally hot summer months, MIRP was a removal program conducted for Mexican nationals without criminal records.⁴⁴ MIRP was designed both to protect aliens from the scorching Sonoran desert heat during peak summer months and to disrupt traditional smuggling patterns by flying Mexican aliens to Mexico City.⁴⁵ Upon the aliens' arrival, the

³⁹ 8 U.S.C. § 1326(a)(1) (2012).

⁴⁰ *FY 2016 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last visited July 17, 2017).

⁴¹ DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF'T, ICE ENFORCEMENT & REMOVAL OPERATIONS REP. 4 (2014).

⁴² A handful of nations refuse to accept the repatriation of their citizens. Such refusal is, of course, a highly sensitive diplomatic issue, one well outside of the focus of this article. See Leo Hohmann, *23 Countries Refuse to Take Back Criminal Aliens*, WORLD NET DAILY (Mar. 18, 2017).

⁴³ See Press Release, Nat'l Immigration Forum, *Analyzing Border Enforcement Operations: Interior Repatriation Programs* (Sept. 22, 2012).

⁴⁴ See *id.*

⁴⁵ *Id.*

Mexican government would then provide transportation to their cities and towns of origin.⁴⁶

Proving the removal of an alien removed via air when a removal document is missing can be easier than doing so for an alien removed via a land port of entry. Air removals leave a greater administrative and documentary footprint, allowing a prosecution team to piece together more admissible evidence of a defendant's removal. Then, it becomes a matter of identifying and locating the agent or officer who either transported the alien to the airport in the United States or who was actually on the airplane with the alien to her home country. Generally, EROs transporting aliens to be removed by air accompany the alien to the airport of the alien's scheduled removal. However, EROs may accompany an alien with a particularly violent criminal history to an airport in the alien's home country. Flight itineraries can often be retrieved from the defendant's A-File, but a lost or missing A-File is of no use.

B. Form G-391

If an alien has been removed within the previous three years, the Form G-391 may be of use in piecing together his removal. The G-391 is used for every alien transfer via land or air. A detainee cannot be removed from any DHS facility, including Field Office detention areas, without a Form G-391. All G-391s are signed by supervisors, retained for at least three years, and filed in order by month. A G-391's usefulness derives from its identification of the DHS officers either witnessing an alien's departure or escorting the alien to the alien's final destination. This form contains the name of the detainee, the place to be escorted, the purpose of the trip, and any other information necessary to carry out the movement.

VII. Conclusion

Prosecuting the offense of Illegal Reentry without an A-File or removal documents can prove difficult, time-consuming, and challenging, and it requires knowledge of DHS; its organizational structure and databases; how the agency arrests, processes, transports, and removes aliens; and how it constructs, maintains, and transports A-Files and T-Files. Such knowledge reveals the importance of the daily operations carried out by DHS officials, usually unseen by AUSAs, and that the lion's share of work necessary to secure successful Illegal Reentry prosecutions has already been done by the DHS officials across the country and world, who strive to enforce the immigration laws of the United States.

ABOUT THE AUTHOR

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⁴⁶ News Release, U.S. Immigration & Customs Enf't, U.S. and Mexico Resume Interior Repatriation Initiative (Nov. 11, 2013).

Prosecuting Human Rights Violators for Naturalization Fraud: HRSP Lessons Learned

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Human Rights and Special Prosecutions Section

I. Introduction

Human rights violators (HRV)¹ gain entry to the United States by hiding their identities or misrepresenting their conduct, thus making the United States an unwitting safe haven for such abusers. United States authorities have a variety of tools to hold these individuals accountable, including a number of statutes specifically aimed at prosecuting human rights abusers for some of the most serious international crimes, such as genocide, war crimes, torture, and the use and recruitment of child soldiers. These statutes have significant jurisdictional and evidentiary restrictions that can make them inapplicable to certain fact patterns or time periods. Consequently, the Human Rights and Special Prosecutions Section (HRSP) has employed a variety of different statutes to hold these human rights violators accountable and has achieved significant success in prosecuting these perpetrators for naturalization fraud under 18 U.S.C. § 1425.

This article provides a brief overview of § 1425 and offers concrete advice for prosecutors litigating criminal naturalization fraud cases. HRSP maintains extensive files on the issues discussed herein and others related to § 1425. HRSP attorneys are available for consultation on these issues as needed.

II. The Statute

Section 1425 criminalizes the fraudulent procurement of U.S. citizenship. It states in full:

¹ The Human Rights and Special Prosecutions Section (HRSP) defines an HRV matter or case as any criminal or civil investigation or prosecution in which the U.S. government suspects that the target assisted or otherwise participated in any of the following activities, whether or not the government charges or attempts to prove them:

- violations of the federal criminal statutes covering genocide, torture, war crimes, or recruitment or use of child soldiers;
- extrajudicial or unlawful killings, assaults, deprivation of liberty or similar crimes committed abroad under color of law or by persons acting on the basis of an association with the U.S. government; and
- persecution abroad on the basis of race, religion, ethnicity, national origin, gender, or political opinion.

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

(b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or [certain citizenship documents]

....

Shall be fined under this title or imprisoned²

A successful § 1425 prosecution can result in significant jail time. Moreover, a conviction also mandates automatic denaturalization. United States authorities can thus seek to remove the perpetrator from the United States permanently after completion of any sentence.

Typically, HRSP's human rights related § 1425 cases are premised on lies, misstatements, or omissions made by an HRV during the naturalization process. Specifically, the cases are based on answers provided by the target on his naturalization application, the N-400 form, and in a naturalization interview where U.S. authorities review those answers. HRSP reviews a target's N-400 to determine if the target answered questions that, if answered truthfully, should have divulged any past participation in human rights abuse. The most common misrepresentations made by HRVs are in response to the following questions, to which targets almost uniformly answer "no":

- Have you ever persecuted any person because of race, religion, national origin, membership in a political group, or political opinion?
- Have you ever been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance?
- Have you ever committed a crime for which you were not arrested?
- Have you ever given false or misleading information to any U.S. government official while applying for any immigration benefit?
- Have you ever lied to any U.S. government official to gain entry or admission into the United States?³

In § 1425 cases, prosecutors seek to prove that the HRV knowingly lied in responding to one or more of these questions by failing to disclose her involvement in human rights abuses in her native country, thus gaining her U.S. citizenship fraudulently. These cases involve two layers of evidence. First, HRSP prosecutors present evidence to prove that an answer on the N-400 was a lie, that is, that the HRV had in fact committed crimes or engaged in persecution, among other possible misrepresentations. Second, HRSP prosecutors submit evidence to show that the lie "sufficiently altered the [naturalization] processes as to have influenced an award of citizenship."⁴

The evidence in the first category tends to be the most time-consuming, both to collect and to present at trial. Using a combination of foreign documents, witness testimony, and other types of evidence, the government must persuade the jury that, for example, although an applicant stated he never committed a crime for which he was not arrested, in fact, he was a prison guard at a notorious detention

² [18 U.S.C. § 1425 \(2012\)](#) (explaining that courts offer varying explanations for the difference between § 1425(a) and § 1425(b). Indictments sometimes use one or the other and often charge both. HRSP is available to discuss charging options in light of circuit-specific case law.).

³ The N-400 form has evolved through many iterations over time and while these specific questions are common, they are not present in every case and are not always phrased exactly the same way. An HRV § 1425 indictment must be tailored to the exact questions answered in the target's form.

⁴ [Maslenjak v. United States, No. 16-309, 2017 WL 2674154, at *8 \(2017\)](#).

camp in Bosnia where he routinely and savagely assaulted and tortured prisoners. This same evidence might also prove that the HRV had, in fact, given false and misleading information to U.S. government officials, if the HRV filled out an immigration-related form that should have elicited that information when he applied for an immigration benefit.

This kind of evidence is typically located overseas. Documentary evidence, for example, might include records of foreign military service, court records for charges in foreign courts, and applications for veterans benefits located in other countries. Similarly, victims and witnesses to human rights violations are often scattered all over the world, having fled from violence in their native country. Obtaining this evidence involves cooperation from foreign governments in the form of requests for mutual legal assistance.

The second category of evidence—that which shows the HRV’s misrepresentations on the N-400 were material—involves the more mundane, but essential, kinds of evidence. This includes the N-400 form itself, documents showing the applicant obtained citizenship based on that N-400 form, a subsequent interview thereon, and testimony from U.S. government authorities about how naturalization applications are assessed and processed. Most commonly, HRSP attorneys present this evidence through testimony from representatives of U.S. Customs and Immigration Services or from U.S. Immigration and Customs Enforcement.

With this very basic overview, below are “lessons learned” from HRSP, which will assist in prosecuting and streamlining these cases.

III. Lessons Learned

A. Statute of Limitations

The statute of limitations for § 1425 is ten years.⁵ The statute begins to run on the date the HRV actually obtains citizenship by taking an oath and participating in a naturalization ceremony.⁶ The first step in these cases is therefore to identify the date of naturalization.

It is possible to toll the statute when there is evidence located overseas that requires a request for foreign legal assistance.⁷ A pending request for evidence located overseas will toll the statute of limitations for three years—no extensions are available past three years even if the request has not been fulfilled.⁸ The tolling starts from the date the United States sends the request to a foreign entity and ends on the date on which the foreign authority takes final action on the request.⁹ Obtaining a response from these requests takes months and sometimes years. Upon receipt of a response, it is critical to promptly and fully review the records received. If all of the requested materials have been sent, that constitutes “final action” and the statute begins to run again. If the materials are not complete, there is no final action, but it is important to notify the responding government, through the Office of International Affairs (OIA), of any missing items so that the gaps can be filled.

B. Foreign Documentary Evidence

Locating, obtaining, translating, and admitting foreign documents can be time-consuming. Relevant foreign evidence might be located in national archives; national, regional, or local administrative

⁵ 18 U.S.C. § 3291 (2012).

⁶ *See United States v. Szilvagy*, 417 F. App’x 472, 476 (6th Cir. 2011) (unpublished); *see also United States v. Kneginich*, No. 1:16-cr-238, 2017 WL 1959354, at *1 (W.D. Mich. May 10, 2017).

⁷ 18 U.S.C. § 3292(a)(1) (2012) (stating that if the statute of limitations has run, it is possible to pursue a civil denaturalization case under 8 U.S.C. § 1451).

⁸ *Id.* § 3292(c).

⁹ *Id.* § 3292(b).

buildings; court files; or police stations. HRSP's attorneys and historians have expertise both in assessing cases and in identifying likely repositories of relevant foreign documents, and they can consult with prosecutors to develop a tailored request for documents.

OIA is responsible for transmitting requests and can provide samples. Some countries require a formal request pursuant to a Mutual Legal Assistance Treaty (MLAT). Where no such treaty exists for a specific country, HRSP attorneys draft, and OIA transmits, a more informal, though similarly formatted, request. In either case, the request must include a blank certification form for the signature of a foreign government official. The certification must ask for the name and title of the official certifying the records, provide a statement that the official's duties qualify that person to issue the records, as well as a description of where the documents were located in the foreign country. It must also set forth the elements that will allow the admission of documents under 18 U.S.C. § 3505, (i.e. statements that will qualify the documents as foreign official records or business records.) OIA can provide examples of the certifications to meet these requirements.

OIA sends these requests through formal diplomatic channels on behalf of the U.S. government to the foreign country. The foreign country will assess whether the request is proper and only then forward it to the person or place where the documents are located. The formal request can take many months, sometimes years, to process in the foreign country. In practice, once the request is sent through the formal channels, HRSP attorneys will also forward the request through informal channels, i.e., directly to the entity HRSP believes maintains the record. Sending the request informally to the person who will ultimately be the recipient through formal channels (e.g., the archivist at the location where state documents are stored) can speed the process while awaiting the request through diplomatic channels.

As noted above, it is vital to review promptly any responses to requests for foreign evidence. In particular, it is critical to ensure that all documents have been properly certified. Sometimes certifications are incomplete, fail to set out the needed elements to overcome a hearsay objection, or fail to mention a specific document. Fixing such an oversight with foreign authorities is not difficult, but it takes time to accomplish, and therefore should be assessed well before trial. Address any gaps immediately rather than trying to do so on the eve of trial.

Move to admit foreign documents in a pretrial motion in limine to streamline presentation of the evidence at trial. Include, as exhibits, all foreign documents to be used at trial along with the respective certifications, translations, and translation certifications. Once the documents are admitted, only the original and translation are submitted to the jury (no certifications). HRSP can provide sample motions.

C. Experts

HRSP attorneys often present a historical expert in the case-in-chief to give the jury context and background for the evidence in the case. Most § 1425 HRV-related cases arise from violence committed during conflicts in countries far from the United States and from a long time ago. Typical jurors will know little or nothing about those events. A historical expert can assist the jury in contextualizing the evidence offered by fact witnesses.

This testimony should not be lengthy. Commonly, a historical expert's direct testimony is limited to a brief description of the country in question, the conflict in which the defendant's action occurred, any details needed to understand terms or phrases that might be used by fact witnesses (e.g., an explanation of the terms or acronyms used to describe the military group in which the defendant might have served), and any historical record of the events at issue (e.g., the establishment of the detention camp at which events took place).

In cases where the indictment charges that a defendant lied about committing a crime for which she had never been arrested, HRSP attorneys also often engage an expert on foreign law to show that the act in question was illegal where it was committed. Federal Rule of Criminal Procedure 26.1 directs that

“[a] party intending to raise an issue of foreign law must provide the court and all parties reasonable written notice.”¹⁰ HRSP recommends submitting a pretrial motion *in limine* to streamline the trial process, styled as a motion for judicial notice of foreign law. Exhibits to that motion are an original language version of the criminal code provisions at issue, a certified translation of those provisions, and a report or affidavit from a lawyer or legal librarian stating that these code provisions were applicable at the time and place where the defendant’s alleged crimes took place. Once the court takes judicial notice of the applicable foreign code provisions, HRSP attorneys move to add the applicable legal provisions to the jury instructions so that the jury can determine whether the defendant’s acts constituted a crime under that law.

D. Witness Prep and Vetting

Direct victim-witness testimony about a defendant’s human rights violations can be the most powerful part of the prosecution’s presentation to the jury, but can also be very challenging to present effectively. Many foreign witnesses will be testifying through an interpreter and will be unfamiliar with U.S. court processes (i.e., direct exam and cross exam). In addition, these witnesses often testify about traumatic events that happened long ago. It is not uncommon for these witnesses to recount lengthy and harrowing details to prosecutors in pretrial interviews, but to truncate those narratives significantly in trial for any number of reasons. Bring fact witnesses, especially victims, to the United States well before trial to allow them to acclimate and to familiarize them with the process. Talk to them in detail about what to expect on direct exam. Advise them that prosecutors may ask them to repeat certain facts during questioning in order to be sure the jury understands the details of their experience. Explain objections and the importance of following the judge’s instructions. Explain cross-exam in detail and prepare the witnesses for working with an interpreter by encouraging them to speak slowly and to pause after every second or third sentence to allow the interpreter to translate the testimony.

E. Trial Tips

Hire the best two interpreters available to translate for foreign witnesses. Interpreters usually work for thirty to sixty minutes before requiring a rest; therefore, rotate interpreters to avoid breaks in trial. These two interpreters should be different from any interpreter used to translate for the defendant. Before hiring, meet with potential candidates to discuss their experience. Court experience is crucial. Explain that the testimony they will be expected to interpret may be graphic and upsetting and that they must translate each word verbatim, including graphic descriptions and blunt or coarse language.

Work with the interpreters, the court, and defense counsel to establish a system to use when an interpreter needs a break, requires a witness to slow down or repeat testimony, or questions the other interpreter’s translation. If one interpreter believes the other has misinterpreted something, it must be brought to the court’s attention promptly, but professionally, so that it can be resolved outside the presence of the jury before the witness’s testimony builds on an erroneous interpretation and before the witness leaves the stand. In such cases, both interpreters and the attorneys should approach the bench to listen to the interpreters’ explanations of the testimony in question. Most often HRSP attorneys have resolved these issues by agreeing with the court and defense counsel to re-ask the question to clarify the record (if the interpreters have come to an agreement about the proper interpretation) or to re-phrase the question (if there is no agreement) to elicit the testimony in a way that avoids the conflicting interpretations.

Prepare a list of names and acronyms for use at trial, and provide it to the court, defense counsel, interpreters, court reporter, and possibly the jury. Include witness names and pronunciations, place names, any relevant military units or militias, and other foreign words that may come up regularly. This will help everyone recognize and work with unfamiliar words.

¹⁰ FED. R. CRIM. P. 26.1.

F. Sentencing

The statutory maximum sentence under 18 U.S.C. § 1425 is ten years, absent other factors.¹¹ The Sentencing Guidelines range from zero to six months if the defendant has no criminal history.¹² However, in these human rights cases, HRSP attorneys have obtained significant upward departures or variances. In at least three cases, courts sentenced defendants to a full ten-year sentence despite the zero to six month guidelines range.

HRSP attorneys typically request upward departure under U.S.S.G. § 5K2.0(a)(1)(A), arguing that the defendant's violent past is an aggravating factor, or under U.S.S.G. § 5K2.0(a)(2), arguing that the circumstances of HRV cases are of a kind not adequately taken into consideration elsewhere in the guidelines.¹³ HRSP also requests upward variances under the factors laid out in 18 U.S.C. § 3553, arguing that the seriousness of the human rights violation should be taken into account in sentencing.¹⁴ It is highly persuasive to present victim witness impact testimony at sentencing, if allowed by the court, recognizing that the victims of the underlying human rights violations are not technically victims of the § 1425 crime.

Be aware that in 2012, the Sentencing Commission added a new Guideline which directs courts to increase the offense level as high as twenty-five in § 1425 cases involving concealment of human rights abuses. This guideline will not apply to anyone who obtained their naturalization prior to 2012, but HRSP cites to it to demonstrate the prior guidelines did not adequately address circumstances of the kind presented in HRV cases and, thus, under the older guidelines, an upward departure is justified.

IV. Conclusion

There are numerous logistical and legal challenges in investigating and prosecuting naturalization fraud offenses against human rights violators in the United States. While there are many frustrations associated with those challenges, the reward is immense and prevents the United States from becoming a safe haven for serious human rights violators. HRSP's experiences and resources can help prosecutors address novel issues common to these cases, and prosecutors should contact the section to discuss these and other issues and best practices related to § 1425 HRV cases.

ABOUT THE AUTHORS

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¹¹ 18 U.S.C. § 1425 (2012).

¹² UNITED STATES SENTENCING GUIDELINES MANUAL § 2L2.2 (U.S. SENTENCING COMM'N 2016) [hereinafter U.S.S.G.].

¹³ U.S.S.G. § 5K2.0(a)(1)(A), (a)(2)(A).

¹⁴ 18 U.S.C. § 3553(a)(2)(A) (2012).

Who's Afraid of Section 922(g)(5)?: Navigating the Criminal, Civil, and Regulatory Foundation of the Statute for a Successful Prosecution

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I. Introduction: A Hybrid Statute

Prosecuting a case under 18 U.S.C. § 922(g)(5) presents unique challenges because it is a mixture of criminal and immigration law. The statute prohibits the knowing possession of firearms or ammunition by certain aliens.¹ With our renewed emphasis on criminal immigration enforcement,² charging this felony may be appropriate in a number of circumstances—from a primary charge for unlawful firearms possession to a secondary charge in relation to assaulting federal officers, drug trafficking, or terrorism. The purpose of this article is to help the prosecutor understand when a charging determination may require reference to sources not generally considered in a criminal prosecution. This includes civil immigration statutes and cases, immigration regulations, and firearms regulations. The prosecutor may reference some or all of these sources when proving the distinctive alien status element that is at the heart of this hybrid criminal and immigration statute.

II. Elements

Section 922(g) prohibits two general classes of aliens from possessing firearms and ammunition.³ Subsection (g)(5)(A) prohibits aliens who are “illegally or unlawfully” present in the United States,⁴ while subsection (g)(5)(B) prohibits aliens who have “been admitted . . . under a nonimmigrant visa” and do not fall under several exceptions listed in § 922(y)(2).⁵ Section 922(d)(5) further prohibits the sale or other disposition “of any firearm or ammunition” if the seller or disposer “know[s] or ha[s] reasonable cause to believe” the recipient is an alien falling within either category.⁶

The elements of § 922(g)(5) are threefold: (1) the defendant must knowingly possess the firearm or ammunition; (2) the defendant must be in the United States illegally or unlawfully or have been

¹ See 18 U.S.C. § 922(g)(5) (2012); 18 U.S.C. § 924(a)(2) (2012).

² Memorandum from U.S. Att’y Gen. Jeff Sessions, U.S. Dep’t of Justice, to All Fed. Prosecutors, U.S. Dep’t of Justice I (Apr. 11, 2017).

³ 18 U.S.C. § 922(g) (2012). While a criminal conviction in a foreign court may prevent an alien from admission into the United States or from securing lawful status therein, it does not itself prohibit the alien from possessing a firearm under 18 U.S.C. § 922(g)(1). See *Small v. United States*, 544 U.S. 385, 394 (2005).

⁴ § 922(g)(5)(A).

⁵ § 922(g)(5)(B), (y)(2).

⁶ *Id.* § 922(d)(5).

admitted to the United States under a nonimmigrant visa (except as provided in § 922(y)(2)); and (3) the firearm or ammunition must have traveled in or affected interstate or foreign commerce.⁷ This article will solely address the second element.

III. Aliens Illegally or Unlawfully in the United States

Of critical import is having familiarity with how the courts view the phrase “alien . . . illegally or unlawfully in the United States.”⁸ The statute does not define this phrase.⁹ However, Congress and the Attorney General delegated the authority to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to investigate, administer, and enforce the provisions of the Gun Control Act (GCA), Chapter 44 of Title 18.¹⁰ In this regard, ATF regulates the firearms industry and provides guidance on the GCA to other federal agencies, such as the FBI’s National Instant Criminal Background Check System (NICS).¹¹ In furtherance of these responsibilities, ATF promulgated a definition for this phrase in the Code of Federal Regulations (C.F.R.).¹² While a regulation does not carry the force of law in criminal cases,¹³ several courts have agreed there should be “some degree of deference to the ATF’s interpretive regulation” of this phrase.¹⁴ ATF’s regulation, 27 C.F.R. § 478.11, details in pertinent part:

Alien illegally or unlawfully in the United States. Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole status. The term includes any alien—

- (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
- (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted;
- (c) Paroled under INA section 212(d)(5) whose authorized period of parole has expired or whose parole status has been terminated; or
- (d) Under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily, whether or not he or she has left the United States.¹⁵

⁷ 18 U.S.C. §§ 922(g)(5), 924(a)(2) (2012); *see United States v. Al Sabahi*, 719 F.3d 305, 308 (4th Cir. 2013); *United States v. Latu*, 479 F.3d 1153, 1157 n.1 (9th Cir. 2007); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993).

⁸ § 922(g)(5)(A).

⁹ *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1294 (10th Cir. 2008).

¹⁰ *See* 28 U.S.C. § 599A(b)(1) (2012); 18 U.S.C. § 926(a) (2012); 28 C.F.R. § 0.130(a)(1) (2017).

¹¹ *See* 28 C.F.R. § 0.130(a)(1); 28 C.F.R. § 25.2 (2017).

¹² 27 C.F.R. § 478.11 (2017).

¹³ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015).

¹⁴ *United States v. Flores*, 404 F.3d 320, 327 (5th Cir. 2005); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); *United States v. Anaya-Acosta*, 629 F.3d 1091, 1094 (9th Cir. 2011); *but see United States v. Orellana*, 405 F.3d 360, 368–69 (5th Cir. 2005) (declining to give deference to ATF’s regulatory interpretation of § 922(g)(5)(A) when imposing criminal liability).

¹⁵ 27 C.F.R. § 478.11.

As one might surmise, the typical § 922(g)(5)(A) case arises from subsection (a) above, that is, after unlawfully entering the United States, the alien knowingly possessed a firearm that has previously moved in interstate or foreign commerce (or has otherwise affected commerce).¹⁶

On occasion, the trial prosecutor will encounter instances where an alien lawfully entered the United States but, due to a host of potential reasons, lost lawful status and willingly chose to remain in the country. Similarly, some aliens may illegally enter the country but subsequently apply to civil immigration authorities for a change of status. Generally, this application is to a program that allows aliens to remain in the United States pending a review that, if granted, may change their status and allow them to seek employment.¹⁷

After losing lawful status, an alien is unlawfully in the United States and cannot possess firearms or ammunition.¹⁸ Likewise, the mere filing of an application that may result in a status change generally does not allow the alien to lawfully possess firearms or ammunition.¹⁹

Another permutation in the law is deferred removal under The Deferred Action for Childhood Arrivals (DACA). This policy arose from the June 15, 2012, memorandum issued by Secretary Janet Napolitano. The memorandum detailed how DHS should exercise its prosecutorial discretion by considering deferred action for certain “low priority cases” involving “people who were brought to this

¹⁶ See 18 U.S.C. § 922(g)(5) (2012).

¹⁷ [United States v. Flores](#), 404 F.3d 320 (5th Cir. 2005); [Ochoa-Colchado](#), 521 F.3d at 1293.

¹⁸ [United States v. Igbatayo](#), 764 F.2d 1039, 1040 (5th Cir. 1985) (deciding that, because of firearm prohibition, defendant, who failed to maintain requirements of student visa, “was in the same position legally as the alien who . . . enters the United States without permission”); [Atandi](#), 376 F.3d at 1188 (holding that “an alien who is only permitted to remain in the United States for the duration of his or her status . . . becomes ‘illegally or unlawfully in the United States’ for purposes of § 922(g)(5)(A) upon commission of a status violation”); [United States v. Al Sabahi](#), 719 F.3d 305, 309 (4th Cir. 2013) (finding defendant “illegally or unlawfully in the United States” for purposes of firearms prohibition when his visa expired); [United States v. Elrawy](#), 448 F.3d 309, 313–14 (5th Cir. 2006) (finding that defendant’s unlawful status began with visa overstay and that neither “his . . . application for adjustment of status” nor his wife’s I-130 petition in his favor legally changed that status “because the approval of the petition is only one step in the application for adjustment of status”); cf. [United States v. Santiago-Hernandez](#), 113 F. Supp. 3d 966, 968–70 (W.D. Mich. 2015) (deciding that defendant granted “parole status” was not illegally or unlawfully in United States, as expressly excluded by ATF regulations).

¹⁹ [United States v. Lucio](#), 428 F.3d 519, 525 (5th Cir. 2005) (finding that alien who applied for adjustment status is still illegal or unlawful, even though permitted to stay in United States pending status review, because “submission of an application does not connote that the alien’s immigration status has changed, as the very real possibility exists that the INS will deny the alien’s application altogether”); [Flores](#), 404 F.3d at 327–28 (5th Cir. 2005) (deciding that alien was “illegally or unlawfully in the United States” even with temporary stay of removal and permission to work during stay); [Hussein v. Immigration and Naturalization Serv.](#), 61 F.3d 377, 381 (5th Cir. 1995) (finding that temporary stay of removal “did not change the alien’s previously illegal status into a lawful status”); [United States v. Bazargan](#), 992 F.2d 844, 848–49 (8th Cir. 1993) (finding that foreign student who lost legal status did not regain it by filing asylum petition and receiving employment authorization and that these measure did not change status to that of legal alien entitled to possess firearms.); [United States v. Latu](#), 479 F.3d 1153, 1159 (9th Cir. 2007) (finding that filing application for adjustment of status “absent a statute preventing Latu’s removability” did not change his presence from “illegal or unlawful”); [Ochoa-Colchado](#), 521 F.3d at 1298 (deciding that Congress likely did not “intend[] to exclude from § 922(g)(5)(A) those aliens who have merely filed applications for adjustment of status”). An exception to the general rule is the Fifth Circuit’s *Orellana* case, where an alien filed for and received Temporary Protected Status (TPS). [United States v. Orellana](#), 405 F.3d 360, 365–66, 371 (5th Cir. 2005). As previously noted, the *Orellana* court gave no deference to ATF’s regulatory interpretation of § 922(g)(5)(A) and held that aliens granted TPS status are not illegally or unlawfully in the United States because they “are allowed to remain in the United States and work . . . [and] are allowed to apply for adjustment of status as if they possessed lawful [nonimmigrant] status.”

country as children” and also considering granting eligibility for employment during the deferral period.²⁰ In July 2017, the Fifth Circuit held that even if an individual has received DACA benefits, that individual still lacks lawful status and is thus subject to possible prosecution under 18 U.S.C. § 922(g)(5).²¹ While the DACA program does grant relief in the form of prosecutorial discretion to individuals on a case-by-case basis, it does not confer any immigration status to those individuals. The court held that lawful immigration status is the determining factor for § 922(g)(5)(A)—not benefits received. In support of the preeminence of lawful immigration status, the court cited a string of cases from the mid-2000s: *United States v. Flores*,²² *United States v. Lucio*,²³ *United States v. Elrawy*,²⁴ and even *United States v. Orellana*.²⁵ According to the court, “what [the defendant] lacks [] is lawful status, and the absence of such status is controlling.”²⁶ In 2014, the Department of Justice’s Office of Legal Counsel (OLC) similarly opined that deferred action is an exercise of enforcement discretion that “confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency’s discretion.”²⁷ Further, in the aforementioned *Igbatayo* case,²⁸ the defendant argued that his failure to maintain his status “merely renders him ‘deportable,’ not ‘illegal,’” an argument that was not persuasive to that court.²⁹ Similar to the holdings in *Flores*, *Lucio*, *Hussein*, *Bazargan*, and *Latu*, a deferred action will likely be considered by the courts as analogous to a temporary stay granted upon the filing of an application to change status—it does not legally change the person’s status for the purposes of § 922(g)(5)(A).³⁰

As the above cases demonstrate, a host of avenues exists whereby an alien’s immigration status may change from legal to illegal and vice versa. When in doubt as to alien status at the time the alien possessed a firearm or ammunition, consultation with the Department of Homeland Security (DHS) is recommended.³¹

IV. Nonimmigrant Visa Aliens

Under 18 U.S.C. § 922(g)(5)(B), aliens who are admitted to the United States under a nonimmigrant visa (NIV) are also prohibited from possessing firearms or ammunition.³² NIVs are issued

²⁰ Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas Dir., U.S. Citizenship and Immigration Servs., & John Morton, Dir., U.S. Immigration and Customs Enf’t (June 15, 2012).

²¹ *United States v. Arrieta*, No. 16-40539, 2017 WL 2889079 (5th Cir. July 7, 2017).

²² *Flores*, 404 F.3d at 326–28.

²³ *Lucio*, 428 F.3d at 526.

²⁴ *Elrawy*, 448 F.3d at 313–14.

²⁵ *Orellana*, 405 F.3d at 368–69.

²⁶ *Arrieta*, 2017 WL 2889079, at *3.

²⁷ U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, Memorandum Opinion on the Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014), Westlaw 2014 WL 10788677, at *15; *see also* 45 C.F.R. § 152.2(8) (2016) (saying that DACA aliens are not considered “lawfully present” under certain regulations promulgated to implement the Affordable Care Act: “An individual with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process, as described in the Secretary of Homeland Security’s June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.”)

²⁸ *See supra* note 18.

²⁹ *United States v. Igbatayo*, 764 F.2d at 1040 (5th Cir. 1985).

³⁰ *See Flores*, 404 F.3d at 326; *Lucio*, 428 F.3d at 526; *Hussein v. Immigration and Naturalization Serv.*, 61 F.3d 377, 381–82 (5th Cir. 1995); *United States v. Bazargan*, 992 F.2d 844, 847–49 (8th Cir. 1993); *United States v. Latu*, 479 F.3d 1153, 1159 (9th Cir. 2007).

³¹ *See Contact Us*, DEP’T HOMELAND SECURITY (last updated Mar. 28, 2017).

³² 18 U.S.C. § 922(g)(5)(B) (2012).

to aliens who come to the United States temporarily, including, but not limited to, diplomats, students, visitors for pleasure, representatives of foreign businesses, representatives of the foreign press, athletes, artists, and entertainers.³³ However, a number of exceptions to this prohibition exists unless the alien falls under the exceptions listed in § 922(y)(2), which are as follows:

(2) Exceptions. --Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

- (A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;
- (B) an official representative of a foreign government who is--
 - (i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or
 - (ii) en route to or from another country to which that alien is accredited;
- (C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or
- (D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.³⁴

The most commonly observed exception is possessing a valid hunting license under (y)(2)(A). Note in particular that the statute does not require the hunting license to be issued by the state where the alien resides—it need only be “issued in the United States.”³⁵

In fact, unless prohibited or restricted by another federal or state statute, an NIV alien may purchase a firearm from a Federal Firearms Licensee (FFL) when the alien is (1) lawfully in the United States; (2) has a current alien registration number; (3) has a valid hunting license or permit from any State; and (4) is a resident of the state where the firearm is purchased.³⁶ Further, in a retail firearms purchase or transfer via an FFL, the NIV alien must present to the FFL “applicable documentation

³³ 8 U.S.C. § 1101(a)(15) (2012 & Supp. III 2015).

³⁴ 18 U.S.C. § 922(y)(2) (2012).

³⁵ § 922(y)(2)(A).

³⁶ *See id.*; 27 C.F.R. §§ 478.11, 478.124 (2017). Subject to certain exceptions, 18 U.S.C. § 922(b)(3) prohibits an FFL from transferring a firearm to a person who does not reside in the same state as the FFL’s place of business, while § 922(a)(9) prohibits “any person . . . who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.” 18 U.S.C. § 922(a)(9), (b)(3) (2012). When acquiring a firearm from an FFL, an eligible alien is subject to the same proof of state residency requirements that apply to U.S. citizens. U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, *Memorandum Opinion on State of Residence Requirements for Firearms Transfers* (Jan. 30, 2012) Westlaw 2012 WL 602349, at *3, *4. Also, 27 C.F.R. §§ 478.11 provides a definition for “State of Residence.” 27 C.F.R. § 478.11 (2017). When researching this issue, note that prior to 2012, this definition required a ninety-day minimum residency requirement for all aliens. *See Supplementary Information, 77 Fed. Reg. 33630 (June 1, 2012)*. On July 9, 2012, § 478.11 was amended to remove the ninety-day requirement because OLC had determined that ATF could not legally promulgate by regulation a fixed minimum in excess of what a U.S. citizen would have to prove regarding residency. *See Open Letter from Chad J. Yoder, Chief, Firearms and Explosives Industry Div., to All Fed. Firearms Licensees* (Dec. 22, 2011), 2011 WL 13067875, at *1.

establishing the exception . . . [and] note on the Form 4473 [(Firearms Transaction Record)]³⁷ the type of documentation provided and attach a copy of the documentation to the Form 4473”³⁸

When determining whether a NIV alien is eligible for a (y)(2)(A) exception, keep in mind that the aforementioned records are required to be kept by FFLs at their licensed business premises.³⁹ ATF Special Agents have statutory authority that allows them to review these records for suspected criminal violations.⁴⁰ While commonly FFLs voluntarily allow the review, Special Agents have the option to seek an administrative warrant from a Federal Magistrate Judge by showing only “reasonable cause to believe a violation of this chapter has occurred and that evidence thereof may be found on the premises.”⁴¹

However, § 922(g)(5)(B) does not apply to all aliens who are in a nonimmigrant status. In an open letter to FFLs, ATF explained OLC’s position that § 922(g)(5)(B) is limited solely to NIV aliens.⁴² OLC indicated that because § 922(g)(5)(B) applies solely to aliens with NIVs, aliens who are not required to have a visa are outside the scope of its prohibition.⁴³ For example, a number of countries fall under the United States’ Visa Waiver Program, as detailed in 8 U.S.C. § 1187.⁴⁴ Further, citizens of Canada and several other countries are generally not required to have a visa when traveling into the United States.⁴⁵ Note also that aliens granted lawful status are admitted without a nonimmigrant visa and are *not* currently subject to Federal firearms prohibitions.⁴⁶ Such aliens include permanent residents (informally known as “green card” holders),⁴⁷ refugees and asylees,⁴⁸ parolees,⁴⁹ and aliens granted Temporary Protected Status.⁵⁰ When in doubt as to whether an alien is required to have a nonimmigrant visa, consultation with

³⁷ U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, FORM 4473, FIREARMS TRANSACTION RECORD (2016).

³⁸ 27 C.F.R. § 478.124(c)(3)(iii) (2017).

³⁹ 18 U.S.C. § 923(g)(1)(A) (2012).

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² Open Letter from Chad J. Yoder, Chief, Firearms and Explosives Industry Div., to All Fed. Firearms Licensees (Dec. 8, 2011), 2011 WL 13067874, at *1.

⁴³ *See id.*

⁴⁴ 8 U.S.C. § 1187 (2012 & Supp. III 2015). Also see <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html> for a current list of eligible countries.

⁴⁵ *See* 22 C.F.R. § 41.2 (2017).

⁴⁶ *See* 18 U.S.C. § 922(g)(5) (2012). Nonetheless, subject to certain exceptions, aliens other than lawful permanent residents are subject to Federal explosives disabilities. *See* 18 U.S.C. § 842(d)(7), (i)(5) (2012).

⁴⁷ *Green Card Eligibility*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017).

⁴⁸ Refugees and asylees have fled from persecution in their countries or fear future persecution. *See* 8 U.S.C. § 1101(a)(42) (2012); *Asylee*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 3, 2017). Refugees gain refugee status prior to entry into the United States. *See Refugee*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017). Asylum seekers apply for asylee status once inside the United States. *See Asylee*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017). These aliens are seeking to reside in the United States permanently (*i.e.*, immigrants). *See id.*

⁴⁹ Parolees are not “admitted” to the United States, but are permitted to temporarily remain in the United States for a specific purpose. *See* 8 C.F.R. § 212.5(b), (c), (e), (f) (2017). Aliens might be granted parole, for instance, to assist in a criminal investigation, for medical purposes, or for deferred inspection because they have not provided sufficient documentation to establish admissibility. *See* § 212.5(b); *Definition of Terms, U.S. Dep’t Homeland Security* (last updated Nov. 3, 2016) (defining “parolee”). This status does not generally exceed one year. *What Is Parole? Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017). In addition, parole status terminates upon fulfillment of the basis for parole. *See* § 212.5 (e).

⁵⁰ TPS is granted to nationals of designated countries, or parts thereof, who are temporarily unable to safely return to their home countries because of “ongoing armed conflict[,] an environmental disaster . . . [,] or other extraordinary and temporary conditions.” *Temporary Protected Status*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017); *see* 8 U.S.C. § 1254(a) (2012). The following countries are currently designated for TPS status: El Salvador,

DHS personnel is recommended.⁵¹

V. Second Amendment

Lastly, as we continue to address cases in the post-*Heller* environment,⁵² many of the firearms disabilities under § 922(g) have been subject to Second Amendment constitutional challenges, and § 922(g)(5) is no exception. With regard to illegal aliens under (g)(5)(A), courts that have examined this issue on facial challenges have ruled that the Second Amendment either does not extend to provide protection to illegal aliens, or that § 922(g)(5) survives intermediate scrutiny.⁵³

With regard to § 922(g)(5)(B), few courts have addressed the Second Amendment rights of aliens who are lawfully present temporarily in the United States. In an unreported decision, a district court in *United States v. Alkhalidi* adopted the magistrate court's determination that a NIV alien did not have a Second Amendment right to bear arms because he "did not come to the United States with the intention of gaining citizenship and, thus, is not firmly on the path toward that goal."⁵⁴ The district court went on to deny an equal protection challenge, saying that legitimate government interests exist in the exceptions for certain NIV aliens that are detailed in § 922(y)(2).⁵⁵ In contrast, courts have upheld suits filed by lawful permanent resident aliens to state firearm restrictions.⁵⁶ These cases indicate that lawful permanent resident aliens are on the path to full citizenship and are entitled to a wide array of constitutional rights. "They are 'a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community' . . . such that they are 'among 'the people' of the United States' . . . for purposes of the Second Amendment."⁵⁷

Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, South Sudan, Syria, and Yemen. *Temporary Protected Status*, U.S. CITIZENSHIP IMMIGR. SERVS. (last visited May 4, 2017). For updates, see <https://www.uscis.gov/humanitarian/temporary-protected-status>.

⁵¹ See *supra* note 31.

⁵² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵³ See *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("[I]llegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given"); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) ("[T]he phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States"); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (same); cf. *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015) ("Congress's interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that 18 U.S.C. § 922(g)(5) does not impermissibly restrict Meza-Rodriguez's Second Amendment right to bear arms."); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169–70 (10th Cir. 2012) (applying intermediate scrutiny in finding that § 922(g)(5)(A) is a lawful exercise of Congress's constitutional power "to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order."). See generally Olesya A. Salnikova, "The People" of *Heller* and Their Politics: *Whether Illegal Aliens Should Have the Right to Bear Arms After United States v. Portillo-Munoz*, 103 J. CRIM. L. & CRIMINOLOGY 625 (2013) (discussing *Heller*'s effect on noncitizens).

⁵⁴ *United States v. Alkhalidi*, No. 4:12CR00001-01 JLH, 2012 WL 5415787, at *4 (E.D. Ark. Sept. 17, 2012), findings and recommendations adopted, 2012 WL 5415579 (E.D. Ark. Nov. 6, 2012).

⁵⁵ *United States v. Alkhalidi*, No. 4:12CR00001-01 JLH, 2012 WL 5415579, at *4 (E.D. Ark. Nov. 6, 2012).

⁵⁶ E.g., *Fotoudis v. City and County of Honolulu*, 54 F. Supp. 3d 1136, 1141, 43–44 (D. Haw. 2014) (finding that state statute that denied lawful permanent resident aliens ability to apply for permit to acquire firearm violated Second Amendment and Equal Protection clause); *Fletcher v. Haas*, 851 F. Supp. 2d 287, 288 (D. Mass. 2012) (finding that Second Amendment protected right of lawful permanent resident aliens to obtain permit under State law to possess firearm).

⁵⁷ *Fotoudis*, 54 F. Supp. 3d at 1144.

VI. Conclusion

The hybrid prohibited status element at the heart of § 922(g)(5) contains unique challenges that the prosecutor can now have greater confidence to tackle. When charging for a (g)(5)(A) or (g)(5)(B) violation, be sure to understand the violation's basis in ATF regulation or civil immigration law or regulation. When in doubt regarding the immigration status of an alien at the time the alien knowingly possessed a firearm or ammunition, DHS personnel are an excellent resource.⁵⁸ Last, there are field attorneys and a Division Counsel in every ATF Field Division. They strive to be subject matter experts in firearms and explosives laws and regulations, as well as related state laws within their field division. Please know they gladly welcome your questions to assist in firearms or explosives prosecutions.

ABOUT THE AUTHOR

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⁵⁸ See *supra* note 31.

ICE Detention and Pretrial Release: How the Federal Circuit Courts Construe the INA and BRA in Immigration Prosecutions

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I. Introduction

This article will discuss the conflicts presented by the mandatory detention requirements of the Immigration Nationality Act (INA) and the presumption of release in the Bail Reform Act (BRA) and how different circuits construe Immigration and Customs Enforcement (ICE) detention and detainers in light of the BRA.

Of the many cases you received last week involving individuals who illegally reentered the United States, one involves a defendant who has significant local community ties. At the defendant's bail hearing, the judge hears from the defendant's neighbors, her employer, and her pastor about her good work and dedication to her children. Under the BRA, the magistrate judge would ordinarily release such an individual pending trial. But in this instance, the defendant is subject to a reinstated removal order and judicially unreviewable detention. Once the defendant is released from custody, INA statutes mandate that the agency detain her and remove her from the United States as promptly as possible. ICE has no statutory authority to detain the defendant for purposes of your criminal prosecution.

As a prosecutor, you inform the magistrate judge that releasing the defendant will result in ICE's having her removed from the country. Therefore, release is inappropriate because there are no conditions that may be fashioned that will "reasonably assure" the defendant's appearance for trial. The magistrate judge does not embrace this news. As explained more fully below, in our district, the magistrate judge views this as the "government's problem." In other words, if you want to prosecute an alien for illegal reentry, it is best to communicate with ICE and request that it drop its detainer and not remove the alien from the country. This is also a violation of ICE's statutory mandate to complete the request. Relying on case authority that a defendant's non-appearance must be volitional to serve as a basis for pretrial detention could result in the court's denying your objection and releasing the defendant. As soon as she is released, ICE will pick the alien up for removal. The court then dismisses your indictment. This brings up the issue of whether some illegal reentry defendants are effectively immune from prosecution or detention. And as a result, is there anything an Assistant United States Attorney (AUSA) can do when confronted with competing statutory obligations under the BRA and the INA? The issue of pretrial release of criminal immigration defendants creates an interplay of several statutes: (1) the Bail Reform Act, 18 U.S.C. § 3142,¹ which provides the procedure for pre-trial release; (2) 8 U.S.C. § 1326,² which prohibits the reentry of an alien who has been removed subsequent to an aggravated felony conviction; (3) 8 U.S.C.

¹ 18 U.S.C. § 3142 (2012).

² 8 U.S.C. § 1326 (2012).

§1231(a)(5),³ which provides for the reinstatement of previous removal orders against aliens who have illegally reentered the United States; and occasionally, (4) 8 U.S.C. § 1226(c),⁴ which requires detention of aliens convicted of certain deportable crimes. This article explores the interplay between the BRA and the INA, surveys cases addressing the conflicts, and offers several potential solutions (including legislative). The conflict presents legal outcomes that vary from circuit to circuit and offers a few remedies. Two cases from the District of Oregon highlight the conflict.

A. Ezequiel Castro-Inzunza

Castro-Inzunza, an alien and citizen of Mexico, was removed from the United States following a drug trafficking conviction. After reentering, the United States located him in rural Oregon and took him into custody.⁵ ICE reinstated its prior deportation order and ordered him removed from the United States.⁶ Because of his criminal history, ICE referred Castro-Inzunza to the United States Attorneys' office (USAO) for prosecution and entered a detainer with the United States Marshals Service.

Castro-Inzunza was subsequently charged with violating 8 U.S.C. § 1326.⁷ Shortly after his arraignment, he asked for and received a detention hearing, at which members of his family and congregation supported his claims that he was neither a danger nor a flight risk.⁸ The government countered that because of defendant's reinstated order of removal, his release would trigger the ICE detainer and Castro-Inzunza would be removed from the United States before the prosecution could be completed.⁹ Because the removal order was self-executing, combined with the detainer, the government argued that there were no conditions that could ensure defendant's presence at trial.¹⁰

Castro-Inzunza was released on conditions.¹¹ The government appealed to the district court, where Castro-Inzunza argued that his removal by ICE was speculative, even if he were removed, his non-appearance would be involuntary, and he should not be detained on that basis.¹² The government countered that the reinstated removal order was self-executing and the defendant would be removed from the jurisdiction by operation of law.¹³ The district court attempted to harmonize the conflicting needs of the government by finding a path that ensured that defendant would be present for trial, the ultimate purpose of the BRA, and determined that there was not a combination of factors which could guarantee defendant's presence at trial.¹⁴ Castro-Inzunza was detained.¹⁵

Defendant appealed to the Ninth Circuit, which held that it is the government's burden to show that it lacks the ability to "defer [a] defendant's removal through a stay or departure control" or that the removal period is not stayed while defendant is on pretrial release.¹⁶ The court issued an order compelling the district court to stay removal during the immigration proceedings, and Castro-Inzunza was released.¹⁷

³ 8 U.S.C. § 1231(a)(5) (2012).

⁴ 8 U.S.C. § 1226(c) (2012).

⁵ See *United States v. Castro-Inzunza*, No. 3:11-cr-00418-MA, 2012 WL 1952652, at *2 (9th Cir. July 23, 2012), *rev'd and remanded*, No. 12-30205, 2012 WL 6622075 (9th Cir. July 23, 2012).

⁶ *Castro-Inzunza*, 2012 WL 1952652, at *2.

⁷ *Id.*; see also 8 U.S.C. § 1326 (2012).

⁸ *Castro-Inzunza*, 2012 WL 1952652, at *2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *3.

¹³ *Id.* at *4.

¹⁴ *Id.* at *5-8.

¹⁵ *Id.* at *8.

¹⁶ *United States v. Castro-Inzunza*, No. 12-30205, 2012 WL6622075, at *1 (9th Cir. July 23, 2012).

¹⁷ See *id.*

ICE dropped its detainer pending the outcome of proceedings.¹⁸

B. Enrique Trujillo-Alvarez

On August 8, 2012, Enrique Trujillo-Alvarez was arrested and released for driving-related charges.¹⁹ Trujillo-Alvarez later reentered the United States as an aggravated felon after being deported to Mexico, and ICE, therefore, arrested him and reinstated the prior removal order.²⁰ Due to his criminal history, ICE referred the defendant to the USAO for prosecution and entered a detainer with the United States Marshals Service.²¹ The defendant was subsequently charged with illegal reentry under 8 U.S.C. § 1326(a).²² At his arraignment on the criminal charge, Trujillo-Alvarez requested and received a detention hearing.²³

At the detention hearing, after the government pointed out that the ICE detainer would likely result in his removal and he would therefore be unavailable for trial, the magistrate specifically acknowledged that defendant's potential detention by ICE was "not within [his] control" and would have to be challenged, if at all, in "a different forum."²⁴ Trujillo-Alvarez was then ordered to be released from custody on conditions, and ICE dropped its detainer pending the outcome of proceedings.²⁵ The defendant was transported to the nearest ICE detention facility, in Tacoma, Washington, to await removal. The government appealed the magistrate's order of release to the district court.²⁶

Trujillo-Alvarez sought a stay of removal and a determination that ICE be held in contempt of court for thwarting the magistrate court's order.²⁷ While the district court declined to make such a finding,²⁸ the judge did hold that "[w]hen the Executive Branch decides that it will defer removal and deportation in favor of first proceeding with federal criminal prosecution, then all applicable laws governing such prosecutions must be followed"²⁹

Noting that the United States Attorney and ICE were both part of the executive branch, the court determined that "the government" must choose between removal and prosecution.³⁰ The court then issued an order directing Trujillo-Alvarez's return to the District of Oregon, or the criminal charge against him would be dismissed with prejudice.³¹ He was not produced, and the charge was dismissed.

II. ICE Detention and Pre-Trial Release

The cases involving Castro-Inzunza and Trujillo-Alvarez are special. They represent INA violators with minimal criminal history who possess an old aggravated felony and who have an aging removal. While the equities of their particular backgrounds were in their favor, their circumstances brought to light an apparent conflict in the law.

¹⁸ *Id.*

¹⁹ *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1171 (D. Or. 2012).

²⁰ *Trujillo-Alvarez*, 900 F. Supp. 2d at 1171.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1172.

²⁴ *Id.*

²⁵ *See id.*

²⁶ *See id.*; *see also* 18 U.S.C. § 3145(a) (2012).

²⁷ *Trujillo-Alvarez*, 900 F. Supp. 2d at 1172.

²⁸ *Id.* at 1179–80.

²⁹ *Id.* at 1169.

³⁰ *See id.* at 1179.

³¹ *See id.* at 1181.

A. Bail Reform Act Release

The BRA of 1984 “requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community.”³² Release is to be granted on “personal recognizance” or subject to a bond, “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person in the community.”³³

Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in the defendant's favor.³⁴ “The government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk and by clear and convincing evidence that the defendant poses a danger to the community.”³⁵

In most cases where the alien is prosecuted solely for criminal reentry, there is often little dispute that defendant is not a danger to the community; only the risk of flight is at issue. Under 18 U.S.C. § 3142(g),³⁶ the court must evaluate: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of any danger to persons or the community if the defendant is released. The statute’s operable language requires that any conditions imposed must reasonably assure the appearance of the person at trial and preserve the safety of the community.

B. Immigration Nationality Act Detention

If an alien has reentered the United States illegally after having been removed, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.³⁷ The ability to challenge the reinstatement is extremely limited and reserved to narrow circumstances.³⁸

During removal proceedings, ICE shall detain the alien.³⁹ Additionally, ICE is required to detain *any* deportable alien previously convicted of certain denominated crimes, which include crimes involving moral turpitude, major drug related offenses, aggravated felonies, and certain firearms offenses.⁴⁰ Judicial review of the decision to detain an alien not otherwise subject to statutory detention is severely limited:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.⁴¹

Further, district courts lack jurisdiction to prevent removals.⁴²

³² *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991); 18 U.S.C. § 3142(c)(2) (2012); *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985).

³³ 18 U.S.C. § 3142(b) (2012).

³⁴ *Motamedi*, 767 F.2d at 1405; *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

³⁵ *Gebro*, 948 F.2d at 1121; *see also Motamedi*, 767 F.2d at 1405.

³⁶ 18 U.S.C. § 3142(g) (2012).

³⁷ 8 U.S.C. § 1231(a)(5) (2012); *see Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 491, 494 (9th Cir. 2007) (en banc) (discussing the distinction between removal and reinstatement and that reinstatement orders are generally foreclosed from discretionary relief).

³⁸ *See Ixcot v. Holder*, 646 F. 3d 1202, 1207 (9th Cir. 2011) (aliens seeking asylum who have a fear of persecution or torture may seek withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and 8 C.F.R. §§ 241.8(e), 208.31 (2017)).

³⁹ 8 U.S.C. § 1231(a)(2) (2012).

⁴⁰ *Id.* § 1226(c).

⁴¹ *Id.* § 1226(e).

⁴² *Id.* § 1252(g).

The result is an illegal alien, who was deported after having committed a felony and who reenters the United States illegally, is automatically subject to the prior order of removal, which is revived by operation of law and not subject to judicial or administrative review. The alien is to be removed, generally, within ninety days.

III. Pretrial Release and ICE Detention—Competing Theories

Several lines of cases are emerging among courts presented with release pursuant to the BRA under circumstances in which the defendant, a criminal alien, is facing an ICE detainer and a reinstated removal order. While some of the opinions result from cases in which the alien had additional charges pending (beyond illegal reentry), the cases are instructive.

A. 18 U.S.C. § 3142 Factors Do Not Contemplate Removal Orders

A growing number of jurisdictions are finding that detaining an alien subject to a removal order is improper. Relying on the removal order as support for a finding of flight creates a categorical bar to release. Because Congress chose not to per se exclude deportable aliens from consideration for release or detention in criminal proceedings, consideration of immigration holds is not among the factors to be considered, and these courts reason that release must be a viable option. Consideration of factors outside of those listed in the BRA is improper.⁴³

Courts following this path have reasoned that the BRA applies to district court judges in the furtherance of their duties, and the INA does not.⁴⁴ The congressional directive in the INA does not supplant the directive to the courts in the BRA, which is independent of the way ICE elects to proceed.⁴⁵ These two statutes run on parallel, but sometimes conflicting, paths and are irrelevant to the judge's considering whether to detain the alien pending trial on criminal charges. "If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not."⁴⁶ The court is governed by the BRA, which, like the INA, is an act of Congress. However, a congressional directive to the executive does not eclipse a competing directive to the courts, as found in the BRA.⁴⁷ Therefore, those duties imposed by the BRA cannot be dependent upon the way in which ICE decides to act, and the factors listed in 18 U.S.C. § 3142⁴⁸ are the only considerations available to the court.⁴⁹

B. Involuntary Removal Is Not Volitional Flight

Ignoring the BRA's ultimate goal to reasonably assure the defendant's appearance at trial and ensure the safety of the public, some courts have found that since the reinstated order of removal is essentially self-executing, the alien is not responsible for his flight, and therefore, the fact of an imminent removal is not a relevant consideration under § 3142.⁵⁰ Even where defendant is an aggravated felon, defendant's risk of *involuntary* removal does not create a serious risk that defendant will *voluntarily* flee.

⁴³ [United States v. Adomko](#), 150 F. Supp. 2d 1302, 1304 (M.D. FL. 2001); [United States v. Santos-Flores](#), 794 F.3d 1088, 1089 (9th Cir. 2015).

⁴⁴ *See* [United States v. Hernandez-Bourdier](#), No. 16-222-2, 2017 WL 56033, at *4 (W.D. Pa. Jan. 5, 2017) (If ICE detained defendant, it would violate this court's order of release").

⁴⁵ *See* [Chavez-Rivas](#), 536 F. Supp. 2d at 964 n.3; [United States v. Marinez-Patino](#), No. 11 CR 064, 2011 WL 902466 (N.D. Ill. Mar. 14, 2011).

⁴⁶ [United States v. Montoya-Vasquez](#), No. 4:08CR3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009).

⁴⁷ *See* [Chavez-Rivas](#), 536 F. Supp. 2d at 964 n.3.

⁴⁸ 18 U.S.C. §3142(g) (2012).

⁴⁹ *See* [Marinez-Patino](#), 2011 WL 902466, at *1.

⁵⁰ *Id.*

An ICE detainer is “an externality not under defendant's control.”⁵¹

The risk of nonappearance referenced in 18 U.S.C. § 3142⁵² must involve an element of volition, these courts reason. Essentially, therefore, the BRA does not permit speculation on the “risk” that a defendant would not appear because of his removal by the same government that is prosecuting the alien. “Failure to appear” under the BRA “is limited to the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions[,] and will. If the government—through ICE or any other authority—prevents his appearance, he has not 'failed' to appear.”⁵²

Under this view, executing statutory mandates creates an inter-agency conflict, with the alien in the center. “The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II agencies will not coordinate their respective efforts. . . . This Court ought not run interference for the prosecuting arm of the government.”⁵³

C. Consideration of Alien’s Removal Order Permissible

Some jurisdictions evaluate and include a removal order or an ICE detainer when considering the alien’s pretrial release. Under this analysis, the existence of a removal order (or an ICE detainer) is part of the history and characteristics of each individual defendant. While the existence of an ICE removal order or a detainer does not create a per se exception to the BRA requirements, it may be considered as a factor in assessing the risk that a particular defendant “will flee,” and may be a relevant factor for consideration when the court undertakes its assessment of a defendant's risk of flight. The weight and manner of assessing these characteristics differ.⁵³

Some courts take a narrower view, limiting consideration of the removal order to the mere fact of its existence but not whether an immigration detainer could, at some time in the future, result in his removal.⁵⁴ The fact of an ICE detainer alone does not merit detention under the BRA.⁵⁵

D. ICE Removal Order Equates to a Risk of Non-Appearance

The “failure to coordinate” between agencies of the executive branch (USAO and ICE) is hardly the fault of either. The fact that Congress, not the executive, decreed that the defendant must be detained and removed within ninety days is not a reason to defer removal. Magistrates judges and district courts, and not the executive, must release defendant, if possible, and set trial in accordance with the Speedy Trial Act (18 U.S.C. § 3161).⁵⁶ The executive branch is powerless to change these rules or statutes.⁵⁷

⁵¹*Marinez-Patino*, 2011 WL 902466, at *11; *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009).

⁵² 18 U.S.C. § 3142 (2012).

⁵² *Montoya-Vasquez*, 2009 WL 103596, at *1.

⁵³ *Barrera-Omana*, 638 F. Supp. 2d at 1111.

⁵³ See *United States v. Salas-Urenas*, 430 F. App’x 721, 723 (10th Cir. 2011) (declining to find that pre-trial detention is proper based solely on a defendant's immigration statute or an ICE detainer); *United States v. Sanchez-Martinez*, No. 13-CR-00236-JLK, 2013 WL 3662871, at *1 (D. Colo. July 12, 2013).

⁵⁴ *United States v. Valadez-Lara*, No. 3:14 CR 204, 2015 WL 1456530, at *1 (N.D. Ohio Mar. 30, 2015).

⁵⁵ *United States v. Tapia*, 924 F. Supp. 2d 1093, 1097 (D.S.D. 2013).

⁵⁶ 18 U.S.C. § 3161 (2012).

⁵⁷ *United States v. Reyes-Vencomo*, No. CR 11-2563 JB, 2012 WL 2574810, at *1 (D.N.M. June 26, 2012) (declining to adopt defendant’s argument that the government has created defendant’s risk of non-appearance); *United States v. Cisneros-Zuniga*, No. 14-cr-278-KD-N-1, 2015 U.S. Dist. LEXIS 1202, at *4 (S.D. Ala. Jan. 6, 2015) (refusing to consider only the risk of intentional flight when assessing the “appearance” factor). *United States v. Magallon-Toro*, Nos. CR.A. 3:02-MJ-332, 3-02-CR-385-M, 2002 WL 31757637 (N.D. Tex. Dec. 4, 2002); *United States v. Nwagbara*, No. 3:11-CR-0298-L, 2011 WL 6372342 (N.D. Tex. Dec. 19, 2011).

The BRA's goal is to reasonably assure the appearance of the person at trial and the safety of the community through the least restrictive methods possible. If the alien will be administratively detained upon release, ordering pretrial detention for a defendant charged with 8 U.S.C. § 1326⁵⁸ "is in no way restricting the defendant's liberty."⁵⁹ Defendant faces detention regardless of what the court decides. "The only congruous result" between the competing mandates of prosecution, removal, and pretrial detention is one that allows the United States Attorney to prosecute the alien and do the following:

"[U]pon his release (either after trial, if not convicted, or after the expiration of the period of imprisonment, if imposed), . . . allow ICE to take the alien into custody for the purpose of deportation. The result protects the constitutional rights of the accused as well as the strong interest of the Government in reasonably assuring the appearance of [defendant] as required, with the added benefit of giving full effect to the express language and known policies of all three congressional directives embodied in the statutes."⁶⁰

IV. Departure Control Orders

The court in *Castro-Inzunza* held that it is the government's burden to show that it lacks the ability to defer a defendant's removal through a stay or departure control or that the removal period is not stayed while defendant is on pretrial release.⁶¹ Notwithstanding 8 U.S.C. § 1231(a)(5) (reinstating prior removals) and 8 U.S.C. § 1231(a)(2) (detention of aliens ordered removed),⁶² a departure control order may not be the talisman that the Ninth Circuit envisions.

Some courts have voiced skepticism that a departure control order may stop the removal of a person subject to an ICE detainer. The departure control order is not for aliens under threat of removal or deportation proceedings, but rather for "aliens seeking to depart the United States voluntarily."⁶³ This rationale appears correct, given the language of the statute, the regulations, and the instructions on the form itself.

The INA and 8 C.F.R. § 215.2 authorize a departure-control officer to temporarily prevent an alien's departure "if his interests would be prejudicial to the interests of the United States."⁶⁴ Section 215.3 lists eleven categories of aliens whose departure would be prejudicial to the interests of the United States, including "[a]ny alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States."⁶⁵ The regulation provides a caveat, however, limiting that class of aliens only to those "who may be permitted to depart from the United States with the consent of the appropriate prosecuting authority."⁶⁶ Permissive departure is not ordered removal.

Form I-246, titled "APPLICATION FOR A STAY OF DEPORTATION OR REMOVAL," advises that "[t]his application may be filed if you have been ordered deported or removed from the United States and you wish to obtain a stay of deportation or removal under the provisions of 8 C.F.R.

⁵⁸ 8 U.S.C. § 1326 (2012).

⁵⁹ *United States v. Lozano*, No. 1:09-CR-158-WKW, 2009 WL 3834081, at *1 (M.D. Ala. Nov. 16, 2009).

⁶⁰ *Id.*; see also *United States v. Ong*, 762 F. Supp. 2d 1353 (N.D. Ga. 2010).

⁶¹ *United States v. Castro-Inzunza*, No. 12-30205, 2012 WL 6622075, at *1 (9th Cir. July 23, 2012).

⁶² 8 U.S.C. § 1231(a)(5) (2012); *id.* § 1231(a)(2).

⁶³ See *United States v. Martinez-Patino*, No. 11 CR 064, 2011 WL 902466, at *6, *9 (N.D. Ill. Mar. 14, 2011); see also 8 U.S.C. § 1185(a) (2012); *State v. Fajardo-Santos*, 199 N.J. 520, 973 A.2d 933 (2009).

⁶⁴ 8 C.F.R. § 215.2 (2017).

⁶⁵ *Id.* § 215.3.

⁶⁶ *Id.* § 215.3(g).

241.6.”⁶⁷ However, “the execution of an order of removal” is listed several times as one of the reasons why the application may be denied. Ultimately, the statutory and regulatory language appears to indicate that it is only for aliens voluntarily departing the United States (even under an order of departure).

Other courts have held that it is the government's burden to show that it lacks the ability to defer a defendant's removal through a departure control, arguing that the government can obtain such an application to prevent aliens from leaving the United States, thereby preventing the ordered removal of the alien.⁶⁸

V. Writ of *Habeas Corpus Ad Prosequendum*

Given the conflict between what courts interpret as “flight” and the issue of mandatory custody during the removal process, there are few other mechanisms that reconcile the balance between the competing statutory mandates. A district court may, for example, issue a writ to secure the presence of a defendant for testimony or for trial.⁶⁹ These writs can be used to get a prisoner into the district court from a state facility as well as a federal one.⁷⁰ A federal court may issue a writ of *habeas corpus ad prosequendum* to ICE in order to receive a detained alien for his criminal trial.

In *United States v. Cooke*, an illegal Jamaican immigrant posted bond for his arrest for federal crimes and “was immediately arrested on a warrant of deportation.”⁷¹ Following Cooke’s immigration arrest, the government filed a writ of *habeas corpus ad prosequendum* in the federal district court for the Southern District of Ohio.⁷²

The issuance of such a writ ensures safe and secure conduct of the defendant from the site of his present custody to where he is needed for testimony or prosecution. The writ authorizes a transfer not a change in custodians. Therefore, the defendant would be present for his trial while still in ICE Custody.⁷³

VI. Conclusion

The BRA and the INA are reconcilable, and courts should be encouraged to harmonize these statutes rather than focusing on the BRA to the complete exclusion of the INA. A defendant subject to a non-reviewable, final removal order should not be released because there are no conditions that will reasonably assure his appearance at trial. “[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”⁷⁴

Although courts may seek to blame the government for the defendant's non-appearance, the fact remains that it was the defendant who either failed to challenge his removal order or unsuccessfully challenged the order but opted to stay in the United States unlawfully. To the extent that courts are unwilling to accept these arguments, prosecutors may consider seeking writs for defendants in ICE

⁶⁷ U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF’T., APPLICATION FOR A STAY OF DEPORTATION OR REMOVAL 1 (2010); 8 C.F.R. § 241.6 (2017).

⁶⁸ See *United States v. Stepanyan*, No. 3:15-cr-00234-CRB, 2015 WL 4498572, at *2 (N.D. Cal. July 23, 2015) (citing *United States v. Castro-Inzunza*, No. 12–30205, 2012 WL 6622075 (9th Cir.2012)).

⁶⁹ See 28 U.S.C. § 2241 (2012).

⁷⁰ See *Carbo v. United States*, 364 U.S. 611, 619 (1961); *United States v. Cruz-Jiminez*, 977 F.2d 95, 99 (3d Cir.1992).

⁷¹ *United States v. Cooke*, 795 F.2d 527, 529 (6th Cir. 1986).

⁷² See *Maphorisa v. Delaney*, 431 F. App’x 67 (3d Cir. 2011), *Ayala-Villanueva v. United States*, CIV.09-00137 JMS/LEK, 2009 WL 3443402, at *8 n.14 (D. Haw. Oct. 23, 2009), each suggesting that regulations pertaining to detainers may be superseded by such a writ.

⁷³ See *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990).

⁷⁴ *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

custody to secure their appearance at trial. Ultimately, a legislative adjustment expressly recognizing that a final removal order is an appropriate factor justifying detention of an alien subject to a final removal order could help resolve the conflict.

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A Practical Approach to Prosecuting Passport and Visa Fraud Cases

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I. Introduction

The purpose of this article is to provide a general overview to help guide you through the preliminary issues in passport and visa fraud cases because no two cases are identical.

Passports and visas are more than just travel documents. They are another means by which individuals are identified as citizens or nationals of a particular country. A passport issued by the United States Department of State identifies the holder of the passport as a citizen or national of the United States. A visa issued by either the Department of State or the Department of Homeland Security identifies the holder of the visa as a citizen of a foreign country who has lawful permission to enter the United States for a specific purpose and a specific period of time.

A United States passport and a nonimmigrant visa are documents of great value, not only to the individual holder of the document, but also to domestic and international criminal organizations. The passport becomes more valuable as a travel document in presenting oneself for entry into the United States at a port of entry. Since a U.S. passport identifies the holder as a citizen of the United States, passport holders are subject to an examination, rather than an inspection, when they present themselves for entry into the United States.

II. Statutes and Maximum Penalties

Two statutes govern passports. False Statement in Application and Use of Passport, 18 U.S.C. § 1542,¹ and Misuse of Passport, 18 U.S.C. § 1544,² relate to passports. Fraud and Misuse of Visas, Permits, and other Documents, 18 U.S.C. § 1546,³ is the only criminal statute which relates to visas. The statutes will be addressed in order below.

A. False Statement in Application and Use of Passport (18 U.S.C. § 1542)

Two ways exist to violate 18 U.S.C. § 1542, False Statement in Application and Use of Passport. The first is to “willfully and knowingly make any false statement” in a passport application with the goal of having the passport issued when the passport should otherwise not be issued to that applicant.⁴ The most common situation where a false statement in a passport application occurs is a false claim to U.S. citizenship. Also commonly seen is an individual who assumes the identity of a deceased U.S. citizen, or an individual who acquires the identity of a true living U.S. citizen without the citizen’s consent.

¹ 18 U.S.C. § 1542 (2012).

² *Id.* § 1544.

³ *Id.* § 1546.

⁴ *Id.* § 1542.

The second way to commit passport fraud is to “willfully and knowingly use or attempt to use . . . any passport” issued by way of any false statement.⁵ This relates to when a passport is issued to the applicant.⁶ To violate the statute, the applicant would then have to use, or attempt to use, the passport obtained by unlawful means.⁷

The maximum penalty for passport fraud is a fine not to exceed \$250,000 or a maximum of twenty-five years of incarceration “if the offense was committed to facilitate an act of international terrorism (as defined in [18 U.S.C. § 2331]).”⁸ “[I]f the offense was committed to facilitate a drug trafficking crime,” then the maximum incarceration period is twenty years.⁹ “[I]f the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime” and is either the first or second offense, then the maximum period is ten years of incarceration.¹⁰ Last, if the crime was committed to facilitate “any other offense,”¹¹ then the maximum period is fifteen years of incarceration.¹² The court may also choose to impose both a fine and incarceration.¹³

However, the Sentencing Guidelines start with a base offense of Level 8,¹⁴ which corresponds to an advisory guideline range of zero to twenty-four months of imprisonment, depending upon the criminal history category.¹⁵ The sentencing guideline ranges may not be significant when compared to other crimes. However, the collateral consequence of losing the privilege of possessing a passport may be considered significant to the individual convicted of this offense.¹⁶

B. Misuse of Passport (18 U.S.C. § 1544)

Three ways exist to violate 18 U.S.C. § 1544, Misuse of Passport. The first occurs when a person “willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another.”¹⁷ The perpetrator of this crime is commonly referred to as an “imposter.” An imposter is an individual who is pretending to have the identity reflected in the passport.

Second, a person violates this section when she “willfully and knowingly uses, or attempts to use, any passport in violation of the conditions or restrictions therein, or of the rules prescribed pursuant to the laws regulating the issuance of passports.”¹⁸ The restrictions on the use of the passport include, but are not limited to, the applicant’s:

⁵ *Id.* (including furnishing such a passport “to another for use” as an additional means of committing passport fraud).

⁶ *See id.*

⁷ *See id.*

⁸ *Id.* (referencing § 2331(1)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. Sentencing Guidelines Manual § 2L2.2 (a) (U.S. Sentencing Comm’n 2016) [hereinafter U.S.S.G.].

¹⁵ U.S.S.G. ch. 5, pt. A, Sentencing Table.

¹⁶ A passport may be revoked if the “passport has been obtained illegally, fraudulently or erroneously; was created through illegality or fraud practiced upon the Department; or has been fraudulently altered or misused.” 22 C.F.R. § 51.62(a)(2) (2017). Also the Department of State, “may revoke a passport when the Department has determined that the bearer of the passport is not a U.S. national, or the Department is on notice that the bearer’s certificate of citizenship or certificate of naturalization has been canceled.” 22 C.F.R. § 51.62(b) (2017).

¹⁷ 18 U.S.C. § 1544 (2012).

¹⁸ *Id.*

- not “taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state”¹⁹ or “entering, or serving in, the armed forces of a foreign state”;²⁰
- “accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof”;²¹
- “making a formal renunciation of nationality” either in the United States or “before a diplomatic or consular officer of the United States in a foreign state”;²² or
- being convicted by a court or court martial of competent jurisdiction of “committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States,” or conspiring “to overthrow, put down, or to destroy by force, the [g]overnment of the United States.”²³

Additionally, the individual applicant must not be “in default on a loan received from the United States under 22 U.S.C. § 2671(b)(2)(B) . . . ”;²⁴ not “be in arrears of child support”;²⁵ not have “seriously delinquent tax debt”;²⁶ or not be a “sex offender.”²⁷ In addition, the applicant must not be the following:

- “the subject of a criminal court order . . . which forbids departure from the United States”;²⁸ or
- not be under subpoena from the United States “in a matter involving [f]ederal prosecution for, or grand jury investigation of, a felony”;²⁹ or
- not the subject of an arrest warrant for a felony;³⁰
- not the subject of a court order for commitment to a mental institution³¹ or “legally declared incompetent”;³²
- not the subject of an extradition or provisional request presented to a foreign country;³³ or
- is not a minor child.³⁴

Third, a person misuses a passport when he “willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued

¹⁹ 8 U.S.C. § 1481(a)(2) (2012).

²⁰ *Id.* § 1481(a)(3).

²¹ *Id.* § 1481(a)(4).

²² *See id.* § 1481(a)(5)–(6).

²³ *See id.* § 1481(a)(7).

²⁴ 22 C.F.R. § 51.60(a)(1) (2017).

²⁵ *Id.* § 51.60(a)(2).

²⁶ *Id.* § 51.60(a)(3) (referencing 26 U.S.C. § 7345 (Supp. III 2015)).

²⁷ *Id.* § 51.60(a)(4) (citing 22 U.S.C. § 212b(c)(1) (Supp. III 2015) and noting additional requirements under 22 U.S.C. § 212b).

²⁸ *Id.* § 51.60(b)(2).

²⁹ *Id.* § 51.60(b)(6).

³⁰ *See id.* § 51.60(b)(1), (8)–(9). Sub-section (1) concerns federal arrest warrants; (8) is for the Armed Services; and (9) is for state or local warrants. *See id.*

³¹ *Id.* § 51.60(b)(3).

³² *Id.* § 51.60(b)(4).

³³ *Id.* § 51.60(b)(5).

³⁴ *Id.* § 51.60(b)(7).

and designed.”³⁵ This section would apply to an individual who loans the passport to another person. Circumstances also exist where it may apply to individuals who are producing fraudulent passports.

The maximum penalty for passport fraud is a fine not to exceed \$250,000 or not more than twenty-five years of incarceration “if the offense was committed to facilitate an act of international terrorism (as defined in [18 U.S.C. § 2331]).”³⁶ “[I]f the offense was committed to facilitate a drug trafficking crime,” then the maximum penalty is twenty years of incarceration.³⁶ “[I]f the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime” and is either the first or second offense, then the maximum penalty is ten years of incarceration.³⁷ If the crime was committed to facilitate “any other offense,” then the maximum penalty is fifteen years of incarceration.³⁸ The court may also choose to impose both a fine and incarceration.³⁹

C. Fraud and Misuse of Visas, Permits, and Other Documents (18 U.S.C. § 1546)

Multiple ways exist to violate this statute. It appears that the authors of the statute took the two passport statutes, 18 U.S.C. §§ 1542 and 1544, and mashed them together into one long paragraph while adding new ways to violate the law. I will do my best to untangle and identify the potential violations.

First, a person violates this statute when he “knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.”⁴⁰

Second, an individual commits visa fraud when she “utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.”⁴¹ Also, the perpetrator must know that the document is “forged, counterfeited, altered, or falsely made, or [has] been procured by means of any false claim or statement, or [has] been otherwise procured by fraud or unlawfully obtained.”⁴²

Third, a person violates this section when he “knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits.”⁴³ An individual also violates this section when she “makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States.”⁴⁴ Last, one can violate this section by “[having] in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents.”⁴⁵ If a person commits these acts “under direction of the Attorney General or the

³⁵ 18 U.S.C. § 1544 (2012).

³⁶ See *id.* (citing *id.* § 2331).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* § 1546(a).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Commissioner of the Immigration and Naturalization Service, or other proper officer,” then no punishment will occur under this statute.⁴⁶

Fourth, an individual commits this crime by “applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States” and, when doing so, the individual “personates another, or falsely appears in the name of a deceased individual.”⁴⁷ One will also violate this statute when he “evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity.”⁴⁸ Last, a violation occurs when one “sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document.”⁴⁹

Fifth, a person defrauds when she “knowingly makes under oath, or as permitted under penalty of perjury under [28 U.S.C. § 1746], knowingly subscribes as true, any false statement [regarding] a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder.”⁵⁰ One will also violate the statute when she “knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact.”⁵¹

The maximum penalty for passport fraud is a fine not to exceed \$250,000 or not more than twenty-five years of incarceration “if the offense was committed to facilitate an act of international terrorism (as defined in [18 U.S.C. § 2331]).”⁵² “[I]f the offense was committed to facilitate a drug trafficking crime,” then the maximum penalty is twenty years of incarceration. “[I]f the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime” and is either the first or second offense, then the maximum penalty is ten years of incarceration.⁵³ If the crime was committed to facilitate “any other offense,” then the maximum penalty is fifteen years of incarceration.⁵⁴ The court may also choose to impose both a fine and incarceration.⁵⁵

This statute includes another subsection (subsection b) which punishes anyone who “uses (1) an identification document, knowing . . . that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing . . . that the document is false, or (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act.”⁵⁶ A violation of this subsection is punishable by being “fined under this title, imprisoned not more than 5 years, or both.”⁵⁷

However, Congress included a government exception in 18 U.S.C. § 1546(c).⁵⁸ This subsection permits the government to issue a visa to someone who is otherwise prohibited from validly possessing a visa.⁵⁹ Certain criteria must be met before a visa may be issued under this subsection.⁶⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (referencing 28 U.S.C. § 1746 (2012)).

⁵¹ *Id.*

⁵² *Id.* (referencing *id.* § 2331)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* § 1546(b) (referencing 8 U.S.C. § 1324a(b) (2012)).

⁵⁷ *Id.*

⁵⁸ *Id.* § 1546(c).

⁵⁹ *See id.*

⁶⁰ *See id.*

III. Charging Decisions

When evaluating a case for potential prosecution, some basic starting points will assist going forward. Defining the prosecution team and the particular facts as they pertain to the investigation, and identifying any supporting evidence during the early stages of reviewing a case, are essential for a successful prosecution.

No hard and fast definition exists for the prosecution team because the team may change from case to case. Typically, the United States Attorney's Office will work in conjunction with the United States, Department of State, United States, Customs and Border Protection, United States, Border Patrol, Homeland Security Investigations, and perhaps state and local law enforcement agencies. Regardless of which agencies comprise the team, having the cooperation of all agencies involved is a key component to obtaining a successful resolution.

After defining the team, one must turn to the facts of the particular case. A myriad of facts exist in evaluating a case. One such fact to determine is the type of document in question. If the document in question is a U.S. passport, then sections 1542 and 1544 may apply. If the document is a nonimmigrant visa (NIV) or other travel document, then section 1546 may apply.

A. Passports

The location of the alleged criminal act is important. Numerous locations exist where an individual might commit any of the aforementioned crimes. A false statement in an application commonly occurs at an acceptance agency.⁶¹ These cases can also occur directly with the United States, Department of State at a Passport Center.

One must also keep in mind that the United States, Department of State issues passport books, which permit overseas travel to a number of different foreign countries.⁶³ The passport card only permits land travel to and from the United States to Mexico and Canada.⁶²

One subtle yet obvious requirement for passports is that the passport be for the use and possession by the applicant. No other person may apply for, use, or possess the passport.⁶³ In the case of a minor child, both parents must consent to the issuance of the passport, and the minor child must be present when the application is submitted.⁶⁴

These cases are typically document-laden cases. When applying for a passport, a person must prove identity and that the person is a U.S. citizen or national. Typically, proof of identity is satisfied when the person presents a validly issued photo identification from a state agency, usually a driver's license or ID card.⁶⁵ Proof of citizenship is often a certified copy of the applicant's birth certificate.⁶⁶

⁶¹ An acceptance agency is any entity approved by the U.S. Department of State to accept passport applications. See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *What Is a Passport Acceptance Facility?*, U.S. PASSPORTS & INTERNATIONAL TRAVEL (last visited May 8, 2017). The two most common are the U.S. Post Office and the state Clerk of the Court.

⁶³ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Passport Card*, U.S. PASSPORTS & INTERNATIONAL TRAVEL (last visited May 8, 2017).

⁶² See *id.* (noting that the passport card also covers travel by sea and allows entrance into the United States from the Caribbean and Bermuda).

⁶³ See 22 C.F.R. § 51.20 (2017); see also *supra* notes 4 and 14 and accompanying text.

⁶⁴ See 22 C.F.R. § 51.28 (2017).

⁶⁵ See *Acceptable Proof of Identity for Passport Applications*, U.S. PASSPORT SERVICE GUIDE (last visited May 8, 2017).

⁶⁶ See *Acceptable Proof of U.S. Citizenship for New Passport Applications*, U.S. PASSPORT SERVICE GUIDE (last visited May 8, 2017).

However, instances occur where other documents are provided.⁶⁷ These documents include, but are not limited to, delayed birth certificates and affidavits attesting to the applicant's birth.⁶⁸

B. Visas

A number of visa classifications exist. They range from A through V.⁶⁹ Some of the more common ones are A, B, D, E, F, K, M, T, and U. I will endeavor to give a brief overview of some of these visas. Each type of visa has its own set of rules and regulations. This means that visa violations are also driven by the type of visa. For example, an A visa requires the individual to be employed in, or be a family member of someone employed in, a diplomatic mission;⁷⁰ B1 and B2 visas permit temporary travel but not residency;⁷¹ F1 requires the individual to be enrolled in an academic program;⁷² and a U visa is for the victims of crimes.⁷³ Employment visas are E, H, L, O, P, I, J,⁷⁴ whereas study and exchange visas are F and M visas.⁷⁵

The common denominator throughout all of the visas is that an application must be filled out.⁷⁶ Most importantly, the applicant must swear to the veracity of the information contained in the application.⁷⁷ As with passports, visas are only for the use and possession by the applicant.⁷⁸ No other person may apply for, use, or possess the visa.⁷⁹ In the case of a minor child, the minor child must be present when the application is submitted.⁸⁰

Similarly, when applying for a visa, applicants must prove their identity, that they are foreign nationals, and that they are otherwise qualified to possess the visa.⁸¹ They must swear to the veracity of their statements and qualifications before submitting their application.⁸² Visa fraud can also occur in multiple different places, such as during a field encounter with law enforcement, during the online application process, at a United States Embassy, or at a Consulate.

“Generally, a citizen of a foreign country who wishes to enter the United States must first obtain a visa, either a nonimmigrant visa for temporary stay, or an immigrant visa for permanent residence.”⁸³ As part of obtaining a visa, individuals must make a written application.⁸⁴ One can now find most of the

⁶⁷ See *Secondary Proof of Citizenship*, U.S. PASSPORT SERVICE GUIDE (last visited May 8, 2017).

⁶⁸ *Id.*

⁶⁹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Director of Visa Categories*, U.S. VISAS (last visited May 8, 2017).

⁷⁰ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visas for Diplomats and Foreign Government Officials*, U.S. VISAS (last visited May 8, 2017).

⁷¹ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visitor Visa*, U.S. VISAS (last visited May 8, 2017).

⁷² See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Student Visa*, U.S. VISAS (last visited May 8, 2017).

⁷³ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visas for Victims of Criminal Activity*, U.S. VISAS (last visited May 8, 2017).

⁷⁴ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Directory of Visa Categories*, U.S. VISAS (last visited May 8, 2017).

⁷⁵ See *supra* note 69.

⁷⁶ See 22 C.F.R. § 42.67(a) (2017).

⁷⁷ § 42.67(a)(2).

⁷⁸ See *supra* note 45 and accompanying text.

⁷⁹ See *supra* note 45 and accompanying text.

⁸⁰ 22 C.F.R. § 51.28(a)–(c) (2017). (covering minors under the age of sixteen in subsection a, minors over sixteen in subsection b, and all minors in subsection c).

⁸¹ See *supra* note 77.

⁸² See *supra* note 77.

⁸³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visa Types*, APPLY FOR A U.S. VISA IN INDIA (last visited May 8, 2017).

⁸⁴ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Forms*, U.S. VISAS (last visited May 9, 2017).

applications online.⁸⁵ On each of the applications, applicants must attest to the veracity of the information contained in the application.⁸⁶ One condition in each of the nonimmigrant visa applications is that applicants maintain a foreign residence which they will not abandon.⁸⁷

When reviewing these cases, one should obtain the supporting documentation and verify the veracity of the document(s). Also, even if individuals validly possessed a visa, if they remain in the United States after the expiration of the visa, they may be subject to criminal prosecution for a violation of 18 U.S.C. § 1546.⁸⁸

1. A Visas—Diplomat or Foreign Government Official

There are three types of diplomatic visas, A-1, A-2, and A-3. “Diplomats and other foreign government officials traveling to the United States to engage solely in official duties or activities on behalf of their national government must obtain” either an A-1 or A-2 visa before entering the United States.⁸⁹ They are not permitted to “travel using visitor visas or [travel] under the Visa Waiver Program.”⁹⁰ Few exceptions to this rule exist.⁹¹

“A” visa holders may also be immune from certain prosecutions.⁹² If a target possesses an “A” visa, it is strongly recommended that the prosecutor contact the U.S. Department of State to determine if the visa holder is entitled to any immunity. Not all “A” visa holders will qualify for immunity.⁹³ There may also be additional steps within the Department of Justice that need to be taken if the target of the investigation holds this classification of visa.⁹⁴

2. B Visas—Business or Tourism

These are the most common visas subject to criminal prosecution. B1 and B2 visas “are [NIVs] for persons who want to enter the United States temporarily for business (visa category B-1), tourism, pleasure or visiting (visa category B-2), or a combination of both purposes (B-1/B-2).”⁹⁵ To be eligible for a B1/B2 visa, applicants must (1) prove they are foreign nationals, (2) prove they are financially solvent, (3) prove their identities, and (4) swear or affirm that they will not abandon their foreign residences.⁹⁶

“The Border Crossing Card (BCC) is both a BCC and a B1/B2 visitor’s visa. A BCC [is] also referred to as a DSP-150[.]”⁹⁷ It is similar in size to a credit card and is usually valid for ten years after it is issued.⁹⁸ In order to qualify for a BCC, the applicants must prove that they (1) are citizens of and

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See 18 U.S.C. § 1546(a) (2012).

⁸⁹ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visas for Diplomats and Other Foreign Officials*, U.S. VISAS (last visited May 9, 2017).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See Convention on Privileges and Immunities of the United Nations art. 5, § 19, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900.

⁹³ See U.S. DEP’T OF STATE, OFFICE OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY 17-19.

⁹⁴ See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 1-13.120 (2011).

⁹⁵ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visitor Visa*, U.S. VISAS (last visited May 9, 2017).

⁹⁶ See 8 U.S.C. §§ 1201, 1202 (2012 & Supp. III 2015).

⁹⁷ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Border Crossing Card*, U.S. VISAS (last visited May 9, 2017).

⁹⁸ *Id.*

residents of Mexico, (2) “meet the eligibility standards for B1/B2 visas,”⁹⁹ and (3) “must demonstrate that they have ties to Mexico that would compel them to return after a temporary stay in the United States.”¹⁰⁰

Some travel restrictions exist on B-visas. Some examples of activities that require different categories of visas and cannot be done while on a visitor visa include: study; employment; “paid performances, or any professional performance before a paying audience”; “arrival as a crewmember on a ship or aircraft”; “work as foreign press, radio, film, journalists, and other information media”; and “permanent residence in the United States.”¹⁰¹

Some of the other more common visa types that may be encountered are the following:

- The D visa, or “crewmember” visa.¹⁰² This visa is for individuals “working on board sea vessels or international airlines in the United States, providing services required for normal operation and intending to depart the United States on the same vessel or any other vessel within 29 days.”¹⁰³
- The E visa, or the “treaty trader/treaty investor” visa.¹⁰⁴ Treaty Trader and Treaty Investor visas, E-1 and E-2 respectively, “are for citizens of countries with which the United States maintains treaties of commerce and navigation.”¹⁰⁵ In order to qualify for this type of visa, the individual must be coming to the United States to either “engage in substantial trade, including trade in services or technology, in qualifying activities, principally between the United States and the treaty country; or [to] develop and direct the operations of an enterprise in which [the individual has] invested a substantial amount of capital.”¹⁰⁶

Some examples of types of enterprises that constitute trade under E visa provisions are “international banking[,] insurance[,] transportation[,] tourism[,] and communications.”¹⁰⁷

The F and M visas are more commonly known, respectively, as the “student visa” and the “vocational visa.” In order for a foreign citizen or national to study in the United States, the individual must have a student visa.¹⁰⁸ The course of study and the type of school the individual plans to attend determines whether she needs an F-1 or an M-1 visa. F visas are for individuals who are attending a university or college, high school, private elementary school, seminary, conservatory, or other “academic institution, including a language training program.”¹⁰⁹ M visas are for individuals who are attending a “[v]ocational or other recognized nonacademic institution, other than a language training program.”¹¹⁰ As with all of the visas, other requirements and restrictions exist on these visas.¹¹¹

As one can see, many ways exist for someone to violate or improperly possess a visa. Each case will take time and effort to untangle and gather the necessary evidence to bring about a conviction.

When evaluating the case, many documents will assist in either proving or disproving the veracity of the statements contained in the application process. Through working closely with the agents, it is

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visitor Visa*, U.S. VISAS (last visited May 9, 2017).

¹⁰² U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Crewmember Visa*, U.S. VISAS (last visited May 9, 2017).

¹⁰³ *Id.*

¹⁰⁴ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Treaty Trader & Investor Visa*, U.S. VISAS (last visited May 9, 2017).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Student Visa*, U.S. VISAS (last visited May 9, 2017).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

helpful to obtain a properly certified birth record for true identity, a certified copy of the death certificate (if appropriate), marriage or divorce decree, prior passport application(s), prior visa application(s), school records, property records, certified conviction records, motor vehicle records, and, perhaps, immigration records. After identifying the documents and deciding to accept prosecution, I strongly recommend obtaining certified copies of these documents. The sooner one obtains the documents, the sooner one can identify and begin to work through any evidentiary issues.

3. Evidence

Once satisfied that sufficient documentation exists to support the alleged criminal conduct, one needs to be able to introduce the documents into evidence. The documents used in these prosecutions can be both foreign and domestic public records. In addition to other applicable rules of evidence, i.e. relevance and prejudice, Federal Rules of Evidence Rules 803,¹¹² 902,¹¹³ and 903¹¹⁴ apply to these types of prosecutions.

In both passport and visa applications, individuals must prove their citizenship.¹¹⁵ Birth certificates or birth records are commonly used to substantiate the location of an individual's birth. For a passport, applicants must prove they are citizens of the United States or non-citizen nationals.¹¹⁶ For a visa application, applicants must prove they are citizens of a country other than the United States.¹¹⁷ The easiest way for the applicant to satisfy this requirement is to present a timely filed and validly issued birth certificate or record.

In the United States, and in most foreign countries, the government keeps official records of births, marriages, and deaths. This official record-keeping is typically done in the ordinary course of a particular agency's function within the government and in compliance with a legal duty.¹¹⁸ Therefore, these documents are usually admissible, using what many refer to as the "Public Records Exception."¹¹⁹ Provided the document comports with the requirements of Rules 401¹²⁰ and 403,¹²¹ Rule 803(8) is commonly used to establish the evidentiary foundation for the admission of the document.

The analysis may seem somewhat circular; taking it piece by piece may help make sense of it all. Generally, a document is hearsay.¹²² Strictly speaking, hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."¹²³ However, some documents may fall within a hearsay exception. The most common exception is the "records of regularly conducted activity" exception, found in Rule 803(6).¹²⁴ For the analysis of this article, I will only review the pertinent subsections of this rule. These subsections provide that "[a] record of an act [or] event" may be admissible "if (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge [of the event]; (B) the record was kept in the course of a regularly conducted activity of a business, organization,

¹¹² FED. R. EVID. 803.

¹¹³ FED. R. EVID. 902.

¹¹⁴ FED. R. EVID. 903.

¹¹⁵ See *supra* notes 66 and 96.

¹¹⁶ *Passport Requirements: What It Takes to Get an American Passport*, U.S. PASSPORT SERVICE GUIDE (last visited May 9, 2017).

¹¹⁷ See *supra* note 96.

¹¹⁸ FED. R. EVID. 803(6), (8)–(9).

¹¹⁹ See *id.*

¹²⁰ FED. R. EVID. 401.

¹²¹ FED. R. EVID. 403.

¹²² FED. R. EVID. 801.

¹²³ FED. R. EVID. 801(c)(1)–(2).

¹²⁴ FED. R. EVID. 803(6).

occupation, or calling, whether or not for profit;” and “(C) making the record was a regular practice of that activity”¹²⁵

Certified domestic documents of regularly conducted activity are admissible provided they meet the requirements of Rule 803(6)(A)–(C), above.¹²⁶ The certification from the custodian or other qualified person must comply with a federal statute or rule as set forth by the Supreme Court.¹²⁷ Finally, the party seeking to offer the certified document during a hearing must give the opposing party written notice of the intent to seek admission of the record, and make the certification available for inspection.¹²⁸ The opposing party needs a fair opportunity to make any challenge it deems appropriate.¹²⁹ If the government is offering the certified record, then the ongoing disclosure obligations should be coupled with either an email or letter stating the government’s intent to offer the document at a hearing.

Certain situations may exist where a marriage is not required to be reported to the government but where a marriage certificate is still created at, or near, the time of the event.¹³⁰ Baptismal records are typically kept with the religious entity where the ceremony occurred not with the government. Both records may be admissible into evidence provided they comply with the requirements of Rule 803(12).¹³¹ Rule 803(9) relates to “public records of vital statistics,”¹³² and Rule 803(12) relates to “certificates of marriage, baptism, and similar ceremonies.”¹³³ These are the rules by which the certified birth record of the defendant may be introduced into evidence. These rules also provide the means by which the defense would seek to introduce baptismal records.

Rule 803(12) is the section where issues tend to arise during the case.¹³⁴ The timing of the filing of the records is important. The document created closest in time to the event typically becomes the controlling document. This is because not only is the birth record primary evidence of the birth, but typically, there is no other contradicting document preceding its issuance. For example, if a person has a birth record indicating a date of birth as January 1, 1947, in Hermosillo, Mexico, and the record is filed on February 8, 1947, this document would be considered “timely filed in Mexico.” Therefore, logic would provide that the birth record becomes the controlling document to establish details of the individual’s birth.

A situation may arise where an individual has obtained a court-ordered delayed birth record from a state court in the United States. Usually, the court order occurs many years after the actual birth, but the defense claims that the court order should be the controlling document establishing the defendant’s birth in the United States. The Ninth Circuit addressed this issue in a couple of cases. In *Mah Toi v. Brownell*, the court found that, “[n]either law nor reason justifies holding an order to be of greater evidentiary value than a certificate in establishing the place and time of birth when such facts are in issue in a proceeding concerned with United States citizenship.”¹³⁵ In *United States v. Casares-Moreno*, a California district court found the evidentiary weight of a court-ordered birth certificate by the Californian Superior Court had the same evidentiary weight as a timely filed registration of birth.¹³⁶ The court noted that both

¹²⁵ FED. R. EVID. 803(6)(A)–(C).

¹²⁶ FED. R. EVID. 902(11).

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.*

¹³⁰ FED. R. EVID. 803(12).

¹³¹ *Id.*

¹³² FED. R. EVID. 803(9).

¹³³ FED. R. EVID. 803(12).

¹³⁴ *Id.*

¹³⁵ *Mah Toi v. Brownell*, 219 F.2d 642, 644 (9th Cir. 1955).

¹³⁶ *United States v. Casares-Moreno*, 122 F. Supp. 375, 377 (S.D. Cal. 1954) *aff’d*, 226 F.2d 873 (9th Cir. 1955).

documents are prima facie evidence, but not conclusive; that is, the order creates a rebuttable presumption.¹³⁷

Rule 803(12)(C) sets a vague time frame for the filing of a document recording a marriage, baptism, or similar ceremony, as it merely requires that the document must “purport[] to have been issued at the time of the act or within a reasonable time after it.”¹³⁸ The phrase “within a reasonable time after it” comes into play where the defense makes arguments that the baptismal certificate is more “accurate” or “reliable” than the birth certificate, usually when there is no birth record to substantiate the defense theory. Focusing on the document which is the primary evidence of birth, i.e. a timely filed birth record, is crucial. Most governments have requirements for the filing of birth records. One could argue, because a government has these filing requirements for birth registrations, that the documents are more reliable. Additionally, a newborn child is highly unlikely to formulate such a plan for the purpose of fraudulently obtaining a U.S. passport. When following the chronology of the defense attempts to legitimize the defendant’s fraudulent home birth, the filing of the documents usually tells a story that tends to show the defendant’s willful and knowing actions of attempting to fraudulently obtain either the passport or visa.

Just as with domestic documents, certain foreign documents exist which are “self-authenticating.” Many times these cases involve the use of foreign birth records and documents. In this scenario, we look to Rules 902¹³⁹ and 903¹⁴⁰ for guidance. Foreign documents can be self-authenticating if they meet the requirements of both rules. Generally, the document must be signed “by a person who is authorized by the foreign country’s law to” sign the document and “must be accompanied by a final certification [which] certifies the genuineness of the signature and the official position of the signer”¹⁴¹ A number of enumerated individuals can sign the certification.¹⁴² Many refer to the certification as the “apostille” copy of the document.¹⁴³

When dealing with a certified foreign document for regularly conducted activity, the document must first meet all the requirements of Rule 902(11),¹⁴⁴ with one slight modification to the certification: the certification “must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification [was] signed.”¹⁴⁵ Typically, requesting an “apostille” copy of the birth record will satisfy this requirement.

4. United States Department of State

Turning to the other members of the prosecution team, the United States Department of State-Bureau of Consular Affairs is the official custodian of records for passport and nonimmigrant visa records.¹⁴⁶ Therefore, all requests for certified documents and testimony related to passports or nonimmigrant visas are handled by Consular Affairs.¹⁴⁷ The request for testimony should be done in writing in the format provided.¹⁴⁸ This request includes all testimony. The memorandum requesting

¹³⁷ See *id.*

¹³⁸ FED. R. EVID. 803(12)(C).

¹³⁹ FED. R. EVID. 902(3), (12).

¹⁴⁰ FED. R. EVID. 903.

¹⁴¹ FED. R. EVID. 902(3).

¹⁴² *Id.*

¹⁴³ See, e.g., *United States v. Vidrio-Osuna*, No. 05-50224, 2006 WL 1765764, at *1, 198 F. App’x 582, 583 (9th Cir. 2006).

¹⁴⁴ FED. R. EVID. 902(11).

¹⁴⁵ FED. R. EVID. 902(11)–(12).

¹⁴⁶ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *About Us*, TRAVEL.STATE.GOV (last visited May 10, 2017).

¹⁴⁷ See 22 C.F.R. § 172.4(b), (c) (2017).

¹⁴⁸ See *id.* § 172.5(a).

testimony should be electronically submitted. Once submitted, Consular Affairs personnel will review the request and send a reply.¹⁴⁹ Typically, the agencies can work out an amicable resolution regarding witness testimony. Either the prosecuting Assistant United States Attorney or the Diplomatic Security Special Agent can submit the memo. A practical tip: one should request a certified copy of any possibly needed document early in one's case preparation. Also, when requesting testimony, one should be sure to allow sufficient time for the Department of State to review the request.

IV. Defeating the Potential Defenses

Some elements of the offenses are more prone to litigation. Most often the defendants will challenge the “knowingly and willfully” *mens rea*. The Ninth Circuit has held that “a violation of § 1542 does not require specific intent. A conviction under the first paragraph of § 1542 requires only that, in applying for a passport, the defendant made a statement that the defendant knew to be untrue.”¹⁵² The Ninth Circuit also stated:

The Supreme Court long ago established that the second paragraph of § 1542 does not require specific intent. In *Browder v. United States*, the Court defined “willfully and knowingly” in the second paragraph to mean “deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.”¹⁵⁰

In passport cases, a common defense is that the defendant was born in a home in the United States and, therefore, was not registered at the time of birth. Also, some defendants may assert that they were brought over to the United States at a young age and have always thought they were U.S. citizens. Some may even claim dual citizenship but lack sufficient documentation to substantiate their claim.

To show requisite intent at the time the defendant executed the application for either the passport or visa, proving the true identity in the passport or visa is crucial. Many times the owner of the true identity is unaware that the identity has been compromised. Often, the defendant assumes the identity of a deceased individual. Fingerprints from both the defendant and the owner of the true identity can assist in confirming identity. Good, old-fashioned police work pays dividends. Interviewing the owner of the true identity, the owner's family members and friends, and even searching public records are gold mines for information. If these individuals are willing to provide statements or give testimonies, such help will only strengthen the case. It is my experience in these situations that the owner of the true identity or the owner's family is willing to assist in the investigation.

In instances where the defendant claims a home birth in the United States or a birth that was not otherwise recorded, proving the falsehood can be challenging. Sometimes taking a step back from the case and just thinking about what typically happens when a child is born in the United States can be helpful. Each state now has laws which require a person who delivers a newborn to register the birth within a few days with the state where the child was born.¹⁵¹ Most often, defendants who claim a home birth were born in an era where the immigration laws of the United States were less stringent. However, tracking down those people who swore to affidavits witnessing the birth and finding family members of either the defendant or the midwife can be incredibly helpful. It is fair to say that having a child born in a home is a memorable experience for all of those present. One should pay close attention to any discrepancy in their stories because it may become important later in the case. Additionally, if any legal

¹⁴⁹ See *id.* § 172.4(b), (c).

¹⁵² *United States v. Alfang Ye*, 808 F.3d 395, 399 (9th Cir. 2015).

¹⁵⁰ *Id.* (emphasis omitted) (quoting *Browder v. United States*, 312 U.S. 335, 341 (1941)).

¹⁵¹ See, e.g., 28 PA. CODE § 1.1 (West, Westlaw through 2017 47 Pa. Bull. 27) (requiring certificate within ten days of birth); FLA. STAT. ANN. § 382.013 (West, Westlaw through 2017 First Regular Session of the Twenty-Fifth Legislature) (requiring certificate to be filed within five days of birth).

proceedings occurred, obtaining the entire file, including transcripts from the court, can be helpful in proving that at the time of the application the defendant knowingly lied.

In visa fraud cases, each visa classification will present different defenses. Some common defenses include arguing that the defendant is really the person who possesses the document, despite failing to resemble the photograph contained in the visa. Some defendants may claim that they did not know the visa was fake, and others may claim that they are actually the proper possessor of the visa. Possession of a visa beyond its expiration is also potentially subject to prosecution.¹⁵² In addition, using a visa for something other than its permitted use is potentially prosecutable.¹⁵³ For example, an individual who possesses an A-2 visa and travels on the visa while facilitating alien smuggling may be subject to prosecution.

V. Other Ways in Which Passport and Visa Charges Can Assist

Passport and visa fraud charges can be instrumental in the disruption of domestic and international criminal organizations. These criminal organizations rely upon the large number of people who enter the United States on a daily basis not only to further their nefarious activities but also to assist in masking these activities. Because of limited government resources and a large number of travelers, these criminal organizations can use visas and, to some extent, passports to avoid detection. Successful prosecutions of these cases assist in disrupting these criminal organizations.

Sometimes an investigation may be progressing, but the prosecutor may be unable to prosecute an individual for possible involvement. For example, there may be an investigation into a narcotics trafficking organization. During the investigation, an individual is identified as being the person who transports either narcotics or bulk currency for the organization. However, law enforcement is unable to catch this individual with either narcotics or bulk currency. Nevertheless, this same person may possess a nonimmigrant visa obtained by fraud. The fraud would likely arise when swearing or affirming the purpose of the applicant's travel; after all, narcotics trafficking is not a permitted purpose for a visa. A successful prosecution for visa fraud, pursuant to 18 U.S.C. § 1546,¹⁵⁴ may be a means to disrupt the international criminal organizations. A couple of the collateral consequences for this conviction are the possible removal of this individual from the United States and the individual's being ineligible for another visa.

VI. Additional or Companion Charges

A careful review of the particular facts and circumstances of each case may lead to additional charges. Those alternative or companion charges may include aggravated identity theft (18 U.S.C. § 1028A),¹⁵⁵ false claims to citizenship (18 U.S.C. § 911),¹⁵⁶ false statements (18 U.S.C. § 1001),¹⁵⁷ and illegal re-entry after deportation (18 U.S.C. § 1326).¹⁵⁸ These criminal charges may permit you to more easily introduce additional evidence that tends to prove the defendant's knowing and willful false statement.

¹⁵² See *supra* note 85 and accompanying text.

¹⁵³ See generally 18 U.S.C. § 1546 (2012).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* § 1028A.

¹⁵⁶ *Id.* § 911.

¹⁵⁷ *Id.* § 1001.

¹⁵⁸ 8 U.S.C. § 1326 (2012).

VII. Conclusion

Prosecutions for passport and visa fraud may not be the most high-profile prosecutions and may not result in a headline where the defendant received a significant term of imprisonment. They are, however, a valuable tool to use when protecting our nation from threats, both foreign and domestic, and attempting to disrupt international criminal organizations. The collateral consequence of losing the privilege to enter the United States is a powerful tool to assist in furthering this goal.

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Material Witness Issues in Alien Smuggling Cases

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On April 11, 2017, the Attorney General issued a memorandum requesting each district to increase its efforts in prosecuting alien smuggling offenses under 8 U.S.C. § 1324.¹ Priority should be given to alien smuggling offenses involving bringing in three or more aliens into the United States, transporting or harboring three or more illegal aliens, or aggravating circumstances, including serious bodily injury, physical and sexual assault, or the death of any person.² Alien smuggling requires at least two participants: the alien smuggler and the smuggled alien(s). This article addresses issues related to the smuggled aliens in these prosecutions.

To sustain a conviction for an alien smuggling offense, except in conspiracy cases where conspiracy is the sole charge and the offense is charged under § 1324(a)(1)(A)(i) (bringing an alien to the United States), the government must prove that the smuggled alien is an alien who has come to, entered, or remains in the United States in violation of law.³ Evidence of alienage can be presented in many forms. The most common method of proof is through the alien's testimony. Because almost all alien smuggling offenses require a smuggled alien, most alien smuggling prosecutions involve the use of the smuggled alien as a witness, also known as the material witness.

Successful alien smuggling prosecutions often rely upon the testimony of one or more undocumented aliens who unlawfully entered or attempted to enter the United States through the services of a smuggling organization. In cases involving a large number of smuggled aliens, the government may be forced to select only a few aliens to testify at trial. In some districts, Border Patrol or HSI agents select the material witnesses to detain based on their investigation. In other districts, the prosecutor may be involved in the selection of the detained material witnesses.

In determining who will be designated a material witness, the selector should pick the alien who is the most articulate and the one who was in the best position to relate the mechanics of, and identify those who participated in, the smuggling offense—who observed the actions of the smugglers, heard the smugglers give commands, identified the smugglers, and identified the roles that the smugglers played. The selector should select the material witness who can provide testimony that will meet the elements of the charged offense(s). Also, the selector should ensure that the material witness is competent, intelligent, and honest. Finally, it is imperative that the selector is aware of the government's constitutional duty to identify and keep the material witness who exculpates or minimizes the roles/actions of the smugglers that the government plans on charging.⁴ This is true even if the selector is skeptical of the material

¹ Memorandum from U.S. Att'y Gen. Jeff Sessions, U.S. Dep't of Justice, to All Fed. Prosecutors, U.S. Dep't of Justice 1 (Apr. 11, 2017).

² *Id.*

³ See *United States v. Guerra-Garcia*, 336 F.3d 19 (1st Cir. 2003); *United States v. Diaz*, 936 F.2d 786 (5th Cir. 1991); *United States v. Barajas-Montiel*, 185 F.3d 947 (9th Cir. 1999); 8 U.S.C. § 1324(a)(1) (2012).

⁴ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

witness' statement, or the other witnesses' statements are contradictory, or the evidence is viewed as overwhelming against the charged smugglers.

Because the material witnesses lack lawful status in the United States, they must either be returned to their country of origin or be detained pending the trial of the smugglers. The Supreme Court has tacitly approved the retention of a limited number of aliens in § 1324 prosecutions. In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), two of three smuggled aliens were returned to Mexico before the defense had the chance to interview them. The aliens were returned following interviews that revealed their statements were similar to that of the retained material witness and were, thus, deemed cumulative and possessed no exculpatory information. The Supreme Court noted “the [e]xecutive [b]ranch’s responsibility to faithfully execute Congress’ immigration policy to prompt deportation of illegal aliens justifies deportation of [undocumented] alien witnesses upon the [e]xecutive’s good-faith determination that [the aliens] possess no information favorable to the defendant.”⁵

The Ninth Circuit held:

[O]nce the government[, including Border Patrol and HSI agents,] is aware that an alien has *potentially* exculpatory evidence, it must treat that person as a material witness and give defense counsel the opportunity to interview him and make a reasoned determination whether to seek . . . [the material witness’s] retention pending trial. This means the [material] witness may not be deported before defense counsel has been retained or appointed and has had a fair opportunity to interview him.”⁶

Once defense counsel has notified the government that the material witness may be useful to the defense, the material witness cannot be deported until defense counsel has either deposed the witness or indicated that the witness is no longer needed. Failure to retain a material witness who may possess potentially exculpatory evidence may result in reversal of the conviction and, at least in the Ninth Circuit, may also result in directions to the district court to “decide whether to dismiss the charges against . . . [the defendant] with prejudice, as a consequence of the government’s conduct.”⁷ In *Leal-del Carmen*, agents identified the defendant as a guide. One of the apprehended illegal aliens from the defendant’s group denied that the defendant gave orders, and when asked to clarify her statement, she stated again that the defendant did not give orders. Her statement was contradicted by her boyfriend (the person who made the smuggling arrangements for the two of them), who was kept as a material witness in the prosecution of the case. She was deported. The court found that the district court erred in finding that her testimony would have been cumulative of that of the government’s three material witnesses.⁸

When there is a large number of illegal aliens apprehended during a smuggling event and agents are attempting to identify the aliens who should be kept as material witnesses, it is recommended that the names and country of origin of all of the apprehended aliens be listed in the apprehending agent’s report. Furthermore, during the separate interview of each alien, it is recommended that agents summarize the alien’s statement in a report, retain notes of the witness’ statement, or record the statement.⁹ The summaries, notes, or recorded statements should be part of the reports/disclosure forwarded to the government. The summaries of the deported aliens’ statements should also be included in those reports/disclosure. While this may be seen as unduly burdensome to the arresting or investigating agency,

⁵ *United States v. Valenzuela-Bernal*, 458 U.S. 858, 858 (1982).

⁶ *United States v. Leal-del Carmen*, 697 F.3d 964, 970 (9th Cir. 2012) (emphasis added), *declined to follow by United States v. Gonzalez-Perez*, 573 F. App’x 771 (10th Cir. 2014) (unpublished).

⁷ *Id.* at 976.

⁸ *Id.* at 971.

⁹ See *United States v. Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009) (noting that the district court found that the government acted in good faith by videotaping the interviews of the deported witnesses which showed that the witnesses did not provide exculpatory evidence that would corroborate the defendant’s claim of duress).

this protects both the government's and the defendant's cases, ensures justice, and is less burdensome than retaining a high number of unnecessary material witnesses.

It is not uncommon for the defendant to argue that he was denied due process or denied his Sixth Amendment right of confrontation because the other aliens were deported. A defendant "cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the . . . [aliens] deprived him of their testimony."¹⁰ To obtain dismissal of an indictment based on the government's deportation of a witness, the defendant must show: "(1) the government acted in bad faith by allowing a witness with potentially exculpatory information to depart; and (2) the voluntary departure of the absent witness prejudiced him by eliminating testimonial evidence that would be both material and favorable to the defense."¹¹ Evidence is material if it relates to the defendant's guilt or impacts his punishment.¹² There is no violation where the government has made a "good-faith" determination that the alien-witness possesses no evidence that might exculpate the defendant.¹³ Negligence is not enough to establish bad faith.¹⁴ "To prevail under the prejudice prong, the defense must at least make a 'plausible showing that the testimony of the deported witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'"¹⁵ Without the plausible showing, the defendant's motion should be denied.

In cases where a potentially exculpatory witness is deported, the government might consider stipulating to the admission of the deported witness' statement. Presentation of the taped-statement, a transcript of the statement, or a summary of the statement might cure the potential defect.¹⁶ Stipulations regarding the admissibility of the missing testimony may avoid later claims of bad faith or materiality. For example, in cases where the material witnesses did not identify the defendant (typically seen in cases where the aliens were transported in the trunk of the vehicle, trailer of a truck, cabin of a boat, etc., and were placed there by their guide or stash house operator and never saw the driver/operator), the government might offer a stipulation that the witnesses could not identify the driver/operator. The stipulation at trial will diminish any perceived prejudice.¹⁷

The government may detain the material witnesses pursuant to 18 U.S.C. § 3144. The government must file an affidavit that states the testimony of the material witness is material in a criminal proceeding, and the government must demonstrate that it will be "impracticable to secure the presence of the person by subpoena."¹⁸ The court will determine whether the material witnesses are subject to release or detention based on the criteria outlined in § 3142.¹⁹ However, the detention of a material witness will only be for a "reasonable" period of time—usually thirty, forty-five, or sixty days. Furthermore, the period of detention will only be long enough to secure the video deposition of the witnesses rather than present them as live witnesses at trial. The deposition must be taken pursuant to the Federal Rules of Criminal Procedure.

Federal Rule of Criminal Procedure 15(a) provides for the taking of pretrial depositions of prospective witnesses to "preserve [their] testimony for trial." Rule 15(a)(2) also gives a witness detained

¹⁰ *Valenzuela-Bernal*, 458 U.S. at 867.

¹¹ *Id.* at 873; *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)); and citing *Leal-del Carmen*, 697 F.3d at 970.

¹² *Valenzuela-Bernal*, 458 U.S. at 868.

¹³ *Id.* at 872–73.

¹⁴ *Youngblood*, 488 U.S. at 56.

¹⁵ *United States v. Dring*, 930 F.2d 687, 693–94 (9th Cir. 1991).

¹⁶ See *Leal-del Carmen*, 697 F.3d at 973–74.

¹⁷ See *United States v. Rivera-Paredes*, 614 F. App'x 889, 892 (9th Cir. 2015) (unpublished).

¹⁸ See 18 U.S.C. § 3144 (2012).

¹⁹ See 18 U.S.C. § 3142 (2012).

pursuant to 18 U.S.C. § 3144 the right to compel the taking of his deposition.²⁰ An indigent material witness who is in custody is entitled to appointed counsel.²¹ The material witness is entitled to be released once the deposition is complete and no good cause exists for the continued detention of the witness.²²

In order to ensure that no good cause exists for the continued detention of the witness, it is imperative that the investigation related to the alien smuggling event be completed prior to the video deposition. In essence, the government must have all the reports and evidence that it would normally use at trial, collected, preserved and turned over to the defense prior to the video deposition. Videotaped depositions require the government to provide the defense with early discovery.²³ As the material witnesses' testimony will be the heart of your case, the government should provide the defense with full trial disclosure and an opportunity to fully cross-examine the witnesses. In order to effectively defend its case, the defense must be advised or given notice of all the charges the government intends to file prior to the taking of the deposition. This notice should be given either in writing or placed formally in the record of the case. Absent appropriate notice prior to the deposition, charges filed after the completion of a videotaped deposition cannot be proven solely using the deposition testimony as the defendant would not have been able to cross-examine the witness regarding the new charges.²⁴ In *Wang*, the Court held that the admission of the videotaped deposition of an illegal alien violated the defendant's Sixth Amendment right to cross-examination when at the time of the deposition, the defendant was charged with conspiracy under 18 U.S.C. § 371, but at trial was charged with the substantive offense of harboring illegal aliens.²⁵

Once the video depositions are completed, the material witnesses are usually voluntarily returned to their countries of origin. If the defendant objects to the release of the material witnesses after the completion of the video deposition, the defense must demonstrate good cause to the court for the continued detention of the witnesses. When the defendant is not objecting to the release of the material witnesses, it is recommended that the government obtain the counseled, written concurrence of the defendant before authorizing the deportation or voluntary return of the witnesses.²⁶

Section 1324(d) of Title 8 of the U.S. Code provides:

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.²⁷

Courts have held that "this provision must be read in conjunction with other rules governing the admission of deposition testimony in a criminal proceeding."²⁸ Rule 15(f) of the Federal Rules of Criminal Procedure provides that deposition testimony may be used "as provided by the Federal Rules of

²⁰ FED. R. CRIM. P. 15(a).

²¹ 18 U.S.C. § 3006A(a)(1)(G), (H) (2012).

²² *Torres-Ruiz v. United States Dist. Ct. for the S.D. of California*, 120 F.3d 933, 935–36 (9th Cir. 1997); *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992).

²³ See FED. R. CRIM. P. 15(e)(3).

²⁴ *United States v. Wang*, 964 F.2d 811, 813–14 (8th Cir. 1992).

²⁵ *Id.* at 811, 813–14.

²⁶ See *United States v. Lujan-Castro*, 602 F.2d 877, 878 (9th Cir. 1979); *United States v. Molina*, 596 F.3d 1166, 1169 (9th Cir. 2010) (noting that the district court did not abuse its discretion by admitting the third-party statement under stipulation. The defendant made clear he entered the joint stipulation voluntarily. Stipulations will be enforced unless one of the parties' consent was involuntary or uninformed).

²⁷ 8 U.S.C. § 1324(d) (2012).

²⁸ See *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002); *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998).

Evidence.”²⁹ Since video depositions are out of court statements, as long as the depositions are admissible under the rules of evidence, they may be used if the witness is “unavailable” as defined in Rule 804(a) of the Federal Rules of Evidence. Rule 804(a)(5) defines “unavailability” as being “absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure” the witness’ attendance at trial.³⁰ Proof of unavailability may also be required under the Sixth Amendment. “Material witnesses are ‘unavailable’ for purposes of the Sixth Amendment Confrontation Clause if the government has made a good faith effort to obtain their presence at trial.”³¹ Nor does “[t]he law . . . require the government to utilize an absolute means of attempting to assure the appearance of a witness, only a reasonable means.”³²

The Circuit courts are not all consistent in determining when a witness is “unavailable” and defining what are reasonable, good faith efforts by the government to secure the witness’ presence at trial.

The Fourth Circuit found the material witnesses were “unavailable” when, after they were deposed, they elected to voluntarily leave the country rather than face normal deportation proceedings, and, as a result, they were returned to Mexico.³³ In making this finding, the court noted that the United States Attorney had a dual responsibility in this case: to consider the rights of the witnesses (who had spent more time in custody than the convicted defendant), as well as the rights of the defendant, and to also comply with his duty of deporting illegal aliens without undue delay.³⁴

The Fifth Circuit has determined that in order for the government to show a good faith effort to secure the material witness at trial, the government must have made a number of, yet not all of, the following steps: (1) issued subpoenas and letters to each witness, translated in the witness’ native language, indicating the trial date and that the witness might be required to testify prior to the witness’ deportation; (2) provided explicit instructions in letters for obtaining the necessary documents to enter the United States and provided each witness with the travel distance to the local American Embassy from his respective place of residence, along with the address and the telephone numbers of the embassies; (3) informed each witness that the government would pay for the trip and reimburse the witness for any other incidental travel necessary for testifying; (4) provided each witness with a contact number in the United States; (5) called each witness in his home country; (6) prior to his deportation, obtained each witness’ repeated assurances that he would return to testify; (7) apprised the border inspectors of each witness’ expected arrival; or (8) issued checks to be given to each witnesses upon his reentry into the United States.³⁵

The Eighth Circuit found the admission of the video deposition was proper when the government showed that the witness had already been deported to Mexico and the Mexican authorities would not extradite the individual based on a material witness warrant.³⁶ The court determined that the witness was unavailable and it would have been futile to require the government to show it could not procure the

²⁹ FED. R. CRIM. P. 15(f).

³⁰ FED. R. EVID. 804(a)(5).

³¹ *United States v. Kellum*, No. CR 10-1093-TUC-CKJ, 2010 WI 3834748, at *1 (D. Ariz. 2010); see *Barber v. Page*, 390 U.S. 719, 724–25 (1968); *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (arguing “good faith” does not require the doing of a futile act), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

³² *United States v. Ruiz*, 105 F. App’x 254, 258 (10th Cir. 2004) (quoting *United States v. Eufrazio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989); see also *Santos-Pinon*, 146 F.3d at 736 (“The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.”)).

³³ *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988).

³⁴ *Id.* at 1208.

³⁵ See *United States v. Allie*, 978 F.2d 1401, 1403, 1407 (5th Cir. 1992); *United States v. Tirado-Tirado*, 563 F.3d 117, 123–24 (5th Cir. 2009).

³⁶ *United States v. Perez-Sosa*, 164 F.3d 1082, 1085 (8th Cir. 1998).

witness' attendance.³⁷

The Ninth Circuit held that “the obligation remains on the government to provide evidence at trial demonstrating the witness’s unavailability as a predicate to the admission of the material witness’s testimony” via video deposition.³⁸ As such, the government is required to “place on the record some evidence of the continued unavailability of the material witnesses” prior to seeking the admission of the video deposition.³⁹ The government can “me[e]t its obligation by detailing its efforts to procure the witnesses’ presence at trial and by showing that despite its efforts, the witnesses remained unavailable.”⁴⁰ The government made reasonable efforts to secure the witness when it promised to pay for the witnesses’ travel expenses, served them with parole letters to enable their return, and reasonably relied on the representations of the material witness attorney—who promised on the record to stay in contact with them.⁴¹

The Tenth Circuit found that the government’s efforts were reasonable when it requested that the witness return to the United States for trial, provided the witness instructions on how to return, provided the witness with instructions on how to obtain the necessary funds to return to the United States, and secured the witness’ promise to return.⁴² In determining whether the government’s efforts were reasonable, the court noted that the use of depositions at trial involves a clash between the defendant’s Sixth Amendment right to confrontation and the witnesses’ Fifth Amendment right to due process.⁴³ When balancing the interests of the defendant against those of the witnesses, the balance tips toward the Fifth Amendment interests of the witnesses.⁴⁴ Thus, the government was reasonable in moving to depose the witness and then releasing them.⁴⁵

In some cases—alien smuggling cases involving death, hostage taking cases, or other egregious cases—the AUSA may find it appropriate to have the material witness released and have the witness remain in the United States pending trial. (It is recommended that prior to such release, the witness’ testimony be preserved via video deposition). If the material witness is released within the United States pending trial, it is recommended that the witnesses be required to check in with the case agent on a regular basis to ensure that if the agent is later unable to contact the witness, efforts can be made to find the witness well in advance of the trial date. HSI has many rules and requirements regarding the ability to parole a witness into the United States and in permitting work authorization and other benefits. The decision regarding the issuance of those benefits is typically within the sole discretion of HSI.⁴⁶ Any work authorization or other benefit given to a material witness constitutes impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972) and must be disclosed to the defense.⁴⁷

Alien smuggling cases can be interesting. The conditions that these aliens endure while they are being brought to the United States, including the conditions of the stash house, the number of days the aliens walked through dangerous terrains, the overcrowded and unsafe vehicles that they were transported in, are typically dangerous and inhumane. The alien smugglers should be held accountable for their illegal

³⁷ *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

³⁸ *United States v. Matus-Zayas*, 655 F.3d 1092, 1102 (9th Cir. 2011).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *United States v. Rivera-Paredes*, 614 F. App’x 889, 892 (9th Cir. 2015) (unpublished).

⁴² *United States v. Eufracio-Torres*, 890 F.2d 266, 269–71 (10th Cir. 1989).

⁴³ *Id.* at 269–70.

⁴⁴ *Id.* at 270.

⁴⁵ *Id.* at 270.

⁴⁶ See generally U.S. IMMIGR. AND CUSTOMS ENF’T, TOOL KIT FOR PROSECUTORS (2011).

⁴⁷ *Giglio v. United States*, 405 U.S. 150 (1972).

criminal actions. Using the video depositions of the material witnesses helps ensure the smugglers are successfully prosecuted.

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Collateral Attacks Under 8 U.S.C. § 1326(d): A General Overview

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I. Introduction

One of the common defenses raised in 8 U.S.C. § 1326 cases is a collateral attack on the prior removal proceedings. If the attack is successful, the pending prosecution is typically dismissed because the removal element necessary for a conviction has been deemed invalid.¹ Prior to the 1996 change to the statute, *United States v. Mendoza-Lopez* was the formative case permitting collateral attacks in removal proceedings.² In 1996, Congress amended 8 U.S.C. § 1326 to allow an alien to collaterally attack a deportation order in certain narrow circumstances.³

Title 8 U.S.C. § 1326(d) states as follows:

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.⁴

The three requirements of § 1326(d) are stated in the conjunctive: each is required, and, generally speaking, a defendant must satisfy all three in order to prevail in a collateral attack.⁵ The defendant bears

¹ See 8 U.S.C. § 1326(a), (d) (2012).

² See *United States v. Mendoza-Lopez*, 481 U.S. 828, 829 (1987).

³ AEDPA § 441 added INA § 276(d), 8 U.S.C. § 1326(d); see [Government's Brief in Opposition to Defendant's Motion to Dismiss the Indictment, United States v. Luis Antonio Dutton-Myrie](#), 2009 WL 6029276 (M.D. Pa. 2009) (No. 3:CR-07-00445).

⁴ 8 U.S.C. § 1326(d).

⁵ See *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *United States v. Torres*, 383 F.3d 92, 98–99 (3d Cir. 2004); *United States v. Wilson*, 316 F.3d 506, 509 (4th Cir. 2003), *abrogated on different grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006); *United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002) *superseded by amendment in statute* 8 U.S.C. § 1326(d), *as recognized in United States v. Ramirez-Carcamo*, 559 F.3d 384 (5th Cir. 2004); *United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2d Cir. 2002). *But see United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001) (stating that exhaustion requirement “cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process”) (citing *United States v. Garza-Sanchez*, 217 F.3d 806, 808 (9th Cir. 2000); also citing *United States v. Andrade-Partida*, 110 F. Supp. 2d 1260, 1269 (N.D. Cal. 2000)).

the burden of proof when attempting to collaterally attack an underlying deportation or removal order.⁶ This article provides a very general outline of issues to be aware of and to address when confronted with a defense motion collaterally attacking a predicate removal.

II. Exhaustion of Administrative Remedies (8 U.S.C. § 1326(d)(1))

Exhaustion generally refers to the defendant’s appeal of the ruling of the Immigration Judge (IJ) to the Board of Immigration Appeals (BIA) in deportation or removal proceedings.⁷ “In a criminal proceeding, an alien cannot collaterally attack an underlying deportation order if the alien validly waived the right to appeal that order.”⁸ To satisfy the exhaustion prong of § 1326, an alien must have filed a motion to reopen, appealed to the BIA, and pursued all other administrative remedies available.⁹ For purposes of § 1326, a failure to follow these procedures, including a failure to file a motion to reopen, will result in the inability to challenge the deportation order.¹⁰

However, courts have generally held that “the exhaustion requirement [of § 1326(d)(1)] must be excused where an alien’s failure to exhaust results from an invalid waiver of the right to an administrative appeal.”¹¹

Additionally, not all courts have been strict about enforcing the exhaustion requirement. In the Ninth Circuit, for example, in order for the waiver to be valid, it must be both “considered and intelligent.”¹² The government bears the burden of proving that a waiver of appeal was “considered and intelligent,” applying a “clear and convincing” standard.¹³ The Ninth Circuit routinely dissects appeal waivers and excuses exhaustion whenever the waiver is not “considered and intelligent.”¹⁴ In the Ninth Circuit, an immigration judge’s non-compliance with 8 C.F.R. § 1240.11(a)(2)¹⁵ relieves the alien of the

⁶ See, e.g., *United States v. Arevalo-Tavares*, 210 F.3d 1198, 1200 (10th Cir. 2000) (“[T]he burden of proof in a collateral attack on a deportation order is on a defendant based on the presumption of regularity that attaches to a final deportation order.”) (citing *United States v. Solano-Ramos*, No. 99-1252, 2000 WL 158952 (10th Cir. Feb. 15, 2000)).

⁷ See, e.g., *United States v. Roque-Espinoza*, 338 F.3d 724, 728 (7th Cir. 2003).

⁸ *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (citing *United States v. Estrada-Torres*, 179 F.3d 776, 780–81 (9th Cir. 1999)).

⁹ See *Roque-Espinoza*, 338 F.3d at 728–29 (citing *Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001); *Bosede v. Ashcroft*, 309 F.3d 441, 446 (7th Cir. 2002)); *United States v. Hinojosa-Perez*, 206 F.3d 832, 836 (9th Cir. 2000) (citing *Zapon v. U.S. Dep’t of Justice*, 53 F.3d 283, 284 (9th Cir. 1995)).

¹⁰ See *Hinojosa-Perez*, 206 F.3d at 836 (citing *Zapon*, 53 F.3d at 284).

¹¹ *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004); accord *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1043 (9th Cir. 2012) (“If Reyes did not validly waive his right of appeal, the first two requirements under § 1326(d) will be satisfied.”) (citing *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049–50 (9th Cir. 2004)); *United States v. Martinez-Rocha*, 337 F.3d 566, 569 (6th Cir. 2003) (finding that signing waiver was “knowing and considered” choice and, therefore, waiver was valid) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)); and citing *United States v. Cruse*, No. 01-5874, 2003 WL 344337, at *5 (6th Cir. Feb. 7, 2003); also citing *United States v. Rangel de Aguilar*, 308 F.3d 1134, 1138–39 (10th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003).

¹² *Estrada-Torres*, 179 F.3d at 780 (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987)), *overruled by United States v. Rivera-Sanchez*, 274 F.3d 905 (9th Cir. 2001).

¹³ *United States v. Lopez-Vasquez*, 1 F.3d 751, 753–54 (9th Cir. 1993) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)); *United States v. Pallares-Galan*, 359 F.3d 1088, 1097 (9th Cir. 2004) (citing *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997); also citing *Lopez-Vasquez*, 1 F.3d at 753–54 (en banc); and citing *United States v. Gonzalez-Mendoza*, 985 F.2d 1014, 1017 (9th Cir. 1993)).

¹⁴ See *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *United States v. Muro-Inclan*, 249 F.3d 1180, 1183, 1184 (9th Cir. 2001) (excusing exhaustion where IJ failed to advise alien of apparent eligibility for relief from removal according to provision in regulation).

¹⁵ 8 C.F.R. § 1240.11(a)(2) (2017).

burden of proving exhaustion of administrative remedies under § 1326(d)(1) because the Court “deem[s] the alien’s waiver of the right to an administrative appeal to have been insufficiently ‘considered and intelligent.’”¹⁶ The Ninth Circuit’s standard is inconsistent with other circuits that have addressed this issue where the burden of proof was placed on the government, instead of the defendant, to prove an invalid waiver.¹⁷ Failure to translate critical portions of the removal proceedings in the alien’s native language results in an improper waiver of the right to appeal, even when the alien is represented by counsel at the hearing.¹⁸ An alien may also assert that ineffective assistance of counsel deprived the alien of the right to seek judicial review.¹⁹

Even in the Ninth Circuit, a valid waiver precludes a collateral attack on removal and bars collateral review.²⁰ If the alien reserves the right to appeal and then fails to pursue the appeal, the alien fails to exhaust administrative remedies, and the collateral attack is barred under § 1326(d).²¹

Not all removal proceedings, however, involve the immigration court. Some types of removal proceedings do not provide for an administrative appeal.²² Consequently, aliens ordered removed pursuant to those sections of the Immigration and Nationality Act (INA) are not precluded from demonstrating exhaustion because they failed to appeal. Although expedited removal provisions also contain a prohibition against collateral attack in the context of criminal prosecutions,²³ a circuit split exists on whether the Courts have jurisdiction to decide appeals of the removal orders in these cases.²⁴

¹⁶ *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013) (quoting *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049–50 (9th Cir. 2004)).

¹⁷ *See, e.g., United States v. Soto-Mateo*, 799 F.3d 117, 120–21 (1st Cir. 2015) (holding that defendant bears burden of proving eligibility for any exception to statutory requirements); *Richardson v. United States*, 558 F.3d 216, 220–21 (3d Cir. 2009) (rejecting reasoning of *Lopez-Vasquez* and holding written waiver was sufficient to prove valid waiver of appeal in deportation proceedings) (citing *Lopez-Vasquez*, 1 F.3d at 753–54); *United States v. Martinez-Rocha*, 337 F.3d 566, 569 (6th Cir. 2003) (affirming district court’s finding of valid waiver, despite defendant’s claim he did not understand it when he signed); *United States v. Rangel de Aguilar*, 308 F.3d 1134, 1139 (10th Cir. 2002) (accepting written waiver as sufficient proof and noting defendant failed to come forward with evidence she was coerced or tricked into executing the waiver).

¹⁸ *See Ubaldo-Figueroa*, 364 F.3d at 1049 (deciding that waiver was invalid where IJ gave appeal advice to alien’s attorney in English but where advice was not translated in Spanish for alien) (citing *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197–98 (9th Cir. 1998), *cert. denied*, 525 U.S. 849 (1998)); *see also United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994) (citing *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 752 (9th Cir. 1992)).

¹⁹ *See United States v. Scott*, 394 F.3d 111, 117–18 (2d Cir. 2005) (citing *United States v. Perez*, 330 F.3d 97, 102 (2d Cir. 2003)).

²⁰ *See* 8 U.S.C. § 1326(d) (2012); *United States v. Garza-Sanchez*, 217 F.3d 806, 810–11 (9th Cir. 2000).

²¹ *United States v. Villavicencio-Burrueal*, 608 F.3d 556, 559–60 (9th Cir. 2010); *see also United States v. Cerna*, 603 F.3d 32, 38 (2d Cir. 2010) (“[I]f an alien knowingly and voluntarily waives his right to appeal an order of deportation, then his failure to exhaust administrative remedies will bar collateral attack.” (citing *United States v. Johnson*, 391 F.3d 67, 75–76 (2d Cir. 2004))).

²² *See, e.g.,* 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (proscribing expedited removal proceedings for arriving aliens with counterfeit, fraudulent, no documents or improper documents); *id.* § 1228(b) (requiring administrative removal proceedings for aliens who are convicted of an aggravated felony and who are not legal permanent resident aliens); *id.* § 1231(a)(5) (foregoing proceedings to reinstate a prior removal order for aliens removed or deported and who reenter the United States illegally).

²³ *See id.* § 1225(b)(1)(A)(i) (authorizing Secretary of Homeland Security to remove, without hearing before immigration judge, aliens arriving in United States who are inadmissible under 8 U.S.C. § 1182(a)(6)(C) (fraud) or 8 U.S.C. § 1182(a)(7) (lacking entry documentation); INA § 235(b)(1)(D), 8 U.S.C. § 1225(b)(1)(D) (2012)).

²⁴ *Compare, e.g., Etienne v. Lynch*, 813 F.3d 135, 138 (4th Cir. 2015) (deciding that “exhaustion requirement does not deprive [court] of jurisdiction to consider such a challenge in the first instance on appeal”) *and Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187–88 (5th Cir. 2013) (per curiam) (jurisdiction lies) *with Malu v. U.S. Att’y Gen.*, 764 F.3d 1282, 1288–89 (11th Cir. 2014) (no jurisdiction) (citing *Fonseca-Sanchez v. Gonzales*,

The Fifth Circuit has upheld the use of an expedited removal order as a predicate for a reentry conviction and rejected a constitutional due process attack for purposes of cases involving aliens who have never been admitted to the United States.²⁵ However, in *United States v. Barajas-Alvarado*, the Court held that a bar on judicial review of expedited removal orders was unconstitutional and concluded that “the rationale for applying the *Mendoza-Lopez* requirement [for “some meaningful review”] is applicable to a defendant in a criminal prosecution regardless of whether the defendant was a non-admitted alien or an alien in the United States when the removal order was issued.”²⁶

In the Sixth Circuit, aliens in removal proceedings conducted pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) fail to exhaust their administrative remedies if they do not contest the ground on which they are found deportable.²⁷

III. Deprivation of Judicial Review (8 U.S.C. § 1326(d)(2))

Significant overlap exists in the analysis under the first two prongs of 8 U.S.C. § 1326(d).²⁸ “[W]here [defendants have] failed to identify any obstacle that prevented [them] from obtaining judicial review of a deportation order, [they are] not entitled to such review as part of a collateral attack under 8 U.S.C. § 1326(d).”²⁹ However, as outlined above, a waiver of appeal in a removal proceeding must be considered and intelligent.³⁰

Removal proceedings are conducted pursuant to 8 C.F.R. § 1240.10.³¹ An immigration judge’s regulatory error also proves that the alien was improperly deprived of the opportunity for judicial review pursuant to § 1326(d)(2) because “an alien who is not made aware [of the] right to seek relief necessarily has no meaningful opportunity to appeal the fact that [the alien] was not advised of that right.”³²

IV. Fundamental Unfairness (8 U.S.C. § 1326(d)(3))

“[A] predicate removal order satisfies the condition of being ‘fundamentally unfair’ for purposes of § 1326(d)(3) when the deportation proceeding violated the alien’s due process rights and the alien suffered prejudice as a result.”³³

A. Due Process Violation

Title 8 C.F.R. § 1240.11(a)(2) instructs IJs conducting removal proceedings to “inform the alien

484 F.3d 439 (7th Cir. 2007)).

²⁵ See *United States v. Lopez-Vasquez*, 227 F.3d 476, 485 (5th Cir. 2000).

²⁶ *United States v. Bajaras-Alvarado*, 655 F.3d 1077, 1083, 1084–87 (9th Cir. 2011) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987)).

²⁷ *United States v. Martinez-Rocha*, 337 F.3d 566, 567, 569 (6th Cir. 2003) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985); also citing *United States v. Cruse*, No. 01-5874, 2003 WL 344337, at *5 (6th Cir. Feb. 7, 2003); also citing *United States v. Rangel de Aguilar*, 308 F.3d 1134, 1138–39 (10th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003)).

²⁸ 8 U.S.C. § 1326(d) (2012).

²⁹ *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1130–31 (9th Cir. 2013) (citing *United States v. Adame-Orozco*, 607 F.3d 647, 652 (10th Cir. 2010)).

³⁰ *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) (citing *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003)).

³¹ See 8 C.F.R. 1240.10 (2017).

³² *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (citing *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998)).

³³ *United States v. Arias-Ordenez*, 597 F.3d 972, 976 (9th Cir. 2010) (citing *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004)).

of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and [to] afford the alien an opportunity to make application during the hearing”³⁴ Consequently, the Ninth Circuit has said that “an alien in removal proceedings has a due process right to be informed of ‘his or her ability to apply for relief from removal.’”³⁵ ³⁶ This right is violated “when the IJ either fails to give the alien any information about the existence of relief for which the alien is ‘apparently eligible’ . . . or when the IJ erroneously tells the alien that no relief is possible.”³⁷

The Ninth Circuit “ha[s] interpreted ‘apparent eligibility’ to [exist] ‘where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief.’”³⁸

In defining the IJ’s duty to inform, we have focused on whether the factual circumstances in the record before the IJ suggest that an alien could be eligible for relief. In *Moran-Enriquez*, we explained that “IJs are not expected to be clairvoyant; the record before them must fairly raise the issue: Until the alien himself or some other person puts information before the judge that makes such eligibility apparent, this duty does not come into play.” 884 F.2d at 422 (internal quotation and alteration marks omitted). On this basis, we have concluded that where the record demonstrates, or at least implies, a factual basis for relief, the IJ’s duty is triggered. *Id.* at 422-23. . . .³⁹ On the other hand, the IJ is not required to advise an alien of possible relief when there is no factual basis for relief in the record.⁴⁰

Although the Second Circuit and the Ninth Circuit agree on the existence of a due process violation in the context of a failure to advise, other circuit courts disagree.⁴¹

Removals under programs that do not involve the immigration court are also subject to due process violation challenges. In *United States v. Ramos*, the defendant challenged his underlying removal resulting from the stipulated removal program.⁴² The Court concluded that Ramos’s due process rights were violated in the streamlined removal procedure, primarily through failure to ensure that he

³⁴ 8 C.F.R. § 1240.11(a)(2) (2017).

³⁵ *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013) (quoting *Ubaldo-Figueroa*, 364 F.3d at 1050).

³⁶ *Vidal-Mendoza*, 705 F.3d at 1015 (citing § 1240.11(a)(2)).

³⁷ *United States v. Gonzales-Flores*, 804 F.3d 920, 926–27 (9th Cir. 2015) (citing *United States v. Lopez-Velasquez*, 629 F.3d 894, 901 (9th Cir. 2010); and citing *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th Cir. 2004); and citing *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000); and citing *Arias-Ordenez*, 597 F.3d 972, 977 (9th Cir. 2010); and citing *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006); and citing *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004); also citing *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003)).

³⁸ *Lopez-Velasquez*, 629 F.3d at 896 (en banc) (quoting *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989)).

³⁹ *Id.* at 900 (quoting *Moran-Enriquez*, 884 F.2d at 422–23).

⁴⁰ *Id.* at 900 (citing *Valencia v. Mukasey*, 548 F.3d 1261, 1262–63 (9th Cir. 2008)).

⁴¹ *Id.* at 897 n.2 (citing as follows: “[s]ee *United States v. Copeland*, 376 F.3d 61, 70–73 (2d Cir. 2004) (holding that failure to advise alien of possible forms of relief may violate due process). *But see United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006) (stating that alien does not have constitutional right to be informed of eligibility for discretionary relief); *Bonhomre v. Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005) (same); *United States v. Arita-Campos*, 607 F.3d 487, 491 (7th Cir. 2010) (same); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (same); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) (same); see also *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (stating that alien’s eligibility for discretionary relief is not constitutionally protected interest); *Escudero-Corona v. INS*, 244 F.3d 608, 615 (8th Cir. 2001) (same); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000) (same).”

⁴² *United States v. Ramos*, 623 F.3d 672, 674 (9th Cir. 2010).

understood the rights he was giving up.⁴³ But the Ninth Circuit held the error was harmless because no plausible grounds existed on which Ramos might have been eligible for relief of removal.⁴⁴ The Ninth Circuit has addressed similar challenges to both expedited removals and administrative removals.⁴⁵ Where a prior removal order is premised on the commission of an aggravated felony, defendants who show that they were not previously convicted of an aggravated felony have established both that their due process rights were violated and that they suffered prejudice as a result.⁴⁶

B. Prejudice

If a defendant can demonstrate that the IJ fundamentally erred, then to meet his burden under § 1326(d)(3), the defendant must also show he suffered prejudice as a result of the error.⁴⁷ Not surprisingly, the circuit courts differ on what an alien must show in order to establish this requirement.

A majority of the circuits require the alien to show a “reasonable likelihood that, but for the errors complained of, he would not have been deported.”⁴⁸

The Ninth Circuit has adopted a less stringent standard, requiring the alien to “demonstrate ‘plausible grounds’ for relief from deportation.”⁴⁹ To establish prejudice, the alien must make a “plausible” showing that, absent the due process violation, the IJ would have granted the discretionary relief requested.⁵⁰ Determining whether an alien has made this showing is a two-step process. First, the Court must identify factors relevant to the IJ’s exercise of discretion as to the relief being sought.⁵¹ Second, the Court must determine whether, “in light of [these] factors . . . and based on the ‘unique circumstances of [the defendant’s] case, it [is] plausible (not merely conceivable) that the IJ would have exercised [] discretion in the [defendant’s] favor.”⁵² “[E]stablishing ‘plausibility’ requires more than establishing a mere ‘possibility.’”⁵³ “[T]he defendant bears the burden of proving prejudice under § 1326(d)(3).”⁵⁴

In assessing whether the alien carried this burden, the Court “focus[es] on whether aliens with similar circumstances received relief.”⁵⁵ “[T]he existence of a single case that is arguably on point means only that it is ‘possible’ or ‘conceivable’ that a similarly situated alien would be afforded voluntary departure. That is plainly insufficient”⁵⁶ Arguments that the defendant’s criminal record would have

⁴³ *Id.* at 683.

⁴⁴ *Id.* at 684.

⁴⁵ See *id.* at 675; *United States v. Garcia-Gonzalez*, 791 F.3d 1175, 1179 (9th Cir. 2015) (assuming due process violation because regulatory violation occurred in proceeding).

⁴⁶ See *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006); *United States v. Martinez*, 786 F.3d 1227, 1233 (9th Cir. 2015).

⁴⁷ *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1263 (9th Cir. 2013).

⁴⁸ *United States v. Aguirre-Tello*, 353 F.3d 1199, 1208–09 (10th Cir. 2004) (quoting *United States v. Calderon-Pena*, 339 F.3d 320, 324 (5th Cir. 2003); and citing *United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003)). See also *United States v. Loaisiga*, 104 F.3d 484, 487 (1st Cir. 1997); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995).

⁴⁹ *Rojas-Pedroza*, 716 F.3d at 1263 (quoting *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003)).

⁵⁰ *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011) (citing *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998)).

⁵¹ See *id.* at 1089, 1090–91.

⁵² See *id.* at 1089 (quoting *United States v. Corrales-Beltran*, 192 F.3d 1311, 1318 (9th Cir. 1999)).

⁵³ *Barajas-Alvarado*, 655 F.3d at 1089.

⁵⁴ *United States v. Valdez-Novoa*, 780 F.3d 906, 916 (9th Cir. 2015); see also *United States v. Gonzalez-Flores*, 804 F.3d 920, 927 (9th Cir. 2015).

⁵⁵ *Rojas-Pedroza*, 716 F.3d at 1263 (citing *Barajas-Alvarado*, 655 F.3d at 1091 n.17).

⁵⁶ *Valdez-Novoa*, 780 F.3d at 920–21 (citing *Barajas-Alvarado*, 655 F.3d at 1089 and *United States v.*

prevented the defendant from receiving discretionary relief have been successful in defeating claims of prejudice.⁵⁷

V. Conclusion

Collateral attacks on predicate removal orders are often the sole defense available to a violation of 8 U.S.C. § 1326. These motions should be resolved by the District Court prior to trial and outside the presence of the jury. As outlined above, a basic understanding of immigration law is essential to defending these challenges.

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[Cisneros-Resendiz](#), 656 F.3d 1015, 1018 (9th Cir. 2011)).

⁵⁷ See [Gonzalez-Valerio](#), 342 F.3d at 1056–57 (citing [Ayala-Chavez v. INS](#), 944 F.2d 638, 641 (9th Cir. 1991) (stating that defendant with “pattern of serious criminal activity” must demonstrate unusual or outstanding equities); [Edwards](#), 20 I & N Dec. 191, 196 (BIA 1990)).

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Combatting Transnational Smuggling Organizations: An Introductory Overview

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I. Introduction

International criminal travel networks present both national security and grave humanitarian concerns. Unlike traditional criminal organizations, these networks depend on often loosely connected international participants and facilitators, each playing a part in the overall scheme to smuggle migrants to, and into, the United States. Their structure can make it a challenge to identify all of the criminal participants, identify the full panoply of criminal activity, and disrupt and dismantle the criminal enterprise effectively.

Migrants who rely upon these criminal travel networks either seek a better life in the U.S. or may present significant national security concerns. Specifically, some migrants engage the services of these networks in order to escape economic or political hardship in their home countries. Ironically, they may face grave humanitarian concerns during the course of their journeys. Many endure highly dangerous situations, encounter corruption within the network itself (falling prey to kidnapping, extortion, and robbery), and risk violence and abuse, including rape and murder.

Alternatively, members of foreign terrorist organizations, radicalized individuals, and other criminals who seek entry into the United States may employ and exploit these networks because they provide a proven method for entry undetected. The vulnerability of our borders presents a serious national security concern. Consequently, dismantling or even disrupting these networks can be a significant deterrent to those seeking to use these networks to further their criminal enterprises.

This article will give an introductory overview of what these networks are and why they are a concern, outline the relevant statutes, identify the challenges of charging, and highlight some practical considerations to keep in mind.¹ This article also employs a case study to show how the operations work and how they can be prosecuted, including sources of evidence to consider. Lastly, the article will discuss some practical constitutional considerations in extraterritorial investigations, such as the application of the Fourth Amendment, foreign advice of rights, “joint ventures,” and securing custody of targets in foreign countries.

II. Overview

Transnational criminal activities and, specifically, human smuggling are nothing new. But over the years, the manner and technique have evolved and become more sophisticated, from employing

¹ Additional guidance can be found in the United States Attorneys’ Manual (USAM).

hawalas² to launder and facilitate the movement of money, to implementing the use of counterfeit and altered documents and visas. Transnational smuggling organizations that specialize in the movement of people have wide-ranging global impact on a multitude of levels: the use of fraudulent documents undermines international security; the means and routes of travel often pose a significant risk to the lives of those being moved; the inherent “underground” nature leaves the people being moved vulnerable to violent crimes, including kidnapping, rape, and murder; the manner of payment and movement of funds is generally intertwined with money laundering that, in turn, impacts economic growth and stability; and the susceptibility to penetration by criminals and terrorists, who may use the established routes and the attendant border vulnerabilities to gain entry into the United States, substantially impacts national security. While these networks often adapt to change, making them difficult to penetrate, they are not impervious. By employing focused investigation and coordination within countries and agencies, these networks not only can be disrupted but also can be dismantled.³ Moreover, with good investigation, evidence can be developed that will both lead to prosecution and be used to argue for enhanced penalties at sentencing.

III. Statutes

The primary statute for prosecuting alien smuggling is 18 U.S.C. § 1324. Within that statute, there are four specific acts under which an individual can be charged. There is some variability in the definition or required elements from district to district, and accordingly, it is important to be aware of the specific case law in the district in which the case will be filed.

A. Bringing Aliens to the United States at a Place Other Than a Designated Port of Entry—8 U.S.C. § 1324(a)(1)(A)(i)

This section provides that any person who knowingly brings an alien into the United States at a place other than a designated port of entry or places designated by the commissioner faces a fine or imprisonment up to ten years.⁴ Attempt, aiding and abetting, and conspiracy are also included in this section. It applies irrespective of where the alien enters or attempts to enter the United States. Moreover, the penalty for this charge can increase if, during and in relation to the offense, the offender causes serious bodily injury or places life in jeopardy. In those circumstances, the perpetrator can face a fine and imprisonment of up to twenty years. If the offender causes a death, the penalty increases to death, life, or a term of years. Because the aforementioned factors raise the statutory penalty, facts to support these enhancements need to be pleaded and proven.⁵ Additionally, if the case involves multiple aliens, this section can be charged per alien. Doing so would avoid unanimity issues.

² Hawalas are informal honor-based money brokerage systems operated by brokers who charge commissions to facilitate the transfer and payment of monies through instruction to a remote associate. For example, a person wanting to send \$100 to a family member in another country will give the money to the hawala. The hawaladar will give the sender a name and code to give to the family member. The hawaladar will then contact her partner in the destination country with payment instructions and the code. When the family member contacts the partner and provides the code, he receive the money. The transfer is paperless, can be completed in short order, and is accomplished without utilizing traditional banking methods.

³ In response to the adaptability, the DOJ, in conjunction with Homeland Security Investigations (HSI), has established a special program called the “Extraterritorial Criminal Travel Strike Force” (ECT). The ECT dedicates investigative, prosecutorial, and intelligence resources to specially selected cases involving national security or serious humanitarian concerns being investigated by HSI. If a case is selected, Human Rights and Special Prosecutions (HRSP) works with the agent to develop the case and then partners with U.S. Attorney’s Offices once venue is determined.

⁴ 8 U.S.C. § 1324(a)(1)(A)(i) (2012).

⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

B. Transporting Illegal Aliens—8 U.S.C. § 1324(a)(1)(A)(ii)

This section states that any person who transports or attempts to transport an alien, knowing or in reckless disregard of the fact that the alien is in the country unlawfully, faces a fine and up to five years in prison.⁶ If the transportation is for financial gain, the penalty increases to up to ten years in prison. If, during and related to the offense, the offender causes serious bodily injury or puts life in jeopardy, the penalty increases to a maximum of twenty years in prison. If death results during the transportation, the penalty increases to death, life, or imprisonment of a term of years. As is the case with a charge brought pursuant to the “bringing to” provision in the statute (8 U.S.C. § 1324(a)(2)), here also a prosecutor can elect to charge one count per alien.⁷ Additionally, pursuant to 18 U.S.C. § 3237, these cases can be prosecuted in any district in which the crime began, continued, or ended.⁸ It is important to keep in mind that “transportation” can include a range of acts, including moving a group to a vehicle for further transport. Unlike “bringing to,” the key to this section is that the transportation must occur within the United States.⁹ Common defenses to this section include claiming a lack of knowledge either of the person’s alienage or of her status and claiming that the perpetrator did not commit an “act in furtherance” of the illegal entry or stay. But in cases of transnational smuggling operations, evidence of payment, efforts to conceal, the relationship between the perpetrator and the organization, and conversely, the lack of relationship between the perpetrator and the alien can help to defeat those defenses.

C. Harboring Illegal Aliens—8 U.S.C. §1324(a)(1)(A)(iii)

This section provides that any person who “conceals, harbors, or shields from detection” an alien, or attempts to do so, with knowledge or in reckless disregard of the fact that the alien entered or remains in the United States unlawfully, faces a fine and up to five years in prison.¹⁰ If the act was done “for the purpose of commercial advantage or private financial gain,” the penalty increases to ten years in prison.¹¹ As is the case with “bringing to” and transporting, harboring can be charged per alien. The prosecutor is only required to prove one of the three acts: concealing, harboring, or shielding. Like transportation, this charge can be brought in the district where the crime began, continued, or ended. Common defenses to this charge include claiming a lack of knowledge or a lack of intent.

D. Encouraging Illegal Entry—8 U.S.C. § 1324(a)(1)(A)(iv) (“Encouraging and Inducing”)

Commonly charged with or alternatively to “bringing to,” the charge of encouraging and inducing an alien to enter does not require an actual entry; rather, it simply requires proof that the alien’s entry is or would be unlawful and that the perpetrator knew or acted with reckless disregard.¹²

The elements of this offense are as follows:

- The defendant “encourages or induces”
- An alien
- “[T]o come to, enter, or reside in the United States”

⁶ 8 U.S.C. § 1324(a)(1)(A)(ii) (2012).

⁷ *Id.* § 1324(a)(2).

⁸ 18 U.S.C. § 3237(a).

⁹ *United States v. Diaz*, 936 F.2d 786, 788 (5th Cir. 1991).

¹⁰ 8 U.S.C. § 1324(a)(1)(A)(iii) (2012).

¹¹ *Id.* § 1324(a)(1)(B)(i).

¹² *Id.* § 1324(a)(1)(A)(iv).

- “[K]nowing or in reckless disregard” that the alien's coming to, entering, or residing in the United States is illegal¹³

This charge is available as an alternative to the “bringing to” charge. The acts commonly associated with these networks (such as providing transportation or travel assistance on a leg of the journey to the United States, providing travel documents (forged, altered, etc.), or receiving payment in association with the smuggling venture) are classic examples of “encouraging” acts, provided the knowledge element can be proven. They serve to overcome the defendant’s most common defense—claiming lack of knowledge of the alien’s status or of the fact that the defendant was participating in an alien smuggling conspiracy.

E. Bringing Aliens to the United States—8 U.S.C. § 1324(a)(2)

This is the principal provision for prosecuting alien smuggling organizations because it applies irrespective of whether or not the alien is smuggled into a port of entry, includes the “for private financial gain” provisions, and has mandatory minimums.¹⁴

The elements of this offense are:

- The defendant brought or attempted to bring a person who was an alien to the United States¹⁵
- The defendant knew or had “reckless disregard of the fact that [the person was an alien who had] not received prior official authorization to come to, enter, or reside in the United States”¹⁶
- Prosecutors practicing in the Ninth Circuit should be mindful that the Ninth Circuit requires a third element for felony offenses under § 1324(a)(2)(B), that “the defendant acted with the intent to violate the United States immigration laws.”¹⁷

Similar to the offense in 8 U.S.C. § 1324(a)(1)(A)(i), this section carries a penalty of up to one year in prison for each alien transported. But if certain aggravating factors are established, the maximum penalty increases and mandatory minimums may also apply. Qualifying factors include whether the offense was committed with intent or reason to believe that the alien being brought in unlawfully will commit an offense against the United States or any State¹⁸ and whether the act was done for the purpose of commercial or private gain.¹⁹ Additionally, if either of the aforementioned factors are pled and proven, the minimum mandatory sentence increases to three years of incarceration for the first and second offenses, and five years for the third or subsequent offenses. Thus, convictions involving these factors are

¹³ *Id.*

¹⁴ *Id.* § 1324(a)(2).

¹⁵ Notably, courts in different jurisdictions have articulated some variability in the meaning of “bringing to” ranging from using hand signals to guide aliens into the United States to orchestrating travel, personally providing the tickets, accompanying the alien to the United States, and then waiting at the airport. While the legislative history of the statute suggests Congress intended to broaden the scope of the statute, both circuit and district courts have favored an ordinary meaning interpretation. The Fifth and Sixth Circuits adopted an “active conduct” requirement. *United States v. McFarland*, 19 F.2d 805, 806 (6th Cir. 1927); *see also United States v. Washington*, 471 F.2d 402, 405 (5th Cir. 1973); *United States v. Garcia-Paulin*, 627 F.3d 127, 132 (5th Cir. 2010). However, the Ninth Circuit has applied a broader interpretation. *See United States v. Yoshida*, 303 F.3d 1145, 1151–52 (9th Cir. 2002); *see also United States v. Gonzalez-Torres*, 309 F.3d 594, 600 (9th Cir. 2001). Contrast with the D.C. Circuit, which has adopted an “ordinary meaning” interpretation but applied a more narrow “accompaniment” requirement, holding that merely providing a ticket for travel and taking a person to the airport is not enough for “bringing to.” *United States v. Assadi*, 223 F. Supp. 2d 208, 210–11 (D.D.C. 2006).

¹⁶ § 1324(a)(2).

¹⁷ *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999).

¹⁸ 8 U.S.C. § 1324(a)(2)(B)(i).

¹⁹ 8 U.S.C. § 1324(a)(2)(B)(ii).

“priorable” in that the penalty increases for subsequent convictions for the same conduct. This is true even where the counts are all charged in the same indictment.²⁰

Another useful option for prosecutors to consider is to charge conspiracy to commit any one of the aforementioned acts (bringing to, transporting, harboring, or encouraging)²¹ or aiding and abetting.²²

F. Additional Charges to Consider

In addition to the § 1324 offenses, charges not specific to alien smuggling may also prove useful in prosecuting transnational smuggling organizations. Depending on the facts of the case, prosecutors may consider charging the following offenses:

Conspiracy

8 U.S.C. § 1324(a)(1)(A)(v)(I)—Conspiracy in Bringing Aliens to the United States²³

Aiding and Abetting

8 U.S.C. § 1324(a)(1)(A)(v)(II)—Aiding and Abetting in Bringing Aliens to the United States²⁴

Passport Fraud

18 U.S.C. § 1542—False Statement in Application and Use of Passport²⁵

18 U.S.C. § 1543—Forgery or False Use of Passport²⁶

Fraud and Misuse of Visas, Permits, and Other Documents

18 U.S.C. § 1546—Fraud and Misuse of Visas, Permits, and Other Documents²⁷

Citizenship and Naturalization Violations

18 U.S.C. § 911—False Claim to Citizenship²⁸

18 U.S.C. § 1425—Unlawful Procurement of Citizenship or Naturalization (Criminal)²⁹

8 U.S.C. § 1451—Illegal Procurement of Citizenship (Civil)³⁰

18 U.S.C. § 1015—Fraud and False Statements Regarding Naturalization³¹

Marriage Fraud

8 U.S.C. § 1325(c)—Improper Entry of Alien (Marriage Fraud)³²

Other charges, such as False Statements and Papers, Material Support (18 U.S.C. § 2339(a)),³³ Hostage Taking (18 U.S.C. § 1203),³⁴ Kidnapping (18 U.S.C. § 1201),³⁵ Extortion (18 U.S.C. § 875),³⁶

²⁰ *United States v. Gonzalez-Torres*, 309 F.3d 594, 601–02 (9th Cir. 2002); *United States v. Yeh*, 278 F.3d 9, 16 (D.C. Cir. 2002); *United States v. Ortega-Torres*, 174 F.3d 1199, 1201–02 (11th Cir. 1999).

²¹ *Id.* § 1324(a)(1)(A)(v)(I).

²² *Id.* § 1324(a)(1)(A)(v)(II).

²³ 8 U.S.C. § 1324(a)(1)(A)(v)(I) (2012).

²⁴ *Id.* § 1324(a)(1)(A)(v)(II).

²⁵ 18 U.S.C. § 1542 (2012).

²⁶ *Id.* § 1543.

²⁷ *Id.* § 1546.

²⁸ *Id.* § 911.

²⁹ *Id.* § 1425.

³⁰ 8 U.S.C. § 1451 (2012).

³¹ 18 U.S.C. § 1015 (2012).

³² 8 U.S.C. § 1325(c) (2012).

³³ 18 U.S.C. § 2339(a) (2012).

³⁴ *Id.* § 1203.

³⁵ *Id.* § 1201.

³⁶ *Id.* § 875.

Ransom (18 U.S.C. §§ 875–877),³⁷ weapons charges, Mail and Wire Fraud, Personation of a U.S. Citizen, Money Laundering, Identity Theft, and Trafficking, may also be applicable.

IV. Challenges of Charging

There are a number of challenges to investigating and prosecuting transnational smuggling organizations, not the least of which is their unique structure. First, these “organizations” are difficult to prosecute because they do not have a traditional “closed system” structure—these operations are more commonly composed of loose international alliances involving facilitators. Even if working in concert, they may not necessarily know each other or be in the same country. Also, the downstream infrastructure is not necessarily composed of components of one organization. Rather, it tends to be a network of freelance and independent contractors consisting of recruiters, money collectors, document providers, travel agencies, transporters, and in some cases, corrupt foreign officials (including law enforcement or government employees), who may also happen to be working together on a repeated basis. Consequently, evidence is often outside the United States, sometimes in multiple countries, a situation that raises many legal and potentially diplomatic complexities to address.

Next, some alien smuggling networks operate on a “pay-as-you-go” system; others offer “white glove” service with a payment due upfront, all arrangements made and planned for the alien during the course of travel, and sometimes a final payment due after arrival. Both scenarios present challenges in identifying the movement of funds between the migrant (or migrant’s family) and the smuggler. These challenges include the following: identifying the relevant financial institution, if any, being used by the parties; obtaining relevant account information; tracking payments en route; and generally identifying those transactions that corroborate the alien’s statement.

Additionally, because some alien smuggling organizations are so well-informed and keenly aware of the current policy trends regarding immigration, they may also coach the alien on what to do upon arrival at the border. Depending on the alien’s nationality, the alien may be instructed to claim asylum based on membership in a particular political or religious group, regardless of whether the alien is truly affiliated or has a proper asylum claim.

Finally, investigations of this kind often require the assistance of foreign investigative agencies and may require the use of Mutual Legal Assistance Treaties (MLAT) to obtain documents and items of evidentiary value. In such situations, the Justice Department’s Office of International Affairs (OIA) is available to assist and provide guidance. But requesting foreign assistance of foreign investigative agencies, in turn, presents an additional challenge when trying to assess the viability of a criminal prosecution—a challenge that may not be clear at the outset and may be hampered by difficulties in securing foreign assistance. For example, the current political climate may change such that the foreign agency may no longer be willing or able to assist.

The foregoing factors may influence a prosecutor’s decision whether to charge “bringing to” and “encouraging or inducing” counts together or in the alternative. Although “bringing to” carries mandatory minimum penalties and a higher statutory maximum, in some cases, it may be easier to prove “encouraging or inducing.” The mens rea for “encouraging” is acting knowingly or in reckless disregard of the fact that the alien’s entry is or will be unlawful, whereas “bringing to” requires acting with knowledge or reckless disregard that the alien had not received prior official authorization to come to, enter, or reside in the United States, and in the Ninth Circuit, the additional element of intent to violate the United States immigration laws.³⁸ Moreover, given the varying interpretations of what constitutes “bringing to,” there may be cases where it is strategically advisable to file both charges.

³⁷ *Id.* §§ 875–877.

³⁸ *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999).

As a final note, in the case of transnational smuggling organizations, more often than not, one or more of the targets may never have set foot in the United States. Consequently, it may be unclear where venue will lie.³⁹

V. Practical Considerations

Quite often the members of the alien smuggling organization will communicate, both with the aliens and with each other, through trending social media applications such as “WhatsApp” and “Viber.” Members of the organization use these applications to ask questions, give instructions, and communicate during the aliens’ travels. Such applications are also used to coordinate smuggling fee payments, to communicate changes in smuggling routes, to provide notifications of successful connections with other members of the organization, and to send photographs of the aliens to the different facilitators along the aliens’ routes. Facilitators use the photographs to immediately identify their alien “clients” when the alien “clients” exit an aircraft, vehicle, or boat. In turn, the facilitators show the photographs to the alien to prove they are the correct “contact” and to assist the alien in the next leg of the journey. These applications are also used to continually communicate with the aliens’ family members or sponsors, in part to receive additional funds to further the aliens’ travels during their journey. Because these applications encrypt the communications, it makes evidence difficult to obtain. However, even a single known telephone number being used in conjunction with such applications may yield significant evidentiary information because pen registers can assist to determine other phone numbers associated with the network and to identify targets.⁴⁰

Transnational smuggling organizations also employ Facebook, both as a means of communications and as a form of advertisement. In many instances, the smugglers within a network will “friend” each other on Facebook. Additionally, smugglers will “friend” the aliens they are smuggling. They then use Facebook to communicate and provide directions along the journey, either through private messaging or through Facebook phone calls. This allows the smuggler to build a “client list.” When courting new clients, such a list serves to assuage concerns about legitimacy and reliability or to prove a smuggler’s ability to move people. For instance, to prove their ability to move people, smugglers who “specialize” in moving Cubans may post photos on their Facebook page of themselves and other Cubans they have smuggled. At times, aliens may even recognize others smuggled by the organization, thus establishing a degree of trust. Many times, smugglers will ask the aliens to wire funds during the course

³⁹ Generally, venue for wholly extraterritorial cases is determined by [18 U.S.C. § 3238](#). However, depending on the facts of the case, [18 U.S.C. § 3237](#) may apply. The second paragraph in [18 U.S.C. § 3237\(a\)](#) provides the following:

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense, and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

[18 U.S.C. § 3237\(a\)](#) (2012).

Whereas [18 U.S.C. § 3238](#), provides, “The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought . . .” *Id.* [§ 3238](#). If there is no last known address in the United States, as may be the case with a foreign national, [18 U.S.C. § 3238](#) further provides that “the indictment or information may be filed in the District of Columbia.” *Id.*

⁴⁰ Jurisprudence regarding electronic evidence is constantly changing. When considering employing any of these tools, it is good practice to contact the DOJ’s Computer Crime and Intellectual Property Section (CCIPS) for the most current legal authority and go-bys.

of their movement. In order to contact family and provide directions regarding the wire transfer, the aliens will use Facebook to communicate.

Consequently, obtaining Facebook records for the smuggler, the victims, family members, and any other individuals associated with the network will often result in corroborative evidence. Moreover, given that these smugglers operate across a number of foreign countries, Facebook records can provide information that can lead to, or assist in, determining an offender's location. Those records may also provide information leading to the discovery and identification of other aliens already in the United States who may be useful material witnesses. Such witnesses could provide evidence that is key to establishing the smuggler's role, proving crimes such as conspiracy, wire fraud, and financial fraud, or supporting sentencing factors, such as the number of aliens moved.

Financial records are also a good prosecutorial tool. In some instances, aliens may arrive with a bank account number and directions to provide payment once in the United States. Items such as Western Union records can corroborate material witness statements as well as reveal the identities of witnesses or targets. Bank records can also provide corroborative evidence for a material witness statement or provide circumstantial evidence of "knowledge" of the witness's participation in an alien smuggling conspiracy. Records can be traced to provide identification, be used to prove money laundering, and be used to freeze bank accounts.⁴¹

Another complexity arises when a member of the alien smuggling organization is a foreign government official. The inability to secure the person for prosecution is just one of many challenges. However, in those instances when prosecution in the United States may not be possible, a foreign prosecution may be an alternative. For example, if an individual is a foreign border official working at the airport, the local government may elect to prosecute the individual. A prosecution may also have the unintended benefit of vetting the unit in which the official is working because, if there is one corrupt foreign official, there may be others.

And what if a case involves aliens who pose a national security concern?⁴² Classified information may be obtained by investigators or prosecutors during the course of the investigation. For example, cases involving joint investigations by the Federal Bureau of Investigation and Homeland Security Investigations are one example of a situation where such classified information could be implicated. If a prosecutor has reason to believe classified information may be associated with a case, she should consult the appropriate Discovery Officer and determine whether a "prudential search"⁴³ should be done and, if so, refer to DOJ policy on the matter and the attendant process.⁴⁴

Additional considerations that arise in these types of cases include how to obtain foreign evidence. As transnational smuggling cases routinely involve foreign investigations, it is not uncommon that a prosecutor will need to obtain evidence and gain access to witnesses abroad. Although information may be obtained informally by domestic law enforcement from their foreign counterparts during the pendency of an investigation, once the investigation is complete and a prosecution results, there will be a need for formal, authenticated documents. Likewise, if there is a need for witnesses to be interviewed or to testify (such as foreign police officers or other aliens connected to the smuggling operation), a formal

⁴¹ To the extent possible, prosecutors should contact the Money Laundering and Asset Recover Section (MLARS) to determine what options might be available in this regard.

⁴² This issue may arise in a number of other types of cases, including drug trafficking, human trafficking, and money laundering.

⁴³ A "prudential search" is a search of the files of the intelligence community and is undertaken when the prosecutor or prosecution team has specific reason to believe that the files may contain classified information that could affect the government's decisions regarding charging or that may be required to meet a prosecutor's discovery obligations.

⁴⁴ Further specific information on this topic, including DOJ policy and process, can be found in USAM § 2052. [U.S. DEP'T OF JUSTICE, USAM, CRIMINAL RESOURCE MANUAL § 2052 \(2002\)](#).

foreign assistance request to the foreign country may be required. Those requests are made through MLATs and multilateral conventions. A request must be approved and submitted through the OIA, the designated central authority. It is DOJ policy and procedure to consult with OIA in instances where such foreign assistance is requested.⁴⁵ OIA can provide guidance and assist with drafting documents. Once the draft has been finalized, OIA will assist in securing the required clearance to submit the request to the foreign country. Bear in mind the process may take several months or longer to complete, and thus it has the potential to impact court proceedings. Prosecutors should consult the United States Attorneys' Manual (USAM) and contact OIA early in their case to discuss any potential requests and any legal issues that could arise.

VI. Case Illustration—East-African Smuggling Network

To give some context about how transnational smuggling organizations operate, consider the following case illustration, which involved an East-African smuggling network. This sophisticated criminal organization employed two alternative routes to smuggle aliens to the United States. The first originated in an East-African country such as Ethiopia, Eritrea, Sudan, or Kenya. From there, the alien would fly to South Africa, then on to Brazil, then to Guatemala, then to Mexico, and finally land in the United States. The second route also originated in East Africa, but the alien would instead fly to the United Arab Emirates, then to Russia, then to Cuba, then to Nicaragua, then to Guatemala, then to Mexico, and ultimately arrive in the United States. These methods and the aliens themselves raised significant concern given the fact that the organization was smuggling from countries that present national security concerns.

This network is a classic example of a transnational smuggling organization. It involved people located in all parts of the world, each with a different role to play. The head of the smuggling organization was based in Mexico City, while his co-conspirator, the document provider, was based in Belize City. The organization also utilized a corrupt embassy employee in Brazil and recruiters based in Africa and in South and Central America. Bus drivers, guides, and money collectors operated in Mexico. The network moved East Africans into the United States, often with fraudulent Mexican visas. The aliens were transported through the desert in the baggage compartments of vehicles and through waterways in flotation devices—facts which reflect a “substantial risk of death or bodily injury.” As part of the process, the head smuggler would e-mail instructions to the aliens and direct them to send their passports to Belize City. Thereafter, a co-conspirator in Belize City would obtain fraudulent Mexican visas with the assistance of the corrupt embassy employee in Belize. The co-conspirator would then insert the visas into the passports and send them back via commercial parcel shipping companies such as FedEx and DHL. The alien would then cross the border from Guatemala into Mexico without either smuggler having to accompany him.

In this case, email searches provided a substantial amount of evidence. Search warrants executed on the email accounts for both the head smuggler and the co-conspirator yielded the identification of individual participants, money transfers, and even copies of the fraudulently obtained travel documents facilitating the entries into Mexico. The emails were also crucial pieces of evidence establishing conspiracy. One email between the two smugglers is particularly illustrative because it discusses the price to charge the alien for a visa and the need for payment before delivery.

Documents also were seized as part of the investigation. U.S. Customs and Border Patrol (CBP) has the general authority to search “all persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof,” subject to some limitations.⁴⁶ This applies to all persons entering the United States, including U.S. citizens, with the exception of individuals with

⁴⁵ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.000.

⁴⁶ 19 C.F.R. § 162.6 (2017); *see also id.* §§ 482, 1467, 1496, 1581, 1582; 8 U.S.C. § 1357 (2012).

foreign diplomatic status. Under 19 C.F.R. § 128.1,⁴⁷ CBP has the authority⁴⁸ to search cargo that is moved by companies such as FedEx and DHL. This authority allows for seizure of documents and is an important tool for obtaining the documents sent by transnational smuggling operations. Once those documents are in law enforcement custody, they can be forensically analyzed to determine their authenticity. They can be processed for latent prints, which can subsequently be used for determining identification of individuals associated with the documents. The packages can also be tracked and used to exploit data associated with the intercepted parcels for intelligence and operational value.

Further, the DOJ coordinated its investigative efforts with the Mexican government by working with local law enforcement counterparts. As a result of this cooperation, the lead smuggler, based in Mexico City, was arrested and extradited to the United States for prosecution shortly after that collaboration. At the time of the arrest, search warrants were executed for the smuggler's home and stash houses. The United States government shared evidence recovered from the Mexico searches with the Belize government, leading to the arrest of the co-conspirator in Belize. In fact, the evidence recovered from the search established that the co-conspirator had obtained legal permanent status in Belize through marriage fraud. With that evidence, the government of Belize was able to revoke his immigration status. The United States obtained an arrest warrant for the partner smuggler, and Belize arrested and expelled him to the United States.

Both smugglers were indicted on twenty-eight counts, including conspiracy and bringing in for "commercial advantage or private financial gain." The lead smuggler admitted to facts which allowed for sentencing enhancements, including that he had smuggled twenty-five to ninety-nine aliens⁴⁹ and had acted as a manager of the smuggling organization;⁵⁰ he was sentenced to sixty months in prison. His co-conspirator (Belize-based document handler) cooperated and received a departure, resulting in a sentence of thirty months in prison.

The arrests in this case also led to spin-off investigations in the United States, Mexico, Guatemala, Belize, South Africa, East Africa, and the United Arab Emirates, thereby further undermining and effectively disrupting the operations of the transnational smuggling organization.

VII. Sentencing Enhancements and Guidelines to Consider

Complex alien smuggling cases often turn upon sentencing enhancements to obtain meaningful sentences. As noted earlier, an enhancement is routinely sought by the government for instances in which the smuggler's conduct posed a substantial risk of death or serious bodily injury.⁵¹ However, there are a number of other significant sentencing enhancements available when prosecuting alien smuggling cases.

For example, additional statutory enhancements under 8 U.S.C. § 1324(a)(4) provide for an increase in the mandatory maximum penalty to ten years in prison when the following occurs: any

⁴⁷ 19 C.F.R. § 128.1 (2017).

⁴⁸ In some investigations, HSI will work in conjunction with CBP to use this regulation in facilitating border searches of a target or witness's phone or bags.

⁴⁹ Pursuant to the United States Sentencing Commission Guidelines (U.S.S.G.), a three-level increase would be added for six to twenty-four aliens, a six-level increase would be added for twenty-five to ninety-nine aliens, and a nine-level increase would be added for one hundred or more aliens. [U.S. SENTENCING GUIDELINES MANUAL § 2L1.1\(b\)\(2\) \(U.S. SENTENCING COMM'N 2016\) \[hereinafter U.S.S.G.\]](#).

⁵⁰ A four-level increase would be added for an aggravated role in a criminal activity pursuant to [U.S.S.G. § 3B1.1\(a\)](#); acting as a manager or supervisor of the smuggling organization would constitute an "aggravated role."

⁵¹ Pursuant to the U.S.S.G., a two-level increase would be added to the offense where it intentionally or recklessly created a substantial risk of death or serious bodily injury to another person per [U.S.S.G. § 2L1.1\(b\)\(6\)](#). A 10-level increase would be added for death per [U.S.S.G. § 2L1.1\(b\)\(7\)\(D\)](#). Moreover, if a death resulted, [U.S.S.G. § 2L1.1\(c\)\(1\)](#) requires cross reference to [U.S.S.G. § 2A1.1](#) and that the greater resulting offense level be applied.

smuggling offense was done as part of an ongoing criminal organization or enterprise;⁵² the aliens were transported in groups of ten or more;⁵³ the aliens were transported in a way that endangered their lives;⁵⁴ or the aliens presented a life-threatening health risk to the United States.⁵⁵

The U.S.S.G. also sets forth in detail a number of provisions that can be applied to increase the sentencing range. Some of those provisions are discussed below.

A. Number of Aliens

First, based upon the number of unlawful aliens smuggled or harbored, the government may seek to increase an offender's guideline range up to nine levels. For example, if the offense involved six to twenty-four aliens, three levels should be added to the offender's base sentencing guideline range; for twenty-five to ninety-nine aliens, six levels should be added; and if one hundred or more aliens are at issue, nine levels should be added.⁵⁶ If the offense involves substantially more than one hundred aliens, an additional upward departure may be appropriate.⁵⁷ Note, the meaning of "substantially more" varies with each circuit; therefore, additional research should be conducted within the applicable jurisdiction.⁵⁸

B. Prior Felony Immigration Conviction

If the defendant has a prior conviction for a felony immigration and naturalization offense, an increase by two levels may be applied.⁵⁹ If the defendant has two or more convictions for felony immigration and naturalization offenses and each such conviction arises out of a separate prosecution, an increase of four levels may be applied.⁶⁰

C. Offense Involving Minors

The U.S.S.G. calls for an increase of four offense levels "if the offense involved the smuggling, transporting, or harboring of a minor^[61] who was unaccompanied by the minor's parent,^[62] adult relative, or legal guardian."⁶³

⁵² 8 U.S.C. § 1324 (a)(4)(A) (2012).

⁵³ *Id.* § 1324 (a)(4)(B).

⁵⁴ *Id.* § 1324 (a)(4)(C)(i).

⁵⁵ *Id.* § 1324 (a)(4)(C)(ii).

⁵⁶ U.S.S.G. § 2L1.1(b)(2)(A)–(C).

⁵⁷ U.S.S.G. § 2L1.1, cmt. n.7(C).

⁵⁸ For example, the Eighth Circuit in *United States v. Yu* did not say what number would amount to "substantially more" than one hundred aliens but held that one thousand aliens qualifies as "substantially more" than one hundred aliens. *United States v. Yu*, 484 F.3d 979, 987 (8th Cir. 2007). The Second Circuit in *United States v. Moe* held that three hundred aliens is "substantially more" than one hundred aliens. *United States v. Moe*, 65 F.3d 245, 251 (2d Cir. 1995). The Ninth Circuit in *United States v. Nagra* held that four hundred aliens is "substantially more" than one hundred aliens. *United States v. Nagra*, 147 F.3d 875, 886 (9th Cir. 1998).

⁵⁹ An "immigration and naturalization offense" is defined by any offense covered by U.S.S.G. Chapter Two, 2L1.1 Commentary, Definitions. U.S.S.G. § 2L1.1 cmt. n.1.

⁶⁰ U.S.S.G. § 2L1.1(b)(3).

⁶¹ A "minor" is any individual under the age of 18. U.S.S.G. § 2L1.1 cmt. n.1.

⁶² A parent is a natural mother or father, a stepmother or stepfather, or an adoptive mother or father. U.S.S.G. § 2L1.1 cmt. n.1.

⁶³ U.S.S.G. § 2L1.1(b)(4).

D. Use or Possession of a Firearm and Dangerous Weapon

If a firearm was discharged, an increase of six levels can be added; however, if the resulting offense level is lower than level twenty-two, the increase goes to level twenty-two.⁶⁴ If a dangerous weapon (including a firearm) was brandished or otherwise used, an increase of four levels can be added, but if the resulting offense level is less than twenty, the increase defaults to level twenty.⁶⁵ Of note, “brandishing a weapon” means that all or part of the weapon was displayed or that the presence of the weapon was otherwise made known to another person with the purpose of intimidating that person, regardless if the weapon is directly visible to that person. In other words, the weapon need not be visible, but it must be present for the upward adjustment to apply.⁶⁶ If a dangerous weapon (including a firearm) was possessed, an increase by two levels can be added, but if the resulting offense level is less than level eighteen, it increases to level eighteen.⁶⁷

E. Death or Serious Bodily Injury

This sentencing factor can apply to a number of factual scenarios and can have serious impact on the sentencing calculation. Prosecutors should keep in mind the breadth of conduct that qualifies under this provision and look for facts in the investigation that establish this basis.

If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury⁶⁸ to another person, increase by two levels, but if the resulting offense level is less than level eighteen, increase to level eighteen.⁶⁹ The application notes provide that, for purposes of subsection (b)(6), reckless conduct may involve a “wide variety of conduct,” such as the following:

[T]ransporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.⁷⁰

Likewise, levels increase as the severity of the bodily injury⁷¹ increases. If any person sustained a bodily injury, add two levels; serious bodily injury, add four levels; permanent or life-threatening bodily injury, add six levels;⁷² or death, add ten levels.⁷³ In determining the offense characteristics for upward adjustments, “all harm that resulted” from “all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity” should be taken into account.⁷⁴ A “jointly

⁶⁴ U.S.S.G. § 2L1.1(b)(5)(A).

⁶⁵ U.S.S.G. § 2L1.1(b)(5)(B).

⁶⁶ U.S.S.G. § 1B1.1 cmt. n.1(C).

⁶⁷ U.S.S.G. § 2L1.1(b)(5)(C).

⁶⁸ “Serious bodily injury” is an injury involving extreme physical pain or the extended impairment of a bodily function, or requiring medical intervention, such as surgery, hospitalization, or physical rehab. If the offense involved criminal sexual abuse or any similar offense, “serious bodily injury” has occurred. U.S.S.G. § 1B1.1 cmt. n.1(L).

⁶⁹ U.S.S.G. § 2L1.1(b)(6).

⁷⁰ U.S.S.G. § 2L1.1 cmt. n.3.

⁷¹ “Bodily injury” means any significant injury, such as an injury that is painful and obvious or one for which medical attention ordinarily would be sought. U.S.S.G. § 1B1.1 cmt. n.1(B).

⁷² “Permanent or life-threatening bodily injury” includes injury that involves a substantial risk of death, loss or substantial impairment of a bodily function that will likely be permanent, or a permanent disfigurement. U.S.S.G. § 1B1.1 cmt. n.1(J).

⁷³ U.S.S.G. § 2L1.1(b)(7).

⁷⁴ U.S.S.G. § 1B1.3(a)(1)(B), (a)(3).

undertaken criminal activity” is “a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others” and does not require that the offense be charged as a conspiracy.⁷⁵

It is important to note that the Sentencing Guidelines provide separate enhancements for endangerment⁷⁶ and actual injury,⁷⁷ even if the same conduct supports each of the enhancements.⁷⁸ Applying both enhancements is not considered “double counting” in a case where aliens were subjected to a substantial risk of death and some suffered serious bodily injury while others died.⁷⁹

F. Detention of an Alien

Another important sentencing factor to consider is whether an alien was detained and, if so, the circumstances surrounding detention. Depending on the situation, the increase could be two to six, as well as an upward departure. If an alien was “involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, an increase of 2 levels would be added; however, if the resulting offense level is less than level 18, the increase defaults to level 18.”⁸⁰ Additionally, if “(i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under § 3B1.1 (Aggravating Role),^[81] increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.”⁸²

G. Role in the Offense

Not unlike traditional organized criminal organizations, transnational smuggling organizations are composed of members with different levels of participation. Depending on an individual’s role and culpability, additional levels may be added. Adjustments are available for an aggravating role,⁸³ mitigating role,⁸⁴ abuse of position of trust or use of a special skill,⁸⁵ using a minor to commit a crime,⁸⁶ and use of body armor in drug trafficking crimes and crimes of violence.⁸⁷

If a defendant’s role in the offense involves decision-making in the “when, where, or how” of the alien-smuggling operation, she may be considered an “organizer” or “leader” and receive an upward

⁷⁵ *Id.*

⁷⁶ U.S.S.G. § 2L1.1(b)(6).

⁷⁷ U.S.S.G. § 2L1.1(b)(7).

⁷⁸ *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001).

⁷⁹ *United States v. Cardena-Garcia*, 362 F.3d 663, 667 (10th Cir. 2004) (holding no double counting because first enhancement (conduct-based) did not overlap second enhancement (outcome-based) and each enhancement independently served different purpose).

⁸⁰ U.S.S.G. § 2L1.1(b)(8)(A).

⁸¹ U.S.S.G. § 3B1.1 says the following:

“Based on the defendant’s role in the offense, increase the offense level as follows: (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.”

U.S.S.G. § 3B1.1 (Aggravating Role).

⁸² U.S.S.G. § 2L1.1(b)(8)(B).

⁸³ U.S.S.G. § 3B1.1.

⁸⁴ U.S.S.G. § 3B1.2.

⁸⁵ U.S.S.G. § 3B1.3.

⁸⁶ U.S.S.G. § 3B1.4.

⁸⁷ U.S.S.G. § 3B1.5.

departure in her sentence.⁸⁸ To be considered an “organizer,” a defendant need not be the actual leader of the operation but could just exercise some responsibility over others.⁸⁹ A sentence enhancement is also appropriate when a defendant did not organize, lead, manage, or supervise, but did “exercise[] management responsibility over the property, assets, or activities of a criminal organization.”⁹⁰

H. Vulnerable Victim

Facts that show the unique nature of the victim’s vulnerabilities can result in the application of additional enhancement levels. For the vulnerable victim enhancement to apply in the alien smuggling context, the defendant must take advantage of a characteristic of the victim “such that the offense demonstrated the ‘extra measure of criminal depravity which § 3A1.1 intends to more severely punish.’”⁹¹ An alien’s illegal status alone is not a factor that can be used to apply the vulnerable victim enhancement because the alien’s illegal status is the prerequisite to a crime of alien smuggling.⁹² Nonetheless, the circumstances of a particular case may actually be appropriate for an increase in sentencing levels under this category if the alien’s illegal status reveals additional vulnerabilities. For example, in *United States v. Dock*,⁹³ the court applied a four-level enhancement⁹⁴ based on “victim vulnerability”⁹⁵ because two aliens died when they were transported by the smugglers in a crowded, unventilated trailer in extreme temperatures. The Court applied the enhancement because the victims were dependent upon the smugglers. The Court stated, “[T]he aliens were desperate to the point that they had little control over their own fate and were at the mercy of those whom they had entrusted their passage”⁹⁶ Likewise, in *United States v. Sierra-Velasquez*, the Ninth Circuit upheld a two-level enhancement for victim vulnerability⁹⁷ in a conspiracy and hostage-taking case in which the smugglers held the alien hostage and made a ransom demand.⁹⁸ The Court affirmed the enhancement even though the money demanded was already owed to the defendant.⁹⁹ In upholding the district court’s two-level increase, the Ninth Circuit focused on the fact that “aliens who want to enter this country illegally and are dependent on their smugglers for entry are more vulnerable than other categories of persons who may be held hostage for ransom.”¹⁰⁰ But an attempt to increase a defendant’s offense level under the vulnerable victim enhancement based solely on the alien’s immigration status is “impermissible double counting because the guidelines did not intend for the vulnerable-victim enhancement to apply ‘if the factor that makes the person a vulnerable victim is incorporated in the offense guideline.’”¹⁰¹

⁸⁸ U.S.S.G. § 3B1.1.

⁸⁹ *United States v. Tejada-Beltran*, 50 F.3d 105, 112 (1st Cir. 1995).

⁹⁰ U.S.S.G. § 3B1.1, cmt. n.2.

⁹¹ *United States v. Angeles-Mendoza*, 407 F.3d 742, 748 (5th Cir. 2005).

⁹² *United States v. Dock*, 293 F. Supp. 2d 704, 713–14 (E.D. Texas 2003), *judgment vacated and remanded on other grounds*, 125 U.S. 2920 (2005).

⁹³ *Id.*

⁹⁴ U.S.S.G. § 3A1.1(b)(1)–(2).

⁹⁵ A “vulnerable victim” is defined as a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable and (B) “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” U.S.S.G. § 3A1.1 cmt. n.2.

⁹⁶ *Dock*, 293 F. Supp. 2d at 713–14.

⁹⁷ U.S.S.G. § 3A1.1.

⁹⁸ *United States v. Sierra-Velasquez*, 310 F.3d 1217, 1220 (9th Cir. 2002) (discussing U.S.S.G. § 2A4.1(b)(1)).

⁹⁹ *Id.* at 1219–20, 1221.

¹⁰⁰ *Id.* at 1220.

¹⁰¹ *United States v. De Oliveira*, 623 F.3d 593, 598 (8th Cir. 2010) (quoting U.S.S.G. § 3A1.1 cmt. n.2; also citing *United States v. Rohwedder*, 243 F.3d 423, 426–27 (8th Cir. 2001)).

I. Upward Departures

In addition to increases in levels, some facts may warrant an upward departure.¹⁰² Some common factual scenarios include where “the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior,” “the defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds,” or “the offense involved substantially more than 100 aliens.”¹⁰³ Additionally, courts have held that an upward departure is warranted if the smuggled aliens faced the likely prospect of paying off their smuggling fees “through years of labor under circumstances fairly characterized as involuntary servitude.”¹⁰⁴

VIII. Constitutional Considerations

When working on a case involving a transnational smuggling organization, it is important to keep in mind that courts have held that the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution may apply extraterritorially under certain circumstances.

A. Fourth Amendment

The Fourth Amendment applies abroad only to foreign searches, seizures, and electronic surveillance involving U.S. citizens and foreign nationals with voluntary attachments¹⁰⁵ to the United States. It does not apply to searches, seizures, or surveillance conducted by foreign law enforcement authorities. Evidence obtained by foreign law enforcement will generally be admissible in court except where its conduct “shocks the conscience.” What would shock the conscience has never been specifically defined and has, in fact, been left to the discretion of the courts to decide based upon the individual facts of a case. Prosecutors should assume the Fourth Amendment applies if the subject has had voluntary attachments to the United States. Agents should advise prosecutors of any prospective search so that they can discuss whether or how the agents should participate. Moreover, participating U.S. agents should be advised to take steps to be present for any foreign law enforcement searches. They should document the process by noting who was present, who did what, what, if any, evidence was found, and where it was found; they should also keep a record of the foreign officials’ efforts to comply with their laws. This includes noting the specifics of any assurances made by the foreign law enforcement officials regarding compliance with applicable foreign law. To the extent possible, U.S. agents should also try to comply with both foreign and domestic laws while participating in any searches and should document what steps were taken. Given that this undoubtedly will be a potential issue for any transnational prosecution, taking these steps can help to extinguish or minimize the issues when raised by the defense. Ultimately, if a case is still in the investigative stages, prosecutors may wish to discuss with their supervisor and with agents whether and to what extent it is desirable for U.S. law enforcement to participate in foreign searches, seizures, and electronic surveillance.

¹⁰² Title 18 U.S.C. § 3553(b)(1) provides for an upward departure where the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration but the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b)(1) (2012).

¹⁰³ U.S.S.G. § 2L1.1 cmt. n.7(C).

¹⁰⁴ *United States v. Fan*, 36 F.3d 240, 245 (2d Cir. 1994).

¹⁰⁵ As opposed to individuals with no “significant voluntary connection with the United States,” “aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990) (citing *Plyler v. Doe*, 457 U.S. 202, 212 (1982)).

B. Joint Ventures

In cases involving transnational smuggling organizations, it is not uncommon for U.S. and foreign law enforcement to exchange information, work in tandem, or even work together in a “joint venture.” A “joint venture” is one where there is “substantial involvement” in a foreign law enforcement action by U.S. agents. Such involvement includes the active participation of U.S. agents with foreign police in a search, electronic surveillance, questioning the defendant or witnesses, or an arrest in a foreign country. To that end, there are a number of factors that courts have considered in determining “substantial involvement,” including the agency relationship, the extent to which the U.S. agents had any control over an act in dispute, and whether there was active U.S. participation in the act. The more engaged and involved the U.S. agents are with the foreign investigation, the more likely it is to qualify as “substantial involvement.” This is important to consider in the investigation of transnational smuggling cases because, if the court finds a “joint venture” exists, it will hold the U.S. to the same constitutional protections that would apply territorially. Consequently, evidence obtained pursuant to a foreign search could still be subject to constitutional scrutiny and could ultimately be barred if obtained in a manner that “shocks the conscience” of the court or does not “respect certain decencies of civilized conduct.”¹⁰⁶ Therefore, prosecutors facing this issue should research the relevant case law regarding “joint ventures” in their jurisdiction and be mindful of how it might relate to their investigation or case.¹⁰⁷

C. Fifth Amendment

In extraterritorial cases, it is not uncommon for U.S. agents to interview individuals in foreign custody. However, whether in the United States or abroad, custodial interrogations require advising the individuals of Miranda rights. Thus, in situations involving a U.S. interview of a suspect in foreign custody, prosecutors should remind their agents to consider the use of a modified advisal of rights form specifically for extraterritorial cases. Statements obtained in those situations can be admitted at trial if the government can show that the defendant was advised of and knowingly and voluntarily waived his Miranda rights.¹⁰⁸ Miranda issues will certainly be raised in pretrial motions, a fact that makes the proper advisal critical. An example of such an advisal might be as follows:

You have the right to talk to a lawyer before we ask you any questions and to have a lawyer present during questioning, even if you cannot afford a lawyer. Because we are not in the United States, we cannot assure you that local authorities will permit you access to a lawyer at this time or that they will provide a lawyers for you if you cannot afford one. If you want a lawyer and one is unavailable, you may decide not to answer any questions.

As an additional complication, if the defendant is a U.S. government employee or contractor, prosecutors should take care to ensure that *Garrity-Kalkines*¹⁰⁹ warnings are also given. The *Garrity* advisal informs the person that the decision to provide information is voluntary, that no adverse employment or disciplinary action can be taken on the basis of refusing to speak, but that a refusal to cooperate can be used against them in administrative proceedings. In short, the purpose is to inform employees that they are not compelled or required to give a statement. The *Kalkines* advisal is usually given in internal investigations. It informs the person that she is being questioned as part of an internal investigation, and while she must answer the questions, those responses cannot be used against her in a criminal proceeding unless she provides a knowingly and willfully false statement.

In addition to the actual advisal, prosecutors should consider asking the agents to consult them prior to any such interviews. Prosecutors should request that extra time be taken with the advisal to

¹⁰⁶ [Rochin v. California](#), 342 U.S. 165, 172, 173 (1952).

¹⁰⁷ See *supra* note 102.

¹⁰⁸ [United States v. Bin Laden](#), 132 F. Supp. 2d 168, 187–88 (S.D.N.Y. 2001).

¹⁰⁹ [Garrity v. New Jersey](#), 385 U.S. 493 (1967); [Kalkines v. United States](#), 473 F.2d 1391 (Ct. Cl. 1973).

completely document all steps taken, to keep a record of all individuals involved, and to detail when and where the interview took place. To the extent possible, prosecutors should conduct the interview outside the presence of foreign law enforcement officials to limit later claims of undue influence. Conversely, if a foreign authority is conducting such an interview, U.S. agents should not be present.

Anticipating this issue and taking steps to protect a target's constitutional rights will protect the integrity of the investigation and minimize the potential for suppression of important evidence at trial.

D. A Note Regarding Discovery

Prosecutors handling transnational smuggling cases should be mindful of discovery-related issues that are likely to arise in extraterritorial investigations. While discovery in extraterritorial cases is governed by the same rules as domestic cases, unique issues may surface when the prosecution team obtains, or has access to, foreign evidence. This issue is common in circumstances of joint cooperation or "joint investigation." To complicate matters, the case law governing discovery in extraterritorial cases is sparse. But the trending case law suggests that the government must make a good faith effort to obtain material that could arguably qualify as *Jencks*, *Brady*, or *Giglio*.¹¹⁰ In addition, courts may require the disclosure of such material, especially *Jencks*, well before the normal deadline. Prosecutors may wish to discuss the issue with their Discovery Officer and determine an action plan.

IX. Securing Custody of Targets in Foreign Countries

Expulsion, extradition, lures, treaties, and Interpol Red Notices are all methods used to secure custody of wanted individuals. Which of the foregoing tools will be most effective will, of course, depend on the circumstances of the case. In all events, the prosecutor should consult with and obtain permission, as needed, from OIA.

In some instances, a country may choose to expel the defendant, such as when the defendant fraudulently obtained that country's citizenship. If the country is willing to expel the defendant by way of the United States, it may eliminate the need for an MLAT or other formal process; this may be the most expedient way to secure custody. Thus, whenever possible, expulsion to the United States is the preferred procedure.

Another course is to seek a provisional arrest and extradition when the country is one that will extradite based on an existing treaty. The benefit is that, if there is a treaty relationship, it is a legal process with established legal requirements.

Alternatively, another common avenue to securing custody is to conduct a "lure." A "lure" is generally some sort of trick or undercover operation by which a defendant is enticed to leave a country so that an arrest can be facilitated. This may be done to bring someone directly to the U.S., to international waters or airspace, or to a third country, and it may be utilized in circumstances where the target is in a country that will not extradite or that does not have a cooperative relationship with the United States. Prosecutors considering a lure operation should consult with their supervisor for initial authorization. Following that process, OIA will partner the prosecutor with a trial attorney handling such requests for the specific country. That trial attorney will be able to advise whether the country in question will expel or extradite an individual. A lure memo detailing the background of the case, the proposed lure, and confirmation that all relevant persons have been advised and have given concurrence will be required. If OIA concurs with the lure, it will contact the State Department for concurrence then forward it to Main

¹¹⁰ "[E]ven in the course of a joint investigation undertaken by United States and foreign law enforcement officials[,] the most the Jencks Act requires of United States officials [is] a good-faith effort to obtain the [evidence] in the possession of the foreign government." [United States v. Paternina-Vergara](#), 749 F.2d 993, 998 (2d Cir.1984) (holding that even though there was a joint investigation, the most the Jencks Act required was a good faith effort by the prosecution to obtain documents).

Justice for approval. Approval will be given in writing and may contain certain restrictions. It is good practice both to advise the agents who will be conducting the lure of any conditions for the approval and to request an acknowledgment in writing. In cases involving transnational smuggling organizations, lures can be useful tools to apprehend a target. It is not uncommon for one of the defendants to be a national of one country while conducting the smuggling operation in another. It may even be the case that the defendant is a national of a country that will not extradite; however, the country in which he is operating may be a country that does extradite. In that situation, a lure may be useful to locate and arrest the defendant in the extraditing country before he has an opportunity to return to his home country and avoid extradition.

An additional option that may be available is extradition through the United Nations Convention Against Transnational Organized Crime, Protocol Against Smuggling of Migrants. If countries are part of the Convention and Protocol, one country can seek extradition from another, even if the offense is not extraditable. Generally, alien smuggling is not an extraditable crime in most countries. But the protocol amends this treaty to include smuggling of aliens for profit as an extraditable offense. Consequently, extradition under this protocol has successfully been obtained in smuggling cases.

Depending on the circumstances of the case, an Interpol Red Notice may be the most effective way to proceed. For example, if the defendant or target frequently travels and is difficult to locate or is located in a jurisdiction that does not have MLATS or extradition treaties with the U.S., an Interpol Red Notice may be the best option. A Red Notice is a request to locate and provisionally arrest a person pending extradition. To obtain a Red Notice, there must already be a charging document and arrest warrant in place. The information is submitted to INTERPOL. The request can only be made by a member country or an international tribunal and must be based on a valid national arrest warrant. A Red Notice is not itself an international arrest warrant. Rather, it is notice published to police around the world. There are some factors to consider. First, while the information is only given to law enforcement, nothing limits countries from publishing the information. This could have the unintended consequence of tipping off the target about the arrest warrant, causing the target to cease travel or “go dark.” Moreover, because there may be extradition concerns regarding the countries involved, it may not be ideal to have a Red Notice issued. Therefore, in some situations, it may be more prudent to keep track of the target’s travel and decide to request the Red Notice once conditions become more suitable. Conversely, a Red Notice can also be useful to inhibit travel, thus effectively sidelining an individual and cutting off the ability to support the smuggling organization.

X. Conclusion

There can be no doubt that transnational smuggling organization cases provide unique challenges. The target organizations can be very complex and the investigations can be fraught with issues. But these organizations pose a significant risk to human life and national security. With a prosecutor’s thoughtful analysis and planning in such cases, it is possible to disrupt and dismantle them. Through resourceful

investigation and prosecution, it may be possible not only to prosecute the smugglers but also to freeze assets, expose the routes and parties, and create roadblocks that effectively end the operation's effectiveness.

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HSI's Public Safety Unit: Combatting Immigration Document and Benefit Fraud

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I. Introduction

Immigration fraud, including document/identity fraud and benefit fraud, has a negative impact on America's national security and public safety, as well as on the integrity of the lawful immigration system. Immigration crimes are also lucrative for the individuals and organizations involved, often connected to the laundering of thousands, even millions, of dollars. Individuals and organizations involved in other crimes—such as human trafficking, drug trafficking, and financial crimes—often use immigration fraud to facilitate and disguise their criminal activity. Immigration crimes can be complex and may take years to investigate and bring to prosecution.

Homeland Security Investigations (HSI), within United States, Immigration and Customs Enforcement (ICE), is the principal investigative arm of the Department of Homeland Security (DHS). It is charged with the investigation of violations of over 400 federal statutes, including immigration fraud crimes ranging from the counterfeiting of immigration documents to asylum fraud, marriage fraud and employment visa fraud. With over 10,000 employees, HSI's footprint includes special agents, analysts, auditors and support staff in more than 200 domestic cities and 46 countries around the world.

The President's recent Executive Order "Enhancing Public Safety in the Interior of the United States" prioritized immigration fraud. In response to this Executive Order, HSI immediately shifted more of its resources toward the investigation and criminal prosecution of immigration fraud.

II. Mission, Priorities, and Composition

Within HSI's Illicit Trade, Travel, and Finance Division, the Public Safety Unit is tasked with targeting major criminal enterprises and individuals who pose a threat to national security and public safety through the perpetration of identity and benefit fraud. The unit is also responsible for developing and advancing policy initiatives and proposing legislative changes to address vulnerabilities in the immigration process, while reducing the incentives for committing identity and benefit fraud. The Identity and Benefit Fraud section of the Public Safety Unit accomplishes its mission by overseeing document and benefit fraud investigations conducted by field agents, supporting and directing HSI's Document and Benefit Fraud Task Forces, and fostering partnerships with state and local governments and private industry through three targeted outreach programs.

Immigration benefit fraud is defined as the knowing and willful misrepresentation of a material fact on a petition or application to gain an immigration benefit. Benefit fraud crimes investigated by HSI range from asylum, marriage, and employment visa fraud to the unlawful procurement of naturalization. Document fraud is defined as the manufacturing, counterfeiting, alteration, sale, or use of identity documents and other fraudulent documents to circumvent immigration laws or commit other criminal

activity. Typical document fraud cases involve counterfeit permanent resident cards, or “green cards,” driver licenses and social security cards. Document fraud investigations may also involve the issuance of genuine documents through fraudulent means.

III. Document and Benefit Fraud Task Forces (DBFTFs)

In 2006, ICE initiated the interagency task forces known as DBFTFs. Created and led by HSI, the DBFTFs seek to target and dismantle transnational criminal organizations and individuals that threaten U.S. national security and public safety—and address vulnerabilities that currently exist in the immigration system. Through collaboration and partnership, the DBFTFs maximize resources, eliminate duplication of effort, promote the sharing of information and produce a strong law enforcement presence. They combine a variety of law enforcement processes and authorities to achieve focused, high-impact criminal prosecutions and financial seizures.

In response to the recent Presidential Executive Order with respect to interior immigration enforcement, HSI has increased staffing at existing DBFTFs and created new task forces in San Diego, New Orleans, and San Antonio, raising the number of DBFTFs from twenty-four to twenty-seven.

Agencies participating in DBFTFs nationwide include:

- United States Citizenship and Immigration Services-Fraud Detection and National Security Directorate (USCIS-FDNS)
- United States Department of State-Diplomatic Security Service (DSS)
- United States Department of Labor-Office of the Inspector General (DOL-OIG)
- Social Security Administration-Office of Inspector General (SSA-OIG)
- United States Postal Inspection Service (USPS)
- State Departments of Motor Vehicles (DMVs)
- Numerous other federal, state, and local agencies

This combination of skills, knowledge and authorities enables DBFTFs to conduct more complex, efficient and successful investigations. To form a DBFTF, the task force must have the full support of the United States Attorney in the district in which it is located. United States Attorney Offices (USAOs) are key partners on these task forces, which are located in cities throughout the United States.

IV. Outreach Programs

HSI recognizes securing the homeland requires the active participation of all segments of society in remaining vigilant and aware of indicators that immigration crimes as well as other crimes are taking place. Through its investigations, HSI has recognized the value of partnerships with state and local government officials, private industry and the public. The Public Safety Unit oversees three programs aimed at educating the public and partnering with those outside of law enforcement to prevent, detect, deter and investigate immigration fraud.

A. Marriage Fraud Outreach

In 2013, HSI launched an outreach initiative to raise public awareness, educate partner organizations, and deter individuals from entering into a fraudulent marriage. The program seeks to counter the common perception that entering into a “sham” marriage to assist a foreign national with gaining U.S. immigration status is a harmless transgression without consequences. It highlights not only the adverse personal, financial and legal ramifications of participating in fraudulent marriages but also the

damaging impact on public safety, national security and the integrity of the immigration system. By partnering with key stakeholders such as county and municipal clerks, recorders, and registrars throughout the United States, HSI seeks to detect marriage fraud at the earliest point possible, while deterring those considering entering into sham marriages by encouraging officiants and recorders of marriages to display outreach materials in their public spaces. To that end, posters and brochures in English and in foreign languages have been developed, stressing that marriage fraud is in fact a federal crime with serious potential penalties. HSI partnered with hundreds of clerks, recorders and registrars nationwide who display those materials in their public spaces, potentially reaching thousands of their customers. HSI also displays these materials at bus stops and Metro stations in major metropolitan areas and is constantly seeking new ways to get the message out to those witnessing or considering participating in a sham marriage.

B. Operation Genesis

Operation Genesis was launched in 2009 as a voluntary partnership with the printing and marking device industries to share information and develop investigative leads regarding the practices of organized document fraud rings. Document fraud organizations seek to acquire professional quality printing equipment, supplies and stamps to support their criminal activities. Operation Genesis is an opportunity for HSI to collaborate with the printing- and stamp-making industries to identify trends, patterns, and methods used by those criminal organizations and individuals who attempt to produce fraudulent documents. Leads acquired through Operation Genesis are reviewed, vetted, and forwarded to HSI field offices for potential investigation or intelligence purposes. Operation Genesis is based on Project Genesis, a similar and successful partnership project between the London Metropolitan Police Department and printing companies in the United Kingdom and Europe.

C. DMV Outreach Initiative

HSI has been at the forefront of numerous DMV employee corruption investigations, resulting in the successful prosecution of those individuals and criminal organizations who utilized document fraud in furtherance of criminal activity. Through the review of these investigations, HSI found many DMV employees did not fully comprehend the seriousness and broad impact of this crime and its threat to public safety and national security. In response, HSI developed an outreach initiative in December 2009 to raise awareness in an effort to deter DMV employee fraud and corruption. The outreach promotes accountability and vigilance, encourages people to report suspected criminal activity, and develops strong partnerships between HSI and DMV stakeholders to ensure investigations are comprehensive and more efficient. This initiative resulted in partnerships in all fifty states, with outreach materials (posters, brochures, and short training videos) reaching over 228 million licensed drivers.

V. Successful Prosecutions

The programs and tools mentioned above—as well as HSI’s robust partnership with its sister agency, United States Citizenship and Immigration Services (USCIS)—has resulted in the successful prosecution of both individual offenders and larger scale conspiracies across the United States. The following are examples of HSI document and benefit fraud investigations that resulted in successful prosecutions by the USAOs.

A. Northern District of Georgia (HSI Atlanta DBFTF)

In 2014, Rex Anyanwu was sentenced to five years and ten months in prison for a marriage fraud scheme through which he orchestrated over 100 “scam” marriages. Anyanwu, who previously obtained his own U.S. citizenship through fraud, was found guilty by a federal jury of visa fraud, conspiracy, alien harboring, and naturalization fraud. From 2001 until 2012, he arranged over 100 marriages, earning at

least a million dollars from this scheme. Anyanwu targeted homeless and financially troubled U.S. citizens, whom he paid about \$700 per “scam” marriage, while charging the alien spouses as much as \$10,000 to find them a willing U.S. citizen. Most of the marriages he arranged were for citizens of Kenya and his native Nigeria; these aliens often met their U.S. citizen spouses on the day of their weddings, sometimes on the steps of the courthouse where the wedding was to take place. Anyanwu took staged pictures of the couples for submission to USCIS as proof the relationships were bona fide. For additional fees, he created false tax returns, leases, bills, and other fraudulent evidence the couples resided together. He coached the couples how to answer probable questions from USCIS immigration officers when they were interviewed regarding their applications for immigration benefits based on the fraudulent marriages. In addition to imprisonment, Anyanwu was denaturalized as a result of his conviction and will be removed from the United States after serving his sentence.

B. District of Rhode Island (HSI Providence)

In February 2017, Nimon Naphaeng, a native of Thailand, pled guilty to seven counts of mail fraud and two counts of visa fraud in connection with a fraud scheme where he filed over 300 falsified asylum applications on behalf of Thai nationals. The aliens in this scheme were unaware they were filing for asylum because Naphaeng forged their signatures on the applications submitted to USCIS. Naphaeng advertised both through flyers and the internet that he could help citizens of Thailand obtain employment authorization documents (EADs) for a fee. Certain aliens who have filed asylum applications are entitled to EADs, which allow them to work legally in the United States and obtain a social security number. Naphaeng, however, did not tell the aliens he was filing for asylum and instead used biographic details submitted for the EADs to fill out asylum applications. He then forged the applicants’ signatures on those asylum applications. Naphaeng completed the applications using his own residential and business addresses where the application called for the applicants’ addresses; he then submitted “boilerplate” asylum claims on behalf of the applicants, claims that contained almost identical stories of persecution. He charged between \$1,500 and \$2,500 for his services, profiting nearly \$300,000 through this scheme, an amount that will be forfeited to the government. Sentencing took place in May 2017.

C. Eastern District of California (HSI Fresno)

In November 2016, a former licensing registration examiner for the California DMV was sentenced to forty-six months in prison and ordered to pay a \$7,500 fine for participating in a bribery conspiracy that enabled unqualified individuals to obtain California commercial and non-commercial driver licenses. Andrew Kimura, thirty-one, of Sacramento, was a licensing registration examiner in the DMV’s Sacramento office, where he processed applications for Class A and Class B commercial and Class C non-commercial driver licenses. Kimura was convicted of conspiring with others and accepting bribes to cause the issuance of commercial driver licenses for individuals who had not passed the necessary DMV examinations.

Kimura’s co-defendants, who owned and operated truck-driving schools, acted as brokers to assist individuals in obtaining driver licenses. The co-defendants paid Kimura to access the DMV’s computer database and alter individuals’ electronic DMV records to fraudulently and incorrectly indicate the applicants passed examinations for commercial and non-commercial licenses or fulfilled the requirements for renewals. As a result, the DMV issued licenses to unqualified individuals. The potential negative impact on public and highway safety an unqualified commercial truck driver could have cannot be overstated.

D. District of Massachusetts (HSI Boston DBFTF)

In June 2016, Patria Zuniga was sentenced to seventy-eight months in prison and ordered to pay \$713,850 in restitution after pleading guilty to eight counts of wire fraud. From 2009 through 2012,

Zuniga targeted immigrant victims, presenting herself as either an immigration attorney or an employee of USCIS. Zuniga told her victims she could assist them in obtaining permanent resident immigration status. Zuniga charged \$8,000 to \$14,000 for her services. After the victims made the payments, however, Zuniga extorted additional funds by, among other things, threatening to have them deported if they refused to pay. Victim payments were initially made in cash, but later in the scheme, Zuniga accepted money via cash deposits made directly into designated bank accounts (including accounts owned by her daughters), money orders, and bank and Western Union wire transfers. In total, victims paid more than \$700,000 over the course of the three-year fraud scheme.

E. Northern District of Texas (HSI Dallas DBFTF)

In June 2016, two brothers, who were convicted at trial, were each sentenced to eighty-seven months in prison for running a fraud scheme involving employment-based H-1B visas. Jay and Atul Nanda used their IT Company, Dibon Solutions, to commit wire fraud, conspiracy to harbor illegal aliens, and visa fraud.

The Nanda brothers recruited foreign workers with expertise who wanted to work in the United States. They sponsored the workers' H-1B visas with the stated purpose of working at Dibon headquarters in Carrollton, when in fact, they did not have actual positions at the time they were recruited. The brothers knew the workers would ultimately provide consulting services to third-party companies located throughout the United States. Contrary to representations made by the conspirators to the workers (and the government), Jay and Atul Nanda directed the workers only be paid for time spent working at a third-party company and only if the third-party company first paid Dibon for the workers' services. In addition, in Dibon's visa paperwork, the conspirators falsely represented the workers had full-time positions and were paid an annual salary, as required by regulation to secure the visas.

This scheme provided the conspirators with a pool of inexpensive, skilled foreign workers who could be used on an "as needed" basis. The scheme was profitable because it required minimal overhead and Dibon could charge significant hourly rates for a computer consultant's services. Thus, the Nandas, as Dibon's owners, earned a substantial profit margin when a consultant was assigned to a project and incurred few costs when a worker was without billable work. This scheme is known as "benching." Dibon actively recruited H-1B workers for the "bench."

The Nandas required the H-1B visa candidates to pay the processing fees the law requires to be paid by the company. The Nandas attempted to hide this, however, by having the H-1B candidates pay the fees directly to Dibon either with cash or a check written to "Dibon Training Center."

VI. Resources for United States Attorneys

Immigration fraud investigations, especially those involving benefit fraud, are complex and specialized, often requiring in-depth knowledge of a wide range of visa categories and applications and a familiarity with the administrative processes of several federal agencies. Assistant United States Attorneys (AUSAs), especially those who are new to the prosecution of these crimes, can take advantage of the expertise and resources available through field agents at the DBFTFs. These resources may include alien file information, travel information for individuals under investigation, and access to USCIS' Office of Fraud Detection and National Security (FDNS) subject matter experts, who can testify on USCIS processes. HSI field agents and the Public Safety Unit may also be able to assist with examples of "go-by" indictments and investigative and prosecutorial strategies successfully used in the past. AUSAs and ICE Special Assistant United States Attorneys, involved in previous document and benefit fraud prosecutions, can also serve as excellent sources of information. HSI's Public Safety Unit can help make those connections.

In some cases, AUSAs prosecuting other types of crimes may encounter information that leads

them to believe an immigration crime has also taken place. For example, immigration fraud charges can sometimes be used in other types of criminal cases, including terrorism, narcotics, and money laundering. AUSAs are welcome to reach out to their local DBFTFs or the HSI HQ Public Safety Unit for advice and information. A list of cities in which DBFTFs are present is found on the ICE website at <https://www.ice.gov/identity-benefit-fraud>. Questions for the HQ Public Safety Unit's Identity and Benefit Fraud experts can be directed to the general mailbox at ibfu-ice-hq@ice.dhs.gov.

The Public Safety Unit is currently partnering with the Executive Office for United States Attorneys (EOUSA) to explore possible interagency training opportunities. HSI Special Agents and Public Safety Unit personnel may be able to provide or contribute to DOJ training on immigration fraud issues, successful case strategies, and other topics upon request. Likewise, HSI may request the Department of Justice's (DOJ's) assistance in providing training to HSI Special Agents on the investigation and prosecution of immigration benefit fraud.

HSI's Forensic Laboratory (HSI-FL) is another resource available to USAOs. The Laboratory provides forensic services in support of HSI's mission to protect the integrity of the immigration system. Laboratory services include forensic examination of travel and identity documents, examination of latent and inked fingerprints, and expert witness testimony in criminal trials and administrative hearings. The laboratory has been accredited in the questioned document and latent print forensic disciplines by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board since 2001.

VII. Conclusion

Immigration fraud cases prosecuted by the DOJ help ensure the public safety and national security of the United States.

Through the DBFTFs and our strong partnerships with local and state government and private industry, HSI and the Public Safety Unit will continue to draw on the authorities and expertise of those with a stake in immigration benefit fraud. They will continue to lead high impact investigations that focus resources on the orchestrators of larger scale fraud conspiracies.

Even prosecutions of single offenders, when possible, can also send a message of deterrence to those contemplating immigration crimes.

For more information on the DBFTFs and Identity and Benefit Fraud, please visit <https://www.ice.gov/identity-benefit-fraud>.

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Stipulated Judicial Removal Orders

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I. Introduction

A. What Is a Judicial Removal Order?

Ask around, but do not be surprised, when veteran attorneys, both prosecutors and immigration attorneys alike, respond with a shrug when asked, “What is a Judicial Removal Order?” Many attorneys have never heard of them. But Judicial Removal Orders (JROs), specifically those obtained by stipulation, offer a powerful and efficient tool for prosecuting criminal aliens—one that provides enormous value to the Department of Homeland Security (DHS) and furthers new Department of Justice policy.¹

What exactly is a “removal order”? Simply put, it is a decision authorizing the physical removal of an alien from the United States. Most attorneys associate removal orders with “removal proceedings” before Immigration Judges and rightly so; Immigration Judges issue about 100,000 removal orders every year.² Removal orders, however, have multiple possible sources. Immigration practitioners know some removal orders are issued by the Board of Immigration Appeals, which has exclusive appellate jurisdiction over nearly all of the decisions issued by Immigration Judges.³ Other removal orders are issued by agencies within DHS. Under certain conditions, “immigration officers” have authority to order “expedited” removal orders against inadmissible aliens who arrive in (or who recently arrived in) the United States.⁴ Similarly, certain aliens with “aggravated felony” convictions may be ordered removed with limited administrative or judicial review.⁵

Unlike these other removal orders issued by executive branch officials, JROs are issued by federal district court judges and magistrates.⁶ They are equally viable and offer some unique benefits but are often unknown and seldom used. Some of the benefits are obvious: the defendant will leave the country, presumably permanently, upon completion of the sentence; DHS can complete the (often challenging) process of arranging the defendant’s travel prior to taking the defendant into immigration custody; and there will be no lengthy removal proceedings before an Immigration Judge, which

¹ See Memorandum from U.S. Att’y Gen. Jeff Sessions, U.S. Dep’t of Justice, to All Fed. Prosecutors, U.S. Dep’t of Justice 1 (Apr. 11, 2017).

² U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK C2, Figure 5 (Mar. 2017).

³ See 8 C.F.R. § 1003.1(b) (2017).

⁴ 8 U.S.C. § 1225(b) (2012); 8 C.F.R. § 235.3(b) (2017).

⁵ Immigration and Nationality Act (INA) 8 U.S.C. § 1228(b) (2012); 8 C.F.R. § 238.1 (2017).

⁶ 8 U.S.C. § 1228(c) (2012). The statutory provision codifying judicial removal orders was mistakenly designated as subsection 1228(c), which was already in use for a different purpose. The provision should have been codified at subsection 1228(d), and is sometimes referenced as such.

sometimes take years to complete and can prompt collateral habeas litigation challenging civil immigration detention. Other benefits are more subtle, like using the JRO as a bargaining chip to negotiate a plea with a defendant who is less interested in fighting removal than in litigating the prison sentence.

There are some obstacles too, both perceived and in practice, that make JROs seem challenging. These include negotiating the complex relationship between criminal law and removability and the immigration laws of the United States, engaging in extensive coordination with DHS's United States Immigration and Customs Enforcement (ICE), and satisfying several preliminary procedural requirements both before and during the criminal prosecution. This article is intended not only to highlight the benefits of JROs, but also to demystify the process by showing the ease with which stipulated JROs can be used and successful ICE collaboration achieved.

B. Where Did JROs Come From?

JROs are not exactly new. Even before the current JRO language was codified in 1996, some federal district courts exercised a form of judicial removal during the sentencing phase of criminal prosecutions. For decades, 18 U.S.C. § 3583(d) provided (and still provides) that: “[i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported^[7] and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.”⁸ Some courts interpreted that language as broad authority to order alien defendants physically deported as a condition of release, without the procedural requirements otherwise needed to obtain a deportation order.⁹ Other jurisdictions, however, read § 3583(d) as merely permitting the court to order an alien defendant be surrendered to immigration officials for administrative immigration proceedings under the Immigration and Nationality Act (INA), with all attendant processes and procedures legally prescribed “for the purpose of determining whether” the alien defendant is in fact “subject to deportation.”¹⁰ Based on these divergent interpretations, until the mid-1990s, some jurisdictions endorsed *de facto* JROs, and some did not.

Congress enacted the first version of what we now call JROs in 1994.¹¹ Former § 1242a(d)(1) authorized judicial “deportation” orders: “a United States district court shall have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under [former] § 1251(a)(2)(A) of this title, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner [of the Immigration and Naturalization Service] and if the court chooses to exercise such jurisdiction.”¹² The language authorizing judicial deportation is effectively identical to the current version, which authorizes “removal” orders. Like the current version, former § 1242a(d)(2) prescribed several arduous requirements for prosecutors seeking unilateral JROs, including proving the defendant is subject to deportation, addressing whether the alien is eligible for “relief from deportation,” and certain specialized evidentiary parameters. Essentially, a JRO where the defendant does *not* stipulate (to which one might refer as a “unilateral JRO”)

⁷ In 1996, “deportation” proceedings and “deportation” orders were replaced by “removal” proceedings and “removal” orders by the [Illegal Immigration Reform and Immigrant Responsibility Act \(IIRAIRA\)](#). Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996). The word “deportation” is still used occasionally by some courts and immigration practitioners as the functional equivalent of “removal,” though there are legal differences not relevant to this article.

⁸ 18 U.S.C. § 3583(d) (2012 & Supp. III 2015).

⁹ See, e.g., [United States v. Chukwura](#), 5 F.3d 1420, 1423 (11th Cir. 1993), cert. denied, 513 U.S. 830 (1994).

¹⁰ See, e.g., [United States v. Quaye](#), 57 F.3d 447, 449 (5th Cir. 1995).

¹¹ See [Immigration and Nationality Technical Corrections Act of 1994](#), Pub. L. No. 103-416, 108 Stat. 4305, 8 U.S.C. § 1252a(d) (1994) (prior to 1996 amendment).

¹² *Id.*

requires a quasi-removal proceeding in federal district court.¹³

The circuit split over 18 U.S.C. § 3583(d) (deportation orders as a condition of release) led Congress to again address how and when federal courts may exercise removal authority. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), reserving the power to issue removal orders almost exclusively to Immigration Judges and specified executive branch officials. After IIRAIRA, even Circuit Courts that expressly allowed judicial deportation as a condition of supervised release recognized “[t]he INA, as amended by the IIRAIRA, does not provide for, or authorize, judicial deportation pursuant to 18 U.S.C. § 3583(d).”¹⁴ With IIRAIRA, Congress retained the concept of the judicial removal order, recodifying JROs into their current location: 8 U.S.C. § 1228(c). Thus, as of 1996, JROs became the exclusive means by which a district court could order a criminal alien defendant removed from the United States.

This is where the new version of the JRO statute becomes so important. The 1994 version of JROs (which perhaps should be called “judicial deportation orders”) allowed for a judicial order only if it had “been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction,” and only after rigorous processes required for a unilateral order.¹⁵ The new JRO statute, codified at 8 U.S.C. § 1228(c), added the critical piece to this puzzle: under subparagraph (c)(5), the United States Attorney, with the concurrence of ICE, “may . . . enter into a *plea agreement* which calls for the alien to . . . stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both.”¹⁶ This “stipulated judicial order of removal” option, added by IIRAIRA, solved the problem created by the circuit split and gave federal prosecutors a new tool, one that should be especially useful in support of DOJ’s recently announced renewed emphasis on criminal immigration enforcement.

C. JROs Today

The current JRO statute is below. As you will see, the first four paragraphs, which deal with unilateral requests made by prosecutors, are essentially identical to the prior statute enacted in 1994. Like its predecessor, the authority is laid out in the first paragraph:

Notwithstanding any other provision of this chapter a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner¹⁷ and if the court chooses to exercise such jurisdiction.¹⁸

The notice requirements for seeking a unilateral JRO are in paragraphs 2(A) and 2(B):

¹³ The authors are unaware of even a single example of a case in which a non-stipulated judicial order of deportation or removal was entered.

¹⁴ [United States v. Romeo](#), 122 F.3d 941, 943–44 (11th Cir. 1997); *see also* [United States v. Tinoso](#), 327 F.3d 864, 865 (9th Cir. 2003) (collecting cases).

¹⁵ *See* [Immigration and Nationality Technical Corrections Act of 1994](#), Pub. L. No 103-416, 108 Stat. 4305, 8 U.S.C. § 1252a(d) (1994) (prior to 1996 amendment).

¹⁶ 8 U.S.C. § 1228(c)(5) (2012) (emphasis added).

¹⁷ The term “Commissioner” referred to the Commissioner of the Immigration and Naturalization Service prior to the creation of the Department of Homeland Security. References to the Commissioner now “mean those officials of the Department of Homeland Security who have succeeded to the functions of the Commissioner of the former Service.” 8 C.F.R. § 1001.1(d) (2017).

¹⁸ 8 U.S.C. § 1228(c)(1) (2012).

- (A) The United States Attorney shall file with the United States district court, and serve upon the defendant and the Service, prior to commencement of the trial or entry of a guilty plea a notice of intent to request judicial removal.
- (B) Notwithstanding section 1252b of this title, the United States Attorney, with the concurrence of the Commissioner, shall file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.¹⁹

Paragraph 2(C) provides the process for determining whether the alien is eligible for relief from removal and, if so, directs the district court to grant or deny such application.

- (C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from removal under this chapter, the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief. The court shall either grant or deny the relief sought.²⁰

Subparagraphs 2(D)(i) through (iv) prescribe the evidentiary parameters and allow the court to order removal if the government demonstrates deportability.

- (i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government.
- (ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 1229a of this title.
- (iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.
- (iv) The court may order the alien removed if the Attorney General demonstrates that the alien is deportable under this chapter.²¹

Paragraph (3) describes appellate rights and procedures, and Paragraph (4) states a district court's denial of a request for a JRO does not preclude the government from initiating traditional removal proceedings based on the same ground of deportability.

The difficulties of obtaining a unilateral JRO are unchanged. Prior to trial, a prosecutor must draft and serve notice of the government's intent to seek a JRO. Then, the prosecutor must provide, with ICE's concurrence, a "charge containing factual allegations regarding the alienage of the defendant," including the crimes which render the alien deportable. Then the district court must decide whether the defendant is prima facie eligible for "relief from removal" under the INA, another daunting task, and if yes, ICE must again weigh in with a "report regarding the alien's eligibility for relief," which the court must then grant or deny. As with a unilateral JRO under the previous version of the statute, the parties must conduct a quasi-removal proceeding within the context of a federal prosecution, complete with cross-examination of any government witnesses and incorporating the evidentiary standards normally reserved for proceedings before an Immigration Judge.²² After all that, the court "may" order the alien removed, and, even if that occurs, the alien may appeal that order to the court of appeals. And, if the process is derailed at any point along the way, ICE may simply initiate traditional removal proceedings and effectively start over.

The current JRO statute's stipulated JRO process was a game-changer. While there are still several procedural requirements, the stipulated version of the JRO sidesteps the more imposing and

¹⁹ *Id.* § 1228(c)(2)(A)–(B).

²⁰ *Id.* § 1228(c)(2)(C).

²¹ *Id.* § 1228(c)(2)(D)(i)–(iv).

²² *See* § 1228(c)(2)(D)(i), (ii).

uncertain aspects of a unilateral JRO. The quasi-removal proceeding is gone, as is the uncertainty of whether the judge will grant “relief from removal” or whether the judge will order removal at the end of the process.

The provision of the statute addressing stipulated JROs reads in its entirety:

The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.²³

Unlike unilateral JROs, examples of which are elusive, United States Attorney’s Offices around the country successfully collaborate with ICE to generate stipulated JROs as part of plea agreements. Although some jurisdictions have their own particular practices, the basic procedural requirements—and the potential pitfalls—are similar in every jurisdiction. What follows is an outline and brief explanation of those procedures and some information that will help ease the process and avoid potential missteps.

II. How to Obtain a Stipulated JRO

A. Who Is Eligible?

In order to be a candidate for a stipulated JRO, the defendant must be an alien who is legally removable under the INA. Removability can be independent of the criminal charge at issue, such as where the defendant entered the United States without admission or parole or where the defendant was lawfully admitted on a nonimmigrant visa but remained in the United States beyond the time allowed.²⁴ Likewise, the defendant may have prior criminal convictions in state or federal court, or in a foreign jurisdiction, that render him removable. Common removable offenses include convictions related to a controlled substance, domestic violence, or theft.²⁵

Alternatively, the defendant’s removability may depend on whether he or she is convicted on the federal charge(s) he or she is facing. Many federal offenses qualify as grounds for removal in and of themselves. Examples include drug trafficking crimes, serious fraud offenses, export violations, and certain national security-related crimes. Even if the federal conviction by itself does not constitute a ground for removal under the INA, the underlying facts set forth in the charging document or plea agreement may support a removal charge. In national security prosecutions, for example, close attention should be paid to whether the conviction is based on conduct that qualifies as “engag[ing] in terrorist activity” under the broad definition provided in § 212(a)(3)(B)(iv)(III) of the INA, 8 U.S.C.

²³ *Id.* § 1228(c)(5).

²⁴ *See id.* § 1182 (2012 & Supp. III 2015) (generally identifying arriving aliens without lawful status or aliens who unlawfully crossed the border as “inadmissible” under section 212 of the INA); *id.* § 1227 (2012) (charging aliens who were admitted but are now removable as “deportable” under section 237 of the INA).

²⁵ *See, e.g.*, 8 U.S.C. §§ 1182(a)(2),

§ 1182(a)(3)(B)(iv)(III).²⁶ In any case, when removability is based on something other than a criminal offense, the removal charge must be supported by specific facts that clearly indicate why the defendant is removable.

Recent developments in immigration and criminal case law have complicated issues involving the removal of criminal aliens, particularly regarding the categorical and modified categorical analyses for whether a conviction is a removable offense.²⁷ Criminal removability can be tricky, so it is important to collaborate with your local ICE Office of Chief Counsel (OCC) early in the process to determine whether a prior conviction, or a pending charge, will constitute a ground for removal.²⁸

B. If Legally Removable, Is the Defendant Otherwise a Good Candidate for a JRO?

Even if the defendant is legally removable under the INA, other factors may come into play that could counsel against a JRO. There are several important questions to ask when determining whether a JRO is appropriate in a specific case. For example, is the defendant involved in an ongoing criminal investigation as a witness or target? In such cases, it may not be in DOJ's or ICE's interest to have the defendant removed. Is the defendant already in removal proceedings before an Immigration Judge? If so, at what stage are these proceedings? Does the defendant have a pending judicial appeal related to an immigration matter, including a prior order of removal, or a denied application for immigration benefits? Is there a stay of removal in place? Is the alien seeking a visa based on his or her status as a victim of domestic violence? Was the defendant extradited to the United States for prosecution?

None of these questions, even if answered affirmatively, will necessarily take a stipulated JRO off the table, but all are important factors to consider and discuss with ICE. Moreover, even if one of these issues renders a JRO unavailable or inadvisable, if a criminal alien is amenable to a stipulated removal order, it is recommended that Assistant United States Attorneys (AUSAs) nevertheless reach out to ICE, which might have alternate tools at its disposal to facilitate removal in such cases. For example, in certain circumstances, aliens already in removal proceedings can agree to stipulated removal orders issued by an Immigration Judge.²⁹ Also, as discussed above, ICE may issue administrative removal orders for certain aliens convicted of aggravated felonies.³⁰

C. How Does One Begin the Process of Seeking a Stipulated JRO?

Start with ICE. ICE's concurrence is a statutory prerequisite to a valid stipulated JRO.³¹ Within ICE, the authority to approve a JRO request has been delegated to the local Special Agent in Charge (SAC) for Homeland Security Investigations (HSI). Your starting point should be the local HSI embed attorney, the Enforcement and Removal Operations (ERO) embed attorney, or your local ICE Special AUSA (if your office has one). You might also reach out to the local OCC's Federal Litigation POC, as

²⁶ Importantly, an alien need not have acted on behalf of a group specifically designated by the United States Government as a terrorist organization in order to be subject to a terrorism-related ground of inadmissibility or removability. *See* INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2012) (stating that a "group of two or more individuals, whether organized or not, that engages in, or has a subgroup which engages in" terrorist activity as defined in the INA, qualifies as a terrorist organization).

²⁷ *See, e.g., Descamps v. United States*, 133 S. Ct. 2276 (2013) (noting that courts conducting a modified categorical analysis of a specific offense must determine whether the criminal statute contains alternative elements versus multiple means within the same element); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 863 (9th Cir. 2015) (holding that California's theft statute is not a "theft offense" as defined in 8 U.S.C. § 1101(a)(43)(G), and can never support removability under that ground, even if the same conduct punished in a different jurisdiction would constitute a removable "theft offense").

²⁸ ICE has 26 OCCs nationwide; your local OCC can be located at <https://www.ice.gov/contact/legal>.

²⁹ 8 U.S.C. § 1229a(d) (2012).

³⁰ *Id.* § 1228(b).

³¹ *See id.* § 1228(c)(5).

some ICE OCCs have attorneys or teams specifically assigned to assist with various federal litigation matters, including JROs.

Generally, AUSAs need to coordinate with ICE attorneys in preparing six documents, listed below, to obtain a stipulated JRO, though some jurisdictions will have slight variations. Consider asking your local ICE POC for samples of previous successful stipulated JROs before you start the process.

1. Notice of Intent to Request Judicial Removal

This short document formally notifies the defendant the United States intends to seek a judicial removal order upon conviction.

2. Application for, and Factual Allegations in Support of, Judicial Removal

This document, signed by the AUSA, identifies the facts supporting the removal charge(s) to which the defendant will be stipulating. Those facts likely will include the defendant's citizenship, current immigration status, the impending conviction and potential prison term, legal ground of removability, and country of removal.

3. Plea Agreement

This document will include several critical details beyond what would otherwise be included in a criminal plea agreement. First and foremost, this is where the defendant formally agrees to a stipulated JRO. In doing so, the defendant voluntarily waives several rights, including: access to removal proceedings under INA § 240; the right to appeal or seek reopening of the removal order; and all rights to apply for relief or protection from removal, like asylum or cancellation of removal.

The plea agreement must also state the defendant agrees to—and this will be absolutely critical for ICE—assist in the execution of the removal order. Depending on the country, procuring a travel document for a criminal alien can be problematic, causing delay and extended custody.³² Through the plea agreement, the defendant promises to take those actions necessary to facilitate the removal process, and further agrees failure to cooperate will result in a breach of the plea agreement. Some offices also include language specifying the defendant's intent to receive the benefit of a plea agreement in lieu of contesting removal through standard removal procedures.

4. Statement in Support of Judicial Removal Order

This document, signed by the defendant, acknowledges the facts and removal charges listed in the application (which was signed by the AUSA) and accepts the provisions listed in the plea agreement.

5. Proposed Stipulated Judicial Removal Order

The proposed order, drafted for the district court's signature at sentencing, will identify the factual and legal grounds for removal, the impending conviction and maximum sentence, and the applicable waivers.

6. ICE Concurrence

Although the JRO statute does not expressly require *written* ICE concurrence, it is strongly advised.³³ The concurrence can be brief—usually a single paragraph. Local ICE offices have varying

³² See U.S. Dep't of Homeland Sec., Immigr. and Cust. Enforcement, *Written Testimony of ICE Deputy Director Daniel Ragsdale for a House Committee on Oversight and Government Reform Hearing Titled "Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals,"* (July 14, 2016).

³³ See § 1228(c)(5).

procedures for processing requests for concurrence, but most or all will require all documents be reviewed by the approving official through the local standard procedure. Also, an ICE attorney's conclusion that the defendant is amenable to a stipulated JRO is not a substitute for the statutorily required ICE concurrence, and a writing signed by the HSI SAC may help avoid any confusion.

Once ICE concurs, the documents may be presented to the defendant for his or her acceptance. If the defendant is willing to stipulate to the JRO, the next step is to file the documents with the court and request that the judge execute the removal order at sentencing. If the judge declines to enter the JRO, ICE is not precluded from initiating removal proceedings pursuant to § 240 of the INA, 8 U.S.C. § 1229a, based on any relevant INA charge of removability.³⁴

III. Conclusion

Whenever an alien defendant is being prosecuted in federal court for a crime that would render him or her removable upon conviction, or where grounds for removal already exist independent of the pending criminal charge, the federal government's collective interest in protecting public safety will be well-served by exploring the possibility of a stipulated JRO. Some alien defendants will contest removability, seek relief or protection from removal, or simply decline to stipulate. Those removal cases can be handled through well-established administrative processes, including the immigration court process. But, other alien defendants may be motivated by the potential decrease in prison time or simply have no incentive to contest removal. In such cases, stipulated JROs are an important tool that enables ICE to remove a criminal alien from the United States without having to devote significant time and resources usually required to secure a final removal order in immigration proceedings. Stipulated JROs also reduce the costs associated with detaining criminal aliens pending removal and the likelihood of protracted habeas litigation. All of this enhances ICE's ability to accomplish its mission of promoting homeland security and public safety through the enforcement of federal laws governing border control, customs, trade, and immigration. ICE stands ready to assist and provide step-by-step guidance to AUSAs in navigating the process of procuring a stipulated JRO, as well as answer any questions regarding the advantages or drawbacks of seeking a JRO in a specific case.

ABOUT THE AUTHORS

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³⁴ See INA § 240, 8 U.S.C. § 1229a (2012).

B-2 Visitor Visa Fraud: The Investigation and Prosecution of an International Business Scheme

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I. Introduction

From at least 2004 through 2016, Omer Gur, an Israeli-born citizen turned U.S.-based businessman, along with other U.S.-based managers and a partner in Israel named Eyal Katz, operated a series of mall kiosks in locations from Pennsylvania to Georgia. These kiosks sold Dead Sea salt cosmetic products through primarily young Israeli men and women. The business, operated through various regional entities, was known as Rasko in both the United States and Israel. Rasko was very profitable, taking in millions of dollars in revenue and affording Gur a million-dollar home, luxury automobiles, and a lavish lifestyle. Gur came to the United States after serving in the Israeli Special Forces, and he entered on a B-2 tourist visa.¹ Rasko had Israeli-born managers for each region and an Israeli-based partner that recruited the workers. These other managers earned six figure salaries and were able to send significant funds back to Israel.

Rasko used Facebook and other social media as marketing and recruitment tools for its workforce and as a platform to share company-wide information. Rasko broadcast photos of the young workers at the kiosks, displaying cash and other awards and enjoying each other's company. The company housed the young workers together in apartments and transported them to the malls in company cars. They socialized with one another and earned cash, gift cards, and other perks during the course of their employment. Once a year, Gur and the managers took the entire workforce to Las Vegas for a company retreat. Many of the Israeli workers came to the United States on B-2 tourist visas and went home after the usual six-month visa period ended. Others came, extended their B-2 visas, and grew into more senior positions with Rasko. These Israeli workers were a key component of Rasko's success. They were young

¹ Visitor visas, known as B-2 visas, are nonimmigrant visas for persons who want to enter the United States temporarily—for tourism, pleasure, or visiting others. The B-2 visitor or tourist visa is a nonimmigrant visitor visa issued by the State Department (DOS). It is issued for tourism or medical treatment purposes only. A nonimmigrant visa is intended for a citizen of a foreign country to enter the United States for a temporary stay. There are some activities which are prohibited for B-2 visa recipients. One of these prohibited activities is employment. A B-2 visa holder is not permitted to work while in the United States.

and aggressive salespersons, and being from the region, they served as an additional marketing tool for the sale of the Dead Sea products.

Though appearing successful and legitimate, over time Rasko came to be built almost entirely on the back of an illegal supply of workers from Israel. A B-2 visa is a tourist visa; it does not permit aliens to work in the United States. Though Rasko initially received approval to use H-2B visas² (which permitted certain alien employment) by 2011, it began using B-2 visa holders as its workforce. These workers earned income, yet Gur and his managers paid no employment or income taxes for them. The housing, travel, and payment of the workers was supervised by the regional managers and paid for, in large part, by Rasko. The company assisted many workers in filing fraudulent visa extensions, using false documentation and reasons for continuing to stay in the United States. The proceeds from the business, made possible by this flow of illegal labor, paid for its continuation and were concealed or transferred to either Gur or the managers and to accounts in Israel. Gur and the managers also worked to conceal the presence of the workers from any governmental authority—be it immigration, labor, or taxing.

In February 2016, officers in the Eastern District of Virginia (EDVA) charged Gur and nine other conspirators, including the three other Rasko managers, Katz (the Israeli-based partner), and five senior workers, in a thirty-four count indictment with an extensive immigration and money laundering scheme. The conspiracy operated from at least 2011 to 2016. It stretched from recruitment of the workers in Israel to their transportation and harboring in various states where the businesses operated, including Virginia, Georgia, Pennsylvania, Maryland, and New Jersey. All nine of the located defendants, including Katz, who had to be extradited from Romania, would enter guilty pleas long before the trial date. Each of the three regional managers were sentenced to five years' imprisonment, with Gur sentenced to seventy-eight months and Katz to eighty-four months. The remaining defendants were sentenced to terms of incarceration ranging from four to nine months. The defendants' forfeited proceeds and property valued at over \$2 million.

This prosecution resulted from the leadership of DOL Special Agent Sara Shalowitz through a multi-agency effort that included the Federal Bureau of Investigation (FBI), DHS, the Internal Revenue Service (IRS), and the DOS.

II. Investigation

The investigation began in December 2012 with one agent and one subject. The kiosk business has been a known vehicle for immigration-related fraud, and the Department of Labor had been engaging in similar investigations. In the course of a separate investigation that focused on kiosks and businesses in the Northern Virginia area, Agent Shalowitz did surveillance at a particular kiosk in a Norfolk mall that sold Dead Sea salt products. This surveillance identified Omer Gur, who was driving a vehicle registered to an entity called Stanga, LLC, which was unrelated to the original objects of surveillance. Agent Shalowitz began an investigation focused on Stanga. The investigation would last over three years and led from Stanga and Gur to Rasko and its web of related businesses, kiosk locations, and associated conspirators.

At the outset, the approach we chose to take was to keep the investigation covert until we were ready to charge. This approach resulted in a much longer investigation, but the evidence we obtained and the steps we took served us in good stead when we finally indicted. In 2013, in a similar kiosk case, we

² Aliens living outside of the United States can apply for a non-immigrant employment-based visa, referred to as an H-2B visa. The H-2B visa permits aliens to work in the United States for a specified, temporary period of time for a specific employer. An employer seeking to employ temporary foreign employees via the H-2B visa must apply via an application process involving at least three steps and at least three government entities: DOL, DHS, and DOS.

observed the execution of search warrants at the kiosks and certain assets restrained, only to watch the main subjects leave the country shortly thereafter. Heightening this threat, all of our subjects had remaining ties to Israel, and many had traveled there in the midst of their tenure with Rasko. While search warrants of the kiosks would have likely yielded valuable payroll and employment information, the risk was simply too great. Understanding the full scope of Rasko took time, and we were uncertain of the full scope of the fraud. Upon indictment, we confirmed that any overt action we could have taken in Virginia would have had notifying ripple effects throughout the various Rasko entities.

The need to stay covert caused us to initially focus on record gathering through grand jury subpoenas and surveillance of the kiosks and apartments, as well as some open source searching on the Rasko Facebook page (we could do limited searching, and subsequent search warrants would be even more productive). An initial challenge was simply identifying the workers at these kiosks and determining how they were brought to and housed in the United States. We learned the workers resided together in apartments leased by the regional business entities and so obtained lease information for the kiosks and apartments. This information led to the confirmation of the roles of the various regional managers. We then obtained phone records for the managers/owners and entity information from each of the state corporation commissions. The various business entities were registered with these commissions, which showed significant overlap between the managers/owners throughout the various regions; however, no records of the individual workers existed.

After months spent gathering information, we obtained search warrants for Facebook, YouTube, and various manager/owner email accounts. In reviewing this evidence, we obtained photographs of managers and B-2 employees together, including many photographs of B-2 employees with cash, gift cards, and other perks of employment. One photograph showed a young woman rolling around on a bed filled with \$100 bills holding a sign with the company logo in her hand. We located a number of photographs of our future targets flashing cash and other items. A review of those records also led to the identification of additional workers being brought to the United States as well as housing lists for various apartment locations. We then had to match these lists to our surveillance and Facebook photographs. Many of the emails and entries were in Hebrew. We used commonly available translation software for leads and had Hebrew-speaking agents and translators available prior to indictment.

We learned early on that not all of the documented immigration information we needed was owned/controlled by any one agency. Agent Shalowitz assembled a team from DHS, DOS, and IRS. After we identified the workers, we had DHS verify their immigration status as well as identify the visa used by each worker to enter the United States. DHS obtained the receipt files for visa extensions and assorted Alien Files (A-Files).³ Within DHS, Customs and Border Patrol (CBP) had the I-94 forms completed upon entry to the United States, which often contained false statements about where the workers would reside and the purpose of their visit to the United States. DOS obtained visa applications that were completed in Israel. DOL obtained the reported wages from the various state agencies for each company. IRS obtained employment tax returns and other returns associated with the various entities. Because each agency tracked information in its own way, difficulties arose, including the inability to cross-reference worker identity, immigration status, and associated companies. This information-gathering was an ongoing process; for example, surveillance and search warrant records might establish the identity of a worker; however, we would not be able to confirm the worker's immigration status for some time thereafter.

A B-2 tourist visa is generally valid for up to six months. Many of the long-term workers, who often moved from one region to another, filed for B-2 visa extensions. On such extensions, they provided

³ An "A-File" contains an alien's immigration-related record.

false information concerning their lack of employment in the United States, their residences, and their need for an extension. We discovered, through emails and the extension applications, that managers provided the workers with various versions of a form letter that contained identical reasons for an extended stay in the United States. These visa extension forms were the basis for charging many of the long-term workers.

In addition to the B-2 workers, Rasko employed some holdover H-2B visa workers past 2011. An H-2B visa does permit work by an alien in the United States, provided certain conditions are met and the jobs cannot be filled by U.S. workers. We chose to focus solely on the B-2 workers; however, because we established that these individuals were, in fact, working and had traveled to the United States with the intent to do so, we had the basis for establishing visa fraud. Also, Rasko had done a visible switch from an emphasis on H-2Bs to B-2s in 2011. In addition, they began reporting fewer employees on their employment tax returns with no corresponding decline in business. This discernible shift was a good starting point for our conspiracy charges.

Once the B-2 workers were identified, another challenge we encountered was establishing they had been paid. These employees had no bank accounts, filed no tax returns, and to our understanding, were paid largely in cash or gift cards. While we recovered some paystubs from trash runs, the Rasko Point of Sale System (a register-based system that tracked kiosk receipts and payroll) was run by a company that served other kiosk businesses. We were convinced this company would disclose the existence of any grand jury subpoena or other pre-indictment process to our targets due to its lack of cooperation with law enforcement in a prior investigation.

The need to stay covert also meant we could not approach any workers to confirm employment, housing, recruitment, or payment—all the hallmarks of the scheme. We considered trying to interview one of the workers in some neutral way, such as through a traffic stop. We concluded, however, that any approach posed too great a risk of notification to the managers and leaders of Rasko. We did not realize, at the time, what control the managers exercised over the employees. Very likely, the managers would have been notified and left the United States.

To further address the need to gather information while staying covert, we obtained tax records for the entities and each manager/owner through an ex parte order. The records revealed no W-2s or 1099s were filed for any B-2 workers; however, such forms had been submitted for workers that were legally present in the United States, albeit with inaccurately reported wages. In our financial analysis, we did find that certain workers who were legally present in the United States, as well as some long-term workers who were not, did receive large checks not commensurate with individual payment—these larger amounts were broken down to pay other workers. We also found evidence of financial transfers to Israel. The email records contained employment contracts showing workers would be paid in commission. Travel records also became important because many of the tickets purchased (due to the B-2 nature of the visas) had return dates that were often not used by the workers.

III. Financial Aspects and Asset Forfeiture

Along with the immigration-related aspects, we conducted a thorough financial investigation. We traced bank accounts, credit card payments, wire transfers, and each expenditure related to the apartments, kiosks, travel, etc. The financial investigation was a crucial piece of the larger immigration case because it related to payments of the workers and to the various implements of the scheme. One challenge here was that our analysis was always slightly behind the current data due to the time it took to obtain records and conduct the analysis. This case was ongoing rather than historical, so our numbers were about a year behind by the time we could indict. This resulted in a very conservative analysis of proceeds.

Through financial analysis, we could readily determine the amount of receipts taken in via the various entities because each had its own bank accounts and credit card processing. The challenge was determining the amount that could be identified as proceeds of the specified unlawful activity for planned money laundering charges. To do this, we needed to get an accurate determination of how many B-2s were employed company-wide. We used surveillance, emails, flight records, and housing lists from the apartments to obtain these numbers. However, because many workers came, stayed for six months and worked, and then returned to Israel, the workforce was fluid. And the number would only grow as we continued to investigate. In the end, we were able to determine that but for this supply of illegal labor, Rasko would not have had the necessary workers to conduct its business—the overwhelming majority were B-2 visa workers.

The financial investigation was also important for forfeiture purposes. Criminal forfeiture is most effectively accomplished where a financial investigation has been done and a defendant's assets have been identified prior to charging. Asset identification coupled with a financial investigation allowed us to determine which property constituted proceeds, which property constituted property involved in money laundering, and which property was simply a substitute asset. Identifying the directly forfeitable assets, including the property constituting proceeds and the property involved in money laundering, put the government in the best position to preserve assets for forfeiture. We included a lengthy forfeiture notice in the indictment that listed specific assets.

IV. Foreign Efforts

We liaised with DOS agents in Israel who were related to the initial visa applications for the workers, but our foreign evidence-gathering was otherwise limited. We obtained foreign emails that had been sent to our U.S.-based subjects' email accounts as well as evidence of foreign wire transfers abroad that originated from U.S. banks. We did not, however, submit a mutual legal assistance treaty (MLAT) request for bank account records from Israel. This decision was related to resources available and our primary concern that it could lead to the notification of our targets.

We did reach out to the DOJ Office of International Affairs (OIA) subsequent to indictment but prior to the arrests. In hindsight, we should have done this earlier in the process. Our assumption was extradition of Israeli citizens from Israel would prove very difficult, and we were concerned that any pre-arrest notification of that information would be passed to our U.S.-based subjects. As it turned out, however, our lead Israeli-based defendant was traveling during the time of our takedown, and we were able to provisionally arrest him in Romania and extradite him within three months. The FBI was a great asset in that area because it had an unmatched ability to navigate and liaise with foreign law enforcement.

V. Charging Decisions

As the investigation continued, another issue we faced was how broad to extend the investigation and our range of charges. We had entities/defendants operating in our district (EDVA) as well as in Georgia, North Carolina, Maryland, New Jersey, and Pennsylvania. Our surveillance and evidence were strongest in and from our district, but DOL was able to enlist resources in the other states to identify illegal workers and managers. Fortunately, the scheme operated in a similar manner across all the regions, though the entities, bank accounts, and workers were distinct. Our investigative actions in the Virginia region became a pattern that we were able to quickly assume across all other regions. The more we looked at the case, the more it became an interconnected web of entities operated under the one Rasko umbrella. We concluded we had to focus on the entire business, but this conclusion brought to bear the

challenges of coordinating a multi-district approach and takedown as well as venue issues in charging. We brought in the FBI as we came closer to the indictment, enlisted DHS and DOS to assist, and narrowed our field of proposed search locations to the primary business location in our district as well as our main subject's residence in North Carolina. We planned for a sealed indictment, to be followed by a two- or three-week period where the agents worked to nail down locations of our defendants, obtain search warrants and 2703(d)/pen registers, and coordinate with foreign law enforcement.

Both initially, and again as the scope widened, we faced the decision whether to employ the RICO statutes, which the agents favored. We were clearly dealing with an enterprise in Rasko and its various related entities. Because the investigation was initially more limited in scope, we initially decided to forego RICO, because we believed we had venue over the immediate targets and we had a number of immigration and financial statutes to use. We kept to that course as the indictment drew nearer, due primarily to timing and resource issues. In hindsight, we should have given greater consideration to RICO from the start. The difficulties this avenue would have presented on the front end would have been warranted with the back-end—the benefits of bringing in more substantive conduct in other districts as predicate acts. The dilemma we faced is that we started with a case we were not certain met RICO criteria. By the time we knew it did, we were too far along in the investigation to pursue the RICO approach. Our “scope” decisions were finalized in the last months of our investigation due to our lack of familiarity at the start with this type of scheme; had we considered the scope of our investigation/charging decisions at the start, it would have been helpful in deciding whether RICO would have been appropriate.

We chose, instead, to do a multi-object conspiracy under 18 U.S.C. § 371—both a scheme to defraud and to commit the offenses of visa fraud, recruitment, transportation and harboring of illegal aliens, and mail fraud.⁴ We also included substantive charges for all the immigration-related crimes. We charged the five managers and owners in a separate conspiracy to commit money laundering. This permitted us greater flexibility on the forfeiture front and a greater statutory maximum (twenty years vs. five). Given that we waited to go overt, we presented a very detailed indictment that fully laid out the entire scheme, along with some ninety-five overt acts. This proved to be a road map for defense counsel when we provided discovery, and only a few of the defendants made any claim that they were not guilty for their roles in the scheme. Our theory, which was accepted fully by the Court and reflected at sentencing, was this was a long-running and sophisticated fraud against various government agencies that were deceived by the defendants, who brought hundreds of illegal workers to the United States and harbored and employed them. The use of almost exclusively illegal laborers to sell even legal goods resulted in proceeds derived from the specified illegal activity—the visa fraud, harboring etc., that resulted from the sales of the product.

In terms of targets, we elected to charge the entire leadership of the conspiracy—the owners and managers, including Katz, the key Israeli-based manager. We also charged long-term workers to obtain some live-employee witnesses, if needed. Our concern, which proved validated, was the majority of the workers would flee the United States once the takedown occurred and the investigation became overt. We did not want to charge workers who had been here for brief periods of time—beyond the lack of jury appeal, those workers did not have the record of activity, in terms of false visa extensions and, sometimes, fake marriages, that we saw in longer-term workers who stayed well beyond the six-month visa period.

⁴ In the thirty-four count indictment, we charged the following: Conspiracy to Defraud and to Commit Offenses Against the United States, in violation of 18 U.S.C. § 371 (Count 1); Visa Fraud, in violation of 18 U.S.C. §§ 2, 1546 (Counts 2–8); Encouraging and Inducing Illegal Entry, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and 18 U.S.C. § 2 (Counts 9–14); Harboring Illegal Aliens, in violation of in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) and 18 U.S.C. § 2 (Counts 15–21); Transporting Illegal Aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and 18 U.S.C. § 2 (Counts 22–33); and Conspiracy to Launder Money, in violation of 18 U.S.C. § 1956(h) (Count 34).

One of the managers and all five long-term workers submitted false visa extensions that relied on similar justification paperwork—the forms provided by Rasko. Other managers had suspect marriages that we investigated once the arrests occurred. The visa fraud charges proved to be leverage building crimes and, within the much larger scope of the case, relatively digestible and easy to prove. A number of the long-term workers claimed they merely came here, worked, and had no knowledge of the activities of the managers or the financial affairs of Rasko. We charged separate money laundering and immigration conspiracies, and the two conspiracy approach addressed this distinction between the immigration and financial ends of the scheme. And, because the visa extensions were all so closely related in terms of their fraud, proving each long-term worker's connection to just that one false extension served to put them in the conspiracy because the managers assisted with these extensions.

To address the real absence of witness testimony, we included some ninety-five overt acts in the indictment that, when viewed together, painted a complete picture of the operation of Rasko—from recruitment to transportation and harboring in the United States to working and payment and visa extensions. We included the following among the ninety-five overt acts: false visa extension forms, Las Vegas conventions, lease signings, travel arrangements, payments for rent, emails showing new worker employment agreements, travel arrangements, and contact amongst conspirators, and the issuance of checks by managers in even amounts that were subsequently cashed.

Despite the clear motive to avoid paying taxes on these employees and their profits, we did not include any tax charges, in large part because of the absence of live witnesses at the front end, prior to indictment. This was an unfortunate byproduct of the covert way we had to approach the case. We had to do ex parte orders for tax records that we had ultimately obtained following indictment. The irony was the district court focused heavily on the tax implications of the scheme at sentencing.

VI. Takedown—Arrests and Forfeiture

In the month prior to our planned indictment, we learned the entire Rasko company had planned another Las Vegas convention for its workers. We sent agents to do surveillance, and they obtained reservations, rooming lists, hotel surveillance of certain presentations the company gave, discarded speeches, and other presentations that showed how the different regional entities were connected. The convention provided worthwhile real-time evidence of how Rasko continued to operate, and it confirmed the presence and roles of our targets. It also led to the identification of additional Rasko management who played roles in the United States and Israel, forming the basis for additional investigation and the indictment of other Israeli-based targets in 2017.

Once we indicted in mid-February 2016, we began planning for arrest operations in five cities. We obtained search warrants and 2703(d)/pen register orders prior to the execution of the takedown. These assisted in monitoring the defendants' movements prior to the arrest. We had alerts at the airports for any travel by our defendants. In the few weeks between the indictment and the planned takedown, two of the main subjects, including Omer Gur, left the United States for brief periods of time. We monitored this as closely as possible and planned for their returns, but we were concerned whether we should make the arrests ahead of schedule. Doing so would have prevented our doing simultaneous search warrants and restraining orders.

On March 1, 2016, a takedown resulted in the arrest of eight defendants and successful searches at multiple locations, including both the main office of Rasko in Virginia Beach and Gur's home in North Carolina. But twelve hours prior to the takedown, we became concerned that an inadvertent disclosure would seriously disrupt our planned takedown.

Our concern arose because subsequent to indictment, we obtained ex parte restraining orders. The case agents served the banks we determined kept proceeds and accounts involving money laundering. The agents did this in the days leading up to the takedown. With most of the financial institutions, the process of serving and implementing the forfeiture restraining order went smoothly. The day prior to the planned arrests, however, a restraining order was served on a bank account belonging to Gur. The bank then inadvertently notified Gur his funds were restrained, and providing the name of an AUSA who handled the ex parte restraining orders, along with the case number. Gur actually called the United States Attorneys' Office that afternoon. What followed was a flurry of phone calls between Gur and the other managers, calls which we were able to monitor through the pen register. Again, we confronted the dilemma of whether to try to arrest Gur that night where he resided in Raleigh, North Carolina without the other arrest and search teams in place at the other locations. We elected to wait due, in part, to another issue in Raleigh that night occupying our local law enforcement support.

We then learned Gur had booked a one-way flight to Toronto set to leave early the following morning, March 1, 2016—the first international flight of the day from the Raleigh, North Carolina airport. We arrested Gur at the airport that morning. At the time of his arrest, Gur was in possession of \$8,000 in U.S. currency. At a detention hearing on March 4, 2016, when prosecutors presented those facts, North Carolina counsel for Gur and his wife claimed this flight was merely part of a planned business trip.

Thankfully, as a result of the search warrant executed at his residence, agents recovered the recently accessed data from Gur's computer. This extraction of information contained dozens of online searches Gur conducted in the hours before his attempted flight, including multiple visits to Priceline, a travel website. He made searches of multiple international one-way flights, all departing on March 1st from Raleigh or Charlotte, North Carolina, including flights to Rome, London, Madrid, Paris, Dublin, and Cancun, before settling on Toronto—the earliest one-way flight from Raleigh. He also made searches regarding whether the government could block individuals from leaving the United States. In addition, Gur deactivated his Facebook page and visited various banking websites. We were able to use all of this evidence to detain Gur after some protracted proceedings. Thus, although Gur's learning of the restraining order caused serious issues with flight and destruction of evidence, the actions Gur took ensured his detention. We were lucky in this case, and the agents were good, but clearly the best route is to ensure a defendant does not learn of a restraining order prior to arrest.

Notwithstanding the above experience, many of the banks from which we subpoenaed records were large, national banks where no concern existed that the targets of the investigation would be notified. However, we did know of one smaller, local bank where one of the main targets had extensive dealings. We were concerned this bank might notify the target of the ongoing investigation. For this reason, we did not obtain records from this small, local bank until after Gur was arrested. Ironically, one of the large, national banks actually notified Gur, validating our concern that a smaller bank, where he was a long-time customer, would certainly notify him.

Although not subpoenaing records from one bank until after the takedown day gave us somewhat of a blind spot starting out, we were still able to restrain a large number of assets just following indictment. These included eight bank accounts, twenty-two cars, and twenty-four merchant services accounts. The merchant services accounts collected credit and debit card payments from customers and deposited them into the merchant's bank account at regular intervals. The bank and merchant services accounts were restrained as proceeds and property involved in promotion money laundering. The cars were restrained because they were conveyances used in the conspiracy, one object of which was violations of the Immigration and Nationality Act. Violations of the Immigration and Nationality Act carry forfeiture of conveyances pursuant to 8 U.S.C. § 1324(b).

In retrospect, restraint of the cars was unwise—we should have obtained seizure warrants for them. Many of the defendants lived in apartment buildings. Once they were arrested, the vast majority of the twenty-two cars we restrained were towed by the apartment management and ended up scattered at various impound lots, where they quickly began to accrue steep storage fees. Those mounting storage fees rendered most of the cars unsuitable for forfeiture because it placed them below the \$5,000 forfeiture threshold for cars set by the Money Laundering Asset Recovery Section’s policy. Most of those cars ended up not being forfeited and were left for the impound lots to exercise whatever legal remedies they had available.

Along with the arrest of Gur, in the early morning hours of March 1, 2016, agents from the DOL, DHS, DOS, and the FBI, executed arrest warrants of managers and long-term workers of the various Rasko entities. Agents arrested eight defendants and searched several locations in the days that followed. Agents also conducted many interviews of other workers; however, beyond providing information that corroborated the roles and actions of various defendants, those interviews yielded little because those workers who had not been arrested quickly left the company apartments and departed from the United States.

We ended the takedown day with various defendants in custody in five different districts and managed to have Katz provisionally arrested in Romania. We had coordinated with OIA directly after obtaining the indictment and put red notices in place. These actions should be done as far in advance as possible—contact OIA, find each country’s requirements, and start putting the information together because the agents will not have time to do so after the arrest occurs, when they are busy coordinating with multiple districts about arrests, searches, and detention hearings.

We prepared a motion to have the case declared complex for Speedy Trial purposes and filed it as soon as the indictment was unsealed. Our district judge granted this motion without waiting for responses from the defendants; this action made setting a trial date easier with defendants arriving in our district on different dates.

We also tried to coordinate with other districts in advance of the arrests by ascertaining the duty AUSA in each district and what the AUSA needed for the detention hearings. We could have coordinated better by preparing the actual detention packets of information in advance. In our district, magistrate judges grant the government three days between arrest and detention hearing, but that is not the case in many larger cities. Additionally, the Eastern District of North Carolina required live testimony through an agent at the Gur detention hearing. We had to prepare a local agent for that hearing. Though he testified in a fulsome manner, the magistrate judge in North Carolina ordered Gur’s release. We sought and obtained a stay from the EDVA district court, had Gur arrested again in North Carolina, and had him transferred to our district. His North Carolina attorneys protested this effort, but our district judge had no issues with detaining Gur as a clear flight risk. Gur then appealed his detention to the Fourth Circuit and lost. Having the leader of this conspiracy detained resulted in quicker plea negotiations. We managed to detain two of the other managers as well and had restrictive bonds on the other defendants. Despite the unlawful status of these defendants in the United States, we learned that a detainer placed on the defendants by DHS would not ensure their administrative/immigration detention. The arrests of the defendants, however, allowed us to reach out to their purported spouses. By doing so, we learned that, as suspected, many of the marriages were fraudulent and Rasko often assisted in arranging such marriages for long-term workers who wanted to stay in the United States. This knowledge proved to be very useful evidence both at the detention hearings and at sentencing.

VII. Sentencing and Forfeiture Disposition

Our concern about proving defendants were, in fact, paid employees turned out to be a very minor issue after the arrests. Most of the defendants readily admitted they worked for Rasko. As the investigation became overt, other crimes (including the marriage frauds) came to the surface. Only one long-term worker seriously challenged whether he was part of the conspiracy—an effort that failed as his colleagues all pled guilty to the immigration conspiracy. The discovery was extensive; but, we had very few issues as the detained managers were eager to plead and cooperate and the indictment was so comprehensive. One challenge raised repeatedly by defense counsel once we indicted (as explained more fully below) was that the products Rasko sold were legitimate—thus, their sale could not result in proceeds for the purposes of the money laundering conspiracy. Another argument brought by the defense was we split one overall conspiracy into two separate conspiracies. These challenges took some time, but they did not result in any real obstacles to resolution. We had each of the managers/owners plead to both conspiracy charges, and the long-term workers all pled to the immigration conspiracy.

The two-conspiracy approach created an unforeseen issue at sentencing: the argument that the guidelines were driven, not by the laundered amounts (over \$7 million for the lead defendants) but by the immigration related offenses. We initially expected Section 2L1.1 (related to Smuggling, Transporting, or Harboring Unlawful Alien) to apply, however, probation and the court applied Section 2L2.1 (related to Trafficking in Immigration Documents). There were minor concerns over how many fraudulent documents were at issue and whether the visa fraud facilitated the commission of other offenses (in our view, it facilitated separate money laundering and tax offenses). The defendants' counsel clearly expected the court to treat this case in a lenient manner, as more of a regulatory offense; however, the district court took a harsh view of the long-running scheme and the assorted fraud and profits it generated. Each of the defendants presented significant family/friend type evidence, but the district court determined that, if anything, the guidelines were too low. Katz, after contesting extradition from Romania and then appealing his detention to the district court, argued he should receive a variance for the time he spent in a Romanian jail. The district court rejected these various variance arguments and sentenced all of the defendants to the mid or high end of the guidelines.

With respect to forfeiture, while only one of the nine defendants did not consent to forfeiture eventually, more of the defendants had not agreed to forfeiture by the time of their guilty plea. This was true, in particular, for two of the three lead defendants. For those two defendants, the plea agreement specifically provided there was no forfeiture agreement. Our view was it was preferable to get a guilty plea without a forfeiture agreement rather than no plea at all, because getting an adjudication of guilt is half the battle in criminal forfeiture. Even in the absence of a forfeiture agreement, once a defendant pleads guilty, determination of the forfeiture issues is a matter of filing a motion and putting on evidence at a hearing.

In both the money laundering and forfeiture contexts, the main issue defense counsel raised was the scope of what counted as proceeds. As to money laundering, an argument we frequently encountered from defense counsel was that the revenues from the sales of the Dead Sea cosmetics at Rasko's kiosks could not be proceeds for the purposes of 18 U.S.C. § 1956 because selling cosmetics is legal even if the defendants were using illegal labor to do so. As part of that argument, defense counsel further asserted that proceeds indirectly derived from the use of illegal labor could not count as proceeds for the purposes of 18 U.S.C. § 1956.

Ours was a case of indirect proceeds. While selling cosmetics is legal, using mostly illegal labor to sell the cosmetics is not, and but for the use of that illegal labor through the visa fraud, the defendants would not have had those monies coming into their cosmetics business. Many of the helpful cases are forfeiture cases not money laundering cases. They are nonetheless illustrative, because the forfeiture

statutes examined use the same language now found in the post-*Santos* fix definition of proceeds in § 1956(c)(9), that is, these forfeiture statutes explicitly define proceeds to include property derived directly or indirectly from the unlawful activity. Two helpful cases from the Eastern District of Virginia are *United States v. Ivanchukov*, 405 F.Supp.2d 708 (E.D. Va. 2005)⁵ and *United States v. Farkas*, 474 F. App'x 349 (4th Cir. 2012).⁶ *Farkas* was a case from the Alexandria Division of the Eastern District of Virginia.⁷

Predictably, the issue with respect to the scope of the proceeds also came up in the forfeiture context. The argument from defense counsel had the same premise as it did in the money laundering context—that the cosmetics being sold were legal, so the measure of proceeds was net profits not gross receipts. The basis of their argument, at least as to the fraud conspiracy, was based on the two definitions of proceeds set out in 18 U.S.C. § 981(a)(2). That statute provides that in cases involving illegal goods, illegal services, and unlawful activities, proceeds means gross receipts. The statute further provides that in cases of legal goods and services provided in an illegal manner, the measure of proceeds is the net profits from the illegal transactions. Ultimately, we were able to resolve these issues by the time of sentencing.⁸

Before reaching a forfeiture agreement with the main defendant, Gur, it came to our attention that

⁵ *United States v. Ivanchukov*, 405 F. Supp. 2d 708 (E.D. Va. 2005).

⁶ *United States v. Farkas*, 474 F. App'x 349 (4th Cir. 2012).

⁷ In *Ivanchukov*, the court found that \$100,000 which was not part of the \$1,300,000 in illegal proceeds generated by the immigration fraud was nonetheless forfeitable because the third party would not have provided the \$100,000 to the defendant but for their joint involvement in the immigration fraud. *Ivanchukov*, 405 F. Supp. 2d at 709. The *Ivanchukov* Court therefore reasoned that the payment constituted proceeds obtained indirectly from the commission of the offense. *Id.* at 712–13. That \$100,000 was the money that the defendant talked a third party into giving him for an attorney because the defendant told the third party, “[I]f I’m in trouble, so are you.” *Id.* at 710.

The *Farkas* case from the Fourth Circuit is also significant because it dealt with a definition of proceeds that was identical to the definition now set out at § 1956(c)(9). *Farkas*, 474 F. App'x at 359–60. The statute supporting forfeiture in *Farkas*, 18 USC § 982(a)(2), uses the same “directly or indirectly” language as § 1956(c)(9). *Id.* at 359. The District Court in *Farkas* issued an order requiring the defendant to forfeit “proceeds he obtained directly or indirectly as a result of his fraudulent activities.” *United States v. Farkas*, No. 1:10-cr-200, 2011 WL 5101752, at *1 (E.D. Va. Oct. 26, 2011). The District Court then applied the “but for” definition of proceeds, reasoning that the proceeds nexus requirement could be satisfied if the government showed that the defendant “obtained such funds indirectly as a result of his crime.” *Id.* at *6. The District Court in *Farkas* noted that “the funds [at issue] would not have been available to him but for his fraud, because [the company] would not have remained in business in the absence of the bank and wire fraud scheme.” *Id.* at *5. These findings by the District Court were precisely what was before the Fourth Circuit in *Farkas*, and the Fourth Circuit affirmed these findings. *Farkas*, 474 F. App'x at 359–60.

⁸ As a threshold matter, one federal appellate court has held that the definitions portion of 18 U.S.C. § 981(a)(2) is only applicable when § 981 is used to accomplish civil forfeiture, not when § 981 is used in conjunction with 28 U.S.C. § 2461(c) to undertake criminal forfeiture, as in our case. *United States v. Holzendorf*, 576 F. App'x 932, 937–38 (11th Cir. 2014). There are, however, appellate courts that have taken the opposite position. *See, e.g., United States v. Nacchio*, 573 F.3d 1062, 1087–90 (10th Cir. 2009). We took the position that even if 18 U.S.C. § 981(a)(2) could be used in criminal forfeiture, the fraud in this case was an inherently unlawful activity, so the definition of proceeds for the fraud conspiracy in our case would be gross receipts, not net profits. *See United States v. Adetiloye*, 716 F.3d 1030, 1041 (8th Cir. 2013) (using gross receipts definition in a mail fraud case); *United States v. Gartland*, 540 F. App'x 136, 139 (3d Cir. 2013) (using gross receipts definition in a case of honest services mail fraud); *United States v. Schlesinger*, 261 F. App'x 355, 361 (2d Cir. 2008) (using gross receipts definition in a mail/wire fraud case). There was no Fourth Circuit case law on point, however, and it was a colorable issue for the defense to argue. *See United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012) (stating that since buying and selling securities is not inherently unlawful, measure of proceeds in an insider trading case is net profits); *United States v. Exec. Recycling*, 953 F. Supp. 2d 1138, 1158 (D. Colo. 2013) (deciding that since defendants’ business involved the provision of lawful services in an unlawful manner, measure of proceeds would be net profits). It was that legal consideration, coupled with the practical consideration that these defendants would all be deported after serving their sentence, which led to some of the forfeiture agreements we ended up reaching.

one of Gur's partners in an unrelated real estate rental business was starting to sell off real properties in which Gur had an interest. The forfeiture restraining order we initially obtained upon indictment did not restrain many of the real properties where Gur had an interest, because we did not have evidence that the properties constituted proceeds of the immigration fraud and money laundering offenses with which Gur was charged. Since Gur had already entered a guilty plea by the time his partner started selling off his real properties, we filed an ex parte motion to modify the first restraining order to include all assets where Gur had an interest up to the amount of \$7,254,220.²² That figure was an extremely conservative calculation of the fraud proceeds giving Gur the benefit of every doubt, including Gur's argument that net profits not gross receipts was the proper measure of proceeds.

Once the amended restraining order was obtained and served, not only did the liquidation of the properties cease, but Gur and interested third parties started approaching us in hopes of reaching an agreement on the forfeiture. When defendants have substantial assets abroad, it increases the difficulty because it greatly complicates forfeiture and lessens the likelihood of successfully obtaining assets abroad. Although 21 U.S.C. § 853(e)(4) gives a court the power to order a defendant to repatriate assets located abroad, as a practical matter these orders often go unheeded and prove more difficult to enforce than one might think. Furthermore, a large monetary judgment against a defendant like Gur might have a paper appeal, but practically speaking, we had to consider the fact that Gur would be deported after he served his sentence. In Gur's case, he owned a plethora of assets in the United States which facilitated the resolution of the forfeiture issues. Our forfeiture focus then shifted to collection considerations. The result was a resolution whereby Gur forfeited just about every worthwhile asset he owned in the United States. This resulted in collections topping two million dollars for Gur alone. A similar resolution was reached with the other top-level defendant Eyal Katz who also had substantial assets in the United States.⁹ Agreements like these were not made with co-defendants who had little to offer in the way of domestic assets, because we lost nothing by obtaining a money judgment against those co-defendants and we gained nothing by resolving the forfeiture as we did for Gur and Katz.

⁹ Obtaining a preliminary order of forfeiture is, of course, not the end of the process in criminal forfeiture. The ancillary proceeding, a quiet title process, follows the entry of the preliminary order of forfeiture and is meant to clear up third-party interests in the forfeited assets. We were able to resolve two main ancillary concerns early on in the forfeiture process. First, a company consisting of Gur, Katz, and a business partner uninvolved in the criminal activity in this case owned a number of real properties in North Carolina. The company rented out those real properties, some of which were over thirty years old and were not in excellent shape. We were able to reach a resolution whereby the uninvolved business partner bought out Gur and Katz's interest in the company. This meant that the government received a substantial sum of money instead of an assortment of rental properties in varying states of repair. While the U.S. Marshals Service has the ability to manage forfeited rental properties and does a good job with it, the preference, where possible, is to take money in lieu of assets, which depreciate and must be managed like rental properties. The government incurs virtually no costs in forfeiting money.

We were also approached by counsel for several property-holding companies in which Gur and Katz had an interest. Counsel proposed permitting the sale of the real properties held by those companies with the proceeds of those sales due to Gur and Katz to be deposited with the U.S. Marshals Service for forfeiture. Gur and Katz were not the only ones with an interest in these property holding companies; rather the companies had a number of interested parties that were not defendants in our case and, thus, whose interest we would have to account for in an ancillary proceeding. We agreed to the proposal, which gave the government \$1,874,372.¹² in lieu of a number of rental properties that would have to be managed and which had interested third parties who would certainly file petitions in the ancillary proceeding. Given that we had the amended restraining order in place, we had to file a motion to modify the amended restraining order to allow the sales to proceed as described above. The early resolution of these two likely third-party claims made for a much smoother ancillary process in this case.

VIII. Conclusion

With the exception of Katz, who did not arrive in the United States until June 2016, the cases against all remaining defendants were fully resolved by December 2016—less than a year after our indictment. The Rasko business has shut down—the kiosks abandoned, the apartments emptied, the assets seized and forfeited. We learned through various cooperating defendants and other sources that the case received significant attention in the kiosk community, including Israel, where it is very common for young people to travel abroad after the completion of their required military service. The Rasko case also led to a spin-off indictment against two third-party money launderers and two other managers who are now in Israel. The success of the case was due to a combination of factors common to many cases and, as always, a little luck—among others: having a solid investigative team and strong lead/point agent as well as agents from DHS and DOS who had worked visa fraud and marriage fraud; doing search warrants for key email accounts and addressing language/translation issues; accomplishing thorough immigration and financial analyses ahead of time; relying on covert methods until takedown and having an organizational process in place to identify workers and associate with relevant emails, photographs, and surveillance; and working the forfeiture end together with the criminal case. All of this enabled our team to establish that the Rasko business, which looked legitimate from the outside was, in fact, permeated by many layers of fraud targeted at our immigration system to the immense profit of our U.S. and foreign defendants.

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Notarios and the Unauthorized Practice of Law: A Signature of Fraud

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I. Introduction

In 1996, Catalina Garcia Nunez, an immigrant from Mexico, sought lawful permanent residency in the United States.¹ She requested assistance at an organization called the General Legal Services and hired “*notario*” Reyna Dorantes to assist her.² Ms. Dorantes provided Ms. Garcia Nunez with a stamp in her passport, purportedly from the then-Immigration and Naturalization Service (INS), which Ms. Dorantes told her was proof of her legal permanent residency and employment authorization.³ Ms. Dorantes also promised Ms. Garcia Nunez she would receive her final permanent residency card in the mail from the INS in twelve to twenty-four months.⁴ Unfamiliar with immigration processes and the legal system in the United States, Ms. Garcia Nunez did not realize the stamp was invalid and used it to obtain a social security card and a state-issued driver’s license.⁵

Unbeknownst to Ms. Garcia Nunez, Ms. Dorantes had fraudulently filed an asylum application on her behalf instead of an application for lawful permanent residency.⁶ The asylum application was filed using General Legal Services’ address, so all receipts and notices went back to the business not Ms. Garcia Nunez.⁷ On March 20, 1997, INS initiated deportation proceedings against Ms. Garcia Nunez after she failed to appear for her interview before the INS Asylum Office and INS sent notice of the deportation proceedings to the address used on her asylum application.⁸ Because Ms. Garcia Nunez did not receive the notice and was unaware she had been placed into proceedings, she did not appear at her scheduled immigration hearing and was ordered deported in absentia.⁹

In 1998, Ms. Garcia Nunez tried to contact General Legal Services to renew her lawful permanent residence but found that the business was closed and Ms. Dorantes had disappeared.¹⁰ Ms. Garcia Nunez then sought assistance from several attorneys, who informed her the stamp she received in her passport was forged and she had been defrauded out of \$3,500.¹¹ They also later learned Ms. Dorantes filed for asylum for Ms. Garcia Nunez without her knowledge or consent and the application led to the deportation proceedings and the in absentia order of deportation.¹²

¹ *Nunez v. Gonzales*, 231 F. App’x 666, 666 (9th Cir. 2007).

² *Id.* at 667.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 668.

This is the factual scenario behind *Nunez v. Gonzales*, an unpublished Ninth Circuit case examining when the immigration courts should equitably toll the deadline for reopening a removal or deportation order based on ineffective assistance by a non-attorney.¹³ This case is illustrative because fraud perpetrated by so-called *notarios* is an extremely common occurrence. The Executive Office for Immigration Review (EOIR) and the Department of Homeland Security (DHS) see *notario* fraud on a daily basis. While exact statistics are impossible to determine, EOIR alone has sent two dozen cease-and-desist letters in 2017 to unauthorized practitioners who attempted to enter an appearance or register to practice before the immigration courts or Board of Immigration Appeals. In addition, EOIR's Fraud and Abuse Prevention Program has received over fifty complaints this year regarding unauthorized practitioners assisting in immigration cases in a behind-the-scenes capacity, including preparation of applications, drafting of briefs and motions, or accompanying respondents to court and coaching them to appear pro se. This number is just the tip of the proverbial iceberg because much of the unauthorized practice of law goes undetected or unreported.

This article will examine why *notario* fraud is so common in immigration proceedings, the ties between *notario* fraud and other federal offenses, strategies for combatting it at the federal level, and case examples that are illustrative of successful federal enforcement actions against *notarios*. Additionally, the article will explore why, increasingly, *notario* fraud must be combatted at the federal level because it is often intrinsically connected to other types of fraud, as with *Nunez v. Gonzales* and the connection to asylum fraud and because enforcement by other government entities is difficult.

II. *Notario* Fraud

Notario fraud, a type of unauthorized practice of immigration law, is a widespread problem before both DHS and EOIR. Unauthorized practitioners routinely misrepresent their qualifications to unsuspecting individuals, most of whom are immigrants who do not speak English, are unfamiliar with the legal system in the United States, and do not understand the qualifications necessary to practice before DHS and EOIR. This leads to thousands of immigrants being defrauded each year and a glut of fraudulent or erroneous applications being filed with DHS or EOIR by *notarios* and other unauthorized practitioners—consequences which clog the immigration system and adversely impact the integrity of the entire process.

To understand the magnitude of the problem, it is important to understand why *notario* fraud is so prevalent. First, while immigrants have the right to representation in most adjudications before DHS and EOIR, they are not entitled to representation at government expense except in limited circumstances.¹⁴ Therefore, immigrants lacking the means to hire an attorney may seek a less expensive option. Second, as expressed by Chief Judge Marvin Aspen of the Northern District of Illinois, immigration law provides “an example of legislative draftsmanship that would cross the eyes of a Talmudic scholar.”¹⁵ In other words, understanding immigration law requires a level of sophistication most lay people lack. Therefore, the complexity of immigration law and procedure combined with the inability of individuals to hire an attorney leaves a vacuum into which unscrupulous individuals step.

Second, the term *notario publico* causes confusion for immigrants from many Spanish-speaking countries. *Notario publico* is the literal translation of notary public; however, the two statuses are vastly different. In many Spanish-speaking countries, including Mexico, a *notario publico* is a licensed attorney

¹³ *Id.*

¹⁴ See, e.g., 8 U.S.C. § 1362 (2012) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

¹⁵

who gained additional qualifications to become a *notario*. For example, in Mexico City, before attorneys can become a *notario*, they must first apprentice with a *notario* for twelve months and then sit for a *notario* exam.¹⁶ Once they receive certification as a *notario publico*, attorneys may conduct arbitrations and mediations, intervene in judicial proceedings, and ensure the legal sufficiency of documents such as bylaws of companies, wills, deeds, powers of attorney, and trusts.¹⁷

As most people in this nation are aware, a notary public in the United States is a very different occupation. In Virginia, for example, an individual need only be eighteen years old, able to read and write English, be a legal resident of the United States, live or work in Virginia, and not be convicted of a felony.¹⁸ Not only does this status not require a law degree, it does not require any legal training whatsoever. Moreover, a notary in Virginia is only permitted to take acknowledgements, administer oaths and affirmations, certify that a copy of any document other than a document in the custody of a court is a true copy thereof, certify affidavits or depositions of witnesses, and perform verification of fact.¹⁹ A notary is prohibited from assisting “another person in drafting, completing, selecting, or understanding a document or transaction requiring a notarial act.”²⁰ All states, Washington, D.C., and Puerto Rico have similar requirements and prohibitions.

Notario fraud, therefore, arises when an individual obtains a notary public license in the United States and then advertises as a *notario publico* in Spanish. Immigrants from Latin America, lacking legal representation and an understanding of the legal system in the United States, turn to these individuals for assistance with the immigration system, presuming the “*notario publicos*” are highly qualified legal representatives. The *notarios* either hold themselves out as attorneys or do nothing to correct the immigrants’ incorrect assumptions about their qualifications. In addition, the *notarios* speak Spanish and are frequently tied to the same immigrant community as their victims.

Furthermore, because of the confusion in the immigrant community regarding whether *notarios* are attorneys, *notarios* frequently charge exorbitant fees for their services. Despite clear guidelines in most states for how much notary publics may charge, *notarios* engaging in the unlawful practice of immigration law charge hundreds or thousands of dollars for their services.²¹ Lacking legal training, *notarios* also frequently give immigrants erroneous legal advice or incorrectly fill out applications and petitions for immigration relief. In more insidious cases, as in *Nunez v. Gonzales*, *notarios* file fraudulent applications on behalf of immigrants or scam them by telling them that they have applied for or have been granted relief for which they have not applied.

It is important to note that the unauthorized practice of law, immigration scams, and application fraud are not limited to immigrant populations from Latin America. These types of fraud can be found in all other immigrant communities. For example, immigrants may turn to non-lawyer “immigration consultants” or “travel agents” for legal assistance. *Notario* fraud is particularly deceptive, however, because the use of the term preys upon a difference in cultural understanding.

III. Federal Requirements to Practice Immigration Law

Further complicating matters from the perspective of immigrants and those trying to bring enforcement actions against unauthorized practitioners is that the practice of immigration law by some

¹⁶ [Ley del Notariado para el Distrito Federal \[LNODF\], Artículo 54, Diario Oficial de la Federacion \[DOF\] 28-3-2000 \(Mex.\)](#).

¹⁷ [Ley del Notariado para el Distrito Federal \[LNODF\], Artículo 33, Diario Oficial de la Federacion \[DOF\] 28-3-2000 \(Mex.\)](#).

¹⁸ VA. CODE ANN. § 47.1-4 (West, Westlaw through end of 2017 Reg. Sess.).

¹⁹ *Id.* § 47.1-12 (Westlaw).

²⁰ *Id.* § 47.1-15 (Westlaw).

²¹ *See, e.g., id.* § 47.1-19 (Westlaw) (permitting notaries to charge between five and twenty-five dollars).

non-lawyers is authorized under federal law.²² Federal regulations at 8 C.F.R. 292.1 (for DHS) and 8 C.F.R. 1292.1 (for EOIR)²³ govern who may practice immigration law, and they are more expansive than those that traditionally govern the practice of law. The regulations not only allow attorneys to practice before DHS and EOIR, but they also permit accredited representatives, law students and law graduates, reputable individuals, and accredited officials.²⁴ The latter categories are all non-attorneys who are permitted to practice provided they meet the regulatory requirements. This causes notable confusion for many immigrants seeking legal representation, as well as for disciplinary authorities and law enforcement agencies seeking to enforce the rules. A brief overview of the federal structure for the practice of immigration law is offered below to acquaint the reader with the types of non-attorneys who are permitted to practice before the DHS and EOIR.

First, EOIR grants accredited representatives status to allow individuals to represent immigrants if they are affiliated with a recognized organization (a status also adjudicated by EOIR to qualified non-profit organizations).²⁵ This category is by far the most prevalent of all non-attorneys who practice before EOIR and DHS. Accredited representatives must both demonstrate they have broad knowledge and adequate experience in immigration law and procedure and meet character and fitness requirements.²⁶ There are two levels of accreditation: partial and full. Partially accredited representatives are permitted to represent individuals solely before DHS, while fully accredited representatives may represent individuals before both DHS and EOIR.²⁷ Once representatives receive accreditation, they are entitled to all of the rights and subject to all of the responsibilities of attorneys appearing before EOIR and DHS, and they may be disciplined in the same manner by the agencies' disciplinary authorities.²⁸

Reputable individuals may be permitted by the adjudicating official to represent immigrants on an individual case basis.²⁹ They must appear at the request of the person they are representing, be of good moral character, and file a written statement that they are appearing without direct or indirect remuneration.³⁰ The person seeking reputable individual status must also have a pre-existing relationship with the person, although this can be waived if no other adequate representation is available.³¹ The regulation explicitly excludes "any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so."³²

Law students and law graduates not yet admitted to the bar may also appear before DHS or EOIR provided they are appearing at the request of the individual they are representing and are permitted to do so by the adjudicating official.³³ They must file a statement stating they are doing so without direct or indirect remuneration and are participating under the supervision of a faculty member (for law students),

²² 8 C.F.R. §§ 292.1, 1292.1 (2017) (governing who may practice immigration law).

²³ The regulations for representation before DHS and DOJ are substantially identical, except that 8 C.F.R. 292.1(a)(6) allows attorneys outside of the United States to represent individuals before DHS.

²⁴ §§ 292.1, 1292.1.

²⁵ § 1292.1.

²⁶ 8 C.F.R. § 1292.12(a)(1), (6) (2017).

²⁷ *Id.* § 1292.12(a). In January 2017, a new rule went into effect regarding the Recognition and Accreditation Program. 81 Fed. Reg. 92346-01 (Dec. 19, 2016) (to be codified at 8 C.F.R. §§ 1001, 1003, 1103, 1212, 1292). The new rule changed the process by which applications are adjudicated before EOIR, the way in which the program is administered, and the name for accredited representatives. While they were previously called Board of Immigration Appeals (BIA) accredited representatives, they are now referred to as Department of Justice (DOJ) accredited representatives.

²⁸ 8 C.F.R. § 1292.12(D) (2017).

²⁹ 8 C.F.R. §§ 292.1(a)(3)(i), 1292.1(a)(3)(i) (2017).

³⁰ 8 C.F.R. § 292.1(a)(3)(i)–(ii); *id.* §§ 292.1(a)(3)(i)–(ii), 1292.1(a)(3)(i)–(ii) (2017).

³¹ *Id.* §§ 292.1(a)(3)(iii), 1292.1(a)(3)(iii).

³² *Id.* §§ 292.1(a)(3)(iv), 1292.1(a)(3)(iv).

³³ *Id.* §§ 292.1(a)(2)(i), (iv).

licensed attorney or accredited representative.³⁴ Finally, accredited officials from the immigrant’s country of origin are permitted in their official capacity with the immigrant’s consent.³⁵

IV. Federal Enforcement

Federal enforcement against the unauthorized practice of law before DHS and EOIR has been sporadic. This arises primarily because the unauthorized practice of law, in itself, is not criminalized under federal law. Therefore, federal authorities must charge individuals engaged in the unauthorized practice of law with violations of statutes that are incidental to the fraud. However, in many cases it proves difficult or impossible to charge the individual under existing federal criminal law, so he never faces federal prosecution. In the face of federal inaction, many state or local authorities have tried to fill the void and have passed statutes or ordinances that seek to criminalize *notario* fraud. However, those efforts have had mixed success predominantly because of federal preemption issues and the confusion that arises from federal authorities permitting non-lawyers to practice. Additionally, many state authorities presume federal authorities are policing the practice of law before federal agencies, so they decline enforcement.

Despite the difficulties noted above, where federal authorities have pursued enforcement actions against unauthorized practitioners, the federal government has found success. The following case examples and statutory provisions demonstrate *notarios* can be held accountable for the harm they do.

A. Eric Alva and Jessica Rivas Alva

The United States Attorneys’ Office in the Western District of Texas obtained a guilty plea from a husband-wife team, Jessica Rivas Alva and Eric Alva, *notarios* from San Antonio who were engaging in the unauthorized practice of immigration law.³⁶ The couple operated “Rivas-Alva Immigration and Notary Services,” and both were licensed by the State of Texas as notaries.³⁷ Initially, the Texas Attorney General filed a petition alleging the defendants listed their business as a “Law Office Atty” in advertisements and had “Law Office” and “Specializing in Immigration and Notary Services” listed on their door.³⁸ In addition to advertising themselves in this way, the defendants also impersonated attorneys for whom they had previously been employed.³⁹ They used business cards with one attorney’s name on it and used a different attorney’s name to access an Immigration and Customs Enforcement (ICE) detention center to meet with immigration detainees.⁴⁰ When meeting with detainees, Rivas Alva represented herself as an attorney.⁴¹

The State of Texas obtained an injunction against the defendants under the Texas Deceptive Trade Practices Act on October 16, 2014, which prohibited them from “soliciting, advertising, or providing any services, assistance, or support to other persons involved in any immigration matter, including matters pertaining to immigration bonds of any kind,” “representing directly or by implication, that [d]efendants have the skill, expertise, or competence to handle immigration matters unless [d]efendants are authorized to practice federal law,” “filling out forms, providing legal advice, or

³⁴ *Id.* §§ 292.1(a)(2)(ii), 1292.1(a)(2)(ii).

³⁵ *Id.* §§ 292.1(a)(5), 1292.1(a)(5).

³⁶ See [Press Release, U.S. Attorney’s Office, W. Dist. of Tex., U.S. Dep’t of Justice, San Antonio Couple Plead Guilty to Conspiracy to Commit Wire Fraud and Identity Theft \(Mar. 2, 2017\)](#).

³⁷ Plaintiff’s Original Verified Petition, *Texas v. Rivas Alva*, 2013-CI-17483 (Bexar Cnty., Tex. Dist. Ct. 2013).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

engaging in other acts or practices which would constitute the practice of law.”⁴² The injunction also prohibited Rivas Alva from accessing any immigration detention center unless she was accompanied by an attorney for whom she was employed.⁴³

On May 15, 2015, Texas filed a Motion for Contempt and Petition for Civil Penalties.⁴⁴ In the motion, Texas alleged defendant Rivas Alva impersonated a third former attorney-employer, using letterhead with his name on it and filing G-28s, the Notice of Entry of Appearance as Attorney or Accredited Representative for DHS, purportedly signed by him but without his consent or knowledge.⁴⁵ The documents used contact information for Rivas Alva rather than the attorney’s law firm.⁴⁶ Rivas Alva also attempted to enter another ICE detention facility using fraudulent letterhead from the same attorney and unaccompanied by a supervising attorney in violation of the injunction.⁴⁷ Texas further alleged Eric Alva impersonated an attorney during a telephonic bond hearing and forged the attorney’s name on bond documents.⁴⁸ The Texas District Court found the Alvas violated the injunction and granted the contempt motion on August 10, 2015.⁴⁹ They were each sentenced to eighteen months in jail and fined over one million dollars jointly.⁵⁰

During the pendency of the state’s proceedings against the Alvas, ICE’s Homeland Security Investigations (HSI) also began investigating the Alvas with the United States Attorney’s Office in the Western District of Washington. On July 8, 2015, Jessica Rivas Alva was indicted in United States District Court for three counts of wire fraud and two counts of aggravated identity theft.⁵¹ The United States Attorney’s Office based its indictment on Rivas Alva’s faxing forged letters from attorneys to gain entry to an ICE detention center.⁵² It also included her misrepresentations of herself as an attorney to detainees and their families while she was under injunction from the State of Texas.⁵³ Eric Alva was also indicted based on his telephonic impersonation of an attorney during a bond hearing.⁵⁴ On March 2, 2017, the Alvas each pleaded guilty to one count of conspiracy to commit wire fraud and aggravated identity theft.⁵⁵ Sentencing was scheduled for June 7, 2017.⁵⁶

This case is an excellent example of federal enforcement against *notarios*, in addition to an example of complementary enforcement actions by state and federal officials. The federal enforcement in

⁴² Agreed Final Judgment and Permanent Injunction at 6, 7, 8, Texas v. United Immigration Consulting, LLC, No. 16-04-00133CVF, at 6-10 (Frio Cty., Tex. Dist. Ct. Oct. 19, 2016).

⁴³ See [Press Release, U.S. Attorney’s Office, W. Dist. of Tex., U.S. Dep’t of Justice, San Antonio Couple Plead Guilty to Conspiracy to Commit Wire Fraud and Identity Theft \(Mar. 2, 2017\)](#).

⁴⁴ See State of Texas’ Motion for Contempt and Petition for Civil Penalties for Violation of the Agreed Final Judgment and Permanent Injunction, Texas v. Rivas Alva, 2013-CI-17483 (Bexar Cty., Tex. Dist. Ct. May 15, 2015).

⁴⁵ See *id.* at 4–5 (No. 2013-CI-17483).

⁴⁶ *Id.* (No. 2013-CI-17483).

⁴⁷ See *id.* at 5–6 (No. 2013-CI-17483).

⁴⁸ See *id.* (No. 2013-CI-17483).

⁴⁹ See [United States v. Alva, No. 5:15–CR–0470–XR, 2015 WL 9413893, at *1–2 \(W.D. Tex Dec. 22, 2015\)](#).

⁵⁰ Order Granting State of Texas’ Motion for Contempt and Petition for Civil Penalties for Violation of the Agreed Final Judgment and Permanent Injunction at 2, 3, Texas v. Rivas Alva, 2013-CI-17483 (Bexar Cty., Tex. Dist. Ct. Aug. 14, 2015).

⁵¹ See [Press Release, U.S. Attorney’s Office, W. Dist. of Tex., U.S. Dep’t of Justice, San Antonio Woman Indicted for Wire Fraud and Identity Theft \(July 8, 2015\)](#).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See [Press Release, U.S. Attorney’s Office, W. Dist. of Tex., U.S. Dep’t of Justice, San Antonio Couple Plead Guilty to Conspiracy to Commit Wire Fraud and Identity Theft \(Mar. 2, 2017\)](#).

⁵⁵ *Id.*

⁵⁶ *Id.*

this case was important here because of the egregious nature of the actions by both individuals in perpetrating fraud against ICE and EOIR, particularly regarding the impersonation of other individuals to EOIR immigration judges and ICE detention officials.

B. Edwin Zavala

Another example comes from the prosecution of Edwin Zavala, Jr., by the United States Attorney's Office in the Western District of Louisiana. ICE and the U.S. Postal Inspection Service investigated the case.⁵⁷ Zavala, a non-attorney who did business through United Immigration Consulting and National Immigration Services, preyed on detainees in ICE detention by promising them legal assistance and bond.⁵⁸ Zavala sent mass mailings to detainees that promised representation in immigration proceedings.⁵⁹ Detainees paid him thousands of dollars, but he never provided the promised services and ceased communication after being paid.⁶⁰ On March 11, 2016, he was indicted on four counts of mail fraud and four counts of wire fraud.⁶¹ To support the charges for mail and wire fraud, the indictment alleged Zavala had detainees wire his fee to bank accounts or through Western Union and he sent the letters through the U.S. Postal Service.⁶² Zavala ultimately pleaded guilty to one count of wire fraud on May 25, 2016, and on May 5, 2017, he was sentenced to twelve months and one day in prison in addition to three years of supervised release and restitution in the amount of \$23,050.⁶³

In addition to the federal conviction secured against Zavala, the State of Texas also obtained an Agreed Final Judgment and Permanent Injunction on October 17, 2016. Zavala stipulated that even though he was unauthorized to do so, he represented himself to immigrant detainees as authorized to offer immigration services and operated his business in a way in which detainees and their families believed he was an attorney.⁶⁴ The injunction prohibits Zavala from providing any assistance or support relating to immigration services unless he is licensed to practice law or accredited by the Department of Justice.⁶⁵ He is further enjoined from advertising immigration or bond services.⁶⁶

C. Nimon Naphaeng

In an example of unauthorized practice in the Thai community, the United States Attorney's Office in the District of Rhode Island obtained a twenty-six count indictment against Nimon Naphaeng on January 20, 2016.⁶⁷ Naphaeng was indicted for a common scam in which immigrants are promised easy access to employment authorization.⁶⁸ Unbeknownst to the immigrants, Naphaeng filed for asylum on their behalf.⁶⁹ He used the asylum application because under the regulations for asylum, applicants are

⁵⁷ See [Press Release, U.S. Attorney's Office, W. Dist. of La., U.S. Dep't of Justice, Lafayette Man Sentenced to 12 Months in Prison for Defrauding Illegal Aliens in Federal Custody \(May 5, 2017\)](#).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Lanie Lee Cook, *Lafayette Man Accused of Scamming Detained Immigrants Across the Country Set for May Trial*, THE ACADIANA ADVOCATE, Mar. 24, 2016.

⁶² *Id.*

⁶³ Press Release, Lafayette Man Sentenced to 12 Months in Prison for Defrauding Illegal Aliens in Federal Custody, *supra* note 57.

⁶⁴ Agreed Final Judgment and Permanent Injunction at 2, Texas v. United Immigration Consulting, LLC, No. 16-04 00133CV (Frio Cty., Tex. Dist. Ct. Oct. 19, 2016).

⁶⁵ *Id.* at 6–7 (No. 16-04 00133CV).

⁶⁶ *Id.* at 7 (No. 16-04 00133CV).

⁶⁷ [Press Release, U.S. Attorney's Office, Dist. of R.I., U.S. Dep't of Justice, Thai National Indicted in Alleged Immigration Fraud Scheme \(Jan. 20, 2016\)](#).

⁶⁸ *Id.*

⁶⁹ *Id.*

eligible for employment authorization if their application has been pending for six months.⁷⁰ Because of the backlog in adjudication of asylum cases, contributed to in no small measure by the common nature of this very scam, employment authorization is granted to the majority of applicants. Naphaeng advertised this scam on flyers posted in local businesses and on the internet.⁷¹ He charged between \$1,500 and \$2,500 per applicant.⁷² According to the press release from the indictment, immigration officials became suspicious of this scam when they noticed a surge in asylum applications for Thai nationals. Traditionally, they only receive twenty applications a year.⁷³ Many of the applicants were located at the same work or home address.⁷⁴ Naphaeng was indicted on seven counts of mail fraud, eight counts of visa fraud, ten counts of aggravated identity theft, and one count of international money laundering.⁷⁵ On July 11, 2017, Naphaeng was sentenced to twenty-seven months in federal prison after pleading guilty to seven counts of mail fraud and two counts of visa fraud.⁷⁶ He will face removal proceedings based on his criminal conviction.

D. Patria Zuniga, Idranis Rocheford, and Alba Peña

The United States Attorney's Office in the District of Massachusetts obtained convictions against Patria Zuniga and her daughters, Idranis Rocheford and Alba Peña, who ran an immigration services fraud scheme where Zuniga posed as either an attorney or an immigration official.⁷⁷ She and her daughters prepared false immigration applications for undocumented immigrants or immigrants with a temporary legal status, promising them lawful permanent residency.⁷⁸ To support the fraud, Zuniga showed victims falsified copies of immigration documents with their names and pictures on them.⁷⁹ The defendants charged between \$8,000 and \$14,000 for this service and, once initial payments were made, extorted additional money from victims by threatening to have them deported.⁸⁰ Authorities were able to identify that the family scammed victims out of more than \$800,000.⁸¹ Payments were made by wire transfer, enabling the United States Attorney's Office to charge the three defendants with eight counts of wire fraud.⁸² Zuniga received six-and-a-half years' imprisonment and three years' supervised release.⁸³ She was further ordered to pay \$713,850 in restitution.⁸⁴ Idranis Rocheford and Alba Peña received thirty-three months and thirty-five months imprisonment, respectively, in addition to three years' supervised release.⁸⁵ They were also ordered to pay \$739,850 in restitution.⁸⁶

⁷⁰ See *id.*; 8 CFR § 208.7 (2017).

⁷¹ Press Release, Thai National Indicted in Alleged Immigration Fraud Scheme, *supra* note 67.

⁷² Press Release, U.S. Attorney's Office, Dist. of R.I., U.S. Dep't of Justice, Thai National Sentenced, Faces Deportation for Operating Immigration Fraud Scheme (July 11, 2017).

⁷³ Press Release, Thai National Indicted in Alleged Immigration Fraud Scheme, *supra* note 67.

⁷⁴ Press Release, Thai National Indicted in Alleged Immigration Fraud Scheme, *supra* note 67.

⁷⁵ Press Release, Thai National Indicted in Alleged Immigration Fraud Scheme, *supra* note 67.

⁷⁶ Press Release, Thai National Sentenced, Faces Deportation for Operating Immigration Fraud Scheme, *supra* note 72.

⁷⁷ Press Release, U.S. Attorney's Office, Dist. of R.I., U.S. Dep't of Justice, Rhode Island Family Charged with Defrauding Immigrants (July 21, 2015).

⁷⁸ *Id.*

⁷⁹ Press Release, U.S. Immigration & Customs Enf't, Rhode Island Woman Pleads Guilty in Massachusetts to 8 Counts of Wire Fraud (Jan. 28, 2016).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *id.*

⁸³ Press Release, U.S. Attorney's Office, Dist. of Mass., U.S. Dep't of Justice, Two Rhode Island Sisters Sentenced for Immigration Services Scam (Apr. 28, 2017).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

E. Federal Statutory Violations

The unauthorized practice of law is seldom the only crime committed in a *notario* fraud scheme. Depending on the specific circumstances presented by the facts, and as exemplified by the examples presented above, the following federal statutes may be implicated by *notario* fraud:

1. 8 U.S.C. § 1324c(a) (Document Fraud): prohibiting any person to knowingly “forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement” to obtain an immigration benefit⁸⁷
2. 18 U.S.C. § 371 (Conspiracy): prohibiting two or more persons from conspiring to evade immigration laws⁸⁸
3. 18 U.S.C. § 1001 (False Statements), prohibiting the actions of one who knowingly and willfully “falsifies, conceals, or covers up . . . a material fact” or “makes any materially false, fictitious, or fraudulent statement or representation . . . or any false writing or document” or “uses any false writing or document knowing [that it contains] materially false” information⁸⁹
4. 18 U.S.C. § 1546(a) (Fraud and Misuse of Visas, Permits, and Other Documents): prohibiting knowingly making under oath, or knowingly subscribing as true, “any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presenting any such . . . document which contains any such false statement or which fails to contain any reasonable basis in law or fact”⁹⁰
5. 18 U.S.C. § 1028 (Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information): prohibiting the use of “a means of identification of another person with the intent to commit . . . any unlawful activity that constitutes a violation of [f]ederal law, or that constitutes a felony under any applicable state or local law”⁹¹
6. 18 U.S.C. § 1343 (Wire Fraud): prohibiting schemes to defraud that cause “wire, radio, or television communication in interstate or foreign commerce” to be used at any stage⁹²
7. 18 U.S.C. § 1341 (Mail Fraud): prohibiting schemes to defraud that cause the mail to be used at any stage⁹³

Other criminal violations appear in cases, including, for example, international money laundering in the Naphaeng case. However, the above-listed statutes are those most commonly violated in these types of criminal schemes.

V. Conclusion

Notario fraud is a continuous issue before EOIR and DHS. Understanding of the issue and increased enforcement are needed because unauthorized practitioners create countless issues for the courts and DHS by filing fraudulent or erroneous applications, and they are often tied to scams that defraud

⁸⁷ 8 U.S.C. § 1324c(a) (2012).

⁸⁸ See 18 U.S.C. § 371 (2012).

⁸⁹ *Id.* § 1001(a).

⁹⁰ *Id.* § 1546(a).

⁹¹ *Id.* § 1028(a)(7)–(8).

⁹² *Id.* § 1343.

⁹³ *Id.* § 1341.

immigrants out of thousands of dollars. This causes undue waste of resources by federal agencies, as well as the victimization of countless numbers of immigrants.

Although the unauthorized practice of law is not criminalized under federal law, there are many offenses that can be charged against these bad actors. It is imperative that federal authorities bring these cases not only for the deterrent effect of a federal prosecution but also because these violations are being committed against federal agencies and are often intrinsically tied to other federal crimes. Relying on state and local officials to police these practices is not sufficient because the complexities of the regulations that allow for the practice of law by non-lawyers before EOIR and DHS, as well as federal preemption issues, rendering these cases difficult for them to bring.

ABOUT THE AUTHOR

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Prosecuting Fraudulent Immigrant Smuggling Schemes

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I. Introduction: Description of the Fraudulent Scheme

Undocumented immigrants, and those individuals who are attempting to enter the United States illegally, are uniquely susceptible to exploitation due to their vulnerable immigration status. Law enforcement and prosecutors have become increasingly aware of criminal enterprises that engage in both labor and sex trafficking of undocumented immigrants in the United States. The immigrants are sometimes forced into these activities as part of the “fee” they owe for being smuggled into the United States. These immigrants are often similarly vulnerable before they even cross the border. Indeed, the Department of Homeland Security has learned, often through its partners at Customs and Border Patrol, that individuals posing as immigrant smugglers are defrauding immigrants and their families prior to the immigrants’ entry into the United States.

In a scheme reaching the Eastern District of California (EDCA), a purported immigrant smuggler (a coyote) in Mexico represented to those seeking illegal entry into the United States that he could successfully transport them for a fee. The fee was typically between \$3,000 and \$5,000. Often, others in Mexico recommended the coyote to the immigrants, thereby creating the appearance of legitimacy. Homeland Security Investigations (HSI) agents believed those providing the recommendations were also involved in the fraud. The coyote agreed on a smuggling fee with the victims and then directed them to a remote location along the U.S.-Mexico border. Their trek to this location was often accomplished with the help of various conspirators.

Once at the location, the coyote convinced the victims to give him the contact information for those in the United States who intended to pay the smuggling fee, typically the victims’ relatives or close friends. The coyote or his or her conspirators contacted the U.S.-resident relatives and directed them to wire money to the coyote’s suspected conspirators in the United States. In some instances, the coyote told the U.S. residents their loved ones had already crossed safely into the United States but were at a location without a phone. The coyote asked them for the smuggling fee and told them that they would see their loved ones shortly.

In some instances, while the coyote and others were attempting to collect the fee from the U.S. residents, conspirators in Mexico held the victims at gunpoint and beat them. On multiple occasions, in an effort to obtain or expedite the payments, the coyote and conspirators told the U.S. residents that their loved ones would be harmed or killed if the U.S. residents did not pay immediately. Once the fee was received in the United States, the suspected U.S.-based conspirators wired all or part of the payment to the coyote or the coyote’s conspirators in Mexico.

At no time, of course, did the coyote intend to assist the victims into the United States—at least not undetected by law enforcement. Once the smuggling fee was received, he guided them to the border and directed them to cross at a particular location, often telling them that transportation would be waiting for them on the other side. The victims were apprehended by U.S. Border Patrol in a matter of minutes after setting foot on U.S. soil.

II. Investigative Techniques

U.S. Border Patrol agents began to recognize this scheme during post-arrest interview statements made by many individuals arrested illegally entering the United States. Eventually, the Border Patrol agents were able to identify the coyote. They showed photographic lineups to immigrants who related a similar story. Invariably, the immigrants identified the same man as their coyote. HSI agents participated in the interviews and also conducted a financial investigation into the wire transfers, identifying many U.S.-based victims.

Indeed, over the course of several years, HSI agents methodically interviewed the U.S.-based victims, as well as victims who were intercepted by U.S. Border Patrol. The U.S.-based victims often provided HSI with receipts reflecting the wire transfers the coyote instructed them to send to individuals in the EDCA. From these receipts, HSI also discovered that many of the wire transfers were to the same individuals in the EDCA. HSI then issued subpoenas for any other wire transfers in these recipients' names. From the subpoena responses, they found many of the EDCA recipients received wire transfers from individuals other than the identified victims. Through interviews of newly identified individuals, HSI determined the majority of them were additional victims of this scheme. Consequently, HSI also investigated the suspected conspirators in the United States who were receiving the wire transfers from these victims and, as the subpoena results indicated, were forwarding part or all of the fees to Mexico.

Law enforcement also interviewed a clerk at the store where suspected conspirators repeatedly obtained and wired the “smuggling” fees. Questioning the clerk about the wires from these individuals proved advantageous, as the clerk contacted law enforcement when the suspected conspirators next arrived. They were interviewed and made statements identifying and incriminating the coyote.

Through the U.S.-resident victims, HSI agents contacted victims located in Mexico and interviewed them about their interactions with the coyote. On some occasions, HSI was able to bring victims into the United States as material witnesses. Additionally, many of the U.S. residents who were paying the purported smuggling fees for their relatives were in the United States illegally themselves. Consequently, HSI arranged for “deferred action” and “employment authorization documents” to permit these witnesses to remain in the United States and obtain lawful employment. These benefits were conferred by HSI, at its discretion, through an internal policy. Agents submit these requests through their chain of command and must ultimately obtain approval from the Deputy Special Agent in Charge.

Ironically, the coyote in the above-referenced case was ultimately apprehended illegally crossing the border himself. Initially, he was charged with a violation of 8 U.S.C. § 1325 (improper entry by alien). However, one of the Border Patrol agents who interviewed the coyote's victims over the years recognized the coyote in the detainment facility. He promptly contacted his counterparts at HSI, and AUSAs began working on a complaint while the coyote was under indictment for the § 1325 violation.

In the investigation and prosecution of victim smuggling operations, local media coverage—particularly, the Latino media—can be very helpful to law enforcement. HSI, the FBI and the United States Attorney's Office repeatedly reached out to the Latino community through press releases and live interviews with the Latino news media urging additional victims to come forward.

III. Charging Decisions

Depending on the facts of each scheme, immigrant smuggling schemes can be charged in a variety of ways:

A. Conspiracy to Commit Wire Fraud/Substantive Wire Fraud¹

Smuggling operations and victim exploitation tactics can easily be described in terms of a fraudulent scheme for purposes of both 18 U.S.C. §§ 1349 and 1343: namely a scheme to defraud immigrants seeking to enter the United States and relatives or friends of such individuals residing in the United States, and to obtain money and property from the immigrants and U.S. residents, by means of materially false and fraudulent representations and omissions. Similarly, interstate or international wire transfers and telephonic communications between coconspirators in Mexico and victims in the United States will provide the factual bases for substantive wire fraud counts.

In the above-referenced case, the government had evidence of numerous interstate/international wire transfers, as well as evidence of the coyote himself placing calls from Mexico to victims and his co-conspirators in the EDCA. Victims' statements to Border Patrol agents also demonstrated multiple assailants assisted the coyote with both detainment and extortion on the Mexico side of the border. Wire fraud conspiracy and several substantive counts of wire fraud were appropriate in this case considering the significant evidence of coordination with conspirators in the United States and Mexico, as well as the evidence of multiple wire transfers and the victims' statements regarding how they were defrauded.

It should be noted that the U.S. Sentencing Guidelines (Guidelines) calculation for wire fraud crimes will be driven by the loss amount.² If the loss amount is not fairly significant, the Guidelines range likely will not reflect the severity of these crimes.

B. Hostage-Taking Conspiracy³

Hostage-taking conspiracy may be a viable charge where, as in the above-referenced case, individuals conspired to detain those seeking to enter the United States to compel a third person (here, the immigrant's family members) to pay money as an explicit or implicit condition of the immigrant's release.⁴ A person is 'seized' or 'detained' under this statute when the person is held or confined against his or her will by physical restraint, fear, or deception for an appreciable period of time. A victim need not be detained at the outset for the hostage-taking statute to apply.⁵ *United States v. Lopez-Flores* states, "that the hostage may initially agree to accompany the hostage taker does not prevent a later 'seizure' or 'detention' within the meaning of the Hostage Taking Act."⁶

Notably, regarding jurisdiction, § 1203(a) restricts the charging of hostage taking that occurred entirely outside of the United States to those instances where (1) the offender or the person seized/detained is a U.S. national; (2) the offender is found in the United States; or (3) in the case of an attempt to compel a governmental organization to act, the governmental organization is the United States. In the aforementioned case, the coyote was "found" in the United States. Moreover, in *United States v. Shibin*, a Somali pirate in Somali waters—who boarded a German ship that his Somali-pirate associates previously seized—could be prosecuted under § 1203(a) despite the crime having no connection to the United States.⁷ The defendant was arrested in Somalia and turned over to the FBI who flew him to Virginia.⁸ Thus, he was "found in the United States" for purposes of the statute. "This statute explicitly

¹ 18 U.S.C. §§ 1343, 1349 (2012).

² U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2016) [hereinafter U.S.S.G.].

³ 18 U.S.C. § 1203(a) (2012).

⁴ See *United States v. Ibarra-Zelaya*, 465 F.3d 596, 602–603 (5th Cir. 2006) (discussing elements).

⁵ *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991).

⁶ *United States v. Lopez-Flores*, 63 F.3d 1468, 1477 (9th Cir. 1995) (quoting *Carrion-Caliz*, 944 F.2d at 226).

⁷ *United States v. Shibin*, 722 F.3d 233, 233 (4th Cir. 2013).

⁸ *Id.* at 235.

reaches hostage taking anywhere in the world, so long as the offender ends up in the United States.”⁹

In *Blancas v. United States*, the defendant was accused of having seized, detained, and threatened to continue to detain, injure, or kill two brothers to compel an undercover FBI agent to pay ransom for the brothers’ release.¹⁰ The defendant argued because the victims’ abduction occurred in Mexico, the U.S. court had no jurisdiction.¹¹ The court had the following response to this argument:

[Defendant’s] claim has no merit. Title 18 U.S.C. § 3231 confers original jurisdiction in the district courts over all offenses against the United States. Further, there is no constitutional bar to the extraterritorial application of penal laws. Title 18 U.S.C. § 1203, which defines the offense of hostage taking, expressly contemplates criminal activity occurring outside the United States. There is moreover no dispute that Blancas was arrested in El Paso, Texas and thus ‘found in the United States.’ The Court therefore concludes that the facts to which Blancas pleaded guilty in open court provided a sufficient basis for exercise of federal jurisdiction.¹²

Regarding venue, where the hostage-taking scheme is initiated outside of the United States, the substantive offense is governed by the venue provisions of § 3238 which provides:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.¹³

Thus, where the defendant is arrested in the United States, venue for the substantive offense will lie in the district of his or her arrest. If, however, any part of the hostage-taking conspiracy occurred in the district, then a hostage-taking *conspiracy* charge may be an appropriate alternative where venue for the substantive offense may not otherwise be found.

Hostage taking and wire fraud were charged in the above-referenced case because, together, they adequately encompassed the coyote’s crimes. Additionally, the Guidelines range for hostage-taking offenses is significantly greater than the wire fraud offenses.¹⁴

C. Interstate Communications¹⁵

These schemes can also be prosecuted as a demand for ransom in violation of 18 U.S.C. § 875(a) where the coyote telephonically threatens to hurt or kill the U.S. residents’ loved ones.¹⁶

Additionally, § 875(a) is arguably a continuing offense under 18 U.S.C. § 3237, in that it is a crime that can begin in one district and be completed in another.¹⁷ If the communication were transmitted in a district, or if the object of the crime—the ransom money—passed through a district, venue may lie in

⁹ *Id.* at 246.

¹⁰ *Blancas v. United States*, 344 F. Supp. 2d 507, 529 (W.D. Tex. 2004).

¹¹ *Id.* at 528.

¹² 18 U.S.C. § 3231 (2012); *see also id.* § 1203; *see also Blancas*, 344 F. Supp. 2d at 528–29.

¹³ *Id.* § 3238.

¹⁴ U.S.S.G. § 2A4.1; U.S.S.G. § 2B1.1.

¹⁵ 18 U.S.C. § 875(a) (2012).

¹⁶ *See United States v. Fei Lin*, 139 F.3d 1303, 1306–07 (1998) (finding that the defendant must intend to transmit a demand for ransom).

¹⁷ 18 U.S.C. § 3237 (2012).

that district.

D. Use of a Firearm During and in Relationship to a Crime of Violence¹⁸

Where a firearm was used during the hostage-taking crime, a § 924(c) violation can be charged notwithstanding the fact that the firearm was employed entirely outside of the United States. Section 924(c) “is an ancillary crime that depends on the nature and reach of the underlying crime,” and, thus, its “jurisdictional reach is coextensive with the jurisdiction of the underlying crime.”¹⁹ The same concept applies in the kidnapping context where the victim is kidnapped in one state and transported to another, but the firearm used during and in relationship to the kidnapping is employed in a district other than where the kidnapping charges are filed.²⁰

Moreover, where the evidence indicates only certain conspirators employed firearms, the other conspirators can nevertheless be charged with the crime under a Pinkerton theory of liability.²¹

E. Other Potential Charges

Other potential charges include:

- **Kidnapping:** Where the scheme involved the use of “any means, facility or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the [kidnapping],” then § 1201(a)(1) may also be an option.²² There may be an issue, however, with charging both hostage taking under § 1203 and kidnapping under § 1201(a)(1).²³
- **Money Laundering:** Where conspirators are conducting financial transactions (e.g., wire transfers) or otherwise moving the proceeds of these immigrant smuggling schemes, consider charging money laundering where the government can demonstrate the conspirators knew the

¹⁸ *Id.* § 924(c).

¹⁹ *Shibin*, 722 F.3d at 246–47 (finding that where the defendant was prosecuted in the United States for hostage and maritime violence occurring entirely outside the United States, he could also be prosecuted under § 924(c) for possessing, using, or carrying a firearm outside of the United States in connection with those crimes; *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010) (concluding that § 924(c) applies extraterritorially because “a statute ancillary to a substantive offense statute is presumed to have extraterritorial effect if the underlying substantive offense statute is determined to have extraterritorial effect” (internal alterations and quotation marks omitted)); *United States v. Hasan*, 747 F. Supp. 2d 642, 684 (E.D. Va. 2010) (applying § 924(c) extraterritorially), *aff’d sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

²⁰ *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (holding that venue in a section 924(c)(1) prosecution is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in a single district.).

²¹ *Pinkerton v. United States*, 328 U.S. 640 (1946) (holding that a defendant can be liable for the substantive acts of his conspirators if such acts were in furtherance of the conspiracy and were reasonably foreseeable); *see also United States v. Castaneda*, 9 F.3d 761, 765 (9th Cir. 1993) (overruled on other grounds) (explaining that “a conviction under §924(c) may be based on Pinkerton.”); *see also United States v. Fonseca-Caro*, 114 F.3d 906 (9th Cir. 1997) (same).

²² 18 U.S.C. § 1201(a)(1) (2012).

²³ *United States v. Angeles*, 484 F. App’x 27, 33–34 (6th Cir. 2012) (explaining on the facts of that case, the kidnapping charges and the hostage-taking charges each required proof of at least one element not required by the other, and, thus, were not multiplicitous, and conviction under both statutes did not violate the Double Jeopardy Clause); *contra United States v. Ahmed Muse Salad*, 907 F. Supp. 2d 743, 748 (E.D. Va. 2012) (finding that hostage taking cannot be proven without also proving kidnapping, and rejecting the government’s argument that the differing jurisdictional requirements is sufficient to avoid Double Jeopardy).

property involved in the financial transaction represented the proceeds of some unlawful activity.²⁴

- **Hobbs Act Extortion**²⁵: Where threats similar to those described above caused victims to wire money interstate or internationally, or participate in interstate telephone calls, or where the threats affected so many individuals that their payments arguably had at least a *de minimis* effect on interstate commerce, a charge of Hobbs Act extortion may be appropriate.
- **Travel Act**: Where a defendant wired money interstate/internationally or received money wired to him or her, made an interstate/international phone call, or otherwise used a facility in interstate/foreign commerce to promote, establish, manage or carry on what would qualify as extortion under the Travel Act, consider a § 1952(a)(3) charge.²⁶

IV. Plea Considerations

While the hostage taking or kidnapping offenses carry the greater U.S. Sentencing Guidelines levels, the unique circumstances of these frauds may warrant a plea to a lesser offense. For instance, in the aforementioned case, the scheme spanned six years and involved over eighty victims. Half of those victims were, of course, the immigrants attempting to enter the country illegally. While their traumatic experiences would likely make them sympathetic witnesses, the fact that they were attempting to enter the country illegally may weigh against their credibility in the eyes of a jury.

Additionally, because in these schemes the immigrants are unsuccessful in their crossing attempt, they permanently reside outside of the United States. Coordinating their appearance in court is logistically challenging and requires assistance from HSI depending on the length of the witness's stay. If HSI provides the witnesses with any type of deferred action, their status will be additional impeachment fodder for the defense.

While the other half of the victims in these schemes are U.S. residents, they too are often in the United States illegally. Like the immigrants themselves, the U.S. residents are also attempting to commit a crime by paying for the smuggling.

Offering a plea to a wire fraud conspiracy charge may be an option, unless the loss amount is significant, where the Guidelines range will not adequately address the seriousness of the conduct. One option is to agree upon a range of incarceration that does adequately reflect the conduct, while still permitting the defendant to plead to the wire fraud. The plea agreement will then expressly recognize the applicable wire fraud Guidelines range, but provide that the parties have come to a separate agreement based on the unique facts of the case. The defense will agree to not argue for less than a certain number of years at the bottom of the parties' agreed-upon range, while the government will forego any argument that exceeds the stipulated range. If the parties elect to enter into such an agreement, it is important for the government that the factual basis be quite detailed, making it obvious to the sentencing court why the wire fraud Guidelines range should not be followed. It is also important to secure an enforceable appellate waiver, if possible, in the event the court views the circumstances deserving of a sentence more indicative of hostage taking.

V. Sentencing Considerations

A. A Detailed PSR

Considering these schemes will likely involve many victims over a lengthy period of time, it is

²⁴ 18 U.S.C. § 1956(a)(1) (2012).

²⁵ *Id.* § 1951(a).

²⁶ *Id.* § 1952(a)(1).

imperative to communicate the facts of each event in a manner the probation officer who is drafting the PSR to understand. It is also important to closely review those facts to ensure the restitution amount and victims are reflected accurately, and the violence, intimidation, and other noteworthy acts are properly and fully captured. Such details usually will not raise an objection by the defense where some or all of them are already included in the factual basis. Even where a defendant is pleading to a wire fraud charge, evidence of violent acts may implicate certain Guidelines enhancements.²⁷ A significant number of victims or the imposition of a substantial financial hardship can also impact the Guidelines range.²⁸

Where the defense does object to the inclusion of a fact in the PSR, the court must make findings of fact concerning any disputed matter it relies upon in sentencing or make a determination that no such finding is necessary because the controverted matter will not be taken into account in sentencing.²⁹ Strict compliance with Rule 32(i)(3)(B) is required and failure to comply will result in the case being remanded.³⁰

Once the court makes a determination about these disputed facts, it “must append a copy of the court’s determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.”³¹ Notably, a request by the defense that disputed facts be entirely stricken from the PSR is improper.³²

B. Consider the Vulnerable Victim Enhancement

Based on the circumstances of the scheme and the crimes to which the defendant pleads, the U.S. Sentencing Guidelines’ vulnerable victim adjustment may be appropriate.³³ This section provides that:

- (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.
- (2) if (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.³⁴

The commentary to the vulnerable victim adjustment defines “vulnerable victim” as “a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.”³⁵

The Ninth Circuit has held, in the hostage-taking context, undocumented immigrants are

²⁷ U.S.S.G. § 2B1.1(b)(15) (increase for possession of a firearm).

²⁸ U.S.S.G. § 2B1.1(b)(2).

²⁹ FED. R. CRIM. P. 32(i)(3)(B); *United States v. Edwards*, 800 F.2d 878, 881 (9th Cir. 1986).

³⁰ *See United States v. Sharon*, 812 F.2d 1233, 1234 (9th Cir. 1987); *Edwards*, 800 F.2d at 881; *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986); *cf. United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (substantial compliance required).

³¹ FED. R. CRIM. P. 32(i)(3)(C).

³² *United States v. Turner*, 898 F.2d 705, 710 (9th Cir. 1990) (“Neither due process nor Rule 32 requires a district court judge to be an editor as well as an arbiter of justice. Any concerns a defendant might have about prison officials relying on unfounded, detrimental information in his presentence investigation report should be met by a district court’s compliance with Rule 32(c)(3)(D).”).

³³ U.S.S.G. § 3A1.1(b)(1)–(2).

³⁴ *Id.*

³⁵ U.S.S.G. § 3A1.1.

considered “vulnerable victims.”³⁶ In *Dock*, the defendants transported undocumented immigrants through Texas in late July for twelve hours in an unrefrigerated, unventilated trailer portion of a tractor-trailer rig.³⁷ Consequently, many of the immigrants died, while others suffered severe injuries.³⁸ In determining the vulnerable victim adjustment applied, the court noted that although they entered the country illegally, and entered the trailer willingly, “these individuals were in many ways unable to help themselves or to change their present situation and were disadvantaged to such a degree that each of them was faced with little choice but to follow the orders of the defendants and their indicted co-conspirators.”³⁹

In addition to hostage-taking cases, the vulnerable victim enhancement may also be applicable when undocumented immigrants are defrauded. For instance, in *United States v. Garza*, the defendants concocted an immigration scheme where they obtained money from undocumented immigrants by promising them immigration services.⁴⁰ They had undocumented immigrants fill out fake applications for INS residency authorizations or work permits.⁴¹ The defendants misrepresented to the victims that they worked for the INS and that the applications were genuine.⁴² None of the victims received the benefits they were promised.⁴³ At sentencing, the district court applied the two-level enhancement for vulnerable victims pursuant to U.S.S.G. § 3A1.1.⁴⁴ One of the defendants appealed that finding as improper under *United States v. Angeles-Mendoza*, a Fifth Circuit case which held a finding of unusual vulnerability could not be based solely on the inherent vulnerabilities of “smuggled aliens” where the offense at issue necessarily involved smuggled aliens.⁴⁵ The Fifth Circuit in *Garza* distinguished the *Angeles-Mendoza* decision, noting “none of the offenses at issue here—mail fraud, conspiracy, and impersonating a federal employee—necessarily involve undocumented aliens. The status of Garza’s victims as undocumented aliens was not taken into account by the base-level offense and consequently would not be an improper consideration under *Angeles-Mendoza*.”⁴⁶

Garza is instructive in cases where a defendant pleads to wire fraud based on a fraudulent immigrant smuggling scheme. Wire fraud does not always—or even typically—involve undocumented immigrant victims. Likewise, the status of defendant’s victims as undocumented immigrants would not be taken into account by the wire fraud base-offense level.

Regarding whether such victims—both in the United States and in Mexico—are particularly susceptible to these fraud crimes, the answer is yes. These purported coyotes target immigrants who are seeking to enter the country illegally, and their U.S.-resident family members who are complicit in the immigrants’ plans and who are, in some instances, in the United States illegally themselves (which certainly is not unpredictable to the coyotes). While the immigrant victims in these cases have not actually been smuggled into the United States, they are “particularly susceptible” to a coyote’s fraudulent scheme in much the same way as immigrants who are already in the United States illegally, as in the cases

³⁶ [United States v. Sierra-Velasquez](#), 310 F.3d 1217, 1220 (9th Cir. 2002) (“ . . . aliens who want to enter this country illegally and are dependent on their smugglers for entry are more vulnerable than other categories of persons who may be held hostage for ransom.”); [United States v. Mendoza-Granades](#), 259 F. App’x 987, 990 (9th Cir. 2007) (unpublished) (applying vulnerable victim enhancement where victims of defendant’s hostage taking were illegal immigrants); [United States v. Dock](#), 293 F. Supp. 2d 704, 713–14 (E.D. Texas 2003) (judgment vacated on other grounds).

³⁷ [Dock](#), 293 F. Supp. 2d at 706.

³⁸ *Id.* at 707–08.

³⁹ *Id.* at 713–14.

⁴⁰ [United States v. Garza](#), 429 F.3d 165, 169 (5th Cir. 2005).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 173.

⁴⁵ [United States v. Angeles-Mendoza](#), 407 F.3d 742, 747 (5th Cir. 2005).

⁴⁶ [Garza](#), 429 F.3d at 173.

of *Sierra-Velasquez* and *Dock* cited above. The victims in Mexico are often isolated, sometimes sustaining beatings or other threats. The immigrants and their relatives are committing a crime in seeking the smuggling services in the first place, so they are reluctant to report fraud and abuse by the coyotes. Indeed, the immigrants typically only report these crimes after they are arrested, and the U.S. residents typically only report the fraud and threats after they are approached by law enforcement.

Additionally, for those U.S. resident-relatives who are in the United States illegally, they are further deterred from reporting fraud to the authorities. Coyotes choose to defraud individuals in this situation because they know that, due to their unique circumstances, they can take advantage of them with less risk of law enforcement detection.

VI. Conclusion

The fraudulent immigrant smuggling scheme encountered in the EDCA spanned at least six years and involved numerous victims and conspirators in the United States and in Mexico. It is certainly not unique. Others seeking to enter the United States illegally likely encounter a host of similar transgressions. Federal agencies should work closely with the United States Border Patrol to identify patterns among undocumented immigrants arrested at the border. Because of the varied elements of these schemes, and the interstate facilities used to facilitate them, federal prosecutors can utilize an assortment of charges to combat these crimes. Prosecutors should aim to provide the court with a detailed PSR and sentencing brief that appropriately characterizes the terror inflicted by these schemes.

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The Times They Are A-Changin’¹: Sentencing in Illegal Reentry Cases and the November 2016 Amendment to U.S.S.G. § 2L1.2(b)(1)

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“There is nothing wrong with change, if it is in the right direction.”

Winston Churchill

I. Introduction

On November 1, 2016, primarily in response to concerns that the existing illegal reentry guideline and the application of the categorical approach had become “overly complex and resource-intensive” and “often [led] to litigation and uncertainty,” the Sentencing Commission amended U.S.S.G. § 2L1.2(b).² The following article discusses the background and emergence of the illegal reentry guideline, the categorical and modified categorical approaches, the November 2016 amendment to § 2L1.2(b) and its effect, and other issues relevant to sentencing in illegal reentry cases.

II. Background and Emergence of Guideline Definitions

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

Congress enacted 8 U.S.C. § 1326 in 1952.³ A conviction under 8 U.S.C. § 1326 “makes it illegal for an alien who has previously been arrested and deported to return to the United States without obtaining the Attorney General’s consent.”⁴ In 1988, Congress amended § 1326 by adding subsection (b), which enhanced the statutory maximum penalties for defendants who were previously deported after being convicted of felonies and aggravated felonies.⁵ Those maximums were set at five years for felonies and fifteen years for aggravated felonies.⁶ In 1994, Congress increased these penalties to ten years and

¹BOB DYLAN, *The Times They Are a-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).

² U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, *supp. app. C, amend. 802 at 155* (U.S. SENTENCING COMM’N 2016) [hereinafter U.S.S.G.].

³ 8 U.S.C. § 1326 (2012); *Almendarez-Torres v. United States*, 523 U.S. 224, 229 (1998); *Brief of Appellee, United States v. Valle-Negrete*, No. 10-10298 (9th Cir. 2010), 2010 WL 6834320 (B. Valliere & E. Frick) (discussing history of illegal reentry statute and guideline). The author of this article gratefully acknowledges the authors of that brief, portions of which were borrowed for this article, with permission.

⁴ *United States v. Gonzalez*, 112 F.3d 1325, 1328 (7th Cir. 1997), *overruling on other grounds recognized in United States v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007).

⁵ *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (1988) (codified as amended at 8 U.S.C. § 1326 (2012)).

⁶ *See id.*

twenty years, respectively.⁷ “Congress made abundantly clear when it amended the illegal reentry statute (8 U.S.C. § 1326(b)) that it wished to enhance the penalties for aliens with prior convictions in order to deter others.”⁸

B. Illegal Reentry Sentencing Guideline—U.S.S.G. § 2L1.2(b)(1)

1. Guideline Before November 2001

The Sentencing Guidelines were promulgated pursuant to the Sentencing Reform Act of 1984.⁹ The initial version of U.S.S.G. § 2L1.2 was added in 1987 and provided for an offense level of six and a two-level enhancement for defendants who had previously unlawfully entered the United States.¹⁰ In 1988, the Sentencing Commission amended the Guideline to provide for a base offense level of eight and deleted the offense level adjustment.¹¹ In 1989, the Commission addressed those defendants who reenter following deportation for felonies by adding a four-level enhancement to the offense level (as well as counting that previous conviction in the defendant’s criminal history).¹² The Commission further explained that district courts should consider upwardly departing in cases where the defendant was deported subsequent to the commission of an aggravated felony.¹³

In 1991, the Sentencing Commission decided to address aggravated felonies in a more consistent fashion by eliminating the recommendation that courts upwardly depart and instead adding a sixteen-level enhancement for deportation following an aggravated felony.¹⁴ In so doing, the Commission explained “[it] has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.”¹⁵ The Commission further amended § 2L1.2 in 1995 and 1997.¹⁶

Subsection (b) of § 2L1.2 increased the base offense level of eight in line with the increased maximum sentences of 8 U.S.C. § 1326(b).¹⁷ A felony conviction triggered a four-level enhancement, and later, so did “three or more misdemeanors for crimes of violence or drug trafficking offenses.”¹⁸ Section 2L1.2(b) provided that if the defendant was previously deported after a conviction for an aggravated felony, “increase by 16 levels.”¹⁹

The Commission defined “aggravated felony” in § 2L1.2 in terms that paralleled the statutory definition of “aggravated felony” in 8 U.S.C. § 1101(a)(43).²⁰ The statutory aggravated felonies in

⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023 (1994) (codified as amended at 8 U.S.C. § 1326(b) (2012)).

⁸ *United States v. Ramirez-Garcia*, 269 F.3d 945, 947 (9th Cir. 2001).

⁹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.); *United States v. Summers*, 895 F.2d 615, 616 (9th Cir. 1990); *United States v. Harris*, 876 F.2d 1502, 1503 (11th Cir. 1989) (stating that defendants unsuccessfully challenged the constitutionality of the Sentencing Guidelines promulgated under the Sentencing Reform Act of 1984).

¹⁰ U.S.S.G. § 2L1.2 (1987).

¹¹ See U.S.S.G. § 2L1.2, app. C, amend. 38 (1988).

¹² U.S.S.G. § 2L1.2, app. C, amend. 193 (1989).

¹³ *Id.*

¹⁴ U.S.S.G. § 2L1.2, app. C, amend. 375 (1991).

¹⁵ *Id.*

¹⁶ U.S.S.G. § 2L1.2, app. C, amends. 523, 562 (1995 & 1997).

¹⁷ See *United States v. Gonzalez*, 112 F.3d 1325, 1328 (7th Cir. 1997) *overruling on other grounds recognized in United States v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007).

¹⁸ *Id.*

¹⁹ U.S.S.G. § 2L1.2, app. C, amend. 562 (1997).

²⁰ Compare *id.* with 8 U.S.C. § 1101(a)(43) (2012).

§ 1101(a)(43) encompass many types of offenses.²¹ Thus, before November 2001, a prior conviction warranting the highest guideline enhancement under § 2L1.2 (sixteen levels) needed to qualify as an “aggravated felony” under one of the enumerated statutory definitions in § 1101(a)(43).

2. November 2001 Amendment

In November 2001, the Sentencing Commission revised § 2L1.2 in response to concerns raised by judges, probation officers, and defense attorneys that the sixteen-level enhancement was too broadly applied to disparate predicate convictions.²² The Commission created a graduated scheme, with some felonies and certain misdemeanors receiving a four-level enhancement while other felonies warranted eight-, twelve-, or sixteen-level enhancements, depending on their seriousness.²³

After this amendment, the application of the sixteen-level enhancement in § 2L1.2 was no longer governed by whether the prior conviction met the “aggravated felony” statutory definition in 8 U.S.C. § 1101(a)(43). Rather, a sixteen-level enhancement was triggered if the conviction was a felony and constituted one of the qualifying offenses under the new guideline definition regardless of whether that conviction also qualified as an aggravated felony in 8 U.S.C. § 1101(a)(43).²⁴ The latter statute now governed primarily whether an eight-level enhancement applied for an aggravated felony.²⁵ In addition, it was irrelevant for guideline enhancement purposes whether a defendant was charged with illegal reentry with a statutory enhancement under 8 U.S.C. § 1326(b)(1) or (b)(2).²⁶

The version of § 2L1.1(b)(1) in effect before the 2016 amendment provided a sixteen-level enhancement would be applied for a felony drug trafficking offense with a sentence imposed greater than thirteen months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense.²⁷ A twelve-level enhancement applied for a felony drug trafficking offense with a sentence of thirteen months or less, or a sixteen-level offense that did not receive criminal history points.²⁸ An eight-level enhancement applied for an aggravated felony conviction or a twelve-level offense that did not receive

²¹ 8 U.S.C. § 1101(a)(43) (aggravated felonies include murder, rape, sexual abuse of a minor, drug trafficking crimes, illicit trafficking in firearms or destructive devices, money laundering, explosive materials offenses, firearms offenses, crimes of violence, theft offenses, offenses relating to demand or receipt of ransom, child pornography offenses, racketeering and gambling offenses, prostitution or human trafficking offenses, disclosure of classified information offenses, fraud or tax evasion where the loss exceeds \$10,000, alien smuggling, illegal reentry offenses with a prior illegal reentry offense, forgery or counterfeiting offenses, failure to appear for service of a sentence where the offense is punishable by imprisonment for a term of five years or more (and in other circumstances), commercial bribery or related offenses, obstruction of justice, and attempts or conspiracies to commit those offenses).

²² See U.S.S.G. § 2L1.2, app. C, amend. 632 (2001).

²³ *Id.* The Commission amended § 2L1.2 on four subsequent occasions before 2011. See U.S.S.G. § 2L1.2, app. C, amends. 637, 658, 709, 722 (2002, 2003, 2007, 2008).

²⁴ *United States v. Pimentel-Flores*, 339 F.3d 959, 963 (9th Cir. 2003) (“We hold that under *United States Sentencing Guidelines* § 2L1.2, amended as effective November 1, 2001, a ‘crime of violence’ needed only to be a ‘felony’ as defined in the application notes—and not an ‘aggravated felony’ as statutorily defined—to qualify for a 16-level enhancement.”); see also *United States v. Cordova-Arevalo*, 373 F. Supp. 2d 1220 (D.N.M. 2004) (same).

²⁵ U.S.S.G. § 2L1.2, app. C., amend. 632 n.1 (2001) (also noting that the aggravated felony statute applied when determining whether a prior conviction constituted an “alien smuggling offense” for a sixteen level enhancement).

²⁶ See *Pimentel-Flores*, 339 F.3d at 964; see also *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (stating that defendant’s prior aggravated felony conviction did not need to be charged in his illegal reentry indictment in order to apply the § 2L1.2 sentence enhancement).

²⁷ U.S.S.G. § 2L1.2 (b)(1)(A) (2015).

²⁸ U.S.S.G. § 2L1.2 (b)(1)(B).

criminal history points.²⁹ A four-level enhancement applied for any other felony conviction or three or more misdemeanors that were crimes of violence or drug trafficking crimes.³⁰

III. Categorical and Modified Categorical Approaches

Over twenty-five years ago, in *Taylor v. United States*, the Supreme Court established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses (e.g., burglary). The Court adopted a "formal categorical approach": sentencing courts may "look only to the statutory definitions" (i.e., the elements) of a defendant's prior offenses, and not "to the particular facts underlying those convictions."³¹

Courts have employed the same categorical approach to determine whether a conviction qualifies for enhancement under § 2L1.2(b)(1):

To determine whether a past conviction qualifies for enhancement as a "crime of violence," we use what is known as the "categorical approach," set forth in *Taylor v. United States*. [In the context of a crime of violence, for example, to] apply the categorical approach, we inquire, based solely upon the elements of the statute forming the basis for the defendant's prior conviction, whether the offense qualifies as a crime of violence. That is, we inquire whether the offense is comprised of each of the elements of a "generic" crime enumerated in § 2L1.2 . . . or, alternatively, whether the offense necessarily requires a finding that the defendant used, attempted to use, or threatened to use physical force against the person of another. The purpose of the categorical approach is to avoid the practical difficulties and fairness problems that would arise if courts were permitted to consider the facts behind prior convictions which would potentially require federal courts to relitigate a defendant's prior conviction in any case where the government alleged that the defendant's actual conduct fit the definition of a predicate offense.³²

Another court explained *Taylor's* categorical and modified categorical approaches, including the types of documents that may be considered:

[Under the categorical approach, courts determine whether a prior offense, such as a crime of violence,] "is categorically a crime of violence by assessing whether the full range of conduct covered by [the statute] falls within the meaning of that term." If the statute of conviction is overbroad—that is, if it punishes some conduct that qualifies as a crime of violence and some conduct that does not—it does not categorically constitute a crime of violence.

[In such a case where the statute is overbroad:] Courts apply the "modified categorical approach" to determine whether the record of conviction shows that the defendant "was convicted of the elements of the generically defined crime." Under the modified categorical approach, courts may "rely[] only on documents that give [it] the 'certainty of a generic finding,' including 'the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the

²⁹ U.S.S.G. § 2L1.2 (b)(1)(C).

³⁰ U.S.S.G. § 2L1.2 (b)(1)(D)–(E).

³¹ *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (quoting *Taylor v. United States*, 495 U.S. 575 (1990)).

³² *United States v. Herrera-Alvarez*, 753 F.3d 132, 134 (5th Cir. 2014) (citing *Taylor*, 495 U.S. at 579; also citing *Descamps*, 133 S. Ct. 2276; and citing *Patel v. Mukasey*, 526 F.3d 800, 802 (5th Cir. 2008)) (internal quotations and citations omitted); see also *United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (discussing *Taylor* categorical approach in context of § 2L1.2).

trial judge to which the defendant assented.”³³

The Supreme Court’s decision in *Descamps v. United States* and its “divisibility” ruling added another consideration to the modified categorical analysis. As one court summarized, in the context of a crime of violence:

If we determine that the statute of conviction covers conduct that does not categorically qualify as a crime of violence, but the statute is divisible—meaning that it sets forth multiple separate offenses or sets forth one or more elements of an offense in the alternative—then we apply a variant of the categorical approach known as the “modified categorical approach.” [The Court in *Descamps* reiterated that under the modified categorical approach, courts] may look beyond the statute to a limited class of documents, such as indictments and jury instructions, made or used in adjudicating the defendant’s guilt to determine which statutory alternative applies to the defendant’s conviction. Courts then apply the *Taylor* approach to assess whether the offense, as narrowed, is categorically broader than an enumerated offense or whether it has as an element the use, attempted use, or threatened use of physical force.³⁴

More recently, in *Mathis v. United States*, the Supreme Court discussed the divisibility rule of *Descamps*, noting *Mathis* concerned a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element.³⁵ The issue was as follows:

[W]hether ACCA treats this kind of statute as it does all others, imposing a sentence enhancement only if the state crime’s elements correspond to those of a generic offense—or instead whether the Act makes an exception for such a law, so that a sentence can be enhanced when one of the statute’s specified means creates a match with the generic offense, even though the broader element would not.³⁶ After engaging in a lengthy divisibility analysis, the Court determined “[b]ecause the elements of Iowa’s burglary law are broader than those of generic burglary, *Mathis*’s convictions under that law cannot give rise to an ACCA sentence.”³⁷

During the over twenty-five years since *Taylor* was decided, federal appellate courts and district courts have found it difficult to apply the categorical approach and have often produced inconsistent results. As the Fifth Circuit noted: “*Taylor* and its progeny do not specify whether we must use a particular method when engaging in a *Taylor* analysis. For these reasons, we have found it difficult to apply *Taylor*’s categorical approach[;] [t]he parties’ arguments illustrate our methodological inconsistencies when applying *Taylor*.”³⁸

The Fifth Circuit further explained these inconsistencies when analyzing whether a defendant’s prior conviction constituted a “crime of violence” for purposes of the sixteen-level enhancement in U.S.S.G. § 2L1.2(b)(1)(A):

Three different methods of determining the “generic, contemporary meaning” of offense categories enumerated in federal sentencing enhancements have emerged among the circuits. First, the majority of circuits have taken a plain-language approach, relying on the

³³ See *Castillo-Marin*, 684 F.3d at 919 (internal citations omitted); see also *Shepard v. United States*, 544 U.S. 13, 16, 20–21, 23 n.4 (2005) (discussing types of judicially noticeable documents that courts may consider); see also *Rodriguez*, *infra* note 38 (also discussing *Shepard* documents).

³⁴ See *Herrera-Alvarez*, 753 F.3d at 134 (citations omitted) (quoting *Descamps*, 133 S. Ct. at 2281).

³⁵ *Mathis v. United States*, 136 S. Ct. 2243, 2249–2250 (2016).

³⁶ *Id.*

³⁷ See *id.* at 2257.

³⁸ *United States v. Rodriguez*, 711 F.3d 541, 550–52 (5th Cir. 2013).

common meaning of terms as stated in legal and other well-accepted dictionaries. Second, some circuits have taken a multi-source approach, deriving the generic meaning of an offense category from the various state codes, the Model Penal Code, federal law, and criminal law treatises. Finally, the Ninth and Eleventh Circuits have adopted a mixed-method approach, distinguishing between: (1) traditional offense categories that are defined at common law and (2) non-traditional offense categories that are not defined at common law. To determine the generic meaning of traditional offense categories, they look to the various codes, the Model Penal Code, federal law, and criminal law treatises. For non-traditional offense categories, they rely on the common meaning of terms as stated in legal and other well-accepted dictionaries.³⁹

The Fifth Circuit ultimately decided to join the First, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and adopt a plain-meaning approach when determining the “generic, contemporary meaning” of non-common-law offense categories enumerated in federal sentencing enhancements.⁴⁰

Courts continued to lament the inconsistent application of the categorical and modified categorical approaches and the confusion and incongruous results.⁴¹ As the Ninth Circuit noted, when applying the prior § 2L1.2 guideline: “Ascertaining whether a prior conviction qualifies as a ‘crime of violence’ under the Guidelines requires application of the ‘categorical approach,’ with which federal sentencing and appellate courts have wrestled for many years.”⁴²

IV. November 2016 Amendment to U.S.S.G. § 2L1.2(b)(1)

A. Reasons for Amendment

The Sentencing Commission significantly amended U.S.S.G. § 2L1.2 in November 2016. It explained:

In considering this amendment, the Commission was informed by the Commission’s 2015 report, *Illegal Reentry Offenses*; its previous consideration of the “categorical approach” in the context of the definition of “crimes of violence”; and extensive public testimony and

³⁹ *Id.* (citations omitted).

⁴⁰ *Id.* at 550–52; see also *id.* at 549 n.10 (“The language of the Guidelines enhancement at issue and its applicable commentary should always be the starting point when deriving the meaning of an undefined Guidelines term.”).

⁴¹ *United States v. Maldonado-Lopez*, 517 F.3d 1207, 1210 (10th Cir. 2008) (McConnell, J., concurring) (“This Circuit’s precedent has become confused regarding when to use the pure ‘categorical method,’ when to use the ‘modified categorical method,’ and when to use the ‘factual approach’ in determining when various sentencing enhancements apply on account of prior convictions.”); *Evanson v. Att’y Gen. of U.S.*, 550 F.3d 284, 290 n.4 (3d Cir. 2008) (“Some confusion has resulted from inconsistent use of the phrase ‘modified categorical approach.’”); *Rodriguez*, 711 F.3d at 545 n.2 (“This problem is a demonstration of the confusion and gymnastics that result from the categorical and modified categorical approaches in their current form.”); *United States v. McDougal*, No. 13-CR-20343, 2016 WL 4761808, at *2 (E.D. Mich. 2016) (unpublished) (“The confusion caused by an overbroad categorical approach was integral to the Supreme Court’s decision in *Johnson*.”); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (“We do not use the common sense approach. Instead, we must apply the categorical approach even when the object offense is enumerated as a per se crime of violence under the Guidelines.”) (internal quotations omitted); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1139 (9th Cir. 2006) (Kozinski, J., concurring in part, dissenting in part); *Flores v. Ashcroft*, 350 F.3d 666, 672–73 (7th Cir. 2003) (Evans, J., concurring) (lamenting the absence of common sense in court’s application of the *Taylor* categorical approach and noting that, “Flores actually beat his wife[;] . . . [a] common-sense review here should lead one to conclude that Flores committed a ‘crime of domestic violence.’”).

⁴² See *United States v. Bernel-Aveja*, 844 F.3d 206, 221 (5th Cir. 2016) (Owen, J., concurring); see also *Public Data Briefing: 2016 Illegal Reentry Amendment*, at 2:10, U.S. SENTENCING COMM’N (noting that categorical approach has been “widely criticized as a resource intensive, overly-legalistic test”).

public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.

[The Commission stated it was responding to three primary concerns.] First, the Commission has received significant comment over several years from courts and stakeholders that the “categorical approach” used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty . . . Determining whether a predicate conviction qualifies for a particular level of enhancement requires application of the categorical approach to the penal statute underlying the prior conviction. *See generally* United States v. Taylor, 495 U.S. 575 (1990) (establishing the categorical approach). Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of “sentence imposed” is the same definition that appears in Chapter Four of the *Guidelines Manual*.

Second, comment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant’s deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.

Third, the Commission’s research identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. . . . The Commission’s 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations.

[The Commission noted that the] amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner[,] reduc[ing] somewhat the level of enhancements for criminal conduct occurring before the defendant’s first order of deportation and add[ing] a new enhancement for criminal conduct occurring after the defendant’s first order of deportation. It also responds to concerns that prior convictions for illegal reentry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.⁴³

In short, the November 2016 amendment to § 2L1.2 was “a result of the Commission’s multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders. Based on this data, legal analysis, and public comment, the Commission identified a number of specific areas where changes were appropriate.”⁴⁴

B. November 2016 Amendment—Offense Level Calculations

On November 1, 2016, § 2L1.2(b) was amended in part to add three-tiered specific offense characteristics in subsections (b)(1), (b)(2), and (b)(3):

(a) Base Offense Level: 8

⁴³ U.S.S.G. § 2L1.2, *supp. app. C*, amend. 802 at 155–56 (2016).

⁴⁴ *Id.* at 153.

(b) Specific Offense Characteristics

- (1) (Apply the Greater) If the defendant committed the instant offense after sustaining—
 - (A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or
 - (B) two or more convictions for misdemeanors under 8 U.S.C. 1325(a), increase by 2 levels.
- (2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.
- (3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.⁴⁵

⁴⁵ U.S.S.G. § 2L1.2 (2016).

A calculation worksheet provided by the Sentencing Commission on its website is attached.⁴⁶ In summary, the sentencing calculation begins with a base offense level of eight. Under § 2L1.2(b)(1), applying the greatest, a sentence will be enhanced by four levels if the defendant committed the illegal reentry offense after committing a felony illegal reentry offense. A two-level enhancement applies if the defendant possesses two or more convictions for misdemeanors under 8 U.S.C. § 1325(a).⁴⁷

As the Sentencing Commission noted, the amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326:

“Illegal reentry offense” is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under § 1325(a).

The Commission’s data indicated that the extent of a defendant’s history of illegal reentry convictions is associated with the number of his or her prior deportations or removals from the United States, with the average illegal reentry defendant having been removed from the United States 3.2 times. Over one-third (38.1 percent) of the defendants were previously deported after an illegal entry or reentry conviction [and] [t]he Commission determined that a defendant’s demonstrated history of violating §§ 1325(a) and 1326 [was] appropriately accounted for in a separate enhancement.

For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the four-level enhancement in the new subsection (b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under the existing subsection (b)(1)(D). The Commission concluded that an enhancement is also appropriate for defendants previously convicted of two or more misdemeanor offenses under § 1325(a).⁴⁸

Under § 2L1.2(b)(2), applying the greatest, if *before* the defendant was ordered deported or removed from the United States for the first time the defendant was convicted of a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, the sentence will be enhanced ten levels. If the sentence imposed was two years or more, the enhancement will be eight levels. If the sentence imposed was more than one year and one month, the enhancement will be six levels. If the conviction was otherwise a felony offense, the enhancement will be four levels. Finally, if the defendant possesses three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, the base offense level is increased by two levels.⁴⁹

Under § 2L1.2(b)(3), the same tiered enhancement scheme applies as in § 2L1.2(b)(2) (e.g., 10-, 8-, 6-, 4-, and 2- levels), if, at any time *after* the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in the same types of convictions.⁵⁰ The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a

⁴⁶ U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION’S ANNUAL NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES, 1, 139 (2017).

⁴⁷ See U.S.S.G. § 2L1.2(b)(1) (2016).

⁴⁸ See U.S.S.G. § 2L1.2, *supp. app. C, amend. 802 at 156* (citations omitted).

⁴⁹ U.S.S.G. § 2L1.2(b)(2) (emphasis added). For the guideline definition of “crime of violence,” see note 67, *infra*. “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.” U.S.S.G. § 2L1.2, *cmt. n.2*. For more information about crimes of violence and drug trafficking offenses, as well as the categorical approach, see the Commission’s “Immigration Sentencing Primer,” see *infra*, note 56, pp. 25–31.

⁵⁰ U.S.S.G. § 2L1.2(b)(3) (emphasis added).

parallel set of enhancements. “The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.”⁵¹ Thus, the offense level calculation will include the applicable enhancements from each applicable subsection—(b)(1), (b)(2), and (b)(3)—after applying the greatest enhancement in each one, to arrive at the final offense level.

The Commission noted that subsections (b)(2) and (b)(3) of the amended Guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the Guidelines Manual determines a defendant’s criminal history score based on her prior convictions. The two subsections are intended to divide the defendant’s criminal history into two time periods. Subsection (b)(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any, that the defendant sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event).⁵²

The Commission discussed other portions of the amendment. “‘Voluntary returns’ do not qualify as ‘deportations’” under the guideline.⁵³ In addition, the first deportation or removal date becomes a very important fact under subsections (b)(2) and (b)(3).⁵⁴ “Priors [must be] countable under criminal history § 4A1.1(a), (b), or (c), and are also used for criminal history points. The prior sentence length includes imprisonment given upon revocation of probation, parole, or supervised release.”⁵⁵ As the Commission notes in its Immigration Guidelines Primer, “[a]nother significant change is that only prior convictions that receive criminal history points are counted for purposes of an enhancement.”⁵⁶ The amendment also altered the alien smuggling offense definition “to include a person under 18” and “clarified that sexual abuse of an undocumented person warrants the 4-level enhancement for serious bodily injury.”⁵⁷

Based in part on data collected and presented in the Illegal Reentry Offenses Report:

The Commission determined that the new specific offense characteristics more appropriately provide for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants’ prior convictions. The (b)(2) specific offense characteristic reflects the same general rationale as the illegal reentry statute’s increased statutory maximum penalties for offenders with certain types of serious pre-deportation predicate offenses (in particular, “aggravated felonies” and “felonies”). The Commission’s data analysis of offenders’ prior felony convictions showed that the more serious types of offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data.

⁵¹ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 157.

⁵² *Id.* at 156–57.

⁵³ See U.S. SENTENCING COMM’N, § 2L1.2 AMENDMENT OVERVIEW, at 1 (2016) [hereinafter 2016 Comm’n Overview of § 2L1.2].

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. SENTENCING COMMISSION, IMMIGRATION SENTENCING PRIMER, at 19 (2016).

⁵⁷ 2016 Comm’n Overview of § 2L1.2, at 1.

The (b)(3) specific offense characteristic focuses on post-reentry criminal conduct which, if it occurred after a defendant's most recent illegal reentry, would receive no enhancement under the existing guideline. The Commission concluded that a defendant who sustains criminal convictions occurring before and after the defendant's first order of deportation warrants separate sentencing enhancement.⁵⁸

C. Departure Provisions

The Sentencing Commission also added a new departure provision:

The amendment adds a new departure provision, at Application Note 5, applicable to situations where “an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense.” The Commission noted that this departure “accounts for three situations in which an enhancement based on the length of a prior imposed sentence appears either inadequate or excessive in light of the defendant's underlying conduct. For example, if a prior serious conviction (e.g., murder) is not accounted for because it is not within the time limits set forth in § 4A1.2(e) and did not receive criminal history points, an upward departure may be warranted. Conversely, if the time actually served by the defendant for the prior offense was substantially less than the length of the original sentence imposed, a downward departure may be warranted.”⁵⁹

In addition to a departure for the seriousness of a prior offense, the Guideline provides for a departure based on time spent in state custody, as well as a departure based on cultural assimilation.⁶⁰ The commentary describes when such departures may be warranted by citing a combination of factors.⁶¹

D. Excluding Stale Convictions—“Sentence Imposed”

The amendment addresses stale convictions:

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. The Commission's research has found that a defendant's criminal history score is a strong indicator of recidivism risk, and it is therefore appropriate to employ the criminal history rules in this context.⁶²

The Guideline also includes a definition of “sentence imposed”:

“Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of § 4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.”⁶³

⁵⁸ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 157 (citation omitted) (citing 8 U.S.C. § 1326(b)(1) and (b)(2) (2012)).

⁵⁹ *Id.* at 158–59.

⁶⁰ U.S.S.G. § 2L1.2, *cmt. nn. 6 & 7.*

⁶¹ *Id.*

⁶² U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 159.

⁶³ U.S.S.G. § 2L1.2, *cmt. n.2* (2016).

E. Application of the “Single Sentence Rule”

The Guideline employs the “single sentence rule”:

The amendment also contains an application note addressing situations in which a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).⁶⁴

Thus, “[i]f a prior single sentence includes both an illegal reentry offense and another felony offense, the respective offenses are used in the application of [specific offense characteristics] in (b)(1) and (b)(3), if independently the prior would have received criminal history points.”⁶⁵ As the Commission noted:

Because the amendment is intended to make a distinction between illegal reentry offenses and other types of offenses, the Commission concluded that it was appropriate to ensure that such convictions are separately accounted for under the applicable specific offense characteristics, even if they might otherwise constitute a “single sentence” under §4A1.2(a)(2). For example, if the single sentence rule applied, a defendant who was sentenced simultaneously for an illegal reentry and a federal felony drug-trafficking offense might receive an enhancement of only 4 levels under subsection (b)(1), even though, if the two sentences had been imposed separately, the drug offense would result in an additional enhancement of between 4 and 10 levels under subsection (b)(3).⁶⁶

F. Definition of “Crime of Violence”

The amendment continues to use the term “crime of violence,” although now solely in reference to the two level enhancement for three or more misdemeanor convictions at subsections (b)(2)(E) and (b)(3)(E). The amendment conforms the definition of “crime of violence” in Application Note 2 to that adopted for use in the career offender Guideline effective August 1, 2016.⁶⁷ The Commission concluded “[u]niformity and ease of application weigh in favor of using a consistent definition for the same term throughout the Guidelines Manual.”⁶⁸ The categorical approach still applies when analyzing this provision.⁶⁹

⁶⁴ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 159.

⁶⁵ 2016 Comm’n Overview of § 2L1.2 at 1.

⁶⁶ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 159.

⁶⁷ *Id.* (citing Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4741 (Jan. 27, 2016)). The guideline commentary defines “crime of violence” as “any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 2L1.2, *cmt. n.2*. The commentary also provides a definition of “forcible sex offense” and limits when the offenses of sexual abuse of a minor and statutory rape are included, as well as other definitions.

⁶⁸ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802.

⁶⁹ *Id.* at 157–58. *See also infra* note 70.

G. Effect of November 2016 Amendment

By focusing largely on the length of the sentence imposed for the prior conviction, the amendment simplifies the calculations and basically eliminates the need to apply the categorical approach when sentencing defendants convicted of illegal reentry.⁷⁰ As such, “section 2L1.2 now focuses on three factors: [(1)] the number of prior illegal reentry convictions; [(2)] the length of the prior felony sentence before the first deportation; and [(3)] the length of a prior felony sentence after reentry.”⁷¹ The Commission explained:

The Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court’s assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in the Chapter Four of the Guidelines Manual. In amending the guideline, the Commission also took into consideration public testimony and comment indicating that tiered enhancements based on the length of the sentence imposed, rather than the classification of a prior offense under the categorical approach, would greatly simplify application of the guideline. With respect [to] an offender’s prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.

The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses. The amendment also addresses another frequent criticism of the existing guideline – that its use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement of up to 16 levels is often disproportionate to a defendant’s culpability or recidivism risk. The Commission’s data showed an unusually high rate of downward variances and departures from the guideline for such defendants. For example, the Commission’s report found that less than one-third of defendants who qualify for a 16-level enhancement have received a within-range sentence, while 92.7 percent of defendants who currently qualify for no enhancement receive a within-range sentence.⁷²

The Commission further explained that “[t]he lengths of the terms of imprisonment triggering each level of enhancement were set based on Commission data showing differing median sentence lengths for a variety of predicate offense categories.”⁷³ The amendments result in lower offense level guideline ranges when compared to the prior version of § 2L1.2(b)(1).

In preparing its report:

The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation. The Commission determined that a sentence-imposed approach is consistent with the

⁷⁰ *Id.* The categorical approach still applies when assessing crimes of violence and drug trafficking offenses for purposes of the two-level enhancement in sections (b)(2)(E) and (b)(3)(E). *See id.* (“The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses.”).

⁷¹ *Id.*

⁷² U.S.S.G. § 2L1.2, *supp. to app. C., amend. 802 at 157–58.*

⁷³ *Id.*

Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.⁷⁴

As some courts have observed, the amendment's elimination of particular definitions or considerations for most illegal reentry sentences does not eliminate the continued need to analyze other definitions or the categorical approach in different contexts. For example:

Even though amendments to the Sentencing Guidelines effective November 1, 2016 eliminated 'burglary of a dwelling' as an enumerated, predicate offense in determining whether a Sentencing Guidelines enhancement applies, how courts define generic burglary continues to be of importance. 'Burglary' is an enumerated predicate offense in the Armed Career Criminal Act (ACCA), and the definition of 'aggravated felony' for purposes of immigration laws includes "burglary."⁷⁵

The November 2016 amendment to § 2L1.2 also conforms the "crime of violence" definition in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016.⁷⁶

V. Other Issues

A. Ex Post Facto

District courts ordinarily apply the version of the Guidelines in effect at sentencing.⁷⁷ The Sentencing Guidelines reiterate that statutory directive, with the proviso that "[i]f the Court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the [E]x [P]ost [F]acto [C]lause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed."⁷⁸

The Supreme Court determined the Ex Post Facto doctrine applies to the Sentencing Guidelines.⁷⁹ "[A]pplying amended sentencing guidelines that increase a defendant's recommended sentence can violate the Ex Post Facto Clause, notwithstanding the fact that sentencing courts possess discretion to

⁷⁴ *Id.*

⁷⁵ *United States v. Bernel-Aveja*, 844 F.3d 206, 219 (5th Cir. 2016) (Owen, J., concurring).

⁷⁶ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802 at 157–58.

⁷⁷ *See* 18 U.S.C. § 3553(a)(4)(A)(ii) (2012); *United States v. Peugh*, 133 S. Ct. 2072, 2081 (2013) ("Under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing Guidelines issued by the United States Sentencing Commission that are 'in effect on the date the defendant is sentenced.'"); *United States v. Acevedo-De La Cruz*, 844 F.3d 1147, 1152 n.1 (9th Cir. 2017).

⁷⁸ *Peugh*, 133 S. Ct. at 2081 (quoting U.S.S.G. §§ 1B1.11(a), (b)(1) (Nov. 2012)).

⁷⁹ *Peugh*, 133 S. Ct. at 2078 ("We consider here whether there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense. We hold that there is."); *see also id.* at 2085 (rejecting "the government's principal argument . . . that the Sentencing Guidelines lack sufficient legal effect to attain the status of a 'law' within the meaning of the *Ex Post Facto* Clause." Whereas the pre-*Booker* Guidelines 'ha[d] the force and effect of laws,' the post-*Booker* Guidelines . . . have lost that status due to their advisory nature) (citing *United States v. Booker*, 125 S. Ct. 738, 738 (2005)).

deviate from the recommended sentencing range.”⁸⁰

B. Motions for Reduction of Sentence Under 18 U.S.C. § 3582

While district courts are generally prohibited from “modify[ing] a term of imprisonment once it has been imposed,” a defendant may be eligible for a reduction of sentence if the sentence was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission” and if “a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”⁸¹

The relevant policy statement, in turn, permits a reduction only if the Sentencing Commission has made the amendment retroactive in § 1B1.10(d).⁸² The Sentencing Commission did not make the November 1, 2016 amendments to § 2L1.2 retroactive, so defendants are not eligible for a reduction pursuant to 18 U.S.C. § 3582(c)(2).

In one case, the district court sentenced the defendant in November 2015 “to a term of fifty-seven months’ imprisonment in accordance with the United States Sentencing Guidelines in effect at that time.”⁸³ The defendant did not appeal. Approximately one year later, he filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 802 to the Sentencing Guidelines in 2016, which, as noted earlier, reduced the level of enhancements for an alien like the defendant who has been convicted of illegal reentry after having been previously removed for his criminal conduct. The district court denied the motion.⁸⁴ The Third Circuit affirmed, stating “[b]ecause Amendment 802 is not listed in § 1B1.10(d), the district court correctly concluded that it was not permitted to modify” the defendant’s illegal reentry sentence.⁸⁵

C. Charging Prior Conviction Not Required (*Almendarez-Torres*)

As noted earlier, aliens who return to the United States after deportation and without permission may be subject to two years’ incarceration under 8 U.S.C. § 1326(a).⁸⁶ An additional prison term of up to twenty years may be imposed under 8 U.S.C. § 1326(b)(2) for aliens “whose [prior] removal was subsequent to a conviction for commission of an aggravated felony.”⁸⁷ One defendant “whose sentence for illegal reentry was increased pursuant to § 1326(b)(2),” argued “that the district court erred in

⁸⁰ *Id.* at 2082. See also *United States v. Rodarte-Vasquez*, 488 F.3d 316, 324 (5th Cir. 2007) (“[A]pplication of the 2003 Guidelines “result[ed] in a more onerous penalty” than would application of the 2002 Guidelines. Therefore, application of the 2003 Guidelines constituted an *ex post facto* violation.”) (citing *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 2001)); *United States v. Lopez-Solis*, 447 F.3d 1201, 1204–05 (9th Cir. 2006) (“One year after Lopez-Solis was sentenced, the Sentencing Commission amended the definition of ‘crime of violence’ under the application note to USSG § 2L1.2(b)(1)(A) . . . Typically, we apply clarifying but not substantive amendments retroactively. We cannot do so if retroactive application would violate the *ex post facto* clause, however. . . . [W]e conclude that we cannot apply the amended definition retroactively. In this context, retroactive application would violate the *ex post facto* clause.”).

⁸¹ *United States v. Flemming*, 723 F.3d 407, 410 (3d Cir. 2013) (citing *United States v. Flemming*, 617 F.3d 252, 252 (3d Cir. 2010)).

⁸² *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995) (stating that an amendment cannot be applied retroactively if it is not listed in former § 1B1.10(c), now § 1B1.10(d)).

⁸³ *United States v. Paulino*, No. 17-1035, 2017 WL 782325, at *1 (3d Cir. 2017) (see U.S.S.G. §§ 1B1.11(a), 2L1.2(b)(1)(A)(ii)).

⁸⁴ *Id.* (citing U.S.S.G. app. C, amend. 802 at 155–56 (2016)).

⁸⁵ *Id.* See also *United States v. De La Rosa-Vargas*, 51 F. App’x 929 (5th Cir. 2002) (unpublished) (Because the Commission did not make amendment to § 2L1.2 retroactive, “the district court lacked authority to modify De La Rosa-Vargas’ sentence under 18 U.S.C. § 3582(c)(2)”).

⁸⁶ 8 U.S.C. § 1326(a) (2012).

⁸⁷ *Id.* § 1326(b)(2).

considering his prior aggravated felony convictions during sentencing because such convictions were not charged in the indictment or proved beyond a reasonable doubt.”⁸⁸

In *Almendarez-Torres v. United States*, however, the Supreme Court rejected this argument.⁸⁹ In that case, the Court considered whether § 1326(b)(2) “defines a separate crime or simply authorizes an enhanced penalty.”⁹⁰ The Court held § 1326(b)(2) “simply authorizes a court to increase the sentence for a recidivist . . . [and] does not define a separate crime.”⁹¹ In so holding, the Court rejected the argument that, because the fact of recidivism increased the maximum penalty to which a defendant was exposed, Congress was constitutionally required to treat recidivism as an element of the crime that must be charged in the indictment and proved beyond a reasonable doubt.⁹² *Almendarez-Torres* therefore “stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged.”⁹³

In *Apprendi v. New Jersey*, the defendant appealed the sentence imposed following his plea of guilty to second-degree possession of a firearm for an unlawful purpose.⁹⁴ Although the statutory penalty for this crime was five to ten years in prison, the trial judge found by a preponderance of the evidence that the defendant had violated New Jersey’s hate crime statute and thus enhanced his sentence to twelve years.⁹⁵ On appeal, the United States Supreme Court reversed the sentence, holding “[o]ther than [the] fact of a prior conviction, any fact that increases [the] penalty for [a] crime beyond [the] prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”⁹⁶

After *Apprendi*, some defendants charged with illegal reentry argued *Apprendi* so “thoroughly undermined the reasoning of [*Almendarez-Torres*]’ that the case ‘no longer has precedential value.’”⁹⁷ The Ninth Circuit responded, however: “the Court in *Apprendi* chose not to overrule *Almendarez-Torres*, and unmistakably carved out an exception for ‘prior convictions’ that specifically preserved the holding of *Almendarez-Torres*.”⁹⁸ Other appellate courts issued similar rulings.⁹⁹

In 2007, a majority of the Supreme Court reaffirmed *Almendarez-Torres* in *James v. United States*, stating “we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.”¹⁰⁰ Thus, *Almendarez-Torres* remains binding precedent.

D. Variances Under *Booker*

For over twenty years, with limited exception, the Sentencing Guidelines were mandatory: “The

⁸⁸ *United States v. Pacheco-Zepeda*, 234 F.3d 411, 413–14 (9th Cir. 2000), as amended on reh'g (Feb. 8, 2001).

⁸⁹ *Almendarez-Torres v. United States*, 523 U.S. 224, 224 (1998).

⁹⁰ *Id.* at 226.

⁹¹ *Id.*

⁹² *Id.* at 260.

⁹³ *Jones v. United States*, 526 U.S. 227, 248 (1999).

⁹⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000).

⁹⁵ *Id.* at 466.

⁹⁶ *Id.* at 466.

⁹⁷ *Pacheco-Zepeda*, 234 F.3d at 414.

⁹⁸ *Id.* at 414 (citing *Apprendi*, 530 U.S. at 466, 490).

⁹⁹ See, e.g., *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007) (“This court has patiently entertained the identical argument in countless cases. . . . Because the Supreme Court treats *Almendarez-Torres* as binding precedent, Pineda’s argument is fully foreclosed from further debate.”); *United States v. Martinez-Villalva*, 232 F.3d 1329, 1332 (10th Cir. 2000) (“We are bound by [*Almendarez-Torres*] to hold that the fact of defendant’s prior felony conviction is not an element of the offense with which he was charged by indictment, but is, instead, a sentencing factor.”); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) (“we have consistently held that *Almendarez-Torres* remains good law”).

¹⁰⁰ *James v. United States*, 127 S.Ct. 1586, 1610 n.8 (2007) (citing *Almendarez-Torres*, 523 U.S. 224).

Sentencing Reform Act of 1984, § 211 et seq., 98 Stat. 1987, prohibited district courts from disregarding the ‘mechanical dictates of the Guidelines’ except in narrowly defined circumstances.”¹⁰¹ In 2005, however, in *United States v. Booker*,¹⁰² the Supreme Court:

Invalidated both the statutory provision, 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), which made the Sentencing Guidelines mandatory, and § 3742(e) (2000 ed. and Supp. IV), which directed appellate courts to apply a de novo standard of review to departures from the Guidelines. As a result of the Court’s decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable.’ Our explanation of ‘reasonableness’ review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.¹⁰³

Thus, litigants may seek variances from the advisory guideline range, under *Booker* and 18 U.S.C. § 3553(a), including upward variances.¹⁰⁴ Appellate courts have affirmed upward variances from the guideline range in § 2L1.2 for various reasons, including a defendant’s significant criminal history, the seriousness of the prior conviction, repeated illegal reentry offenses, or other factors.¹⁰⁵ “[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”¹⁰⁶

VI. Conclusion

Attorneys, judges, and probation officers, particularly in districts and circuits with very large immigration caseloads, have grappled with illegal reentry guideline calculations under prior versions of

¹⁰¹ [Irizarry v. United States](#), 553 U.S. 708, 713 (2008).

¹⁰² [United States v. Booker](#), 543 U.S. 220, 125 (2005).

¹⁰³ [Gall v. United States](#), 552 U.S. 38, 46 (2007).

¹⁰⁴ *See, e.g.*, [United States v. Rosales-Bruno](#), 789 F.3d 1249, 1249 (11th Cir. 2015) (holding that “sentence of 87 months imprisonment for illegal reentry following deportation after felony conviction was substantively reasonable”; although “sentence was 60 months above the advisory sentencing guideline range of 21 to 27 months imprisonment, upward variance was supported with significant justifications, including facts of defendant’s earlier violent crimes, and it was 33 months below statutory maximum of 120 months”).

¹⁰⁵ *See id.* (affirming sixty month upward variance, noting that “the sentencing court is permitted to attach great weight to one factor over others”); *see also* [United States v. Gutierrez-Duenes](#), 522 F. App’x 548, 550–51 (11th Cir. 2013) (unpublished) (affirming twenty-four month sentence, an upward variance from ten to sixteen month guideline range, and consecutive ten month term for violating supervised release); [United States v. Gutierrez](#), 570 F. App’x 295, 295 (4th Cir. 2014) (unpublished) (holding “[d]efendant’s 78-month sentence for illegal reentry, which represented an upward variance from the sentencing guidelines range of 37 to 46 months, was not substantively unreasonable; defendant illegally returned to the United States six times, and although the guidelines accounted for some of his criminal history, he had been deported several times without facing criminal charges, and the district court reasonably could conclude that the upward variance sentence was necessary to deter defendant from reentering and violating the law again”); [United States v. Sanbria-Bueno](#), 549 F. App’x 434, 437, 441 (6th Cir. 2013) (unpublished) (affirming court’s upward variance in illegal reentry case, based on seriousness of prior conviction, noting it also did not constitute impermissible double-counting) (citing [United States v. Rivera-Santana](#), 668 F.3d 95, 101–02 (4th Cir. 2012) (“holding district court did not impermissibly engage in triple- or quadruple-counting when it relied on prior convictions to determine that the sixteen-level enhancement applied, in calculating the criminal history category, in departing upward, and in varying upward”)); [United States v. Martinez-Carmona](#), 415 F. App’x 811, 812 (9th Cir. 2011) (unpublished) (“holding district court did not impermissibly engage in triple-counting when it relied on prior convictions to calculate criminal history category, enhance the offense level, and impose an upward variance”).

¹⁰⁶ [Gall](#), 552 U.S. at 41.

U.S.S.G. § 2L1.2 (b)(1), especially when analyzing the categorical approach. The November 2016 amendment provides more straightforward calculations, almost entirely eliminates the “cumbersome and overly legalistic” categorical approach,¹⁰⁷ “[a]ccounts for prior criminal conduct in a broader and more proportionate manner,”¹⁰⁸ and should reduce the amount of labor involved in analyzing the Guideline. One Ninth Circuit judge recently “applaud[ed] the United States Sentencing Commission for reworking § 2L1.2 to spare judges, lawyers, and defendants from the wasteland of *Descamps*” and encouraged the adoption of simplified guidelines to “avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls.”¹⁰⁹ The November 2016 amendment appears to be change “in the right direction.”¹¹⁰

ABOUT THE AUTHOR

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¹⁰⁷ U.S.S.G. § 2L1.2, *supp. to app. C.*, amend. 802, at 157 (2016).

¹⁰⁸ 2016 Commission Overview of § 2L1.2.

¹⁰⁹ See *United States v. Perez-Silvan*, --- F.3d ---, 2017 WL 2784971, at *7 (June 28, 2017) (Owens, J., concurring). The latter quote refers to a scene from the 1981 movie *Raiders of the Lost Ark*, directed by Steven Spielberg and starring Harrison Ford as archaeologist Indiana Jones. RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

¹¹⁰ *Winston Churchill Quote*, GREAT-QUOTES.COM (last visited Aug. 1, 2017).

§2L1.2 Worksheet – 2016 Amendment

Scenario No: _____

Date the defendant was ordered deported or removed for the
FIRST TIME: _____

(a) Base Offense Level (BOL): 8

(b) Specific Offense Characteristics (SOCs):

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

- (A) a conviction for a felony that is an illegal reentry offense, **add 4 levels**
- (B) two or more convictions for misdemeanors under 8 USC 1325(a), **add 2 levels**

Offense Level Increase at (b)(1): _____

(b)(2) - (Apply the Greatest) If BEFORE the defendant was ordered deported/
removed from the U.S. for the first time, the defendant sustained –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the
sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the
sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the
sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add
4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug
trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(2): _____

(b)(3) - (Apply the Greatest) If AFTER the defendant was ordered deported/ removed from the U.S. for the first time, the defendant engaged in criminal conduct resulting in –

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, **add 10 levels**
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, **add 8 levels**
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, **add 6 levels**
- (D) a conviction for any other felony offense (other than an illegal reentry offense), **add 4 levels**
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, **add 2 levels**

Offense Level Increase at (b)(3): _____

§2L1.2 Offense Level Sum: _____

Note from the Editor . . .

Our sincere thank you to Gretchen C. F. Shappert, the Assistant Director for the Indian, Violent, and Cyber Crime Staff at the Executive Office for United States Attorneys, for shepherding this issue from start to finish. She recruited authors, oversaw submissions, arranged editing at Main Justice, and helped in numerous other ways. Any value of this *Bulletin* to attorneys practicing in this area is a direct result of her efforts.

Thank you,

K. Tate Chambers