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March 21, 2008

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Follow-up on Issues Regarding Proposed Amendments to USSG § 2L1.2
that Arose at March 13 Hearing

Dear Judge Hinojosa:

I write on behalf of the Federal Public and Community Defenders to address issues of concern regarding the proposed amendments to USSG § 2L1.2 that arose at the hearing on March 13.

The Department's witness reiterated the Department's position that it does not advocate an increase in sentences under USSG § 2L1.2 for illegal reentry. She testified that the Department favors Option 3, pointing out that the Commission's data indicates that under Option 3, "overall sentences would remain about the same." But Option 3, like every other option proposed by the Commission for which impact on sentence length could be determined, would result in significantly higher sentences for the least culpable defendants without any reason, with sentences more than doubling for those defendants whose current offense level is 8 or 12.¹ Option 3 also retains categories of offenses that trigger the highest offense levels, contrary to the Department's stated position that the fundamental problem with § 2L1.2 results from the need to engage in a guidelines-level categorical approach. Moreover, the Department supports importing into Option 3 the departure considerations from Option 2, which would encourage increases based on multiple previous removals despite the fact that such increases were virtually never imposed when previously available in the guideline and despite the manifest due process concerns raised by such a provision.

¹ See Memorandum from Kevin Blackwell to USSC Immigration Team, *Impact of Proposed Amendments to §2L1.2(Unlawfully Entering or Remaining in the United States)*, at 12 (Feb. 29, 2008).

In our letter of March 6, we set forth some of the most glaring problems with the options proposed during this amendment cycle.² As much as we support the Commission's efforts to simplify the guidelines, we also recognize that simplification is not a "purpose of sentencing" under 18 U.S.C. § 3553(a)(2) and may actually undermine sentencing purposes and fairness. Any tension between simplification and the SRA's stated goals must be resolved by the Commission's charge under 28 U.S.C. § 991 to establish sentencing policies that, among other things, "assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)]" and "provide certainty and fairness in meeting the purposes of sentencing." See 28 U.S.C. § 991(b)(1)(A)-(B). In other words, in the absence of a sound policy reason based on empirical evidence and national experience that supports an increase in sentences for any category of defendant convicted of illegal reentry on the ground that it furthers the purposes of sentencing, the Commission must refrain from increasing those sentences.

In light of the several bills currently pending before Congress that address immigration issues, we have suggested that the Commission wait before attempting to amend § 2L1.2. Joseph Kohler, Assistant U.S. Attorney from the District of Arizona, argued in response that the Commission should not wait because Congress is unlikely to act in the near future. Mr. Koehler further stated that Option 3 is consistent with S. 2611, the Comprehensive Immigration Reform Act of 2006 passed by the Senate in May 2006. See S. 2611, 109th Cong. § 207 (2006).

However, much like the Department's proposal during the previous amendment cycle, Option 3 is far broader than S. 2611. Unlike S. 2611, Option 3 would (1) apply the greatest enhancements to several categorical offenses without limit on the length of the prior sentence, (2) utilize significantly shorter prior sentence lengths than those specified by section 207 of S. 2611 at each gradation of seriousness, and (3) reduce the number of predicate felonies for the gradation that triggers the highest statutory maximum. Further, unlike S. 2611 or the current § 2L1.2, Option 3 would create a higher penalty level for "national security offenses" and "terrorism offenses" than for any other kind of offense, and then define "terrorism offense" to require a complex factual inquiry far afield of the offense of conviction,³ and "national security offense" as any offense "covered" in Chapter 2, Part M, which includes offenses that bear no resemblance to terrorism with offense levels as low as 6, 13, 14 and 18.

² See Letter from Jon Sands to Hon. Ricardo H. Hinojosa Re: Comments on Proposed Amendments, at 4-8 (Mar. 6, 2008).

³ Under the case law interpreting the same definition in § 3A1.4, the inquiry is: Did the offense of conviction or any relevant conduct of the defendant or others for whose acts or omissions the defendant can be held accountable involve or have as one purpose the intent to promote a Federal crime of terrorism set forth in 18 U.S.C. § 2332b(g)(5), which in turn is defined as an enumerated offense calculated to intimidate, coerce or retaliate against government action? See *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2003).

In addition, S. 2611 creates a separate crime where the defendant had been previously removed three or more times, meaning that it must be charged in the indictment and proved beyond a reasonable doubt. In contrast, the Department's proposed changes to Option 3 would not only encourage upward departure based on uncharged conduct that S. 2611 treats as a separate crime, but also based on a preponderance of the evidence that the defendant had been previously removed "multiple" times, which could mean only twice. And unlike Option 3 (or the current § 2L1.2 or any other guideline), S. 2611 specifies that the predicate convictions are elements of the offense of illegal reentry, to be alleged in the indictment and proved beyond a reasonable doubt. Given these many differences, the Department's suggestion that Option 3 best approximates congressional will is without basis.⁴

As we have for many years, the Defenders again noted the absence of any empirical basis or policy reason for the 16-level increase under USSG § 2L1.2(b)(1)(A). In response, Richard Murphy, the Department's Commissioner *Ex Officio*, stated that he was present at the Commission in 1991 and claimed that a study was done before the Commission amended the guideline to include the 16-level enhancement. No such study has ever been published, and the existence of such a study is not supported by historical accounts:

The Commission did no study to determine if such sentences were necessary-or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16- level increase and the Commission passed it with relatively little discussion.

Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275, 276 (Mar/Apr.1996). See also James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996) (same). However, if such a study exists, we would very much like to see it so that we can respond accordingly. Otherwise, we must work with the information provided the public, which indicates that the 16-level increase is unsupported by any empirical or policy basis.

We think the Chair's observation that the Commission adopted the 16-level increase because Congress doubled the statutory maximum is a more accurate account than that offered by Commissioner *Ex Officio* Murphy. However, we do not agree with the theory that when Congress increases a statutory maximum, the Commission is required to increase the guideline range to reflect the "kinds of sentences available." The only directive regarding "kinds of sentences available" in the SRA is to the courts, in 18 U.S.C. § 3553(a)(3); there is no such directive to the Commission. Moreover, "kinds of

⁴ For a more thorough discussion of the Department's proposal from the previous amendment cycle, and its inconsistencies with S. 2611 and the identical H.R. 1645, see Letter of Jon Sands to Hon. Ricardo H. Hinojosa Re: Follow-Up on March 20 Hearing, at 2-4 (Mar. 29, 2007).

sentences available” refers to sentence type, not magnitude. *See, e.g.*, 18 U.S.C. § 3553(b)(1) (excised by *Booker*) (distinguishing “kind” from “degree”). Thus, the Supreme Court recently reversed the Eighth Circuit, in part, because although probation was not available under the Guidelines, “§ 3553(a)(3) directs the judge to consider sentences other than imprisonment.” *Gall v. United States*, 128 S. Ct. 586, 602 & n.11 (2007). Finally, a congressional increase in the statutory maximum does not obviate the need for empirical evidence showing that a *guideline* increase advances the purposes of sentencing. *See Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007); *Gall*, 128 S. Ct. at 594 n.2.

We would also like to clarify that our purpose in including fast-track dispositions in the rate of below-Guidelines sentences in illegal reentry cases was not to raise the issue of unwarranted disparities between districts based on the presence or absence of fast-track programs, but to urge the Commission to take those sentences into account as a more accurate measure of the appropriate sentence as determined by both the courts and prosecutors. The Commission is charged with receiving, and taking into account, feedback from the courts and the criminal justice community regarding how the guidelines should be improved. *See Rita v. United States*, 127 S. Ct. 2456, 2464-65 (2007); 28 U.S.C. § 994(o). The fact that Congress has sanctioned the use of fast-track programs supports this point rather than undermines it.⁵

Finally, we would like to reiterate that we strongly oppose each of the options proposed by the Commission this amendment cycle for all of the reasons set forth in our letter of March 6, 2008. Most fundamentally, we cannot support Option 1 (or any option) for which the Commission cannot determine its impact on sentences, and the Commission’s data indicates that Options 2 and 3 would raise sentences for the least culpable defendants for no reason based in policy or justice. We continue to believe our proposal, modeled on USSG § 2K2.1, represents the most principled starting point, both for purposes of simplification and to assure that USSG § 2L1.2 will better serve the purposes of sentencing.

Thank you for the opportunity to provide these comments, and we look forward to working with you on improving the illegal re-entry guideline.

Very truly yours,



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Chair, Federal Defender Sentencing Guidelines
Committee

⁵ We further note that before *Booker* was decided, the Commission itself included fast-track dispositions in the rate of government-sponsored downward departures for illegal reentry cases that were not based on substantial assistance under USSG § 5K1.1. *See, e.g.*, United States Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2004).

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