TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

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On Behalf of the Practitioners Advisory Group

PUBLIC HEARING ON IMMIGRATION

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My name is Knut S. Johnson, and I am a federal criminal defense lawyer in San Diego, California. I am currently the Criminal Justice Act representative for the Southern District of California and was previously employed by Federal Defenders of San Diego, Inc. I am also an adjunct professor at the University of San Diego, School of Law, where I teach Criminal Procedure II.

I am pleased to have the chance to testify on behalf of the Sentencing Commission's Practitioners Advisory Group ("PAG"). As members of one of the Commission's three standing advisory bodies, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

In general, the proposed amendments will increase the guideline range for the vast majority of alien smuggling defendants and for the illegal reentry defendants with the least serious prior records. Many illegal reentry defendants with more serious records will have their guideline ranges reduced.

I. Proposed Amendment to §2L1.1 (Alien Smuggling)

The Commission is considering amending § 2L1.1 and its policy statement to address concerns of the DOJ that this guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors.

The Commission has proposed two alternative options for raising the § 2L1.1(a) base offense level for ordinary alien smuggling from 12 to 16: either to increase all ordinary smuggling crimes from 12 to 16 (Option 1); or to increase the base offense level to 16 if the defendant "smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization" (Option 2). The PAG respectfully believes that there is no demonstrated need for increasing the base offense level, particularly in light of existing options that already address the

Commission's concerns. For these reasons, the PAG urges the Commission to adopt neither option.

The Commission's most recent statistics show that the vast majority of offenders who are sentenced under § 2L1.1 are sentenced *at or below* the existing guideline range, and that the *government requested the below-guideline sentence* in a high majority of such cases. Thus, there is little reason to believe that application of § 2L1.1 of the current guideline range fails to reflect appropriate sentences. In other words, an across-the-board increase from base offense level 12 to base offense level 16 as suggested by Option 1 belies current sentencing practice. Furthermore, Congress has authorized mandatory-minimum sentences for certain immigration offenses, such as alien-smuggling for financial gain. 8 USC § 1324(a)(2)(B)(ii). Thus, Option 1 is also unnecessary in light of mandatory minimum sentences.

The second option (Option 2) would increase the base offense level to 16 if the defendant "smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization." This option would unnecessarily increase the sentence for ordinary smuggling events and is unnecessary in light of existing provisions of the USSG.

Almost all alien smuggling events arguably include an "ongoing smuggling organization." The General Accounting Office noted that, "The types of smugglers can range from opportunistic business owners who seek cheap labor to well-organized criminal groups that engage in alien smuggling, drug trafficking, and other illegal activities." "Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response," GAO report number GAO-05-305, June 29, 2005.

It is also the experience of PAG members who practice in border districts that a significant number of migrants who have entered the United States without inspection have cases that included most of the following: an organizer outside of the United States, a person at the United States border on the Mexican side of the border, a guide across the border, a "stash house" with one or more people watching the aliens, and one or

more smugglers who take the alien through internal checkpoints and into the United States. Moreover, the foot guides are often recruited from among the illegal reentrants and given a reduction in the smuggling fee for acting as a guide.

Thus, whether a defendant is a foot guide at the border, a driver inside the United States, a smuggler at the border with an alien hidden in a vehicle, or a person at a stash house, a defendant in an ordinary smuggling case would be subject under option 2 to an increase to a level 16. Option 2 would, therefore, increase the guideline range for an ordinary smuggling event, while Commission statistics show that both the government and the courts view these cases as less serious than the existing guidelines suggest. In effect, increasing sentences under Option 2 is akin to the former practice of treating all drug couriers as necessarily having a significant role within a drug trafficking organization.

The PAG believes that the more sensible solution is to apply existing enhancements to increase the guidelines range where appropriate. For instance, a defendant convicted of a §1324 offense is eligible for any increase of 2 or 4 levels for role in the offense under USSG §3B1.1. Under that adjustment, any "organizer or leader" of a smuggling venture that included 5 or more participants would have an adjusted offense level of 16. Also, schemes to smuggle six or more aliens will still receive a 3 to 9 level upward adjustment under §2L1.1(b)(2).

Should the Commission choose to adopt the amendment, the PAG respectfully recommends it be a slightly revised version of Option 2. The PAG would revise Option 2 to increase the base offense level to 16 only for offenses where the defendant as part of an ongoing commercial organization smuggled, transported, or harbored a minor who the defendant *knew* was unaccompanied by the minor's parent or grandparent; otherwise, a base offense level of 12 would apply. The PAG also recommends making the enhancement at § 2L1.1(b)(4) inapplicable to offenses involving a base offense level of 16 to avoid duplicate-counting.

Second, the Commission has proposed to amend § 2L1.1(b)(4) to make the enhancement offense-based (with a *mens rea* requirement). The PAG encourages the Commission to adopt an offense-based enhancement with a *mens rea* requirement, because the current enhancement applies even when a defendant did not know that the individual being smuggled, transported, or harbored is a minor. However, the PAG believes the *mens rea* requirement should also apply to the defendant's knowledge of the alien's age. As such, the PAG would propose to amend § 2L1.1(b)(4) to state that "If the offense involved smuggling, transporting, or harboring an unlawful alien who the defendant knew was a minor and who the defendant knew was unaccompanied by the minor's parent or grandparent, increase by **2** levels."

Third, the Commission has proposed to revise the definition of "minor" for purposes of the "unaccompanied minor" enhancement at § 2L1.1(b)(4) from minors under the age of 16 to minors under the age of [18]. The PAG respectfully believes this change is unnecessary, and may lead to unreasonably harsh sentences. In light of the fact that certain countries, such as Mexico, allow individuals who are 16 or older to work without a parent's permission, it seems unjustifiably harsh to increase a defendant's sentence for smuggling, transporting, or harboring an unlawful alien who is 16 or older who may be fully emancipated in his or her home country and travelling to the United States to continue working.

Fourth, the Commission has proposed to amend the § 2L1.1 commentary to clarify that "serious bodily injury," included in subsection (b)(7)(B), has the meaning given to that term in the § 1B1.1 (Application Instructions) Commentary, which states that "serious bodily injury is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." The PAG supports this clarification, which would call for a four-level increase for any case involving criminal sexual abuse.

The Commission has bracketed the possibility of adding an upward departure provision for instances where the "offense involved the smuggling, transporting, or harboring of six or more minors who were unaccompanied by their parents or grandparents." The PAG believes that an upward departure on such grounds would be inadvisable because this offense behavior is adequately addressed through the existing 3-level increase applicable to offenses that involved the smuggling, transporting, harboring of six or more unlawful aliens and the existing 2-level increase applicable to offenses where the defendant smuggled, transported, or harbored a minor who was unaccompanied by that minor's parent or grandparent.

Finally, the Commission has invited comment on whether the clarification that §2L1.1(b)(7)(B) (four level increase for serious bodily injury) "adequately accounts for cases in which the offense . . . involved sexual abuse of a [smuggled] alien . . ." With the clarification that if "the offense involved . . . criminal sexual abuse" then the increase for "serious bodily injury" applies, the PAG believes that the four level increase adequately accounts for the conduct.

II. Proposed Amendments to §2L1.2 (Illegal Reentry)

The Sentencing Commission proposes to amend U.S.S.G. § 2L1.2. The PAG supports the current proposal in general but proposes some changes. If the Commission will entertain modifications to the proposed amendment, the PAG has three proposals:

A. First Proposal

The PAG believes that the base offense level should be left at 8 for those with no prior immigration convictions, rather than increasing it to 10. While the amendment proposes raising the base offense level from 8 to 10, there does not appear to be any empirical support for such an increase. By increasing the base offense level, the Commission increases the offense level for defendants who otherwise have no triggering prior convictions, meaning the change will increase sentences for the illegal reentry defendants having

the least egregious conduct without empirical evidence demonstrating its necessity.

For instance, a base offense level of 8 results in a Guidelines range of 0–6 months for a first-time offender, which seems to better reflect the culpability and average sentence of someone who commits illegal reentry without any aggravating facts; a range of 6–12 months—the resulting Guidelines range at a base offense level of 10—does not. Of course, any offender sentenced for illegal reentry will not receive an early release to a Community Corrections Center or to home detention. In addition, increasing the sentence range for these offenders will likely result in U.S. Probation having to prepare Pre-Sentence Reports for a large number of offenders – and the accompanying costs – that would otherwise require only a Criminal History Report.

Thus, the PAG recommends a two-level increase to 10 for a defendant with a single prior illegal reentry conviction, and a base offense level of 12 for a defendant who has two or more prior illegal reentry convictions. The Commission's proposed change will affect *all* illegal reentry defendants, but it will *disproportionately* harm defendants with no criminal history, the lowest level offenders.

B. Second Proposal

The PAG thinks that the amendments should not include the enhancement for pre-removal misdemeanor convictions that now exists under § 2L1.2(b)(1)(E). The amendment provides a two-level increase for defendants who (before or after their first removal) have "three or more convictions for misdemeanors involving drugs, crimes against the person, or both." As it is written, the guideline is unclear and will lead to sentencing disparities. Should the Commission proceed with this amendment, the PAG respectfully requests the Commission propose a more objective sentencing rubric.

It is not clear how to apply this section or whether the categorical approach applies to determine if the prior conviction qualifies. *Compare Almanza-Arenas*, 809 F.3d 515, 521-28 (9th Cir. 2015) (*en banc*) (applying

categorical approach to determine whether a predicate conviction is a "crime *involving* moral turpitude") (emphasis added) *with Nijhawan v. Holder*, 557 U.S. 29, 33 (2009) (applying circumstance-specific approach to determine whether a predicate conviction "*involves* fraud or deceit in which the loss to the . . . victims exceeds $10,000) (emphasis added). If the categorical approach no longer applies, there is no reason to use it for this one provision.

If the categorical approach does not apply, and some sort of case-specific inquiry is required, that will inevitably require significant research and investigation into the nature of the client's prior misdemeanor convictions. That work will necessarily create litigation and confusion in a Guideline that is now otherwise relatively straightforward. For the rare defendant who has numerous misdemeanor convictions, that fact can be addressed through a Guidelines departure.

Furthermore, the phrase "involving" will cause undue confusion and litigation over when an offense "involves" drugs and/or crimes against a person. For instance, may a sentencing court, under this amendment, look to acquitted or dismissed counts to determine whether the count of conviction "involves" drugs and/or crimes against a person? As the Supreme Court noted in *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013),

> A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.

The Commission noted Judge Owen's concurrence in *Almanza-Arenda v. Lynch*, __ F. 3d __, 2015 WL 946297, at *8-*9 (9th Cir. Dec. 28, 2015), that the 'categorical approach' "will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal

judges reviewing thousands of criminal state laws and certain documents to determine if an offense is 'categorically['] [a predicate offense]. . ." Determining whether an offense "involved" drugs and/or a crime against a person will likewise cause unnecessary and often inconsistent decisions that result in different results in different courts based on the same facts. The Commission, should it wish to enhance based on misdemeanor priors should look to a more objective approach, such as sentence based enhancements for misdemeanor priors.

C. Third Proposal

The Commission should consider increasing the length of sentences that trigger enhancements under § 2L1.2(b)(1) & (2) and/or looking to the time actually served in custody. Currently, the proposed amendment calls for an 8-level enhancement for a prior conviction (before or after removal) that resulted in a sentence of 24 months or more. We recommend a tiered system increasing the length of the triggering sentence starting at 5 years.

For many defendants, depending on the jurisdiction in which their prior was adjudicated, there is no meaningful difference in the underlying facts of prior convictions where the client receives a 13-month sentence or a 24-month sentence. That means that defendants who have non-aggravated felonies who currently receive only a 4-level enhancement will receive an 8-level enhancement under the proposed scheme, depending on where they were previously convicted.

Also, it makes little sense to impose four extra levels—and the 1-to-3 years of extra *federal* custody time that comes along with it—because the state conviction was two years, instead of one. However, the PAG believes that there is a meaningful difference in the seriousness of an underlying offense when a defendant receives a 4, 6, or 10-year sentence. Those sentences seem to be reserved in most states (and in federal court) for particularly aggravated crimes. It is those crimes that support an enhancement.

Moreover, the Commission should consider using the length of a defendant's *prior custody* rather than the length of the *sentence* imposed. The time a prisoner serves for a particular sentence varies wildly from state to

state. Thus, judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using the time actually served in custody rather than the sentence imposed may create greater uniformity[1] and fairness when sentencing offenders with identical priors from different states.

D. The Guidelines Should Not Include Alternative Base Offense Levels or Invited Upward Departures for Multiple Prior Deportations

The Commission asked whether the Guidelines should consider multiple "deportations and orders of removal" to apply alternative base offense levels. The Commission proposes a departure for prior removals "not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326." The PAG opposes the use of removals or orders of removal to increase the recommended guideline sentence.

First, this proposal would lead to additional punishment for otherwise law abiding migrants who may have been subject to vague and difficult to defend "expedited removal" and "reinstatement of removal." Second, this proposal would require counsel to investigate the legal and factual background of every immigration contact, increasing case complexity, time, and cost. Thus, already complex § 1326 litigation would be made unnecessarily much more complex and time consuming.

E. Mitigation and Aggravation

The Commission has invited comment on the existing aggravating factors and what mitigating factors it should incorporate into §2L1.2. The PAG believes that § 2L1.2 adequately accounts for aggravating factors.

[1] The Commission has noted that increasing "certainty and uniformity" are among the goals of the Sentencing Reform Act. *See*, Special Report to the Congress, U.S. Sentencing Commission (August 1991).

However, the PAG believes that the following mitigating factors could be addressed by adjustments or departures:

- Time served in state custody for probation violations due to deportations (see, below F. DEPARTURE FOR TIME SERVED)
- Entering the United States for unusually compelling reasons, such as to see a dying relative.
- Paying taxes and owing property. A segment of those who have entered the United States illegally pay taxes (federal, state, and local) and own real property. However, few if any will ever receive any government related benefits (such as social security or Medicare).

F. Departure for Time Served

The Commission has asked for comment on whether the Commentary adding a departure for time spent in state custody should be deleted. The PAG believes that the Commission should keep that Commentary and should expand it to include, in some circumstances, time spent in state custody before being located by immigration authorities. Actual cases illustrate why this departure should remain and why it should be expanded.

In SD Cal. Case 09 cr 02001-GT a state court twice violated a defendant's probation for failing to appear at the probation office *after* his deportation to Guatemala, stating in the Minutes: "Defendant fails to appear without sufficient cause." The defendant served several years for those violations. Also, the defendant's sentence under the guidelines was nearly doubled because of these two priors (which would not have counted but for the probation violations for being deported).

Likewise, SD Cal. Case 13 cr 00273-BEN the defendant suffered a 2001 conviction followed by a deportation. The defendant then had her probation revoked and a bench warrant issued because she failed to report to her probation officer. Because of that revocation she received additional

time in custody. But for the additional time and the revocation, the 2001 conviction would not have counted.

In both cases (and in others not mentioned) defendants received state custody for being deported (and not being able to report because of the deportation). In addition, in those cases because of the probation revocation proceedings (for not being able to report after deportation) priors that would have been too stale to count added years to the defendants' guidelines ranges. In such cases the court should be able to depart downward.

III. Conclusion

I would like to thank you, on behalf of the PAG, for providing us with this opportunity to provide input on amending these guidelines. We look forward to helping the Commission and the Staff in any way that we can.

Sincerely,

Knut S. Johnson