United States Sentencing Commission
March 7, 2016

Thank you for giving me the opportunity to comment on the new proposed amendment, 2L1.2. My thoughts are as follows.

I believe that any judge would welcome the opportunity not to have to go through the tedious "Taylor analysis" and the hoops we have to jump through because of "Deschamps." I am concerned that the proposed amendments may still just shift our focus to something else.

I have talked to many probation officers who find it frustrating the luck of how a particular state statute was written. Which is much more significant than the underlying conduct in any particular case.

In current 9th circuit case law California penal code 422 involving criminal threats is categorically a crime of violence enhancement supporting a 16 level enhancement. While this conviction oftentimes is extremely serious sometimes the underlying conduct only suggests threatening actions that did not occur. However because of precedent case law this offense is categorically a crime of violence and given a 16 level enhancement automatically.

In many states aggravated assault statutes reference that the conviction could in theory be committed recklessly. Therefore, even if you have judicially

noticeable documents that state the defendant intentionally stabbed the victim 4 or 5 times in the chest, the offense would only get a 4 level enhancement based upon the inclusion of recklessness in the statute.

Many of the sex offense predicate convictions are also problematic based on the lack of minimum age requirements in statutes of convictions which often lead to conduct where a young child of 12 is molested and doesn't result in the 16 level enhancements where "consensual" sex between a 15 and a 19 year old receives a 16 level increase. Even when the state court declined not to impose any jail time or a time served sentence.

I therefore think that simplifying the 2L1.2 guideline to a simpler scenario would help to lead to maybe some more consistency in sentencings.

However, I am concerned that the proposed amendments may just shift our focus to something else. Will we be arguing about how we actually determine the prior conviction? How do you prove that someone has a prior conviction? Are we just looking at court documents, looking at FBI rap sheets? How will we determine what is the first date of removal? Are we looking at the A file? Is this going to be something subject to attack? It also may be something where we will be arguing more in court about whether or not the deportation procedure was a valid constitutional procedure or not. Whether or not there was level of relief that could have been given to the defendant that was not given or offered.

It concerns me that the commission is raising the lower level of reentry offenders, rather than just dropping the high level. Many of the low level reentry offenders are only reentry offenders. These are that category of criminal defendants who are the least dangerous that we see.

I am also concerned about the fact that increases in sentences are based upon how much time someone received for a prior conviction. There are many times, in state court in particular, that a sentence is imposed simply because the court thinks the person is going to be deported and would be a waste of resources to have them languish in a state penitentiary. So sometimes in very serious offenses, little time is given. These are some of the issues that concern me about the new 2L1.2 guideline.

Despite these concerns I do believe that a new amendment would be a positive development, which would hopefully make the guidelines clearer to apply and more equitable, not only to the District of Arizona, but throughout the entire country.