STATEMENT OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

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HEARING ON
PROPOSED AMENDMENTS TO THE FEDERAL
SENTENCING GUIDELINES

WASHINGTON, DC

FEBRUARY 16, 2011

Madam Chair and Members of the Commission:

Thank you for the opportunity to appear before you today to testify on behalf of the Department of Justice and federal prosecutors across the nation regarding the Commission's proposals for guideline amendments relating to supervised release and illegal reentry. In light of the tremendous impact that post-incarceration supervision and the illegal immigration docket have on the judicial system, we thank the Commission for considering amendments that affect these issues. We also

appreciate the intent of the Commission to preserve the limited resources of the judicial system. However, the Department is here today to urge the Commission *not* to promulgate the particular amendments it has proposed with respect to supervised release and illegal reentry. As we discuss in detail below, the current proposals do not render the guidelines more effective; they will make the work of enforcement more difficult and are unnecessary in any case in light of existing guideline provisions that address the concerns that prompted the Commission's proposals.

SUPERVISED RELEASE

In connection with supervised release, the Commission has published three proposals for consideration: (1) adding a provision to §5D1.1 that states that "ordinarily" alien defendants who are likely to be deported and barred from lawful return should not be placed on supervised release; (2) revising USSG §§5D1.1 and 5D1.2 to narrow the class of cases in which a guidelines presumption for the imposition of a term of supervised release is triggered and (3) revising §5D1.2 either to lower or eliminate entirely guidelines-based minimum terms of supervised release for any offenses. The Department opposes each of these proposals.

Notably, in support of its proposals, the Commission indicates that its intention in revising the supervised release guidelines is to "help courts and probation offices focus limited supervision resources on offenders who need supervision." The Commission also notes that a high percentage of supervised releasees are non-citizens and that the deportation of a "vast number of them" is "virtually inevitable." The Commission thus implies that these non-citizen releasees are a drain on scarce supervision resources.

However, the suggestion that the imposition of supervised release for alien defendants places an unwarranted burden on courts and U.S. Probation appears unsupportable. Typically, alien defendants are in fact deported following the completion of their terms of incarceration and they are not, therefore, supervised by the courts post-incarceration unless and until they return to the United States. If such reentry does occur and the alien's presence becomes known, revocation proceedings are often then initiated. The very fact of the defendant's return violates the mandatory condition of release that the defendant not commit any new criminal offense and often a special condition of release not to return to this country without the permission of the Secretary of Homeland Security. While some resources are expended in the revocation process, it is a streamlined, expeditious, and

cost-efficient mechanism for holding the defendant to account for his violation of the law and deterring him from future violations.

Revocation of supervised release is a particularly important tool of the southwest border districts in combating immigration offenses. Often, aliens prosecuted and convicted by the southwest border districts quickly return to the United States following their deportation/removal. This is especially true with respect to aliens convicted of illegal entry and the non-aggravated illegal reentry, under 8 U.S.C. §§ 1325 and 1326, respectively. The turnaround time for these aliens to enter/reenter, be prosecuted, sentenced, deported, and then illegally return to the United States can be very short, *i.e.*, as compared to the aggravated § 1326 cases, the sentences for which are considerably longer. This is not meant to suggest that considerations relating to the prosecution of the aggravated felony variety of § 1326 cases do not also support the Department's opposition to the proposed changes in the supervised release guidelines. But because the turnaround time for § 1325 and non-aggravated § 1326 cases is usually so much quicker, they best illustrate why the proposed amendments are misguided. Alien defendants are sometimes found in the United States within days, weeks, months, or a few years following their deportation. It is easier and more judicially economical simply to revoke their

supervised release and sentence them, as opposed to instituting subsequent prosecutions (*i.e.*, starting over at square one).

Border-area courts are so overwhelmed with immigration offenses that some have been forced to adopt policies that, for example, require multiple entries and voluntary returns/removals before § 1325 and non-aggravated § 1326 charges are even filed. This is in keeping with the necessary establishment of priorities that, to preserve resources, favors prosecution of multiple violators and those with aggravated criminal histories.

But it is not just the border districts that avail themselves of the supervised release revocation procedure when a defendant alien has returned to this country. Indeed, in non-fast track districts, supervised release revocation, either in lieu of or in addition to a new criminal prosecution, is crucial to efforts to punish and deter aliens who violate the law. In these districts, federal prosecutors note that they do not experience any expedited litigation (which is the *public benefit* at the heart of a fast-track program), but do experience the reduced penalties associated with a fast-track program. This is so because judges in some such districts award defendants up to a 4-level reduction under the 18 U.S.C. § 3553(a) factors, based on

the disparity with fast-track districts (in which such a reduction is expressly countenanced by USSG §5K3.1 (relating to early disposition programs)). At the same time, the non-fast track districts not only do not obtain expedited guilty pleas in their cases, but they expend full prosecutive resources, perhaps even litigating the propriety of the underlying deportation or responding to a sentencing appeal. Accordingly, in these districts, it is more efficient to forgo a new prosecution and, instead, pursue the relatively less costly path of revocation.

Deterring unlawful reentry into the United States and the commission of new criminal offenses that sometimes follows such reentry is a legitimate law enforcement priority in border districts. We believe eliminating supervised release for such offenders would undermine those deterrence efforts. In addition to curtailing the possibility of separate punishments for the new reentry offenses and the violations of the conditions of supervised release, eliminating supervised release would effectively lower the sentences for the former, as the 2-level enhancement that applies under § 4A1.1(d) for commission of a new offense while on supervised release would no longer be applicable.

The proposed amendment to § 5D1.1 that disfavors imposition of supervised release for a defendant who is "a deportable alien who will likely be deported after imprisonment" is flawed in another respect. *Sentencing courts* do *not* make the ultimate determination as to the likelihood of deportability, nor do they control deportation proceedings. Even if an alien defendant *appears* to be "deportable," that does not mean that he/she will be deported. This decision-making function resides within the ICE Detention and Removal administrative authorities. Further, even when ICE initially represents (to the court, a law enforcement agent and/or an Assistant United States Attorney) that an alien will face deportation, this is not a guarantee that deportation will occur. It is reasonable to expect that, were the proposed amendment to be promulgated, the majority of district judges would lean heavily against imposing supervised release terms for those they believe might get deported. But there will always be some unknown group of defendant aliens, albeit perhaps small in relation to total numbers, who will be released from prison and not deported. The determination of deportability, therefore, should not rest with the district judges.

As to the application of the proposed supervised release amendments more broadly to citizen and alien defendants alike across the spectrum of criminal

offenses, a few observations are warranted.

First, regarding the "preservation of resources" concern, there are already methods available to accomplish this goal. Many probation offices have undertaken a program of risk assessment of supervised releasees, and these offices tailor the intensity of supervision to the perceived need, concentrating their efforts on those at greatest risk to recidivate. In addition, judges have the ability to terminate supervised release for those defendants who have demonstrated that further supervision is unnecessary.

Second, the fundamental premise undergirding the Commission's proposals seems to be that the benefits of supervised release simply do not warrant the resource expenditures and, thus, fewer and shorter terms of supervised release is the stated goal. The Department believes that this premise is unsupported. For one thing, the imposition of supervised release plays an important role in supporting the collection of restitution from offenders once they have been released from prison. A tax offender who is incarcerated for 12 months, for example, is likely to owe restitution (or the cost of her incarceration) upon release. We submit that post-release supervision of offenders – even in cases where the term of imprisonment was less than 15 months – provides a benefit that is worth the

expenditure associated with efficiently managed supervision. Further, while we agree that efforts need to be made to ensure that supervised release is as effective as it can possibly be in assisting defendants to transition from incarceration to a productive and law-abiding existence within society, less supervision simply is not the answer. Moreover, the current supervised release system has worked very well over the past 20 years. In surveys of federal judges, almost none have suggested that the current practice is problematic. There is no data suggesting a problem, nor has there been a groundswell of concern from judges around the country.

ILLEGAL REENTRY

The Commission has proposed revising §2L1.2 to reduce the current magnitude of the enhancements that apply to defendants who have been deported following their conviction of the two most serious categories of felony offenses. Included in those categories (set forth in subsections (b)(1)(A) and (B)) are drug trafficking offenses and violent, firearms, child pornography, terrorism, human trafficking, and alien smuggling offenses. Currently, the enhancements relating to such convictions apply regardless of whether they receive any criminal history points under Chapter 4. Under the Commission proposal, these enhancements would be reduced from 16 and 12 levels, respectively, to 8 if the conviction on

which they were based received no criminal history points under Chapter 4. The Department opposes the Commission's proposal.

In the "Synopsis of Proposed Amendment," the reasoning the Commission offers in support of the §2L1.2 amendment is based on a perceived need to respond to case law, most notably *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (in which the 16-level section (b)(1)(A) enhancement was based on two convictions that were 25 years old). Experience teaches, however, that line drawing concerning what convictions can and cannot be considered worthy of the 16 and 12 level enhancements is difficult and complicated. The proposal draws a bright line, and we recognize that it is the very one that is drawn with respect to the counting of prior convictions for purposes of establishing offense levels for certain other offenses (for example, firearms offenses under §2K2.1), so it has a superficial appeal and provides some symmetry within the guidelines. But this demarcation is not one that will consistently be reflective of whether a predicate conviction merits the lower 8-level enhancement. And there is already a mechanism for ready relief in the exceptional case where application of the present illegal reentry guideline would result in what is perceived to be an unjustifiably high offense level based on inconsequential or ancient prior convictions: prosecutors and defense counsel can

recommend a deviation or departure and, with or without such a recommendation, courts can grant one.

The mitigating circumstances in *Amezcua-Vasquez* were atypical as compared to the vast majority of alien defendants with aggravated criminal histories. That unusual nature perhaps supported a departure to which many, perhaps even most, prosecutors would assent. But the guidelines should not be amended based on isolated results that can be remedied in other ways.

It is also notable that time-frame exclusions as to prior convictions that trigger §2L1.2 enhancements have been debated before. During the 2007 guidelines amendment cycle, amendments to the provisions under current discussion, among others, were considered. At that time, in a proposal aimed at eliminating the ever-increasing uncertainty and lack of uniformity as to what constitutes a "crime of violence" or "aggravated offense" in applying the “categorical” approach, the Department asked the Commission to adopt an amendment that focused on the length of the prior sentence as the determining factor in deciding what level of enhancement would apply under §2L1.2. Notwithstanding the support across various groups for the proposal, the Commission adhered to the "categorical"

approach. As to time-frame exclusions, the Commission recognized that § 1326 does not apply remoteness rules because Congress sought a greater deterrent to aliens with more serious criminal convictions returning to the United States. Congress chose not to provide time-frame or staleness exclusions in § 1326, knowing that the guidelines already operate to reduce criminal history categories for so-called "stale" prior convictions/sentences. There was no perceived reason to modify or revamp the guideline enhancement structure in 2007, and there is no new reason to do so in 2011.

Indeed, there are affirmative reasons not to amend § 2L1.2 as proposed, as consideration of those defendants who are subject to the 16-level enhancement under subsection (b)(1)(A) demonstrates. The prior convictions that come within the ambit of that provision are very serious. Aggravated felonies of those sorts can cause even a legal permanent resident to be deported. Those convictions result in the alien being banned from reentering the United States for either life or at least a period of twenty years before being eligible even to reapply for admission. Consequently, as Congress has recognized, it is especially important to deter that class of aliens from returning to this country. The Commission's proposal would appreciably undermine that goal.

To illustrate, if based on a new age-of-conviction time limit, a defendant alien with the most serious type of aggravated felony conviction receives only an 8-level enhancement, his adjusted offense level will be 16 (a base offense level of 8 plus the 8-level enhancement). If he pleads guilty and receives the 3-level acceptance-of-responsibility downward adjustment, even in a non-fast track district his total adjusted offense level will be 13. In Criminal History Category I, this yields a guidelines sentencing range of only 12-18 months; even for a Criminal History Category III offender, the guidelines sentencing range is only 18-24 months. It seems apparent that many aliens who are barred from returning to the United States for at least 20 years would readily risk apprehension and prosecution if the likely sanction is that modest. Moreover, under the new guidelines Sentencing Table, a 12-18 month guidelines sentencing range is in Zone C. In many districts, prosecutors are already battling, often unsuccessfully, the defense argument that, because a split sentence cannot be applied to an alien, the judges should only impose the first half of the incarceration, *i.e.*, six months. Such a sentence is woefully inadequate to provide meaningful deterrence to illegal reentry, again for a class of defendant aliens whom we most want to deter.

In sum, overhauling §2L1.2 to address a relatively small number of *Amezcua-Vasquez*-type defendants, who have not been convicted of additional crime in the years following their aggravated felony conviction and deportation, is unwarranted given that courts are free to depart or vary from the guidelines in such cases, and the staleness of the prior convictions already results in a reduction along the horizontal access of the Sentencing Table.

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In closing, I would like to thank the Commission, again, for affording the Department this opportunity to provide its perspective on these very important issues. The Department looks forward to continuing to work with the Commission to achieve fair sentencing policy.