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U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Re: Comments to the Proposed Amendments to the Sentencing Guidelines

Dear U.S. Sentencing Commission:

MALDEF (the Mexican American Legal Defense and Educational Fund) respectfully submits the below comments in response to proposed changes to the Sentencing Guidelines (Guidelines), as contemplated by the U.S. Sentencing Commission (Commission), published in the January 15, 2016 edition of the Federal Register. MALDEF expresses its serious concerns with the proposed changes to Guideline §2L1.2, “Unlawfully Entering or Remaining in the United States,” given the impact these proposed changes will have on Latino defendants, and the community at-large.

Founded in 1968, MALDEF is the nation’s leading Latino legal civil rights organization. Often described as the “law firm of the Latino community,” MALDEF promotes social change through legislative and regulatory advocacy, community education, and high-impact litigation in the areas of education, employment, voting rights, and immigrant rights. Our focus on immigrants’ rights includes advocacy related to the increasing criminalization of immigrants and the direct and collateral consequences of criminal convictions for immigrants.

The Sentencing Commission has identified illegal reentry offenses as a priority for this round of proposed changes to the Sentencing Guidelines in an effort to address what it notes as a need to address 1) stated difficulties from stakeholders in sentencing when enhancements are involved and the current use of the categorical approach; 2) concerns “that the 16-level enhancement for prior felonies listed in subsection (b)(1)(A) is overly severe and inconsistently applied;” and 3) data suggestions that additional factors related to defendants’ dangerousness and culpability may be relevant to sentencing.¹

Latinos are disproportionately impacted by over-prosecution of illegal reentry offenses and harsh sentencing of illegal reentry convictions, as

¹ U.S. Sentencing Commission, Proposed Amendments to Immigration Guidelines, 12 (2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/immigration_briefing.pdf.

directed by the Guidelines. Illegal reentry offenses comprise a significant proportion of the federal criminal caseload, constituting 26 percent of the overall docket in FY 2013.² The Sentencing Commission's data shows that 98.1 percent of illegal reentry offenders are Hispanic.³ The greatest concentration of illegal reentry convictions are in heavily Latino areas in Texas, New Mexico, Arizona, and California.⁴

As a result, Latino families are greatly impacted by illegal reentry prosecutions and the collateral consequences of these convictions. For example, data from the Commission shows that 49.5 percent of persons sentenced for illegal reentry had at least one child living in the United States, and that those sentenced were an average (and median) age of 17 at the time of initial entry.⁵ Latinos acutely understand the realities of heavy prosecution of illegal reentry cases and the harsh penalties of imprisonment and deportation on families.

Furthermore, prosecutions of illegal reentry offenses are not an effective deterrent for individuals seeking to reunite with their loved ones. The proposed amendments that the Commission has made to address some of the mechanics of the sentencing scheme for illegal reentry offenses are misplaced and will do little to address our broken immigration system. Instead, persons seeking to be with and provide for their families become entangled in the criminal justice system. The proposed changes will only increase the penalties for illegal reentry offenders without addressing the root cause of immigration flows.

MALDEF urges the Advisory Committee to *reconsider* the proposed amendments to Guideline §2L1.2:

- 1) Amending the Base Offense Level (BOL) for illegal reentry from 8 to 10 when there is no prior illegal reentry conviction, and creating additional alternate BOLs for multiple illegal reentry convictions;
- 2) Amending the calculation for enhancements based on the length of sentence imposed for prior criminal convictions;
- 3) Inclusion of enhancements based on all post-first-entry conduct, rather than post-last-entry conduct; and
- 4) Allowing for an upward departure for multiple prior deportations, regardless of possible due process violations.

I. An Increase in the Base Offense Level from 8 to 10 for Persons Without a Prior Conviction for Illegal Reentry Would Have a Detrimental and Disproportionate Impact on Latino Defendants and Would Fail to Address the Commission's Concerns Regarding the Disparity in Within-Range Sentencing.

MALDEF is greatly concerned with the proposed increase in the base offense level from 8 to 10 for persons with no prior illegal reentry convictions and the creation of alternate BOL's for repeated illegal reentry convictions. According to the Commission's data analysis, individuals with no applicable criminal conviction enhancements or other upward departures would see their

² U.S. Sentencing Commission, *Illegal Reentry Offenses*, 1 (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

³ *Id.* at 9.

⁴ *Id.* at 13.

⁵ *Id.* at 25-26.

average guideline minimum sentence increase of 500 percent from 1 to 6 months.⁶ Those with a 4-level enhancement for any felony conviction with a sentence under a year, which could have resulted in no jail time and/or had as an element or motivation the individual's immigration status, would see their average guideline minimum double from 12 to 24 months.⁷

The Commission appears to have rooted the proposed amendment for the base level offenses to address a discrepancy in sentencing “within-guideline ranges” between those offenders who received a 16-level enhancement (31.3 percent) and those who received no enhancements (92.7 percent),⁸ while maintaining the average sentence level at 21 months. However, the Commission has failed to provide any justification for seeking to maintain the average sentencing level at 21 months.

There is simply no basis for increasing the base offense level to 10 rather than 8 and creating an upward escalation in base level for those with prior reentry convictions. The result for many individuals prosecuted and convicted for illegal reentry will be a dramatic increase in the average sentence. These proposed changes are out of step with the current climate urging criminal justice reform and efforts to address mass incarceration.

II. A Focus on the Sentence Imposed When Determining the Seriousness of a Conviction Would Have an Unwarranted Negative Impact on Certain Defendants That May Not Accurately Reflect the True Seriousness of a Prior Conviction.

While we applaud the Commission's attempt to address concerns that determinations of a past conviction's seriousness through an application of the categorical approach is overly complicated, MALDEF is concerned with the proposed amendments shift to focus on the sentence imposed. The impact of using the sentence imposed in making these determinations would be particularly severe and have an unintended impact on individuals with state convictions in jurisdictions where suspended sentences or automatic parole are systematically taken into account by the sentencing court. An alternative proxy for seriousness might be the time served, rather than the sentence imposed.

III. The Proposed Amendments to Expand the Opportunities to Increase Offense Levels Based on Pre-Deportation and Post-Reentry Convictions Fails to Appropriately Deemphasize Older Convictions.

One of the objectives the Commission highlighted in its proposed amendments to the Guidelines was “to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions.”⁹

However, MALDEF is concerned that the proposed change would ultimately broaden the range of offenses that can be used for enhancements without truly deemphasizing older, staler convictions that occurred pre-deportation. Under the current Guidelines, time limitations

⁶ U.S. Sentencing Commission, Proposed Amendments to Immigration Guidelines, 32 (2016),

http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/immigration_briefing.pdf.

⁷ *Id.*

⁸ U.S. Sentencing Commission, *Illegal Reentry Offenses*, 1 (2015), available at http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

⁹ U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, 61 (2016),

http://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160113_RFP_Combined.pdf.

generally exist through Chapter Four's restrictions on certain older offenses when calculating a defendant's criminal history points. Under the current proposal, the Commission appears to increase the number of older offenses that would result in sentencing enhancements.

The Commission's intent create two distinct periods of the defendant's criminal history – 1) those convictions that occurred before the first deportation and 2) those convictions that occurred after the most recent reentry – without creating a meaningful distinction between the treatment of these two periods fails to meet the Commission's stated goal to deemphasize pre-deportation offenses and does not sufficiently shift the focus to post-reentry conduct.

IV. Allowing for an Upward Departure for Cases Where the Defendant was Previously Deported on Multiple Occasions Not Reflected in Prior Convictions Under 1325 or 1326 Negatively Impacts Those Individuals Who Were Deported without Due Process

Finally, MADLEF suggests that the Commission change its proposed amendment allowing for an upward departure based on multiple prior deportations so sentencing courts do not consider prior deportations that occurred in violation of an individual's due process rights, such as in the case of a stipulated removal proceeding.¹⁰

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For the foregoing reasons, MALDEF respectfully recommends that the Commission carefully reconsider the proposed amendments to the Sentencing Guidelines related to illegal reentry convictions. MALDEF thanks the Commission for the opportunity to comment on these proposed changes.

Thank you for your time and consideration. Please do not hesitate to contact me with any questions or concerns at (202) 293-2828 ext. 19 or asenteno@maldef.org.

Respectfully,



Andrea Senteno
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MALDEF

¹⁰ See *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010) (concluding an immigrant's stipulated removal proceedings violated due process.).