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

Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to immigration that were published on January 30, 2007.

The proposed amendments would substantially increase the prison sentences for individuals convicted of immigration offenses, *i.e.*, smuggling of undocumented aliens, trafficking in immigration documents, and returning to the United States illegally. These enhancements are not justified by any new legislation, current sentencing practices, the nature of immigration offenses, reliable data, or the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). As a matter of structure, Option 6 of the proposed amendment to § 2L1.2 is of interest as it endeavors to further the Commission's overarching goal of simplifying the guidelines. However, we are hesitant to support or oppose that option without further data.

I. Number of Aliens and Number of Documents, §§ 2L1.1, 2L2.1

A. § 2L1.1 (Smuggling, Harboring, Transporting Aliens)

Section 2L1.1(b)(2) currently provides a 3-level enhancement for offenses involving 6 to 24 aliens, a 6-level enhancement for offenses involving 25 to 99 aliens,

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and a 9-level enhancement for 100 or more aliens. In Option 1, the Commission proposes additional increases for larger groups of aliens. Last year, the Commission attempted to justify an identical proposal based on the concerns of prosecutors regarding the adequacy of punishment for those defendants who smuggle a large number of illegal aliens. *See* Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines at 7 (hereinafter "Interim Report"). The Commission also referred to two bills introduced in the House that contained directives to the Commission to increase penalties associated with the number of aliens smuggled. *See id.* at 8. However, these bills were never passed, and Congress did not enact any new legislation that would in any way support this amendment. Most significantly, the Commission's own data reveals that less than 2% of the cases involve more than 100 aliens. *See id.* Increasing penalties in the absence of supporting legislation, directive, data or analysis runs contrary to the Commission's role as an independent expert body. It would appear that it is more appropriate to continue to allow courts to vary from the Guidelines in cases involving significantly larger groups of aliens.

Option 2, with its additional calibrations, will result in substantially higher sentences not only for those defendants whose offense involves more than 24 aliens, but also for an unknown number of the nearly 46% of defendants whose offenses involved 6 to 24 illegal aliens. *See id.* Unlike the purported justification for increasing penalties when 100 or more aliens are involved, the proposed three-level increase in sentences for offenses involving 16 to 24 aliens and 50 to 99 aliens is lacking justification. Indeed, the Commission's data reveals that the vast majority of cases involve fewer than 25 aliens and that courts sentence defendants within the advisory guideline range in more than 64% of cases and *below* the guideline range in nearly 34% of cases. *See id.* at 4. There is no indication that higher sentences are warranted for these cases.

The current advisory guideline allows the court flexibility to account for differences in the number of aliens and any related differences in culpability. Under this advisory system, the courts have ample ability to account for the number of aliens smuggled by either the organization or the individual. At a time when the Commission has committed itself to simplifying the guidelines, the Commission should not be making them more complex with unnecessary and unjustified numerical calibrations.

B. § 2L2.1 (Trafficking in Immigration Documents)

The Commission proposes to add enhancements for trafficking in large numbers of documents parallel to the alien smuggling enhancements with a ratio of one document to one alien. Counting documents on a par with aliens overstates the harm in document cases, and appears to be animated by little more than historical consistency with the structure of § 2L1.1 and its method of measuring culpability by counting aliens. *See*

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Interim Report at 15-16. As the Department of Justice representatives emphasized at various roundtables, and as we stressed at the February 14 hearing, one of the harms of alien smuggling is the inhumane handling of human beings. Aliens are often transported in dangerous, over-crowded vehicles and kept in substandard housing. *See also* Interim Report at 11. In contrast, the major harm with respect to documents is in their potential use for illegal activity, but more often they are used for otherwise lawful employment. Thus, the harm would appear to be less aggravated. One document is not the same harm as one person. The ratio of documents to aliens should be the subject of study to arrive at a more suitable ratio.

Further, the Commission's data reveal that the majority of cases involve five or fewer documents, which range among a wide variety of different types of documents. *See id.* at 15, 18. Unlike human beings, immigration documents are relatively easy to produce and transport in bulk. They may also be counterfeit, which would suggest that the potential harm is more fairly measured not by how many documents are involved but by how well the documents are likely to pass as authentic. To count obviously counterfeit documents at the same rate as real human beings ignores the fundamental distinctions at play. Rather, the Commission should trust courts to measure the real harm involved and use the advisory guidelines to arrive at the appropriate punishment.

The effect of Option 2 in the proposed amendment is the same as the effect of Option 2 in the proposed amendment for § 2L1.1, adding unnecessary specificity and complexity and essentially increasing potential penalties in almost every category. Especially in light of the new enforcement initiatives enacted in recent times, the Commission should not increase these penalties absent data and analysis to support them. The Commission should instead study and observe the broader trends as they play out over the next several years, while allowing courts to utilize the flexibility already present in the advisory guidelines.

II. § 2L1.2 (Illegal Reentry)

A. Options 1 through 5

Our previous comments regarding Options 1 through 5 can be summarized as follows:

- **The Commission has never justified the 16-level enhancement, which is far greater than similar increases in other guidelines that depend on prior convictions and does not fairly correspond to the potential danger to the community.**

- **The term “aggravated felony” is over-broad and ambiguous, and its use would drastically increase sentences for all manner of individuals convicted of non-violent offenses and even misdemeanors. Indeed, current practice reveals that even the Department of Justice believes that lower sentences are appropriate for most of these individuals.**
- **Option 5 would be unconscionable and probably unconstitutional in that it places the burden of proof on the party least able to sustain it.**
- **Option 4 would appear to be the least ill-advised with certain modifications, including increasing the requisite sentence imposed for the 16-level enhancement and limiting the definition of “crime of violence.”**
- **We would support an amendment that would subject prior convictions used to increase a defendant’s offense level to the same remoteness rules in Chapter 4.**

We submitted a proposed guideline for illegal reentry offenses that we believe more accurately reflects the severity of the offense. This proposed guideline is similar in structure to the firearms guideline, providing enhancements based on the nature and number of prior felony convictions and limiting consideration to convictions within the time limits set forth in Chapter Four. Although our proposal does not define “crime of violence” as it is defined in § 8 U.S.C. § 16, it is premised on retaining the structure of linking offense level increases to prior “aggravated felonies” and “crimes of violence.” This proposal still merits consideration.

B. Option 6

By largely eliminating the need for the court to engage in the categorical approach in determining whether to apply an enhancement based on a prior conviction, Option 6 appears to be a simpler way to calculate sentences under this guideline. Simplicity, though, is not a substitute for fairness. The proposed triggers for the steepest increases remain unjustified by any policy or analysis and may still result in extremely steep increases based on relatively minor prior offenses.

Further, Option 6 includes severe consequences for very short prior sentences. Such short sentences are frequently not a result of culpability, but a result of poverty. As written, the proposal provides for a 16-level increase if the defendant has “three prior convictions resulting in sentences of imprisonment of at least 60 days”; a 12-level increase for a “conviction resulting in a sentence of at least six months, or two prior

convictions resulting in sentences of imprisonment of at least 60 days"; an 8-level increase for a "conviction resulting in a sentence of imprisonment of at least 60 days."

Thus, although we continue to believe that Option 6 holds promise, we are hesitant to take a position without data that demonstrates its potential impact. Sentences should not be increased overall, and in fact should be decreased. We offer the following thoughts:

- 1. The 16-level enhancement should be fairly correlated to previous sentence served of 10 years or more.**

Congress sought to increase penalties for reentry crimes in order to target the worst of the worst, *i.e.*, those individuals who are involved in very serious crimes such as murder and organized drug trafficking of the highest order, and who return to the United States illegally in order to continue their criminal activities. *See, e.g.*, Robert J. McWhirter and Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases*, 8 Fed. Sent. R. 275 (1996). The 16-level increase in the guideline for this federal offense has never been justified by data or analysis, a source of constant bedevilment and frustration for those of us who regularly experience its harsh results. The increase applies unevenly due to state law differences and is routinely applied to relatively minor state offenses, demonstrating that there is no reasonable relationship between the steep increases and the previous sentence.

While we acknowledge that the 16-level increase should be used as a measure of culpability for these offenses, we believe that the measure should be the same in the federal system as in the system that imposed the previous sentence. Because the increase in the federal sentence for the immigration offense is directly tied to the seriousness of a prior offense, it should be a direct reflection -- not a categorical approximation -- of the seriousness of the prior offense. In other words, the federal sentence should be roughly the same or slightly less than the sentence served for the prior offense, taking into account that the current offense is one of illegal reentry, itself not a violent or aggravated crime in terms of actual conduct.

For example, applying the 16-level increase for a defendant falling in Criminal History Category IV results in an advisory sentence of roughly 8 years. A defendant convicted of illegal reentry should receive 8 years only when he previously served a sentence of 10 years or more. Similarly, the 12-level increase should be reserved for those who previously served a sentence of 5 years. This approach would more fairly, consistently, and accurately correlate the increases for the reentry offense to the readily measurable time served for the previous offense.

The Commission should adopt this approach and its principled justification that the 16-level increase would then reflect a real relationship in relative culpability by effectively doubling the punishment for the previous offense.

2. **The Commission should take the existence of fast-track programs into account by lowering the advisory guidelines to reflect the true value of the danger presented by immigration offenses.**

Now that fast-track programs have received Congressional imprimatur, the Commission should adjust the guidelines to take them into account as it did for the mandatory minimum guidelines. In other words, the Commission should recognize that reductions under fast-track programs reflect the value of the danger presented by individuals who commit offenses amenable to fast-track disposition. *See, e.g.,* Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517 (2006). The Commission should use fast-track dispositions as a guide for setting lower offense levels in order to capture the true danger and to eliminate unwarranted disparity in those districts without a fast-track program. The guideline should reflect the present value of the danger by lowering the advisory guideline levels to correspond with the sentences imposed in fast-track jurisdictions, leaving fast-track dispositions up to the Department of Justice. At the February 14 hearing, the Department of Justice indicated that it does not want to see sentences increase, which suggests that it tacitly endorses guidelines set at levels that correspond to fast-track dispositions.

3. **The Commission should use "sentence served" instead of "sentence imposed."**

Given the manifest disparity in state sentencing practices, "sentence served" is a truer marker of culpability than "sentence imposed" because it reflects the real deprivation of liberty intended by the state sentencing authority. "Sentence imposed" does not account for those jurisdictions with parole where, for example, the judge sentences a defendant to "ten years at 35%," fully intending the actual punishment of incarceration for 42 months to be the appropriate reflection of the seriousness of the crime. The difficulty created by relying on the categorical approach in order to measure culpability derives from the fact that state labels do not always mean what they should in the context of federal sentencing. The natural implication of the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), is that grave consequences in federal sentencing arising from standardized classifications -- such as those advised by the Commission in § 2L1.2 -- should not rise or fall on a state's misleading label or

unique sentencing practice. *See id.* at 632-33. Thus, “sentence served” represents the most accurate method of capturing the actual harm as punished by the state.

Although using “sentence served” would not eliminate disparity in state sentences, it would certainly lessen the disparate impact of differing state practices on federal sentencing for illegal reentry. It would also lessen the effect of triple counting of prior offenses, first for increasing the statutory maximum for “aggravated felony,” second for criminal history, and third for recency. Finally, using “sentence served” would not be complicated or difficult; probation officers already use this measure for determining recency.

4. The decay factor should be incorporated into § 2L1.2.

As the Commission has recognized, a prior conviction that is twenty or more years old, although not countable for criminal history purposes under Chapter 4, can be used to increase a defendant’s offense level. *See* Interim Report at 28. First, as a matter of simplicity, prior convictions used to increase the offense level under this guideline should be first subject to the Chapter Four – Criminal History Rules. Second, keeping in mind Congress’s intent to deter and increase punishment for those individuals who were convicted of very serious crimes such as murder and major drug trafficking but who then return to this country to continue their illegal activities, it is highly unlikely that a prior offense committed over twenty years earlier bears any palpable relationship to the defendant’s reason for committing the current reentry offense. Particularly in the context of an offense whose measure of culpability is directly linked to a prior offense, the relationship between the offenses should be subject to temporal limitations.

5. Status and recency points should be excluded from § 2L1.2 cases.

Under § 2L1.2, prior convictions are double-counted when a prior conviction is used both to increase the offense level and in the calculation of the criminal history score.

As the Commission has recognized, the situation is often further aggravated by the fact that many defendants are found to be in the country illegally while they are serving a prison sentence. *See* Interim Report at 28. As a result, these defendants often receive an additional increase of up to three criminal history points under § 4A1.1(d) and (e) for being under a criminal justice sentence at the time of the offense and for committing the offense less than two years after release. *Id.* The resulting sentencing range in such situations is driven almost entirely by the double- and triple- weighting of the same conduct. In order to avoid this result, the Commission should at the very least exclude status and recency points in the criminal history calculation for § 2L1.2 offenses when they arise from these situations. The ordinary justification for status and recency

points -- that the defendant has not learned his lesson from a previous encounter with the criminal justice system -- is simply not present when the "continuing" reentry offense occurs both *before and after* the previous offense at issue.

6. The Commission should add an application note suggesting bases for downward departure.

At the very least, the Commission should add an application note to § 2L1.2 suggesting the following basis for departure:

Over-representation of criminal history

If the Commission recommends an upward departure if the categorical approach under-represents severity of previous offenses (as in Options 1, 2, 3, and 4 and as courts are already using), then fairness mandates a corresponding downward departure if the categorical approach over-represents severity, as in § 4A1.3. The following examples illustrate the need for a suggested departure on this ground.

- Client was convicted at age 17 of aggravated assault for punching a fellow high school student and breaking his nose. In the following 15 years, his only violations of the law were for illegal reentry. The 16-level enhancement applied.
- Client was convicted of robbery for pushing the security guard who stopped him for shoplifting. Although a seven-year sentence was imposed, he only served a few months. The 16-level enhancement applied.

III. Issues for Comment

The Commission seeks comment regarding the Supreme Court's decision in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). As that decision relates to the statutory definition of "aggravated felony," it would seem that the Commission is seeking comment as it would relate to § 2L1.2 if it decides to retain the reference to the statutory definition of "aggravated felony" in 18 U.S.C. § 1101(a)(43), either because it does not amend the guideline after all or because it chooses an amendment that refers to "aggravated felony." The Commission should not amend the guideline to "account" for *Lopez*. The Supreme Court has spoken, and the Commission should defer to it and its reading of Congress's intent on this point.

Lopez is consistent with all other guidelines that do not use possession of a controlled substance for offense level enhancements, *i.e.*, felon in possession and career offender. If Congress thinks that all drug felons should be treated harshly, Congress can

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say so. As in other categorical approach cases, the court can currently consider the facts in deciding whether to impose the guideline sentence. And Justice Souter got it right: possession is not drug trafficking in any ordinary sense. *See id.* at 629-30. Addicts or mere users do not pose the same threat as traffickers.

Further, it would seem that any amendment that would reinstate an enhancement for possession that is not an aggravated felony under § 1101(a)(43) would only add to the complexity of the guideline. If the justification is that a majority of the courts interpreted "aggravated felony" to include such state offenses, it is enough to say that the Supreme Court said they were wrong. In reaching its conclusion, the court reasoned that Congress could not have intended for federal sentencing to depend on varying state criminal classifications. As the Court stated, "[i]t is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." *Id.* at 633. As such, the Commission should not take any action that would run directly counter to congressional intent and interpreted by the Supreme Court.

We appreciate the opportunity to comment on the Commission's proposed amendments relating to immigration. We would be happy to provide any further insights as requested.

Sincerely,



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cc: Hon. Ruben Castillo
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