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Public Hearing on Proposed Immigration Amendments
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We wish to thank the United States Sentencing Commission on behalf of the Federal Public and Community Defenders for the opportunity to comment on the proposed amendments to the Sentencing Guidelines pertaining to immigration offenses.

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 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).

In the Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines (hereinafter “Interim Report”), the Commission attempts to justify these enhancements based on a purported increase in immigration offenses, an alleged increase in violence associated with these offenses, and supposed congressional interest in enhancing penalties for these offenses. As to a purported increase in offenses, the report cites an increase in the number of immigration prosecutions during the past decade. An increase in prosecutions, however, does not correlate directly with an increase in offenses. Instead, this increase in prosecutions is driven by a dramatic increase in the number of law enforcement personnel along the border, as well as a decision by the Department of Justice to increase enforcement of immigration laws, particularly the criminal laws. Indeed, the number of immigration cases brought along the border is often a function of local border patrol policies and decisions by individual border agents, rather than the number of immigrants trying to enter the United States illegally.

For the proposition that there is increasing violence associated with immigration offenses, the Interim Report cites only a hearsay CNN news report by Lou Dobbs that border patrol officers in Texas had been shot at 38 times during the previous week. There is no effort to determine whether, if true, this report reflects the norm, or whether the alleged shootings were in any way associated with immigration, as opposed, for example, to drug smuggling. The Commission's own data that firearms were involved in only 3.7% of immigration prosecutions shows that violence is rarely associated with alien smuggling. Similarly, less than 2% of the smuggling cases resulted in serious injury or death, and most of these resulted from accidents, not shootings.

Finally, the Interim Report's reliance on H.R. 4437 is misguided. While H.R. 4437, as passed by the House of Representatives, would indeed increase the penalties for most immigration offenses, this bill is not law. The bill's Draconian penalties will undoubtedly be rejected in the Senate and it is doubtful, in light of the significant congressional controversy over how to balance economic needs with enforcement, that such an immigration bill will ultimately become law. Increasing penalties in anticipation of Congressional action, particularly absent data to support the increases, or any analysis, as required by statute,¹ of how these harsher penalties would increase costs to the public and prison overcrowding,² runs contrary to the Commission's role as an independent expert body.

We turn then to the proposed amendments.

1. §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

The proposed amendments (1) add enhancements for the smuggling of minors; (2) add or modify enhancements based on the number of smuggled aliens; (3) expand the enhancement for smuggling certain inadmissible aliens; (4) provide separate increases for serious bodily injury and death, as well as a cross reference to expand coverage to deaths other than murder; and (5) add an enhancement for abducting aliens or holding them for ransom.

A. Smuggling Minors

Of particular concern are the proposed enhancements under the category of "Endangerment of Minors." Option 1 would provide an enhancement for smuggling any unaccompanied minor, while Option 2 would provide graduated enhancements for minors under the age of 12 and minors under the age of 16. These proposals, however, reach

¹ 18 U.S.C. § 4047; 28 U.S.C. § 994(g), (q).

² The Bureau of Prisons was 40% over capacity in 2004. See U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Prisoners in 2004, at 7.

conduct that does not constitute endangerment. Moreover, the enhancement will often increase the punishment of the least culpable defendants.

As the Interim Report reflects, some participants in the Immigration Roundtable³ expressed concern that smuggling young minors, unaccompanied by their parents, is more harmful because these children may end up as wards of the state. The Report, however, inexplicably identifies the age of risk as less than 15. The concern expressed at the Roundtable was that children who are very young cannot identify their relatives and some cannot even talk. But children far younger than 15 can give sufficient information to identify their place of origin, their identity, and their relatives. By the time they are of school age, most children can give authorities adequate identifying information.

As noted at the Immigration Roundtable, many minors, some as young as 12 or 13, set out for the United States on their own in search of employment. They are not readily distinguishable from would-be workers of majority age. The smuggling of these young workers neither reflects on the culpability of the defendant nor does it increase the risk to these individuals. Unlike sex offenses, the defendant's smuggling offense does not violate moral norms nor does it cause lasting psychological trauma to the minor.

With respect to exploitation of minors, there are already statutes and guidelines that can deal with these issues: notably hostage taking, 18 U.S.C. § 1203, which is often used in even standard alien smuggling cases. See USSG §2A4.1. If children are a particular concern, there is already an enhancement in the hostage guideline that covers children. USSG §2A4.1(b)(6). Any additional enhancement for smuggling minors is more appropriately addressed under the vulnerable victim adjustment for those minors who are unusually vulnerable. USSG §3A1.1(b).

Significantly, the reasons for the smuggling of unaccompanied minors are complex. As indicated above, teenagers often make the journey as a matter of their own choice. In other cases, the parents first establish themselves in the United States and later send for their children. The smuggler is no more culpable because he brings the child to the United States at the parents' request, than he is for bringing the parents in the first place. Finally, the children are often smuggled separately for their own safety and for ease of crossing the border. Again, the smuggler is accommodating the customer, not exploiting a juvenile.

Finally, this enhancement will result in increased sentences for the least culpable defendants. For example, the government has maintained that smugglers use wives, girlfriends, and other female associates to lend an air of "familial normalcy" when smuggling children. See Government's Reply to Motion in Limine, United States v. Cardenas, Cr. No. H-03-221 (S.D. Tex. Apr. 23, 2004). Thus, while the leader of the

³ U.S. Sentencing Commission, Washington, D.C., Sept. 29, 2005.

operation delivers the adults to the safehouse, the minimally involved individual stays behind to accompany the child for the child's safety and security. It is this least culpable individual who will receive the harsher sentence.

We oppose any enhancement for the smuggling of minors, believing that cases of endangerment and exploitation can already be addressed in other guidelines. Alternatively, the enhancement should be limited to the smuggling of unaccompanied minors under the age of 6. Further, like other guidelines providing that certain enhancements should not apply if the defendant is eligible for a mitigating role adjustment, *see, e.g.*, USSG §2D1.1(b)(4) (importation of methamphetamine), a similar limitation should be included for any enhancement for smuggling minors.

B. Number of Aliens

USSG §2L1.1 currently provides a 3-level enhancement for offenses involving 6–24 aliens, a 6-level enhancement for offenses involving 25–99 aliens, and a 9-level enhancement for 100 or more aliens. USSG §2L1.1(b)(2). The Commission proposes additional increases for larger groups of aliens. In light of the fact that the Commission's own data reveals that less than 2% of the cases involve more than 100 aliens, *see* Interim Report at 7, it would appear that it is more appropriate to allow courts to deviate from the Guidelines in cases involving significantly larger groups of aliens.

Option 2, with its additional calibrations, will make the guideline unnecessarily complex. The current guideline allows the court flexibility to account for differences in the number of aliens. The guidelines are, after all, advisory. *See United States v. Booker*, 125 S. Ct. 738 (2005). Under this advisory system, the courts have ample flexibility to account for the number of aliens smuggled by either the organization or the individual. Particularly now, the Commission should be simplifying the guidelines, not making them more complex. *See* Letter from Defenders to the U.S. Sentencing Commission on Federal Sentencing Since *United States v. Booker* 11 (Jan. 10, 2006); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005).

C. National Security

This proposed guideline has two options: Option 1 specifies that the base offense level of 23 applies to anyone convicted under 8 U.S.C. § 1327, *i.e.*, smuggling a person the defendant knows to be an aggravated felon or terrorist. Option 2 adds an enhancement for smuggling an alien involved in spying or terrorism, regardless of whether the defendant was convicted under § 1327. The definition of terrorism is worded so broadly that it could apply to anyone who has donated money to certain organizations or who comes from a suspect country. Requiring a conviction under § 1327 is necessary to protect against government overreaching.

The Commission asks for comment on how broad to make this provision. This enhancement is a very large increase justified only by real danger to national security. If a conviction is not required, the standard of proof should be heightened. See, e.g., USSG §3A1.1(a) (hate crimes). The Interim Report suggests a need to relax standards of proof that an alien is inadmissible because the smuggled alien may be deported prior to the determination of inadmissibility. This is precisely the reason that an enhancement should not be available unless the defendant has been convicted under 8 U.S.C. § 1327. Due process requires, at a minimum, that enhancements be based on reliable information. See United States v. Tucker, 404 U.S. 443, 447–48 (1972); Townsend v. Burke, 334 U.S. 736, 740–41 (1948). An enhancement should not be permitted where deportation has deprived the defendant of the opportunity to obtain evidence relevant to the determination of inadmissibility. Cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982) (deportation of potentially exculpatory witnesses may deprive defendant of Fifth Amendment right to due process and Sixth Amendment right to compulsory process). There is no justification for cumulative adjustments for those who smuggle terrorists and aliens otherwise inadmissible.

D. Offenses Involving Death and Injury

The proposed cross-reference to the relevant offense level for different types of homicide advances the Commission’s goal of providing punishment that is proportional to culpability. It is a necessary and overdue modification. In most of the cases resulting in death, the aliens perish in a traffic accident or of heat stroke in the desert. At most, these offenses constitute involuntary manslaughter or negligent homicide. While a defendant’s sentence should reflect the gravity of the resulting death, the conduct is almost never equivalent to murder.

The Commission also seeks comment on a proposal to require cumulative punishment for bodily injury and death. Presumably, this would apply only if there were more than one alien, one of whom was injured and another who died. If this is the Commission’s intent, it should make this specific to avoid potential double counting. Significantly, death and bodily injury are not a frequent result in these cases. Just 1.9% of the immigration cases surveyed by the Commission involved injury and less than 1% resulted in death. See Interim Report at 12. Thus, we believe it would be more appropriate to allow courts to depart when more than one person was injured or killed.

E. Abducting Aliens, or Holding Aliens for Ransom

There is no need for a specific offense characteristic for abducting aliens in USSG §2L1.1, as there is a separate crime of hostage-taking already applicable to smugglers who hold people for ransom, 18 U.S.C. § 1203, covered by a detailed guideline. USSG §2A4.1; see, e.g., United States v. De Jesus-Batres, 410 F.3d 154, 163 (5th Cir. 2005), cert. denied, 2006 WL 37176 (U.S. Jan. 9, 2006). The proposed amendment will convert

virtually all alien-smuggling for a fee into holding for ransom. In trying to justify this amendment, the Commission maintains that aliens are coerced to remain in safe houses pending payments “so that smugglers can get more money from the families of aliens or so they will provide inexpensive labor.” See U.S. Sentencing Commission, Proposed-Non-Emergency Amendments to Guidelines at 21. This is simply not true. In most cases, smugglers are anxious to get the aliens out of the safe house as quickly as possible. The only condition is payment of the agreed upon fee.

2. §§ 2L2.1, 2L2.2 (Trafficking in Immigration Documents, Fraudulently Acquiring Documents)

The proposed amendments would add enhancements for trafficking in larger numbers of documents at a ratio of one document to one alien, and add a 2-level increase for foreign passports.

A. Number of Documents

The Commission proposes to add additional enhancements for trafficking in large numbers of documents parallel to the alien smuggling enhancements. Counting documents on a par with aliens overstates the harm in document cases. As the Department of Justice representatives emphasized at the Immigration Roundtable, 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. 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. The ratio of documents to aliens should be the subject of study to arrive at a more suitable ratio.

B. Other Documents

Last year’s justification for the enhancement for misuse of United States passports was the government’s claim that American passports are the “gold standard” for identification documents. See http://www.uscg.gov/hearings/03_17_04/0317ussc.pdf. These passports enable people to go anywhere, particularly in the United States, and to obtain other types of documentation. This rationale simply does not apply to foreign passports.

Enhancements for other documents such as driver’s licenses, alien registration cards, and social security cards are not warranted and would render the base offense level meaningless. The government has other criminal statutes, and their corresponding guidelines, which address the harm flowing from use of false identification, particularly identification belonging to an actual person. See USSG §2B1.1(b)(10). Extension of this enhancement to these other documents will result in substantial increases in sentences for

individuals whose only reason for possessing them is to earn a living to support themselves and their dependents.

A downward adjustment for obviously counterfeit documents, similar to USSG §2B5.1, is warranted. The justification for the passport enhancement is the increased ability of the bearer to elude detection with such a trustworthy document. An obviously counterfeit document will not significantly enhance an individual's ability to evade detection or to cross international borders.

3. §2L1.2 (Illegal Reentry)

The Commission has published five different options modifying the illegal reentry guideline, none of which address the concerns that have been raised by counsel, the courts, and commentators. The first four options continue to require a 16-level enhancement for most “aggravated felony offenses,” although there is some reduction if the defendant received a sentence of less than 2 years or less than 13 months. These proposals have significant flaws.

A. The 16-Level Enhancement Is Not Justified

The Commission has never articulated any justification for the 16-level enhancement, which results in a ten-fold increase in the defendant's sentencing range. For example, a defendant with no prior convictions, and a base offense level of eight, is in the 0–6 month range. A defendant who was convicted of a felony crime of violence at any time in his life is subject to a 51–63 month range even if he has a Criminal History Category of I. The defendant with no prior felony or aggravated felony convictions but a criminal history category of VI, is subject to a range of 18–24 months, while the aggravated felon faces 100–125 months.

There is no similarly severe adjustment for other offenses that include elements of the defendant's prior record. For example, a felon in possession of a firearm has a base offense level of 14. USSG §2K2.1(a)(6). He or she is enhanced just 6 levels for a prior felony conviction for a crime of violence or a controlled substance offense. USSG §2K2.1(a)(4)(A). Moreover, the definition of “a controlled substance offense” does not include felony possession of a controlled substance. USSG §4B1.2(a), USSG §2K2.1, comment. (n.1). A felon with two prior convictions for crimes of violence or controlled substance offenses receives only a 10-level enhancement. USSG §2K2.1(a)(2). Further, these prior convictions do not result in enhancement for the felons in possession of firearms if the convictions were too remote to be counted under the criminal history provisions. USSG §2K2.1, comment. (n.12). Surely a violent felon's possession of a firearm presents a greater potential danger to the community than an alien felon's unauthorized reentry into the United States.

The Federal Public and Community Defenders have previously submitted and now resubmit a modified proposed revision of the illegal reentry guideline that 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 of the guidelines. A copy of the modified proposal that takes into account United States v. Booker, 125 S. Ct. 738 (2005), is attached to this statement.

B. The Term “Aggravated Felony” Is Itself Overly Broad and Ambiguous

The proposed changes in the guideline are motivated in large part by dissatisfaction with the categorical approach to determining the nature of prior convictions. See, e.g., United States v. Dominguez-Ochoa, 386 F.3d 639 (5th Cir. 2004), cert. denied, 125 S. Ct. 1103 (2005); United States v. Vargas-Duran, 356 F.3d 598 (5th Cir.) (en banc), cert. denied, 543 U.S. 995 (2004); see generally Shepard v. United States, 125 S. Ct. 1254 (2005); Taylor v. United States, 495 U.S. 575 (1990). The Interim Report echoes the complaints of prosecutors and probation officers that the different definitions contained in the guideline and the statute require multiple determinations of the nature of the conviction. These participants also bemoan the difficulty in obtaining supporting documentation. As the Interim Report acknowledges, use of the definition of aggravated felony set out in 8 U.S.C. § 1101(a)(43) will not eliminate the categorical approach. See, e.g., Leocal v. Ashcroft, 543 U.S. 1 (2004); United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) (injury to a child not an aggravated felony); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (DWI not an aggravated felony).

Use of the statutory definition of aggravated felony would drastically increase sentences for all manner of individuals convicted of non-violent offenses and even misdemeanors. For example, a defendant convicted of a misdemeanor theft, who receives a one-year suspended sentence and is placed on probation is deemed to be an aggravated felon. United States v. Graham, 169 F.3d 787, 790–91 & n.2 (3d Cir. 1999) (interpreting 8 U.S.C. § 1101(a)(43)(G)).⁴ Thus, under Options 1 and 2, a defendant whose only prior conviction is for misdemeanor theft would receive an 8-level enhancement, while a defendant with a prior felony could receive an enhancement as low as 4 levels. In addition to misdemeanor theft offenses, the term “aggravated felony” includes such non-violent offenses as fraud, tax evasion, and money laundering where the offense involved more than \$10,000, 8 U.S.C. § 1101(a)(43)(D), (M); forgery of certain documents,

4 The Third Circuit concluded that the misdemeanor conviction was an “aggravated felony” “[d]espite [its] misgivings that, in pursuit of a clearly defined legislative goal . . . , a carelessly drafted piece of legislation has improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors.” Graham, 169 F.3d at 788.

§ 1101(a)(43)(P); and counterfeiting and bribery, § 1101(a)(43)(R). Under both the statutory definition and proposed Option 4, a crime of violence would include the use, attempted use, threatened use, or substantial risk of the use of force against property as well as against a person. 18 U.S.C. § 16. As such, it would include exceedingly minor offenses that are not actually violent, such as unauthorized use of a motor vehicle, including a child taking the family car for a joyride,⁵ and failing to stop when signaled by a flashing blue light.⁶

In 2001, the Commission chose to reduce the enhancement to eight levels for many individuals deemed aggravated felons under the statute, reserving the 16-level enhancement for those convicted of the most serious offenses such as crimes of violence and drug trafficking. *See* USSG App. C, amend. 632. The Commission based these reductions on analysis of sentences—particularly departures—where the courts had recognized that the 16-level enhancement was disproportionately high for individuals whose criminal history was not violent and who were returning to the United States to make a living or to join family. Nothing has changed in the past five years that justifies a return to such severe sentences for these individuals.

Indeed, current practice reveals that even the Department of Justice believes that lower sentences are appropriate for most of these individuals. Nearly 75% of illegal reentry cases are disposed of pursuant to a government approved fast-track program.⁷ Through charge bargaining, many illegal aliens face a maximum prison term of 30 months. In other cases, the government recommends a downward departure of 2 to 4 levels for early disposition of the case. USSG §5K3.1. The Attorney General's designation of some districts for fast-track programs and not others, however, increases

5 United States v. Galvan-Rodriguez, 169 F.3d 217, 219–20 (5th Cir. 1999); *see also* United States v. Charles, 301 F.3d 309, 312–14 (5th Cir. 2002) (en banc) (limiting Galvan-Rodriguez to cases involving § 16(b)'s definition of crime of violence, which includes the use of force against property).

6 United States v. James, 337 F.3d 387, 391 (4th Cir. 2003).

7 United States v. Perez-Chavez, No. 2:05-CR-00003PGC, slip op. at *24 n.69 (D. Utah May 16, 2005) (citing Federal Justice Statistics Resource Center, <http://fjsrc.urban.rog/index.cfm>). It is unclear whether this figure includes only fast-track departures or fast-track charge bargains also. Fast-track dispositions are approved for and regularly used in cases involving aggravated felonies. United States v. Medrano-Duran, No. 1:04-cr-00884, Doc. 19, at 8, 22–37, available on PACER at https://ecf/ilnd.uscourts.gov/cgi-bin/show_case_doc?19,143476,,,,,7745517,1.

unwarranted disparity.⁸ Fast-track authorization is supposedly based on the need of prosecutors along the Southwest Border to resolve an overwhelming number of cases quickly, but the program is not consistently applied even along that border. For example, two divisions within the Southern District of Texas, Brownsville and McAllen, have a fast-track program permitting a 2-level departure. The busiest division, Laredo, has no such program. Districts in the interior, including North Dakota, Nebraska, and Idaho, have fast-track authorization, although the prosecutors there handle only a few immigration cases per year. The Department of Justice cannot credibly contend that higher sentences are necessary when its own recommendations have resulted in annual reductions in the average sentence for illegal reentry.⁹

C. Drug Offenses

The proposed amendments also redefine “drug trafficking offense” to have the meaning given that term in 18 U.S.C. § 924(c). See also 8 U.S.C. § 1101(a)(43)(B). The purported justification for this modification is the practice in some states of permitting individuals to plead to possession of a controlled substance, rather than distribution, even though they possess significant quantities of the substance. The proposed reliance on Section 924(c), however, will not fairly resolve this concern.

Section 924(c)(2) defines a “drug trafficking crime” as “any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.) . . .” In Jerome v. United States, 318 U.S. 101 (1943), the Supreme Court held that the term “felony” refers to a federal felony unless the statute specifies otherwise. In most instances, possession of a controlled substance is a misdemeanor under federal law. 21 U.S.C. § 844(a). In most other contexts, the term “drug trafficking” requires an element of distribution type activity that distinguishes the dealer from the user. See, e.g., USSG §2K2.1(a) & comment. (n.1); USSG §4B1.2(b). In the aggravated felony context, however, a number of circuits have held that a controlled substance offense is a drug trafficking crime if it is a felony in the jurisdiction of conviction. See, e.g., United States v. Wilson, 316 F.3d

8 “Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.” See U.S. Sentencing Commission, Report to Congress: Downward Departures from the Federal Sentencing Guidelines 66–67 (Oct. 2003).

9 Average sentence length in cases sentenced under §2L1.2 decreased from 36 months in 2000 to 35 months in 2001 to 30 months in 2002 to 28 months in 2003 to 29 months in 2004 to 27 months in 2005. U.S. Sentencing Commission, Special Post-Booker Coding Project 13–15 (Jan. 5, 2006).

506, 512 (4th Cir. 2003); United States v. Simon, 168 F.3d 1271, 1272 (11th Cir. 1999); United States v. Hinojosa-Lopez, 130 F.3d 691, 694 (5th Cir. 1997); United States v. Briones-Mata, 116 F.3d 308, 309 (8th Cir. 1997); United States v. Cabrera-Sosa, 81 F.3d 998, 1000 (10th Cir. 1996); United States v. Restrepo-Aguilar, 74 F.3d 361, 364 (1st Cir. 1996).

There is a growing split among the circuits over the application of the term “drug trafficking” as used in the aggravated felony definition to mere possession of a controlled substance, particularly in light of the fact that the offense is not a federal felony. Compare Hinojosa-Lopez with United States v. Palacios-Suarez, 418 F.3d 692, 694–700 (6th Cir. 2005); Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 912 (9th Cir. 2004); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002); Aguirre v. INS, 79 F.3d 315, 317 (2d Cir. 1996). Indeed, the Solicitor General has urged the Supreme Court to resolve the split. See Brief of Respondent, Lopez v. Gonzales, No. 05-547 (U.S. Jan. 24, 2006). The Commission should defer to the likelihood of Supreme Court review.

The Commission indicates that it received a comment complaining that individuals are convicted of mere possession even though they possessed distributable quantities of the controlled substance. In fact, the more common scenario is a user convicted of a state felony for possession of a minute quantity of a controlled substance, a quantity associated only with personal use. See, e.g., United States v. Hernandez-Avalos, 251 F.3d 505, 508 (5th Cir. 2001) (state conviction for possession of “small quantity” of heroin). In recognition of the more common situation, where a drug user is convicted of possession, in 2001 the Commission defined drug trafficking for purposes of USSG §2L1.2 to exclude mere possession, USSG §2L1.2, comment. (n.1(B)(iv)), making this guideline consistent with the approach taken in other guidelines.

D. Proposed Options

Option 5 would be unconscionable and probably unconstitutional. Inverting §2L1.2 to provide reductions based on the type of prior conviction is entirely unwarranted. Both the statute, 8 U.S.C. § 1326(b), and every other guideline place the burden on the government to establish an enhancement, see, e.g., USSG §2K2.1, or a criminal history point based on prior convictions. See United States v. Herrera-Solorzano, 114 F.3d 48 (5th Cir. 1997). It is the government that must prove a prior conviction necessary to trigger an enhancement. See, e.g., Shepard v. United States, 125 S. Ct. 1254 (2005); Taylor v. United States, 495 U.S. 575 (1990). The difficulty in proving the nature of the conviction is not a basis for placing the burden on the defendant, who is after all a foreign national, usually unable to communicate effectively in English, and in most cases indigent. In other words, this proposal would have the perverse effect of placing the burden of proof on the party least able to sustain it, raising serious due process concerns.

Of the proposed options, Option 4 would appear to be the least ill-advised with the following modifications. First, as in Option 1, the 16-level enhancement should be reserved for individuals whose sentence previously imposed (and not suspended) exceeded 2 years. Some jurisdictions, e.g., Col. Rev. Stat. § 18-3-204, permit a sentence in excess of one year for misdemeanors. The 2-year limitation wisely eliminates these misdemeanors from the more severe enhancements. Second, the definition of crime of violence should not be based on 18 U.S.C. § 16, which includes the use and risk of force against property. We recognize that the different definitions of crime of violence have resulted in multiple determinations under the guideline and the statute requiring careful analysis of the law and the defendant's actual record. Instead of expanding the definition to include property offenses, the Commission should retain the limitation to the use of force against a person but could import the statutory definition of the use of the force. In other words, if the Commission chooses Option 4, a crime of violence should be defined as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

The Commission should also explain that the aggravated felony enhancement does not apply if the prior conviction is not a felony, as defined in USSG §2L1.2, comment. (n.2).

E. Remote Convictions

Finally, we support the Commission's suggestion that prior convictions used to increase a defendant's offense level under USSG §2L1.2 be subject to the rules of criminal history found at §4A1.2. The criminal history provisions of the Guidelines recognize that prior convictions at some point become too remote to have much bearing on an individual's likelihood of recidivism and danger to the community. This is no less true of undocumented aliens than it is, for example, of felons in possession of a firearm. Many individuals prosecuted under 8 U.S.C. § 1326 sustained convictions decades ago, some at a time when the conviction was not an aggravated felony or a basis for exclusion. Many have subsequently lived law abiding lives with family in the United States only to be suddenly deported when the law changed. Consideration of remote convictions simply does not advance the purposes of punishment set forth in 18 U.S.C. § 3553(a)(2).

We hope that our comments on the proposed amendments to the immigration guidelines will be useful. As always, we are available to provide further information or assistance as needed.

Attachment

Proposal of the Sentencing Committee of the Federal Public and Community Defenders To Amend USSG §2L1.2

I. Introduction

Analysis of sentences imposed pursuant to USSG §2L1.2 for the offense of illegal reentry, including the extraordinary number of downward departures, both sought by the government and determined by the court, as well as comments from frontline participants including judges and defense attorneys, reveals that the current guideline for this offense is greater than necessary to address the purposes of punishment. See generally 18 U.S.C. § 3553(a)(1). Further, the guideline results in sentences that are disproportionately high when compared with other federal offenses. Finally, the guideline is one of a number of guidelines with different definitions of certain prior offenses, resulting in unwarranted confusion and disparity.

The proposed guideline is modeled on the guideline for prohibited persons in possession of firearms, USSG §2K2.1, as both offenses and guidelines are enhanced on the basis of the nature of the defendant's prior convictions. We believe, however, that the potential harm to the community of a felon's possession of a firearm, particularly a felon with serious prior convictions for violence and drug trafficking, is far greater than the potential harm resulting from illegally reentering the United States.

The proposed guideline retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, resulting in conviction.

Finally, the proposed guideline notes, as have the courts, that a downward departure may be warranted when the defendant has returned because of family medical needs, see, e.g., United States v. Singh, 224 F. Supp. 2d 962 (E.D. Pa. 2002), or because the defendant was culturally assimilated into the United States. See, e.g., United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001); United States v. Lipman, 133 F.3d 726 (9th Cir. 1998).

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

(a) Base Offense Level (Apply the Greatest):

- (1) **[16]** if the defendant committed the instant offense subsequent to sustaining at least two “aggravated felony” convictions of either a crime of violence or a controlled substance offense or one “aggravated felony” conviction of a national security or terrorism offense;
- (2) **[14]** if the defendant committed the instant offense subsequent to sustaining one “aggravated felony” conviction of either (i) a controlled substance offense for which the sentence served exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a human trafficking offense; or (vi) an alien smuggling offense; or
- (3) **[12]** if the defendant committed the instant offense subsequent to sustaining any other “aggravated felony” conviction;
- (4) **[10]** if the defendant committed the instant offense subsequent to sustaining a conviction for any other felony or three or more convictions for misdemeanors that are crimes of violence or controlled substance offenses; or
- (5) **[8]**; except as provided below.

(b) Specific Offense Characteristics

- (1) If the defendant committed the instant offense in connection with the commission of a national security or terrorism offense, resulting in a conviction, increase by **[8]** levels. If the resulting offense level is less than level **[24]**, increase to level **[24]**.

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:

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7. *For purposes of this guideline:*

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2. “Felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

8. *A conviction for an offense punishable by a maximum term of imprisonment of one year or less shall not be treated as a felony or an “aggravated felony” under this guideline.*
9. *For purposes of applying subsection (a)(1), (2), (3), or (4), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b) or (c). See §4A1.2(a)(2) & §4A1.2, comment. (n.3).*
10. Departure Considerations—*There may be situations in which the offense level determined under this guideline substantially overstates the seriousness of the offense. For example, the defendant may have returned to the United States (1) to offer medical or humanitarian care to ill family members, (2) because he or she was assimilated into the culture of the United States, or (3) because of dangerous conditions in his or her country of origin. In such cases, a downward departure may be warranted.*