national IMMIGRATION project of the National Lawyers Guild

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Jeanne Doherty
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Re: Comments on Proposed Amendments Relating to Immigration

Dear Ms. Doherty:

With this letter, the National Immigration Project of the National Lawyers Guild (National Immigration Project) provides comments to the proposed amendments to the United States Sentencing Guidelines published in the Federal Register.

We would like to address two proposed amendments: (1) "Sentence Imposed" in §2L1.2; and (2) Categorical Approach.

I. The U.S. Sentencing Commission Should Follow the Majority Approach in Interpreting "Sentence Imposed" in §2L1.2

The National Immigration Project urges the Sentencing Commission (Commission) to amend Guideline § 2L1.2 to clarify that a "sentence imposed" does not include consequences, such as revocation of probation or supervised release, that occur subsequent to deportation.

The Circuit courts have split as to the meaning of the commentary to § 2L1.2: "The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release." USSG § 2L1.2, Application Note 1(B)(vii). The Fifth, Seventh, and Eleventh Circuits have generally reasoned that there is a temporal restriction inherent in the enhancement not altered by the commentary and concluded that the "sentence imposed" is determined at the time the defendant was deported or unlawfully remained in the United States.[1] Since the Commission issued its request for comments, the Tenth Circuit has joined these circuits.[2] Only the Second Circuit has taken a different view—holding that "sentence imposed" can include terms of imprisonment imposed subsequent to deportation.[3] When the Second Circuit issued its lone

[1] *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (per curiam); *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011). The Ninth Circuit has also indicated that it would adopt this rule. *United States v. Jimenez*, 258 F.3d 1120, 1125-26 (9th Cir. 2001) (explaining that aggregation of revocation sentence would apply only if "both statutory elements of an aggravated felony [the fact of conviction and a 'sentence imposed' of a particular length] were met prior to his deportation").

[2] *United States v. Rosales-Garcia*, __ F.3d __, 2012 WL 375518 (10th Cir. 2012).

outlier decision, it had only one contrary opinion to consider rather than today's four.

The majority interpretation of the guideline is consistent with both the purpose behind the enhancement and the larger goal of consistent application of the Sentencing Guidelines. The Chapter Two guidelines set forth the considerations that measure the seriousness of a defendant's offense conduct and establish his "offense level." [4] Under § 2L1.2, the seriousness of a defendant's offense conduct is measured by the facts as they were when he decided to return, specifically, his pre-deportation criminal record. Thus, while it makes sense to include a revocation sentence when that revocation sentence precedes the deportation and unlawful reentry, it does not make sense to increase a defendant's offense level for conduct that occurred after he committed the offense:

> Defendants who reenter the country illegally after having committed more serious drug trafficking crimes should be punished more severely than defendants who reenter the country illegally after having committed less serious drug trafficking crimes. The Guidelines use the length of the sentence as a rough measure of the seriousness of the underlying drug trafficking crime and the seriousness of the new crime of illegal reentry. Probation revocation sentences imposed after a defendant has been deported tell us little about the seriousness of either the prior drug trafficking crime or the new crime of illegal entry. Probation can be revoked for non-criminal and relatively less significant actions or inactions. Here, for example, the state court originally sentenced Lopez to 180 days in jail and 48 months of probation for his drug trafficking offense, indicating that it believed his offense to be of the less serious variety. The fact that his probation was later revoked for his inevitable failure to report to his probation officer after he was deported tells us nothing about the relative seriousness of the original drug trafficking offense or the illegal reentry.[5]

In contrast, conduct beyond the initial crime that led to the deportation is normally assessed in the form of criminal history points under Chapter 4 of the guidelines. Thus, under Chapter 4, a defendant whose probation was revoked on an earlier case will face a sentence increase based on the probation revocation.[6]

The majority interpretation is also consistent with the Guidelines' overarching goal of narrowing the wide disparity in sentences imposed for similar criminal offenses. In contrast, under the Second Circuit's interpretation, it is possible for two defendants who committed identical acts to receive widely disparate guideline ranges depending on the accident of which authorities moved more quickly:

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[3] *United States v. Compres-Paulino,* 393 F.3d 116 (2d Cir. 2004).
[4] *See* USSG Ch.2, intro. comment.
[5] *Lopez*, 634 F.3d at 951.
[6] USSG § 4A1.1(d).

> [A] defendant who was sentenced to probation and deported, and who later reentered illegally, could have his probation revoked by state authorities if they discovered that he had reentered illegally. If he were sentenced to more than thirteen months' imprisonment and were later found in state custody by ICE officials, he could then be charged with illegal reentry and have his offense level enhanced by sixteen levels under the Government's [and the Second Circuit's] interpretation. Meanwhile, a second defendant with an identical criminal history who also illegally reentered, but was fortunate enough to be apprehended by ICE before the state authorities, would have a much lower sentence for his guideline range, even if the state later revoked his probation based on his federal conviction. In contrast, under Bustillos's interpretation, both defendants would receive identical guideline ranges.[7]

The National Immigration Project urges the Commission to adopt its first option, which follows the majority approach and "specifies that a post-revocation sentence increase is included, 'but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.'"

II. Comments Regarding Categorical Approach

1. The United States Sentencing Commission's notice of proposed amendment mischaracterizes when a court can use the modified categorical approach.

The Commission notice in the Federal Register states when a factfinder can use the "modified categorical" approach:

> In cases where the defendant's prior conviction involved a provision that covers both *conduct* that fits within the category and *conduct* that does not, the Court has authorized courts to look at the judicial record to determine whether the prior conviction was in fact based on conduct that fit within the category of crimes." [emphasis supplied]

The Supreme Court actually permits recourse to the modified categorical approach:

> When the law under which the defendant has been convicted contains statutory phrases that cover several different *generic crimes*, some of which require violent force and some of which do not, the " 'modified categorical approach' " that we have approved, *Nijhawan v. Holder*, 557 U.S. ——, ——, 129 S.Ct. 2294, 2302, 174 L.Ed.2d 22 (2009), permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record.[8]

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[7] Bustillos-Pena, 612 F.3d at 868.

[8] *Johnson v. United States*, __ U.S. __, 130 S.Ct. 1265, 1273 (2010).

The Commission's departure from the Court's formulation will foreseeably result in a factfinder reaching a different result for the same statute of conviction when applying the Commission's proposed Guidelines test than the factfinder would reach under 18 U.S.C. § 924(e) (or other statutory enhancement). A battery statute that punishes a person who touches another without the victim's consent illustrates the problem with the Commission's proposal. A conviction under this battery statute would "cover conduct" ranging from hitting a person with a sledgehammer to tapping a person on the shoulder. If the Commission's proposed formulation were the test, a factfinder could examine the record of conviction under such a battery statute case to determine the defendant's "conduct." Under the Supreme Court's test in *Taylor*/*Shepard*/*Johnson*, the battery statute categorically would not involve force because it only defines only one generic crime.

2. The Commission's Proposed Amendments to the modified categorical approach are inconsistent with Congressional intent

In determining whether a prior offense warrants an enhancement under USSG § 2L1.2 for an aggravated felony, each of the Commission's proposed options would eliminate the first step in the categorical approach by permitting the "narrow exception" described in *Taylor/Shepard* to apply even where the elements of a statute were categorically not an aggravated felony. Under the Commission's test described in Section I above, an offense that could not justify an aggravated felony under the statutory enhancement in 8 U.S.C. 1326(b)(2), could possibly warrant an enhancement under each of the proposed options. In addition to being unreasonable, this outcome is inconsistent with the known intent of Congress.

The Supreme Court applies the same test to determine whether an offense is an aggravated felony for purposes of deportability under 8 U.S.C. § 1227(a)(2)(iii) and whether an offense warrants an enhancement under 8 U.S.C. § 1326(b)(1) and (b)(2).[9] The Commission's proposed amendments do not change the Commentary to USSG § 2L1.2, which requires a factfinder to use the definition in 8 U.S.C. 1101(a)(43) to determine whether a defendant warrants an 8 level increase for having an aggravated felony prior.

The Commission's proposed amendments ignore that the Supreme Court treats Congressional inaction regarding the statutory guidelines as evidence that Congress legislatively acquiesced to the *Taylor*/*Shepard* categorical approach.[10] In *Shepard v. United States*,[11] the Court treated Congress' failure to amend 18 U.S.C. §924(e) during the fifteen-year interval after *Taylor*, as evidence that Congress legislatively acquiesced to its categorical approach formulation. That the Supreme Court determined that Congress has legislatively acquiesced to the *Taylor*/*Shepard*

[9] In *Leocal v. Ashcroft*, 543 U.S. 1, 11, n. 8 (2004), the Court stated: "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."
[10] *Shepard v. United States*, 544 U.S. 13, 23 (2005).
[11] 544 U.S. 13, 23 (2005).

categorical approach means that it is part of the statutory framework for determining statutory enhancements, including an enhancement for an aggravated felony conviction under 8 U.S.C. §1326(b)(2). In turn, an aggravated felony enhancement under 8 U.S.C. §1326(b)(2) applies the definition of aggravated felony provided under 8 U.S.C. § 1101(a)(43), which is the same definition the Guidelines apply under U.S.S.G. § 2L1.2. Consequently, the Commission cannot change the categorical approach to which Congress has acquiesced because to do so would be inconsistent with *Stinson v. United States*, 508 *U.S.* 36 (1993) (treating Guideline Commentary as having the force of unless it is inconsistent with Congress or the Constitution). If the Commission were to disagree that it is not prohibited from such an interpretation as a matter of law then the National Immigration Project urges the Sentencing Commission not to adopt such an interpretation in the exercise of its discretion.

We thank you for considering our past comments and hope the Commission finds these comments helpful.

Sincerely,
s/Dan Kesselbrenner

Dan Kesselbrenner
Executive Director

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