WASHINGTON
LEGISLATIVE OFFICE

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United States Sentencing Commission,
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Public Comment on Proposed Amendments re:
Cultural Assimilation, Collateral Consequences, and Recency
(75 Fed. Reg. 3525, Jan. 21, 2010)

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Dear Commissioners:

On behalf of the American Civil Liberties Union ("ACLU"), and its hundreds of thousands of members, its activists, and its 53 affiliates nationwide, we submit these comments pursuant to the U.S. Sentencing Commission's request for public comments, as noticed in the Federal Register in January 2010, relating to the Commission's proposed amendments to the guidelines.

The Commission's request for comments on aspects of sentencing that affect non-citizens is especially timely in light of the enormous number of federal criminal immigration prosecutions. Chief Justice Roberts noted in his 2009 Year-End Report on the Federal Judiciary that these "climbed to record levels, as cases jumped 21% to 25,804 [out of a total of 76,655.]" The Chief Justice added that 80% of immigration prosecutions involved illegal re-entry.[1] In comparison, fiscal year 1994 saw only 2,338 immigration offenses sentenced under the guidelines, comprising less than six percent of all federal criminal cases.[2]

The ACLU respectfully submits that the Commission should amend the sentencing guidelines to provide for downward departures based on collateral consequences and cultural assimilation, as well as eliminate the redundant recency provision. Since *United States v. Booker*,[3] federal district judges have exercised much greater discretion in sentencing than they did when the guidelines were mandatory. At the same time, the advisory guidelines continue to play an important role both in a district judge's crafting of a sentence and in determining its reasonableness on appeal.[4] The availability of downward departures based on non-citizens' individual attributes would help fulfill the "overarching" mandate of 18 U.S.C. § 3553(a), for "district courts

[1] *2009 Year-End Report on the Federal Judiciary* (Dec. 31, 2009), available at http://www.supremecourtus.gov/publicinfo/year-end/2009year-endreport.pdf
[2] U.S. Sentencing Commission, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 2 (Jan. 20, 2006).
[3] *United States v. Booker*, 543 U.S. 220 (2005).
[4] *Rita v. United States*, 551 U.S. 338 (2007).

to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

I. Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted on the basis of collateral consequences of a defendant's status as a non-citizen? If so, how?

The ACLU supports amending the guidelines to permit downward departures for collateral consequences to non-citizens for two reasons. First, sentencing policies exclude non-citizens from programs and facilities that would make their incarceration shorter and less onerous. Second, the operation of the immigration laws, particularly the aggravated felony classification, imposes severe collateral consequences on non-citizens for even minute variations in sentence length. Both reasons support the principle that "a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence," *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994), either at the time the defendant is incarcerated or thereafter. *See United States v. Bautista*, 258 F.3d 602, 606 (7th Cir. 2001) ("Bautista does not rely solely on the fact of his impending deportation (a prospect shared by all aliens who commit a deportable offense), but instead points to individualized circumstances that, he argues, make deportation extraordinarily harsh for him . . . . [W]e see nothing in the Guidelines that forbids consideration of extralegal consequences that follow a sentence as grounds for a departure.")

a. Differential Conditions of Confinement and Prison Time Served

The Bureau of Prisons ("BOP") classifies non-citizen inmates in a manner that has severe negative consequences for their conditions of confinement and the length of their prison terms. Non-citizen inmates are automatically assigned a Deportable Alien Public Safety Factor ("PSF") based solely on the fact that they are not U.S. citizens.[5] An inmate with a Deportable Alien PSF is ineligible for housing in a minimum security facility or a Community Corrections Center (CCC).[6] As a result, many non-citizen inmates are transferred to facilities far from their relatives. Moreover, an inmate with a Deportable Alien PSF is barred from the BOP's Residential Drug Abuse Program and therefore ineligible for the early release incentive in 18

[5] Program Statement 5100.08, *Inmate Security Designation and Custody Classification* (Sept. 12, 2006), ch. 5, 9 (the deportable alien public safety factor is assigned to "[a] male or female inmate who is not a citizen of the United States" unless immigration authorities "have determined that deportation proceedings are unwarranted or there is a finding not to deport at the completion of deportation proceedings").

[6] *Id.* at ch. 5, 12, ch. 1, 2; Program Statement 7310.04, *Community Corrections Center (CCC) Utilization and Transfer Procedures* (Dec. 16, 1998), 10 (listing as ineligible for CCC confinement "[i]nmates who are assigned a 'Deportable Alien' Public Safety Factor").

U.S.C. § 3621(e)(2), a sentence reduction which can be up to one year.[7] Inmates assigned a PSF are also ineligible for work furloughs.[8]

Non-citizen inmates thus consistently serve longer terms of imprisonment under harsher conditions of confinement than citizens guilty of the same crime and issued the same sentence. In the United Kingdom, a similar ineligibility for early release allows non-citizen inmates to receive a reduced sentence to equalize their treatment.[9] Disparate treatment is not limited to the BOP term of incarceration, however. Non-citizens may be denied credit for pre-trial administrative detention.[10] They will also be subject to mandatory detention in the custody of the Department of Homeland Security after their criminal sentence expires.[11] This dual track is contrary to the principle expressed in 18 U.S.C. § 3553(a)(6), which identifies as a sentencing factor "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See also* 28 U.S.C. § 991(b)(1)(B) (directing the Commission to avoid such disparities "while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices"); *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) ("[W]e have no reason to believe that the Guidelines have accounted for a defendant's status as a deportable alien in setting the level for that offense [importing heroin]. The district court is thus free to consider whether Farouil's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement.").

b. Severe Immigration Consequences

A downward departure for collateral consequences is also justified because it would allow sentencing judges to consider the disparity for non-citizens whose convictions have severe immigration consequences following from the length of their sentences. It is a core judicial function to look at all the consequences of the sentence and judgment in a criminal case. As stated in *Koon v. United States*, 518 U.S. 81, 113 (1996), "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") The import of collateral immigration consequences to a criminal conviction is so vital that the U.S. Supreme Court is considering whether an attorney's failure accurately to advise a client of potential immigration jeopardy constitutes ineffective assistance of counsel. *See Padilla v. Kentucky*, No. 08-651 (argued Oct. 13, 2009). Regardless of whether the U.S. Constitution as interpreted by the Supreme Court requires such advice, it is clear that reduction of a non-citizen's sentence by even one day, from 365 days to 364, can avoid collateral consequences that result in hardship

[7] *See* 28 C.F.R. § 550.56 ("Inmates enrolled in a residential drug abuse treatment program shall be required to complete subsequent transitional services programming in a community-based program."); 28 C.F.R. § 550.58 (discussing eligibility for early release).
[8] Bureau of Prisons, Program Statement 5280.08, *Furloughs* (Feb. 4, 1998), 11.
[9] Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*. 21 Fed. Sent. Rptr. 177 (2009).
[10] *Id.* at 174 & n.6.
[11] 8 U.S.C. § 1226(c).

disproportionate to what the guidelines intend. The missing day would be more than made up by the fact that a defendant sentenced to 364 days imprisonment will normally be incarcerated for longer than one sentenced to 365 days, because of the reduction in 18 U.S.C. § 3624(b).[12]

Convictions designated as aggravated felonies, for example, which often require a sentence imposed of 365 days or more,[13] lead the non-citizen to be ineligible for discretionary relief from removal, including asylum and cancellation of removal for both lawful permanent residents and others.[14] An individual convicted of an aggravated felony who is not a lawful permanent resident may summarily be ordered removed without presentation before an immigration judge.[15] A non-citizen convicted of an aggravated felony will neither be eligible for voluntary departure in lieu of removal[16] nor for a determination of good moral character,[17] which dispels any future hope of naturalization.[18] An aggravated felony conviction can also *permanently* bar the non-citizen from admissibility to the U.S.[19] These collateral consequences of an aggravated felony conviction are only illustrative; there are myriad other immigration consequences that can attach to a non-citizen's length of sentence and constitute "individualized circumstances that . . . make deportation extraordinarily harsh for [the non-citizen concerned]." *Bautista*, 258 F.3d at 606. What unifies all the consequences is that they operate to make the effect of a non-citizen's guidelines sentence substantially more severe than that of a similarly situated U.S. citizen, the very type of unjustified disparity for which a downward departure should be available in mitigation.

c. *Restrepo* is not an obstacle

United States v. Restrepo, 999 F.2d 640 (2d Cir. 1993), cited in the Commission's request for public comment as standing in opposition to collateral consequences departures, did not consider the consequences for non-citizens of the immigration laws' current focus on even minute disparities in sentences. That omission is understandable, as many of the relevant changes -- like the greatly expanded reach of the "aggravated felony" definition -- were included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Restrepo* concluded that *inevitable* deportation would not be mitigated by a downward departure, which "must . . . rationally be capable of remedying or alleviating the problem. . . . The fact that

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[12] "[A] prisoner who is serving a term of imprisonment of more than 1 year, other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment."

[13] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (crime of violence), (G) (theft offense), (R) (commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered), (S) (obstruction of justice, perjury or subornation of perjury, or bribery of a witness).

[14] 8 U.S.C. §§ 1158(b)(2)(B)(i); 1229b(a)(3), (b)(1)(C).

[15] 8 U.S.C. § 1228(b).

[16] 8 U.S.C. § 1229c(a)(1).

[17] 8 U.S.C. § 1101(f)(8).

[18] 8 U.S.C. § 1427(a).

[19] 8 U.S.C. § 1182(a)(9)(A)(i).

Restrepo is to be deported is not alleviated by reducing his term of imprisonment." *Id.* at 647. Today, by contrast, downward departures in appropriate cases to avoid the immigration consequences of an aggravated felony designation would remedy a host of severe problems for non-citizens, ranging from whether they are eligible for discretionary relief from removal to whether they can ever return to the U.S.

In addition, *Restrepo*'s rationale for forbidding a departure based on BOP policies for non-citizens relied on a pre-*Booker* framework of guidelines sentencing, denouncing "the ad hoc granting of departures that have the effect of creating the very type of disparity in sentencing that the adoption of the Guidelines was intended to eliminate." *Id.* After *Booker*, and were a new downward departure in place, collateral consequences departures based on incarceration disparities would not be ad hoc but rather carefully tailored to reduce the disparity in the length and conditions of confinement for non-citizens. *See Gall v. United States*, 552 U.S. 38, 51 n.8 (2007) (emphasizing the imperative to "successfully balance the need to reduce unjustifiable disparities across the Nation and consider every convicted person as an individual" (internal quotation marks and citation omitted)).

d. State Court Practice

Providing for a downward departure for collateral consequences would also accord with the practice of numerous state courts. *See, e.g.*, *State v. Svay*, 828 A.2d 790, 791 (Me. 2003) ("immigration status and the effect that criminal convictions and criminal sentences can have on deportation are factors that a sentencing court can consider"); *see also Ochoa v. Bass*, 181 P.3d 727, 731 (Okla. Crim. App. 2008) ("citizenship status is a circumstance that may affect the sentencing"); *State v. Tinoco-Perez*, 179 P.3d 363, 365 (Idaho Ct. App. 2008) (a conviction's "effect on immigration status is an appropriate consideration for a trial court in fashioning a sentence"); *State v. Quintero Morelos*, 137 P.3d 114 (Wash. Ct. App. 2006) (affirming reduction of sentence to less than a year to prevent deportation).[20] Federal district courts are familiar with the pertinent immigration laws, which they are often required to apply in the criminal context. The availability of a downward departure for collateral consequences would not be an additional burden on the sentencing process.

For these reasons, the ACLU supports adding to the guidelines a downward departure for collateral consequences. The departure should apply when a sentence imposed on a non-citizen would lead to more severe incarceration consequences and/or disproportionately severe adverse immigration jeopardy as compared with a sentence of equal length imposed on a citizen defendant who is otherwise similarly situated.

[20] Brief of the American Bar Association as *Amicus Curiae* in *Padilla v. Kentucky*, No. 08-651 (June 2, 2009), 23.

II. Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted in an illegal re-entry case on the basis of "cultural assimilation"? If so, how?

The ACLU also supports amending the guidelines to permit downward departures in illegal re-entry cases for cultural assimilation. Such departures are essential to individualized sentencing. As noted in the request for comment, no court of appeals has held that such departures are impermissible while several have endorsed the departure. Departures on the basis of cultural assimilation recorded from October 1, 2003 through June 24, 2004, when the Supreme Court decided *Blakely v. Washington*,[21] made up only 0.7% of departures for that period, or 24 cases.[22] District judges have shown through the years that they are capable of applying downward departures for cultural assimilation in careful and measured fashion.

As currently written, the guidelines fail to account for the widely disparate factual circumstances that compel non-citizens to re-enter the U.S. illegally. For example, individuals who enter for criminal reasons are distinct from those who cross the border for familial or cultural reasons. *See United States v. Lipman*, 133 F.3d 726, 731 (9th Cir. 1998) ("Cultural assimilation may also be relevant to the character of a defendant sentenced under U.S.S.G. § 2L1.2 insofar as his culpability might be lessened if his motives were familial or cultural rather than economic. Thus, unlike the general threat of deportation, cultural assimilation is a fact-specific ground for departure that may speak to an individual defendant's offense, his conduct and his character, and not just to possible future events unrelated to the defendant's individual circumstances."). Likewise, an individual who came to the U.S. as an infant is situated differently from one whose prior deportation resulted from expedited removal proceedings at the border and who may never have spent significant time in the U.S. *See, e.g.*, *United States v. Melendez*, 420 F.3d 45, 51 n.3 (1st Cir. 2005) ("We . . . note the difficulty of Melendez's position[;] at the time of sentencing, [he] had lived in the United States for 52 years, has a wife and four children in the United States, and can neither speak nor write Spanish."); *United States v. Castillo*, 386 F.3d 632, 636 (5th Cir. 2004) (upholding departure where defendant "was brought to the United States at age three by his parents and continuously lived here, where he was educated and worked, becoming fluent in English. . . . Juxtaposed with his connections to the United States, he has virtually no ties to Mexico; his family does not reside there; and he has spent virtually no time there.")

In *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917 (E.D. Wis. 2003), the court suggested a useful four-part test to determine the appropriateness of a downward departure for cultural assimilation. The first factor is "the length of time the defendant lived in the United States," including whether the defendant was educated in the U.S. and the circumstances of his or her entry into the country. *Id.* at 920. This analysis provides a quantitative and qualitative measure of a defendant's American identity.

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[21] 542 U.S. 296 (2004).

[22] *Reasons Given by Sentencing Courts for Other Departures Below the Guideline Range*, Table 25, available at http://www.ussc.gov/ANNRPT/2004/table25pre.pdf

The second factor is "the defendant's level of familiarity with his [or her] country of origin." American cultural assimilation can be relative to that experienced in a country of origin and non-citizens with few ties abroad "will have a greater motivation to leave than one deported to a more familiar environment." Many non-citizens are deported from the U.S. to countries unknown to them, and not surprisingly they struggle with language, adjustment, and acculturation especially in the absence of kinship support. For example, Cambodian refugees who were born in Thai camps and came to the U.S. as infants have been deported to Cambodia despite the clear impression that "these are not Cambodians. These are Americans. They're Americans by experience, education, language. They think in English, they speak to each other in English. They arrive [in Cambodia] essentially alone, with nothing."[23]

The third factor is the defendant's American family ties. In the decade ending in 2007, more than 108,000 parents of U.S. citizen children were removed.[24] Such parents are forced to make gut-wrenching choices about the education and health of their children, weighing the costs of family separation and the absence of parental care against the benefits of continuity and resources for their children in the U.S. The Supreme Court has recognized that deportation causes a non-citizen to "lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). A cultural assimilation downward departure would ensure that cases of non-citizens returning for family unity purposes are not misclassified as being akin to returns for criminal activity.

The fourth factor is "what the defendant did and where he went upon re-entry." This appraisal permits a court to test the objective indicia of cultural assimilation against the subjective behavior of a defendant. For example, in *Lipman*, despite the defendant's extensive American cultural assimilation, the district court found significant that although "Lipman claims that his reentry was motivated by his desire to visit his disabled U.S. citizen daughter after he learned that she had been sexually assaulted . . . his trip took him to Los Angeles instead of to his daughter's home in New York." 999 F.2d at 729.

Differing levels of culpability are not taken into account by the one-size-fits-all illegal re-entry statute. The ACLU supports amending the guidelines to provide a downward departure for cultural assimilation, with an application note mentioning, nonexclusively, the four factors laid out in *Martinez-Alvarez*. *Martinez-Alvarez* observed that for cultural assimilation "the closest analogy to an existing guideline is to U.S.S.G. § 2L2.1(b)(1), which provides for a three level reduction in certain immigration offenses if the crime 'involved the smuggling, transporting, or harboring only of the defendant's spouse or child.' This suggests that the Commission has determined that a defendant's violation of immigration laws with the motive of being with his family is worth a three level reduction." 256 F. Supp. 2d at 922. The ACLU agrees and recommends that the guidelines be amended to allow for a three-level downward departure for defendants' cultural assimilation.

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[23] Bill Herod, Returnee Assistance Project Director, quoted in *Sentenced Home* (2007), available at http://www.pbs.org/independentlens/sentencedhome/film.html

[24] Department of Homeland Security, Office of the Inspector General, *Removals Involving Illegal Alien Parents of United States Citizen Children* (Jan. 2009), 1.

III. Recency

The ACLU supports Option 1 of the request for comment's proposals to amend the recency provision of the guidelines. Other parts of the guidelines, notably the status provision of § 4A1.1(d) and the criminal history computation, more than adequately account for past convictions. As a result, the recency provision leads to disproportionate multiple counting of a defendant's past criminal conduct. The recency provision's redundance is especially clear in illegal re-entry cases. Henry J. Bemporad, the Federal Public Defender for the Western District of Texas, recently emphasized to the Commission that in some illegal re-entry cases a defendant "can have the prior reentry conviction counted as many as *six* times."[25]

The Commission's proposed Option 1 would ameliorate the multiple counting problem by reducing the treatment of past criminal conduct as an exponential aggregator. The guidelines would continue to take a defendant's criminal past into account without the recency provision but the recommended ranges would be more just.

IV. Retroactivity

The request for comment asks whether the proposed amendments should be made retroactive. The ACLU supports the retroactive application of the three amendments discussed in this comment. In the background section of the application note for guidelines § 1B1.10, the Commission states: "Among the factors considered [for retroactivity] . . . were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1)." All these factors support retroactive application of the amendments.

Each of the proposed amendments' purpose is to ameliorate unequal past sentencing practices and to effectuate the guidelines' objective to take into consideration individual defendants' circumstances. Non-citizens have been serving sentences that are disproportionate when compared with the treatment of otherwise identical citizen defendants convicted of similar conduct. Some of these past sentences reflect improper severity for failure adequately to take into account collateral consequences. Other past sentences are overly harsh due to multiple counting of past criminal history based on the recency provision. Retroactive application of these amendments is justified based on their purpose to align the guidelines more precisely with their intent. The cultural assimilation departure has already been implemented in some circuits but without the specificity that a guidelines amendment would offer both in terms of criteria to apply and an appropriate departure range. This departure should therefore also be applied retroactively in cases that warrant revisiting.

The changes to guideline ranges made by these amendments will be manageable, as they are discrete modifications, as will the determination of amended guideline ranges.

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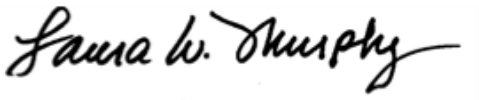
[25] Henry J. Bemporad, Statement at Public Hearing on *The Sentencing Reform Act of 1984: 25 Years Later*. (Jan. 21, 2010), 17.

Thank you for your consideration of these important matters. If you have any questions, please contact Joanne Lin, ACLU legislative counsel, at 202/675-2317 or jlin@dcaclu.org.

Sincerely,



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