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ATTORNEY GENERAL'S ADVISORY SUBCOMMITTEE
ON BORDER AND IMMIGRATION LAW ENFORCEMENT

PRESENTED TO THE
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INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is a pleasure to appear before you on behalf of the Department of Justice. Today I will address just one of the issues raised in the "Proposed Amendments" that you issued for comment on January 24th. As is customary, the Department of Justice will be sending to the Commission, in a few days, a far more comprehensive response to all of the proposals.

I have with me today Joe Koehler, who I believe you know from previous hearings. He is a supervisory attorney in my office and has years of experience prosecuting immigration cases. He has just returned to our office from a detail to

Washington where he represented the Department in drafting provisions of the immigration bill. I ask the Commission's indulgence if I call upon one of him to respond to particular questions that you may have.

Before I address the main topic, I would like to express the Department's appreciation for all of the hard work that you and your staff have done over the past year. Obviously on some issues we have not had a complete meeting of the minds, but we can all agree that from collecting and analyzing the data on the impact of crack retroactivity, to conducting the roundtable on Immigration, and working with all of the interested parties in developing the other guideline proposals for your consideration, the staff's hard work, expertise and guidance has helped us all better understand these complex issues. On behalf of the Department I would like to thank them for their assistance.

IMMIGRATION

Let me now address immigration and in particular the proposals to amend § 2L1.2. As you are aware, the Department has been urging wholesale change to this guideline for the past 3 years. We have made specific proposals aimed at furthering the dialogue and have been open to alternative suggestions. We have not sought to increase or decrease the length of sentences; rather, we have

suggested ways that we believe would help fix a guideline that, despite all good intentions in the past, is broken. Broken because of the unintended way that it operates and ends up requiring everyone, judges, probation officers, prosecutors, and defense attorneys, to spend an inordinate amount of time locating records and litigating issues that in the end do not further the goal of the guidelines, i.e., “detering crime, incapacitating the offender, providing just punishment, and rehabilitating the offender.”

As we have said before, there is a dire need for change.

Let me try to put this in perspective. When the Commission published the first manual it noted in the Introductory Chapter: “The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery).” It never mentioned immigration, which is not surprising because there were only 2,289 defendants prosecuted for immigration crimes in Federal court in 1988, which represented approximately 4% of all defendants (55,764) that year. In contrast, according to the Commission’s data, in 2007 there were 17,592 defendants prosecuted for immigration offenses, and that now constitutes 24.2% of the federal docket. In the past 3 years that the illegal reentry guidelines have been under consideration by the Commission, there have been approximately 50,000 defendants sentenced for immigration offenses,

nearly two thirds of them under 2L1.2. Last year alone, nationwide, 10,953 cases were sentenced with 2L1.2 as the primary guideline, with 8,542 receiving some type of increase under 2L1.2(b).

Let me briefly describe how illegal immigration prosecutions impact Arizona. The Southwest border districts represent only five of the nation's 94 federal districts, but those 5 districts, including mine, conducted nearly 30% of all federal sentencings in FY 2007 (21,850 of the national total of 72,865 guideline sentences), according to the Sentencing Commission's 2007 Sourcebook of Federal Sentencing Statistics. In my district, immigration cases comprise 58.0% (2,249) of the entire docket. We anticipate that percentage will continue to increase. Of the 1,849 cases sentenced under Guideline 2L1.2, 89% received an increase under subsection (b). Although our district has struggled to complete its mission with current resources, last year we initiated Operation Streamline in the Yuma Sector, and this year we recently initiated Arizona Denial Initiative, a Streamline like program in the Tucson Sector. These initiatives involve filing criminal charges against nearly everyone caught crossing the border illegally within certain areas of the border. Right now we are prosecuting 35 new cases a day in Yuma and 50 new misdemeanors a day in Tucson, with plans to incrementally increase the Tucson prosecutions to 100 a day.

We anticipate bringing at least an additional 40 felony cases per month as part of this operation. In 2007, each of our judges sentenced approximately 250 felony defendants; the national average is about 75. Presently my office has four lawyers on loan from the Department of Homeland Security to help with this influx. Unfortunately, I have heard that the Federal Public Defender does not have that luxury and is hard pressed to find panel lawyers willing to take these cases. Similarly, the probation office is overwhelmed. On average, each day, all year long, in every courtroom, a defendant is being sentenced. In each case a presentence report had to be prepared, which includes obtaining prior conviction records and analyzing under current precedent what guideline range is appropriate.

Not surprisingly, in most illegal reentry cases the length of the prospective sentence stands as the lone issue triggering litigation in the case and thereby delaying resolution of the case. This delay creates difficulty throughout the federal criminal justice system, tying up judges, probation officers, prosecutors, defenders and consuming valuable detention space.

As you are aware, the stakes are high. If a court determines that a prior conviction qualifies as a crime of violence, that will probably double the defendant's sentence. And these are not easy things to determine. First, we must get the record of the previous conviction - that occasionally includes the

preliminary task of determining where the conviction took place when all we have is a record of incarceration at a prison facility. Even when we finally obtain the preliminary conviction records, they may not be complete or may not supply the information that is necessary and we end up having to go back and ask for additional information. It is no small task to obtain more documentation, particularly for convictions issued from all of the various state, county, and local courthouses among the 50 states. Often, the further records that are needed – such as various plea or trial transcripts, or more complete documentation – are not available because of the age of the conviction, the vagaries of the state court retention practices, or other circumstances out of our hands. And even when all the conviction records can be obtained, the parties and the court must labor to determine, under oft-changing circuit precedent, whether the records contain sufficient information to cause the conviction to qualify as a predicate for any of the enhancements under 2L1.2(b).

In most cases, you will have four parties examining this material. At least initially, agents and prosecutors try to get a “quick read” of a defendant’s record both to inform a charging decision and to determine what, if any, plea agreement might be offered. Second, a defense attorney will examine those same records so that the defendant can make an informed decision. Third, once a guilty verdict or

plea has been entered, the probation officer will conduct a detailed search and review of the records. Finally, the Court often will engage in an independent analysis as it prepares to rule on whether an offense under a particular jurisdiction's statute falls within the scope of one of the offenses that trigger the enhancements set forth in 2L1.2.

Unfortunately, it doesn't end there. My office, and I am sure this applies to the Federal Defenders, spends an enormous amount of time briefing and arguing these cases before the Court of Appeals. In our experience, the circuit precedent that flows from this appellate litigation has not made subsequent guideline determinations easier or more straightforward – quite the contrary. The total financial cost, much less the diversion of personnel, to the judicial system is mind boggling. It is clearly a frustrating situation to everyone and especially to you.

We went back and looked at the history of 2L1.2. It is somewhat shocking to realize that in the 1987 Guidelines, 2L1.2 started out as a Base Offense Level 6, with a single Specific Offense Characteristic calling for an increase of 2 levels if the defendant was a repeat offender. Ironically, just a few months later, the guideline was “simplified” even further to a Base Offense Level of 8 with no SOC's. In the next 20 years, the Commission has struggled with this guideline,

often attempting to respond to Congressional revisions of the statute. In total it was amended 8 more times including several major restructurings.¹

In 1989, “aggravated felonies” were mentioned for the first time reflecting their addition by Congress to 8 U.S.C. § 1326 just a few months before. Even though the amended statute increased the maximum punishment from 2 to 15 years (5 if it was for a non-aggravated felony), the commission simply added an SOC of 4 for a felony conviction and invited a departure if it was an aggravated felony. Two years later, a second SOC was added calling for an increase of 16 levels if the defendant had previously been convicted of an “aggravated felony.” In 1996 Congress expanded the definition of “aggravated felony” found in 8 U.S.C. § 1101 and in 1997 the Commission again amended this guideline to include the expanded definitions while at the same time expressly authorizing downward departures for aggravated felonies that were not violent, nor weapons related, and for which the previous sentence had been 1 year or less.

In 2001, the Commission responded “to concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the

¹ November 1, 1989 (amendment 193); November 1, 1991 (amendment 375); November 1, 1995 (amendment 523); November 1, 1997 (amendment 562); November 1, 2001 (amendment 632); November 1, 2002 (amendment 637); November 1, 2003 (amendment 658); November 1, 2007 (amendment 709)..

southwest border between the United States and Mexico, that §2L1.2 (Unlawfully Entering or Remaining in the United States) sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties result because the breadth of the definition of “aggravated felony” . . .”²

It once again dramatically rewrote 2L1.2 so that there were more graduated SOC's. The SOC for aggravated felonies was reduced 8 levels, however crimes of violence, certain drug trafficking offenses, child pornography and a few other specific crimes still received an SOC of 16.

The final substantial amendment occurred in 2003 and was in response “to application issues raised by a number of judges, probation officers, defense attorneys, and prosecutors”³ concerning the changes made in 2001. You added definitions for “alien smuggling”, “child pornography”, and “human trafficking”, further explained what was covered by “crimes of violence”, and clarified a number of other issues.

I apologize for this somewhat detailed recitation of where we have been, but we think it is important to remember how long everyone has been struggling with

² See Reason for Amendment 632, effective date November 1, 2001.

³ Amendment 658, Reason for Amendment, Effective November 1, 2008.

this issue and I hope it gives some context to the options available now and why we believe that another attempt at defining terms will not alleviate the problems.

There is no question that the Commission has had a difficult if not impossible task. Periodically, Congress has changed the statute, increasing the penalties or expanding the offenses included as an “aggravated felony.” The Courts have rendered often conflicting opinions on what offenses qualify under various categories while also placing restrictions on the manner of proof, thus limiting the ability to use prior convictions anticipated by the statutes and guidelines as the basis for increased sentences. I would like to provide a few examples from my district. In one case, the Ninth Circuit ruled this past year that a North Carolina conviction for indecent liberties with a child was not categorically sexual abuse of a minor and therefore not a crime of violence, even though the Fifth and Eleventh Circuits had ruled that the very same North Carolina statute was a crime of violence. Thus, if this same individual illegally entered in Texas, he would face a different guideline range under 2L1.2 than he faces in my district. These kinds of decisions cause more work because more underlying conviction documents must be obtained to try to demonstrate that the prior conviction qualifies. In the case I just mentioned, we needed to go back and obtain transcripts from a courthouse in North Carolina to try to prove that the

conviction qualified under the modified Taylor approach. The court conducted another sentencing on remand, and the matter is now pending on appeal again. In another case, the Ninth Circuit ruled that the Arizona state crime of unlawful discharge of a firearm into a residential structure did not categorically constitute a crime of violence. The panel ruled for the first time that we needed to show that the residence was “presently occupied,” which then required us to go back and try to unearth more conviction documents before re-sentencing to prove this fact. I would also note that, because of all the varying crimes and wording in statutes among the 50 states, one circuit decision on a particular issue does not end the litigation on that issue. For example, if a circuit rules that a California prior conviction qualifies for enhancement under section 2L1.2, for example, this may not definitively resolve whether an Arizona or other state conviction for a similar crime will qualify, even in the same circuit. As these examples show, circuit precedent can make sentencing determinations more unpredictable and laborious. As a result, we believe that the Courts, the probation offices, defense attorneys and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. With the kinds of immigration caseloads like we have in my district, the burdens

become even more immense for all concerned. We believe that the current immigration guidelines provide a significant barrier to doing more with increasingly limited resources.

We believe the Commission has two choices - it can once again try to adjust the existing guideline, or it can select a new tactic which will clearly save resources for everyone, the courts, probation offices, defenders and prosecutors while, we believe, still obtaining equally fair and just sentences. Given nearly unanimous agreement that there are serious problems with the current guideline, we do not believe that leaving things the same is an option.

As it has for the past two years, the Department favors a variation of Option 3 of the proposed amendments. We want to emphasize that this is not an attempt to increase the overall sentences for illegal re-entry cases and in fact the Commission's data indicates that under Option 3 overall sentences would remain about the same.

Under Option 3, the Guideline calculation would be driven primarily by the length of sentence imposed for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is

governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. At the same time, for very serious offenses, namely a prior felony conviction for murder, rape, kidnapping, a human trafficking offense, a child pornography offense, or an offense of child sexual abuse it would keep the present categorical approach. We would note, that for most of these specific offenses there hasn't been the litigation that has proven so problematic as with other offenses current listed in 2L1.2(b). Although there continues to be litigation in the circuits about what constitutes sexual abuse of a minor (as the North Carolina example I gave illustrates), the proposed amendment should decrease the Taylor litigation when the length of sentence for those and other offenses can be considered under the guideline.

We believe length of sentence has been proven to be an appropriate indicator of the seriousness of an offender's prior record. The present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. While some have expressed concern with the disparate way sentences are imposed from one jurisdiction to another, we would note that current 2L1.2(b)(1)(A)(i) and (B) both

determine the application of certain offenses based upon the length of sentence imposed.

We would however, offer a couple of changes to proposed Option 3 by including certain parts of the other Options. Option 2 includes at Application Note 4 departure considerations⁴ in those cases where there have been multiple prior removals or where the Court feels that the resulting offense level “substantially overstates or understates” the seriousness of the prior conviction. This is language that is present in Guideline 4A1.3, (Criminal History) and it would provide judges with the flexibility to address one of the concerns that has been raised that sentences for illegal aliens sometimes understate the seriousness of the underlying offense because the local court takes into account the fact that the illegal alien will be deported upon completion of the sentence.

We would also suggest including the definition of “forcible sex offense” that is proposed as sub-option A of Option 1 for the definition of “Crime of Violence”. This could be added to Application Note 1(B)(vi) of Option 3 which

⁴ 4. Departure Considerations.

- (A) In a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction, a departure may be warranted.
- (B) In a case in which the defendant has been removed multiple times prior to committing the instant offense, an upward departure may be warranted.

uses the term “forcible sex offense and would address the definitional problem that would remain under either option.

Let me address a couple of the issues that have been raised with regard to this proposal. First, while overall average length of sentences would not change under Option 3, for some groups of offenders there would be those whose sentences would generally be shorter and for others their sentences would be longer. Presently many defendants who have a simple assault conviction qualify for a 16 level SOC under § 2B1.2(b)(a)(ii) because the maximum potential sentence is more than a year. Thus under the current guideline and under Option 1, they are treated equivalently to murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling. Under Option 3 they would generally receive a lower sentence. On the other hand, under the present guideline, a defendant who had been convicted of a major fraud disrupting the lives of hundreds of people and was sentenced to 4 years or more imprisonment, and then was deported, now only gets a 4 level increase if he illegally reenters. Under Option 3, if the original trial court felt it was a serious enough offense to merit substantial incarceration, then the illegal alien would get a 16 level increase. We believe these changes are appropriate.

The other concern has been whether using the length of sentence for a prior conviction is an adequate substitute for determining the increase in offense level when compared to the “nature” of the prior offense. Perhaps, if we had a unitary judicial system where all defendants were charged under a single statutory scheme, the current guideline would work; but we don’t. Instead, we must try to interpret and equate hundreds of often unfamiliar federal, state, local, and foreign statutes, attempting to identify what was in effect on a particular date and how that might fall within one of the categories within 2L1.2(b). Variances in the sentencing policies of the myriad of jurisdictions are no different than the charging decisions and at least much more transparent. Further, as we have mentioned, we at least have the assurance from empirical studies, that the prior length of sentence can be linked to a clear current sentencing objective. On the other hand, we have no such support for individual offenses.

This approach is not merely valuable for the sake of easing the burden on the criminal justice system; it is equally valuable to the people most affected—the defendants facing charges under Section 1326. Just as attorneys, probation officers and judges struggle with application of the categorical analysis, criminal defendants with no legal training have significantly more difficulty. Two defendants who are housed together and face the same charges and have the same

type of convictions often face dramatically different enhancements under 2L1.2 because, as I mentioned earlier, the statutes under which they were convicted have minor variations in wording, or the records of one defendant's conviction are more specific than the records for the other. This confusion creates difficulties between defendants and their counsel, often leading to delays in the resolution of re-entry cases. Enhancements based on length of sentence will be far more consistent in application and easier to explain, in turn giving the system greater transparency to the criminal defendant.

Let me now address Option 1. As we have previously mentioned, we are concerned that Option 1 will only perpetuate all of the problems that presently exist. Everyone will still be required to obtain and litigate the details of the previous convictions and in fact, at least for the short term, the new "definitions" will probably generate an increase in contested sentencings until the courts sort through the new criteria. Of the options available in Option 1, we prefer sub-option A. This option, both in expanding the offenses included in SOC (b)(1)(A) and (b)(1)(B), and clarifying the definitions for "crime of violence" and "drug trafficking," will address some of the issues that have led to many conflicting decisions within and between the circuit courts and in district courts as well. Failure to include all of these in an amendment, especially that pertaining to the

expanded SOCs (b)(1)(A) and (b)(1)(B) would leave us in practically the same place that we have been in for the past several years. Unfortunately, even if all of Option A were implemented, we would still face continued extended litigation in many of these sentencings, forcing us to expend substantial resources and delaying the movement of re-entry cases through the system.

Option 2 is similar to Option 3 in that it is based in large part on the length of sentence of the underlying conviction. Option 2, however, does not include the list of serious offenses that participants in the Commission's round table sessions felt should be retained from the current guideline. We would note that Option 2 would drastically change the penalties for re-entry offenses. For example, under Option 2's § 2L1.2(b)(3) a defendant with a prior felony conviction for which he did not receive a sentence of more than 2 years, nor was it an "aggravated felony", would receive, at the lowest alternative, a 4 level SOC increase to a base offense level of 12 resulting in a total offense level of 16. Under current guidelines, that same offense would have a total offense level of 12. On the other hand, a defendant previously convicted of most drug trafficking, firearms, child pornography, and alien smuggling offenses would receive substantially lower sentences. We cannot support such dramatic changes and the shift in priorities

that they represent without additional empirical evidence that they are merited.

To date we have not seen that evidence.

Regardless of how one balances the various factors regarding these options, we believe there is one additional factor that has already impacted the fairness, and will increasingly do so in the future, of current 2L1.2(b) or the application of Option One. That factor is the disappearance of the complete records necessary to make the factual and legal determinations required by the SOC's. More and more often when we request court records pertaining to a suspect's records, we are getting, at best, an abstract of the conviction record. Sometimes we get nothing. That piece of paper will usually include the defendant's name and enough other identifying information that will assure that it can be linked to our suspect. Also included will be the date of sentence and the actual sentence imposed. Finally, there will be some description of the offense and statute of conviction, but the information is often generic rather than specific, leading to an inability to identify the specific charge that would serve as the predicate for the SOCs. In many instances, the abstract will only give a statute number or maybe combine that with a generic name for the offense. Using the United States Code as an example, an abstract might state that the defendant had been convicted of "tampering with a witness, victim or an informant" in violation of 18 U.S.C. § 1512. A court,

looking at that statute, would find violent and non-violent offenses, felonies and misdemeanors. It would be necessary to find additional information before the court could determine whether one of the SOC's applied to that conviction.

Further complicating matters, as I mentioned earlier, is the disappearance of the underlying record that might help provide the necessary information. We have heard of jurisdictions that are destroying their paper files and relying exclusively on abstracts. For example, we understand that Houston no longer keeps files longer than five years. As a result, we will have disparate treatment under the enhancements under existing § 2L1.2 or under Option 1 depending upon how the local jurisdiction keeps and reports its records. This problem is going to get worse in the future. Option 3 helps avoid that disparate effect.

We favor Option 3 as a means to achieving fair sentences more efficiently, thereby allowing the Federal Judicial system to handle more cases with the same amount of resources, and reduce confusion and perception of unfair treatment among re-entry defendants. In its current form, § 2L1.2 encourages endless litigation over whether convictions qualify for enhancement under the “categorical approach” outlined in the Supreme Court’s *Taylor* decision. As I have mentioned, this litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the

defense. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds. Of all of the proposals, we believe Option 3 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases.

CONCLUSION

That concludes my prepared remarks. The Department will be submitting within a few days a letter responding to many of the other issues raised in the Commission's *Proposed Amendments*. Let me say again how much I appreciate the Commission's time and attention on these important issues. The Department stands ready to assist the Commission in any way.

I will be glad to answer any questions.