Written Statement of Philip R. Martinez
United States District Judge
Western District of Texas
El Paso Division

March 2016

Introduction

Chief Judge Orlando L. Garcia has requested that I represent the Western District of Texas and provide testimony before the United States Sentencing Commission at the Public Hearing on March 16, 2016 regarding the proposed amendments to the immigration sentencing guidelines (§§ 2L1.1 and 2L1.2). Accordingly, this written statement addresses the "workability and fairness of the proposed immigration amendments."

At the outset, it is important to recognize that the Western District of Texas is one of the largest districts in the United States court system where a state has more than one district. It encompasses over 92,000 square miles and is home to seven divisions. It has three of the largest cities in Texas (San Antonio, Austin, and El Paso) and, given its geographic proximity to Mexico, has one of the heaviest criminal dockets.

In preparing this statement, I have invited all active District Judges (12), Senior Judges (4), and Magistrate Judges (14) of the Western District of Texas to review and provide me with feedback on the proposed immigration amendments. Additionally, I have had informal discussions regarding the proposed immigration amendments with various members of the Western District of Texas United States Attorney's Office, the Office of the Federal Public Defender, and private bar attorneys. Nevertheless, the information submitted herein is not

the official view of the Court, but is informed by, and hopefully reflective of, the views expressed in both written and oral comments that the aforementioned individuals and/or agencies provided to me.

Finally, the comments herein are not an exhaustive review of the proposed immigration guidelines. This written statement is only intended to address some of the issues for comment regarding these proposed amendments in light of the feedback provided by those whom I consulted.

WDTX Immigration Statistics

The 2014 Fiscal Year statistics indicate that 61.0% of all felony criminal defendants were convicted of immigration related crimes, 312 for alien smuggling, and 2,701 for illegal reentry. Of the 2,701 defendants sentenced for felony illegal reentry convictions, 79% were sentenced within the guideline range. The percentage of defendants sentenced for felony illegal reentry convictions in which a twelve level enhancement applied (+12) declined to 68.7%. It declined even further to 58.7% in cases in which a sixteen level enhancement applied (+16).

This sentencing history is consistent with the national experience as reflected in the 2015 United States Sentencing Commission Illegal Reentry Offenses Report. The Report reflected that the rate of withinguideline range sentences diminished among offenders who received different tiers of enhancement for predicate convictions when compared to the within-range rate for those offenders that received no enhancements.

Favorable Proposed Changes

1. "Categorical Approach"

The single most favorable proposed change to the immigration guidelines is the elimination of the "categorical approach" for predicate felony convictions in determining the appropriate enhancement. The objective standard that the proposed amendments provide (i.e., the length of sentence imposed on the prior conviction rather than on the type of offense — "crime of violence" or "aggravated felony") — serves several beneficial purposes.

First, the amount of resources that are expended under the current system, by all involved (prosecutors, defense counsel, probation officers, district and circuit judges) is significant.

Second, the "categorical approach" has led the courts to inconsistent and arbitrary sentencing results. An inherent unfairness arises in having defendants receive different sentences due to the different practices of charging criminal conduct given the bewildering array of state criminal provisions. Oftentimes, defendants who have been convicted of similar offenses may receive different sentences simply because of the differences among state criminal statutes. Moreover, the application of the enhancement under the "categorical approach" often depends on the record-keeping practices of the state where the prior conviction occurred. Finally, under the present system, a defendant convicted of a substantially dated crime of violence can receive a significant enhancement, while a defendant with no predeportation conviction might receive no enhancement even if the defendant returned to the United States and committed serious crimes. While the 2011 amendments tempered this disparity by lowering the enhancement for dated convictions, they neither address the problem posed by defendants who return to the United States and commit crimes, nor did they do away with unfair enhancements.

Finally, the use of an objectively determinable standard as a predicate for calculating an appropriate enhancement will not only

reduce the resources required to litigate these issues. More importantly, such a standard should enhance counsel's ability to more accurately predict and inform defendants regarding the guideline range that the sentencing court will be asked to consider. However, it is worth noting that determining the date of first deportation, as the proposed amendments would require, may be challenging at times given the complexity of immigration law and unavailability/inaccuracy of government files.

2. Other Benefits of the Proposed Immigration Guidelines

As contemplated by the proposed amendments, the guidelines should continue to afford those defendants convicted of immigration offenses with a record of previously committed serious and/or violent offenses a more stringent sentence.

It is also fair for the guidelines to invite sentencing judges to consider the need to deter those aliens previously convicted of illegal reentry and return thereafter, and occasionally on a repeated basis.

Finally, as suggested above, it is fair for the guidelines to address the problem of aliens who return to the United States and are thereafter convicted of other crimes.

Issues of Concern Regarding Proposed Immigration Guidelines

1. The Western District of Texas judges agree that the BaseOffense Level for the crime of illegal reentry should remain at 8. It seems illogical to allow criminal history to be taken into consideration in determining the Base Offense Level, when criminal history is accounted for in the Criminal History Category (which encompasses culpability and the increased risk of recidivism).

2. There is a general concern that the proposed amendmentscould result in unwarranted higher sentencing ranges, which can, in turn, lead to an increased number of downward variances in low-end reentry cases. For example, the proposed § 2L1.2(a)(3) sets the lowest Base Offense Level at 10 (instead of 8 under the current guidelines). Allowing for an adjustment of two levels for acceptance of responsibility, the Total Offense Level would be 8, resulting in at least a four-month term of imprisonment for all defendants except those in Criminal History Category I. Yet, judges throughout the Western District of Texas generally impose time-served sentences of less than 4 months in low-level reentry cases. Should this long-standing practice continue, judges will have to impose the sentence by way of downward variance rather than imposing a within-guideline sentence.

For cases at the higher end of the guideline range, there is little reason to believe that the downward variances currently imposed (given the length of incarceration and its perceived harshness) would change in any substantial way. For instance, the proposed offense level enhancements in § 2L1.2(b)(1) and (b)(2), applied cumulatively, could create overly severe sentences. Conceivably, a defendant could face an offense level as high as 30 under the proposed guideline; for an offender charged with a 10-year maximum offense (under §1326 (b)(1)), the proposed offense level would be higher than for a defendant sentenced as a career offender (which sets the offense level at 24 for 10-year offenses. *See* U.S.S.G. § 4B1.1(b)(5)). Such a scenario could, conceivably, justify a downward variance.

Finally, one might question the fairness of counting all reentry convictions for purposes of determining the Base Offense Level, when we only use convictions that receive criminal history points to increase levels for felonies and misdemeanors under § 2L1.2(b)(1) and (b)(2).

3. While the Western District of Texas judges prefer abandoningthe "categorical approach" in exchange for a more objective

standard ("length of sentence imposed"), determining the length of sentences imposed for previous convictions can also be complicated; specifically, courts may be asked to consider issues of fairness, given the sentencing practices in the jurisdiction where the defendant was convicted. For example, federal courts often impose sentences of one year and a day, rather than one year, so that the convicted defendant can be eligible for good conduct time credit. Under the proposed immigration guideline amendments, such a sentence would warrant a two-level enhancement when a sentence of 364 days (which would deprive the convicted defendant from being considered for good conduct time credit, resulting in a longer sentence) would NOT warrant an enhancement. Again, a downward variance may arguably be considered under this scenario.

Additionally, it is conceivable that sentencing courts in different jurisdictions may impose sentences based upon the court's subjective understanding of the actual time to be served, given the jurisdiction's early release practices. While the "length of sentence" can be determined in most circumstances, the fairness of the underlying sentence will arguably invite requests for variances.

4. Given the proposed immigration guideline amendments'abandonment of the "categorical approach" for felony convictions, it is difficult to reconcile the proposed § 2L1.2(b)(1)(D) and (b)(2)(D), which provide enhancements for "three or more convictions for misdemeanors involving drugs, crimes against the person, or both." Whether misdemeanors "involving drugs" or "crimes against the person" depend upon a categorical or factually based specific approach is not clear. Under Fifth Circuit law, the three-misdemeanor language in the guideline (which derives from §1326(b)(1)) requires application of the categorical approach. *See, e.g., United States v. Miranda-Garcia,* 427 F. App'x 296, 298 (5th Cir. 2011). Such three-misdemeanor cases are relatively uncommon, and they could be addressed by a departure provision in the application notes. Finally, one colleague suggests that the term "crimes against the person" is ambiguous.

5. Increasing the penalties based upon the first conviction afterthe order of removal may also implicate due process concerns if the removal order is subject to challenge and if the order was entered *in absentia,* in which case the defendant may not have had notice. Perhaps the date of removal, and not the date of the order of removal, should serve as the determining factor.

6. Judges in the Western District of Texas generally agree thatthe departure for time served in state custody should be retained as it exists under the current guideline. Such a departure, if granted to reflect all or part of the time served in state custody, would have to be justified on the record. Given that the determination of the departure is discretionary, the need for the Commission to limit the applicability of the provision is questionable.

7. One colleague expressed concern that there will be increasedconfusion as to how the criminal history rules apply in deciding whether to count prior convictions for purposes of the proposed guideline amendments. One benefit of the 2011 guideline amendment was that it used the normal criminal-history counting rules in calculating the most significant adjustments in § 2L1.2(b)(1). The proposed guideline amendments remove those rules. Instead, the guideline includes a new application note 3, which applies the Chapter 4 criminal-history rules to the enhancements in proposed §2L1.2(b), but does not apply when calculating the Base Offense Level in new subsection (a). This colleague believes that the application rules seem unnecessarily confusing. He goes on to note that the rules become even more confusing when considered in conjunction with current application note 1(B)(vii), which has been retained as note 2 of the proposed guideline. This application note gives the term "sentence" the meaning it has in guideline § 4A1.2 — "without regard to the date of conviction." Yet the conviction date is normally very important for determining whether a prior sentence counts as criminal history under Chapter 4. The Commission does not explain whether new note 3, which follows

the Chapter 4 rules for subsection (b), overrides the existing note, which exempts the guidelines from some of these rules.

The Commission may wish to consider having the Chapter 4 rules apply across the board. Judges and probation officers would then only be required to do one calculation instead of two or three. Along these same lines, it might make sense for the enhancements in proposed subsection(b) to use the sentence-length rules of § 4A1.1(a) and (b), enhancing the offense level based on sentences exceeding 13 months and of at least 60 days, respectively, instead of the 24-month cut-off in the proposed guideline amendments. *See* Issue for Comment 2. This would also simplify the guideline calculation. If this proposal were followed, the offense-level increases in proposed § 2L1.2(b)(1) and (b)(2) might possibly be reduced, perhaps to 6,4, and 2 levels.

8. When considering a defendant's prior conviction anddetermining when that prior conviction either understates or overstates the seriousness of the defendant's conduct, variances or departures may still occur. It is well known that some jurisdictions preclude the imposition of specific term sentences when a sentence is suspended. Also, some jurisdictions, including Texas, routinely punish relatively minor offenses with two-year penalties — in such circumstances the amount of time actually served may be more telling than the length of the sentence actually imposed.

Closing Considerations

The elimination of the "categorical approach" analysis is the singularly significant achievement of the proposed immigration guideline amendments. Regarding the request to address the "workability" of the proposed amendments, courts and probation officers, prosecutors, and defense attorneys will undoubtedly be able to apply the proposed guidelines as written in order to determine a

guideline range of sentence. As stated above, the process of calculating the sentencing guideline is enhanced given the proposed amendment's reliance upon more objective factors, and the abandonment of the mystery resulting from the "categorical approach" variable. Yet, several issues of concern exist and I have endeavored to highlight a few of those challenges.

In conclusion, however, one must be mindful that one possible consequence of the guideline amendments may be sentencing ranges that will, on average, increase with a corresponding rise in the prison population. If the proposed amendments only serve to increase the length of sentences for lower-level defendants and decrease the length of sentences for more serious defendants (by maintaining the "average sentence" for illegal reentry offenders of 18 months), one must question the fairness of such a system.

The judges of the Western District of Texas would invite the Commission to analyze the effect of the proposed guideline amendments by employing various sampling methods and determining the effect of the proposed changes in light of current concerns of prison overcrowding and the growth of the federal prison budget. While deterrence of repeat offenders and incapacitation of those who pose the greatest threat to the safety of American communities are worthy goals, further study would afford a more informed determination of whether the means accomplishes the ends.

U.S. Sentencing Commission 3.16.2016.(2)