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March 22, 2010

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

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

Dear Commissioners:

On behalf of the National Immigration Project of the National Lawyers Guild (National Immigration Project) 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.

We thank you for considering our past comments and hope the Commission finds these comments helpful.

I. The U.S. Sentencing Commission Should Amend the Sentencing Guidelines to Permit a Downward Departure Based on the Additional Consequences a Noncitizen Defendant Faces

The National Immigration Project urges the Sentencing Commission to amend the Sentencing Guidelines to permit a downward departure because a noncitizen offender faces: detention in prison-like conditions while awaiting removal or challenging their deportability; harsher and more restrictive conditions of confinement while in Bureau of Prisons (BOP) custody; and permanent separation from family and loved ones. By amending the guidelines to permit a downward departure, a federal district court judge would have more discretion to mitigate the instances where noncitizens endure these harsher consequences exclusively because of their status as noncitizens.

Certain sentencing courts have already indicated a desire to take into consideration the increased severity in punishment that results from immigration consequences.¹

Federal immigration law has continued to increase the categories of offenses for which a noncitizen, and even a permanent resident, will face deportation. Lawful permanent residents may be faced with mandatory deportation for relatively minor crimes such as petty theft, or forgery of check for less than \$20.²

In addition, previously available forms of discretionary relief have been eliminated, taking power away from immigration judges and preventing them from even considering a noncitizen's rehabilitation, family ties, and other equitable factors.³ For these reasons the Sentencing Commission should provide a downward departure that permits a federal district court to depart downwardly in consideration of the additional consequences that noncitizens face.

Immigration cases continue to be the fastest growing segment of cases in the federal system. As a result, an increasing number of noncitizens are experiencing disproportionately more severe sentencing consequences.⁴

A. ***Noncitizens Experience Harsher Conditions of Confinement than U.S. Citizens***

The BOP treats alienage as a public safety factor (PSF) in classifying a prisoner's security status. As a result, a noncitizen has a higher security classification than would a citizen. This higher classification results in a noncitizen inmate's ineligibility to serve his or her sentence in a minimum security facility.⁵ This status-based and artificial increase in security classification essentially prevents noncitizen inmates from working beyond the perimeter of the institution, receiving furlough or serving the last ten percent of his or her sentence in a halfway house or Community Corrections Center.⁶ These noncitizens are unable to benefit from the early release provisions that permit participation in the Residential Drug Abuse Treatment Program (RDAP).⁷ Noncitizens also do not have the same kind of access as citizens to

¹ See, e.g., *U.S. v. Gomez*, 431 F.3d 818 (D.C. Cir. 2005) (discussing district court downward departure on the ground that a noncitizen would face more severe punishment because of her status).

² Bill Ong Hing, *Deporting Our Souls*, p. 55.

³ Specifically, the elimination of INA 212(c) in 1996 by IIRIRA eliminated discretionary relief from deportation for long-time lawful permanent residents. Until and unless INA 212(c) is reinstated, it is important for federal criminal sentencing judges to be able to have discretion to consider deportation as punishment and provide a downward departure.

⁴ Overview of Federal Criminal Cases, Fiscal Year 2008, United States Sentencing Commission. http://www.ussc.gov/general/20091230_Data_Overview.pdf

⁵ U.S. Bureau of Prisons Program Statement 5100.08, *Inmate Security Designation and Custody Classification*, Ch. 5, at 9 (9/12/2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

⁶ U.S. Bureau of Prisons Program Statement 5100.08, *Inmate Security Designation and Custody Classification*, Ch. 5, at 9 (9/12/2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

⁶ 28 C.F.R. § 550.55(b); Federal Bureau of Prisons, Program Statement 5100.04: Security Designation and Custody Classification Manual, Chs. 7-9, 7-10, 10-4, 10-29, 11-7, (June 15, 1991) ("BOP Manual");

⁷ 28 C.F.R. § 550.55(b); U.S. Bureau of Prisons Program Statements 5331.02 *Early Release Procedures*

occupational and educational programs, including English as Second Language classes.⁸ In addition to these limitations, noncitizen inmates end up receiving lower wages than citizen inmates because deportable prisoners do not receive the \$10 release gratuity when they are released from prison.⁹

The increased security classification means that noncitizen offenders are less likely than a similarly-situated noncitizen to serve their sentence in a minimum security prison. This difference has a substantial impact on a prisoner's daily life. The physical reality of a higher security facility has serious detrimental affects on a prisoner's mental health, which may be all the more vulnerable if the individual came to the U.S. to flee persecution in their home country. Other differences in confinement in a minimum versus maximum security facility include supervised work within the institution as opposed to an outside job assignment, greater restrictions on access to mail and visitors including a prohibition against receiving "contact" or physical visits from children, parents, spouses, and other relatives, and the inability to receive visits from friends or non-family members.¹⁰ Prisoners in medium or high security institutions are faced with highly invasive body cavity searches before and after visits, and visitors are subject to the same searches.¹¹ Prisoners in medium and high security facilities have no privacy with respect to their mail – all mail is inspected by the institution.¹² Additionally, leisure time is seriously restricted in higher security institutions including the inability or limitations in accessing movies, hobbycraft programs, attendance at religious programs¹³, access to legal reference materials¹⁴, and incoming publications such as magazines and newspapers.¹⁵ Moreover, deportable noncitizens are not eligible for the one-year reduction of a sentence granted to those who complete the Board of Prison Term's 500-hour drug treatment program.¹⁶

It is indisputable that immigration consequences create severe hardship for the individual and his or her family – parents, spouses, siblings, and even children, by causing a permanent separation.

under 18 U.S.C. § 3621(e), at 3, §5(1) (3/19/2009) and 7310.04, Community Corrections Center(CCC) Utilization and Transfer Procedures, at 11, §(10)(b) (12/16/1998), available at www.bop.gov/policy/progstat/5331_002.pdf and www.bop.gov/policy/progstat/7310_004.pdf.

⁸ 28 C.F.R. §§ 544.51(b) and 544.71(a)(3); U.S. Bureau of Prisons Program Statement 5353.01, Occupational Education Programs, at 3, §7(b) (12/17/2003), available at www.bop.gov/policy/progstat/5353_001.pdf; 28 C.F.R. §§ 523.20(d) and 544.41(a)(3); U.S. Bureau of Prisons Program Statement 5350.24, *English as-a-Second Language Program (ESL)*, at 3, §5(a)(3) (7/24/1997), available at www.bop.gov/policy/progstat/5350_024.pdf.

⁹ U.S. Bureau of Prisons Program Statement 5873.06, *Release Gratuities, Transportation and Clothing*, at 5, §7(e) (8/6/2003), available at www.bop.gov/policy/progstat/5873_006.pdf.

¹⁰ 8 C.F.R. § 540.44.

¹¹ 28 § C.F.R. 511.12.

¹² 28 C.F.R. § 540.12, 540.14.

¹³ 28 C.F.R. § 548.10.

¹⁴ 28 C.F.R. § 543.10.

¹⁵ 28 C.F.R. § 540.70.

¹⁶ *McClellan v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999).

B. *Noncitizens face additional confinement that would otherwise not be credited*

The sentencing guidelines should expressly permit a downward departure based on a defendant's status as a noncitizen because noncitizens will spend more time in custody than citizens solely because of their status as noncitizens.¹⁷ These decisions reflect the statistical reality that defendants face additional time locked up in immigration custody while ICE implements the removal process. These times are longer if a noncitizen challenges the basis for her or his removal.

The BOP generally does not credit time served in immigration custody.¹⁸ Moreover, Immigration and Customs Enforcement custody facilities often fail to provide adequate medical care.¹⁹ In too many instances, this failure has led to the death of an ICE detainee. The press has identified at least 104 deaths of inmates in ICE custody from October 2003 to August 2009, which ICE now acknowledges.²⁰

Because certain noncitizens are likely to be locked-up in immigration custody, which time would otherwise not be credited, the Sentencing Commission should revise the Guidelines to permit a downward departure on this basis to address this discrepancy in the severity of punishment that noncitizens face.

II. A Defendant's Cultural Ties to the United States, *i.e.*, Cultural Assimilation, Should Be an Encouraged Basis for Departure in Cases under USSG §2L1.2

Family and cultural ties to the United States, rather than intending to commit additional crimes often motivate a noncitizen reentering the United States illegally. These factors include protecting family members, lack of familiarity with their home country, and hardship in their home country. Courts have recognized that length of time in the United States and a lack of familiarity with the customs and language of their countries of birth impose hardships on noncitizen defendants charged with immigration-related crimes. Courts have fashioned individual variances to avoid the

¹⁷ See, e.g., *U.S. v. Camejo*, 333 F.3d 669 (6th Cir. 2003) (recognizing that defendant spent two years in immigration detention for two years before trial); *U.S. v. Montez-Gaviria*, 163 F.3d 697 (2d Cir. 1998)(recognizing availability of downward departure where defendant spent time in immigration custody pursuant to a detainer, which was not credited elsewhere.

¹⁸ U.S. Bureau of Prisons Program Statement 5880.28, *Sentence Computation Manual (CCCA of 1984)*, at 1-15A (7/20/99), at http://www.bop.gov/policy/progstat/5880_028.pdf.

¹⁹ Amnesty International, *Jailed Without Justice*, at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>, p. 39; Human Rights Watch, *US: Immigration Detention Neglects Health*, <http://www.hrw.org/en/news/2009/03/17/us-immigration-detention-neglects-health>, and *Detained and Dismissed, Women's Struggles to Obtain Health Care in United States Immigration Detention*, <http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed>

²⁰ New York Times, *In-Custody Deaths*, http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html; DHS Press Release, *ICE Identification of Previously Un-tracked Detainee Deaths Highlights Importance of Detention Reform* (8/17/09), available at www.ice.gov/pi/nr/0908/090817washington.htm

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III. The Commission should Eliminate Recency Points

For the reasons identified in the Federal Defenders' comments, the National Immigration Project urges the Commission to follow Option One and to §4A1.1(d) as well.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,



Dan Kesselbrenner
Executive Director



Carrie Rosenbaum
Member, National Immigration Project
San Francisco, CA

²² See, e.g., *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 964 (E.D. Wis. 2005) (motive for reentry mitigates seriousness of § 1326 offense, supports below guideline sentence); *United States v. Castillo*, 386 F.3d 632, 638 (5th Cir. 2004) (affirming cultural assimilation departure based on lengthy residence beginning at age three); *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917, 921-22 (E.D. Wis. 2003) (granting departure granted where defendant's motivation for returning was that he had spent virtually his entire life in United States); *United States v. Hernandez-Garcia*, 97 Fed. Appx. 119, 123 (9th Cir. 2004) (affirming cultural assimilation based on lengthy residence beginning at age six).