

U.S. Sentencing Commission Public Meeting Minutes
April 28, 2006

Chair Ricardo H. Hinojosa called the meeting to order at 1:55 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Chair
- Judge William K. Sessions, III, Vice Chair
- Michael E. Horowitz, Commissioner

The following Commissioners were present via telephone:

- Judge Ruben Castillo, Vice Chair
- John R. Steer, Vice Chair
- Beryl Howell, Commissioner
- Michael Elston, Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director

The Chair called for a motion to adopt the minutes of the March 15, March 23, and April 5, 2006, public meetings. Commissioner Horowitz made the motion to adopt the minutes of the three meetings, with Vice Chair Steer seconding the motion.

Vice Chair Sessions inquired if additional comments that he and Commissioner Howell had made with respect to the firearm's amendment promulgated at the April 5, 2006, public meeting could be appended to those meeting minutes. Vice Chair Castillo also expressed an interest in appending his comments to the April 5 meeting minutes and suggested a motion to adopt only the two March public meeting minutes so that this could be accomplished. The Chair asked if the Commissioners who made the pending motion would like to withdraw it. Both Commissioner Horowitz and Vice Chair Steer withdrew their motion to adopt the three public meeting minutes.

Vice Chair Castillo made a motion to adopt the March 15 and March 23, 2006, public meeting minutes, with Commissioner Horowitz seconding the motion. Hearing no further discussion, the Chair called for a vote. The motion was adopted by a unanimous vote.

The Chair called for a motion to table the April 5, 2006, public meeting minutes until a future Commission meeting. Vice Chair Castillo made the motion to table the April meeting minutes, with Vice Chair Sessions seconding the motion. Hearing no further discussion, the Chair called for a vote. The motion was adopted by a unanimous vote.

The Chair called on Ms. Sheon to inform the Commission on a possible vote to promulgate a guideline amendment. Ms. Sheon stated that Part One of the proposed amendment modifies

§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). It addresses national security concerns pertaining to the smuggling of illegal aliens by increasing the base offense level at §2L1.1(a)(1). Second, the proposed amendment provides a two-level enhancement for a case in which the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent or grandparent. This enhancement addresses concerns regarding the increased risk involved when unaccompanied minors are smuggled into, or harbored or transported within, the United States. Third, the proposed amendment makes two changes with respect to offenses involving death. It increases the enhancement from 8 levels to 10 levels if any person died as a result of the offense. Additionally, the cross reference at §2L1.1(c)(1) is expanded to cover homicides other than murder. Fourth, the proposed amendment adds a two-level enhancement and a minimum offense level of 18 in a case in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States.

Part Two of the proposed amendment modifies §§2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport) and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use). First, the proposed amendment adds a new specific offense characteristic at §2L2.1(b)(5)(A) that provides a four-level enhancement in a case in which the defendant fraudulently used or obtained a United States passport. Second, the proposed amendment provides, at §2L2.1(b)(5)(B) and §2L2.2(b)(3)(B), a two-level enhancement if the defendant fraudulently obtained or used a foreign passport.

Ms. Sheon stated that a motion to promulgate the amendment was in order, with an effective date of November 1, 2006, and with the staff authorized to make technical or conforming changes, if needed.

The Chair asked if there was a motion to promulgate the proposed amendment as provided to the Commissioners and as attached hereto as Exhibit A. Commissioner Horowitz made such a motion, with Vice Chair Castillo seconding the motion. The Chair asked if there was any discussion on the amendment.

Commissioner Horowitz noted for the record that the proposed amendment did not modify §2L1.2 (Unlawfully Entering or Remaining in the United States), a guideline that has been the focus of a considerable amount of the Commission's recent efforts. In light of legislation currently before Congress and its possible impact on the sentencing guidelines, Commissioner Horowitz stated that the Commission agreed to defer action on §2L1.2. Vice Chair Castillo expressed his agreement with Commissioner Horowitz's statement. The Vice Chair also commended the Chair for holding regional hearings on the issues related to illegal immigration. These hearings were, in his opinion, very useful in helping the Commission better understand the nature of the problem, especially as to how it affects the districts along the U.S.-Mexico border. Vice Chair Castillo added that it was proper at this time to defer action on §2L1.2.

Vice Chair Sessions expressed his appreciation that illegal immigration is a complex issue. The

Vice Chair noted that the Commission had unanimously agreed on the provisions of the proposed amendment and the proposed amendment incorporates the views of the Commissioners. As a result, all the Commissioners are invested in the outcome of the Commission's efforts and this, the Vice Chair believes, is why the Commission is so effective in its work.

Hearing no further discussion, the Chair called for a vote on the motion to promulgate the proposed amendment. The motion was adopted unanimously.

The Chair asked if there was any further business before the Commission and hearing none, called for a motion to adjourn the meeting. Commissioner Horowitz made such a motion, with Vice Chair Sessions seconding the motion. The Chair called for a vote and the motion was adopted unanimously. The Chair thanked the members of the Commission for their work and adjourned the meeting at 2:04 p.m.

EXHIBIT A

REVISED PROPOSED AMENDMENT: IMMIGRATION

Proposed Amendment:

Part 1: §2L1.1

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

(a) Base Offense Level:

- (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);
- ~~(1)~~(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- ~~(2)~~(3) **12**, otherwise.

* * *

(b) Specific Offense Characteristics

* * *

- (4) **If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent, increase by 2 levels.**

~~(3)~~(5) * * *

~~(4)~~(6) * * *

~~(5)~~(7) * * *

- ~~(6)~~(8) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

| <u>Death or Degree of Injury</u> | <u>Increase in Level</u> |
|--|--------------------------|
| (1) A Bodily Injury | add 2 levels |
| (2) B Serious Bodily Injury | add 4 levels |
| (3) C Permanent or Life-Threatening Bodily Injury | add 6 levels |
| (4) D Death | add 10 levels. |

- (9) **If an alien was involuntarily detained through coercion or threat, or in**

connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(c) Cross Reference

- (1) If ~~death resulted~~ any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder ~~homicide~~ guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline—:

* * *

"Minor" means an individual who had not attained the age of 16 years.

"Parent" means a (A) natural mother or father; (B) stepmother or stepfather; or (C) adoptive mother or father.

2. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. *In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.*
3. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:
- (A) ~~Where the~~ *The* defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, ~~an upward departure may be warranted.~~
- (B) *The* defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
4. (C) ~~If the~~ *The* offense involved substantially more than 100 aliens, an upward departure may be warranted.
5. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history

points pursuant to Chapter Four, Part A (Criminal History).

6. Application of Subsection (b)(5).— * * *

7. Inapplicability of §3A1.3.—*If an enhancement under subsection (b)(9) applies, do not apply §3A1.3 (Restraint of Victim).*

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants.

Part 2: §§2L2.1 and 2L2.2

§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

* * *

(b) Specific Offense Characteristic

* * *

(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.

* * *

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

* * *

(3) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.

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