Written Statement of Marjorie Meyers
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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Immigration

March 16, 2016

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I. Introduction

My name is Marjorie Meyers and I am the Federal Public Defender for the Southern District of Texas, as well as Chair of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the guidelines regarding illegal reentry and alien smuggling.

This year, the Commission has proposed a major overhaul of the guideline for illegal reentry, changing core considerations for the base offense level and the specific offense characteristics, but continuing to place too much emphasis on a defendant's criminal history, even though that conduct is already addressed through the criminal history guidelines. For those individuals who score at the highest levels under the current guideline, the proposed amendment brings a welcome reduction from unduly severe recommended sentences. We applaud the Commission for pursuing this change. There is good reason for it: it reflects that judges are consistently imposing sentences far below what the guidelines recommend. For those individuals who score on the other end of the spectrum, however, those who score at the lowest levels under the current guideline, the proposed amendment will increase their guideline recommended sentences. There is no evidence-based justification for increasing these sentences on individuals who are the least culpable and who pose no danger to the community. In fact, the data demonstrates that courts consistently sentence these individuals at or below the current recommended range.

The Commission's proposal would affect a significant number of people and we urge the Commission to proceed with caution in this tricky area that involves defendants with a wide range of culpability, and politics that often obfuscate reality. In light of the significant changes being proposed and their wide-reaching impact, we have tried to carefully set out our thoughts on what we understand to be the both positive and negative aspects of the Commission's proposal. We appreciate the Commission's interest in simplifying application of this frequently used guideline, and the much needed reduction in the recommended guideline range for those who currently score at the high end of the, but we have serious concerns about many aspects of the proposal including (a) the continued reliance on criminal history as a measure of offense seriousness; (b) the unwarranted increase in recommended sentence lengths for those individuals who currently score at the lower end of the guideline; (c) the proposed increase in the recommended sentence length on the basis of prior illegal reentry offenses because it both fails to account for the significant numbers of people who come to the United States to improve their

lives, rather than with an intent to commit crime, and it exacerbates disparity arising from how immigration laws are enforced and prosecuted; and (d) the specific offense levels that fail accurately to reflect the seriousness of prior offenses because the thresholds (based on length of sentence) are set too low for the proposed increases in offense level.

We also believe that the proposed increases to the offense levels for alien smuggling are unwarranted. The commercial nature of an enterprise is already taken into account by current Guideline enhancements. We welcome the addition of a mens rea to the enhancement for smuggling minors but would urge the Commission to require that the defendant also know that the individual being smuggled was a minor.

These and other issues are discussed in more detail below.

II. Illegal Reentry

A. The Commission's Data on Persons Convicted of Illegal Reentry Suffers from Several Flaws and Fails to Provide a Reliable Basis for Policy-Making.

We appreciate that the Commission has undertaken efforts to collect data from a special coding project and has shared some of the findings with the public. And we encourage the Commission to release the datasets from this and other special coding projects. That said, we have serious concerns about the sources of information the Commission relied upon for this special coding project and do not believe those sources and the resulting data accurately capture the criminal histories, prior deportation/removal, and personal characteristics of individuals sentenced under §2L.2.

The Commission's special coding project focused only on those cases for which the Commission received full documentation.[1] Such documentation, however, is not available for a significant number of immigration cases. Districts with the most immigration cases vary significantly in the rate at which they submit presentence reports to the Commission. For example, in FY 2013, presentence reports were waived in 1,463 cases in the Western District of Texas, 2,170 in Arizona, 964 in the Southern District of California, and 145 in the Southern District of Texas.[2] Many, if not most, of the cases for which the Commission does not receive full documentation are immigration cases because of the heavy reliance on worksheets in these cases, which are not submitted to the Commission.[3] Those worksheets contain only the

[1] USSC, *Illegal Reentry Offenses* 14 (2015).

[2] USSC, *FY2013 Sourcebook of Federal Sentencing Statistics*, tbl. 1. In contrast, the Southern District of Texas had only 145 waived presentence reports. *Id.*

[3] Defenders will make a redacted worksheet available to the Commission for review.

information necessary to calculate the guidelines and no information about the individual's personal characteristics. These worksheets are typically done for those with minimal criminal histories that do not result in enhanced sentences under the current guidelines. Consequently, the Commission's coding project underrepresents those who would be most harshly punished by the Commission's proposed amendment to raise the minimum base offense level from 8 to 10 and increase offense levels for prior convictions for illegal reentry offenses.

Even in cases where presentence reports are done, they often do not contain adequate information about the defendant's background. Some presentence reports are modified and contain little or no personal history background.[4] Even where there is a full presentence report, the information on the individual's personal characteristics is often sparse and inaccurate. For example, a person may be unlikely to reveal to a probation officer that an undocumented spouse, child, or other relative is living in the United States. And in cases where the individual elects to disclose information about family located in the United States, neither pretrial nor probation probe far into family information about unauthorized immigrants who entered this country. They usually find no need to verify such information because the individual will not be released to family in the United States.

Because of the difficulty in obtaining accurate and reliable information about the nature of §2L1.2 offenses, we believe the Commission needs to explore other sources of information such as the anthropological studies cited elsewhere in our testimony.

B. It is Unsound Policy to Seek to Maintain the Same "Average Guideline Sentence" for all §2L1.2 Cases, Increase Recommended Sentences for Lower Level Defendants for the Purpose of Decreasing Recommended Sentences for Those with Pre-Removal Convictions, and Continue to Use Criminal History to Elevate Offense Levels.

The Commission seeks to raise guideline ranges for those with lower base offense levels in order to lower the ranges for individuals at higher base offense levels. Defenders believe this approach is unsound because it lumps individuals with vastly different criminal histories into a stereotypical "average." To our knowledge, the Commission has never sought to amend a guideline in a way that kept the same average guideline minimum sentence. For example, when it lowered the guidelines for crack cocaine, it did not seek to raise penalties for cocaine powder or other drugs to maintain an average guideline minimum. Similarly, when it sought to lower penalties for high dollar loss amounts, it did not propose raising penalties at the lower loss amounts.

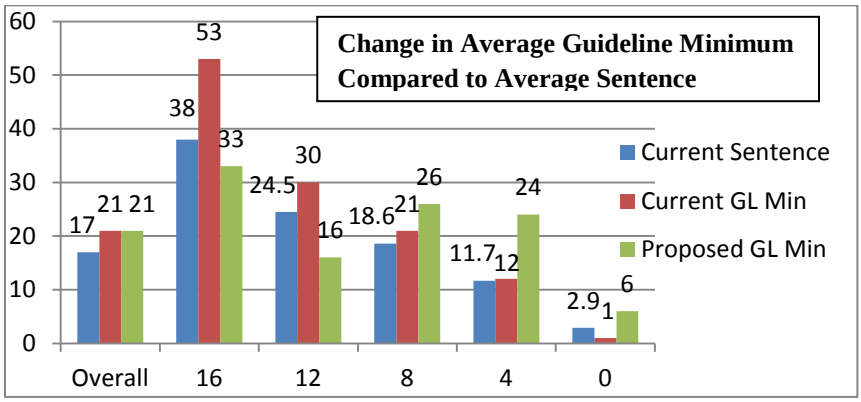
1. Using the Average Guideline Minimum to Measure the Overall Impact of the Proposed Amendment Ignores Data About the Actual Sentences Being Imposed

[4] Defenders will make a redacted modified presentence report available to the Commission for review.

in Illegal Reentry Cases and Invites Higher Sentences or More Sentences Below the Advisory Guideline Range.

The Commission's data analysis suggests that the average guideline minimum for all cases under the proposed §2L1.2 would be 21 months,[5] with decreased recommended sentence length for those currently subject to +16 and +12 increases in offense level, and increased recommended sentence length for those subject to +8, +4, or 0 increases in offense level. While this may be accurate, it ignores critical information about the sentences actually being imposed in these cases. Table I[6] compares the proposed average guideline minimum to the current actual sentence imposed, and shows a different picture than slide 32 of the Commission's presentation.

Table I



Note: the average sentence of 2.9 months for those who receive no increase in offense level is likely the result of the time spent in detention before being sentenced to time served.

First, if courts impose sentences within the amended guideline range, individuals currently receiving the 8- and 4-level increases would face a greater increase in the length of their sentences than suggested by slide 32 in the Commission's Immigration Data Briefing. Second, the difference between the proposed guideline amendment and the sentence actually imposed for those subject to the 16-level enhancement is significantly less than the difference between the current guideline minimum and the proposed guideline minimum.[7] Third, whereas

[5] USSC, *Immigration Data Briefing*, Slide 32 (2016).

[6] Sources: *Id*. and USSC, *FY 2014 Monitoring Dataset*.

[7] The Commission's presentation on *The Application of Proposed §2L1.2 Amendment* is misleading because it suggests that more guideline ranges would be lowered or stay the same than is actually the case. Only two of the six case examples in the presentation received higher sentences under the proposed amendment although the Commission's coding project shows that the recommended guideline range would increase for persons falling within three (+0, +4, +8) out of the five current offense levels, which make up 68.5% of the individuals sentenced under the §2L1.2 guideline in FY 2014. *Immigration Data Briefing*, *supra* note 5.

the average guideline minimum sentence for all illegal reentry offenses is 21 months, FY 2014 data show that the average overall sentence imposed under §2L1.2 is 17 months with a median of 12 months.[8] If the Commission truly wanted to respond to feedback from the courts and base the amendments on empirical data, it would consider actual sentences imposed in cases and construct a guideline that more closely aligns with those sentences.

By not accounting for actual sentences imposed and increasing the recommended sentences for persons who currently receive the +8, +4, and +0 enhancements in order to reduce guideline ranges for those who receive the +16 and +12 enhancements, the proposed amendment could have two possible effects: (1) a net overall increase in actual length of sentence imposed when courts choose to strictly follow the new guidelines, particularly since the percentage of persons receiving the 4-level increase under the current guideline has been on the rise while fewer persons are receiving the 16-level increase;[9] or (2) an even more significant number of cases sentenced below the recommended guideline range because courts will reject the increased base offense levels for prior illegal reentries and convictions sustained after the first order of removal, just as many courts have with the current 16-, 12-, 8-, and 4-level increases.

2. The Commission's Attempt to Rewrite §2L1.2 So It Replicates the Current Average Guideline Minimum and Continues to Emphasize Criminal History Overlooks How Relying on Criminal History to Ratchet up Offense Levels Lacks an Empirical Foundation, Does Not Serve the Purposes of Sentencing, and Is Inconsistent with the Commission's Organic Statute.

The Commission's attempt to keep the average guideline sentence at 21 months is particularly troublesome because the history of §2L1.2 shows that the current guideline lacks an empirical basis related to actual offense conduct and the purposes of sentencing.[10] The guideline's reliance on prior convictions to establish offense levels is also ill-conceived and inconsistent with the Commission's organic statute, which anticipates that criminal history will be considered as an "offender," not an "offense," characteristic. The better course is for the Commission to go back to square one, reject the long history of ratcheting up sentences for prior conduct for which punishment has already been imposed, and construct a guideline that focuses on the instant offense.

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[8] USSC, *FY 2014 Monitoring Dataset*.

[9] USSC, *Quick Facts: Illegal Reentry Offenses* (2015).

[10] *See United States v. Aguilar-Huerta*, 576 F.3d 365, 367 (7th Cir. 2009) (citing multiple cases criticizing the 16-level enhancement on the basis that it is not the "result of the Commission's utilizing empirical data, national experience, or input from a range of experts in the field").

When §2L1.2 was first promulgated and based on past practice, the base offense level was 6 with a 2-level increase if the person previously entered or remained in the United States. If the defendant had "repeated prior instances of deportation without criminal conviction," the guideline stated that "a sentence at or near the maximum of the applicable guideline range may be warranted." §2L1.2, comment. (n.2) (1987). Within two years, the base offense level increased to 8 with a 4-level increase for a pre-removal felony conviction other than a felony involving immigration laws and an invited departure for aggravated and violent felonies. USSG App. C, Amends. 38 (Jan. 15, 1988) & 193 (Nov. 1, 1989). Two years later, the Commission changed the invited departure to a 16-level increase, but cited no empirical evidence to support the change. *Id.* at Amend. 375 (Nov. 1, 1991). In 1995, the suggestion that a person with repeated instances of prior deportations (currently known as removals) not resulting in criminal convictions may warrant a sentence at or near the maximum guideline range was switched to an invited upward departure. Again, no empirical evidence was cited in the reason for amendment. *Id.* at Amend. 523 (Nov. 1, 1995).

As congressional immigration policy got more severe, the severity of the guideline increased drastically (with a 16-level increase for any aggravated felony) even though, once again, no empirical evidence supported the increases and they were not justified by the purposes of sentencing. *Id.* at Amend. 562 (Nov. 1, 1997). In 2001, the Commission responded to feedback from judges and other stakeholders about the severity of the 16-level enhancement and graduated the enhancements by adding 8- and 12-level enhancements. *Id.* at Amend. 632 (Nov. 1, 2001). Subsequent amendments primarily focused on definitions of terrorism and other aggravated felonies. *Id.* at Amends. 637 (Nov. 1, 2002), 658 (Nov. 1, 2003), & 722 (Nov. 1, 2008). Finally, in 2010, the Commission recognized that cultural assimilation was a mitigating circumstance that could provide a basis for a downward departure, *id.* at Amend 740 (Nov. 1, 2010), and that old prior convictions should not result in extreme 16- or 12-level enhancements. *Id.* at Amend. 754 (Nov. 1, 2011). It then amended the guideline to clarify how revocation sentences should be counted. *Id.* at Amend 764 (Nov. 1, 2012). And in 2014, the Commission added a downward departure based on time served in state custody, which acknowledged the arbitrariness of not having time credited toward service of a federal sentence when the defendant is located by immigration authorities while serving time in state custody. Amend. 787 (Nov. 1, 2014).

Section 2L1.2 is the only Chapter 2 guideline that exclusively focuses on prior convictions as specific offense characteristics even though the prior offense has no factual nexus to the instant offense of reentry.[11] That focus is inconsistent with the Commission's organic

[11] A handful of guidelines contain specific offense characteristics based upon prior convictions, but they are not the exclusive focus of the guideline. *See* USSG §§2D1.1, 2K1.3, 2K2.1, 2L1.1, 2L2.1, 2L2.2, 2N2.1. Significantly, three of the Chapter Two guidelines that contain specific offense characteristics for prior convictions are for immigration, naturalization, and passport violations. USSC, *Interactive Sourcebook*, tbl. 46 FY 2014.

statute, which directs the Commission to establish "categories of offenses" and "categories of defendants." 28 U.S.C. § 994(c) and (d). Criminal history is expressly listed as a potentially relevant factor for the Commission to consider in "establishing categories of defendants," but it is not listed as a factor to be considered in "establishing categories of offenses." 28 U.S.C. § 994(d)(10). The Commission recognized this distinction when it first promulgated the guidelines. *See* Ch. 1, Pt. A (Statutory Mission) (providing an example of offense behavior as "bank/robbery committed with a gun/$2500 taken" and an "offender characteristic category" as an "offender with one prior conviction not resulting in imprisonment").

The Commission's proposal to continue to focus the specific offense characteristics in §2L1.2 on convictions sustained before the first deportation or first order of removal, and add even more specific offense characteristics based upon prior illegal reentry convictions and convictions sustained after the first order of removal, moves the guideline further away from drawing a "distinction between the instant offense and criminal history."

To avoid obliterating that distinction, the Commission should leave Chapter Four to address prior convictions rather than add more offense levels based upon past convictions. The multiple uses of past convictions in calculating the guidelines and increasing sentence length have been the subject of criticism by judges and commentators for years.[12] Whether counted in criminal history or used to elevate an offense level, using criminal history punishes the defendant twice for the same bad act. When the guidelines use past offense to elevate the criminal history score and offense level, it punishes the defendant three times for the same bad act. In the context of illegal reentry, where a prior conviction is an element of the offense, the prior history is used against the defendant four times.

The Defenders' November 2015 testimony on crimes of violence contains an analysis of why the purposes of sentencing are not served by using prior convictions multiple times to

[12] *See United States v. Santos*, 406 F. Supp. 2d 320, 327 (S.D.N.Y. 2005) (granting downward departure because of inappropriateness of using prior convictions to enhance criminal history and raise offense level); *United States v. Garcia-Jaquex*, 807 F. Supp. 2d 1005, 1011-15 (D. Colo. 2011) (discussing lack of empirical support for §2L1.2(b)(1) and how double-counting of prior convictions by using them to enhance criminal history and offense level "places excessive and unwarranted emphasis on the defendant's prior acts instead of placing the focus where it should be – on the instant offense"); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005) (finding it "questionable whether a sentence should be increased twice" on the basis of a defendant's prior record). *See also* Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important Role for District Courts*, 57 Drake L. Rev. 575, 590-91 (2009) (noting how §2L1.2 "effectively punishes the defendant twice for the same misconduct" by "placing such heavy emphases on the defendant's prior record"); Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Reentry Cases are Unjust and Unjustified (and Unreasonable Too*), 51 B.C.L. Rev. 719, 748 (2010) (discussing Commission's failure to articulate a purpose for its prior conviction scheme in §2L1.2).

increase sentence length.[13] Here, we present a brief summary: (1) as the introductory commentary to Chapter 4 makes clear, the criminal history score was specifically designed to promote the four purposes of sentencing;[14] (2) major research studies have found that "insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects";[15] (3) in contrast to the criminal history score, no research supports the premise that offense level is associated with recidivism and that longer sentences are necessary to serve the goal of specific deterrence or to protect the public; and (4) retributive or "just deserts" should be focused on the instant offense of conviction rather than past conduct, which has already been punished.[16]

C. Prior Illegal Reentry Offenses and Removals Should Not Be Used to Increase the Base Offense Level or for Invited Upward Departures.

1. Increasing Sentences Based Upon Prior "Illegal Reentry Offenses" Overcriminalizes Individuals Who Come to this Country to Improve Their Lives Rather Than Commit Serious Crimes That Threaten Public Safety.

We strongly oppose the increase in the base offense level and the alternative offense levels based upon the number of illegal reentry offenses. The premise that individuals with one or more convictions for illegal reentry offenses are more dangerous and more culpable is

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[13] Statement of Molly Roth Before the U.S. Sent'g Comm'n, Washington, D.C., at 3-11 (Nov. 5, 2015).

[14] The commentary states: "The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2)). A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." USSG Ch. 4, Pt. A, intro. comment. *See also United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005) (justifications for increasing offense level based upon criminal history "substantially overlap with those the Commission uses to justify increasing the defendant's criminal history score").

The Commission acknowledged in its supplementary report that criminal history rules serve utilitarian and retributive purposes. USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 41 (1987).

[15] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 90 (2015).

[16] Section 2L1.2 has never considered the actual conduct associated with reentry compared to the person's criminal history.

misguided and unsupported by the evidence.[17] In many respects, the Commission's bold assertion that these individuals are more dangerous mirrors the claims that resulted in ICE removing over one million people who were a threat to no one – a policy that has since been rescinded following heavy criticism.[18] Rather than protect the public and deter individuals from reentering, increasing sentences for those with one or more prior illegal reentry offense exacerbates human rights violations, the harsh treatment immigrants receive in private prisons and during the removal process, and the lack of proportionality in trespass laws.

Research shows that the motive for many people returning to the United States after being removed is to reunite with family, return to the only place they know as home, seek work to support their families, or flee violence or persecution in their home countries.[19] These

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[17] The Commission's data presentation states that there is "Commission research suggesting additional factors regarding dangerousness and culpability of the defendant that may be relevant," but does not elaborate on those factors or explain how a prior reentry makes one more dangerous or culpable or how other provisions of the guidelines do not already account for those factors. USSC, *Immigration Data Briefing*, *supra* note 5, Slides 12 and 20.

[18] *See*, *e.g.*, Immigration Policy Center, *Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One* (2014) (discussing how 80% of ICE removals did not focus on "aliens who pose a danger to national security or a risk to public safety"); Jeh Charles Johnson, Secretary of Homeland Security, *Memorandum on Policies for Apprehension, Detention,, and Removal of Undocumented Immigrants* 2 (Nov. 20, 2014) (changing policies to on enforcement and removal activity to refocus efforts on "threats to national security, public safety, and border security"), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. Thomas Miles & Adam Cox, *Does Immigration Enforcement Reduce Crime?, Evidence from Secure Communities*, 57 J.L. & Econ. 937 (2014) (finding that "Secure Communities led to no meaningful reductions in the FBI index crime rate").

Secure Communities was an immigration enforcement program in place from 2008 to 2015 that focused not only on immigrants with criminal convictions, but those "not yet convicted, of criminal offenses, in addition to individuals with no criminal history, such as individuals with final orders of removal from an immigration judge." U.S. Immigration and Customs Enforcement, *How is PEP Different from Secure Communities*, /www.ice.gov/pep#wcm-survey-target-id. The program was replaced in July 2015 with the "Priority Enforcement Program," which will no longer focus on "individuals with civil immigration offenses alone, or those charged, but not convicted of criminal offenses." *Id*.

Data from ICE shows that 45% of the individuals removed between FY 2008 and FY 2013 were "Non-criminal Immigration Violators." In a single year – FY 2008, 69% of those removed were non-criminal. U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf. There is no reason to believe that these individuals pose any more of a threat when reentering to be with families, find work, or otherwise improve their lives.

[19] *See*, *.e.g.*, Jeremy Slack, *et al*., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. Migration & Human Security 109, 123 (2015) (finding that "a shift toward family-oriented migration is becoming a significant portion of the unauthorized stream" of migrants). *See also*

powerful motives are stronger than any deterrent value of longer sentences.[20] As one recently removed person explained about his reason for wanting to return to the United States: "I have no choice, my family is there. I need to go back to my children who want me back."[21]

Others who enter without authority have families in Mexico or Central America, but come to this country to find employment so they can support their families.[22] A 23-year-old Mexican man Defenders recently represented on an illegal reentry charge provides an example of a scenario we often see. He has two children and a wife who live in Mexico. He came to the United States to find employment. When living in Mexico, he earned $52 a week as an agricultural laborer. When living in the United States, he earned $400 a week as a cook and $500 a week as a landscape laborer. He was removed to Mexico on 6 separate occasions between 2009 and 2014. His criminal history category was V based upon three prior convictions for illegal reentry and one prior conviction for driving while intoxicated. Under the current guidelines, his sentencing range was 15-21 months based upon a CH V and final offense level of

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American Immigration Council, *Unauthorized Immigrants Today: A Demographic Profile* 1 (2014) (Data from U.S. Census Bureau and other sources show that "three-fifths of unauthorized immigrants have been here over a decade. One of every 20 U.S. workers is an unauthorized immigrant." "Nearly half of all adult unauthorized immigrants have children under the age of 18, and roughly 4.5 million native-born U.S.-citizen children have at least one parent who is an unauthorized immigrant."), http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-today-demographic-profile.

The Commission's data also shows that the criminal history of persons sentenced under §2L1.2 has shifted over the past ten years, with far fewer individuals having serious felony convictions. In FY 2004, only 33.9% of individuals sentenced under §2L1.2 received a 0- or 4-level increase in offense level. In FY 2014, 59.7% received either no increase or a 4-level increase. USSC, *Use of Guidelines and Specific Offense Characteristics*, §2L1.2 (2004) (2014). That data is not surprising given the Secure Communities program and the focus of removing people that have lived in this country for many years, have family members who are U.S. citizens, but who have no way to become legal residents or citizens because they may have committed a minor crime or reentered after being removed. *See* Juan Quevedo, *The Troubling Case(s) of Noncitizens: Immigration Enforcement Through the Criminal Justice System and the Effect on Families*, 10 Tenn. J.L. & Pol'y 386 (2015).

ICE has acknowledged that "many Central American nationals are asserting claims of credible or reasonable fear of persecution." Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

[20] The Migrant Border Crossing Study shows that "deterrence by arrest, incarceration and removal is largely ineffective." Slack, *supra* note 19. at 114. The study is based on surveys of a random sample of deportees in six cities, including five along the U.S.-Mexico Border and Mexico City. *Id*. at 111.

[21] *Id*. at 114-15.

[22] *See, e.g., United States v. Santos*, 406 F. Supp. 2d 320, 327-28 (S.D.N.Y. 2005) (defendant "returned to the United States illegally to find work and send money home to support his family and his son, who needed, and continues to need, special medical attention to treat his asthma").

10 (BOL 8, +4 for a prior felony conviction, -2 for acceptance of responsibility). The court sentenced him to 10 months imprisonment for the illegal reentry conviction and 4 months consecutive for a violation of supervised release on a prior reentry. Under the proposed amendment, his guideline range would increase to 21-27 months (BOL 14, - 2 for acceptance = 12, CH IV).[23]

For individuals fleeing gang violence in their native countries, longer sentences also would have no deterrent value. Faced with a choice between being killed or risking being caught coming into the United States and removed, the logical, life-sustaining choice is obvious – reenter whether immigration officials find you qualify for refugee status or not.[24]

In addition to not having any deterrent effect, elevating sentences for persons with multiple illegal reentry convictions who come to this country to meet basic human needs is a serious violation of human rights. The Human Rights Watch in 2013 reported:

> US civil immigration law fails to adequately protect families and makes it nearly impossible for many who have been deported to reunite with their families legally in the United States. Recent surveys, as well as reports from humanitarian organizations along the border, indicate that a growing number of people seeking entry into the United States are not traditional migrants but former long-term residents seeking to return to their families. Increasingly, the US immigration system is splitting families through deportation and then subjecting the deported family member to potentially lengthy prison terms for trying to reunite with loved ones. The focus on criminal prosecutions also means that asylum seekers fleeing violence or persecution can face serious obstacles to obtaining the protection guaranteed by international refugee law ratified by the United States.

Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions* 4 (2013).

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[23] To impose the same 10 month sentence, which the sentencing judge found sufficient but not great than necessary, the judge would have to give a variance 50% below the advisory guideline range.

[24] *See* Yara Simon, *Human Rights Watch to Investigate Immigration Detention Centers Along the U.S.-Mexico Border* (2016), http://remezcla.com/culture/human-rights-watch-to-investigate-immigration-detention-centers; Joshua Partlow, *El Salvador Is On Pace to Become The Hemisphere's Most Deadly Nation*, Wash. Post, May 17, 2015, https://www.washingtonpost.com/world/the_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed_story.html?tid=a_inl; U.S. Dep't of State, *El Salvador Travel Warning* (Jan. 15, 2016) (warning that crime and violence levels remain critically high), https://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html. *See also* U.S. Dep't of State, *Honduras Travel Warning* (Oct. 30, 2015) (discussing high murder rates, extortion, kidnapping, sexual assault, and other violent crimes); U.S. Dep't of State, *Mexico Travel Warning* (Jan. 19, 2016) (warning of threats from organized crime groups).

Increased punishment for these individuals is also incompatible with the views of United Nations human rights experts, who "have urged the use of civil law, and strongly cautioned against using criminal law, to punish illegal entrants." *Id.*

The Commission's proposal to increase sentences for individuals with multiple reentry convictions also fails to consider the uniquely harsh conditions under which such individuals are housed in prisons, the "extra" punishment of removal under circumstances that endangers their lives,[25] and the utter lack of proportionality in how people who cross the U.S. border unlawfully are treated significantly more harshly than other people who trespass on government property for unlawful purposes.

First, noncitizens suffer worse conditions of confinement than other federal prisoners. Crowding in the federal prison system is a longstanding problem, but it is especially acute in immigration cases. Because of overcrowding, BOP has entered into contracts with private companies to detain noncitizens convicted of immigration offenses and other federal crimes. Currently, BOP has thirteen contract prisons located throughout the country.[26] The quality of the services they provide has long been a source of concern. A recent analysis shows that many persons incarcerated in "immigrant only contract prisons" suffer serious medical neglect, in some cases leading to death.[27] An investigation done by the American Civil Liberties Union found that "the men held in these private prisons are subjected to shocking abuse and mistreatment, and discriminated against by BOP policies that impede family contact and exclude them from rehabilitative programs."[28]

Second, increasing sentences for those with prior reentry convictions fails to acknowledge that prosecution and incarceration for immigration offenses is a "supplement to, not a substitute, for deportation."[29] Accordingly, the individual faces incarceration and exile,[30]

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[25] Slack, *supra* note 19, at 119 (discussing how certain repatriation strategies place people at increased risk of violence).

[26] https://www.bop.gov/about/facilities/contract_facilities.jsp.

[27] Seth Wessler, *Separate, Unequal, and Deadly*, The Investigative Fund (Jan. 27, 2016), http://www.theinvestigativefund.org/investigations/immigrationandlabor/2200/Most%20Read?page=entire. *See also* Alicia Neaves, *Family of Detainees, Current Inmate Speak Out Regarding Maltreatment at Big Spring Correctional Center*, NewsWest9, Feb. 12, 2015, http://www.newswest9.com/story/28098380/family-of-detainees-current-inmate-speak-out-regarding-maltreatment-at-big-spring-correctional-center.

[28] American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* 3 (2014), https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf.

[29] Daniel I. Morales, *Crimes of Migration*, 49 Wake Forest L. Rev. 1257, 1269 (2014).

and may encounter enormously dangerous conditions in their home countries for trespassing into the United States without permission. The process of repatriation has been riddled with problems, with migrants being robbed, stripped of personal belongings, and stranded in places they have never been before during the removal process.[31]

Third, the stark differences between punishment for illegal reentry and other forms of trespass raise serious proportionality concerns and undermine respect for the law. For example, a person in possession of a firearm who trespasses at a secure government facility faces an offense level of 8 under USSG §2B2.3. A person who "goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or regulation," or who reenters after "having been removed therefrom or ordered not to reenter" faces no more than 6 months imprisonment. 18 U.S.C. § 1382. Similarly, a person who trespasses on Bureau of Prisons land faces a penalty of 6 months. 18 U.S.C. § 1793. While the Commission has no control over the statutory maximum penalties that Congress has set forth for these various forms of trespass, it certainly can consider these inequities when deciding how best to structure guidelines that recommend sentences sufficient but not greater than necessary to serve the purposes of sentencing.[32]

Against the backdrop discussed above, we fail to see how the increased base offense levels under the proposed amendment are justifiable. The following case examples illustrate how the Commission's proposal increases the recommended sentence length for the least culpable individuals who do nothing but cross the border for a better life and may have committed a minor offense.

- Defendant A has two prior illegal reentry convictions, for which she received sentences of imprisonment of 2 months (time served), which result in a total of 4

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[30] *See Costello v. INS*, 376 U.S. 120, 128 (1964) ("deportation is a drastic measure, at times the equivalent of banishment or exile").

[31] *See* American Immigration Council, *New U.S. – Mexico Repatriation Agreements Seek to Protect Returning Migrants* (2016) (discussing problems associated with removal that prompted policy changes), http://immigrationimpact.com/2016/03/01/new-u-s-mexico-repatriation-agreements-seek-to-protect-returning-migrants. *See also* Dep't of Homeland Security, *United States and Mexico Sign Updated Repatriation Agreements* (2016) (noting vulnerability of individuals repatriated to Mexico and need for policy changes), https://www.dhs.gov/news/2016/02/23/united-states-and-mexico-sign-updated-repatriation-arrangements.

[32] The lack of proportionality prevalent in the proposed base offense levels is apparent upon examination of other guidelines as well. A person who obstructs a police officer is subject to an offense level of 10 – the same offense level of someone who may do nothing more than put their foot over the border after having once been removed. And a person who obstructs an officer and injures the victim is subject to the same offense level as a person who reentered after sustaining a single conviction for illegal reentry. USSG §2A2.4. A person who commits criminal sexual abuse of a ward is subject to a base offense level of 14. USSG §2A3.3.

criminal history points (CH III). Under the current guideline, she would have an offense level of 8 +4 (felony) = 12, placing her in a range of *15-21 months* (10-16 months with acceptance). Under the proposed amendment, her guideline range would increase to *21-27 months* (OL 14, CH III) (15-21 months with acceptance).

- Defendant B has one prior illegal reentry conviction for which he received a sentence of imprisonment of 3 months. After his first order of removal, he sustained a conviction for forgery for which he received a sentence of 24 months. The two convictions give him 5 criminal history points (CH III). Under the current guideline, he would have an offense level of 8 +4 (felony) = 12, placing him in a range of *15-21 months* (10-16 months with acceptance). Under the proposed amendment, his guideline range would increase to *41-51 months* (BOL 12 +8 for a felony offense for which the sentence imposed was 24 months or more = 20, CH III) (30-37 months with acceptance).

- Defendant C has a 2006 conviction for drug possession, for which he received a 1-year sentence, and three misdemeanor illegal entry convictions (12/14/01, 7/5/03, 6/2/06), for which he received 30 days, 30 days, and 60 days custody. He unlawfully returned to the United States in 2006, lived a law abiding life, and then was arrested for illegal reentry in 2015. Because all of the prior sentences were imposed within 10 years of the instant illegal reentry offense, USSG §4A1.2(e)(2), all of his prior convictions count for criminal history points, giving him 6 criminal history points (CH IV). Under the current guideline, he would have a base offense level of 8 +4 (felony) =12, placing him in a range of *21-27 months* (15-21 months with acceptance). Under the proposed amendment, his guideline range would increase to *51-63 months* (BOL 14 +6 for felony conviction before first order of removal = 20, CH IV) (37-46 months with acceptance).

- Defendant D has a 2011 forgery conviction for which he received a nine month sentence. He was deported in December 2011. Following a 2013 arrest for possession of a controlled substance and driving while intoxicated, ICE agents placed a detainer on him. In separate proceedings on different days,[33] he received 4 months for the drug possession and 6 months on the misdemeanor DWI. The prior convictions give him 6 criminal history points (CH III). He receives an additional 2 points under §4A1.1(d) because he was "found" on the day after he was sentenced in the state case, resulting in a CH IV. Under the current guideline,

[33] Texas processes misdemeanors and felonies in separate proceedings even if the person was arrested for both offenses at the same time.

> he would have a base offense level of 8 + 4 (felony) = 12, placing him in a range of *21-27 months* (15-21 months with acceptance). Under the proposed amendment, his guideline range would increase to *41-51 months* (BOL level 10 +4 for conviction before first order of removal +4 for conviction after first order of removal = 18, CH IVI) (33-41 months with acceptance).

No evidence shows that increasing sentences for these individuals and removing them from the United States does anything to protect the public. Indeed, evidence about the impact of the "Secure Communities" initiative, which was in place from 2008 to 2014 and designed to identify immigrants who had committed crimes and remove them, shows that the program did not reduce rates of violent crimes or make communities safer.[34] If detaining and deporting noncitizens who committed minor crimes had no effect on crime rates, then there is no reason to believe that increasing sentences for these individuals, many of whom will have done nothing but commit a status offense because they returned to the United States, would do anything to protect the public.

2. Increasing Offense Levels Based Upon Convictions for Illegal Entry, Illegal Reentry, Failure to Depart, and Failure to Comply with Terms of Release Under Supervision Would Perpetuate Disparity in the Enforcement of Immigration Laws and Fails to Acknowledge the Weak Procedural Protections Associated with Prosecutions under 8 U.S.C. § 1325.

Using a broad category of "illegal reentry offenses" to increase base offense levels exacerbates widespread disparity in how immigration laws are enforced[35] and overlooks how § 1325 prosecutions are handled.[36]

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[34] Thomas Miles & Adam Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & Econ. 937 (2014).

[35] Significant disparity also exists in the sentences imposed upon those convicted of illegal reentry. Even setting aside *Booker*, a similarly situated individual can receive a vastly different sentence depending upon the nature of the fast track policy. Jane L. McClellan, Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517, 524 (2006).

[36] The proposal to include an offense under 8 U.S.C. § 1253 as an "illegal reentry offense" that increases the offense level is also misguided. Although there were few prosecutions under 8 U.S.C. § 1253 in FY 2015, persons convicted of failing to depart should not be subject to additional increases because they are often asylum seekers who are afraid to return to their home countries so they refuse to fill out travel documents. In addition, failure to depart prosecutions against persons who are afraid to sign travel documents can be arbitrary because in our experience they are sometimes brought to shift the expense of detention from immigration authorities to the U.S. Marshals.

First, not all individuals who unlawfully enter this country face prosecution for illegal entry or reentry. Instead, they may face reinstatement of removal. Reinstatement of removal is a process used by the Department of Homeland Security to quickly remove people who previously departed the United States under an order of removal and reentered without lawful authority. Reinstatement of removal proceedings, which have grown in the past years,[37] permits the immigration officer to serve as law enforcement officer, prosecutor, and judge. But whether a person faces a reinstatement of removal proceeding or prosecution under 8 U.S.C. §§ 1325 or 1326 varies from agent to agent, prosecutor to prosecutor, and district to district. The different policies that states and localities adopted regarding cooperation with ICE also create disparities in the rates of removals under ICE's Criminal Alien Program (CAP).[38] For example, in FY 2013, Texas and Arizona experienced the highest rate of removals per 1,000 noncitizens whereas other states, such as Florida and New York, had "comparatively lower rates of CAP removals per 1,000 noncitizens."[39] Other disparities are documented in a report by the Office of the Inspector General, which found that Border Patrol does not have a consistent practice of referring for prosecution aliens who "express fear of persecution on return to their home countries."[40] Disparities in prosecutions for §§ 1325 and 1326 offenses are also prevalent. In FY 2015, the Southern District of Texas and the Western District of Texas were the top ranked districts (per one million people) for prosecutions of § 1325 offenses.[41] The Southern District of Texas had 21,656 prosecutions, whereas Arizona only had 1,592 prosecutions for § 1325 offenses. In contrast, Arizona and New Mexico were the top ranked districts (per one million people) for

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[37] American Immigration Council, *Removal Without Recourse: The Growth of Summary Deportations from the United States* (2014).

[38] ICE itself has noted that the level of cooperation from state and local law enforcement agencies impacts its operations. U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* 3 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

[39] *See* American Immigration Council, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program* 5 (2015).

Federal prosecutions also vary. The Southern District of Texas, Arizona, and the Western District of Texas have had the most prosecutions for the past twenty years, but the Southern District of Texas had 14.1 percent more prosecutions in 2015 than it did in 2010. During the same time period, the District of Utah experienced a growth in prosecutions while the Central District of California saw a decline. Transactional Records Access Clearinghouse, *Immigration Prosecutions for 2015* (2015).

[40] Office of Inspector General, U.S. Dep't of Homeland Security, *Streamline: Measuring Its Effect on Illegal Border Crossing* 2 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

[41] Transactional Records Clearinghouse, *Prosecutions for 2015: Lead Charge 8 U.S.C. § 1326 (reentry of deported alien)*; Transactional Records Clearinghouse, *Prosecutions for 2015: Lead Charge: 8 U.S.C. § 1325 (entry of alien at improper time or place)*.

prosecutions of § 1326 offenses. Arizona had 16,894 prosecutions, whereas the Southern District of Texas only had 3,999 for § 1326 offenses.

The disparity in practices could easily result in a two or four level difference in the base offense level under the proposed amendment between, for example, (1) a person who was prosecuted for entry without inspection under § 1325 and was prosecuted again under § 1325 or § 1326 upon returning to the United States (BOL 14), (2) a person who had a single conviction under § 1326, returned several times and was subject to an expedited removal rather than prosecution (BOL 12), (3) a person who was removed multiple times without conviction (BOL 10), and (4) a person who was only removed one time without conviction (BOL 10). The solution to this disparity, however, as discussed below, is not to count removals that did not result in a conviction.

Second, the proposal to use a second or subsequent offense under 8 U.S.C. § 1325 (regardless of whether the conviction was designated a felony or misdemeanor) to increase the base offense level raises serious fairness concerns. Those offenses are the most frequently prosecuted immigration offenses.[42] The proposal to treat a second or subsequent § 1325 conviction the same as a § 1326 conviction overlooks how the prosecution and defense of a § 1325 case is dramatically different than that of a § 1326 case. The process surrounding misdemeanor illegal entry cases under § 1325 is so fraught with error that it is unfair to count second or subsequent convictions regardless of whether they are treated as misdemeanors or felonies.

Section 1325 prosecutions are rushed, rely heavily on standard pleas, and typically occur with minimal access to legal representation. For example, in the Western District of Texas, a half dozen lawyers might go to a detention center and visit with 120 individuals charged with a §1325 violation. The lawyers explain the charges and basic legal rights to the group. Because of the high numbers and bureaucratic hurdles in obtaining relevant information, it is difficult for criminal defense counsel to determine if the person has a viable claim for derivative citizenship or if they can apply for a visa. When the detainees get to court, there may be two to three lawyers representing seventy-five people in a single day. The process moves so quickly that "potential defenses – such as being a juvenile or unfit to stand trial, or being eligible for citizenship or asylum – slip through the cracks."[43] If the Commission were to use these convictions to increase offense levels, it would set up a situation where individuals without counsel or barely adequate counsel face lengthier terms of imprisonment.

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[42] In FY 2015, 50% of immigration-related federal prosecutions (36,014) were for illegal entry and 44 % (31,703) were for illegal reentry. Transactional Records Clearinghouse, *Immigration Convictions for 2015*.

[43] Joshua Partlow, *Under Operation Streamline, Fast-Track Proceedings for Illegal Immigrants*, Wash. Post, Feb. 10, 2014 (referencing testimony of federal public defender Heather Williams before Congress).

If the Commission were to amend the guidelines to count § 1325 offenses in criminal history and offense level, then the incentive to challenge the validity of the conviction would increase and new litigation would emerge over whether a court should vary below the guideline range based upon the invalidity of a prior conviction or the questionable circumstances surrounding it. *See United States v. Miramontes-Murillo*, 21012 WL 2884689 (W.D. Texas 2012) (prior sentence resulting from proceeding where defendant denied right to counsel cannot be used to increase defendant's criminal history score).[44]

3. Neither Alternative Base Offense Levels Nor an Invited Upward Departure Should be Based upon "Multiple Prior Deportations not Reflected in Prior Convictions."

The Commission requests comment on whether it should use "deportations and orders of removal" to apply alternative base offense levels and it proposes a departure for prior removals (a.k.a. deportations) "not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326." Defenders oppose the use of removals or orders of removal as a basis to increase the recommended guideline sentence, whether in the form of an alternative base offense level or invited upward departure.[45]

First, U.S. Immigration and Customs Enforcement's (ICE) and Removal Operations (ERO) have been seriously criticized for focusing on removing immigrants who pose no threat to anyone. In FY 2013, only 20% of persons removed were within ICE's highest enforcement priority, i.e., those "who pose a danger to national security or a risk to public safety."[46]

Second, enhancing sentences based upon multiple removals not reflected in prior convictions raises serious due process concerns and invites litigation over the validity of the removal. The system of justice associated with the removal of immigrants lacks core procedural protections. In the past, most removal or deportation orders were entered after a hearing before an immigration judge. In recent years, "two-thirds of individuals deported are subject to summary removal procedures, which deprive them of both the right to appear before a judge and

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[44] Although USSG § 4A1.2 does not confer a right to attack a prior conviction on grounds other than deprivation of the Sixth Amendment right to counsel, nothing precludes a defendant from arguing for a variance because of the circumstances surrounding his prior entry conviction. *See* 18 U.S.C. § 3661 ("no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence").

[45] The criminal history rules already invite upward departures in criminal history for prior removals. USSG §4A1.3(a)(2)(B). If the guideline was to include such prior removals or orders of removal in the offense level or an invited departure, it confuses guideline application and invites multiple departures for the same conduct.

[46] *Misplaced Priorities*, *supra* note 18.

the right to apply for status in the United States."[47] Two of these procedures, "'expedited removal,' and 'reinstatement of removal,' allow immigration officers to serve as both prosecutor and judge – often investigating, hearing, and making a decision all within the course of one day. Typically, the immigrant does not have access to counsel or even his or her immigration records."[48] Another procedure – stipulated removal – begins in immigration court, but the party waives his or her right to a hearing and the judge "may enter the order of removal without seeing the person and asking him or her whether the stipulation was entered into knowingly and voluntarily."[49]

Using such removals as a basis to increase sentences would increase litigation and require more investigative resources. Counsel would be obligated to investigate the circumstances surrounding the removal and point out any mitigating factors to the court, which would then place an additional burden on probation, prosecutors, and judges. What occurred during the interaction between the immigration enforcement officer and the individual would be relevant to how the removal should factor into the sentencing decision. For example, was it a voluntary departure, formal removal by an immigration judge, judicial order of removal, or expedited removal where the individual was not allowed to consult legal counsel, present his or her case to an immigration judge, or have the removal decision reviewed by a judge? Was it a border removal, interior removal, removal of someone who failed to leave the United States based on a final order of removal, or failed to report to ICE for removal? Was the person detained for a long period of time[50] or removed quickly? Was the removal done under circumstances that placed the person's life in jeopardy?[51] Were the person's basic needs met during the removal process? Were there mitigating circumstances surrounding the entry and removal - e.g.,

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[47] American Immigration Council, *Removal without Recourse: The Growth of Summary Deportations from the United States* 1 (2014). *See also Misplaced Priorities, supra* note 18, at 5 (data from a single year show that seven out of ten persons subjected to removal did not have an opportunity to appear before an immigration judge); American Immigration Council, *How the Immigration System Falls Short of American Ideals of Justice: Two Systems of Justice* 2 (2013) ("stipulation may occur quickly and without the assistance of any attorney").

[48] *How the Immigration System Falls Short of American Ideals of Justice, supra* note 47, at 2.

[49] *Id.* at 3.

[50] *See* Suzy Khimm, *Many Immigrants Facing Deportation Must Wait 550 days for Their Day in Court*, Wash Post, Feb. 22, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/02/22/many-immigrants-facing-deportation-must-wait-550-days-for-their-day-in-court.

[51] *See generally* WOLA: Advocacy for Human Rights in the Americas, *U.S. Dangerous Deportation Practices News & Analysis* (2015), http://www.wola.org/research_analysis/1180. For example, in March 2014, "three recently deported Mexican women were kidnapped while waiting in line at a Western Union in Matamoros." Clay Boggs, *What Happens to Migrants After They Are Deported?* (2014), http://www.wola.org/commentary/what_happens_to_migrants_after_they_are_deported.

cooperation, illness, cultural assimilation, need to visit an ill family member, or desire to visit a child?[52]

Third, using removals to increase sentences would perpetuate unwarranted racial and ethnic disparity. Mexican and Central Americans are overrepresented in CAP removals when "compared to their share among the noncitizen and the undocumented population living in this country."[53] According to a study done by the American Immigration Council, "[p]eople from Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) accounted for 92.5 percent of all CAP removals between FY 2010 and FY 2013, even though, collectively, nationals of said countries account for 48 percent of the noncitizen population of the United States."[54] The difference in crime rates among the noncitizen population did not explain this disparity.[55]

4. Any Conviction Used to Increase Sentences Should at Least Receive Criminal History Points.

Even if multiple illegal reentry offenses were relevant to the dangerousness and culpability of the defendant, Defenders see no rationale for the Commission's proposal to use only convictions that receive criminal history points to increase offense levels for felonies and misdemeanors under §2L1.2(b)(1) and (b)(2), but count all "illegal reentry offenses," no matter how old, for purposes of determining the base offense level. Just as old convictions should not count in criminal history, they should not count for enhancements in base offense level. A person who is convicted of failure to depart, receives a two month time served sentence, is removed, and then returns to this country ten years later to visit an ill family member is certainly less culpable than a person who is removed, returns and is convicted of illegal reentry, removed again, and then returns within one year to see a former spouse with whom he is having a financial dispute (though we question the severity of either one of these offenses).

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[52] The removal of parents of U.S. children is a significant human rights issue that can have a devastating impact on the future lives of the children. *See generally* Human Rights Watch, *Border Enforcement Policies Ensnare Parents of U.S. Citizen Children* (Jan. 2015) (discussing consequences of summary removals of parents of U.S. citizen children and how the removal process rarely gives the parent a chance for a hearing before an immigration judge), https://www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children.

[53] *Enforcement Overdrive*, *supra* note 39, at 17. *See also id*. at tbl.7.

[54] *Id*. at 3.

[55] *Id*. at 19.

5. If Adopted, the Commission's Proposal to Increase Even the Lowest Base Offense Level Above the Current Level Would Entangle It In the Debate (on the Anti-Immigrant Side) About Whether Undocumented Workers Help or Hurt the U.S. Economy.

The Commission should be mindful of the consequences of its policy decisions and the "community view of the gravity of the offense." 28 U.S.C. § 994(c)(4). With illegal reentry, the community views vary widely. An example of those diverse views is found in the debate on the economic impact of undocumented workers. The challenge for the Commission is whether it wants to take sides in that debate by recommending higher sentences for persons who come into this country unlawfully, but commit no other crime or only a minor crime.

The Pacific Standard recently published an article that shows the deep disagreement on the impact of undocumented workers on the American economy.[56] The article discusses research showing how "'undocumented workers improve companies' bottom lines and create more jobs,"[57] and other views from economists that believe illegal immigration "has tended to depress both wages and employment rates for low-skilled American citizens."[58]

The Commission's suggestion that persons who enter this country multiple times are more dangerous and culpable ignores the data that shows how many individuals enter this country to find work and puts the Commission on the side of the debate that views people who enter this country illegally as "social and economic burdens to law-abiding, tax-paying Americans."[59] We think it a mistake for the Commission to take sides on this issue (by rejecting the notion that people come into this country multiple times to find work and to support families

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[56] Francie Diep, *How Undocumented Immigrants Contribute to the American Economy: Would You Notice a Day Without Latinos? Most Definitely*, Pacific Standard, Feb. 19, 2016, http://www.psmag.com/business-economics/how-undocumented-immigrants-contribute-to-the-american-economy. *See also* Andrew Wallace, *et a*l., *The Immigration Debate: Economic Impact* (2015), http://www.umich.edu/~ac213/student_projects07/global/economicimpact.html; H. Goodman, *Illegal Immigrants Benefit the U.S. Economy*, The Hill, Apr. 23, 2014, http://thehill.com/blogs/congress-blog/foreign-policy/203984-illegal-immigrants-benefit-the-us-economy.

[57] Julian Aguilar, *Report: Immigrants Economic Strength Increases*, The Texas Tribune, May 30, 2013 ("If all unauthorized immigrants were removed from Texas, the state would lose $69.3 billion in economic activity, $30.8 billion in gross state product, and approximately 403,174 jobs, even accounting for adequate market adjustment time"), http://www.texastribune.org/2013/05/30/report-immigrants-economic-strength-increases.

[58] *Id. See* ProCon.org, *Is Illegal Immigration and Economic Burden to America?* (2015) (summarizing various positions in debate on the impact of undocumented immigration on the U.S. economy), prohttp://immigration.procon.org/view.answers.php?questionID=000788.

[59] *Id*.

within and outside the United States), particularly since its decision to punish more harshly those individuals who enter multiple times for work reasons could well have a negative impact on the economy.

6. The Commission Has Other Alternatives to Using Prior Illegal Reentry Offenses to Modify the Guideline.

Rather than drive up sentence length for those with a single or multiple illegal reentry offense in order to reduce sentences for those with prior felony convictions, the better course is to look to the individual's motive in reentering and punish those who reenter and commit serious offenses. As one commentator has explained:

> [I]t seems tenuous at best to suggest that a defendant is more blameworthy for reentering the country after a previous conviction than for reentering without a criminal record. To the extent that courts look beyond the act of reentry in assessing the defendant's culpability for the offense, motives for reentering appear much more relevant than criminal history to an analysis of culpability. For example, courts should treat a defendant who reenters to rejoin his wife and children and work to support them differently from one who returns to engage in gang activity.

Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1233 (2010).

If the Commission wants to pursue offense level increases for post-reentry convictions and move from the categorical approach, it should keep the base offense level at 8 and not use illegal reentry offenses to increase the offense level. If the Commission decides to explore other ways to amend §2L1.2, we would be happy to work with staff on a new proposed amendment. In the meantime, the Commission should at least incorporate into §2L1.2 the new definitions in §4B1.2.[60] Multiple definitions for the same term cause confusion and lead to mistakes. To ease application, a single definition should be put in place. In addition, the definitions set forth in the current guideline are questionable because they are based on the unconstitutional residual clause of 18 U.S.C. § 16.

[60] For the same reasons that the Commission excluded burglary of a dwelling and most statutory rape in §4B1.2, it should exclude them in §2L1.2.

D. The Proposed Amendments on How Prior Convictions Count as Specific Offense Characteristics Would Overstate the Seriousness of the Prior Offense, Create Problems with Proportionality, and Generate Confusion about the Application of the Enhancement for Misdemeanors.

Defenders have several concerns about the proposed amendments: (1) the proposed sentence length for each tiered enhancement is not supported by empirical evidence and fails to consider states that call for lengthy terms of imprisonment, including 2-year minimums, for minor offenses; (2) three tiers with 2-, 4-, and 6-level increases would provide more proportional increases than 4 tiers with 2-, 4-, 6-, and 8-level increases; and (3) the terms "misdemeanor involving drugs" and "crimes against the person" need clarification.

1. The Break Points for the Sentence Lengths Triggering the Proposed Tiered Enhancements for Prior Convictions Are Not Sufficiently Supported by Empirical Evidence.

We understand that the Commission has tried to show through its immigration data briefing that sentence length is a reasonable proxy for the seriousness of the offense, but we are concerned that the data shared with the public does not provide sufficient information to fully assess the Commission's proposal.

First, the Commission chose only to share the cutoff point of 24 months or more rather than provide a greater statistical breakdown on sentence length.[61] For example, the data shows that 51% of assault cases received a sentence of 24 months or above, but it does not provide other break points[62] that would be more informative. If it were actually the case that 50% of all assault cases had a sentence over 30 months, then the 24-month break point would overstate the seriousness of the offense.

Second, the Commission does not provide definitions for the offenses it used to measure sentence length. For example, does assault include only "aggravated assault" or also "simple assault"?

Third, the offenses for which the Commission provides average sentence length do not correspond to the most frequent convictions triggering the current enhancements. According to the *Illegal Reentry Offenses* report, burglary was the most frequent conviction that triggered the 8-level enhancement,[63] but the Commission provides no information on what the average

[61] *Immigration Data Briefing*, *supra* note 5, Slide 28.

[62] *Id*.

[63] *Illegal Reentry Offenses*, *supra* note 1, at 21.

sentence length was for burglary. Similarly, the Commission's *Illegal Reentry Offenses* report, which draws a distinction between possession with intent to distribute drugs and trafficking or distribution of drugs, shows that possession with intent to distribute drugs was a frequent conviction for the 8-, 12-, and 16-level enhancements,[64] but the Commission's publicly released data does not draw the same distinctions. Without such information, it is difficult to determine whether the proposed sentence lengths are a reasonable proxy for offense seriousness at the levels set by the Commission.

Fourth, the Commission also has not explained how it arrived at the proposed 12- and 24-month break points when other data relevant to offense seriousness as defined by the Commission shows that the average sentences imposed for offenses triggering the highest enhancement in the current guideline – 16 levels – was 40 months.[65] Fifth, the Commission's own data on average sentence imposed demonstrates that the break points are too low. In FY 2014, the average sentence imposed for a federal felony conviction was 51 months.[66] Federal drug trafficking and assault had average sentences of 73 months and 38 months.[67]

Sixth, data on state prison sentences further shows that the Commission's break points for the tiered enhancements would not provide meaningful distinctions and are too low. While current information on the average sentences imposed for state offenses is not readily available, two studies show that twenty-four months for the highest proposed offense level would likely result in many individuals receiving an 8-level increase. A 2009 study from the Bureau of Justice Statistics showed the average length of prison sentences imposed for state felony offenses in 2006 was 38 months. Offenses that the Commission deems more serious had longer average sentences, e.g., 41 months for aggravated assault; 38 months for drug trafficking; 87 months for robbery; 78 months for sexual assault other than rape.[68] Another study of time-served sentences shows that the sentences imposed in many state felony offenses are substantial.[69] Individuals released from prison in 2009 spent an average of 2.9 years in state custody.[70] These findings are

[64] *Id*. at 21-22.

[65] *Id*. at 22.

[66] USSC, *Interactive Sourcebook*, Length of Imprisonment in Each Primary Offense Category.

[67] *Id*.

[68] Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006-Statistical Tables, tbl. 1.3 (2009), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152.

[69] The PEW Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 13 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

[70] *Id*.

consistent with our experience, which is that sentences of at least 3, 4, and 5 years are imposed on the more serious offenses considered aggravated felonies.

2. The Proposed Break Points Would Result in Disproportionate Penalties.

The proposed 8-level increase for offenses where the sentence imposed was 24 months or more also would result in disproportionate penalties because low level offenses may be punished by a period of imprisonment of 2 years or more depending upon the state. For example, under California Penal Code, felonies are punishable by 16 months, 2 years, or 3 years, unless the statute of conviction specifies another term. Cal. Penal Code § 18(a). The proposed amendment makes many California felonies subject to a 6- or 8-level increase. Texas and other states also present proportionality problems. In Texas, a court may impose a term of imprisonment or probation or defer adjudication for certain felony offenses,[71] but if a period of imprisonment is imposed, minimum terms apply. Many offenses that would normally not be considered serious offenses carry 2-year minimum prison sentences, including delivery of more than 5 pounds but less than 50 pounds of marijuana.[72] The harshness of that penalty is shown by comparing it to the federal drug guideline. A person who distributes 5.5 pounds of marijuana is subject to a guideline recommended sentence of 0-6 months. To reach the 2 year mark, a person would have to distribute at least 44 pounds or 20 kg of marijuana. (BOL 16, CH I, range of 21-27 months). USSG §2D1.1.[73]

Texas also has harsher penalties for other offenses compared to other states. A person can be sentenced for 2 years as a state jail felony for fleeing from a police officer in a vehicle or watercraft when he knows the officer is trying to arrest or detain him.[74] In comparison,

[71] *See* Texas Code Crim. P. § 42.12.

[72] Texas Health & Safety Code Ann. § 481.120. Theft and fraud offenses also have 2-year minimum prison sentences, including fraudulent transfer of a motor vehicle with a value of more than $30,000 but less than $150,000, Texas Penal Code Ann. § 32.34; harvesting timber valued at least $20,000, Texas Penal Code Ann. § 151.052; theft of cattle, horses, livestock, or 10 or more head of sheep, swine or goats if valued less than $150,000. Texas Penal Code Ann. § 31.03. Simple assault on a public officer also is subject to a 2-year minimum prison sentence. Texas Penal Code Ann. § 22.01.

[73] Other states also have harsh sentences for possession offenses. For example, simple possession of a Schedule I or II controlled substance in Oklahoma is punishable by a minimum of two and not more than ten years imprisonment. Okla. Stat. Ann. tit. 63, § 2-402. Possession of two ounces or more of marijuana in Vermont is punishable by up to three years in prison. Vt. Stat. Ann. tit. 18, § 4230.

[74] Texas Penal Code Ann. § 38.04.

resistance in California is subject to imprisonment of not more than 1 year.[75] And in New Mexico, it is a misdemeanor subject to a maximum of 1 year.[76]

The 12-month break point for the proposed 6-level increase is also disproportionate and arbitrary.[77] What evidence supports a higher sentence for a person who receives 366 days versus 364 days when that two-day difference is relevant to whether the person is eligible for good time credits? For example, a person sentenced in the federal system is more likely to get a 366-day sentence to earn good time credits, which results in a lesser time served than the person sentenced to 365 days.[78] Under the proposed amendment, the person who gets the one-year-and a-day sentence would receive a 6-level increase whereas the person who received less than 1 year (e.g. 364 days) would receive a 4-level increase. The reality is that the court that imposes the lesser sentence and deprives the person of good time credits typically does so because the offense is considered more serious.[79]

3. A Three-Tiered Set of Specific Offense Characteristics Would Promote Greater Proportionality.

Defenders also oppose the proposal to have four tiers of enhancements and urge the Commission, if it is going to pursue this model, to consider a simpler 3-tiered approach. A person convicted of a felony offense who receives a sentence of less than 12 months is no more culpable or dangerous than a person convicted of three or more misdemeanors "involving drugs" or "crimes against the person." For example, a person in a jurisdiction where minor offenses carry a prison term of over 1 year, but who receives nothing more than a time-served sentence, should not be treated more harshly at a subsequent proceeding because of the arbitrariness of state criminal codes. Similarly, we fail to see how a person who is convicted of a single felony theft who is sentenced to a short period of imprisonment (likely time-served) is more culpable or more dangerous than a person who committed three misdemeanor assaults.

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[75] Cal. Penal Code Ann. § 148.

[76] N.M. Stat. Ann. §§ 20-22-2; 31-19-1.

[77] The arbitrariness of the Commission's 24-month and 12-month break points is apparent when compared to a recent legislative proposal that set statutory penalties according to whether the person received a term of imprisonment of not less than 30 months or not less than 60 months. S. 1640 114th Cong (2015).

[78] 18 U.S.C. § 3624(b).

[79] *See also* National Conference of State Legislatures, *Good Time and Earned Policies for State Prison Inmates* (2011), http://virginiacure.weebly.com/uploads/2/0/8/8/20882986/sentence_credit_50-state_chart.pdf. Defenders believe that looking at time served rather than sentence imposed would provide for more proportionate offense level increases, but we recognize that there may be concerns with how such an approach would be more complex.

To avoid the disproportionate results that would occur under the proposed amendment and to construct a guideline that more appropriately reflects offense seriousness and that leaves more flexibility to account for variations in good and earned time policies,[80] Defenders suggest a better approach would be as follows:

> *(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was **60** months or more, increase by **6** levels;*
>
> *(B) a conviction for a felony offense(other than an illegal reentry offense) for the which sentence imposed was at least **36** months but less than **60** months, increase by **4** levels;*
>
> *(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than **36** months, increase by **2** levels.*

If the Commission is determined to keep the proposed breaking points for sentence length of prior offenses, it should at least keep the base offense level under §2L1.2 at 8 and not raise the base offense levels for prior illegal reentry offenses. While there would still be disproportionate results, fewer increases in the base offense level would offset the lack of proportionality in increasing offenses levels based upon other prior convictions and counting those prior convictions again in criminal history.

4. The Proposed Language Regarding the Counting of Three Misdemeanors Lacks Clarity.

Defenders are concerned the proposal to change the current guideline language ("misdemeanors that are crimes of violence or drug trafficking offenses") to "misdemeanors involving drugs, crimes against the person, or both" would complicate guideline calculations and generate litigation. The proposed amendment leads to the question: Is the addition of the word "involving" meant to change the guideline application from a categorical to a circumstance specific approach where the court examines the defendant's actual conduct? [81] Given the Department of Justice's push for exceptions to the categorical approach during the Commission's

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[80] *Id.*

[81] *Compare Nijhawan v. Holder*, 557 U.S. 29, 38 (2009) (using circumstance specific approach to determine if offense involves fraud or deceit in which the loss to the victim or victim exceeds $10,000; noting that "'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed") *with Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) (using categorical approach to determine whether offenses "involv[e] fraud or deceit" within the meaning of 8 U.S.C. § 1101(a)(43)(M)(i)).

November hearing on crimes of violence,[82] DOJ would likely argue that the change reflects a circumstance specific approach.

Whether the categorical approach is retained, the terms "involving drugs" and "crimes against the person" are overbroad and lack clarity. The use of the term "involving drugs" might be construed to expand the definition to include offenses such as simple possession of drugs or transportation of drugs[83] – a significant change from the current guideline. Is driving under the influence of marijuana or possession of paraphernalia a misdemeanor "involving drugs"?[84] By "crimes against the person," does the Commission contemplate the meaning used by the Fifth Circuit – "offenses that, by their nature, are likely to involve the intentional use or threat of physical force against another person"?[85] If so, this definition, which the Fifth Circuit defined by reference to 18 U.S.C. § 16, is unconstitutionally vague.[86] Even if not unconstitutional, the meaning of the term is not clear. *See United States v. Selvan-Selvan*, 2015 WL 5178200 (E.D.N.C. 2015) (parties disputed the meaning of the phrase "crimes against the person" and whether it applied to convictions for child abuse, simple assault, and assault on a female), *appeal docketed* No. 15-4541 (4th Cir. Sept. 9, 2015).

Defenders believe that the better course of action for misdemeanors is to keep the current language in place, but redefine the term "crime of violence" to be consistent with that set forth in the Commission's January 2016 crime of violence amendment.[87]

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[82] Transcript of Public Hearing Before the U.S. Sent'g Comm'n, Washington, D.C., at 70-109 (Nov. 5, 2015) (Robert Zauzmer).

[83] Cal. Health & Safety Code Ann. § 11379 (punishing transportation of drugs under the heading "Offenses Involving Controlled Substances Formerly Classified as Restricted Dangerous Drugs").

[84] Under the Fifth Circuit's "common sense approach," which has been used to broaden the reach of enumerated offenses, our concerns are not merely hypothetical. *See United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006).

[85] *United States v. Trejo-Galva*, 304 F.3d 406, 410 (5th Cir. 2002); *United States v. Miranda-Garcia*, 427 F. App'x 296, 298 (5th Cir. 2011). Few reported decisions discuss the meaning of "involving drugs" and "crimes against the person," but that is likely because many of these cases are handled through fast track programs. If changes in sentencing length modify fast track policies, more litigation could be forthcoming.

[86] *See United States v. Gonzalez-Longoria*, __ F.3d __, 2016 WL 537612 (5th Cir. 2016) (holding 18 U.S.C. §16 definition of crime of violence to be unconstitutionally vague); *United States v. Vivas–Ceja*, 808 F.3d 719, 720 (7th Cir. 2015) (same); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (same).

[87] 81 Fed. Reg. 4741-4745 (Jan. 27, 2016).

E. The Proposed Language "First Deportation or First Order of Removal" Is Ambiguous and Needing to Determine the Date of the "First Deportation" or the "First Order of Removal" Would Unnecessarily Complicate Guideline Application.

We appreciate that the Commission is trying to fix a complicated guideline, but we fear that the proposed amendment would create substantial confusion and be more difficult to apply than it appears at first blush. The proposed amendment contains specific offense characteristics that turn on the timing of any prior convictions in relationship to the defendant's "first deportation" or "first order of removal." The amendment would be difficult to apply because the terms "first deportation or first order of removal" are confusing and determining the dates of those events would not be as easy as one might think. Moreover, because some first orders of removal, or orders of deportation or exclusion, are legally insufficient to support a conviction under 8 U.S.C. § 1326, they should not be the benchmark for enhancing sentences based on prior convictions.

The language "first deportation or first order of removal" is confusing and injects unnecessary complication into application of the guideline. The proposed amendment fails to distinguish between the "first deportation" and "first order of removal." The term "deportation" is not expressly defined in the application notes, but USSG §2L1.2, comment (n.1(a)(i)) states: "A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding." The comment suggests that "deportation" refers to the defendant leaving the United Sates after an order of removal, order of exclusion, or order of deportation was entered.[88] If so, then the reference to both "deportation" and "first order of removal" is redundant because

[88] Depending upon when it was entered, an order prohibiting the person from being in the United States has one of three names: an order of exclusion; an order of deportation; and a removal order. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which went into effect on April 1, 1997, combined exclusion and deportation hearings into one unified removal hearing. IIRIRA § 309(c); Ira J. Kurzban, *Immigration Law Sourcebook* 203 (14th ed. 2014–2015). Persons in exclusion or deportation proceedings on or before April 1, 1997 are not subject to the new rules. 8 C.F.R. § 1240.30–.39. The term "removal" order has now replaced the terms "order of deportation" and "order of exclusion" used in pre-IIRIRA proceedings. Socheat Chea, *Reopening Exclusion, Deportation, and Removal Orders*, 1 n.5 (2005), http://www.employmentvisaimmigration.com/images/Articles/ReopeningExclusionOrders.pdf. To prove a violation of 8 U.S.C. § 1326, the government must prove that the person left under one of those orders (albeit not necessarily the first order) and then illegally reentered. *United States v. Baraja-Alvardo*, 55 F.3d 1077 (9th Cir. 2011).

An order of removal is entered when a person is deemed inadmissible (in the case of an undocumented person) or deportable (in the case of a documented person). 8 U.S.C. § 1229a(e). Formal removal proceedings occur before immigration judges and may be based upon "any applicable ground of inadmissibility" or "any applicable ground of deportability." 8 U.S.C. § 1229a(a)(2). Expedited removal proceedings do not require a hearing in front of an immigration judge. 8 U.S.C. §§ 1225, 1228.

correct guideline application would still require a determination of the date of the first order of removal rather than the date the defendant left the United States.

If the terms "first deportation" and "first order of removal" are not redundant, then an additional problem arises because there can be a time gap between the two events. Consider the case of a person who was ordered removed, appealed the decision, and while awaiting the result sustained a conviction. The person was then removed from the United States and later returned. Does the single conviction serve to enhance the sentence twice: once under proposed §2L1.2(b)(1) because the conviction occurred before the person was removed (deported?) and again under §2L1.2(b)(2) because the conviction occurred after the first order of removal?

The ambiguity of the proposed language "first deportation or first order of removal" could also generate disparity based on whether the person was ordered deported, excluded, or removed. Does the Commission intend for convictions that occurred after an "order of deportation" or "order of exclusion," but before the person departed the United States, to not be used to increase the offense level under §2L1.2(b)(1), but for convictions that occurred after an "order of removal" to count regardless of whether the person departed the United States?

Even if the language is clarified, having to determine the date of the "first order of removal" would complicate the sentencing process because it would require the probation officer to examine the "Alien" (a.k.a. "A") file that may consist of hundreds of pages, as well as other records that may have incomplete or inaccurate information.

An examination of the file would be necessary because the removal order used to sustain the instant conviction is not always the "first order of removal." Consider a defendant charged with illegal reentry based on a December 2013 expedited removal order entered by an immigration inspector when the defendant was found attempting to enter the United States without permission. The December 2013 expedited removal order was the subject of a collateral attack and ultimately found valid, leading to a guilty plea to unlawful reentry. While the bulk of the discovery and other records in the case focus on the December 2013 removal, it cannot be assumed that the December 2013 order was the "first order of removal." To apply the guideline correctly, the probation officer and counsel would have to review the entire "A" file and other records to determine the "first order of removal." And even after collecting all the records, the accuracy of the files is questionable.[89] Defenders have seen files that contain multiple sets of removal documents and where it is not clear which ones were actually executed. In this not

[89] *See* Barbara Hines, *Immigration Law*, 35 Tex. Tech L. Rev. 923, 945 (2004) (author, with years of experience of dealing with immigration records, expresses pessimism about whether INS record keeping and file maintenance was sufficiently accurate for court to assume that Attorney General's consent for defendant to apply for readmission would have been found in INS records).

uncommon scenario, it is nearly impossible to accurately determine the "first deportation or first order of removal."

The need to examine the often unreliable and confusing "A" file and other documents adds an unnecessary step to current practice. When preparing presentences reports, probation officers typically receive an agent's summary of the person's immigration file, which is often riddled with errors because the agents do not have all of the documents and the multiple repositories' for records makes them time-consuming and difficult to collect. In addition, presentence reports and worksheets do not always contain information on the first date of removal.[90]

Focusing on the first order of removal for sentencing purposes and the date of removal for purposes of establishing an element of the offense and determining the applicable statutory maximum sentence also would require two separate analyses of the relationship between the dates of removal, the dates of the order of removal, and dates of any convictions. Under 8 U.S.C. § 1326(b)(2), the statutory maximum is 20 years for "any alien . . . whose removal was subsequent to a conviction for commission of an aggravated felony." When applying the statute, the relevant point in time is the date of any removal in relationship to the conviction for an aggravated felony. For example, a person ordered removed in 1997 and then removed twice -- once in 1997, and again in 1999 after a 1998 conviction – is subject to an enhanced penalty because the 1998 conviction occurred before the 1999 removal even though the 1999 removal was based on the 1997 order of removal.[91] Under the proposed amendment, however, the enhancement would not be based on the 1998 conviction occurring before the 1999 removal. Instead, it would be based on the 1998 conviction occurring after the first order of removal in 1997. While the net sentencing result is the same, the analysis is complicated by the different terms.

The need to use the first order of removal for purposes of calculating the guideline range under the proposed amendment and the use of a later order for purposes of establishing the element of the illegal reentry offense also raises a question about whether the defendant would be able to collaterally attack the validity of the first order of removal. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987) ("where a determination made in an administrative

[90] The redacted PSR and worksheet provided to the Commission demonstrate how reports may provide information on the dates of previous removal and grants of voluntary return, but not the date of the first order of removal.

[91] *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (defendant subject to enhanced penalty based upon the following: "after having been deported (equivalent to being removed), he reentered the United States illegally; was convicted for an aggravated felony; was removed pursuant to the summary removal procedure set forth in 8 U.S.C. § 1231(a)(5) ('prior order of removal is reinstated from its original date'); reentered the United States once again; and was convicted for illegal reentry, in violation of 8 U.S.C. § 1326").

proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding"). We are concerned that enhancing sentences based on conduct that occurs after the first order of removal may unfairly punish people who did not realize the significance of the removal order, or may not have even been aware that the order was entered. Research shows that about 28 percent of individuals who signed a removal order while in the custody of the United States Border Patrol did not receive an explanation of what they were signing or did not know what they were signing.[92] "Thirty-three percent reported feeling forced or pressured to sign a removal order."[93] Others may not have had notice of the order of removal because it was entered in absentia. We have seen cases where a person enters the country seeking asylum, is left out on work release, does not show up for the immigration court proceeding because of insufficient notice,[94] asylum is denied and the person is ordered removed, but they are not found for five years before being removed. If between the time of the entry of the order of removal and actual removal, the person committed an offense, such as a minor crime characterized as a "felony," then the person is subject to a harsher sentence without notice.[95]

The proposed amendment's focus on "first order of removal" rather than the order of removal supporting the conviction for reentry also fails to consider how a person may be ordered removed in absentia if the person fails to appear after proper notice. An in absentia order may be rescinded when the person did not receive the notice to appear and notice of hearing. A motion to reopen the removal proceeding can be filed at any time if the person did not receive proper notice, was incarcerated, or was not at fault for the failure to appear.[96] The order can also be rescinded if there were exceptional reasons for the failure to appear, such as illness. The process

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[92] Slack, *supra* note 19, at 121.

[93] *Id*.

[94] Convictions under 8 U.S.C. § 1326 have been overturned where the in absentia removal order was not valid. *See, e.g., United States v. Essam Helmi El Shami*, 434 F.3d 659 (4th Cir. 2005).

[95] A similar situation would arise in the case of a person who is initially granted voluntary departure by an immigration judge and given a set period of days to depart on their own. If the person fails to depart within the allotted time frame or is unable to obtain a travel document, the voluntary departure order is automatically vacated and an alternate removal order takes immediate effect. 8 C.F.R. §§ 1240.26(b)(1)(E)(iii), 1240.26(d). The person will not be brought before an immigration judge again in this scenario and there may be a delay of years before the person is found and the deportation actually executed.

[96] *See* 8 U.S.C. §1229a(b)(5)(C)) – Removal Proceedings; Beth Werlin, American Immigration Council, *Rescinding An In Absentia Order of Removal* (2010) (discussing various challenges to in absentia orders of removal), http://www.legalactioncenter.org/sites/default/files/lac_pa_092104.pdf. *See* Lawyers.com, *In Absentia Deportation & Removal Proceedings*, http://immigration.lawyers.com/deportation/in-absentia-deportation-and-removal-proceedings.html.

to rescind an in absentia order complicates the focus on the "first order of removal" because the filing of a motion to reopen for lack of notice automatically stays deportation pending a decision.[97] And some courts have ruled that an in absentia order is not final until the Board of Immigration Appeals rules on the motion to reopen.[98]

Given the multitude of problems with the proposed amendment's focus on the "first deportation or first order of removal," if the Commission is going to pursue this path of enhancing offense levels based on prior convictions and their timing in relation to prior immigration proceedings, we encourage the Commission to instead focus on the date of actual removal underlying the offense of illegal reentry. Such a rule would be consistent with the language of 8 U.S.C. § 1326. *See United States v. Salazar-Lopez*, 506 F.3d 748, 752 (9th Cir. 2007) ("the date of the removal, or at least the fact that [the defendant] had been removed after his conviction, should have been alleged in the indictment"). It would also ensure that the benchmark for determining when the predicate conviction occurred is based on a constitutionally valid removal. *See United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); 8 U.S.C. § 1326(d).

F. Several Departure Provisions and an Amendment to the Criminal History Rules on Counting Remote Convictions Should be Incorporated into the Guidelines to Mitigate the Specific Offense Characteristics Based upon Prior Convictions.

The Commission requests comment on what mitigating factors it should incorporate into §2L1.2. Here, we offer three suggestions for departures and an amendment to the criminal history rules on remote convictions.

First, the Commission should include an invited downward departure where the sentence imposed for a prior conviction is higher than it would have been in the majority of jurisdictions. Such a provision would encourage a court to consider how the sentence imposed overrepresented the seriousness of the offense. It would be particularly applicable in cases where a higher sentence than average was imposed for drug possession.[99]

Second, the Commission should invite a departure for predicate felony convictions that are classified as misdemeanors under state law, as the Commission did in its recent crime of

[97] 8 U.S.C. § 1229(b)(5)(C).

[98] *See Kay v.Ashcroft*, 387 F.3d 664, 670–73 (7th Cir. 2004); *Santo-Quiroa v. Lynch*, 2016 WL 850954, at*10 (1st Cir. 2016).

[99] *See, e.g.*, Ky. Rev. Stat. Ann. §218A.1437, §532.020 (possession of a methamphetamine precursor is a Class D felony subject to a sentence of at least 1 year but not more than 5 years); Ky. Rev. Stat. Ann. §218A.1415 (possession of a controlled substance in first degree (e.g. cocaine) is subject to a three year maximum penalty); Texas Penal Code Ann. §481.124 (depending upon nature of the precursor, possession of a chemical with intent to manufacture is punishable by a minimum of 2 years or 180 days to 2 years).

violence amendments.[100] Defender testimony submitted for the crime of violence hearing contains an extensive discussion of the problems associated with the current definition of felony, particularly for states that punish misdemeanors with more than 1 year imprisonment. The Commission also has acknowledged that certain offenses "such as theft, assault, drug possession, and some DUIs [] are treated differently from jurisdiction to jurisdiction."[101] Because some states call for harsher punishments for some offenses than do other states, it is important to encourage courts to be mindful of unwarranted disparity by including an invited departure for offenses that meet the definition of felony under federal law, but are considered less serious offenses under state law even though the maximum sentence may be higher because of the vagaries of state law.

Third, the Commission should use the date the defendant was discovered in the United States as the date of commencement of the instant offense or include an invited downward departure for old convictions that count under the criminal history rules because of the continuing nature of the offense of illegal reentry. In its publicly available presentation on the proposed amendment,[102] the Commission emphasizes how only convictions that receive criminal history points would be used to increase offense levels for convictions sustained before and after the individual's "first deportation or first order of removal." The limitation on applicability of enhancements to convictions that receive criminal history points overlooks how the criminal history rules apply in illegal reentry cases in ways that overstate the risk of recidivism.

The focus on the date of the defendant's "commencement of the instant offense" for purposes of determining the applicable time period for prior convictions under §4A1.2(e) often results in old convictions counting under the criminal history rules even though the person remained crime free for years. The example of Defendant C, provided earlier in our testimony, shows how old convictions can drive up a sentence because illegal reentry is treated as a continuing offense that starts from the moment of the person's unauthorized border crossing.[103] The court in *United States v. Vaolyes*, 2011 WL 3099881, at *2 (E.D.N.Y. 2011), provided another illustration of how treating illegal reentry as a continuing offense that commenced on the day the person crossed the border "stands the concept of recency and repose embedded in criminal history computations on its head":

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[100] 81 Fed. Reg. 4741, 4742 (Jan. 27, 2016).

[101] *Illegal Reentry Offenses*, *supra* note 1, at 16.

[102] USSC, *Public Data Briefing: Proposed 2016 Immigration Amendments* (2016).

[103] *See United States v. Hernandez-Guerrero*, 633 F.3d 933 (9th Cir. 2011) (defendant's 1992 conviction for possession for sale of a controlled substances counted for criminal history purposes because he unlawfully reentered the United States in 1995 and was subsequently found in 2009).

> With no statute of limitations to bar prosecution on the front end, an illegally reentered alien who apparently has not had a single brush with the law, say, for a quarter century, still would be accountable under the Guidelines at the back end, upon being apprehended and (inevitably) convicted, for crimes committed almost 40 years before being "found." Specifically, extrapolating in Lozano's case, if Lozano had been arrested in the year 2041, at the age of 90 (the age of the oldest judge currently serving in this district), her three prior convictions in 1997, 1991, and 1990 – 44, 50, and 51 years earlier, respectively – still would be held against her for Guidelines purposes. That is because these convictions would be deemed imposed within the time limits set out by the Guidelines for including prior offenses in the criminal history calculation, which run from the "commencement of the instant offense" – the illegal reentry.

Id.

Such outcomes are unjustified because the criminal history score in the context of a violation based on nothing more than a person's status in the United States overstates the risk of recidivism. By living a crime free life for years, these individuals have already proven that they need not be incapacitated for long periods of time to protect the public from further crimes.

We offer two suggestions on how the Commission can fix this problem. First, as recommended by the court in *Valoyes*, the Commission should adopt an application note in Chapter 4 specifying "that the date of discovery in illegal reentry cases be used for purposes of calculating the illegally reentered alien's criminal history category."[104]

If the Commission in unwilling to do that, it should add language to §4A1.3(b), similar to that found for upward departures at §4A1.3(a)(2):

> Types of Information Forming the Basis for Downward Departure:
>
> *Prior sentences that fall within the applicable time period under §4A1.2(e) because of the ongoing nature of an illegal reentry offense and that would not fall within the requisite time period if the commencement of the illegal reentry offense began at the time the defendant was found within the United States*.

G. The Commission Should not Delete the Departure Provision that Allows Credit for Time Served in State Custody.

The departure for time served in state custody needs to be retained.

The Commission amended the guideline in 2014 to invite departures based on time served in state custody because it acknowledged that the "amount of time a defendant serves in

[104] *United States v. Valoyes*, 2011 WL 3099881, at *3 (E.D.N.Y. 2011).

state custody after being located by immigration authorities may be somewhat arbitrary." USSG App. C, Amend. 787 (Nov. 1, 2014). The arbitrariness, recognized by many courts,[105] stems from the delay that may occur between the time the defendant is found in state custody and the time federal authorities proceed with an illegal reentry charge.

The arbitrary nature of the delay in the lost opportunity for a concurrent sentence does not change with the Commission's proposal to use convictions that occur after the first deportation or first order of removal in elevating offense levels. An example demonstrates our point.

Defendant E was convicted in state court of simple possession of marijuana and placed on probation. Soon thereafter, he was deported. Following his deportation, the state court issued a warrant for his arrest for failure to report to the state probation agency. When he tried to reenter to reunite with his citizen parents, he was stopped and arrested on the outstanding warrant. The state court imposed a revocation sentence of 2 years. Federal authorities waited until his release from state custody before charging him with illegal reentry. Under the current guideline, that single state court conviction is used against the defendant six times:

(1) the original probation sentence;

(2) a 2-year revocation for failing to report and reentering;

(3) an increase in the statutory maximum penalty from 2 to 10 years, 8 U.S.C. § 1326(a) and (b)(1);

(4) a 4-level offense level enhancement, §2L1.2(b)(1)(D);

(5) 3 criminal history points rather than 1 point because the sentence is now deemed a 2-year sentence (§§4A1.1(a), 4A1.2(k));

(6) 2 additional points because the reentry offense was committed while he was on probation, §4A1.1(d).

[105] The Commission cited several cases in support of the departure: "*United States v. Sanchez-Rodriguez*, 161 F.3d 556, 563-64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in proceeding with the illegal reentry case, the defendant lost the opportunity to serve a greater portion of his state sentence concurrently with his illegal reentry sentence); *United States v. Barrera-Saucedo*, 385 F.3d 533, 537 (5th Cir. 2004) (holding that 'it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody'); *see also United States v. Los Santos*, 283 F.3d 422, 428-29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable)." USSG App. C, Amend. 787, Reason for Amendment (Nov. 1, 2014).

Under the proposed amendment, that single state court conviction is still used against him six times, but his guideline range increases from 10-16 months[106] to 15-21 months.[107] Given the multiple ways in which the single simple possession conviction is used against the defendant to increase his time in prison, because the time served in state custody is not covered by §5G1.3(b), which permits concurrent sentences, or §5K2.23, which permits departures for time in state custody, and because the delay in bringing the illegal reentry charge was arbitrary and kept the defendant from getting a concurrent sentence either from the state court or federal court, the departure provision is still warranted.

Another example shows that even if the Commission keeps the invited departure based on time served in state custody, the proposed amendments would result in a higher guideline recommended sentence than the current guideline.

Defendant F has three misdemeanor illegal entries under 8 U.S.C. § 1325(a) (12/14/01, 7/5/03, 6/2/06) for which he received sentences of 15, 30, and 45 days. He unlawfully returned to the United States in 2006 and worked as a landscaper until he was arrested in November 2014 for simple possession of marijuana and sentenced to 1year imprisonment. Immigration authorities located him in state custody shortly after his arrest, but he was not charged with illegal reentry until November 2015. Under the current guideline, he would have 5 criminal history points (CH III), a base offense level of 8 and a 4-level increase for a felony conviction, placing him in a range of 10-16 months (OL 12 -2 for acceptance = 10, CH III). At sentencing, the court would have the option of departing based on the time he served in state custody for the possession of marijuana offense. With a 6-month credit for time in state custody, his guideline recommended sentence would be *4 months*. Under the proposed amendment, his guideline range would be *30-37 months* (BOL 14 +6 for a conviction for a felony offense for which the sentence imposed was at least 12 months = 20 -3 for acceptance = 17, CH III). If the Commission were to remove the invited departure for time served in state custody, his minimum guideline sentence would be *30 months.* If the Commission were to keep the departure provision in place and the court granted him a 6-month departure based upon time served in state custody, then his guideline recommended sentence would be *24 months* – 20 months higher than under the current guidelines.

[106] Under the current guideline, his offense level would be 12 (BOL 8, +4 for felony) and criminal history category III. With 2 points for acceptance, the guideline range would be 10-16 months.

[107] Under the proposed amendment his offense level would be 14 (BOL 10, +4 for sentence imposed of less than 12 months) and criminal history category III. With 2 points for acceptance, the guideline range would be 15-21 months.

III. Alien Smuggling

Defenders believe it unnecessary and inequitable to increase the base offense level for alien smuggling or to add an alternative base offense level to account for ongoing commercial organizations involved in smuggling. We also think the amendment regarding unaccompanied minors moves the guideline in the wrong direction and that the guideline and other criminal law provisions already adequately account for sexual abuse of unaccompanied minors and others smuggled across the border.

A. Available Data Does Not Show a Need to Increase Sentences for Alien Smuggling Offenses.

The Commission's data on sentences imposed under §2L1.1 does not support the Department of Justice's claim that the sentences are inadequate.[108] Since 2011, within range sentences under §2L1.1 have decreased from 55.1% to 42%.[109] Government sponsored below range sentences have increased from 30.5% to 44.7%.[110] In the Southern District of Texas – the district with the most alien smuggling cases – the rate of government sponsored below range sentences has increased from 12.7% to 46.1%, and the rate of within range sentences has dropped dramatically from 72.7% to 41.5%.[111] Other border districts with alien smuggling cases also have significant rates of government sponsored below range sentences.[112] And the average sentence of 18 months in FY 2014 was lower than the average guideline minimum of 21 months.[113] Importantly, in FY 2014, 57.1% of all cases receiving the unaccompanied minor

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[108] *See* USSC, *Proposed Amendments to the Sentencing Guidelines* 55 (January 15. 2016) (referencing Department of Justice's letter to the Commission). *See also Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing DOJ's concerns).

[109] USSC, *Interactive Sourcebook*, tbl. 50.

[110] *Id*.

[111] *Id*.

[112] In the Western District of Texas, the rate of government sponsored below ranges sentenced increased from 12.3% in 2011 to 40.6% in 2014. *Id*. The rate of within guideline sentences dropped from 69% to 50.8%. *Id*.

In Southern California, the rate of government sponsored below range sentences has been above 70% since 2010, and the rate of within range sentences, which hovered around 20% from 2010 to 2013, dropped to 14.6% in 2014. The only district where the rate of government sponsored below range sentences has remained steady over the past few years is Arizona, with a 40% rate. *Id*.

[113] In FY 2014, only 2.9% of alien smuggling cases involved an upward departure or above range sentence. USSC, FY *2014 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (*2014 Sourcebook*).

enhancement received a government sponsored below range sentence and only 32.1% of cases were within range.[114]

That sentences for alien smuggling are typically below the guideline range is not surprising. The majority of individuals sentenced under §2L1.1 do not have significant criminal histories and do not play an aggravating role in smuggling. The Commission reported that in FY 2014, 59.9% of individuals sentenced under §2L1.1 were in Criminal History Category I and only 12.6% were in the top three categories (IV through VI).[115] In FY2014, 94.5% of §2L1.1 cases received no aggravating role enhancement.[116] That data is consistent with our experience, which is that many of the individuals prosecuted for alien smuggling were involved in smuggling to cover their own smuggling debt, and are often drivers who are easily replaced.[117] Because these are individuals desperate to come to this country and are willing to risk their own lives in crossing dangerous terrain, higher sentences will do nothing to deter them. And as the Commission is aware, ample evidence shows that longer periods of incarceration have marginal deterrent value,[118] so the notion that punishing these individuals more harshly will put a stop to smuggling is unsupported.

In deciding whether to increase offense levels in §2L1.1, the Commission should also be aware that it can be more difficult for individuals involved in smuggling to provide meaningful cooperation over time because we have been informed that agents often rotate their duty station every six months. Commission data confirms that few persons sentenced under §2L1.1 are able to obtain cooperation departures. Whereas 13.62% of all cases in FY 2014 involved §5K1.1

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[114] USSC, *FY 2014 Monitoring Dataset*.

[115] USSC, *Quick Facts: Alien Smuggling Offenses* (2014).

[116] 3% received a 2-level increase under §3B1.1; 1.4% received a 3-level increase; and 1.1% received a 4-level increase. USSC. *FY 2014 Monitoring Dataset*.

[117] *See also* Garbiella Sanchez, *Working Paper, Security from Below: The Role of Families in the Negotiation of Extra-legal Border-Crossing Services on the US/Mexico Border*, Research Gate (Aug. 2015) (finding that many involved in smuggling were "irregular migrants themselves who were offered discounts on their smuggling fees in exchange for performing driving, cooking, or cleaning duties"), https://www.researchgate.net/publication/281149623_WORKING_PAPER_Security_From_Below_the_role_of_families_in_the_negotiation_of_extra-legal_border-crossing_services_on_the_USMexico_Border.

[118] National Institute of Justice, *Five Things About Deterrence* (Sept. 2014), http://www.nij.gov/five-things/pages/deterrence.aspx, flyer available here: https://ncjrs.gov/pdffiles1/nij/247350.pdf; Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 201 (2013); Gary Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a "Collective Wisdom"?*, 59 Crime & Delinq. 1006, 1031-33 (2013); Brennan Center for Justice, *What Caused the Crime Decline?* 26 (Feb. 2015), https://www.brennancenter.org/publication/what-caused-crime-decline.

departures, and 26% of cases under §2D1.1, only 7.6% of cases under §2L1.1 involved a cooperation departure.[119]

B. Existing Guidelines Already Account for the Few Cases Involving "Large Scale Criminal Organizations," Which Should Be Defined More Broadly than Five or More People Smuggling Persons on More than One Occasion.

To the extent that persons prosecuted for smuggling, transporting, or harboring an "unlawful alien" are involved with five or more other persons in smuggling for profit and know that the group was involved in smuggling on more than one occasion, such involvement does not warrant increased offense levels. Contrary to popular belief and DOJ's claims that alien smuggling operations are more likely to be associated with organized crime,[120] available research shows that many individuals involved in smuggling are not part of other criminal organizations – such as drug trafficking. Research done by Gabriella Sanchez – an anthropologist at the University of Texas at El Paso – found that "[s]muggling is conducted by men and women known to each other through their immediate family and friends," and who often "collaborate in multiple smuggling efforts."[121] Because they "must provide relatively safe journeys, amid often precarious conditions," they "stay away from purposely engaging in violent acts."[122] Profit is a motive for these individuals only because they are typically poor and undereducated.[123] Moreover, the income generated for these individuals from smuggling is "by no means significant"[124] and does nothing more than help cover "their most immediate, urgent needs like rent, food, and medical expenses."[125]

To the extent cases involve large scale criminal organizations, they can be handled through two provisions already present in the guideline: (1) the enhancement at §2L1.1(b)(9) for a defendant convicted under 8 U.S.C. § 1324(a)(4), which includes cases where the "offense was part of an ongoing commercial organization or enterprise," and (2) aggravating role enhancements, which the Commission anticipated would apply in "large scale smuggling,

[119] *2014 Sourcebook*, at tbl. 28.

[120] USSC, *Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing DOJ's concerns).

[121] Sanchez, *supra* note 117, at 276.

[122] *Id*. *See also id*. at 277 (citing additional research, which shows a "low incidence of violent acts against undocumented immigrants on the part of smugglers").

[123] *Id*. at 280.

[124] *Id*.

[125] *Id*.

transporting, or harboring cases." §2L1.1, comment. (n.2). Organized criminal activity involving kidnapping and extortion can also be prosecuted under other statutes, including racketeering and money laundering, which carry higher base offense levels. *See, e.g.*, §2B3.2 (extortion by force or threat of injury or serious damage – base offense level of 18).[126]

If, notwithstanding the evidence contradicting DOJ's claim that alien smuggling operations are "more likely to be 'lucrative,' larger-scale enterprises associated with organized crime,"[127] and the availability of other guideline provisions to cover such cases, the Commission still wants to increase offense levels in §2L1.1, then Defenders prefer Option 2 over Option 1. We encourage the Commission, however, to make several changes. First, the definition of "part of an ongoing commercial organization" should have a mens rea requirement based upon the defendant's actual knowledge. In addition, the definition should require that the group smuggle, transport, or harbor different groups on multiple occasions over more than a year rather than on just one occasion. These changes would help ensure that the increased offense level applies only to a person who knowingly participates in a profit-making commercial organization that is truly "ongoing."

If the Commission increases the base offense level or adds an alternative offense level for "ongoing commercial organizations," the Commission also should consider modifying the definition of "offense committed other than for profit," which currently "means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens." This definition is incompatible with the common meaning of "profit," which means a financial gain made after all costs and expenses are paid. Under the common meaning of "profit," an "offense committed other than for profit" should still allow for minimal payments so long as they do not rise to the level of a "profit." Our indigent clients who participate in smuggling, harboring, or transporting aliens to help pay their own smuggling fees or to meet basic living expenses are not making a profit – they are surviving, and the guidelines should not recommend a higher sentence simply because they received minimal payments to aid basic survival.

C. The Guidelines for Smuggling of Unaccompanied Minors and Sexual Abuse are Generally Adequate. The Only Amendment Necessary Is to Limit the Enhancement at

[126] *See Porges v. Samuels*, 2008 WL 323634, *3 (D.N.J. 2008) (defendant convicted of racketeering for involvement in smuggling of illegal aliens from China); *Pham v. United States*, 2007 WL 542378 (D.N.J. 2007) (defendant sentenced to 235 months imprisonment on seven counts related to smuggling of Chinese aliens: RICO conspiracy; conspiracy to collect extensions of credit by extortionate means; conspiracy to interfere with commerce by threats of violence; transportation of illegal aliens within the United States; concealment, harboring and shielding aliens from detection; kidnapping; hostage taking; and receipt of firearms with intent to commit offense).

[127] *Immigration Data Briefing*, *supra* note 5, Slide 4 (discussing Department of Justice's concerns).

§2L1.1(b)(4) to Circumstances Where the Defendant Knew the Minor was Unaccompanied by a Parent, Grandparent, *or Other Related Adult.*

The Commission proposes several amendments related to unaccompanied minors and seeks comment on the adequacy of the guidelines for offenses involving sexual abuse of "aliens smuggled, transported, or harbored." Defenders see no need for these amendments and request one small change to account for situations where minors are accompanied by other relatives.

First, the Commission should consider the context in which children may cross the border. In our experience, border crossings involving unaccompanied minors are often done for the safety of the children because the parents are already in the United States,[128] or need to stay in their home country, or because the children may ride in a car after crossing the border whereas their parents go through the brush. The case of Nora and her family is an example. Nora had crossed the border and three years later finally reunited with her 8- and 10- year-old daughters. When interviewed by Professor Gabriella Sanchez, Nora explained the efforts she undertook to get her children across the border safely:

> We wanted to bring the girls for a long time. But when I crossed the border [I did it] on foot. We walked for almost an entire month and I knew I did not want for my girls to come that way. So I started to ask around, but nobody would cross children. I was told it was too dangerous. Finally, a lady from work told me she knew of a guy who did, and I contacted him. I told the man I was concerned about my girls' safety, that I did not want for them to walk through the desert or to suffer. And he said, 'no ma'am, we don't cross children through the desert, we would never do that.' Instead, the man said, his contacts would get the girls through the checkpoint and would then drive them all the way to my home in Salake. But I decided to come get them to Phoenix, despite all the rumors that the sheriffs here are mean and arrest Mexicans. I asked my dad's girlfriend to come with me. We drove for 11 hours, and here we are. My mother accompanied the girls all the way from our hometown in Mexico. Once on the border she went at a hotel, and two different men came and asked to take the girls. My mother called to let me know and I called the coyote, and he gave me a code word the men who were supposed to cross the girls would use so that I knew they were the real thing. We did not want for the girls to end up in the wrong group or in the wrong hands. The men crossed the girls one at a time through Nogales as my mother watched from afar. My babies made it through the checkpoint in less than 15 minutes, got

[128] When the "unaccompanied minor" enhancement was proposed in 2006, Judge Vazquez made the same point during testimony before the Commission. *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, San Diego, California, at 42 (Mar. 6, 2006) (Honorable Martha Vazquez) (discussing how other family members or friends bring the child into the country after the parents have already arrived). *See also* GAO, *Unaccompanied Children: HHS Can Improve Monitoring of Their Care* 11 (2016) (Office of Refugee Resettlement released to a parent 60% of unaccompanied children from El Salvador, Guatemala, and Honduras).

> in a car with a couple who drove them, and they are now on their way here. I have been checking up on them by cellphone; they have been saying that they are OK and the coyote driving them said they will be here soon.

Sanchez, *supra* note 117, at 6-7.

In other cases, the parents are trying to save their children from the drug cartels so they spend significant money to have them smuggled into the U.S.

Second, the enhancement at §2L1.1(b)(4) for unaccompanied minors should have an actual knowledge requirement and remain defendant rather than offense specific. The proposed "offense involved" and "reason to believe" language would sweep in many of the least culpable individuals, including those who transport other immigrants in exchange for reduced fees for their own border crossing, other family members and friends who help a child reunite with a parent in the United States, and persons who perform services such as cooking and cleaning.

Third, the Commission should amend the guideline to redefine unaccompanied minor. Defendants involved in smuggling, transporting, or harboring children who were accompanied by a related adult should not be subject to an increase in offense level. In FY 2014, a sizable number of families that did not include a parent, but did include a related individual, were apprehended crossing the border.[129] Because these individuals can protect the interests of the child during border crossings and provide authorities information relevant to removal or asylum proceedings, no legitimate reason for an enhanced sentence exists.[130]

Fourth, the 4-level enhancement at §2L1.1(b)(7)(B) sufficiently accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored. The Department of Justice's claim that alien smuggling offenses often involve sexual abuse of unaccompanied minors is not supported by the evidence. The Office of Refugee Resettlement (ORR) is responsible for the care and custody of unaccompanied children apprehended by the Department of Homeland Security. ORR must determine if the child was a victim of trafficking, a special needs child with a disability, or "a

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[129] Congressional Research Service, *Unaccompanied Alien Children: An Overview* 3 (2016) ("Apprehensions of family units (unaccompanied children with a related adult) increased from 14,855 in FY2013 to 68,445 in FY2014. Of these apprehended family units, 90% originated from Guatemala, El Salvador, and Honduras.").

[130] An amendment that redefines unaccompanied minor would be consistent with the Asylum Reform and Border Protection Act of 2015 (H.R. 1153), which would amend the definition of unaccompanied alien child to "to add, in addition to no parent or legal guardian, that there are no siblings, aunts, uncles, grandparents, or cousins over the age of 18 available to provide care and physical custody to the unaccompanied minor. The act would also provide that the term unaccompanied alien child would cease if any person in the aforementioned category is found in the United States and is available to provide care and physical custody to the minor." Congressional Research Service, *supra* note 129, at 14.

child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened." 8 U.S.C. § 1232(c)(3)(B). If such circumstances exist, ORR must do a home study before placing the child. In FY 2015, ORR received referrals for 33,726[131] unaccompanied children, but only did home studies for 1,895 (5.6%).[132] The Commission's data also shows that few §2L1.1 cases involve unaccompanied minor children and even fewer include minor children subject to abuse. In FY 2014, only 392 (17.3%) cases involved minor children.[133] Of those, only 12 received a 2-level increase for bodily injury and another 12 received a 4-level increase for serious bodily injury under §2L1.1(b)(7).[134] That means only 1% of all alien smuggling cases involved any form of abuse of an unaccompanied minor. In the rare case where the government believes a 4-level enhancement for sexual abuse is inadequate, it is always free to seek a variance or pursue sex abuse, sexual assault, or sex trafficking charges.[135]

Lastly, the definition of "minor" for purposes of the §2L1.1(b)(4) enhancement should not be changed to include individuals under the age of 18. The Commission's *2006 Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* noted that some participants in the Immigration Roundtable "expressed concerns that smuggling younger minors unaccompanied by their parent(s) is more harmful than smuggling older teenagers because younger minors may end up as wards of the state."[136] The report concluded that "minors between the ages of 15 and 18 may not present as great of a risk as the smuggling of minors under the age of 15."[137] Nothing has changed since the Commission made the original decision to define "minor" as a person under 16. A 16- to 18-year-old is still more capable than a younger child of providing information about where they came from, who their parents are, and where they were going. And age aside, a recent GAO report noted that "most children come with contact information for a relative who can serve as a sponsor."[138]

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[131] This number is a significant drop from the 57,496 referrals in FY 2014. Office of Refugee Resettlement, *Facts and Data*, http://www.acf.hhs.gov/programs/orr/about/ucs/facts-and-data.

[132] *Id*.

[133] USSC, *FY 2014 Monitoring Dataset*.

[134] *Id*.

[135] The Commission should not mix smuggling with trafficking. To do so would undercut efforts to protect victims of trafficking. *See* U.S. Dep't of State, *Human Trafficking & Migrant Smuggling: Understanding the Difference* (2015), http://www.state.gov/j/tip/rls/fs/2015/245175.htm.

[136] USSC, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines* 9 (2006).

[137] *Id*.

[138] GAO, *supra* note 128, at 6.