



Amendments to the Sentencing Guidelines

May 3, 2010

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.

3. CULTURAL ASSIMILATION

Reason for Amendment: *This amendment addresses when a downward departure may be appropriate in an illegal reentry case sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of the defendant's cultural assimilation to the United States.*

*Several circuits have upheld departures based on cultural assimilation. See, e.g., United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998); United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998). Other circuits have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006) ("We need not address that debate in the altered post-Booker landscape."); United States v. Melendez-Torres, 420 F.3d 45, 51 n.3 (1st Cir. 2005); see also United States v. Ticas, 219 F. App'x 44, 45 (2d Cir. 2007) (acknowledging that the Second Circuit has never recognized cultural assimilation as a basis for a downward departure). Some circuits, though not foreclosing the possibility of cultural assimilation departures, have stated that district courts are within their discretion to deny such departures in light of a defendant's criminal past and society's increased interest in "keeping aliens who have committed crimes out of the United States following their deportation." United States v. Roche-Martinez, 467 F.3d 591, 595 (7th Cir. 2006); see also Galarza-Payan, *supra*, at 889-90 (stating that "in assessing the reasonableness of a sentence [] a particular defendant's cultural ties must be weighed against other factors such as (1) sentencing disparities among defendants with similar backgrounds and characteristics, and (2) the need for the sentence to reflect the seriousness of the crime and promote respect for the law").*

In order to promote uniform consideration of cultural assimilation by courts, the amendment adds an application note to §2L1.2 providing that a downward departure may be appropriate on the basis of cultural assimilation. The application note provides that such a departure may be appropriate if (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant. The application note also provides a non-exhaustive list of factors the court should consider in determining whether such a departure is appropriate.

Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
 - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

7. Departure Consideration Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.
8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the

visited 11/12/2010

defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.