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March 16, 2007

Honorable Ricardo H. Hinojosa  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

**Re: Comments on Proposed Option 7 for Amendment of § 2L1.2**

Dear Judge Hinojosa:

Thank you for providing us with the Proposed Option 7 for Amendment of § 2L1.2. We have had a chance to review it, and look forward to more in-depth analysis once we are able to examine the data on how this impacts cases. With that in mind, and to help the Commission in addressing the need to rationalize and simplify the guideline, we provide the following comments on behalf of the Federal Public and Community Defenders.

One persistent and across-the-board criticism of the current guideline has been its complexity. This issue of complexity arises whenever a guideline seeks to enumerate offenses, or uses enumerated past convictions for enhancements. The Commission recognizes this, and has moved in Option 7 to an acknowledgment that the sentence imposed on past convictions serve as an equally effective barometer for seriousness while at the same time eliminating the uncertainties inherent in the categorical approach. The Commission should adopt this approach completely and dispense with enumeration except for national security and terrorism convictions, with the definition of terrorism offenses revised as below.

The reasons the Commission should adopt this approach are the same as the reasons the Commission saw the need to move to an Option 7, that is, to avoid the complexities associated with any categorical approach. There are myriad potential problems with the proposed definitions of the offenses, the elements of which they are comprised, and the danger of disparity as the various states inevitably have quite different definitions. Enumeration is categorization and hence a return to complexity, uncertainty, and disparity.

Most of all, the enumerations are not necessary. A serious prior conviction of a true “murder,” forcible rape, serious offense of child sexual abuse or child pornography cannot be a murder, forcible rape or the most serious sex offense if it was not punished by at least 48 months. A true serious offense will be punished severely, and will fit easily into the 48-month sentence imposed category, subject to 16 levels. A less serious offense will fall in the 24-month sentence imposed category, subject to 12 levels.

One example will work well to illustrate the unnecessary complexity and potential overbreadth of the enumerated offense approach in (A). The definition of “offense of child sexual abuse” has numerous problems. First, it would result in a 16-level increase, the same as for murder and forcible rape, for generic “statutory rape” (*see, e.g., United States v. Eusebio-Giron*, 2006 WL 1735866 (5<sup>th</sup> Cir. 2006) (17-year-old defendant, who later married his 14-year-old girlfriend, received a 57-month sentence for “statutory rape” under current definition of “crime of violence”), and for federal statutory rape (“sexual abuse of a minor” is statutory rape, *see* 18 U.S.C. § 2243(a)), *i.e.*, a 19-year-old boy who has consensual sex with his 14-year-old girlfriend). Second, it is repetitive in including both generic and federal statutory rape. Third, the age of 18 is not the cutoff for statutory rape under federal law, *see* 18 U.S.C. § 2243(a) (under 16 years of age), or the law of the majority of states.

The second area in Option 7 in need of modification is the threshold of “at least 12 months” for the 16 level increase at § 2L1.2 (b)(1)(B) (“two prior convictions each resulting in a sentence of imprisonment of at least 12 months”), and the 8 level increase at § 2L1.2 (b)(1)(D) (“a prior conviction resulting in a sentence of imprisonment of at least 12 months”). It is imperative that the Commission use “a sentence of imprisonment exceeding one year and one month,” not “at least 12 months,” in (B) and (D). A choice of twelve (12) months is a decision to write in disparity. This is because a sentence of 12 months means vastly differently things across the 50 states. In one, it is the sentence that is pronounced when the result is to have someone released on that day after serving two months to effectuate time-served. Because it is the sentence *imposed* (not served), in another state, it carries 10 months in jail - no questions asked. In others, it is the reflexive sentence of judges and prosecutors for very low-level crime with no discernible harm or victim. It paints with too broad a brush, capturing a disparately wide range of criminal conduct. A *meaningful* cutoff is “a sentence of imprisonment exceeding one year and one month,” as in USSG §4A1.1(a). To comport with both simplification and consistency across the guidelines, it should read exactly as in §4A1.1(a). This definition and application are well-settled.

A similar improvement should be made in §2L1.2(b)(1)(D) (“three prior convictions resulting in a sentence of imprisonment of at least 90 days, increase by 8 levels”) and §2L1.2(b)(1)(E) (“a prior conviction resulting in . . . a sentence of imprisonment of at least 90 days, increase by 4 levels”). This proposed change violates the stated premise of Option 7-sentence neutrality. Currently, there must be three prior convictions of crimes of violence or drug trafficking offenses in order to receive a 4-level increase; otherwise, there is no increase. Option 7 would give an 8-level increase for three prior convictions of any kind if they resulted in a sentence of imprisonment of at

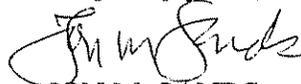
least 90 days, and a 4-level increase for one prior conviction resulting in a sentence of imprisonment of at least 90 days. Option 7 would obviously raise sentences in this respect. A middle ground can be achieved by requiring a 4-level increase for three prior convictions each resulting in a sentence of imprisonment of at least 60 days. Such a change represents a measured attempt to hold sentences steady while maintaining consistency with the cutoffs in Chapter Four, namely § 4A1.1(b).

Further, the Commission should use “felony,” *i.e.*, punishable by more than one year, in (A)-(D) (as distinguished from “any” offense in the alternative in (D)). This requirement ensures that the punishment is for offenses that are “punishable” by more than one year across the board and across the nation, reflecting a general recognition of seriousness, and again, does not invite disparity by sweeping in a wide range of possibilities for much less serious conduct. In an appropriate case, the court can take offenses punishable by a year or less into account.

Finally, if the Commission retains “terrorism offense” as an enumerated offense, it should simplify the definition. As written, it is defined as “any offense involving, or intending to promote, a ‘Federal crime of terrorism,’ as that term is defined in 18 U.S.C. § 2332b(g)(5).” *See* Application Note 1(B)(vii). This is the same definition used in § 3A1.4, the upward adjustment in Chapter Three. In applying this definition, the courts do not simply look to the offense of conviction. Rather, they engage in a complex case-by-case factual inquiry: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant is responsible involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 U.S. 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6<sup>th</sup> Cir. 2003). This is particularly inappropriate since it is a prior conviction that is at issue. The Commission should adopt the following offense of conviction definition: “‘Terrorism offense’ means a ‘Federal crime of terrorism’ as defined in 18 U.S.C. § 2332b(g)(5),” first, because it is straightforward and simpler to apply, and second, because to do otherwise would permit a 20-level increase for offenses that are not terrorism offenses.

These comments are made, as noted above, without access to the data on Option 7. We propose an Option 8, attached, that incorporates our suggestions. We request that the Commission run the data using our proposal to see how it compares on a system-wide level.

Very truly yours,



JON M. SANDS

Federal Public Defender

Chair, Federal Defender Sentencing Guidelines  
Committee

AMY BARON-EVANS  
ANNE BLANCHARD  
Sentencing Resource Counsel

cc: Hon. Ruben Castillo  
Hon. William K. Sessions III  
Commissioner John R. Steer  
Commissioner Michael E. Horowitz  
Commissioner Beryl A. Howell  
Commissioner Dabney Friedrich  
Commissioner *Ex Officio* Edward F. Reilly, Jr.  
Commissioner *Ex Officio* Benton J. Campbell  
Judith Sheon, Staff Director  
Ken Cohen, General Counsel  
Martin Richey, Visiting Assistant Federal Public Defender

[Option 7 (New):

§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 removed, deported, or unlawfully remained in the United States, after—

- (A) a prior felony conviction for a national security offense or terrorism offense, increase by **20** levels;
- (B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by **12** levels;
- (D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;
- ~~(E)~~ a prior felony conviction not covered by subdivisions (A) through (D) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by **4** levels.

Deleted: a prior conviction for murder, rape, a child pornography offense, or an offense of child sexual abuse; (ii)

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Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

- (i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.
- (ii) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).
- (iii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.
- (vii) "Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).

3. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.
4. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.
5. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

Deleted: (i) . "Child pornography offense" means an offense (I) described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States. ¶

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Deleted: (iii) . "Murder" means an offense (I) covered by §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder); or (II) under state or local law consisting of conduct that would have been an offense under 18 U.S.C. § 1111 if the offense had taken place within the territorial or maritime jurisdiction of the United States. ¶

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(v) . "Offense of child sexual abuse" means an offense in which the victim had not attained the age of 18 years and that is any of the following: (I) an offense described in 18 U.S.C. § 2242; (II) a forcible sex offense; (III) statutory rape; or (IV) sexual abuse of a minor. ¶

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**[Option 8 (New):**

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    - (D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;
    - (E) a prior felony conviction not covered by subdivisions (A) through (D) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by **4** levels.

Commentary

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

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- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*
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- (vii) *"Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).*

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