

DRAFT OF TESTIMONY
BEFORE THE
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON PROPOSED IMMIGRATION AMENDMENTS
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SAN DIEGO, CALIFORNIA

Jon M. Sands
Federal Public Defender
District of Arizona
&
Reuben Camper Cahn
Executive Director, Federal Defenders of San Diego

We would like thank the United States Sentencing Commission, on behalf of the Federal Public and Community Defenders, for the opportunity to resume our comments on the proposed amendments to the sentencing guidelines pertaining to immigration offenses. On February 21, 2006, Marjorie Meyers, Federal Defender for the Southern District of Texas, and Lucien B. Campbell, Federal Defender for the Western District of Texas, both testified on behalf of the Defenders and expressed concerns in detail over the proposals. Our purpose now is to invite the Commission's attention to two fundamental questions.

First, in light of the proposed immigration legislation in the House and now in the Senate, does it make sense for the Commission to weigh in to this politically charged and volatile climate? The answer appears to be "no." The Sentencing Commission would be ill-advised to act on the amendments when the very ground rules are likely to be radically altered. The Commission's plans to refashion the alien smuggling and illegal re-entry guidelines necessarily rest on the underlying statutory schemes remaining the same. But both immigration bills now before Congress, while different from each other, would drastically change the offenses and penalties. Senator Specter's bill, for example, would enhance sentences not based upon "aggravated felony," but upon the length of the sentence for the prior conviction and would require prior convictions to be charged in the indictment and proved beyond a reasonable doubt. It would needlessly complicate the amendments' progress to proceed with promulgating new immigration guidelines, especially some of the more far-reaching proposals, only to have to amend them again. The immigration guidelines have already been amended four times between 2001 and 2004, leading to confusion in the courts and *ex post facto* litigation.

Second, in relation to illegal re-entry, what is the reason for the 16-level increase in the present guideline? This is an issue that has bedeviled all attempts to reform §2L1.2. Unless the Commission can justify a 16-level increase, which is one of the steepest in the guidelines' framework, and moor the enhancement to 18 U.S.C. § 3553 purposes and factors, the Commission will not have fulfilled its statutory mission. The Commission's expertise, valued in *United States v. Booker* and lauded by federal courts, rests on its ability to justify its sentencing ranges as

appropriate. The present 16-level enhancement for certain aggravated felonies, which sets the boundaries for all the Commission's current proposals cannot be justified. The lack of a justification is reflected in the excessive dissatisfaction with the guideline, the ways of calculating, and the broad penalty. The Commission's inability to justify 16 levels has led to general discontent, unwarranted disparity, and the reduction of 75% of the sentences by "early disposition" programs.

In answering these two questions, the Commission may have to study more and take longer. That may not be what the Commission hoped when it scheduled these hearings. Nonetheless, the changing political environment, and the need to truly justify guideline levels, rather than just ratcheting them up cycle by cycle, demands careful and thoughtful study. These hearings are a useful beginning, but more work needs to be done. That work needs to be transparent, with all stakeholders being apprised of the relevant data. Only then can the immigration guidelines fulfill the Commission's mandate to promote certainty and fairness in sentencing.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
District of Arizona