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VIA ELECTRONIC MAIL

November 25, 2015

Honorable Patti B. Saris,Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments to the Sentencing Guidelines

Dear Judge Saris:

With this letter, the National Immigration Project of the National Lawyers Guild (National Immigration Project) provides comments to proposed amendments published on August 17, 2015.

I. Recklessness and Crimes of Violence

A. Treating a Reckless Assault as a Crime of Violence Exceeds the Commission's Authority

1. Such a Definition Would be Inconsistent with Supreme Court Case Law

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. *See Stinson v. United States*, 508 U.S. 36 (1993). The National Immigration Project believes that the proposal to add reckless assaults to the "Crime of violence" Commentary for U.S.S.G. § 2L1.2 and U.S.S.G. § 4 is contrary to the Supreme Court's case law interpreting the meaning of "use of force." *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Although the *Leocal* Court reserved the question of whether a crime with a mens rea of recklessness could be a crime of violence, the *Leocal* Court's reasoning strongly suggests that an offense with a reckless mens rea lacks sufficient intentionality to be a crime of violence. In a subsequent case, the Court noted that only the First Circuit treated a reckless offense as a crime of violence predicate. *See U.S. v. Castleman*, __ U.S. __ 134 S. Ct. 1405, 1414, n.8 (2014).

Following a *Castleman* remand, the First Circuit continued to permit an offense with a mens rea of recklessness to qualify as a misdemeanor crime of domestic violence predicate. *See United States v. Voisine*, 778 F.3d 176 (1st Cir. 2015). In dissenting, Judge Torruella noted the *Castleman* Court was "implicitly suggesting that we bring our holdings in line with the other federal circuit courts of appeals." *Id*. at 177 (Torruella, J., dissenting). Significantly,

the Supreme Court recently granted certiorari to resolve the issue. *Voisine v. U.S.*, __ U.S., 2015 WL 3614365, No. 14-10154 (Oct. 30, 2015).

The National Immigration Project recognizes that it would be speculation to predict what the Court will do in *Voisine*. Nevertheless, at a time when the Court appears poised to pronounce that recklessness is an insufficient mental state for a crime of violence enhancement, it would be ill-advised for the Commission to expand the definition of crime of violence to include reckless offenses. Even if the proposed language might not pose a *Stinson* problem now, it makes little sense to expand the meaning of a crime of violence to include reckless offenses when it is foreseeable that the Court will preclude such an interpretation in the near future.

2. Such a Definition Would be Inconsistent with Federal Statutory Provisions

Congress provided that the seriousness of the offense and the meting out of just punishment for the offense are two factors in determining the proper sentence to impose. *See* 18 U.S.C. § 3553(a)(2)(A). A person who commits a crime recklessly is less culpable than a person who does it intentionally or knowingly. *See Enmund v. Florida*, 458 U.S. 782, 800 (1982). In addition, the Court considers whether intentional wrongdoing is present in evaluating whether a criminal penalty is unconstitutionally excessive within the meaning of the Eighth Amendment. *See, e.g., Robinson v. California*, 370 U.S. 660. 667 (1962). In light of *Enmund* and *Robinson,* it would therefore not be a "just punishment" to treat someone who had a reckless mental state as deserving the same punishment as someone who acted intentionally. As such, the proposed inclusion of reckless assaults in the Guideline Commentary would be contrary to 18 U.S.C. § 3553(a)(2).

B. Including Reckless Offenses is a Poor Policy Choice

1. It Would Promote Racial and Ethnic Disparity in Sentencing

At a time when scholars increasingly recognize the discriminatory nature of policing and the impact it has on communities of color, adding reckless assaults to the term "crime of violence" is an exceptionally poor policy choice.[1] Individuals of color face significantly more exposure to policing than do white people, which explains the disproportionate levels of incarceration that people of color face compared to white people. A recent Department of Justice study confirms that racial disparity exists in the sentencing for violent offenses. [2] A statistical imbalance exists for illegal entry offenses too. According to the Sentencing Commission's Dataset, "Hispanic" individuals made up more than 97% of the individuals who received a 16 level increase under §2L1.2. Adding reckless offenses would increase the number of people subject to enhancements and lengthier sentences. In so doing, the Sentencing

[1] *See generally*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

[2] Bureau of Justice Statistics, *Prisoners in 2014* 16 (2015).

Commission would be exacerbating systematic disparity which the National Immigration Project believes should never be a part of the criminal justice system.

2. It Would Promote Continued Geographic Disparity in Sentencing

In an April 2015 report, the Sentencing Commission reported that there were widespread geographic differences among federal judicial districts regarding the punishment of illegal reentry offenses. United States Sentencing Commission, *Illegal Reentry Cases* (April 2015). The report specifically noted that:

> [I]n fiscal year 2013, in the District of New Mexico, the majority of illegal reentry offenders received no enhancement and less than 10 percent of offenders received an enhancement of 8, 12, or 16 levels, while in the Southern District of Texas less than ten percent received no enhancement and a majority received an enhancement of 8, 12, or 16 levels.

Id. at 13.

Absent evidence that more serious offenders avoid New Mexico and prefer to enter in South Texas, the statistics suggest a troubling sentencing disparity. By adding reckless offenses to the definition of crime of violence, the Commission would introduce another variable that potentially would increase this disparity.

C. Failing to Define "Reckless" Will Lead to Confusion and Prolonged Litigation

The proposed amendment does not define "reckless." Comparing the decisions from Georgia, Ohio, and Massachusetts courts reveals that the term "reckless" means completely different things in different jurisdictions. *Compare Willis v. State*, 728 S.E.2d 857 (Ga. Ct. App. 2012) (defining reckless conduct as, "in essence, an instance of criminal negligence, rather than an intentional act") and *State v. Colon*, 118 Ohio St. 3d 26 (2008) *on reconsideration*, 119 Ohio St. 3d 204 (2008) (treating recklessness as the catch-all culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes for which the accused's mental state is irrelevant)" *with Com. v. Welansky*, 316 Mass. 383 (1944) (likening act of omission to an intentional act).

By failing to define "reckless" the proposed amendment, if adopted, would result in protracted litigation and promote a lack of uniformity in sentencing. The simplest and fairest way to avoid these needless complications and harsh results would be for the Commission to eliminate "recklessness" as a mental state from the Sentencing Guidelines for Assaults.

D. "Simple Recklessness" is Too Low a Mental State for Covered Assault Offenses

If the Commission chooses to include offenses that lack a meaningful volition requirement, it should at a minimum follow the Model Penal Code definition, which requires that the defendant "manifest an extreme indifference to human life" for the offense to be an "aggravated assault."[3] By not defining recklessness, offenses of simple recklessness may be covered as well. It appears that the Commission is following the Fifth Circuit's lead in *United States v. Mungia-Portillo*, 484 F.3d 813, 816-17 (5th Cir. 2007) (rejecting Model Penal Code definition of aggravated assault statute). The National Immigration Project suggests that the Commission require "an extreme indifference to human life" if it chooses to include reckless offenses, at all. *See, e.g.*, *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (rejecting Fifth Circuit's approach in *Mungia-Portillo*).

II. Proposed Change to Definition of Felony

The Commission proposes amending §4B1.2 and related commentary to require that a prior offense must be "punishable by imprisonment for a term exceeding one year" and be "classified as a felony (or comparable classification) under the laws" of the convicting jurisdiction. The National Immigration Project considers the Commission's proposal an improvement over current law. The proposed test eliminates the existing interpretation that treats as a "felony" a conviction under state schemes that define misdemeanor to include sentences longer than a year.

The National Immigration Project objects to including the term "comparable classification" in the Guideline Commentary. The Commission fails to define the term "or comparable classification." In so doing, the Commission risks adding a potential layer of uncertainty to an otherwise straightforward definition. The National Immigration Project suggests deleting the parenthetical language to fix this problem.

The Sentencing Commission would not be the only governmental unit to make this type of change. In formulating enforcement priorities and eligibility for certain Executive Branch immigration programs, the Department of Homeland Security abandoned the traditional definition of felony for a definition that looks to the law of the convicting jurisdiction.[4]

Thank you for considering our views.

Sincerely,

Dan Kesselbrenner

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[3] Model Penal Code, § 211.1(2), Aggravated Assault.

[4] *See* Jeh Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014).