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The National Immigration Project of the National Lawyers' Guild (NIP/NLG) hereby submits the following comment on the Proposed Amendments to the Immigration Guidelines at U.S.S.G. §§ 2L1.1 and 2L1.2.

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

The NIP/NLG opposes an overall increase in the Base Offense Level for smuggling, from Base Offense Level 12 to 16, under either Option 1 or Option 2 in the Proposed Amendment. There is no need to increase the Guideline's current offense level when the vast majority of cases prosecuted in the federal courts do not involve aggravated circumstances and involve the smuggling of adults. As noted by District Judge Andrew S. Hanen in the Southern District of Texas, in his written comments to the 2L1.2 Guideline, many smuggling cases involve simply the transportation of undocumented adults within the United States on a road, without no attendant aggravating circumstances—no flight, no undue risk of harm, no minors. The prototypical case is where the defendant was offered compensation to pick up undocumented adults near the border area and transport them to another location in the United States. In other cases, a defendant was likewise offered money in exchange for driving undocumented adults across the border. In some cases, a person agreed to shelter undocumented adults at their home as a layover during transportation to the intended destination within the United States. These are the most common circumstances where the Department of Justice prosecutes for alien smuggling—as any border state practitioner or judge will attest.

Indeed, the 16-level enhancement for smuggling in the current illegal reentry Guideline has been one of the focal points of the criticism of that Guideline—because alien smuggling is often so dissimilar to crimes of violence, so non-aggravated. It involves violating immigration laws and assisting others in violating immigration law for some form of compensation. It is often committed by individuals with *no* prior criminal history, as borne out by this Commission's own sentencing data. *See* U.S. Sent. Commission, "Quick Facts: Alien Smuggling Offenses," 2014 *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Alien_SmugglingFY14.pdf. This data also demonstrates that most cases do not involve any risk of physical injury, let alone the extremely rare case that involves actual physical injury.

The Department of Justice has advocated this general increase in the Base Offense Level to address the recent refugee crisis at the Southwest border, specifically a spike in the influx of child refugees from Central America fleeing enormous violence and danger in the region. In the past, the United States responded to refugee influxes by prosecuting individuals that violated 8

U.S.C. § 1324 for humanitarian purposes. *See United States v. Merk*t, 764 F.2d 266 (5th Cir. 1985). That people may help individuals to flee violence to find a safe harbor from widespread violence does not justify increasing punishment to deter individuals from coming to the United States. Moreover, when fleeing to save their lives and those of their family, these increased criminal sanctions are unlikely to serve as an effective deterrent. The United States' failure to provide a meaningful and safe mechanism for individuals fleeing violence to receive protection without entering the United States makes even more inappropriate these increased criminal sanctions.

The NIP/NLG objects to the existing and proposed upward departures for smuggling unaccompanied individuals, which do not require that the United States prove any nefarious purpose whatsoever. The absence of any such requirement is inconsistent with the Department of Justice's stated concern of punishing child traffickers.

These circumstances do not support an increase in the Guidelines for these lowest-level participants, which include people smuggling others for humanitarian purposes. Such an increase would conflict with this Commission's guidance on Role, and such sentencing factors are otherwise addressed by the Aggravating and Mitigating Role guidance in § 3B1.1. In general, many if not most criminal offenses involve a group of individuals who associate for the purpose of illicit financial gain. Smuggling undocumented immigrants is no different, and it should not receive a special increase for this common aspect of conspiracy that may be part of *any* criminal offense.

In aggravated smuggling cases, which may involve a greater risk of harm, the trafficking of minors, or possible sexual abuse or extortion, the Department of Justice has a number of other options—options that it does not hesitate to pursue. For example, if there is evidence to support kidnapping, ransom, coercion, human or sex trafficking, or sexual abuse, these cases will likely be charged under other statutes that specifically address those offenses. Even in alien smuggling cases that do not involve minors, extortion, or sexual abuse—that involve no coercion, no mistreatment, no holding for ransom by the defendant—the Department of Justice has used, and does not hesitate to use, the mandatory minimum sentences that may apply to alien smuggling and conspiracies to smuggle in 8 U.S.C. § 1324. For example, in cases where the smuggling is by *panga* boat or jet ski off the coast of California, which may present a heightened risk of harm to all involved (even if many such cases actually result in no harm whatsoever), the Department of Justice will charge a mandatory minimum sentence of 3 or 5 years—and it will not settle the case under any other resolution than a mandatory minimum sentence. Thus, smuggling defendants, who may have no prior criminal history whatsoever, and who may be participating in the smuggling event solely to pay their own smuggling fee, and who are smuggling only adults, may receive 3 or 5-year minimum sentences in these circumstances, simply because of what the Department perceives to be a heightened or increased risk of harm created by this method or mode of smuggling.

In sum, the NIP/NLG objects to using the criminal justice system to respond to a humanitarian crisis. In cases that truly present aggravated circumstances, the Department of Justice may seek mandatory minimum sentences, or other charges indicative of the aggravated circumstances—such as kidnapping, ransom, sexual abuse, sex trafficking, or drug trafficking

charges. There is no need to increase the base offense level for *every* alien smuggling case to address these particular, unique circumstances.

2. Proposed Amendment to § 2L1.2 (Illegal Reentry)

a. Base Offense Level

The NIP/NLG opposes an overall increase in the Base Offense Level for illegal reentry, from Base Offense Level 8 to 10. There appears to be no empirical support for raising the Base Offense Level, which effectively increases the offense level for defendants who otherwise have *no* triggering prior convictions—in other words, the least serious of illegal reentry cases.

As summarized by the Commission in the Proposed Amendment itself, the general statutory scheme for the offense of illegal reentry in 8 U.S.C. § 1326 provides for a statutory maximum of *two years*, while increasing the statutory maximum to 10 and 20 years in the case of defendants who have been previously convicted of a felony, or "aggravated felony," respectively. Thus, the base statutory maximum sentence for the offense of illegal reentry is two years.

Federal offenses with two-year statutory maximums almost uniformly begin at a Base Offense Level of 6 or 8. The Proposed Amendment would thus place the illegal reentry Guideline out of sync with the rest of the Guidelines by providing a Base Offense Level of 10 for this two-year statutory maximum offense.

A review of the Guidelines and the U.S. Code indicates that this increase would appear to make simple illegal reentry the *only* federal criminal offense that carries a two-year statutory maximum but that begins at a Base Offense Level of 10. For example, the offense of making a false claim to United States citizenship at 18 U.S.C. § 911 carries a *three-year* statutory maximum, yet, the Guidelines provide a Base Offense Level of either 6 or 8 for this offense. *See* U.S.S.G. §§ 2B1.1, 2L2.2. The offense of making a materially false statement to a U.S. official at 18 U.S.C. § 1001 has a *five-year* statutory maximum, but again, the Base Offense Level in U.S.S.G. § 2B1.1 is 6. Federal offenses that carry a one-year statutory maximum are generally misdemeanors, to which the Guidelines do not apply. Thus, if two-year statutory maximum offenses do not start at a Base Offense Level below 10, then it is hard to see which federal offenses would ever start at a Base Offense Level below 10. Indeed, as noted above, federal offenses that involve *more* aggravated circumstances—e.g. fraud—and *higher* statutory maximums begin at the lower Base Offense Level of 6 or 8. As such, while there is no empirical justification for increasing the Base Offense Level from 8 to 10 for the non-aggravated offense of entering the United States without authorization after previously being deported, there is empirical support for maintaining the offense level at 8, or even reducing it to 6.

Furthermore, as noted in many written comments submitted to the Commission, particularly the written comment submitted collaboratively by the judges, the defense attorneys, and the prosecutors in the Western District of Texas, which handles some of the largest numbers of illegal reentry cases in the United States, this specific aspect of the Proposed Amendment "could result in unwarranted higher sentencing ranges" for first-time criminal

defendants. Specifically, the recommended Guideline range would be 6 to 12 months for someone with *no* prior criminal history, for whom the offense of illegal reentry represents their first conviction and first incarceration. The NIP/NLG agrees with the Western District of Texas and Knut Johnson of the Practitioners' Advisory Group that this increase disproportionately, and without justification, provides for higher sentences in the most mitigated cases of illegal reentry, and that it would be seriously out-of-step not only with the Guidelines as a whole, but with the typical sentences given in such cases.

The NIP/NLG recommends in the alternative that, in structuring the Base Offense Level in the new Guideline to reflect prior immigration violations, the beginning offense level should remain at 8, or be reduced to 6. From that starting offense level, the Commission could impose increases for prior illegal reentry convictions. For example, the Commission could impose a two-level increase for one prior illegal reentry offense, a four-level increase for two prior illegal reentry offenses, and a six-level increase for more than two (i.e. three or more) prior illegal reentry offenses. This would provide a more nuanced, increasing range of punishment for recidivist immigration violators, while recognizing that their prior criminal history is still related only to the violation of immigration laws, and not to other, more aggravated criminal activity, such as theft, violence, or drugs. It would steadily and gradually increase the penalties for repeated reentry recidivists. This format has greater empirical justification, synchronizes with the Guidelines as a whole, and provides for more just sentences, as stated by judges and practitioners in other written comments to the Commission.

b. Length of Sentences and the Specific Offense Characteristic

The NIP/NLG recommends that the length of the sentences for the newly-structured enhancements for prior convictions be increased, in order to more justly reflect the severity of such sentences.

The Proposed Amendment currently sets the highest level of enhancement (under the Specific Offense Characteristic) at a two-year prior sentence. The two-year length of this sentence does not represent a serious prior offense. In fact, a two-year sentence is the default, mid-level sentencing range for many if not most state felonies. For example, in California, under Cal. Penal Code § 18(a), a sentence of two years is the default for most felonies. Thus, the Proposed Amendment effectively sets the highest enhancement at the median sentence for state felonies.

In addition, there is, in general, little difference in severity between three misdemeanor convictions and one prior felony offense. An individual could have received multiple six-month sentences for prior misdemeanors, while another individual could have received one time-served, twenty-day sentence and probation for a prior felony conviction. Yet, the Proposed Amendment provides for a two-level increase for one and a four-level increase for the other. Differentiating these prior offenses. Moreover, differentiating these offenses would require delving into the facts of the prior convictions, which the Commission plainly intends to avoid with this Proposed Amendment.

The National Immigration Project thus recommends augmenting the benchmarks for prior sentences, both in the length of prior sentences and in the difference between each benchmark. The National Immigration Project recommends that the initial, two-level enhancement encompass prior misdemeanors and felonies with sentences of less than one year. The second benchmark, providing a four-level increase, would encompass felonies with sentences of two years. The third benchmark, providing a six-level increase, would encompass felonies with sentences of five years. If the Commission wishes to address the minority of prior sentences at the upper range—prior sentences of 6, 8, or 10 years—it may provide for a fourth benchmark, an eight-level increase for those upper range sentences. This structure would avoid sentencing disparities that will result from the benchmarks in the Proposed Amendment that are currently so close together. It will also more justly reflect the severity of prior sentences by not setting the bar for the highest enhancement at a mid-range prior sentence.

In addition, the National Immigration Project recommends the Commission use the length of the *time served* rather than the sentence imposed, in order to provide for a more uniform enhancement scheme, given the vast differences in state sentencing practices. States have different practices and schemes for providing credit for good behavior or calculating release dates. Even if many states and the federal government no longer have indeterminate sentencing schemes, there are still some states that do, and many did before. Under indeterminate sentencing, the prior sentence imposed carries even less weight, or may be difficult to calculate, as it may be stated in a range. In order to better reflect the severity of the prior conviction, and provide for a more uniform application of the enhancements to the many state practices, the Commission should use the time in custody rather than the numerical sentence (or sentencing range) imposed for the prior conviction.

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