

**FEDERAL
DEFENDERS
OF
SAN DIEGO,
INC.**

The Federal Community
Defender Organization
for the Southern
District of California

Home Savings Tower
225 Broadway
Suite 900
San Diego,
California
92101-5008
(619) 234-8467
FAX (619) 687-2666

March 15, 2001

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs/ Michael Courlander

Dear Sentencing Commission,

We are excited to learn that the Sentencing Commission is considering amending the Sentencing Guidelines, and we appreciate the opportunity to weigh in with our comments.

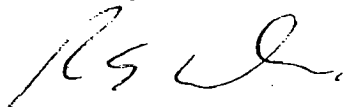
The Federal Defenders of San Diego is the community defender organization for the Southern District of California, which is one of the busiest federal districts in the country. The bulk of the crimes in our district result from our proximity to the U.S.-Mexican border; thus, we have a great deal of experience with drug smuggling and illegal immigration cases. The proposed amendments to the Guidelines would affect defendants convicted for both of these crimes.

We specifically comment on proposal 7, which addresses drug defendants and mitigating role, and proposal 18, which addresses the increased adjustment, under section 2L1.2(b)(1), for aggravated felons charged with illegal entry. We also include some miscellaneous proposals at the end.

Most of our suggestions and comments are general, without providing specific examples. We would be happy to provide the Commission with examples and cases to support our comments.

Thank you for the opportunity.

Sincerely,



Ross E. Viselman
Federal Defenders of San Diego, Inc.

Please see additional attached signatures.

[175]

MARIO G. CONTE, 093211

FRANK M. MANGAN, 057689

STEVEN F. HUBACHEK, 147703

SHEREEN J. CHARLICK, 147533

MARK F. FLEMING, 165770

VINCENT J. BRUNKOW, 174904

MICHAEL PETRIK, 177913

KATHERINE KIMBALL, 185883

BENJAMIN L. COLEMAN, 187609

JULIE A. BLAIR, 190802

BENJAMIN P. LECHMAN, 185729

MATTHEW C. WINTER, 190726

LESLIE S. DANIELS, 187847

GUADALUPE VALENCIA, 197831

HEATHER M. ANGOVE, 197696

TONY L. CHENG, 197740

CARLA V. GOMEZ, 197693

SHAUN S. KHOJAYAN, 197690

TODD W. BURNS, 194937

SUZANNE M. LACHELIER, 199561

JASON I. SER, 201816

ROSS E. VISELMAN, 204979

MARY A. GILG, 205717

ROBERT P. RAMIREZ, 202616

NORMA A. AGUILAR, 211088

MICHELLE D. ANDERSON, 208786

MICHELE A. MCKENZIE, 209657

SIRI SHETTY, 208812

GERALD B. SINGLETON, 208783

ANDREW K. NIETOR, 208784

ANGELA M. KREUGER, #

KURT D. HERMANSEN, 166349

KASHA K. POLLREISZ, #204148

MATTHEW A. JOHNSON, 207984

MARNIE G. GANOITIS, 206178

SHEILA L. O'CONNOR, 187520

MARISA L. DERSEY, 207724

LORI SCHONBERG, pending

Sign-in









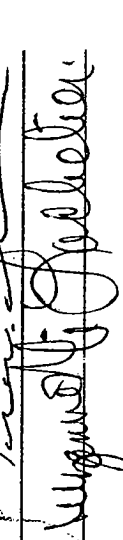


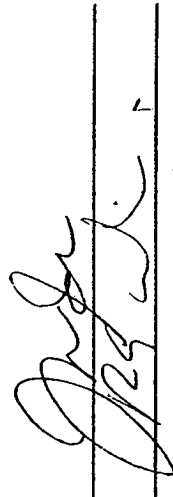






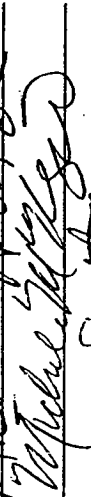


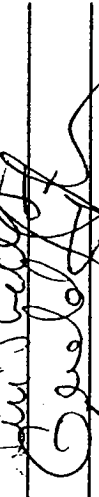














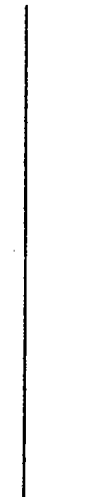


















Proposed Amendment 7 : Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

Many of our clients are drug couriers, as described by the Guidelines, and deserve a downward adjustment for minor or minimal role. The government and its agents would likely agree that drug smuggling ventures require the efforts of multiple participants.

Issues for Comment:

1. With respect to a defendant whose role in a drug offense is limited to transporting or storing drugs, should the Commission, as an alternative to the proposed amendment, preclude such a defendant from receiving any mitigating role adjustment under §3B1.2? Alternatively, should the Commission provide that such a defendant may qualify only for a minor role adjustment, but not a minimal role adjustment?

Comment: Defendants who transport or store drugs should be entitled to mitigating role adjustments. As the Application Notes suggest, the analysis of a mitigating role adjustment should be made on a case by case basis. There are cases in which a defendant who stores the drugs or transports the drugs from point A to point B is less culpable than other participants. The Commission should also not limit the ability of the judges to adjust downward on the basis of minor or mitigating role. The decision to grant a mitigating role adjustment should be made on a case by case basis with input from defense counsel, the government, and the probation officers.

2. Should the example in proposed Application Note 3(C) (i.e., that a defendant whose role in a drug trafficking offense is limited to transporting or storing drugs and who is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment) be broadened to make clear that the rule is intended to cover defendants convicted of offenses other than drug trafficking offenses who have a similarly limited role in the offense? Specifically, should the example be expanded to make clear that the rule is intended to apply to a defendant who has a similarly limited role in any offense and who is accountable under §1B1.3 only for that portion of the offense for which the defendant was personally involved?

Comment: The downward adjustment for mitigating role should not just apply to drug smugglers. Specifically, it should also apply to alien smuggling cases. Alien smuggling cases are similar to drug smuggling cases. The government would probably agree that alien smuggling can entail a large organization with multiple participants, including couriers. An alien smuggler might play a minor or minimal role in a much larger alien smuggling enterprise. Often an alien smuggler plays no more a substantial role than a drug courier. The crimes are comparable and the Guidelines should make clear that the drug smuggling examples are illustrative only and not exclusive.

Proposed Amendment 18: Immigration

We agree with the Commission that the increase under 2L1.2 "often results in offense levels that are disproportionate to the seriousness of the prior aggravated felonies," especially in light of the circumstances of the case and the background of the defendant.

Issues for comment: *The Commission invites comment regarding whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?*

We agree with the proposal to graduate the increase in the adjustment by time served. It is an easy and predictable rule to follow. Option 1, on the other hand, is less predictable and more difficult to apply. Increasing the adjustment based on the type of crime will result in further litigation regarding the definitions of the crime, and make it more difficult to advise clients and negotiate pleas. We would not recommend Option 1.

We agree with Option 2(B), which provides "A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal."

Issues for comment: *The Commission also invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, e.g., fifteen years, or the counting rules provided by §4A1.2 (Definitions and Instructions for Computing Criminal History).*

The Guidelines should only allow a court to consider aggravated felonies that count for criminal history purposes under Chapter 4.

There are other factors the Guidelines should allow a court to consider.

A. **Recency of deportation:** The court should be able to consider the recency of the deportation and the facts underlying the deportation. Someone who is deported for an aggravated felony and then comes back after 10 years should receive a departure.

B. **Cultural assimilation:** Please consider allowing a departure for people who can demonstrate cultural and family ties to the United States. This factor demonstrates a lack of culpability and evil intent. Sometimes, aliens are trying to get back into this country to reunite with their family.

C. **Prior legal status:** Please consider allowing a departure for aliens who at one point had legal status to live here. Again, this is a mitigating factor because it shows that at one point the person was a responsible person with significant ties to the United States.

D. **Grounds for deportation:** Deportations vary widely among defendants. Some defendants are quickly removed; others appeal their cases and are narrowly denied relief. For example, a person might barely fail in a claim to derivative citizenship. A court should be able to consider these circumstances in considering why the defendant committed his crime of reentering the United States

E. **Evidence of rehabilitation:** Courts should be able to depart if the alien can show that since his aggravated felony/ illegal activity he has significantly rehabilitated.

Proposed amendment:

Please include petty theft (e.g., shoplifting) in the category of felonies counted under 4A1.2(c); sentences for petty theft convictions should only be counted "if the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days or (b) the prior offense was similar to an instance offense."

