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On Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2008
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Thank you for holding this hearing and for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the Sentencing Guidelines pertaining to § 2L1.2 (Unlawfully Entering or Remaining in the United States).

A. In General

At the outset, we commend the Commission for its commitment to addressing the complex application problems that plague the current § 2L1.2. We appreciate the ongoing efforts in this area and are hopeful that the ultimate result will be a guideline that is both simpler to apply and a fairer reflection of the purposes of sentencing under 18 U.S.C. § 3553(a). However, given the ongoing national debate about federal immigration law and the inevitable changes to come with a new Administration, we believe that the Commission should not amend § 2L1.2 during this cycle. Instead, we urge the Commission to wait until stability has been established, after which we can begin work on a long term and comprehensive solution that is consistent with national policy.

Whether the Commission addresses § 2L1.2 this year or next, however, we wish to reiterate the Federal Defender community's longstanding view that the guideline, by including a broad 16-level enhancement for prior convictions, produces sentences that are simply too high.[1] In our view, the guideline, if followed, contravenes the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *See Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). While data provided by the Commission indicates that Options 2 and 3 would reduce some of the more severe sentences,[2] we are concerned that for every variation of every option, sentences would significantly increase for many defendants at the lowest offense levels. There is no policy reason why sentences should be increased for those who are the least culpable.

As the Commission has recognized, the original guideline for illegal reentry was largely based on past practice, but subsequent revisions to the guideline, beginning in 1988 and including the 16-level enhancement in 1991, caused penalties to soar, with the

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[1] *See, e.g.*, Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 19 (July 9, 2007); Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Amendments Relating to Immigration at 3-4 (Mar. 2, 2007); Testimony of Jon Sands and Reuben Cahn before the U.S. Sentencing Commission Re: Proposed Immigration Amendments, San Diego, California (Mar. 6, 2006).

[2] *See* Memorandum from Kevin Blackwell to USSC Immigration Team, *Impact of Proposed Amendments to §2L1.2(Unlawfully Entering or Remaining in the United States*) (Feb. 29, 2008). The Commission was not able to perform an analysis of the impact of Option 1. *Id.* at 1.

average length of sentences nearly tripling between 1990 and 2001.[3] The Commission has never justified, either with empirical data or any policy analysis based on national experience, the 16-level enhancement in § 2L1.2, even though this enhancement is far more severe than other increases that depend on prior convictions. In the absence of empirical data or experience, § 2L1.2 does not "exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 567, 574-75 (discussing crack cocaine guideline). Accordingly, while we recognize that the driving force behind the current proposals is the Commission's immediate interest in a certain degree of simplification, we believe that the Commission should not amend § 2L1.2 without also reviewing its fundamental premises and reducing the penalties themselves.

The actual sentences imposed, including the widespread use of government-sponsored downward departures, demonstrate that the current guideline is greater than necessary to achieve the goals of sentencing under § 3553(a)(2). For example, in 2006, based on motions by the government and determinations by the courts, 36.5% of sentences imposed for illegal reentry were lower than the advisory guideline range, not including sentences reduced for substantial assistance under § 5K1.1.[4] In contrast, only 15.6% of offenders sentenced for crack cocaine received sentences lower than the advisory guideline range (excluding reductions for substantial assistance),[5] despite the Commission's own view that guideline sentences for crack cocaine are too harsh and result in unwarranted disparities.

In short, reducing the more severe sentences without raising the sentences for the least culpable should be a primary objective underlying any amendment to § 2L1.2. In aid of that goal – and the overarching goal of achieving the purposes of sentencing – we summarize what we believe should also be included as the Commission's primary objectives when it amends § 2L1.2:

- If kept, the 16-level enhancement should be reserved for only the *most serious* of the offenses that fall into the category of "aggravated felonies" under 8 U.S.C. § 1101(a)(43).

- Prior convictions used to increase a defendant's offense level should be subject to the same remoteness rules in Chapter 4 to reflect more accurately Congress's intent to deter and increase punishment for those individuals who present the most serious risk of recidivism.

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[3] *See* United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing*: *An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 61-65 (Nov. 2004).

[4] United States Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2006).

[5] *Id.* tbl. 45; *see also* United States Sentencing Comm'n, *2007 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2007) (showing similarly divergent rates of below-guidelines sentences for illegal reentry (40%) and offenses involving crack cocaine (15%) for fiscal year 2007). Preliminary statistics indicate that the rate of below-guideline sentences has increased to 38% since *Gall* and *Kimbrough* were decided. *See* United States Sentencing Comm'n, *Preliminary Post*-Kimbrough/Gall *Data Report*, tbl 4 (Feb. 2008).

- The Commission should take into consideration, as a factor, the existence of "fast-track" dispositions in any amendment to the immigration guidelines. The "fast-track" dispositions clearly indicate the true seriousness of many offenses, which is markedly lower than current guidelines. Considering "fast-track" sentences also would address the problem of unwarranted disparity for those similarly situated defendants in nonfast-track districts.

- For every Chapter Two guideline that relies on prior convictions (and for calculation of criminal history), the Commission should use "sentence served" instead of "sentence imposed." "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. It would also lessen the effect of triple counting prior offenses in § 2L1.2 cases, first for increasing the statutory maximum for "aggravated felony," second for criminal history, and third for recency.

- The Commission should eliminate criminal history points for status and recency for defendants arrested for illegal reentry while they are serving a prison sentence. *See* USSG § 4A1.1(d), § 4A1.1(e). This would help avoid unfair double- and triple-counting of the same conduct.

- The Commission should add an application note suggesting bases for downward departure, such as overrepresentation of criminal history and a defendant's benign motives for the reentry (*e.g.*, defendants who return for medical or humanitarian reasons, due to dangerous conditions in the defendant's country of origin, or because of cultural assimilation into the United States).

B. Our Proposal

We previously submitted a proposed guideline modeled on the guideline for prohibited persons in possession of firearms, USSG § 2K2.1.[6] Our proposal is premised on the fact that both offenses, illegal possession of a firearm and illegal reentry, are enhanced based on the nature of the defendant's prior convictions, but that the potential harm to the community of a felon's possession of a firearm is far greater than the potential harm resulting from illegally re-entering the United States. Our proposal retains an enhancement for defendants who enter the United States in connection with the commission of a national security or terrorism offense, and notes that a downward departure may be warranted where the defendant has returned because of family medical needs or because the defendant was culturally assimilated into the United States.

Although our proposal was not included as one of the options published for

[6] *See* Letter from Jon Sands to Hon. Ricardo Hinojosa, Re: Proposed Priorities for 2007-2008, at 21-23 (July 9, 2007).

comment for this amendment cycle, we believe that it deserves consideration. First, our proposal both addresses application problems presented by the current proposals and reflects the sound policy that Chapter Two guidelines that set offense levels based on prior convictions should have a similar structure while appropriately calibrating punishment to the relative harms involved. Second, the Commission has provided data on its potential impact on sentences, which indicates that our proposal would reduce sentences overall. Like Options 2 and 3, however, it would raise some sentences for the least culpable defendants, though to a significantly lesser degree than Options 2 and 3. Because there is no reason to raise any sentences for illegal reentry, we hope to work with the Commission to discover the reason that our proposal would raise some sentences and then amend it accordingly.

Finally, we remain open to modifications to our proposal that address the goal of simplification (for example, our proposal does not define "crime of violence" in accordance with 8 U.S.C. § 1101(a)(43), as Option 1B of the proposed amendments would do).

C. The Proposed Amendments

In light of our general position, we hesitate to comment at length on the Commission's proposals because they leave unaddressed many of the most fundamental problems presented by § 2L1.2. However, we would like to point out several ambiguities and problems presented by the proposed amendments – areas that invite more questions than are answered and are of particular concern to the Defender community.

Option 1

The Commission was not able to conduct an impact analysis for Option 1 with the available data. Without knowing whether Option 1 would reduce the most severe sentences without raising the least, we nevertheless provide the following comments:

Option 1A

Option 1A not only fails to simplify, but increases complexity to § 2L1.2. By including new language and defining new terms, such as "forcible sex offenses," Option 1A adds to the many statutory and guideline definitions that the court must consider in each case, exacerbating the confusion and creating yet more areas for litigation. *See, e.g.*, *United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007), *reh'g en banc granted*, 2008 WL 373182 (5th Cir. Feb. 22, 2008) (considering the meaning of "forcible sex offense"). In addition, by retaining guideline-level enumerated categories of offenses that may constitute "crimes of violence," Option 1A does little to address the application problems identified by many commentators, judges, and practitioners, who have noted with frustration the complex litigation even in the mine run of cases.

Further, by amending the definition of "drug trafficking offense" to include transportation and offers to sell, Option 1A will increase sentences for a large number of

defendants without any reasoned basis for doing so. There has been no empirical evidence, data, or policy reason offered to explain why sentences should now be increased across the board for every defendant convicted of these minor offenses. It is not enough to say that on occasion, defendants sentenced under the current guideline do not receive a 16- or 12-level enhancement for a prior offense that might have been a drug trafficking offense.[7] We cannot support an amendment that addresses unsupported speculation about "problems" created by the categorical approach in some cases by enhancing punishment for defendants not previously subject to an enhancement because the Commission did not view the prior conviction as a drug trafficking offense.

Option 1B

Option 1B appears to be a step in the right direction – at least as far as simplicity is concerned – in that it tends to eliminate some of the application problems, streamlining the definition of "crime of violence" by referring to the controlling statute, 8 U.S.C. §1101(a)(43), and defining "drug trafficking offense" as it is defined by 18 U.S.C. § 924(c)(2) and recently interpreted by the Supreme Court in *Lopez v. Gonzales*, 126 S. Ct. 625 (2006). These changes respond to comments from judges and practitioners alike who urged the Commission to eliminate the often incoherent results of the second-level guideline definitions for "crime of violence." In addition, the use of § 924(c) as the source of the definition of "drug trafficking offense" enjoys a level of certainty and some needed narrowing of covered offenses. However, we have several concerns.

Option 1B does not address the disproportionate severity of the guideline as a whole. Nor does it address stale convictions or the 16-level enhancement for alien smuggling, which many commentators view as particularly inappropriate in the mine run of cases. In those isolated cases in which aggravating circumstances occur, sufficient mechanisms for increased punishment are already in place. And we are wary of the wholesale incorporation of the definition of "drug trafficking offense" from § 924(c)(2) into the provision advising a 16-level enhancement, as that definition can reach simple possession of more than 5 grams of crack and cases with two prior convictions, including misdemeanors. *See* 21 U.S.C. § 844. Given the varying degrees of seriousness for these offenses, the Commission should exempt the least serious offenses covered by § 924(c)(2) from the 16-level enhancement.

Option 1 – Departure Considerations

Option 1 also proposes two departure considerations in Application Note 7. The first suggests an upward departure where a prior conviction for possession or transportation or offer to sell does not qualify for the 16-level enhancement because it is

[7] *See, e.g.*, *United States v. Gonzales*, 484 F.3d at 412, 714-15 (5th Cir. 2007) (applying the categorical approach to Tex. Health & Safety Code § 481.112, the offense of "delivery of a controlled substance" includes the offense of "offering to sell a controlled substance," and thus "lies outside section 2L1.2's definition of 'drug trafficking offense'"); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 354 (5th Cir. 2005) (under the categorical approach, an unspecified conviction under Cal. Health & Safety Code § 11352(a), which includes transportation, does not constitute a "drug trafficking offense" under § 2L1.2).

not a "drug trafficking offense" as defined by § 2L1.2, but the offense involved "a quantity of a controlled substance that exceeds a quantity consistent with personal use." In essence, this proposal invites judges to make factual determinations that second-guess the nature of a prior conviction as determined by the relevant jurisdiction, with the apparent purpose of "making up for" – through increased punishment for the illegal reentry – what a federal judge views as a "too-lenient" state sentence. Although we generally oppose incorporating these types of factual determinations into the advisory guidelines, we believe that should the Commission adopt such a departure provision in § 2L1.2, it must be mitigated by an Application Note that emphasizes the purpose of the system of graduated punishment for illegal reentry:

> *The purpose of the specific offense characteristics is to reflect the seriousness of the current offense. It is not to punish the defendant for a prior offense for which he or she has already been convicted and punished.*

The second departure consideration in Option 1B suggests a downward departure where the prior conviction does not meet the definition of "aggravated felony" under § 1101(a)(43). We believe that any version of § 2L1.2, including the current guideline as written, should limit the 16-level enhancement under § 2L1.2(b)(1)(A) to convictions that meet the definition of "aggravated felony" under § 1101(a)(43). Otherwise, it should include a note such as the one in Option 1B suggesting a downward departure where the prior conviction does not meet the definition of "aggravated felony" under § 1101(a)(43).

Option 2

Option 2 avoids many of the application problems that currently complicate §2L1.2 by reducing the emphasis on the categorical approach and by linking the greatest single enhancement to national security or terrorism offenses or those "aggravated felonies" described in 8 U.S.C. § 1101(a)(43)(A). However, the data confirms that Option 2 would raise sentences for many of the least culpable defendants without any reason. Although we hesitate to comment at length given this fundamental problem, we point out several features that, in our view, raise serious concerns.

First, in subsection (b)(1), we believe it would be more appropriate to increase punishment if the defendant was convicted of a felony for which a sentence *of imprisonment* that exceeded 24 months was imposed. This is especially true if the ambiguous language of subsection (b)(3) means that other felony offenses could result in additional (and apparently limitless) increases, as appears to be the case under either option in proposed Application Note 3 .

Second, subsection (b)(4) appears to shift the burden to the defendant to show that he or she has no prior felony convictions in order to receive a decrease in the offense level, a shift that violates principles of basic fairness and implicates constitutional questions of due process. Even worse, it places the burden on the party who is least able to obtain the information. Far from simplifying the process, subsection (b)(4) invites

unnecessary litigation of constitutional proportion and should not be considered.

Third, we oppose the use of any conviction to enhance a sentence for illegal reentry that did not receive any criminal history points under the rules for computing criminal history points in Chapter Four, as directed by Application Note 2 of Option 2. The proposed structure of Option 2 is ambiguous as best, potentially allowing for stacked enhancements through the repeated application of subsection (b)(3) for old convictions or multiple convictions that were disposed of in single proceedings. Application Note 2 thus could operate to result in significantly higher sentences for illegal reentry based on a system that is not only out of sync with the Commission's view of the predictive value of criminal history under Chapter Four (or its relationship to culpability for the instant offense), but is not, as far as we know, based on any reasoned principles or empirical evidence related to the overarching purposes of sentencing for illegal reentry.

A similar criticism must be leveled against Application Note 3, Option B. That provision would greatly increase sentences that, in our view, are already too high. (It would, for example, set the offense level as high as 30 for a defendant convicted twice of minor drug offenses, even if one of them occurred decades earlier.)

Finally, we question the purpose of the upward departure consideration in Application Note 4. The note would invite an upward departure in cases in which the defendant has been removed multiple times before committing the offense of illegal reentry. In addition to raising serious due process concerns (along with the specter of unwarranted disparity between defendants from contiguous and noncontiguous nations), such a departure provision is unnecessary. The Commission removed a similar provision from § 2L1.2 in 2001 when it restructured the guideline to provide for graduated punishment based on the seriousness of the prior offense.[8] Although the Commission provided no specific reason for removing the provision, we note that in fiscal year 2001, it was applied in only two out of 6,121 cases (.03%) for which §2L1.2 was the primary guideline, an application rate that approached zero.[9] We presume that the Commission removed the provision after analyzing it in light of empirical data and the purposes of sentencing in 18 U.S.C. § 3553(a). That judges did not apply it further supports the conclusion that it was not necessary to achieve the purposes of sentencing. Reintroducing a similar provision at this time – in the absence of any new evidence or articulated policy reasons and when sentences are already too high – strikes us as particularly unsound.

Option 3

Option 3 is conceptually interesting, but should not be adopted at this time. It relies on a sentence-length approach, which is designed to eliminate many of application

[8] *See* USSG App. C, Amend. 632 (Nov. 1, 2001) (deleting provision allowing for an upward departure in the case of "repeated prior instances of deportation").
[9] *See* United States Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*, tbls. 17 & 24 (2001).

problems However, like Option 2, Option 3 would raise sentences for the least culpable. Moreover, Option 3 retains several enumerated offenses that would require a guideline-level categorical approach, leading to complexity and litigation.

Although we have expressed interest in a sentence-length approach in the past, we recognize that it would represent a fundamental change in the structure of § 2L1.2, one that, if adopted here, might also reasonably be applied to firearms and other Chapter Two guidelines relying on prior convictions. In addition, we believe that before the Commission considers a sentence-length approach for § 2L1.2, it should both revisit criminal history in general, as we expect it will, and revisit the underlying premise of the 16-level enhancement. No matter what, we believe that Option 3B's requirement of a prior sentence of imprisonment exceeding 13 months in order to apply the enhancements under subsection (b)(1)(B)(iii) and (b)(1)(D) is the more appropriate approach, as it is consistent with Chapter 4.

D. Issue for Comment

The Commission has asked for comment on whether any specific offense characteristics and departure provisions in one option should be adopted by the Commission as part of another option. As we have indicated, we believe that any tinkering with § 2L1.2 should be delayed at least until the next amendment cycle, unless the Commission proposes revising the guideline to address all of its fundamental problems, not just a few application problems, while refraining from raising any sentences without sound policy reasons. For all of the reasons set forth above, we do not believe that any combination of the specific offense characteristics or departure considerations contained in the proposed amendments would achieve the needed reform of § 2L1.2.

Instead, we urge the Commission to take this time to consider our proposal, modeled on the guideline for § 2K2.1. Of course, we would be happy to discuss modifications to it that would advance the goal of simplicity and the overarching purposes of sentencing, but we believe it represents the best starting place.

Thank you for considering our comments, and please let us know if we can be of any further assistance. We look forward to working with the Commission on this very important issue.