United States District Court
Southern District of California
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Chambers of
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U.S. District Judge

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March 15, 2016

Honorable Patti B. Sarris, Chair & Members
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Sarris and Members of the Sentencing Commission:

The Sentencing Commission has proposed amendments to the Sentencing Guidelines in illegal reentry cases (18 U.S.C. § 1326), and I am writing to voice my partial opposition to them. By way of introduction, my name is Larry A. Burns, and I have served as a district judge in the Southern District of California since 2003. Before that, I was a magistrate judge in this district for six years. My typical weekly sentencing calendar in our border district court includes 5 to 10 criminal immigration cases, most of which involve criminal aliens who have reentered the United States after deportation.

The Commission proposes several changes to the way prior criminal convictions should be counted in illegal reentry cases (U.S.S.G. § 2L1.1). I agree with some of the proposals, but disagree with others. Let me start with a point of agreement: I think the Commission's proposal to shift from the complicated elements-based comparison test mandated by *Taylor v. United States*, 495 U.S. 575 (1990) to a method that focuses on the actual time that a defendant served for the prior conviction is exactly right. Such a change will, in my opinion, greatly reduce the complexity of sentencing in these cases, and should also significantly reduce the number of sentencing appeals. For what it's worth, I believe that the Commission should consider adopting the proposed new method of counting prior convictions not only in illegal reentry cases, but in every case in which the Guidelines provide for the enhancement of a sentence based on a prior conviction. Experience over the past twenty-six years has proven that *Taylor* has not delivered on its goal of preventing sentencing proceedings from becoming mini-trials – in fact, just the opposite. It's time to abandon the difficult-to-apply and ever-morphing *Taylor* process once and for all.

The Commission has also proposed lowering the enhancement levels for prior convictions. I disagree, in part, with this proposed change. As proposed by the Commission, the enhancement for most serious prior convictions will top out at 8 levels. In relation to a statute that carries a 20-year maximum sentence, I respectfully suggest that's disproportionately low. Many of the illegal

reentry offenders whom I sentence are aggravated felons – repeat offenders with serious records of violence and drug trafficking, or serial theft offenders. Placing an 8-level ceiling on enhancements for prior offenses will generally mean shorter sentences for these recidivist offenders. Although the Commission also proposes raising the base offense level from 8 to 10, 12, or 14 (depending on whether the offender has suffered a prior immigration offense), even an offender with the most heinous criminal record who starts at the highest base offense level will face a lower sentencing range than under the current Guidelines (topping out at 22 rather than the current level of 24). This strikes me as a curious and antithetical reward for repeated criminal behavior.

Capping the enhancement for prior offenses at 8 levels also increases the likelihood of disparate sentencing. In my opinion, it's unrealistic to assign all offenders who have been previously sentenced to 24 months or more to a single residual category, which is what the Sentencing Commission proposes. Most of us who have been part of the criminal justice system for a long time know there's a big difference between the seriousness of crimes and the moral culpability of offenders who are sentenced to 24 months, on the one hand, and to 5 or 10 years on the other. Yet the proposed Guideline ignores this difference and lumps all of them together in a one-size-fits-all sentencing range.

Let me offer an example to make my point. Assume a §1326 offender has suffered two prior felony immigration convictions and has a prior conviction for residential burglary. In my state, California, a person convicted of residential burglary (which includes burglary of an attached garage) faces a potential prison sentence of 2, 4, or 6 years. A state judge chooses the specific term after evaluating sentencing factors that resemble our Guidelines factors. Let's assume that our hypothetical offender entered a garage and stole a bike, and the state judge imposed a low term of 2 years. Under the proposed Guideline, this offender's base offense level, before common adjustments for Acceptance of Responsibility (§ 3E1.1) and Fast Track (§ 5K3.1) would be 22 (14 base offense level, plus an 8 level enhancement for his prior record).

In contrast, assume a second §1326 offender who also has two prior felony immigration convictions, but also has a prior conviction for forcible rape. In California, rape is punished by imprisonment for 3, 6, or 8 years – the term again depending on the state judge's determination of sentencing factors. Let's assume here that the offender committed a particularly violent forcible rape and was sentenced to the high end term of 8 years. Under the proposed Guidelines, this offender's base level would be exactly the same as the bike burglar (14 base offense level plus 8 level enhancement for his record).

Most seasoned trial level judges would recognize the obvious differences between these two offenders, and I think most would be inclined to sentence the defendant with the rape prior to a longer sentence because of the likelihood that he presents a greater risk to the public than the bike burglar. Yet under the Commission's proposal for counting priors, a sentencing judge would have

to depart or vary to account for this significant difference between the two offenders. The Commission's own statistics demonstrate that upward departures and variances are uncommon, probably because most sentencing judges are mindful that the Supreme Court has reminded us that sentences outside the applicable Guidelines range are subject to increased scrutiny and require more detailed explanation. *See Gall v. United States*, 552 U.S. 38, 50 (2007). Lumping offenders with serious and violent crime records into a single category together with those with less serious criminal records – like the forcible rapist and the bike burglar – invites disparity and potential second-guessing by appellate courts.

This raises the related concern that a judge may commit procedural error by relying on a hearsay account of the nature and underlying facts of a prior offense, even if the judge does decide to depart or vary upward. It is not at all inconceivable that defense counsel will advocate, and reviewing courts may require, fidelity to *Shepard*-like standards (*Shepard v. United States*, 544 U.S. 13 (2005)) in making findings regarding the underlying facts and nature of a defendant's prior conviction. In my opinion, such restrictions will only increase the likelihood that sentencing courts will feel hamstrung in attempting to distinguish between violent and serious offenders whose illegal presence in United States presents great risk, and other offenders who present much less risk and for whom a sentence within the Guideline range is adequate.

The Commission has specifically asked judges to comment on whether the enhancement categories are too limited. For reasons I have outlined above, I believe that they are. To help eliminate the likelihood of disparate sentencing, the revised Guideline should provide for additional enhancement levels. For defendants previously sentenced to 5 years or more, I contend that a 12-level increase is warranted. For defendants previously sentenced to 10 years or more, I contend that a 16-level increase is warranted. These increased enhancements for serious and violent offenders are supported by common sense and experience, and by reference to the §3553(a) factors – just punishment and protecting the public to name two.

I appreciate the opportunity to comment and to offer my opinions on the proposed revisions to this Guideline.

Sincerely and respectfully yours,

Larry A. Burns

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