isomers, or salts of isomers." *See* 21 U.S.C. § 860a. Ketamine does not fall within those categories and hence is not covered under § 860a. It may be that the Commission intended to refer to § 841(g), which does cover ketamine and which carries a twenty-year statutory maximum for convictions under that particular statute. The proposed amendments addressing § 841(g) are discussed in Part II, *infra*.

II. Using the Internet to Distribute Date Rape Drugs, § 2D1.1

Section 201 of the Adam Walsh Act created a new offense at 21 U.S.C. § 841(g), prohibiting knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. The Commission has proposed three options for sentencing defendants convicted under § 841(g). Under Option One, the sentence would increase by either two or four levels for a § 841(g) conviction. Option Two would impose a four-level increase if the defendant was convicted of knowing or having reasonable cause to believe that the drug would be used in the commission of criminal sexual conduct. Option Three would impose a six-level increase and a floor of 29 if the defendant knew the drug would be used to commit criminal sexual conduct, a three-level increase and a floor of 26 if the defendant had reasonable cause to believe the drug would be so used, and a two-level increase for all other § 841(g) convictions. Issue for Comment 1 seeks input on these proposals or alternative methods.

Option One is unsatisfactory because it is overbroad and would create unwarranted disparity. This option would require an enhancement for a defendant convicted under § 841(g)(1)(B) of using the Internet to distribute a date rape drug to an unauthorized purchaser. However, distributing drugs to unauthorized purchasers is the basis of every distribution charge. Section 2D1.1 already results in substantial sentences for unauthorized sales of date rape drugs over the Internet,[1] including a two-level enhancement for distributing a controlled substance through mass marketing over the Internet. *See* 2D1.1(b)(5). Accordingly, sentences under § 841(g)(1)(B) should not be subject to additional enhancement, particularly in light of the Commission's priority of simplifying the Guidelines.

Option Three is unsatisfactory because it too would require a two-level enhancement for distributing a date rape drug to an unauthorized purchaser under § 841(b)(1)(B). In addition, Option Three's increases and minimum offense levels would result in excessive sentences and unwarranted uniformity. A defendant in Criminal History I convicted under § 841(g)(1)(A) of selling even one pill classified as a date rape drug or one unit of a drug analogue would be subject to a minimum offense level of 26 (63-78 months in CHC I) or 29 (87-108 months in CHC I). A minimum sentence of 5 ¼

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[1] *See, e.g.*, DEA Press Release, *Missouri Mother and Son Are Sentenced to Lengthy Prison Terms on Drug Conspiracy Charges* (Jan. 30, 2004) (reporting sentences of 168 months and 100 months for selling date rape drugs over the Internet), available at http://www.dea.gov/pubs/states/newsrel/stlouis013004.html.

to 9 years for distributing a single unit of a drug over the Internet would overstate the seriousness of the offense.

Defenders' Proposal. We propose that the Commission adopt a variant of Option Two, which would not add an enhancement for defendants convicted under § 841(g)(1)(B) for distributing a date rape drug to an unauthorized purchaser. For defendants who fall under the "criminal sexual conduct" aspect of § 841(g), we propose that the Commission use the following language:

> If the defendant was convicted under § 841(g)(1)(A), increase by 2 levels.

A 2-level increase would sufficiently reflect the increased culpability of defendants convicted under § 841(g)(1)(A). *Accord* U.S.S.G. § 2D1.1(e)(1) (requiring 2-level increase under § 3A1.1(b)(1) where defendant committed or attempted to commit a sexual offense against another by distributing a controlled substance to that individual). Any defendant who distributed the drug by using the Internet to solicit a large number of purchasers would receive an additional 2-level increase under § 2D1.1(b)(6).

If, however, the Commission wishes to distinguish between the greater culpability of a defendant who acted with knowledge and the lesser culpability of a defendant who acted "with reasonable cause to believe," we propose the following language:

> If the defendant was convicted under § 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 3 levels, or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level.

Again, the additional enhancement under § 2D1.1(b)(6) would apply if the defendant distributed the drug by using the Internet to solicit a large number of purchasers.

The Commission should not provide a cross reference to the criminal sexual abuse guidelines for defendants convicted under 21 U.S.C. § 841(g)(1)(A) first, because a defendant convicted under 21 U.S.C. § 841(g)(1)(A) did not commit criminal sexual abuse, and second, because defendants should not be sentenced for crimes of which they were not convicted.

Additional Issues. Ketamine is listed along with gamma hydroxybutyric acid ("GHB") and flunitrazepam in § 841(g)'s definition of a "date rape drug." Accordingly, selling ketamine over the Internet in violation of § 841(g) is subject to a 20-year statutory maximum. Ketamine, however, is a Schedule III drug, which is different from both GHB (Schedule I) and flunitrazepam (Schedule IV[2]). As such, unlike GHB and flunitrazepam, the number of levels added in the Drug Quantity Table is capped at 20:

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[2] Although flunitrazepam is a Schedule IV substance, it is treated the same as a Schedule I depressant under 21 U.S.C. § 841(b)(1)(C) and is subject to significantly higher offense levels under U.S.S.G. § 2D1.1.

The Commission should not remove this cap for ketamine. When Congress enacted § 841(g), it was fully aware that ketamine is a Schedule III drug and that guideline sentences for ketamine-related offenses are capped. Congress has been very clear when it intends to generally increase penalties for offenses involving date rape drugs. It did not do so here.

In 1996, Congress amended 21 U.S.C. § 841(b)(1)(C)[3] to include flunitrazepam, which increased the statutory maximum to twenty years, or thirty years with a prior felony drug conviction. *See* Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807, 3807-08 (Oct. 13, 1996). At the same time, Congress directed the Commission to ensure "that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses." *See id.*

In 2000 and 2003, Congress took identical steps with respect to GHB. *See* Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106-172, 114 Stat 7, 9 (Feb. 18, 2000). First, it amended § 841(b)(1)(C) to include GHB, thereby increasing the statutory maximum for GHB offenses to twenty years (or thirty with a prior), and directed the Attorney General to reclassify the drug. *See id.* at 8-9. Then it directed the Commission to "consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them." *See* Illicit Drug Anti-Proliferation Act of 2003, Section 608(e)(2), Pub. L. 108-21, 117 Stat 650, 691-92 (April 30, 2003).

Here, when passing § 841(g), Congress did not indicate any dissatisfaction with ketamine sentences generally, nor did it amend § 841(b)(1) to provide for harsher treatment of ketamine. Ketamine stills falls under § 841(b)(1)(D), which carries a statutory maximum of five years' imprisonment (ten with a prior). *See* 21 U.S.C. § 841(b)(1)(D). Congress did not direct that ketamine be reclassified as a Schedule I or Schedule II substance, which would have had the effect of both increasing the statutory maximum under § 841(b)(1) and removing the 20-level cap (which applies only to Schedule III drugs). And it did not issue any directive to the Commission to review or amend the ketamine guidelines.

The federal drug laws have been repeatedly criticized as the primary cause of prison overcrowding. A large part of that criticism has been focused on the Guidelines, which often require lengthy sentences for nonviolent offenders, which are not connected to the risk of recidivism or dangerousness. As a matter of policy, the Commission should not raise drug sentences when there is no directive and no need to do so. That general principle is particularly applicable here, where Congress has explicitly increased sentences for other date rape drugs but has said nothing about raising ketamine sentences.

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[3] The offense levels set forth in § 2D1.1(c) are based on the statutory penalties for the drug as set forth in 21 U.S.C. § 841(b)(1). *See* U.S.S.G. § 2D1.1 application note 10 ("The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences.").

Even if removing the cap for convictions under § 841(g) involving ketamine were justified, which it is not, there is no basis for raising ketamine sentences across the board, as the proposed amendment would do. A simpler and more rational approach would be to withdraw the proposed amendments to the Drug Quantity and Drug Equivalency Tables, and instead add an application note to § 2D1.1 stating:

> In any case in which a defendant is convicted of violating 21 U.S.C. § 841(g) by distributing ketamine, the Drug Quantity Table levels and quantities for Schedule III substances should not be used for purposes of determining the offense level. Instead, ketamine should be treated under the Drug Quantity Table as though it is a Schedule I or II Depressant for purposes of determining the offense level for the § 841(g) violation.

We emphasize, however, that even this step is unnecessary. We oppose any change to the ketamine guideline.

III. Crack/Powder Cocaine Disparity

The Commission has offered to receive additional comments on the proper approach to remedying the disparate treatment of crack and powder cocaine under the Guidelines. We continue to urge the Commission to amend the Guidelines to remove the unwarranted and unjustifiable 100:1 ratio for cocaine and crack sentences, and to replace it with a retroactive guideline establishing a 1:1 ratio that ensures equal penalties for equal amounts of crack and powder cocaine.[4] In addition, we urge the Commission to follow Judge Sessions' suggestion and add a downward adjustment or a recommended downward departure for successful completion of a drug treatment program.

There is no justification for maintaining the disparity between crack and powder cocaine sentences. The disparity has had a detrimental effect on families and communities and increased exponentially the costs of our criminal justice and penal systems. As stated by Senators Kennedy, Hatch and Feinstein in a recent amicus brief to the Supreme Court, "the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine - a ratio currently incorporated in the sentencing guidelines - demonstrate that the guidelines do not always reflect objective data or good policy." *See* Br. of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein, *Claiborne v. United States*, 2007 WL 197103, *21

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[4] We incorporate by reference all of the letters and testimony provided by us to the Commission in the past year in support of our position on this issue. *See* Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Follow-Up on Commission Priorities (Nov. 27, 2006); Testimony of A.J. Kramer Before the United States Sentencing Commission Public Hearing on Cocaine and Sentencing Policy (Nov. 14, 2006); Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 (July 19, 2006); Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Re: Report on Federal Sentencing Since *United States v. Booker* (Jan. 10, 2006).

(Jan. 22, 2007). Noting that the crack-powder disparity would be a principled basis for a sentence below the guideline range, the Senators stated, "Attention to this problem . . . is long overdue." *Id.* at **27-28. It is time for the Commission to repair this injustice.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,

JON M. SANDS
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CHAMBERS OF
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JUDGE

March 30, 2006

Via Federal Express

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Dear Judge Hinojosa and Members of the
United States Sentencing Commission:

I am writing to indicate my respectful disagreement with parts of the proposed amendments to the Immigration guidelines. I apologize for missing the March 28th deadline. I had mistakenly thought that March 31st was the deadline, and learned of my error when I reviewed the web site last night. I hope you will be willing to consider my concerns and

observations, notwithstanding that this letter missed your deadline by a few days. Further, I wish to emphasize that I make these remarks in my individual capacity as an interested federal district judge, and not as a representative of any group.

I. § 2L1.2(b)(1) Enhancements Based on Prior Convictions

My strongest concerns relate to the proposed amendments to § 2L1.2, which addresses the offense of illegal reentry by an alien who had previously been deported. Section 2L1.2 provides for a base offense level of 8, and then enhances that level based on the seriousness of the criminal conviction that preceded or led to the alien's deportation. The proposed amendment would, as a practical matter, substantially reduce the sentences of those deported illegal aliens who have committed the most serious offenses and, who, by their reentry into this country in violation of a clear command not to do so, evidence their continuing disdain for our law and pose the greatest continuing threat to the American communities in which they reside. Respectfully, I cannot understand why such a result would be considered to be a good development.

Specifically, the present Guideline awards a 16-level enhancement for a deported alien who had incurred a felony conviction for one of seven serious, enumerated offenses.[1] Thus, for example, an alien who has

[1] These offenses are a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, an alien smuggling offense, and a drug trafficking offense for which the defendant received at least a 13-month sentence. § 2L1.2(b)(1)(A).

stolen back into this country after being deported, and after having sustained a conviction for rape, or child molestation, or robbery, or attempted murder, or aggravated assault, or a terrorism offense, in his previous sojourn here, will receive a total offense level of 24 (8+16) and, postulating a 3-level reduction for acceptance of responsibility (for a final offense level of 21), and a Criminal History Category II, the sentencing range would now be 41-51 months.

The proposed amendments, however, would not necessarily confer on such a defendant the above 16-level enhancement. Rather, unless the alien defendant had actually received at least a 13-month sentence [Option 1] or a 2-year sentence [Option 2] for one of his prior convictions, the 16-level enhancement would not apply. Instead, the defendant would receive only an 8 or a 12-level enhancement, depending on the iteration adopted. The theory, apparently, is that by insisting that at least a 13-month [2-year] sentence had been previously imposed for one of the defendant's prior crimes, the Guidelines insure that the prior crime was actually a serious offense.

Unfortunately, as anyone who has dealt with overburdened state criminal justice systems knows, the latter rarely impose sentences on illegal aliens that reflect the seriousness of the crimes committed. In my experience, those systems are revolving doors, and the defendant often receives a short, time-served sentence, no matter how serious and repeated are his crimes. In fairness, many local governments have been beleaguered by many forces, including the huge numbers of illegal aliens

in their communities and the corresponding strain on the budgets of public health services, schools, and law enforcement that this influx has caused. Perhaps, these local entities have concluded that it is the job of the federal government to remove people who are here illegally and that the locals should not have to expend their scarce resources housing criminal aliens in state-supported jails. Whatever the reason, and with no intention to cast blame, the fact is that the sentence imposed on such an alien is rarely going to be a reliable proxy for the seriousness of the crime or the danger that the alien's continued presence in the country poses.[2]

In addition, the premise reflected in the proposed amendment is rather counterintuitive: an alien who was fortunate enough to receive a light sentence for his assault, robbery, or child molestation conviction continues to be able to utilize that generosity in perpetuity to receive more lenient treatment for future crimes.[3]

Although it appears that a desire to lower sentences for illegally reentering aliens is the primary impetus behind the proposed amendment,

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[2] In the many prosecutions before me of defendants for illegal reentry, the defendant has typically been discovered in a local jail, having been arrested for committing another crime since his illegal reentry. Indeed, while I may have had some cases that do not meet this general rule, I cannot specifically recall them.

[3] I recognize that the criminal history sections operate on this premise as well, but, for a variety of reasons, the criminal history provisions are not truly analogous to the enhancement provision in 2L1.2. For example, an underrepresentation of criminal history in the criminal history calculation will have much less impact on the resulting sentence than will an undercalculation of prior convictions in 2L1.2, because the enhancement for prior convictions is what powers that guideline.

the synopsis accompanying the proposal suggest another reason to abandon the "categorical approach." Specifically, the synopsis indicates that the "categorical analysis" "is often complicated by lack of documentation, competing case law decisions, and the volume of cases." I don't really understand what this sentence means, as I do not believe our district has experienced any problems applying the guideline. While we are not a border state, we have had a goodly number of these cases.

If there are competing case law decisions, the Commission should settle those conflicts. If there is a lack of documentation, that lack will exist no matter what methodology is used. Moreover, an absence of documentation supporting the enhancement will mean that the defendant will not receive the enhancement anyway. If there is a high volume of cases, there will still be a high volume of cases after the amendment is passed. In short, the explanation does not seem sufficient to me to warrant making the change.

Likewise, the Interim Staff Report indicates that there is some support for lowering the immigration guidelines because some border districts have "fast-track" programs that allow the imposition of substantially lower sentences to pleading defendants, and other districts do not have these sanctioned programs. I do not see this phenomenon as warranting a reduction of what should otherwise be an appropriate guidelines sentence, however. Admittedly, I am not totally clear on the thinking behind "fast-track" programs. If one has a lot of a particular kind of crime in a geographic area, lowering the sentence for that

offense will not likely reduce its incidence. To the contrary, criminals can rationally be expected to flock to places where the sentences are lower. Presumably, the basis for these programs is not principled, however, but pragmatic: there are so many immigration cases, and the border districts have been so inadequately supported and staffed, that they need some carrot to encourage the hundreds of illegal reentrants who appear before them to quickly dispose of their cases.

Yet, to work, that principle means that the border districts have to have some differential between the sentences that they impose under a fast-track plan and the sentences that would otherwise be imposed if the defendant went to trial. If the Guidelines sentencing ranges are lowered across the board, then necessarily the fast-track districts will have to further lower the sentences that they impose on their alien defendants, to make a guilty plea worthwhile for the defendant, until one reaches a point where the crime of reentry, itself, has been effectively decriminalized. In short, if, on a national level, everyone tries to emulate the border districts, it will be a race for the bottom, in terms of sentencing ranges.[4]

II. Making a Distinction Between a Probationary Sentence and Other Sentences, for Purposes of an Enhancement

Whatever the Commission decides to do regarding the "categorical approach" versus this new proposed approach, I implore you not to make

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[4] In the Northern District of Georgia, we do not need such an incentive. In thirteen years on the bench, I have only had one defendant go to trial on an illegal reentry charge. Everyone else pled guilty.

a distinction between a probationary sentence and other sentences, for purposes of pegging the level of an enhancement, because such a distinction is nonsensical. That is, under the proposed iterations, a reentering alien who had previously gotten a 10-day time served sentence for an assault would get a 12-level bump as a result of this conviction. Yet, if this same defendant had happened to see a judge immediately upon his arrest, and had instead gotten a probationary sentence (which, going forward, is effectively what a time-served sentence is), that defendant would receive only an 8-level bump. That a sentence is a probationary sentence versus a sentence for a relatively short term tells one nothing about the severity of the underlying offense. As Peter Hoffman, the principal drafter on the Commission in its early days, used to say, you might as well base the enhancement on the defendant's weight or his zodiac sign.

Moreover, to the extent one is concerned about the administrative burdens on sentencing judges, this suggestion would be very burdensome. Defendants would forever litigate this matter and, if document scarcity is a true problem, it would create a real problem in resolving this factor.

III. Suggestion

My suggestion is that the Commission defer doing anything radical this year in terms of changing the enhancements for illegal reentry. Before proceeding on the new approach for enhancements set out in the proposed amendments, I think that it would be useful to run the data to

see how much sentences would be shortened under the Guidelines. Moreover, Congress may well be enacting new immigration laws this year, and waiting until the dust settles might be prudent. However much reasonable minds might differ about the wisdom of this change, from a policy point of view, there can be little disagreement that it would not be helpful for there to be a perception that the Commission is lowering sentences for the most dangerous reentering illegal aliens.

It may well be that the guideline, as written, sometimes sweeps too broadly. Likely, there are cases where there is an isolated 20-year old conviction or other substantially mitigating circumstances as to the facts underlying the conviction. If that is so, I believe that the Commission should collect those anecdotes and see if it can determine a way to carve out those situations, either through departure language or language in the guideline, itself. Yet, throwing out the enhancement, itself, seems to me to be too broad-brushed a way to handle a factor that could suggest great dangerousness on the part of many defendants. Further, it seems to me that the Commission should consider creating an enhancement based on repeated reentries. Many of my defendants have had two or more reentry convictions. Such conduct suggests a dogged determination to violate the law and should be accounted for by the Guidelines.

Thank you for considering my comments. I offer them in a constructive spirit. You have an enormous responsibility in these post-*Booker* days and are an institution that all look to in the upcoming

debates. I greatly respect the work, time, and thought that you all bring to the task. Please let me know if I can ever be of service.

Sincerely,

Julie E. Carnes
U.S. District Court Judge

JEC/ghh

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March 2, 2007

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Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

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

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

II. § 2L1.2 (Illegal Reentry)

A. Options 1 through 5

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

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

- **The term "aggravated felony" is over-broad and ambiguous, and its use would drastically increase sentences for all manner of individuals convicted of non-violent offenses and even misdemeanors. Indeed, current practice reveals that even the Department of Justice believes that lower sentences are appropriate for most of these individuals.**

- **Option 5 would be unconscionable and probably unconstitutional in that it places the burden of proof on the party least able to sustain it.**

- **Option 4 would appear to be the least ill-advised with certain modifications, including increasing the requisite sentenced imposed for the 16-level enhancement and limiting the definition of "crime of violence."**

- **We would support an amendment that would subject prior convictions used to increase a defendant's offense level to the same remoteness rules in Chapter 4.**

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

B. Option 6

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Over-representation of criminal history

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

- Client was convicted at age 17 of aggravated assault for punching a fellow high school student and breaking his nose. In the following 15 years, his only violations of the law were for illegal reentry. The 16-level enhancement applied.

- Client was convicted of robbery for pushing the security guard who stopped him for shoplifting. Although a seven-year sentence was imposed, he only served a few months. The 16-level enhancement applied.

III. Issues for Comment

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

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

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

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

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

Sincerely,

JON M. SANDS
Federal Public Defender
District of Arizona

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
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March 16, 2007

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
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Washington, D.C. 20002-8002

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

Dear Judge Hinojosa:

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

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

[Option 7 (New):

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

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

(A) a prior felony conviction for a national security offense or terrorism offense, increase by **20** levels;

(B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;

(C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by **12** levels;

(D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;

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

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

Deleted: i

Deleted: of at least 12 months

Deleted: of at least 12 months or three prior convictions each resulting in a sentence of imprisonment of at least 90 days

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Deleted: [any other sentence of imprisonment][

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Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

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

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

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

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

(i) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.*

(ii) *"National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).*

(iii) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.*

(vii) *"Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).*

3. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.*

4. *Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.*

5. *Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

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

Deleted: *i*

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

Deleted: *iv*

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

Deleted: *vi*

Deleted: *any offense involving, or intending to promote,*

Deleted: .

Deleted: *that term is*

[Option 8 (New):

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

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

(A) a prior felony conviction for a national security offense or terrorism offense, increase by **20** levels;

(B) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (ii) two prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;

(C) a prior felony conviction resulting in a sentence of imprisonment of at least 24 months, increase by **12** levels;

(D) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;

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

Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

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

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

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*

(iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

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

(i) *"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.*

(ii) *"National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).*

(iii) *"Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.*

(vii) *"Terrorism offense" means a "Federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5).*

3. *Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.*

4. *Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.*

5. *Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

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March 30, 2007

Honorable Ricardo H. Hinojosa
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One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: ***Unlawfully Entering or Remaining in the United States***

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to propose an Option 9 for §2L1.2. Since we proposed Option 8, H.R. 1645 was introduced in the House. Its penalty structure is identical to that in S. 2611, passed by the Senate last year. If Congress passes an immigration bill, it appears there will not be compromise on the penalty structure. As explained in our letter dated March 29, 2007 at pp. 2-4, the penalty structure in the pending legislation is less severe and less complex than DOJ's Option 7. It is also less severe than our Option 8.

If the Commission amends §2L1.2 before Congress enacts legislation, the guideline should at least be consistent with the legislation that is pending. We therefore offer Option 9.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

(170)

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

Option 9:

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

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) (Apply the greatest):

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

(A) (i) a prior felony conviction resulting in a sentence of imprisonment of at least 60 months; or (ii) three prior felony convictions each resulting in a sentence of imprisonment exceeding one year and one month, increase by **16** levels;

(B) a prior felony conviction resulting in a sentence of imprisonment of at least 30 months, increase by **12** levels;

(C) a prior felony conviction resulting in a sentence of imprisonment exceeding one year and one month, increase by **8** levels;

(D) a prior felony conviction not covered by subdivisions (A) through (C) or any three prior convictions each resulting in a sentence of imprisonment of at least 60 days, increase by **4** levels.

Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

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

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

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued

after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

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

(i) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.

(ii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.

2. Related Cases.—Sentences of imprisonment are counted separately if they are for offenses that are not considered "related cases", as that term is defined in Application Note 3 of §4A1.2.

3. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

national
IMMIGRATION
project
of the National Lawyers Guild

NCLR
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March 29, 2007

Honorable Ricardo Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, the National Immigration Project of the National Lawyers Guild (National Immigration Project) and the National Council of La Raza (NCLR) provides comments to the proposed amendments relating to immigration that were published on January 30, 2007.

I. General Concerns

1. Proposed options are inconsistent with pending legislation

Without any apparent justification, the proposed amendments would substantially increase the potential prison sentences for noncitizens convicted of illegally reentering the United States. There is no new legislation, or authoritative research to justify these harsher amendments. Moreover, all of the published options are out of sync with current legislative proposals. The Sentencing Commission should refrain from publishing a new Guideline, which may well be out of date very soon.

Legislation pending in the House (H.R. 1645) and the Senate (S. 2611) provides maximum statutory sentences of 20, 15, 10 and 2 years for illegal re-entry. Under section 236 of H.R. 1645 and section 207 of S. 2611, a defendant cannot receive a 20-year sentence unless she or he has:

-- a felony conviction for which a court sentenced the defendant to at least sixty months,
-- 3 felony convictions, or
-- a conviction murder, rape, kidnapping, a felony relating to slavery or peonage, or a felony relating to terrorism.

2. Sentencing Commission should republish notice to allow meaningful opportunity for public comment

Section 994(x) of Title 28 U.S.C.A. subjects the United States Sentencing Commission to the notice and comment requirements of the Administrative Procedures Act. 5 U.S.C.A. § 553. Under 5 U.S.C.A. § 553, subject to exceptions that do not apply in this instance, an agency must publish proposed rules in the Federal Register and give the public a meaningful opportunity to comment. The Sentencing Commission is considering an additional Option 7 for U.S.S.G. § 2L1.2 that the Commission did not publish in the Federal Register. The Commission did provide the National Immigration Project and NCLR with a copy of Option 7, for which we are grateful. However, the good graces and the helpfulness of the Commission staff cannot compensate for a failure to publish Option 7 in the Federal Register. Principles of good government and the obligations under 5 U.S.C.A § 553 made binding on the Sentencing Commission by 28 U.S.C.A. § 994(x) require that the Commission not amend 2L1.2 until it gives the entire public notice and the opportunity to comment on Option 7 and any other amendments that the Commission is considering. The National Immigration Project and NCLR are not offering comment on Option 7 because to do so would be inconsistent with the letter and spirit of 28 U.S.C.A. § 994(x) and with principles of good government.

3. Existing and proposed penalties are inappropriate for seriousness of the offense

The proposed and existing penalties for unlawfully entering and remaining in the United States are disproportionate to the seriousness of the offense. Other federal offenses that enhance a sentence based on a defendant's criminal record are much less severe than the proposed options under U.S.S.G. § 2L1.2. For example, a felon in possession of a firearm receives an enhancement of six levels for having a prior conviction for a crime of violence, U.S.S.G. § 2K2.1(a)(4)(A), as opposed to an eight or sixteen level increase under Options 1-4 of U.S.S.G § 2L1.2.

The disproportionately harsh consequences are especially problematic because the definition of aggravated felony under 8 U.S.C. § 1101(a)(43) is so broad and overarching that it includes offenses that are neither aggravated nor felonies. The definition of aggravated felony includes federal and state nonviolent offenses and individuals who serve no prison time whatsoever. *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (treating as an aggravated felony a conviction for misdemeanor petty theft with a one-year suspended sentence). Therefore, defendants will be included under these harsh Guidelines who are not guilty of serious criminal offenses.

4. Sentence served is a more reliable indicator of seriousness of predicate offense than sentence imposed

If the Sentencing Commission were to use the sentence a defendant served rather the sentence a court imposed, it would be better able to sentence harshly those defendants who warrant more serious sentences. Using the time a defendant served is more consistent with the overall sentencing purposes of 18 U.S.C.A. § 3553(a)(2) than using sentence imposed. A common thread among the great variety of state sentencing schemes is that the time a defendant actually serves is the best measure of the seriousness of her or his offense. As a result, using the sentence served would reduce the uneven impact that flows from the variety of state sentencing schemes and promote a more uniform federal treatment of defendants charged with illegal reentry. This approach also would be consistent with the Supreme Court's view in *Lopez v. Gonzales*, 127 S.Ct. 626 (2006) that Congress did not want a state's label to decide a federal concern.

II. General Concerns Regarding Commentary and Application Notes

The Commentary under the United States Sentencing Guidelines has the force of law unless contrary to the Constitution, a statute, or inconsistent with the Guideline that it interprets. *Stinson v. United States,* 508 U.S. 36 (1993). As a result, the National Immigration Project and NCLR note its concern regarding the proposed Commentary to U.S.S.G. § 2L1.2, because it includes material, which does not deserve the force of law, and thus should not be included in the Commentary.

1. Provisions of Federal Juvenile Delinquency Act should govern treatment of persons under 18

The proposed Commentary to all six options to U.S.S.G. includes offenses committed by a person under 18 if the law of the jurisdiction treated the defendant as an adult. The Sentencing Commission should heed the reasoning behind the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), and not make an enhancement dependent on the vagaries of local law. The National Immigration Project and NCLR suggest that the test be whether the defendant would have faced mandatory treatment as an adult under the Federal Juvenile Delinquency Act. Using a federal test would avoid disparities based on state law and promote uniformity.

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2. Application notes should include downward departure considerations

The proposed options lack provisions that take into account the motivation for a substantial number of reentering noncitizens in returning to the United States, including such factors as: (1) extended length of residence in the United States, (2) the presence of family members in the United States who need them, and (3) the fear of persecution in their home country. Many reentering noncitizens are not being motivated by a desire to commit new crimes in the United States. Courts have recognized that a reduction in sentence is appropriate for defendants who are culturally assimilated or who return because of family medical needs. *See, e.g, United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001) (recognizing availability of downward departure for cultural assimilation); *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998) (same); *United States v. Singh*, 224 F. Supp.2d 962 (E.D. Pa. 2002) (granting downward departure for defendant who reentered to visit his dying mother).

III. Specific Comments to Proposed Options

1. Continued use of categorical approach

Options 1-4 would still require the categorical approach. The Supreme Court created the categorical approach in connection with the Armed Career Criminal Act. In 2007, the Supreme Court endorsed this approach to establish whether an offense is an aggravated felony. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007). The term "aggravated felony" means the same thing whether used in the civil or criminal contexts. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004); *Lopez v. Gonzales*, 127 S.Ct. 626 (2006). According to the Fifth Circuit, "*Lopez* ineluctably applies with equal force to immigration and criminal cases." *U.S. v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir. 2007).

The synopsis to the immigration proposal raises the concern that the "lack of documentation" makes difficult implementation of the existing 2L1.2. 72 FR 4372, 4393 (Jan. 30, 2007). While it may make sense to switch from a Guideline that is based on proving the existence of an aggravated felony to a Guideline based on the time a defendant served for her or his predicate offense, the lack of documentation is not a good reason on which to base a switch.

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In the United States' criminal justice system, one price of having the rule of law paramount is that the lack of evidence sometimes means the truly guilty go unpunished. The Supreme Court has historically emphasized that justice is best served by promoting respect for the rule of law even if it is more difficult for prosecutors or law enforcement officials to obtain a confession, conviction, or an appropriate sentence. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (preventing interrogation of arrested person until right to counsel waived); *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding race-based preemptory challenges) *Blakely v. Washington*, 542 U.S. 296 (2004) (requiring proof beyond a reasonable doubt of any fact, other than recidivism, that increases a defendant's punishment). That the categorical approach is the Court's preferred method should be a sufficient response to the government's concerns that the proof requirement to establish an enhancement is too exacting.

2. Option five is fundamentally unfair

Section 1326(b) of Title 8 U.S.C.A adds punishment for having an aggravated felony or three misdemeanor convictions involving crimes against the person or drugs or both or a felony other than an aggravated felony. The Supreme Court has repeatedly put the burden on the government to prove an enhancement. *See Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). In *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007), the Supreme Court applied the *Shepard* and *Taylor* categorical approach to whether a noncitizen was deportable for an aggravated felony. In *Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004), the Court made clear that the test for whether an offense is an aggravated felony is the same, regardless of whether the term is interpreted in the context of a civil removal proceeding or a criminal sentence enhancement:

> Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

In *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), the Supreme Court abrogated both illegal reentry cases and civil immigration cases. Taken together, *Leocal*, *Duenas-Alvarez*, and *Lopez* mean that the Supreme Court intends for principles in *Shepard* and *Taylor* to apply to sentencing enhancements under 2L1.2. Since Option 5 puts the burden on the defendant to get a lower sentence, it is inconsistent with Supreme Court

law. In addition, it is inconsistent with notions of fundamental fairness to put the burden on the defendant, who is the least able to meet the burden.

IV. Issue for Comment

The United States Sentencing Commission specifically seeks input regarding what changes, if any, the Commission should make to U.S.S.G. § 2L1.2 in light of *Lopez v. Gonzales*, 126 S.Ct. 625 (2006). The National Immigration Project and NCLR urges the Sentencing Commission to treat differently a defendant who has an aggravated felony based a state misdemeanor. For purposes of the existing 2L1.2 or proposed Options 1-4, which maintain an eight level enhancement for any aggravated felony, the Commission should include in the Commentary an exception for a defendant whose aggravated felony conviction is a state misdemeanor.

In *Lopez*, the Court acknowledged that defendants convicted of a misdemeanor under state law might have an aggravated felony for purposes of 8 U.S.C.A. § 1101(a)(43)(B). *Lopez v. Gonzales*, 126 S.Ct. 625, 633 (2006). In a post-*Lopez* decision, the Southern District Court for the District of Texas has held that a state misdemeanor can constitute an aggravated felony. *U.S. v. Castro-Coello et al*, 2007 WL 397496 (S.D. Tex. Feb. 6, 2007) (treating second possession conviction as a recidivist offense despite lack of equivalent notice to that provided under 21 U.S.C.A. § 851). An eight level increase for someone with a misdemeanor prior as the predicate offense is disproportionate to the seriousness of the offense.

Under principles of "fair notice," this exception should apply to all misdemeanor aggravated felony convictions, not just those under *Lopez*. Should the Commission decide not to exclude misdemeanor offenses completely from 2L1.2(b), then the National Immigration Project and NCLR suggests that the Commission provide a reduction of six levels for any misdemeanor that is treated as an aggravated felony.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,

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[179]

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Re: § 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director of Bureau of Prisons (Policy Statement)

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.[1]

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating that the Commission:

> shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

[1] We thank Steven Jacobson, AFPD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the district court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.[1] However, Congress also recognized that post-sentencing developments could provide appropriate grounds to reduce a sentence. Using § 4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments. This section of the SRA is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

> The court may not modify a term of imprisonment once it has been imposed except that-
>
> (1) in any case-
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-
>
> (i) extraordinary and compelling reasons warrant such a reduction;.

Congress also mandated that the Sentencing Commission, also created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

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[1] See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

The legislative history of these provisions demonstrates the Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of the legislative history, said, in pertinent part:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment. . . .the bill . . . provides . . . . for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.[2]

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.[3]

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[2] S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

[3] See, Mary Price, The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001); John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions "in particularly meritorious or unusual circumstances which could not have reasonably been foreseen by the court at the time of sentencing," including "if there is an *extraordinary change in an inmate's personal or family situation* or if an inmate becomes severely ill." 28 C.F.R. § 572.40 (1980) (emphasis added); *see* 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, "extraordinary and compelling circumstances," but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fe. Reg. 1238 (Jan. 7, 1994); *see* USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing "the standards to evaluate the early release remain the same," though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department's standards for filing such motions:

> The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department's standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

> the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed "extraordinary and compelling reasons" to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would "more accurately reflect our authority under these statutes and our current policy," the rules rename the section "Reduction in Sentence for Medical Reasons," and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP's proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

> shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe "extraordinary and compelling" beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem. Declaring anything the Commission does to define "extraordinary and compelling reasons" as a *dead letter* if it is broader than the government's chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of "extraordinary and compelling reasons," the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current "Issue for Comment" are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation "alone" is not sufficient).

We submit that the Commission should take a "combination" approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons' role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,

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March 29, 2007

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Re: ***Follow-Up on March 20 Hearing***

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to follow up on some of the issues that arose at the March 20th hearing relating to the Guideline Manual, Immigration, Criminal History, Mandatory Minimums, and Sentence Reduction.

I. The Guideline Manual

The Guideline Manual should correctly represent current sentencing law. As the Commission has said, *United States v. Booker*, 543 U.S. 220 (2005) is "the most significant case affecting the federal sentencing guidelines system since . . . *Mistretta*." Testimony of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006. When we again urged the Commission to amend the Manual to take the *Booker* decision into account, the response was that judges and practitioners know the law and so, apparently, there is no need for the Commission to change the Manual.

The Supreme Court announced over two years ago that the mandatory guideline system established by 18 U.S.C. § 3553(b), and echoed throughout the Guideline Manual, violated the Constitution. The Manual has yet to mention the case. This is not a matter of formality – it goes to the integrity of the Manual itself. A new practitioner reading the Manual has no way of discerning that the Guidelines no longer represent the final word on the appropriate sentence, and that 18 U.S.C. § 3553(a) is now the governing sentencing law. The Manual offers no understanding of this framework or of the advisory role of the Guidelines within it, as constitutionally mandated. To the contrary, the mandatory language of the Manual would lead one to believe, wrongly, that the

Guidelines continue to represent the sum total of appropriate considerations in any sentencing.

The Manual is not only silent about *Booker*, but in numerous instances recommends a course of action that is in direct conflict with the *Booker* decision and the Constitution. As one example, § 5K2.0 continues to rely explicitly on 18 U.S.C. § 3553(b)(1), which was excised as unconstitutional over two years ago. *See* U.S.S.G. § 5K2.0(a)(1), (c). As another, the Manual states that numerous aspects of the defendant's history and characteristics are never or not ordinarily relevant, though such matters "shall" be considered under § 3553(a)(1).

We would be happy to work with Commission staff on how to harmonize these and other guideline provisions with the state of the law post-*Booker*, as well as how and where to insert *Booker*'s holding and citation as is done with other cases in the Manual, even those the Supreme Court has since questioned, such as *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997). *See Booker*, 543 U.S. at 240 & n.4.

We would also welcome the opportunity to work with staff on improving the procedural advice set forth in U.S.S.G. § 6A1.3. *Watts*, for example, is cited for the proposition that a court may consider any information with "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3, comment., but the Court said no such thing. *See* 519 U.S. at 157. It said that a preponderance of the evidence standard is generally permissible, though a clear and convincing standard may be required under some circumstances, and said nothing to denigrate the quality of the evidence required at sentencing.

II. Immigration

Since our last communication with the Commission, we have studied the immigration legislation that is currently under consideration by Congress. Unlike the Department, which has urged the Commission to amend § 2L1.2 without waiting to hear from Congress, we urge the Commission to proceed with caution and with respect for congressional intent.

If the Commission amends § 2L1.2 this year, it must avoid promulgating a guideline that conflicts with legislation the 110th Congress is likely to enact. H.R. 1645, introduced in the House on March 22, 2007, and S. 2611, passed by the Senate last term, have identical penalty structures. The Commission must not promulgate a guideline that is more severe, more complex, or creates more unwarranted disparity than this penalty structure.

The Department suggests that its proposal is consistent with what Congress is considering, and maintains that it merely seeks simplicity and not increased severity. *See* 3/20/07 Testimony of John C. Richter at 5. This is not accurate. Option 7 is more complex, more severe, and would create more unwarranted disparity than the penalty

structure set forth in H.R. 1645 and S. 2611, and in some respects is more severe than current § 2L1.2.

H.R. 1645 and S. 2611 set forth statutory maxima of 20, 15, 10 and 2 years for illegal re-entry. Predicates for the 20-year maximum are (1) a "felony" for which the defendant was sentenced to not less than 60 months, (2) three "felonies," or (3) murder, rape, kidnapping, a "felony" described in chapter 77 (relating to peonage or slavery), or a "felony" described in chapter 113B (relating to terrorism). *See* H.R. 1645, § 236; S. 2611, § 207. In contrast, Option 7:

- would not require the prior offense to be a felony;
- would set a lower threshold of 48 months for the length of sentence imposed;
- would treat two prior convictions sentenced to as little as 12 months the same as one prior conviction sentenced to 48 months (in contrast with H.R. 1645 and S. 2611, which treat three "felonies" the same as one prior "felony" sentenced to at least 60 months)
- would add numerous specific *and* categorical offenses in the areas of child pornography and child sexual abuse;[1]
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "terrorism offenses" than for any other kind of offense (except "national security"), and would use a definition of "terrorism offense" that requires a complex factual inquiry far afield of the offense of conviction;[2]
- unlike H.R. 1645, S. 2611 or current § 2L1.2, would create a higher penalty level for "national security offenses" than for any other kind of offense (except "terrorism"), and would define "national security offense" as any offense "covered" in Chapter 2, Part M, which includes offenses that bear no resemblance to terrorism with offense levels as low as 6, 13, 14 and 18.

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[1] Those are (1) an offense described in 18 USC 2251, 2251A, 2252, 2252A, or 2260, (2) any offense under state or local law consisting of "conduct" that would have been such an offense had it been committed within the special maritime or territorial jurisdiction, (3) an offense in which the victim had not attained the age of 18 and is "an offense described in 18 USC 2242," (4) an offense in which the victim had not attained the age of 18 and is a "forcible sex offense," (5) an offense in which the victim had not attained the age of 18 and is "statutory rape," (6) an offense in which the victim had not attained the age of 18 and is "sexual abuse of a minor."

[2] Under the case law interpreting the same definition in § 3A1.4, the inquiry is: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant can be held accountable involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? *See United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003).