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Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*



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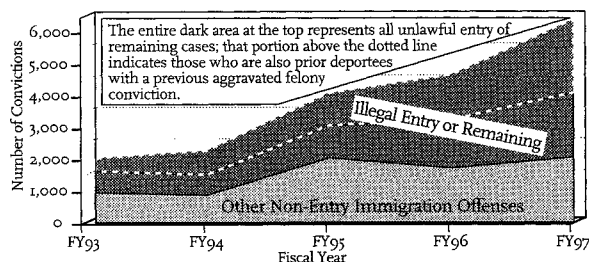
The opinions
expressed in this
report are those of the
authors and do not
necessarily reflect the
policies of the U.S.
Sentencing Commis-
sion.

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In 1997, immigration offenses account for 13.7 percent of all federal sentencing guideline convictions, up from 5.1 percent in 1993.¹ Three-quarters (73.0%) of this increase is due to unlawful entry (“unlawful entry”): non-U.S. citizens who unlawfully enter or re-enter the United States (after deportation or removal order), or who stay beyond the duration of an approved presence.

Exhibit 1 shows that unlawful entry cases are a majority of all FY97 federal guideline immigration convictions (67.9%). Half of the unlawful entry convictions involve re-entry of deported aggravated felons, represented by the dark area above the dotted line in Exhibit 1.

Exhibit 1
Number of Immigration Offense Cases
Under Federal Sentencing Guidelines FY93-FY97



Source: U.S. Sentencing Commission, 1993–1997 Datafiles, USSCFY93–USSCFY97. Only federal and Class A misdemeanor offenses are subject to the federal sentencing guidelines.

Court documents report that almost one in four of all FY97 immigration offenders (23.4%) receive a downward departure based upon the judge’s determination that the case involves circumstances not in the heartland of the guideline. Further, among unlawful re-entry offenders with aggravated felonies, the downward departure rate is 34.4 percent: more than one in three of these aggravated felons receive a downward departure. In contrast, only 13.6 percent of all guideline cases sentenced in fiscal year 1997 are reported as downward departures.

Unlawful re-entry offenses by prior aggravated felons inundate a relatively small number of federal districts. Three federal districts—California South, Texas West, and Arizona—account for nearly 50 percent (48.9%) of these guideline convictions. However, district downward departure rates vary markedly: 15.8 percent in the District of California South; 47.5 percent in the District of Texas West; and 95.3 percent in the District of Arizona.

The large number of downward departures occurring generally for immigration offenses, and specifically for unlawful re-entry offenders with a prior aggravated felony, potentially jeopardizes the guidelines’ statutory requirement to reflect proportionality and the Commission’s goal to assure that similar offenders are sentenced similarly. High rates of guideline departure suggest areas in which the guidelines may be failing to capture the heartland of offense conduct, and thus may be permitting unwarranted disparity through unguided sentencing discretion.

This paper focuses on offenses involving unlawful re-entry into the United States by a deportee with a prior aggravated felony conviction. This analysis investigates the extent to which the federal sentencing guideline for unlawful entry (USSG §2L1.2) is being applied comparably across offenders and districts. Where discrepancies are identified, the analysis determines whether the cause is due to a failure of the guideline provisions, or varying district prosecutorial or sentencing practices.

I. Immigration Statutes

Immigration offenses are contained in Title 8 of the United States Code. 8 U.S.C. § 1326 defines re-entry of removed aliens and provides criminal penalties for those aliens. Exhibit 2 describes the three subsections of this statute in terms of the statutory maximum sentence and gives the relevant offense description. Statutory maximums range from two years to twenty years, depending on the prior criminal conviction status of the offender. The 20-year statutory maximum sentence applies to offenders who have a previous conviction for an aggravated felony and a deportation or removal at some time after the prior aggravated felony conviction. An aggravated felony, defined in 8 U.S.C. § 1101(a)(43), includes, but is not limited to, murder, rape, drug trafficking, firearms trafficking, or any crime of violence or theft for which the term of imprisonment is at least one year.

The legislative history of this statute is of particular interest. In its original form, the statute called for only a maximum two-year sentence for any unlawful entry offense.² In 1988, the law was amended to include longer sentences, or enhancements, for aliens who had been deported from the United States because of a criminal conviction.³ Finally, in 1994, the longer sentences mandated in current subsections (b)(1) and (b)(2) were further increased from 5 and 15 years to the

Exhibit 2
Statutory Provisions of 8 U.S.C. § 1326
"Re-entry of Removed Aliens"

Sub-Section	Statutory Maximum	Offense Description
(a)	2 years	alien re-entering the United States after a previous removal
(b)(1)	10 years	alien re-entering the United States after a previous removal subsequent to a commission of three or more misdemeanors or one non-aggravated felony
(b)(2)	20 years	alien re-entering the United States after a previous removal subsequent to the commission of an aggravated felony

current 10 and 20 years, respectively.

Because of the complexity of issues relevant to this immigration guideline and its corresponding offenses, this analysis is limited to re-entry offenders who were previously removed following the commission of an aggravated felony. As described in the section below, these offenders—who face a statutory maximum sentence of 20 years imprisonment—can be clearly identified using information provided in the guideline computation documentation provided to the Sentencing Commission.⁴

II. Immigration Guidelines

There are five immigration guidelines, but only one of them is relevant to this paper.⁵ §2L1.2 (unlawful entry or re-entry into the United States) is the most frequently applied immigration guideline and the number of its applications has been increasing over time. A copy of this guideline as it applied to cases sentenced in fiscal year 1997 appears in Exhibit 3.

Exhibit 3
Reproduction of Federal Sentencing Guideline §2L1.2
Fiscal Year 1998

- §2L1.2. Unlawfully Entering or Remaining in the United States
- (a) Base Offense Level: 8
 - (b) Specific Offense Characteristics
 - (i) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):
 - (A) If the conviction was for an aggravated felony, increase by 16 levels.
 - (B) If the conviction was for (i) any other felony, or (ii) three or more misdemeanor controlled substance offenses, increase by 4 levels.

Source: United States Sentencing Commission, USSG §2L1.2 (November 1, 1998).

As Exhibit 3 indicates, for the sampled cases sentenced in fiscal year 1997, the base offense level was set at 8 (§2L1.2(a)). The base offense level was further increased by the 16-level specific offense characteristic under §2L1.2(b)(1)(A) when:

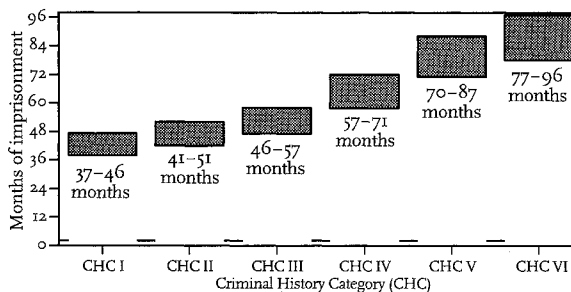
- The defendant was previously deported (or remained after receiving a removal order) after a criminal conviction; and

- The conviction was for an aggravated felony.

The resulting offense level was level 24, which would have provided a sentence range between 51 and 125 months, depending upon the offender's Criminal History Category. However, the vast majority of these defendants received a three-level reduction under §3E1.1 for accepting responsibility for the criminal conduct. Thus, the final offense level for these offenders was typically level 21.

Exhibit 4 details the distribution of level 21 sentencing ranges for each of the six Criminal History Categories (CHCs), ranging from a low of 37 (minimum guideline sentence at CHC I) to a high of 96 months (maximum guideline sentence at CHC VI).

Exhibit 4
Sentencing Table Level 21 Guideline Range
for Each Criminal History Category



Source: U.S. Sentencing Commission, USSG Ch 5, Pt. D, Sentencing Table.

III. Methodology

The Sentencing Commission receives copies of the sentencing court documents, including the Judgment and Conviction Order, the Report on the Sentencing Hearing (statement of reasons for imposing sentence), and the Presentence Report; many times the Indictment and the Plea Agreement are also sent along. Commission staff extracts information from these records for input into the Commission data file, the most complete record of federal guideline offenders in the country. In fiscal year 1997 there were 2,124 sentencings of previously removed aggravated felons who attempted re-entry. Of these, over 80 percent met the following standardized criteria:

- Statute of conviction solely under 8 U.S.C. § 1326
- Guideline application solely under §2L1.2
- Application of the 16-level §2L1.2(b)(1)(A) enhancement for a prior aggravated felony
- Receipt of Acceptance of Responsibility Adjustment (3-level decrease)
- Final Offense Level of 21
- Receipt of complete guideline application documents.

For the intended analysis, more detailed information was needed from these immigration cases than was

available in the standard USSC data files. Thus, a stratified sample of 195 cases from the Districts of Arizona, California South, and Texas West was selected for supplementary data collection. These three districts were chosen because they constitute the majority of unlawful re-entry offenses with a prior aggravated felony.

An intensive study project collected data on statute(s) of indictment and conviction (including sections and subsections as cited in any court document); plea agreement provisions and reasons for any sentence reductions; departure status and reasons for any departure from the guideline sentencing range; and criminal history information (including offense type, number of prior convictions, and number of prior deportations).

IV. Findings

A. Demographic Trends

The Districts of Arizona, California South, and Texas West account for just fewer than 50 percent of convicted re-entries by aggravated felons, but their cases accurately describe such offenders across all districts. Although the following description is based on cases sampled from these three districts, this description also represents the demographic characteristics of these offenders nationally.

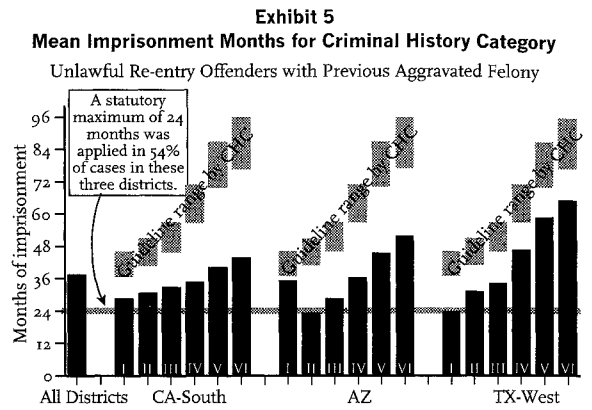
Of these unlawful re-entry cases with a prior aggravated felony, more than 90 percent of the offenders (n=1,645) are Hispanic. Also, almost every one (99%) is male (n=1,693). Almost 85 percent (n=92) of these offenders have less than a high school education. Thus, these offenders are primarily Hispanic males with less than a high school education.

Of particular importance to these cases is the issue of criminal history. By definition, these offenders have been previously convicted of at least one aggravated felony and removed from the United States to their country of citizenship. Based on the information gathered from the USSC data file, the most common (29.5 %; n=506) Criminal History Category for this group is Category VI, the highest federal guidelines category. The average number of previous convictions is five. Of these convictions, approximately 85 percent are drug-related and 28 percent are violent offenses. Also, these offenders average approximately two prior deportations.

B. Length of Imprisonment

Exhibit 5 indicates that average sentence lengths imposed for these aggravated felony offenders are substantially below the guideline ranges, which are labeled on the exhibit and appear in the step-wise lightly shaded areas.

The length of imprisonment varies by district. The average is 37 months across all districts. Mirroring the



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21.

guideline range increments by Criminal History Category (CHC), as offenders' criminal history scores increase, so do sentence lengths, more notably in the Districts of Arizona and Texas West than in the District of California South. However, even controlling for CHC, sentences cover a wide range of lengths. In CHC I, the average sentence varies from 24 to 35 months; for CHC VI the average sentence varies from 44 to 65 months.

Why would sentences lengths for these offenders be so much shorter than guideline ranges? The most common reason is departures from the guideline range. However, downward departures do not explain the observed sentencing patterns.

C. Downward Departures

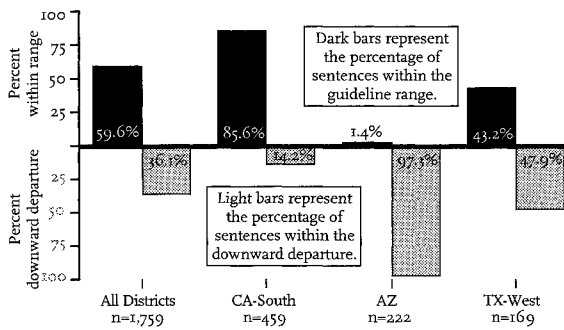
Departure rates are presented in Exhibit 6 and also show wide variations by district. While the District of Arizona's departure rate is almost 100 percent (97.3%), the District of California South departs downward only 14.2 percent of the time. A majority of these downward departures cases receive a departure in exchange for waiving a formal deportation hearing. Analysis of each studied district reveals that of those cases in which a departure is given, approximately 9 out of 10 offenders receive the departure in exchange for accepting voluntary deportation (95 % in the District of California South; 92% in the District of Arizona; and 86% in the District of Texas West). Analysis of departure rates indicates that an offender receives on average a two-to-five level decrease in sentence when a downward departure is granted.

Exhibit 7 compares average sentences in the three districts for those offenders who receive a downward departure and those who do not. The sentence length patterns are distinctly different:

- The District of Arizona shows the expected pattern of shorter imprisonment sentences for

Exhibit 6

Sentence Location: Within-Guideline and Departure Rates
Unlawful Re-entry Offenders with Previous Aggravated Felony



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21. Substantial Assistance §5K1.1 departures do not appear on the exhibit but are included in sentence location statistics. These cases had no upward departures.

downward departure cases: an average sentence length of 53 months for cases sentenced within the guideline range and an average sentence length of 38 months for downward departure cases.

- The District of Texas West has sentence lengths approximately equal for offenders, regardless of departure status: an average sentence length of 48 months for cases sentenced within the guideline range and an average sentence length of 49 months for downward departure cases.
- The District of California South shows a startling and illogical relationship: sentences for cases with a downward departure are substantially longer than sentences for cases within the guideline range. The sentence length average is 25 months for cases sentenced within the guideline range, and 41 months for downward departure cases.

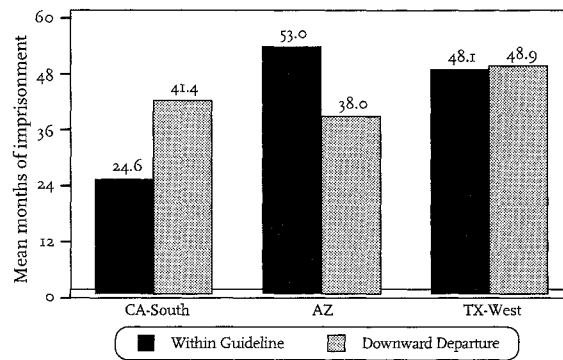
In two of the three districts – California South and Texas West – downward departure case sentences are longer than within-guideline case sentences. The presence of downward departures not only fails to explain the sentencing patterns for these offenders under §2L1.2, but requires investigation of another potential cause of sentencing variation: disparate district charging and plea practices affecting the application of statutory maximum punishment limits.

D. Statutory Maximum Penalties and the Statutory “Trump”

The cases analyzed all receive the §2L1.2(b)(1)(A) 16-level guideline enhancement for a prior aggravated felony conviction and have a final offense level of 21. The distribution of criminal history categories among the districts is comparable. All of the studied offenders

Exhibit 7

Effect of Departure Status on Mean Imprisonment Months
Unlawful Re-entry Offenders with Previous Aggravated Felony



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21.

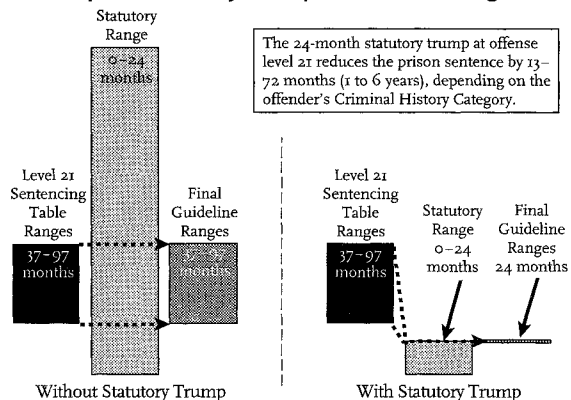
have a documented +16 guideline enhancement and should be subject to a statutory maximum penalty of 20 years (240 months). All guideline ranges shown in Exhibit 4 are consistent with this statutory maximum.

In 54 percent of these cases in the three districts, however, a statutory “trump” of two years – as provided under 8 U.S.C. § 1326(a) – is applied, even though the offense conduct for these offenders is best described by 8 U.S.C. § 1326(b)(2). Any guideline range that is in conflict with statutorily prescribed parameters is “trumped” so that the final guideline range must always be consistent with the statutory provisions. Exhibit 8 graphically explains the sentencing effect of a two-year trump applied to cases with offense conduct under 8 U.S.C. § 1326(b)(2). The left half of the exhibit shows guideline application under the 240-month statutory maximum: The guideline sentencing ranges are not altered by any statutory restrictions. The right half of the exhibit, however, shows that the guideline ranges at level 21 would be significantly reduced (“trumped”) by a 24-month statutory limit. This trump would reduce the average prison sentence for these offenders by one to six years, depending on the offender’s criminal history category.

The reason for sentence lengths significantly below the level-21 guideline levels (as shown in Exhibit 5) and for the anomalous longer downward departure sentences, is the application of a 24-month statutory maximum punishment limit – instead of the expected 240-month statutory maximum punishment limit.

How is this accomplished? Typically the procedure involves a “fast track” plea offer by the prosecution. Under the plea deal that typically involves a waiving of the right to a deportation hearing, offenders meeting the offense conduct criteria of 8 U.S.C. §1326(b)(2) and its 240-month statutory maximum are instead charged with and permitted to plead guilty to a different

Exhibit 8
Impact of Statutory "Trump" on Guideline Range



Source: U.S. Sentencing Commission.

subsection of this statute (8 U.S.C. § 1326(a)) that has a punishment provision limited to "not more than 2 years."⁶ Under this strategy, the associated guideline computation presented in the Probation Officer's Presentence Report and submitted to the U.S. Sentencing Commission details the application of the 16-level §2L1.2(b)(1) guideline enhancement for deportation after a prior aggravated felony. However, the resulting guideline is "trumped" down to the 24-month statutory prison limit of the statute of conviction.

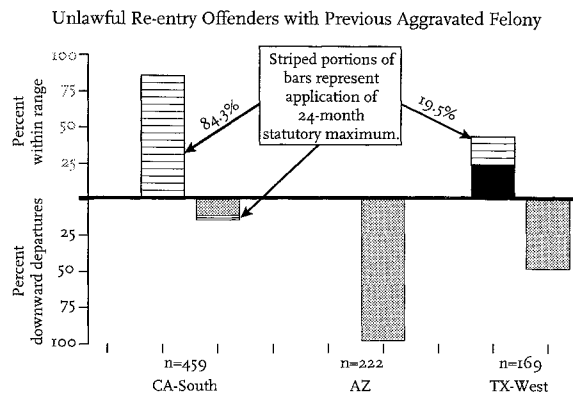
As a consequence, for the offenders receiving the trump, the guideline range is recalculated at 24-months (compare right half of Exhibit 8). A sentence of 24 months in the newly-trumped 24-month guideline range is by strict definition a "within-guideline" sentence, not a downward departure. Exhibit 9 shows the impact of the trumped guideline range on the departure statistics for these cases.

- In the District of California South, 85.6 percent of cases for these offenders are within the guideline range. This disaggregates into only 1.3 percent within the 240-month statutory guideline range, and 84.3 percent in the statutory-trumped guideline range.
- In the District of Texas West, 43.2 percent of cases for these offenders were sentenced within the guideline range. This disaggregates into 23.7 percent within the 240-month statutory guideline range, and 19.5 percent in a statutory-trumped guideline range.
- In the District of Arizona, almost all (97.3%) cases receive a downward departure. There is no statutory trump; that is, all of these cases are sentenced under 8 U.S.C. § 1326(b) and its relevant statutory maximum of 240 months.

E. The Impact of Discretionary Application of Statutory Maximums

Due to differential charging and plea practices across districts, unlawful re-entry offenders with a prior aggravated felony received disparate sentences in fiscal

Exhibit 9
Departure Rates and 24-Month Statutory Maximum Application



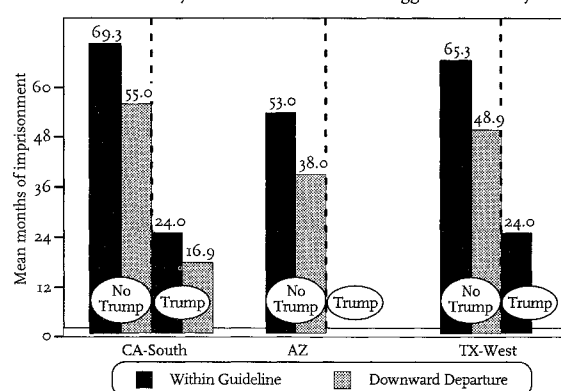
Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21. Substantial Assistance §5K1.1 departures do not appear on the exhibit but are included in sentence location statistics. These cases had no upward departures.

year 1997. An individual convicted for the same offense conduct, with the same guideline computation offense level, could receive a significantly different sentence length not due to the guideline system, but due to the manipulation of charge and plea bargaining.

Exhibit 10 shows the impact of the discretionary application of statutory maximums: Cases that receive the 24-month statutory trump receive shorter sentences – by a factor of two or three – than cases that do not receive the trump.

- The offenders in the District of California South receive shorter sentences because of the widespread use of the statutory trump. More than 85 percent of these offenders are serving average sentences of two years or less.

Exhibit 10
Effect of Statutory "Trump" on Mean Imprisonment Months



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21.

- Offenders in the District of Arizona serve at least three years, with an overall average sentence of 38 months. Even without the statutory trump, these offenders receive an average four-level downward departure.
- A majority of the offenders in the District of Texas West serve between four to five-and-a-half years in prison. Approximately 20 percent are serving the two-year trumped sentence.

F. Correlates of Discretionary Statutory “Trumping”

While overall the district-by-district policy is highly predictive of average sentence length differences, some districts additionally appear to have policies concerning the types of offenders who will be offered the statutory maximum plea deal. Two apparent correlates to application of the 24-month trump are: Criminal History Category (CHC) and the types of prior offenses committed.

CHC results are as follows: In Exhibit 11’s leftmost bars for all national cases, there is a general “U” shape curve of statutory maximum application across CHCs: higher application rates at the lowest category, and at the higher categories. The two trumping districts examined here show different patterns:

- In the District of California South the cases are trumped fairly evenly across all CHCs, with a higher rate at the lowest CHC I and a lower rate at CHC VI.
- In the District of Texas West, 100 percent of CHC I cases are trumped. As the CHC category increases, the percentage of cases trumped decreases to less than 10 percent.

The offense types of the prior convictions appear to be marginally correlated to receipt of the statutory trump. In both the Districts of California South and

Texas West, offenders without a history of violence are slightly more likely to receive the statutory trump than offenders with a history of prior violence. For prior drug traffickers, however, the results are mixed. In Texas West, offenders with prior drug-trafficking convictions are more likely to receive the statutory trump than are offenders without prior drug-trafficking convictions.

In summary, there is evidence that only in some districts – such as Texas West – the offender’s Criminal History Category may substantially affect receipt of the statutory trump. Additionally, the type of prior convictions may play a small role in the trump decision, specifically between violent and non-violent offenses. However, these increased propensities are contingent upon the district in which the unlawful re-entry felon is prosecuted.

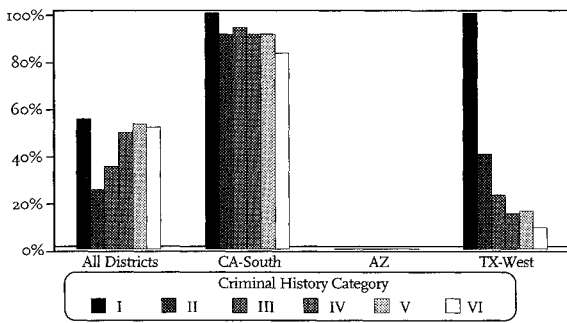
G. Distribution of District Practices

Exhibit 12 focuses on all 70 districts in fiscal year 1997 that sentenced unlawful re-entry offenders with a prior aggravated felony conviction, and categorizes them by the type of charging and plea practices used.

The largest grouping of districts (58 of the 70 districts) always applies the 240-month statutory maximum and sentences within the guideline range or downwardly departs from the range. None of these districts in fiscal year 1997 ever used the statutory trump for these offenders. The average sentence length for these districts varies between 40 to 58 months, based on the relative use of downward departures.

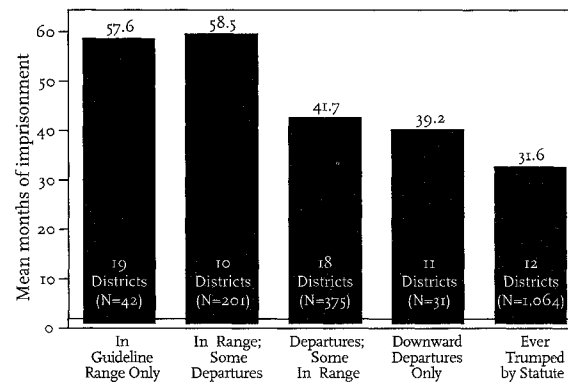
- 19 of these districts sentenced within the true guideline range only (no departures), resulting in an average sentence length of 58 months. However, these districts sentenced only 42 of these cases in FY97.

Exhibit 11
Criminal History Category and Percent with Application of 24-Month Statutory “Trump”
Unlawful Re-entry of Offenders with Previous Aggravated Felony



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21.

Exhibit 12
Mean Imprisonment Months and Primary District Practices
Unlawful Re-entry Offenders with Previous Aggravated Felony



Source: U.S. Sentencing Commission, 1997 Datafile, USSCFY97. Exhibit includes only offenders with one and only one guideline computation of §2L1.2, the +16 level enhancement for a prior aggravated felony, a reduction of -3 levels for acceptance of responsibility, and a final offense level of 21.

- 10 of these districts (201 cases) occasionally used some downward departures. This practice results in an average sentence length of 59 months.
- 18 of these districts (375 cases) sentenced primarily with downward departures, which resulted in a sentence length of 42 months.
- 11 of these districts (31 cases) sentenced only with departures. This resulted in an average sentence length of 40 months.

On the other extreme are the remaining twelve districts — accounting for the majority of cases nationwide (1,064 cases) — that use the 24-month statutory trump practice. The frequency of application varies from only one case in one district, to the vast majority of cases in another. The practice of statutory trumping results in this group of districts having the shortest average term of imprisonment for unlawful re-entry offenders: 32 months.

V. Conclusion

District charging and plea practices have a significant effect on the length of imprisonment for unlawful re-entry offenders with a prior removal and a prior aggravated felony conviction. Data from fiscal year 1997 indicate that 12 districts of the 70 convicting such offenders use a statutory trump policy that results in a statutory imprisonment limit of 24 months. However, according to information documented in the guideline application sections of their Presentence Reports, these offenders have offense conduct and a prior conviction history that imply both a Congressionally-intended sentence maximum of 240 months and a guideline sentence substantially longer than 24 months. These same 12 districts that use the 24-month statutory maximum trump account for the majority of these offenders sentenced in fiscal year 1997.

Data also indicate that for these offenders, there are widely different rates of downward departure across districts. In some districts the downward departure rates approaches 100 percent. Further work is needed to determine if these differential rates indicate unwarranted disparity in departure decisions, and whether — given high numbers of departure cases — the guideline itself is capturing the heartland cases being brought

before the federal courts.

In conclusion, these immigration cases present a challenge for the federal sentencing guidelines. Due to charging and plea practices, it appears that the §2L1.2 guideline is being applied inconsistently across districts, with a resulting violation of guideline principles. Similar offenders are not being sentenced similarly. The challenge for the guidelines is not merely that offenders receive sentences shorter than the guideline ranges, but that there is likely unwarranted disparity that makes shorter sentences unavailable to all similarly situated unlawful re-entry offenders in the other districts.

Notes

- * This article uses data for fiscal year 1997. As such, the analysis and findings apply to the §2L1.2 guideline as it was structured in 1997 and the following years, until the recent guideline amendment took effect in November 2001. While empirical application information has not yet become available to examine the new amendment, note that Dr. Maxfield has prepared a companion “addendum” report that appears in this volume and updates the analysis of §2L1.2 unlawful entry sentencing using the Commission’s fiscal year 2000 data file.
- ¹ Due to the likely possibility that a number of guideline immigration cases were not being forwarded to the Commission prior to 1997, data for years prior to 1997 may have under-represented immigration cases.
- ² Congress enacted the original version of this statute as part of the Immigration and Nationality Act of 1952, codified at that time at 8 U.S.C. § 276(1952).
- ³ 8 U.S.C. § 1326(b)(1), (2) (1988).
- ⁴ Because statute subsections often do not appear on court documents, use of the statute of conviction to identify offenders would greatly undercount convictions under 8 U.S.C. § 1326(b)(2).
- ⁵ The other four are §2L1.1 (smuggling, transporting or harboring of an unlawful alien); §2L2.1 (trafficking in naturalization, citizenship or legal resident status documents); §2L2.2 (fraudulent acquisition of documents relating to naturalization, citizenship, or legal resident status); and §2L2.5 (failure to surrender canceled naturalization certificate).
- ⁶ Another statutory trumping strategy becoming evident in the data involves charging these unlawful entry offenders under 8 U.S.C. § 1325 and its punishment provision of “not more than 2 years” for improper entry by an alien. As a conviction under either 8 U.S.C. §§ 1325 or 1326 is referred to guideline §2L1.2, any unlawful entry offender with a prior deportation and a prior aggravated felony would be assessed the +16 level enhancement under §2L1.2(b)(1)(A).