appellation tempts one to draw unsound analogies between sentencing procedures and trial procedures.

No, the offender being sentenced is guilty. The prospective victims of his and others' future crimes are innocent or at least presumed so. Wise procedures would be designed, in cases where facts and predictions bearing on the sentence are in doubt, to protect innocent members of society more than may be necessary, rather than to give convicted offenders undue leniency.

This principle should lead us, for example, to establish burdens of persuasion of sentencing facts different from the preponderance standard currently endorsed by the Commission (sec. 6A1.3) and used by most federal courts. When a convicted offender tries to prove a fact that would mitigate his sentence, he should have to prove it by more than a preponderance. Clear and convincing proof might wisely be required, for example.

Conversely, when the government tries to prove a fact that would support a more severe sentence, the burden of persuasion should be less then a preponderance. There are, of course, other contexts in which a standard lower than a preponderance is used. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555 (1995) (holding that a defendant claiming a violation of the prosecutorial disclosure requirement articulated in United States v. Bagley, 473 U.S. 667 (1985), need only adduce less than a preponderance of evidence that the undisclosed evidence would have been likely to prevent a conviction). I think "substantial likelihood" of an aggravating fact describes pretty well the showing that should justify greater

protection of the public from a convicted offender.

Congress has not forbidden this general approach, i.e., allocating most of the risk of sentencing error to offenders. It remains to be seen what constitutional limits the courts will set on the resolution of most specific issues of sentencing procedure. Certainly the Supreme Court has not categorically rejected the general approach I suggest. The Commission, the Congress, and the courts should do all in their power to adopt sentencing procedures that limit the risk of error to the degree that best makes practical sense, and that then allocate most of the remaining risk to the guilty offenders who have created the problem.

An acquittal should not be treated as a special matter for this purpose. Current constitutional precedents make it quite clear that it need not be so treated. See, e.g., Dowling v. U.S., 110 S. Ct. 668 (1990). All an acquittal shows is that the government failed, under the especially rigorous rules of procedure and evidence that govern the trial of one who is presumed innocent, to prove at least one element of the charged offense beyond a reasonable doubt. The acquittal creates no reasonable expectation in the defendant (who later becomes the offender being sentenced for another crime), or in the public, that the same misconduct will not later be proven under less rigorous procedural and evidentiary rules, to a lower degree of probability, at the subsequent sentencing.

III. Simplification of the Guidelines

It may seem that my suggestion to add more offender

characteristics is incompatible with simplification of the Guidelines. The impression that my views are contrary to simplification may be strengthened when I add that, in my view, the current Guidelines unduly limit the number of offense characteristics courts can consider, and their ways of doing so. It may also seem that the Congressional limit on ranges of terms of imprisonment to the lesser of six months or a 25% span obstructs simplification.

Despite these likely impressions, simplification is indeed possible and desirable. The Commission's attempt to simplify the Guidelines should be based on the following fundamental observations and principles.

Criminal behavior is enormously voluminous, varied, and complex. Likewise, the character traits and other personal qualities that lead offenders to commit crimes are extremely varied, complex, and subtle, and the facts about an offender's life that shed substantial light on these traits and qualities are even more numerous, varied, and complex.

Crime prevention is extremely important. Therefore, it is wise to design the criminal justice system so that the public actors (e.g., legislatures, prosecutors, judges, and jurors) who make decisions about prosecutions, convictions, and sentences can consider every important fact about each crime and each defendant. Only in that way can crime prevention be made as effective as practically possible, while at the same time unjust convictions and excessive sentences are avoided.

However, it would be impracticable to consider every significant offense and offender characteristic at every stage of the criminal process. Dealing sensibly with information that is so voluminous, varied, complex, and subtle requires great flexibility and discretion to handle every case in a unique way. The presumption of innocence and other important procedural protections would be impossible to enforce adequately if every stage of a criminal case were handled with great flexibility and discretion.

The basic solution to this problem that the federal and all state governments have followed for most cases, for almost the entire history of the Republic, is as follows. To protect the presumption that one accused of crime is innocent until proved guilty by overwhelming evidence under rigorous procedures, the middle stage of the criminal process, that of formal adjudication of guilt, is designed in peculiar way.

First, the facts to be proved at this middle stage relate only to the charged offense, not to the character or personality of the defendant. Then, those facts are deliberately selected and worded so as to be few in number and relatively simple and specific in content. These elements are chosen and defined in such a way as to make them provable in a very technical and rigorous trial process; the other side of the same coin is that these elements lack realistic richness and subtlety. For example, the defendant is alleged to have possessed something specified (burglar tools, or a specified drug, for example) with a specified state of mind (e.g., the intention to make an unauthorized entry of another's property,

or to transfer the drug).

These few facts, deemed the elements of the crime, must be proved to a very high probability, through rigorous evidentiary and procedural rules. Harmful errors in application of these requirements can almost always be identified and remedied on direct or collateral review of the conviction.

As a result of these rules for the stage at which guilt is adjudicated, it is extremely rare for innocent defendants to be convicted of crimes. A collateral result is that, during this middle stage of the criminal process, the decisionmaker (the judge or jury deciding whether guilt has been proven) learns very little about the defendant's character and personality. In addition, the decisionmaker makes findings that describe even this particular crime in a peculiar way: the findings leave out many significant facts about the crime, and they oversimplify or state very generally even the facts the findings do cover.

For example, the jury returning a guilty verdict may find only that the offender possessed at least one object designed to open a locked door. The jury may find it unnecessary to decide whether the offender also possessed a large kit of other, highly sopisticated devices indicating great professional skill at such a crime. He may or may not, as far as the verdict indicates, have possessed also equipment for disabling alarm systems, a case designed for transporting crystal without damage, and the like.

In the other hypothetical case mentioned above, the jury may find only that the offender possessed heroin, not also facts about

its quantity, purity, and packaging that indicate his role in its distribution. In neither of these two cases does the jury find the offender's ultimate motive for the crime, nor his character or propensity to commit similar or different kinds of crimes in the future.

Thus, in the stage of a criminal case where guilt is adjudicated, an unrealistically simplified presentation is made of some of the key facts about the crime. No facts at all are presented about other offense characteristics or about the characteristics of the offender that should inform the selection of a punishment.

This partial blindness and complete oversimplification during the middle stage of a criminal case did little harm in the traditional American system, because the first and third stages allowed consideration of all relevant facts, as well as discretion to respond to all of them. At the first stage, that of charging, the prosecutor had almost complete discretion (1) not to charge at all, (2) to charge a less serious offense than the evidence would justify if the narrow view taken during the middle stage governed, or (3) to accept a bargain for a lesser conviction. He could base such leniency on details of the offense that are ignored or oversimplified in the middle stage, and on facts about the offender that could not be proved at all at trial.

In view of these facts, the prosecutor could be lenient when more aggressive prosecution would strike an unwise balance among competing factors such as the seriousness of the offense in all its

real, complex details; the degree of likelihood that the defendant or others would commit future crimes of various kinds in the absence of any criminal conviction or punishment; the likelihood that the defendant would respond well to probation or various kinds or treatment or training; and various other facts and predictions too numerous, varied, complex, and subtle to be considered during the much more formal and structured middle stage.

Similarly, the third stage of a criminal case, sentencing, traditionally allowed another consideration of any kind of information bearing on the whole gamut of offense and offender characteristics. Cases that appeared identical, if one looked only at the indictment and verdict, were examined again at the sentencing stage and found to be very different, as the judge took a more thorough and subtle look at the facts of the offense, as well as his first thorough look at the character of the offender.

This system thus had a first and third stages in each of which a decisonmaker had discretion to consider and act upon all relevent information about the offense and the offender, and a middle stage where artifically narrow factual allegations must be proved through rigorous evidentiary and procedural methods.

This system is excellent in conception. It allows potential criminal defendants to be screened out of the process before being tried or even charged, or to receive other forms of leniency, where the specifics of the offense or the offender make this wise resolution of the competing demands of crime prevention, economy, and justice. This system also minimizes the chance that an

innocent defendant will be convicted, by requiring very strong proof of just a few important facts under very demanding procedures. And then it creates an opportunity for wise crime prevention and punishment of the guilty offender, by basing the sentence on all significant information about the crime and the offender.

Under this basic, traditional system, sentencing should not be simple. There are methods by which to achieve simple sentencing, but each of them fails to accomodate adequately the needs for effective crime control, economy, and justice.

One such failed method is embodied by the current Guidelines. The Guidelines preclude or strongly discourage consideration of many facts, such as an offender's unadjudicated crimes dissimilar to the one for which sentence is to be imposed, that are of substantial importance in selecting a sentence to prevent future crimes. As to facts the Guidelines do allow judges to consider, i.e., the offense characteristics comprising most of the current book's bulk, the Guidelines define them in ways that are artifically narrow and discontinuous, ways that inadequately reflect the true variety and subtlety of such facts. The result is that the Guidelines unduly restrict and oversimplify sentencing criteria.

Consequently, the current Guidelines set a task for sentencing judges that is much more technical than before the Guidelines, but is also simpler in substance, for two reasons. First, judges must ignore or give trivial weight to much important information.

Second, even the information that the Guidelines do make significant in sentencing is broken into artifically defined and discontinuous bits, and given predetermined interrelationships. Judges must use this information more to make a calculation than to make a judgment.

Thus, the difficult and complex judicial sentencing process of weighing many, varied, interrelated factors having different degrees of importance is replaced in the current Guidelines by a computation that has only the technical complexity of a math problem, not the substantial complexity of an attempt to evaluate human behavior and character, to predict criminal conduct and the reactions of criminals to sanctions, and thus to prevent and punish crime with optimal effectiveness.

The ultimate results of the current Guidelines are that crime prevention is less effective than it should be, that unjustified disparity and unjustified parity of sentences are unduly frequent, and that all we gain is an illusion of sentencing parity.

It is also true that the pre-Guidelines system of federal sentencing was grossly inadequate. There, too, unjustified disparity and unjustified parity were both rampant. Also, many sentences were surely ill-designed to prevent crime or to punish wisely. Sentencing was lawless, unreviewable, and insufficiently explained. There were inadequate processes for Congress and courts to create data, analyze them, and improve sentencing by learning from experence.

The concepts of Guidelines to be announced and then amended

regularly, of limits on departures from the Guidelines, of stated reasons for sentences, and of appeals by both parties were sound. These concepts could have led to a great improvement in sentencing. Instead, the Commission has implemented these concepts in a way that (1) has definitely impaired crime prevention and just sentencing by barring or minimizing reliance on some important sentencing factors, (2) has probably increased the problem of unjustified parity, (3) has not necessarily reduced that of unjustified disparity, and (4) has produced sentencing law that is excessively technical and complex.

The wise approach to simplification, which also is the wise approach to solving the other problems just mentioned, would be as follows. Sentencing cannot be both simple and wise. We therefore must choose between having either (1) relatively simple Guidelines or (2) relatively simple judicial application of them. So far, the Commission has made the latter choice.

The Commission promulgated the initial Guidelines in an attempt to limit courts to simple functions of factfinding and technical application of relatively precise rules. It tried also to make the Guidelines themselves rather simple, by leaving out important sentencing factors and by unduly quantifying the ones it left in. Even so, the initial Guidelines were rather complex.

Then the Commission promulgated annual sets of amendments making the Guidelines ever longer, more precise, and more complicated. At present, we therefore have a system where the judicial function is more mechanical (and thus easier in substance)

than before the Guidelines; where the Guidelines are so complex as to be hard to use; and where, ironically, these complex Guidelines are so much more simple than the real world of crimes and criminals that they do not produce sufficiently effective, economical, and fair crime prevention and punishment.

At this time, the Commission should begin experimenting with an approach that is virtually the opposite of the approach it has used to date. To be cautious, it should try this new approach at first only for a few kinds of offenses and a few kinds of offenders. The Commission should replace some of the current provisions with new ones so designed that the new Guidelines will be relatively simple and their use by the courts will be as complex as good crime prevention and just punishment demand.

Application of this approach should begin with the observation that, although the statute requires that each range of imprisonment cannot be wider than the greater of 25% or six months (sec. 994(b)(2)), the statute does not require that the Guidelines employ narrow or specific factual categories or calculations in the preceding steps by which a judge considers facts relevant to the sentence. Offense and offender characteristics can be described in general language. The numerical values assigned to them can consist of ranges.

For example, the Commission might choose to experiment with this new approach by replacing the Guideline for the offense of Failure to Appear by Offender (sec. 2J1.6). The Commission might also create a new Offender Characteristics Category Guideline to

apply to this offense instead of the current Criminal History Category Guideline (sec. 4A1.1).

The new Failure to Appear Guideline could begin, as does the current one, by making 11 the base offense level for failure to report for service of sentence, and 6 the base level otherwise.

Then the new Guideline could authorize the sentencing judge, for example, to "decrease the offense level by 4 levels or less, or increase it by 6 or less, because of offense characteristics warranting the decision, including but not limited to the gravity of the charge or conviction in the case in which he failed to appear, the stage of the proceedings when he failed to appear, the kind of facility to which a sentenced offender was ordered to report, how long after he was scheduled to report he surrendered or was apprehended, and the circumstances under which he surrendered or was captured."

This draft adds offense characteristics that the current Guideline omits, such as the gravity of the offense for service of whose sentence the offender failed to appear. It also eliminates arbitrary discontinuities in the weight given to offense characteristics covered by the current Guideline, such as the 3-level difference between a pending charge punishable by 15 years imprisonment and one punishable by any less. In addition, it eliminates the unjustified parity of giving the same significance to a pending cpaital case as to a pending case where the maximum punishment is as little as 15 years.

The new Guideline for Offender Characteristics, to be adopted

only for use with the new Failure to Appear Guideline, could direct the judge to determine the offender's "offender characteristics points" in a similar fashion. The court would choose from a wide range of points by considering a wide variety of facts, such as the nature, seriousness, and recency of prior convictions and sentences and prior crimes established for the first time in this sentencing proceeding.

To combine this new set of offense levels with this new set of offender points, the Commission could use a Sentencing Table very similar in substance to the current one. However, for this offense the vertical column would be headed "offender charactistics category," not "criminal history category."

These proposals are simpler than the current Guidelines, and they encourage judicial consideration of all significant offense and offender characteristics in their true subtlety and interrelatedness. They facilitate use of the kinds of procedures I recommend in the previous section of these comments, because they treat most sentencing facts as evidentiary rather than ultimate facts. They thereby confine burdens of persuasion and other crucial procedural issues to a manageably narrow scope.

At the same time, these drafts confine and guide judicial discretion vastly more than the pre-Guidelines law of sentencing. Coupled with the requirement of stated reasons for sentences, the authorization of appeals from sentences, and the roles of the Commission in gathering data and learning from experience, Guidelines drafted in this manner could promote effective

sentencing while making unjustified disparity of sentences much less common than before 1987, and unjustified parity of sentences much less common than after 1987. It would at least be worthwhile experimenting with this approach.

IV. Conclusion

At the conclusion of my comments, it must have become clear how interrelated are my views on the three sets of issues I said in the beginning I would address. Federal sentencing will not become as effective as it should be to prevent crime until offender characteristics are made much more important determinants of sentences than under the current Guidelines, nor until offense characteristics are described more comprehensively and in terms that encompass all their important variations. The only way the Guidelines can adequately cover all important offense and offender characteristics, and cover them with language that is reasonably simple, is to describe them in general terms and to provide ranges of numerical values for them. Procedures for finding sentencing facts and for applying Guidelines to the facts should be relatively informal, and should place most of the risk of error on convicted offenders, not on a public entitled to protection from crime.

This approach is so different from the current Guidelines that it should be tried in small steps. The results of both approaches should be studied carefully. In the long run, it will be found that the current Guidelines produce only illusory parity and indiscriminate prevention of crime, while the new approach produces more effective crime control, fairer sentences, relatively little

unjustified parity or disparity, and a more workable system.

Sincerely,

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April 14, 1997

Commissioner Michael Goldsmith
U.S. Sentencing Commission
Federal Judiciary Building
Suite 2-500, South Lobby
One Columbus Circle, NE
Washington, D.C. 20002-8002

RE: Immigration Guidelines

Dear Commissioner Goldsmith:

This letter follows up earlier correspondence we had concerning waiver of sentencing appeal in plea agreements. I wrote you last October, and we exchanged correspondence. I am writing now to express my concern that the will of the Commission, as seen in its most recent amendments to the illegal re-entry offense conduct in §2L1.2 will be thwarted by the policies of the various U.S. Attorneys.

As I understand it, the Commission recently voted to amend §2L1.2 (unlawfully entering or remaining in the United States). The amendment was to authorize a limited departure application note, which allows a court to depart from a "aggravated felony" should the defendant have only been convicted of one felony offense; the offense was not a crime of violence or firearms offense; and the term of imprisonment was less than one year. In such a case, a downward departure "may be warranted based on the seriousness of the aggravated felony."

As you can expect, the District of Arizona, which borders Mexico, sees quite a few illegal re-entry cases. Unfortunately, our U.S. Attorney here has an iron-clad plea agreement which forbids the defendant from seeking a downward departure. The government allows a limited departure based on waiver of a defendant's right to a deportation hearing, but all other attempts to have the court exercise its discretion and have the court depart downward will result in the government withdrawing from the plea agreement. I enclose a copy of one such agreement.

As such, the Commission's recognition that all aggravated felonies are not the same, and that some, especially those involving small drug quantities (such as a few grams of marijuana), will be given no effect because of plea policies. This is not right.

There are two remedies for this situation. One, of course, is to take the clear intent of the Commission to reform §2L1.2, and placing it in the specific offense characteristics. Instead of allowing a basis for a departure, the Commission should underscore that aggravated felonies not for certain specified crimes should not be subject to the "plus 16" jump. The plus 16 level increase, by the way, is the steepest of any in the guidelines. To show the draconian nature of this, I am enclosing an article that Bob McWhirter, an AFPD in this office, and myself wrote on aggravated felonies that appeared in the *Federal Sentencing Reporter*.

A more general approach, and one that was the subject of my previous correspondence, was the pernicious policy of the U.S. Attorney in requiring appeal waivers in virtually all pleas. Sentencing is being insulated from the review of the Courts of Appeal, and the Commission, by this draconian requirement. The goals of the guidelines, fairness and non-disparate treatment, are being undermined by this practice, as the courts can sentence willy-nilly, misapplying the guidelines or even ignoring the guidelines, safe in the knowledge that no appeal will issue. Ninety percent of sentencing is by plea, and so you have subterranean subterfuge of the worst kind. This waiver practice results in the Commission being in the position of a speleologist who tries to conduct his work solely above ground.

I hope you will give attention to reform of §2L1.2 that takes into account the need to lessen the 16-level specific characteristic increase for aggravated felonies as a specific offense characteristic and not as a discretionary departure. Without a specific offense characteristic, sentences will continue to be too severe and the disparity too great.

Sincerely,

JON M. SANDS
Asst. Federal Public Defender

JMS:cfc
Correspo\Goldsmith3.ltr

cc: John Steer, General Counsel
Tom Hutchison
Tom Hillier

Copy of Original
filed Jan 16, 1997
at COP Hrg

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. ANTONIO ALVARADO-MERAZ, Defendant.	CR-96-439-PHX-ROS PLEA AGREEMENT

The United States of America and the defendant agree that this document, which contains the following terms and conditions, sets forth the full and complete plea agreement between the parties:

1. PLEA

1. Defendant will plead guilty to an information charging him with a violation of Title 8, United States Code, Section 1326(b)(2), Illegal Re-entry of an Alien after Deportation Subsequent to an Aggravated Felony Conviction, a felony offense.

2. TERMS

2) The defendant understands the guilty plea is conditioned upon the following terms, stipulations, and requirements:

3. MAXIMUM PENALTIES

(a) A violation of Title 8, United States Code, Section 1326(b)(2), is punishable by a maximum fine of $250,000.00, or a maximum term of imprisonment of 20 years, or both, a term of supervised release of not more than three (3) years.

(b) Pursuant to Title 18, United States Code, Section 3561, et seq., at the sole discretion of the Court, and even if probation is available, the defendant may be sentenced to a term of imprisonment with two to three years of supervised release to follow under §§ 5D1.1 and .2 of the Sentencing Guidelines.

(c) Pursuant to the Sentencing Guidelines issued under the Sentencing Reform Act of 1984, the Court shall order the defendant to pay a fine unless the defendant establishes the applicability of the exceptions contained in § 5E1.2(f) of the Guidelines.

(d) Pursuant to 18 U.S.C. section 3013(a), the defendant shall pay a special assessment of not less than $100.00. The special assessment is due and payable at the time the defendant enters the plea of guilty, but in no event shall be paid later than the time of sentencing unless the defendant is indigent. If the defendant is indigent, the special assessment will be collected according to the provisions of Chapters 227 and 229 of Title 18, United States Code.

4. AGREEMENTS REGARDING SENTENCE

Pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P., and 5K2.0 of the Sentencing Guidelines, the government and the defendant

stipulate and agree that the following is an appropriate disposition of this case:

(a) Assuming the defendant makes full and complete disclosure to the Probation Department of the circumstances surrounding the defendant's commission of the offense, if the defendant is eligible for a two level reduction pursuant to Section 3E1.1(a) of the Sentencing Guidelines and, if the defendant demonstrates an acceptance of responsibility for this offense up to and including the time of sentencing, the United States will stipulate to a three level reduction in the applicable Sentencing Guideline offense level, pursuant to Section 3E1.1(b) of the Sentencing Guidelines.

(b) Further, based in part on the defendant's agreement for deportation or exclusion, set forth below, the government and the defendant agree to a four-level downward departure from the applicable guideline range as determined by the Court at the time of sentencing.

(c) If the Court, after reviewing this plea agreement, concludes any provision is inappropriate, it may reject the plea agreement, giving the defendant, in accordance with Rule 11(e)(4), Fed. R. Crim. P., an opportunity to withdraw the defendant's guilty plea.

(d) Defendant understands that the court is neither a party to, nor bound by this agreement and the court may impose any sentence provided by law. It is understood that if the court imposes a sentence outside of the recommendations and

stipulations above, the United States or the defendant will be permitted to withdraw from this agreement and the matter may be set for trial.

(e) The defendant understands there is no agreement regarding the defendant's criminal history or criminal history category.

(f) The defendant understands and agrees that this plea agreement contains all the terms, conditions and stipulations regarding sentencing and that if the defendant moves or applies for any further downward departure(s) that the United States will be permitted to withdraw from the agreement.

5. AGREEMENT FOR DEPORTATION OR EXCLUSION

(a) In accordance with paragraph 4(b) of this plea agreement, the defendant agrees and stipulates to an order of deportation or exclusion, whichever is applicable, to be issued by an Immigration Judge or appropriate Immigration official prior to the time of sentencing. The defendant agrees to appear before such Immigration Judge or appropriate Immigration official before the time of sentencing to enable the issuance of the order of deportation or exclusion.

(b) In the event this plea agreement is accepted by the Court, the defendant further waives any and all rights to appeal, reopen, or challenge in any way the deportation or exclusion order.

(c) If the defendant fails to comply with this provision, the sentencing provision of this agreement shall become void and the defendant shall be sentenced under the United States

Sentencing Guidelines without having a right to withdraw the defendant's guilty plea.

This agreement for deportation or exclusion is in exchange for the government's agreement to a four-level downward departure from the sentencing guidelines pursuant to Sentencing Guidelines Section 5K2.0 as set forth above. The justification for the four-level departure is that the Sentencing Guidelines do not adequately take into account the savings to the government resulting from the stipulated deportation or exclusion, including reduced expenses for conducting hearings and housing of the defendant pending such hearings.

6. WAIVER OF DEFENSES AND APPEAL RIGHTS

The defendant waives any and all motions, defenses, probable cause determinations, and objections which defendant could assert to the information or indictment or to the Court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement. Defendant further waives any right to appeal or collaterally attack any matter pertaining to this prosecution and sentence as long as the sentence does not exceed the statutory maximum penalty.

7. REINSTITUTION OF PROSECUTION

Nothing in this agreement shall be construed to protect the defendant in any way from prosecution for perjury, false declaration or false statement, or any other offense committed by defendant after the date of this agreement. Any information, statements, documents and evidence which defendant provides to

the United States pursuant to this agreement may be used against the defendant in all such proceedings.

If the defendant's guilty plea is rejected, withdrawn, vacated, or reversed by any court in a later proceeding, the government will be free to prosecute the defendant for all charges as to which it has knowledge, and any charges that have been dismissed because of this plea agreement will be automatically reinstated. In such event, defendant waives any objections, motions, or defenses based upon the Speedy Trial Act or the Sixth Amendment to the Constitution as to the delay occasioned by the later proceedings. The defendant understands that any statements made at the time of the defendant's change of plea or sentencing may be used against the defendant in any subsequent hearing, trial or proceeding as permitted by Fed. R. Crim. P. 11(e)(6).

8. DISCLOSURE OF INFORMATION TO U.S. PROBATION OFFICE

(a) The defendant understands the government's obligation to provide all information in its file regarding defendant to the United States Probation Office.

(b) The defendant will cooperate fully with the United States Probation Office. Such cooperation will include truthful statements in response to any and all questions asked of the defendant by the Probation Office. Failure to answer any and all of the questions regarding this matter or related relevant conduct, for whatever reason, will allow the United States to withdraw from this agreement and to prosecute the defendant for all charges as to which it has knowledge, and any charges that

have been dismissed because of this Plea Agreement will automatically be reinstated.

(c) The defendant fully understands and agrees to cooperate fully with the United States Probation Office in providing:

(1) All criminal history information, i.e., all criminal convictions as defined under the Sentencing Guidelines.

(2) All financial information, e.g., present financial assets or liabilities that relate to the ability of the defendant to pay a fine or restitution.

(3) All history of drug abuse which would warrant a treatment condition as part of sentencing.

(4) All history of mental illness or conditions which would warrant a treatment condition as a part of sentencing.

9. EFFECT ON FORFEITURE PROCEEDINGS

Nothing in this agreement shall be construed to protect the defendant from civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Further, this agreement does not preclude the United States from instituting any civil proceedings as may be appropriate now or in the future.

10. WAIVER OF DEFENDANT'S RIGHTS

(a) I have read each of the provisions of the entire plea agreement with the assistance of counsel and understand its provisions. I have discussed the case and my constitutional and other rights with my attorney.

(b) I understand that by entering my plea of guilty I will be giving up my right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination; all with the assistance of counsel, to be presumed innocent until proven guilty beyond a reasonable doubt, and to appeal.

(c) I understand that I have a right to have this charge prosecuted by an indictment returned by a concurrence of 12 or more members of a legally constituted grand jury consisting of not less than 16 and not more than 23 members. By signing this agreement, I knowingly waive my right to be prosecuted by indictment and to assert at trial or on appeal any defects or errors arising from the information, the information process, or the fact that I have been prosecuted by way of information.

(d) I agree to enter my guilty plea as indicated above on the terms and conditions set forth in this agreement.

(e) I have been advised by my attorney of the nature of the charge to which I am entering my guilty plea. I have further been advised by my attorney of the nature and range of the possible sentence.

(f) My guilty plea is not the result of force, threats, assurance or promises other than the promises contained in this agreement. I agree to the provisions of this agreement as a voluntary act on my part, rather than at the direction of or

because of the recommendation of any other person, and I agree to be bound according to its provisions.

(g) I agree that any Guideline Range referred to herein or discussed with my attorney is not binding on the Court and is merely an estimate. I understand that if I am placed on supervised release by the court, the terms and conditions of such supervised release are subject to modification at any time. I further understand that, if I violate any of the conditions of my supervised release, my supervised release may be revoked and upon such revocation, notwithstanding any other provision of this agreement, I may be required to serve a term of imprisonment or my sentence may otherwise be altered.

(h) I agree that this written plea agreement contains all the terms and conditions of my plea and that promises made by anyone (including my attorney) that are not contained within this written plea agreement are without force and effect and are null and void.

(i) I am satisfied that my defense attorney has represented me in a competent manner.

(j) I am not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair my ability to fully understand the terms and conditions of this plea agreement.

11. FACTUAL BASIS

I further agree that if this matter were to proceed to trial the government could prove the following facts beyond a reasonable doubt:

I am a citizen of Mexico. I was convicted of Transportation or Sale of a Controlled Substance, Cocaine, an aggravated felony, on May 18, 1989. I was lawfully deported from the United States through the Port of Nogales, Arizona, on September 21, 1995. I was present in the United States in the District of Arizona on September 25, 1996. I did not obtain the express consent of the Attorney General to reapply for admission to the United States prior to returning to the United States.

I understand that I will have to swear under oath to the accuracy of this statement, and if I should be called upon to testify about this matter in the future, any intentional material inconsistencies in my testimony may subject me to additional penalties of perjury or false swearing which may be enforced by the United States under this agreement.

This agreement has been read to me in Spanish and I have carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to do it.

16:19 7
Date

X
ANTONIO ALVARADO-MERAZ
Defendant

DEFENSE ATTORNEY'S APPROVAL

I have discussed this case and the plea agreement with my client in detail and have advised the defendant of all matters within the scope of Rule 11, Fed. R. Crim. P., the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea, including the defendant's waiver of the right to appeal. No assurances, promises, or representations have been given to me or to the defendant by the government or by any of its representatives which are not contained in this written agreement. I concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of my client. I agree to make a bona fide effort to ensure the guilty plea is entered in accordance with all the requirements of Rule 11, Fed. R. Crim. P. and the provisions of this plea agreement.

I translated or caused to be translated this agreement from English into Spanish to the defendant on 16 day of January, 1997.

January 16, 1997
Date

Robert C. McWinter
for MICHAEL D. GORDON
Attorney for Defendant

GOVERNMENT'S APPROVAL

I have reviewed this matter and the plea agreement. I agree on behalf of the United States that the terms and conditions set forth are appropriate and are in the best interests of justice.

JANET NAPOLITANO
United States Attorney
District of Arizona

Date

CHARLES F. HYDER
Assistant U.S. Attorney

COURT'S ACCEPTANCE

Date

United States District Court Judge

MARCH / APRIL 1996

IMMIGRATION AND SENTENCING

Given the complexity of the issues of immigration and criminal sentencing, the passions stirred by them, and the very different approaches currently being taken by the Senate and the House, one may reasonably question the Congress's ability to address them in a coherent and rational manner in an election year.

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DOES THE PUNISHMENT FIT THE CRIME? A DEFENSE PERSPECTIVE ON SENTENCING IN AGGRAVATED FELON RE-ENTRY CASES

Robert J. McWhirter*
Jon M. Sands**

I. Introduction

Punishment for an aggravated felon re-entry offense is among the most severe of any immigration crime. How that came to be, and its implications for defendants, are the subjects of this article. We will look at plea agreements, downward departures, and overall sentencing strategies as ways to mitigate punishments perceived as too draconian and inflexible.[1]

II. Aggravated Felony Guidelines

A. Present Offense Levels

The federal sentencing guidelines control sentencing in criminal immigration cases.[2] Generally, the offense conduct is referenced under Part L (Offenses Involving Immigration, and Naturalization of Passports); the offense conduct concerning unlawfully re-entering or remaining in the United States is found in Section 2L1.2.[3]

Under the present sentencing scheme, a probation eligible defendant with no prior criminal conviction is at level 8 facing a sentence of 0 to 6 months. A defendant with a prior non-drug felony conviction will generally find himself in criminal history category III—with four points added to his offense level—facing a sentence of 15 to 21 months. Finally, a defendant who was previously deported for an aggravated felony would find himself at level 24 after 16 points are added to the base offense level of 8. With a criminal history category VI, he would face a sentence of 100 to 125 months.

B. Evaluation of Offense Levels

When the guidelines were formulated, with offense levels derived from past practices, the so-called "heartland" of sentencing immigration re-entry offenses was pegged at level 6.

1. 1988 Amendment

By amendment, effective January 15, 1988, the base offense level for re-entry offenses was raised to level 8. There is no explanation for this rise, except a sense in the Commission that immigration offenses should be treated more severely. No greater offense level was assessed for those previously deported after a felony or aggravated felony conviction.

2. 1989 Amendment

Amendment 193, effective November 1, 1989, saw the first distinction between illegal re-entry and illegal re-entry after deportation for a prior felony. Under newly inserted specific offense characteristics, a defendant who had previously been deported after a felony conviction for other than an immigration offense, received a four-level increase. This raised the offense level from 8 to 12. The guidelines made clear that this punishment was in addition to, not in lieu of, a defendant's criminal history. Thus, a defendant convicted of illegal re-entry after deportation for a felony would be sentenced in consideration of his or her prior criminal history plus an additional adjustment for that same history. The guidelines also allowed upward departures for felonies that were considered aggravated or violent. Discretion in these cases, therefore, remained with the court.

3. 1991 Amendment

On November 1, 1991, the gradual slope of immigration offenses underwent an unprecedented upheaval, with the creation of a stark cliff for aggravated felons. Punishment by upward departure was no longer enough—Amendment 375 mandated a 16-level increase for defendants previously deported as aggravated felons. The Commission stated this change reflected a desire to acknowledge the more serious nature of these immigration offenses.

The 16-level adjustment is unlike any in the guidelines. There is neither a gradual increase in severity of the offenses, such as in drug or fraud crimes, nor is the increase pegged to a more serious element in the offense itself. After all, illegal re-entering is the same offense whether a defendant has no criminal history or was previously deported after a felony or aggravated felony conviction. The 16-level increase exists solely because of a defendant's criminal history. Therefore, it actually constitutes a "double bite," because the sentence is twice affected by the severity of his criminal history.

The following example indicates the enormity of the increase. A defendant with a felony conviction who would be in criminal history category II would have a sentencing offense level of 12, and a sentencing range of 2 to 18 months. The same defendant, with a felony conviction classified as aggravated, would face a sentencing range of 57 to 71 months. This is a jump from approximately one year to around five years.

An argument can be made for treating the re-entry of an aggravated felon more harshly, independently of his criminal history, because of the prospective protection of citizens and legal residents. After all, the odds are higher that a portion of these defendants will engage in more severe criminal conduct in the future (although criminal history supposedly accounts for this). This argument is also used for punishing felons in possession of a firearm more severely: the fear that they are up to no good.[4]

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However, if one punishes under this theory, it makes no sense to punish far in excess of the possible penalty for a crime a defendant *might* commit. Most aggravated felons are convicted of small drug sales. Punishments usually range from probation to several months in jail or even a year or less in prison. The penalties for returning across the border generally rocket the punishment to five, even ten years.

The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion. The 16-level increase, therefore, is a guideline anomaly—an anomaly with dire consequences.

4. **1995 Amendment**

The most recent amendment to § 2L1.2 is # 523, added in 1995. This amendment removes language stating that a sentence at or near the guideline maximum should be considered for defendants with prior deportations not resulting in criminal convictions. Instead, it substitutes language that a departure might be warranted for criminal history.

III. Definition of Aggravated Felony and Recent Legislative Changes

Title 8 U.S.C. § 1101(a)(43) defines "aggravated felon." The statute has been amended several times since its inception with the Anti-Drug Abuse Act of 1988, including the 1994 Immigration and Nationality Technical Corrections Act (INTCA) and the Antiterrorist and Effective Death Penalty Act of 1996 (AEDPA). It now includes all drug trafficking offenses, violent crimes, and a wide range of fraud and moral turpitude convictions.

A real question exists as to the effective date of the various provisions defining "aggravated felony" because each amendment to § 1101(a)(43) has a different effective date. As the Ninth Circuit recognized in *United States v. Gomez-Rodriguez*, 77 F.3d 1150 (9th Cir.), *en banc hearing granted*, 7 F.3d 150 (9th Cir. 1996), the amendments to § 1101(a)(43) that were part of the Crime Control Act of 1990 added several "crimes of violence" to the definition of aggravated felon. These amendments, however, only apply to aliens who committed crimes after the provision's effective date of November 29, 1990. This conformed to INS's own reading of the effective date in cases where the Service used these "crimes of violence" as a basis of deportation for being an aggravated felon.

The effective date for the recent Anti-Terrorism Act, which added several elements to the aggravated felon definition, is April 24, 1996. The Act clearly states the "amendments [are] effective for convictions entered on or after the enactment" of the Act. The only exception is the categorization of alien smuggling as an "aggravated felony." This classification, found at sub-paragraph N, is effective as of the date when the original aggravated felony provision relating to alien smuggling was passed as part of the Immigration and Nationality Technical Corrections Act of 1994. Pub.L. 103-416, October 25, 1994.[5]

In addition, the final sentence of 8 U.S.C. § 1101(a)(43) places a time limit on what otherwise would be considered an aggravated felony:

> Such term (aggravated felony) applies to offenses described in the previous sentence whether in violation of federal or state law and also applies to offenses described in the previous sentence in violation of foreign law *for which the term of imprisonment was completed within the previous 15 years*.[6]

IV. Plea Offers For Re-Entry Cases

The high penalty cliff for aggravated felonies has changed the plea bargaining landscape. The long sentences combined with increasing case filings have created pressures for fast pleas and significant plea reductions, often below the guideline range.

For example, the standard "fast track" policy that the U.S. Attorney's Office in San Diego used in the past was to offer every person who could be prosecuted as a felon or aggravated felon after re-entry a plea to simple re-entry after deportation in violation of 8 U.S.C. § 1326(a), which carries a two-year statutory maximum. This avoids the higher statutory maximum for felons of 10 years under 8 U.S.C. § 1326(b)(1) and for aggravated felons of 20 years under 8 U.S.C. § 1326(b)(2). This standard offer provided a stipulated two-year statutory maximum cap to every alien charged with re-entry after deportation. The Ninth Circuit specifically found that this fast-track plea offer policy does not constitute selective prosecution against the aliens who do not accept it.[7]

If a person enters the United States at a point but a few miles to the East and is prosecuted from the Yuma Border Patrol Station in Arizona as opposed to San Diego, he will be prosecuted under the "standard policy" of the District of Arizona. That policy is that persons charged with 8 U.S.C. § 1326(b)(1) re-entry of a felon, are offered a cap at the low end of the guideline range after acceptance of responsibility if they agree to the expedited deportation procedure provided at 8 U.S.C. § 1251(a). If they are charged as aggravated felon re-entrants in violation of 8 U.S.C. § 1326(b)(2), the defendant gets what basically constitutes a stipulation to three levels off for accepting responsibility and three additional levels off for agreeing to expedited deportation (four levels if done preindictment). This means that most aggravated felon re-entrants are looking at sentences of anywhere between six and eight years after they received the downward adjustments outlined above.

Even though the new policy in the Southern District of California has narrowed the sentencing gap between the two districts,[8] the divergence in "standard policy" exemplified in the example is instructive as to what is occurring nationwide. The policy goal of the guidelines to create uniformity and certainty in sentencing has been totally thwarted by a variety of re-entry after deportation guidelines. The Department of Justice has not yet moved to create uniformity nationwide.

V. Guideline Departures

Departures in the cases of aggravated felonies have focused primarily on immigration status and over-representation of criminal history.

A. Immigration Status

Being an illegal alien in the U.S. prison system can create stricter circumstances of confinement and carry harsher subsequent consequences. Downward departures may be based directly on consequences due to the client's alienage. Different circuits, however, have viewed this issue differently. The D.C. Circuit in *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994), held that the harsher conditions set by the Bureau of Prisons for deportable aliens, such as ineligibility for minimum security placement and ineligibility to serve the last 10% of the sentence in a halfway house or home confinement, may justify a downward departure:

> [A] downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence.[9]

The Second Circuit upheld a downward departure to account for time spent in INS custody. *United States v. Ogbondah*, 16 F.3d 498 (2d Cir. 1994).[10]

Attempts to use the gross negligence of INS in misinforming defendants of the penalties for subsequent re-entries have been unavailing. *E.g. United States v. Smith*, 14 F.3d 662 (1st Cir. 1994). Even though INS told the defendants they only faced a two-year sentence, and not 15 years as aggravated felons, the First Circuit held equitable relief through departures inappropriate.

B. Criminal History

In *United States v. Cuevas-Gomez*, 61 F.3d 749 (9th Cir. 1995), the Ninth Circuit granted a downward departure because the criminal history score of the aggravated felon over-represented his criminal history. Thus, for aggravated felons who get 16 levels added to their base offense level to take them to level 24 in addition to having points added to their criminal history for the same prior felony, there may be some leeway in the guideline scheme to level the landscape for fairness. The Second Circuit, however, rejected such over-representation as a valid basis for a downward departure. In *United States v. Polanco*, 29 F.3d 35 (2d Cir. 1994), the court held that the disparity between the 16-level enhancement and the seriousness of the underlying conviction was not a ground for departure. This was re-affirmed in *United States v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995), where the Second Circuit rejected a departure even though the defendant's deportation occurred three years after his drug conviction, his attempted reentry was only to visit his family, and there was little threat of recidivism.

VI. Grouping of Counts in Immigration Cases

Many times aliens are charged with several immigration-type crimes. For instance, the alien may be charged not only with re-entry after deportation, but also with making false claims to United States citizenship. Under §3D1.2, immigration offenses involving "substantially the same harm" are to be grouped. The grouping is appropriate since the offense usually involves the same victim or transaction, consists of a common scheme or plan, is a characteristic of another guideline offense, or is continuous in nature. In some situations the re-entry offense is connected to a non-immigration offense. Sometimes it may be advantageous to plead to an offense other than the immigration crime. For instance, the offense level could well be lower.

Grouping can also result in a higher sentence if the various offenses amount to a higher guideline range. In *United States v. Moreno-Hernandez*, 48 F.3d 1112 (9th Cir..1995), the defendant was convicted of several alien smuggling offenses and illegal re-entry after deportation for a felony. Even though at trial the government failed to move that the felony be considered aggravated, at sentencing it met this proof. The appellate court upheld the subsequent sentence combining all counts except the re-entry count, which was run consecutively.

In plea bargaining, it is vital to be aware of the offenses that will be grouped, and the effect of the grouping. A plea to felon re-entry, instead of an aggravated felon re-entry, will not help the defendant if it is run consecutive to either grouped, or non-grouped, counts. Rather, it must be "the combined offense level, not the offense level applicable to the individual counts, that is used to determine not only the total punishment but the appropriate routine for each count." § 5G1.2.

VII. Supervised Release

Many times persons who re-enter after deportation are serving their term of supervised release for a prior charge of re-entry after deportation or other immigration offense. Generally speaking, Chapter 7 of the guidelines provides that violations of supervised release should run concurrently to any sentence the defendant receives on the new charge. However, the practicalities of imposing such a sentence make it easier for the parties to simply agree to run the time concurrently. Because Chapter 7 is a policy state-

ment, it is not binding upon the court and therefore permits such a solution.

On this point, however, the Antiterrorist and Effective Death Penalty Act of 1996 seems to have changed the law and would now seem to *require* the violation for supervised release time run consecutively. This Act could well be overturned or superseded on this point.

VIII. Conclusion

The drastic penalty for aggravated felons fails to consider the appropriateness of the 16-level adjustment, which is based solely on the nature of the alien's criminal history rather than the actual prior sentence imposed. This adjustment undermines the supposed proportionality of the guidelines and creates great disparity. Fairness and appropriateness of such sentences are nowhere addressed in the guidelines.[11]

NOTES

[1] These efforts are especially needed now. Recent law enforcement initiatives targeting immigration crimes have led to a corresponding rise in aggravated felon re-entry prosecutions. These have caused a crisis for those border districts bearing the brunt of the increase. For example, in the District of Arizona, the government has added close to 400 new INS agents in its two major initiatives against border related immigration crime, "Operation Safeguard" and "Operation Hardline." As a result, in January 1996, the Tucson section of the Border Patrol made over 40,000 arrests, compared to 20,000 the previous January. Caseloads in the Tucson Federal Public Defender's Office were almost 75% higher than over the same period the previous year.

[2] Deportation is a civil proceeding. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (civil action even though the proceedings may result in "loss of both property and life; or all that makes life worth living.")

[3] Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

If more than one applies, use the greater:

(1) If the defendant previously was deported after a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels.

(2) If the defendant previously was deported after a conviction for an aggravated felony, increase by 16 levels.

[4] *See, e.g.*, §2K2.1(a)(1)(8).

[5] When Congress originally passed the Immigration and Nationality Technical Corrections Act of 1994, it grossly mis-drafted subparagraph N to state that "an offense described in section 274(a)(1) of Title 18 U.S.C. § (relating to alien smuggling) for purposes of commercial advantage" is an aggravated felony. However, § 274(a)(1) of Title 18 U.S.C. does not exist. Presumably the drafters of the Act used a citation to § 274(a)(1) of the Immigration and Nationality Act, but mistakenly also cited to Title 18 of the United States Code, which relates to criminal matters. Thus, the amendment to subparagraph N of the Anti-Terrorism Act with its effective date of October 25, 1994, relating to the Immigration and Nationality Technical Corrections Act of 1994, is an attempt to correct a blatant mistake.

[6] For grammarians, this is a compound sentence with a dependent noun clause that should modify the whole sentence. This 15-year-limit interpretation would seem to dovetail with Chapter 4 of the federal sentencing guidelines' 15-year-limit on priors that qualify for criminal history points. Supporting such a reading would be the Rule of Lenity which states that when in doubt, find in favor of the least harsh result. *United States v. Bass*, 404 U.S. 336, 339 (1971).

[7] *United States v. Estrada-Plata*, 57 F.3d 757 (9th Cir. 1995).

[8] See Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, *supra* at 254.

[9] While other circuits have not been so generous, they still leave room for creativity. In *United States v. Restrepo*, 999 F.2d 640 (2d Cir.), *cert. denied* 114 S. Ct. 405 (1993) the Second Circuit held that pertinent collateral consequences of a defendant's alienage may form the basis for a downward departure. However, harsher conditions of confinement by the Bureau of Prisons, such additional period of confinement imposed by INS while awaiting deportation, the deportation itself, the felon's loss of his permanent resident status, and the deportation consequences of separation from his U.S. citizen wife and three children did not justify a downward departure. The Second Circuit also rejected deportation, separation from a U.S. citizen fiancé, and ineligibility to serve the last part of his sentence in a halfway house as grounds for downward departure. *United States v. Adubofoudur*, 999 F.2d 639 (2d Cir. 1993).

[10] *See also United States v. Nnanna*, 7 F.3d 420, 422 (5th Cir. 1993); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1487 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1552 (1994); *United States v. Alvarez-Cardenas*, 902 F.2d 734, 736-37 (9th Cir. 1990); *United States v. Plummer*, 1995 W.L. 548870 (E.D. PA).

[11] This article might have been introduced with a subtitle from Gilbert & Sullivan, *The Mikado or the Town of Titipa* 173 (G. Schumer ed. 1885): "My object all sublime/ I shall achieve in time—/ To let the punishment fit the crime—/The punishment fit the crime." In the same vein, we conclude with another quote from the same libretto where the Grand Inquisitor's sentiments seems to sum up the current attitude toward illegal immigrants and especially aggravated felon re-entry cases:

As some day it may happen that a
victim must be found,/
I've got a little list—
I've got a little list/
Of society offenders who might
well be underground,/ And
who will never be missed—
who never would be missed.