

Testimony of Chief Judge Irma E. Gonzalez and Judge Marilyn L. Huff,
Southern District of California before the United States Sentencing Commission
Concerning Proposed Amendments to the Immigration Guidelines
San Diego, California March 6, 2006

Thank you for the opportunity to provide testimony before the United States Sentencing Commission concerning proposed amendments to the immigration guidelines. As the Chief Judge of the Southern District, I extend a warm welcome to the Sentencing Commission for taking the time to hold a public hearing on these important issues in our district.

The judges in the Southern District of California appreciate the opportunity to discuss the proposed changes to the immigration guidelines due to the high volume of immigration cases the court handles in our court. The most recently published numbers in the 2003 Sourcebook of Federal Sentencing Statistics indicate that our district sentenced 2,046 immigration defendants out of the national total of 15,081 defendants, or approximately 13.56% of the total immigration cases in the district courts. For that reason, our court thanks the Sentencing Commission for this public hearing to discuss issues raised by the proposed amendments. Our court also compliments the Sentencing Commission for the thoughtful and reasoned analysis accompanying the proposed amendments. We encourage the Commission to carefully consider the proposed amendments in light of the testimony and comments from all that are interested in this topic of public concern.

In general, our district supports the concept that amendments to the immigration guidelines might help achieve the statutory purposes of sentencing while providing advisory guidance to the district courts in immigration cases. I will highlight certain issues relating to the proposed amendments for 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while my colleague will address special issues related to high speed chase cases, highlight our thoughts concerning proposed amendments to 2L1.2 (Unlawfully Entering or Remaining in the United States), overall uniformity of the immigration guidelines compared to drug smuggling guidelines, and the success of the fast track program in our district.

1. 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

A. National Security Concerns

The court supports the proposed amendment to increase the base offense level for national security concerns, and leaves it to the Commission to determine the best option after public comment. The Commission might also want to consider whether a similar adjustment for national security concerns might be available in appropriate cases under 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use,) although the court has limited experience with these cases.

B. Number of Aliens

The court supports an increase for offenses involving a large number of aliens (over 100), and leaves it to the Commission to determine the best option after public comment.

C. Endangerment of Minors

The court supports an increase for offenses if the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent, and leaves it to the Commission to determine the best option after public comment.

D. Offenses Involving Death

The court supports the changes to the guidelines in cases where death occurs, and agrees that it is appropriate to allow for cumulative enhancements in cases where both bodily injury and death occur.

E. High Speed Chase Cases/Evasion of Law Enforcement

Particularly problematic in our district are those cases where death or serious bodily injury occurs after the smuggler fails to comply with law enforcement's lights or sirens, runs the port of entry or checkpoint, or engages in a high speed chase. Often, there is a vehicular accident on a freeway that results in significant danger to the public, the aliens, and law enforcement. As an example, enclosed is a local

newspaper article concerning a recent serious injury accident on our freeway involving allegations of alien smuggling and evasion of law enforcement. While the Sentencing Commission previously addressed these concerns in 2L1.1(b)(5) (increase of two levels or up to level 18), the court encourages the Sentencing Commission to evaluate whether a higher enhancement might be warranted for those cases where the death or serious bodily injury occurs after egregious conduct such as a high speed chase, a port runner case, or failure to comply with a law enforcement officer's lights and sirens.

2. 2L1.2 (Unlawfully Entering or Remaining in the United States)

In these cases, the court is frequently required to determine whether a prior conviction meets the definition of "aggravated felony" as described in Title 8 U.S.C. § 1101 (a) (43) under the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990) and Shepard v. United States, 125 S. Ct. 1254 (2005). The court appreciates the Sentencing Commission's attempts to clarify the guideline application issues resulting from the categorical approach analysis required by Taylor and Shepard.

As a preliminary matter, the court does not know whether any of the proposed options would alleviate the challenges presented by the requirements of the categorical approach set forth in Taylor and Shepard, and the court anticipates further litigation of these issues under any of the proposed options. The first four options presented in the proposed amendment to 2L1.2 tie specific offense characteristics based upon the defendant's prior convictions to the existing statutory definitions found in Title 8 U.S.C. § 1101(a)(43) (Aggravated Felony) that determine the appropriate statutory penalty for a defendant. These options would reconcile the statutory and guideline definitions for the same terms such as crime of violence and have a consistent approach.

Of the options, there are pros and cons with each position. The first or second options may provide the clearest guidance. The first option provides a 16 level increase for a conviction for an aggravated felony for which a sentence of imprisonment exceeding 13 months was imposed. It provides for a 12 level increase for a conviction for an aggravated felony for which a sentence of imprisonment of 13 months or less was imposed. If neither apply, the increase is 8 levels. This approach addresses the proportionality of guideline increases tied to the sentence imposed for

a prior conviction. The second option provides for a 16 level enhancement for an aggravated felony for which the sentence imposed exceeded 2 years, a 12 level increase in which the sentence imposed was at least 12 months but did not exceed 2 years, an 8 level increase for an aggravated felony not otherwise covered above, a 4 level increase for any other felony, and a 4 level enhancement for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses. Option 2 provides for greater punishment for more serious aggravated felonies where the defendant received a judgment exceeding two years. We suggest, subject to further public comment and analysis, that options one or two are the most straightforward applications, and may provide more certainty for the courts and provide greater punishment for offenders with more serious prior convictions. Of course, the trade off is that some defendants under the current guidelines would no longer be subject to the 16 level increase. The court encourages the Sentencing Commission to carefully evaluate the comments from those that have experience with litigation over these issues. We anticipate that the categorical approach required by the law may continue to pose some challenges in guideline sentencing under any of the proposed amendments as long as the advisory guidelines have courts determine whether a prior felony is an “aggravated felony.”

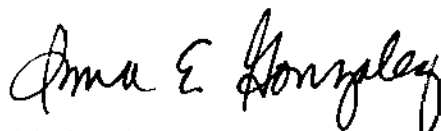
3. Success of the Fast Track Program Authorized by the PROTECT ACT

While the Sentencing Commission is in our district, we thought it prudent to update the Commissioners on the success of our fast track or early disposition programs. Congress recognized the benefit of a fast track policy and authorized it in the PROTECT Act under specified circumstances. The Attorney General recognized the value of a fast track program in our district due to the potential for a large volume of criminal border cases in the district. The Southern District of California includes San Diego and Imperial Counties, and the City of San Diego ranks as the seventh largest city in the United States. Additionally, the district includes six ports of entry along the Southwest border with Mexico. Significantly, there were 85,112,433 inspections of individuals occurring in the district in 2005 according to published United States Customs and Border Protection statistics. The Customs and Border Protection data also indicates that the port of entry at San Ysidro in San Diego County is the busiest land port of entry in the world with 41,424,069 inspections of individuals occurring in fiscal year 2005. Given the volume of potential cases, the U.S. Attorney continues to implement fast track policies authorized by the Attorney General through the traditional exercise of prosecutorial discretion.

With a high potential for criminal border cases, Congress and the Attorney General recognize the value of a fast track program, and the court agrees. The early disposition programs benefit the justice system in a number of ways. The early disposition of cases helps to reduce the cost and time of jurors, interpreters, deputy U.S. marshals, detention facilities, prosecutors, defense attorneys, material witness attorneys, investigators and court resources. Detention costs of contract facilities for pretrial defendants in metropolitan San Diego are higher than faced in other geographical localities, and the early disposition program helps to conserve these costs. Overall, the participants value the benefits of an early disposition program. The success of the programs are demonstrated by the fact that the district ranks second in the nation in the early disposition of criminal felony cases according to the 2005 Federal Court Management Statistics.

In conclusion, the court encourages the Commissioners to visit our border, if time permits, to see firsthand the high volume of immigration inspections that occur daily at one of our many ports of entry in our district as shown by the attached picture of the San Ysidro port of entry. If available, this visit may provide some helpful context for the complexity of the issues raised by the proposed amendments to the immigration guidelines. We express our gratitude to the Sentencing Commission for the opportunity to be heard and the thoughtful work on these challenging issues.

Respectfully submitted,

A handwritten signature in black ink, reading "Irma E. Gonzalez". The signature is written in a cursive, flowing style.

Chief Judge Irma E. Gonzalez

Hearing is set in smuggling case

Decision expected on denial of bail

By **Onell R. Soto**
STAFF WRITER

Six men accused in a smuggling attempt that ended with a violent crash in Otay Mesa on Friday afternoon are scheduled to appear in federal court today for a judge to decide whether they may be held without bail while awaiting trial.

Border Patrol agents and witnesses identified three of the men as van drivers and the three others as foot guides who led more than 90 people across the border north of the Tijuana airport into an area west of the Otay Mesa border crossing.

Two of the men are felons who have been deported before, a Border Patrol agent said.

One of the vans rolled over Friday near the juncture of state Route 905 and Interstate 805 as the driver tried to get away from Border Patrol agents. Twenty-one illegal immigrants were injured.

About 30 people were riding in each of three 14-passenger

vans. A black sedan seen with the vans got away.

A spokesman for the Mexican Consulate said yesterday that all the injured have been released from the hospital and that all except the accused and witnesses were deported to Mexico.

The group used a drainage system in the area to get across the border, consulate spokesman Alberto Lozano said, citing reports from the Border Patrol and interviews with the smuggled immigrants.

A Border Patrol spokesman wouldn't say how the large group of immigrants got across the border in broad daylight in an area where there are two fences and constant surveillance.

"We're not 100 percent conclusive on that," said Richard Kite. "They're still looking into that. . . . I don't want to get into it yet, into how they actually entered."

In a report filed in court this week, a Border Patrol agent said at least part of the group met in a house in Tijuana before being driven to the border.

A caller told the Border Pa-

trol about 1:30 p.m. that about 200 people were running north from the border in an area known as the old strawberry fields and were getting into three vans and a car, the agent wrote.

The area, well known for immigrant smuggling, is about half a mile west of where a sophisticated drug-smuggling tunnel was found Jan. 25. Federal agents have been guarding the tunnel since its discovery.

Border Patrol agents responded within minutes and watched as the four vehicles approached Siempre Viva Road and then went north on La Media Road toward Route 905.

One of the vans, which was carrying 36 people, got stuck in traffic and its driver moved into the passenger area, according to the report. A Border Patrol agent jumped into the driver's seat to stop the vehicle.

The driver of another van carrying 34 people rammed a Border Patrol vehicle three times with the van, drove erratically and avoided spike strips in an effort to get away, but the van got stuck between a truck

and a guardrail, the agent wrote.

A Border Patrol agent shot a tire-deflating device into the left rear tire of the third van as it headed west on Route 905, according to the report.

Another agent farther down the road threw a spike strip under the same tire. A short time later, the van, by then traveling on the shoulder because traffic had stopped, began swerving from side to side, according to the report.

The van struck a utility trailer being towed by a truck and smashed through the guardrail, rolling as it careened down the embankment, the agent wrote.

The report doesn't say how many people were in that van, but Friday a Border Patrol agent said there were 28.

Border experts say storm drainage systems are commonly used by smugglers, although drains typically have locked and welded grates.

Staff writer Norma de la Vega contributed to this report.

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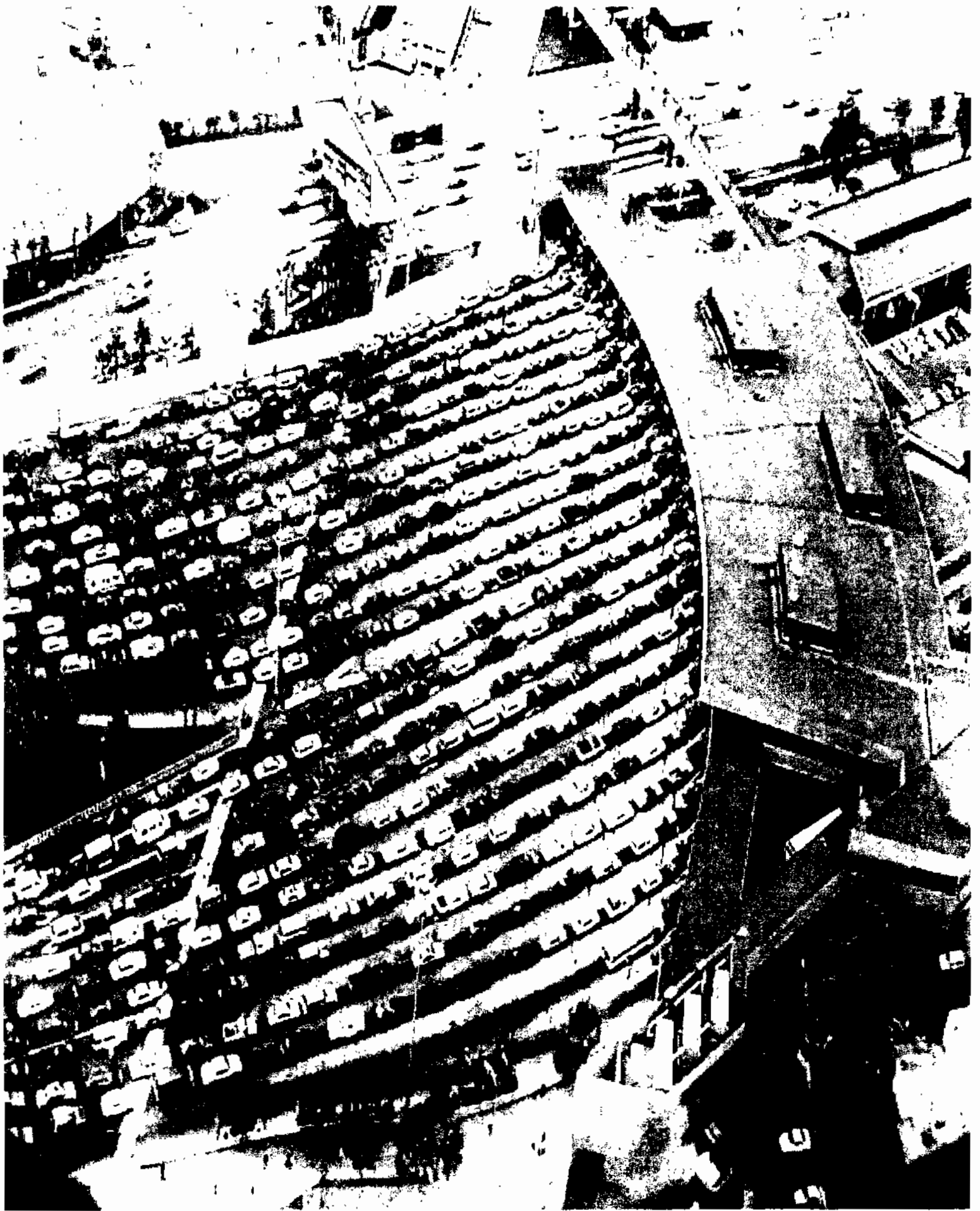


Exhibit 2