

PUBLIC COMMENT

1997 AMENDMENT CYCLE



United States Sentencing Commission

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FEDERAL PUBLIC DEFENDER

Western District of Washington

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February 4, 1997

Honorable Richard P. Conaboy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On behalf of the Federal Public and Community Defenders, I submit the following comments on the proposed emergency amendments to the guidelines.

Amendment 1
(§ 2D1.11)

Amendment 1 would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment responds to the Congressional directive in the Comprehensive Methamphetamine Control Act of 1996 (P.L. 104-237). Section 302 of the Act directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). The Act also raises the maximum penalty for these offenses from ten to twenty years. We do not oppose the amendment.

Amendment 2
(§ 2L1.1)

Amendment 2 responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), which directs the Commission to increase the

guideline penalties for alien smuggling offenses. Specifically, the legislation directs the Commission to increase the base offense level for alien smuggling by at least three levels; increase the enhancement in § 2L1.1(b)(2) by at least 50 percent; provide an enhancement for an offender with a prior felony conviction for a similar offense; impose an enhancement for death or bodily injury; and consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child.

Base Offense Level

Amendment 2 would increase by three to five levels the base offense level in § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony." The amendment would increase the base offense level for other smuggling offenses covered under § 2L1.1 (a)(2) by three, four, or five levels. A three-level increase in the offense levels of both subsection (a)(1) and subsection (a)(2) satisfies the Congressional directive in section 203, and best serves the purposes of sentencing. Without data indicating that the resulting offense levels are inadequate, there is no rationale for raising the offense levels higher than the legislation requires.

Number of Aliens Smuggled

In response to the second directive, which requires at least a 50-percent increase in the sentencing enhancement for the number of aliens smuggled, transported, or harbored, the proposed amendment would completely revise the present alien-smuggling table. We oppose this part of the proposal as written.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of aliens	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to promulgate an emergency amendment adding an enhancement for offenses involving 3-5 aliens. Under the amendment, however, an offense involving 3-5 aliens will result in a one-level increase for number of aliens smuggled. The Commission should collect data to determine if it is necessary to promulgate such an amendment, increasing already harsh penalties for low level offenders, under the Commission's regular authority.

There is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 aliens. The legislation requires that the two-level enhancement for these offenses be increased by one level, but the amendment would increase the enhancement by three levels. According to Commission data,¹ between October 1994 and September 1995, 63.7 percent of the offenses covered by § 2L1.1 involved the smuggling of 6-24 unlawful aliens. Thus, without any

¹Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 44 (December 2, 1996).

rational justification, the amendment increases the enhancement for a large percentage of cases by 150 percent.

For offenses involving 25-99 aliens, the amendment, without a reasoned basis, would increase the enhancement by three-levels -- a 75-percent increase. The enhancement for the most egregious cases, those involving 100 or more aliens, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. The cosmetic uniformity provided by a table with two-level increments is not worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 2 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

We oppose the amendment's broad interpretation of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction of an immigration, naturalization, or passport offense.

We support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 (three-strikes), which requires predicate offenses to be separated from the instant offense (and from each other) by a conviction. The Commission has adopted a similar policy for the career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions" In addition, as the Commission staff has pointed out, the approach of option 2 "would make the enhancement more susceptible to prosecutorial manipulation."² To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Firearm Enhancement

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . uses or brandishes a firearm or other dangerous weapon." In response, the amendment would provide a six-level increase and a minimum offense level of [22-24] if "[the defendant discharged a firearm][a firearm was discharged]," a four-level increase and a minimum

²Id. at 6.

offense level of [20-22] if [the defendant brandished or otherwise used a dangerous weapon (including a firearm),] [a dangerous weapon (including a firearm) was brandished or otherwise used], and a two-level increase and a minimum offense level of [18-20] if "a dangerous weapon was possessed."

We oppose the part of this amendment that would provide minimum offense levels. These minimum offense levels would only result in a greater proportional increase for possession or use of a weapon in less egregious cases where the base offense level would be determined under § 2L1.1(b). For example, a defendant whose base offense level is determined under § 2L1.1(a)(1), would, under the amendment, receive a base offense level of [23-25]. If that defendant brandished a firearm, then the offense level would be increased to [27-29] -- an increase of up to four levels. A defendant convicted of a less egregious offense would receive a base offense level of [12-14]. If that defendant brandished a firearm, however, the offense level would be [20-22] -- an increase of up to ten levels. We find this tendency to over punish relatively less serious offenders troubling and inconsistent with thoughtful legislation, such as 18 U.S.C. § 3553(f), the "safety valve" statute. Rather than create mandatory minimums within the guideline structure, the enhancement should simply provide a uniform increase for use of a weapon.

We oppose those parts of this amendment that do not strictly conform to the legislative directive. We therefore oppose that part of the amendment that would provide a two-level increase and a minimum offense level of [18, 19, or 20] "if a dangerous weapon (including a firearm) was possessed." The legislation does not give the Commission emergency authority to provide an enhancement for possession of a weapon. Similarly, the legislation does not give the Commission emergency authority to impose an enhancement on a defendant who did not personally discharge,

brandish or otherwise use a firearm or other dangerous weapon. To comply with the Congressional directive, the proposed enhancements should apply as presented in the first brackets. Thus, for discharging a weapon, the enhancement should read "if the defendant discharged a firearm" and the proposed enhancement of § 2L1.1(4)(B) should read, "if the defendant brandished or otherwise used a dangerous weapon . . ."

The proposed amendment would also add a new application note, which would hold a defendant accountable if "another person discharges, brandishes, or otherwise uses a firearm and the defendant is aware of the presence of the firearm," and if "another person possesses a dangerous weapon during the offense." We oppose this part of the amendment.

The legislation requires the defendant personally to have used the weapon; the legislation does not give the Commission emergency authority to make the defendant accountable for another person's use or possession of a weapon. In any event, the language proposed is flawed. Although the note appears to be designed to limit a defendant's accountability for acts of others under § 1B1.3, the proposed application note would hold a defendant accountable for possession or use of a weapon by "another person." Thus, the enhancement would apply to an offense involving an unarmed defendant who is stopped by an armed border patrol officer. We also believe that a defendant's "awareness" of the presence of a weapon should not make that defendant as culpable as the defendant who controls and is in a position to use the weapon. A defendant who is aware of the presence of a weapon should not receive the same enhancement as a defendant who fires the weapon. Finally, the note should specify that the defendant was aware of the presence of the weapon when the offense commenced. A defendant may be unaware of a weapon when the

offense begins, but become aware of the weapon (when a co-defendant displays it, for example) after it is too late for the defendant to back out.

Risk of Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury." The amendment presents two options to carry out that directive. Each option provides a two-level increase and a minimum offense level of [18, 19 or 20] "if the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person." The first option would make this enhancement an alternative to the weapon enhancement, by putting the risk of death enhancement in the same subsection as the weapon enhancement. The second option would call for the risk of bodily injury enhancement to be in addition to the weapon enhancement. Neither option properly responds to the Congressional mandate.

The Congressional directive calls for an enhancement if the defendant personally "engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury" The amendment, however, applies more broadly than that. The enhancement would apply "if the offense involved" creating a risk of injury. Congress has not given the Commission emergency authority to make a defendant accountable for conduct other than the defendant's own conduct. If the amendment is limited to cover only the defendant's conduct, we would support the placement of the enhancement as presented in option 1.

The presence of a weapon always increases the risk of death or serious bodily injury. When a weapon is present, a separate, additional enhancement to account for risk of death or

injury, will often result in double-counting. Under option 2, a sentence could be enhanced for discharge of a weapon under § 2L1.1(b)(4), for creating a substantial risk of death or bodily injury under § 2L1.1(b)(5), and for actual bodily injury under § 2L1.1(b)(6). The Congressional directive does not authorize an emergency amendment cumulating the enhancements. Congress has directed the Commission to impose an enhancement on a defendant who "(i) murders or otherwise causes death; (ii) uses or brandishes a firearm or other weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury (emphasis added)." The use of the term "or" between (ii) and (iii) requires that the enhancements be alternative.

We also oppose the part of this amendment that would require a minimum offense level of [18, 19, or 20]. A mandatory minimum in the guideline structure disproportionately increases the sentence of less serious offenders. Thus, under the proposal, a defendant with a base offense level of [12-14] under § 2L1.1(a)(2) would receive an increase of four to eight levels. A more serious offender, with a base offense level of [23-25] under § 2L1.1(a)(1) would receive only a two-level increase.

Bodily Injury or Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury to another individual." In response, the amendment would provide an enhancement "[i]f any person died or sustained bodily injury as a result of the offense," including a two-level increase for bodily injury, a four-level increase for serious bodily injury, a six-level increase for permanent or life-threatening injury, and an eight-level increase for death. In addition, the amendment would

• add a cross-reference to the murder guideline "[i]f any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special and maritime and territorial jurisdiction of the United States."

We believe that the proposed enhancement for death or bodily injury exceeds the emergency authority that Congress gave the Commission. The legislation specifies that the enhancement should apply to "a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury" This directive limits the accountability of the defendant to acts the defendant committed or aided and abetted.

Downward Adjustment for First Offense if Person Smuggled is Defendant's Spouse or Child

This part of the amendment responds to the Congressional directive which requires the Commission to "consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child." The proposed amendment would delete § 2L1.1(b)(1), which provides a three-level reduction "if the defendant committed the offense other than for profit" and replace that provision with "[i]f the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child, decrease by [2-3] levels." We oppose this amendment.

The Congressional directive does not require the Commission to amend the guidelines or policy statements, but only to consider the appropriateness of a downward adjustment under the circumstances described in the Congressional directive. Section 2L1.1(b)(1) already provides for a reduction in such circumstances. There is nothing in the legislation to confer emergency authority on the Commission to delete the reduction provided by § 2L1.1(b)(1) if, for example, a defendant, for no profit, smuggles a parent into the country. The directive mandates study -- not

change. We suggest that before deleting § 2L2.1(b)(1), the Commission should study further the appropriateness of amending the existing downward adjustment. The legislative language produces a result difficult to defend -- a defendant would receive a downward adjustment for smuggling a spouse or child, but not for smuggling a parent or grandparent.

The proposed amendment would also provide a [2-4] level enhancement "if the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense." We oppose this amendment. Congress did not give the Commission emergency authority to add an enhancement for a defendant's status as a former deportee.

Amendment 3
(§§ 2L2.1 and 2L2.2)

Amendment 3 responds to section 211 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (P.L. 104-208). The legislation directs the Commission to increase by two levels the guidelines applicable to offenses involving the fraudulent use of government documents; "review the sentencing enhancement for number of documents or passports involved (U.S.S.G. § 2L2.1(b)(2)), and increase the upward adjustment by at least 50 percent;" and provide an enhancement if the defendant has one or more prior felony convictions for an offense that involved the same or similar underlying conduct as the current offense.

Base Offense Level

In response to the legislation, amendment 3 would increase the base offense level of § 2L2.1 (trafficking in immigration documents) from level 9 to level [11-13] and the base offense level of § 2L2.2 (fraudulently acquiring immigration documents or passports) from level 6 to level [8-10]. We believe that the amendment should increase the base offense level of both guidelines

by two-levels -- the minimum required by the legislation. Without data to indicate that the current base offense levels are inadequate, there is no justification for an increase of more than two levels.

Downward Adjustment

The amendment presents two options to provide a reduction from the base offense level of § 2L2.1. Either option would replace the three-level reduction in § 2L2.1(b)(1) currently available "if the defendant committed the offense other than for profit." Option 1 would provide a three-level decrease "if the defendant committed the offense other than for profit and had not been convicted of an immigration and naturalization offense prior to the commission of the instant offense." Option 2 would provide a decrease of [2-3] levels "if the offense involves documents only related to the defendant's spouse or child." We oppose both options.

The legislation does not authorize the Commission to promulgate an emergency amendment to limit or revise the reduction available under § 2L2.1(b)(1). Further, without data to indicate that the existing adjustment needs revision, there is no justification for this part of the amendment.

Enhancement for Number of Documents

In response to the directive to provide an increased enhancement based on the number of documents, the amendment completely revises the table in § 2L2.1(b)(2). The revised table would provide a one-level increase if the offense involved three to five documents, a three-level increase if the offense involved six to eleven documents, a five-level increase if the offense involved 12 to 24 documents, a seven-level increase for 25-99 documents, and a nine-level increase if 100 or more documents were involved. We oppose this part of the amendment.

The legislation directs the Commission to "review the sentencing enhancement for the number of documents or passports involved . . ." We believe that the Commission should increase the enhancement by the 50 percent that Congress mandated until the Commission has thoroughly reviewed the sentences under this guideline. The review may indicate that no further adjustment is necessary.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of documents	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to add an enhancement for offenses involving 3-5 documents. Under the amendment, however, an offense involving 3-5 documents will result in a one-level increase. Instead of arbitrarily increasing the penalty for offenses involving 3-5 documents, the Commission should collect data to determine whether such an increase is warranted.

Similarly, there is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 documents. The legislation requires that the two-level enhancement for these offenses be increased by one-level, but the amendment would increase the enhancement by

three levels. For offenses involving 25-99 documents or passports, the legislation requires a two-level increase (50 percent of four). Again, without a reasoned basis, the amendment would increase the enhancement by three-levels -- a 75-percent increase. The most egregious cases, those involving 100 or more documents, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. We do not believe that the cosmetic uniformity provided by a table with two-level increments is worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 3 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

Here too, we oppose the amendment's broad use of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction for an immigration, naturalization, or passport offense.

As stated in our comments to proposed amendment 2, we support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 ("three-strikes") and the Commission's career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions." Both the "three-strikes" and career offender provisions lessen the ability of prosecutors to manipulate sentences. To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Our comments to amendments 2 and 3 suggest that the Commission, as the sentencing policy maker, should move thoughtfully and not more aggressively than is minimally required by Congress. We are, of course, concerned about increasing the harsh penalties already suffered by our non-citizen clients. But we are also mindful that the legislative directives for change in these guidelines flow from a volatile, emotional, political environment. Such an environment is not the best for producing rational and fair sentencing law. By moving cautiously, the Commission furthers a greater, overriding Congressional mandate for penalties that are "sufficient, but not greater than necessary" to satisfy the purposes of sentencing and the goal of equal justice.

Amendment 4
(§ 2H4.1)

Amendment 4 responds to section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). The legislation increases the maximum penalty for peonage offenses and slavery offenses from five to ten years imprisonment and directs the Commission to review the guidelines for involuntary servitude offenses and to amend the guidelines as necessary.³

Involuntary servitude, peonage, and slavery cases are brought infrequently. The Commission's staff reports seven cases brought in the last ten years -- less than one case per year. The involuntary servitude guideline (§ 2H4.1) presently calls for an offense level of 15 or two plus the offense level applicable to an underlying offense. That offense, almost invariably, will be kidnaping. Because the present guideline produces an offense level greater than the kidnaping guideline, any disparity that may exist results from § 2H4.1 producing an offense level greater than the offense level for kidnaping. Similarly, when the offense involves alien smuggling, § 2H4.1 produces an offense level greater than the alien smuggling guideline. Again, any disparity that

³Section 218 directs the Commission to amend the guidelines as necessary to:

(A) reduce or eliminate any unwarranted disparity . . . between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnaping offenses and alien smuggling offenses; (B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses and adequately reflect the heinous nature of such offenses; and (C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve — (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude."

may exist is caused by § 2H4.1 producing an offense level greater than the offense level for alien smuggling.

We believe, therefore, that no increase in the offense level produced by § 2H4.1 is necessary to eliminate unwarranted disparity with the kidnaping and alien smuggling guidelines. The additional complexity that amendment 4(A) would bring to § 2H4.1 is unnecessary. We oppose amendment 4(A).

Amendment 4(B) invites comment on whether the enhancements provided by the multiple count rules "are sufficient to ensure appropriately enhanced sentences when peonage, involuntary servitude, or slave trade offenses involve a large number of victims or whether a new specific offense characteristic for a large number of victims is needed." We believe that the multiple count rules ensure appropriate incremental punishment for the number of victims.

Of the seven cases in the past ten years reported on by the Commission's staff, four involved one victim and another involved "several" men.⁴ In the unusual case where a large number of victims are involved, the grouping rules provide additional sufficient punishment to account for the number of victims. Under the grouping rules of § 3D1.2, offenses involving different victims will not group together. Each count involving a separate victim will comprise a separate group. Under § 3D1.4, the combined offense level will result in as much as a five-level increase. If, in a particular case, the increase provided by § 3D1.4 inadequately addresses a large number of victims, the court can depart upwards. "Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be

⁴Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 38-40 (Dec. 2, 1996).

unusual and can be handled by departure from the guidelines." U.S.S.G. § 3D1.4, comment (backg'd.). Because cases involving a large number of victims occur infrequently, we do not believe that a specific offense characteristic is necessary to account for the number of victims.

We appreciate the opportunity to express our views on the proposed emergency amendments and trust that you will give serious consideration to our comments.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hillier II" with a stylized flourish at the end.

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington,
on behalf of the Federal Public
and Community Defenders