



U.S. Department of Justice

2L1.1
2L1.2

Washington, D.C. 20530

DEC 15 1987

Mr. Peter Hoffman
Principal Technical Advisor
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Peter:

I am writing on behalf of the Department to bring to the Commission's attention a serious problem that exists under the guidelines with respect to immigration offenses addressed in §§ 2L1.1 and 2L1.2. These sections deal with 8 U.S.C. 1324 and 1325, involving smuggling, transporting, or harboring an illegal alien and unlawfully entering or remaining in the United States, respectively.

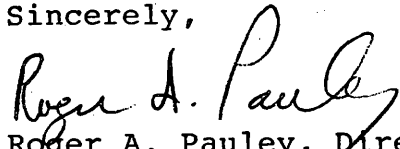
As indicated in the correspondence previously furnished you from Peter Nunez, the United States Attorney in San Diego, the guidelines are causing severe practical difficulties in border districts, essentially for two reasons. First, the guidelines are anomalous in that they assign a higher base offense level to the two-year felony of entering the United States after having been deported (§2L1.2) than to the five-year felony of smuggling, transporting, or harboring illegal aliens (§2L1.1). This problem is not solved by the proposed staff amendment (which responds to yet another problem with these guidelines) to delete any treatment in the guidelines of a first offense of unlawful entry (a petty offense). The difficulty remains that §2L1.2, insofar as it will apply to felony violations, carries a base offense level of 8, which is higher than the level 6 assigned to the considerably more serious offense of smuggling or transporting illegal aliens. Second, in terms of the smuggling offense, there is no distinction in the guidelines between the person who smuggles one or two illegal aliens (e.g. other members of his family) and the offender who smuggles a large number of illegal aliens. Obviously, the harm caused by the latter is significantly greater and common sense would seem clearly to justify a higher penalty for the large scale alien smuggler.

Taking the second problem first, the solution here would seem to be the inclusion in the guidelines of an aggravating factor permitting an increase in the base offense level under §2L1.1 if the number of aliens smuggled, transported, or harbored exceeded a certain figure. One reasonable suggestion, for example, would be a provision to increase the offense level by 1, 2, or 3 levels if the number of illegal aliens smuggled, transported, or harbored was between 5-10, 11-25, or 26 or above, respectively.

The second problem of the anomaly between the base offense levels in §§ 2L1.1 and 2L1.2 could be solved either by raising the base offense level for §2L1.1 or by lowering the level for §2L1.2. We favor the first approach since it accords with Congress' recent judgment in the 1986 immigration reform law to treat alien smuggling offenses as serious felonies. We suggest raising the base offense level in §2L1.1 to 9. You had suggested the possibility of dropping §2L1.2(b), which increases the base offense level by 2 where the defendant previously has unlawfully entered or remained within the United States. The difficulty with this approach is that, from conversations with Assistant United States attorneys in border districts, it appears that this factor is presently relied upon by courts to increase the sentence; thus deleting it as a means of achieving better proportionality between the smuggling and illegal entry offenses would only create a further problem.

Whether or not the specific remedies discussed heretofore are adopted, it is important that the Commission correct the underlying problems with these guidelines as soon as practicable. As the letters from Peter Nunez demonstrate, these guidelines are causing severe problems in border districts, which process thousands of alien smuggling and illegal entry cases per year. Moreover, these cases, because there is typically a very short time between arrest and disposition, are beginning to "hit" the system now and thus are giving rise to an unfavorable impression of the guidelines in those districts affected. The Department therefore urges that you bring this letter to the attention of the Commission and endeavor to have this matter placed on its December 16, 1987, agenda for action under the newly granted emergency guideline amendment authority in Public Law 100-182. I am advised that the Deputy Attorney General's office concurs in this request.

Sincerely,



Roger A. Pauley, Director
Office of Legislation
Criminal Division