

As the Commission embarks on the fifteenth year of amendments, we ask you to consider whether the Guidelines are producing the "certainty and fairness [and] individualized sentences" required by 28 U.S.C. § 991(b)(1)(B). We recognize that the guidelines result not just from the discretionary actions of the Sentencing Commission. The Commission certainly must carry out any express congressional mandates and must formulate guidelines that correlate to newly enacted criminal statutes. At the same time, the Commission must exercise its broad discretion to establish sentencing practices and promulgate amendments. In this regard, we refer you to an observation by the Honorable Richard Posner, commenting on the "disturbing state of affairs" of our criminal justice system that marks us as the "most penal of civilized nations." Judge Posner notes that judges "should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. Richard A Posner, Overcoming Law 157-158 (Harvard U. Press, 1995).

At present, the guidelines require a sentence of life (without parole) for persons convicted of premeditated murder as well as for repeat drug offenders where death results from use of the drug. See U.S.S.G. § 2A1.1; 2D1.1(a).¹ Yet, it is not simply the most serious offenders designated so by Congress who end up with an offense level 43 but also a number of drug offenders who are neither kingpins nor violent whose sentence, based on sentencing factors determined on a preponderance of "reliable hearsay" result in a guideline range of life. Now, the guidelines also require life sentences for first-time defendants convicted of serious white collar offenses although the maximum statutory penalty for white collar offenses is generally twenty years.²

The consequence, intended or unintended, of years of ratcheting up penalties where all but a few of the six-hundred forty-eight amendments promulgated since 1988 have increased sentences is a guidelines system that provides sentences "greater than necessary" to comply with any legitimate sentencing purpose. 18 U.S.C. § 3553(a).

¹ In the federal system, "good time" credit is not deducted for defendants who are sentenced to imprisonment for life even where that sentence results not just from a statutory mandate but from an aggregate of guideline factors. See 18 U.S.C. § 3624(b)(1). In contrast, the federal Three-Strikes law which mandates a sentence of life does for violent repeat offenders does provide an opportunity for early release for those who reach the age of seventy after having served thirty years of their sentence and are not a danger to others. 18 U.S.C. § 3582(c)(1)(A)(ii).

² A first time, white-collar offender convicted of an offense (offense level 6), for which he was not the leader or organizer (no reduction), involving a loss of more than \$50 million (+24); to a publicly traded company that, as a result of the offense, suffered a substantial reduction in the value of its assets or its equity securities or the value of its employee retirement accounts (+4); where the offense involved more than 250 victims (+6); and was committed through sophisticated means such as the use of offshore financial accounts or corporate shells to hide assets or transactions or merely the use of complex transactions (+2); and the defendant was also an officer or director of the company (+4); would be facing, even after pleading guilty in a timely fashion and admitting responsibility, a sentence of life (offense level 46-3 = 43).

The Federal and Community Defenders thank the Commission for the consideration of our comments and welcome the opportunity to provide additional information, if desired.

CORPORATE FRAUD PERMANENT AMENDMENTS

A. Increasing the Loss Table at the Low End Is Neither Required Nor Advisable

Defenders oppose any increase of the loss table at lower loss amounts because these are not the offenses or offenders targeted by the Sarbanes-Oxley Act. The purpose of the Act is clear: "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. 107-204. The cases that concerned Congress were those like the Enron Corporation that involved multimillion dollar losses and "endangered the solvency or financial security of a substantial number of victims." *See Id.*, § 805(a)(4). The Act also focuses on offenses involving registered brokers and dealers and "corporate directors and officers of publicly traded corporations who commit" serious offenses involving "securities, pension, and accounting fraud." *See* Pub. L. 107-204, § 1104(a)(2) & (b)(1). The emergency amendments the Commission just promulgated more than adequately take into account each of the harms identified by Congress in the Sarbanes-Oxley Act and no increase of the loss table at the low end is required or advisable.

1. A Sentence of Imprisonment Is Inappropriate for Low Level White Collar Cases Under 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(g) & (j)

The Commission correctly responded to the Sarbanes-Oxley Act when it did not increase sentences for low-level white collar offenses. Increasing the loss table at the low-end just to ratchet up sentences is not sound policy. It is not consistent with the parsimony principle in 18 U.S.C. § 3553(a) nor with the stated purposes of sentencing in 3553(a)(2).

It was proper for the Commission to comply with the directive in 28 U.S.C. § 994(j), which requires the Commission to insure that the guidelines provide a sentence "other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Although § 994(j) does not explicitly define "serious offense," there is no reason to suddenly interpret 994(j) any differently particularly where the Sarbanes-Oxley Act does not explicitly or impliedly require a reassessment of the definition that has been in *de facto* use.

Indeed, compliance with the §994(j) mandate is now more critical than ever. As the Commission may be aware, the Bureau of Prisons recently has restricted the use of community confinement facilities for nonviolent, low-level offenders based on a Department of Justice memoranda that newly interprets the requirements of U.S.S.G. § 5C1.1 and 18 U.S.C. §§ 3621 and 3624. The persons affected are now being sent directly to prison or spending longer periods in prison before being released to community confinement centers. Although a number of suits

challenging the new BOP rule are pending in the courts, the Commission should act now to bring the guidelines into compliance with the 994(j) mandate. It should, as it has been considering for the last few cycles, expand the sentencing zones to permit sentencing alternatives to imprisonment for cases covered by § 994(j).

The factors that Sarbanes-Oxley identifies for enhancements are in fact consistent with the current interpretation of §994(j). For example, the Act requires the Commission to increase penalties for offenses where a large number of victims are injured or when the victims face financial ruin. See Pub. L. 107-204, §805(a)(4); 1104(b)(5). The legislative history of the Act is the same. The section-by-section analysis of title VIII of the Act describes the Enron case as a "serious fraud" involving "publicly traded securities [that] can affect thousands of victims." 148 Cong. Rec. S7418-01, S7420.

Loss amounts already often overstate the culpability of defendants. Calculating loss under the relevant conduct guideline sweeps in the conduct of others, based on a preponderance standard, without the opportunity to confront the witness, and based on uncharged, dismissed, acquitted and related conduct. Loss also includes intended loss no matter how economically unrealistic the intended loss may be. Sometimes, a defendant commits the offense just to retain his or her job, or for misguided loyalty or no personal profit and for motives that may be tinged with financial need rather than pure greed. Increasing the base offense level or compacting the loss table to increase offense levels will just exacerbate the overrepresentation of culpability in many cases.

For practical and policy reasons, it makes little sense for the Commission to enhance penalties for low level white collar defendants in light of the time and effort that just went into completely revamping the guidelines for white collar offenses effective November 1, 2001. There is also no empirical basis for increasing penalties for low level white collar offenders. That is, there is no evidence that higher penalties at the low end would deter or result in more just punishment.

Each loss table and offense level increase that results in mandatory prison terms or greater terms of imprisonment for persons who commit low level white collar offenses will do little more than create additional chaos for the persons and their families without any corresponding benefit to society. Imprisonment for such low level defendants will mean a loss of jobs and the consequent disruptions, loss of homes, emotional costs to children, disbanded family ties, inability to care for children and elderly parents, loss of health benefits, inability to make restitution and the increased recidivism that follow such disruptions. No corresponding benefit will likely flow from sentences that at most will require several months' imprisonment. Cf. *United States v. Rivera*, 994 F.2d 942, 956 (1st Cir. 1993) (explaining that small downward departure for low level embezzlement may be appropriate to allow defendant to retain his job and make restitution) (Breyer, then-C.J.).

It is also runs afoul of 28 U.S.C. § 994(g) which requires the Commission to consider prison capacity in formulating guidelines. As in other instances where the guidelines overstate the seriousness of the offense, ratcheting up the sentences for low level defendants will likely result in

a lack of uniformity in sentencing and a lack of fairness for those left out in the shuffle. Defendants in larger districts where such relatively less serious offenses will tend to clog the dockets will plea bargain for discounted sentences through informal accommodations such as "fast-track" departures, charge bargaining, and other stipulated downward departures and adjustments. Smaller districts will not follow the same procedures. The uniformity and fairness that the guidelines purportedly provide will be lost.

The reality is that judges will depart downwardly and the parties will find ways around the sentence if the guidelines are set to require imprisonment for first time, nonviolent offenders for whom a sentence other than imprisonment is more fair and practical. Based on the abilities of defense and government counsel, the judicial temperament of the judge and the happenstance of the circuit where the offense was committed, some defendants will receive downward departures and some will not; some of the departures will be affirmed and others reversed. All will occur based more on the vagaries of fate than on the culpability of the defendant.

B. Permanent Amendments Should Be Adjusted to Comply with the Structure of the Guidelines

1. Cap the Offense Level

Defenders recommend that the Commission make two changes to the recently promulgated emergency amendments before making them permanent. First, the Commission ought to cap the total offense level for white collar offenses at a level below offense level 43. As shown in the example at footnote two, the guidelines currently provide a sentence of life without parole (offense level 43), for defendants convicted of white collar offenses involving a loss in excess of \$50 million even if there is a timely acceptance of responsibility. At the highest loss level, someone who is a leader or organizer and who timely accepts responsibility would end up with a total offense level of 53, ten levels above the highest offense level. Such a sentence is inappropriate.

Moreover, Defenders have consistently advocated that offense level 43 which calls for a mandatory sentence of life should not be available in any case where Congress has not established mandatory life as the maximum penalty. Simply stated, a sentence of life without parole is one that should be available only upon the will of Congress. It should be reserved only for the most serious offenses where the incapacitation of a person for life is essential for the protection of society. It should be imposed only after scrupulous adherence to the Constitutional protections of a grand jury indictment, upon a finding by a jury, beyond a reasonable doubt. In an American court, life without parole should not be imposed on a person as a result of an aggregate of findings based on a preponderance of "reliable hearsay" determined by a court at a sentencing hearing. In our view, Congress cannot delegate the authority to make an offense punishable by a sentence of life without parole to the Sentencing Commission to be meted out under procedures with such limited due process protections. In addition, there is no circumstance where the appropriate punishment for a nonviolent offense should be life without parole.

Furthermore, offense level 43 or greater for a guideline applicable to offenses that generally carry a statutory maximum of 20 years is simply inconsistent with the structure of the guidelines. The most egregious offense calculated under §2B1.1 ought to come out with a maximum offense level 40 (or 36 assuming that a 4-level enhancement for role in the offense is imposed). In that fashion, a first time offender who timely accepts responsibility (-3), would end up with an offense level 37 for a sentencing range of 210 to 262 months, within the statutory maximum of twenty years. Compare, for example, that an armed bank robbery (OL 22) committed by a first-time offender, where a firearm was discharged and permanent bodily injury resulted to a victim (capped at +11), the loss exceeded \$5 million (+7), a person was restrained to facilitate the offense (+2), and the defendant timely accepted responsibility (-3) would result in a total offense level of 39 (42-3) with a sentencing range of 262 to 327 months, within the statutory maximum twenty five-years.

Offense level 43 should simply not be an available option for an offense calculated under U.S.S.G. § 2B1.1, the guideline applicable for offenses that generally carry a statutory maximum of 20 years. Compare, for example, that the guidelines provide an offense level of 42 for espionage only if "top secret information was gathered or transmitted" but offense level 37, otherwise. See 2M3.1.

2. The Offense Level for Less Culpable Defendants Should Be Capped

For less culpable defendants, the Commission ought to set a cap on the cumulative specific offense characteristics that may be imposed. Defenders propose the following provision:

(b) Specific Offense Characteristics

...

(14) If the defendant receives an adjustment under §3B1.2(Mitigating Role), the cumulative adjustments from U.S.S.G. § 2B1.1(b) shall not exceed 20 levels.

Under this provision, a secretary or clerk who is convicted of aiding and abetting the commission of a serious white collar offense, for example, but who neither directed nor profited directly from the extensive fraud would be facing a maximum offense level 26.

1. Cumulative Adjustments for Like Harms Should Be Capped

The Commission ought to set a maximum cap for various enhancements that capture related harms. In other guidelines, the Commission has established such caps. For example, in the robbery guideline, the cumulative adjustments that may be imposed for use of a weapon and for injury to a victim may not exceed 11 levels. See U.S.S.G. § 2B3.1(b)(2) & (3). The Commission ought to cap the cumulative adjustments that may be imposed for harm to victims in the same fashion in § 2B1.1.

IMMIGRATION – U.S.S.G. § 2L1.2

A. Background

When the Commission amended this guideline in 2001, it did so to eliminate the “disproportionate penalties” that resulted because “the breadth of the definition of ‘aggravated felony’ provided in 8 U.S.C. § 1101(a)(43), which is incorporated into the guideline by reference, means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault.” U.S.S.G. App. C, Amend 632 (Reason for Amendment). The Commission also found that the inequity was being addressed “on an ad hoc basis in such cases by increased use of departures.” *Id.* The amendment provided a “more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant.” *Id.*

The current proposal seeks once again to address the disproportionate penalties by further refining the “aggravated felony” enhancement. In considering the current amendments, Defenders ask the Commission to consider that problems continue to plague this guideline because in most respects it is a flawed guideline.

First, § 2L1.2 applies to offenses that are essentially “status” offenses. That is, persons sentenced under this guideline are guilty of being in the United States (or attempting to enter the United States) after having been deported. The majority of these persons return to the United States to be reunited with children and spouses left behind in the United States, to take care of sick relatives, or to earn money to provide food and sustenance for themselves and their dependent families doing work made available to them by American citizens and corporations. The guideline does not punish any other new criminal conduct, which if it has been committed is covered under a separate guideline. Section 2L1.2 will continue to be plagued by problems in its application so long as it fails to take into account the motivation of the offender and so long as it continues to mete out such harsh punishment for an offense that is more difficult to deter and punish justly because it is generally driven by need and other complicated human factors rather than by calculated greed or malevolence.

Second, the magnitude of the enhancement – from 8 to 16 offense levels – for prior conduct basically unrelated to the severity of the instant offense is another major source of the disproportionate penalties and problems that plague this guideline. Making matters worse, as the Commission has recognized, is the vast range of conduct underlying this enhancement. Its application is further complicated because it is driven by a definition found in the immigration code established for purposes unrelated to the criminal code and the appropriate punishment to be applied. An enhancement of this magnitude is rare under the guidelines because it is inconsistent with the notion of graduated punishment geared to fit the crime that undergirds guideline sentencing and will continue to create inequities until the Commission scraps it and returns to a more modulated and just measure of this offense characteristic.

Third, this enhancement is problematic because it double counts a measure – past criminal conduct – which is a questionable measure of culpability in any event but particularly with respect to this offense. A single prior, which may or may not reflect serious past criminal conduct, may account for a 16-level offense increase and 6 criminal history points, if criminal history recency enhancements are applied. This is another area where the Commission needs to refine the guideline. For this reason, Defenders believe that the Commission ought to import from Chapter IV the staleness provisions in U.S.S.G. § 4A1.2(e) currently used to ameliorate the problems encountered when using prior convictions to enhance sentences.

Despite our basic objections to this guideline, Defenders support a number of the published proposals and, in some instances, recommend that the Commission refine the definitions even further. A simple but an essential initial step to deal with the application problems caused by this enhancement is for the Commission to establish a uniform definition for “aggravated felony.”

B. “Aggravated Felony” Defined

Defenders recommend a two-part test before a prior conviction would trigger the 8-16 level enhancement that § 2L1.2 provides for “aggravated felonies.” First, the prior conviction must be a felony as defined under federal law, namely an offense punishable by imprisonment in excess of one-year. Second, the prior conviction must meet the statutory definition of “aggravated felony” found in 8 U.S.C. § 1101(a)(43). These two prerequisites would help simplify and bring some uniformity to an area that is complicated by the intersection of immigration and criminal law definitions, which are not always consistent with each other.

That two-part definition is the beginning but not the end. For offenses that meet the two-part definition, the Commission ought to add further refinements to the “aggravated felony” enhancement to reduce the “disproportionate penalties” that have plagued this guideline, address the vast range of conduct that underlie the list of “aggravated” felonies, and diminish the inequities that confront persons accused of these offenses and which, at times, are addressed on an “ad hoc” basis by the district courts, the government and the defense bar.

C. Juvenile Adjudications

Defenders support the Commission’s proposal to exclude juvenile adjudications. This approach is consistent with the immigration precedents, which do not treat juvenile adjudications to be convictions for purposes of removal or exclusion. In re Devison-Charles, 22 I & N. 1362, 2000 WL 1470461 (BIA, Sept. 12, 2000)(interpreting 8 U.S.C. § 1101(a)(48)(A)).

Defenders would further recommend that any offense committed prior to the defendant’s reaching the age of 18 not be counted for an offense level enhancement regardless of how it was classified under the laws of the jurisdiction in which the defendant was convicted. The normal application rules for criminal history calculation may be applied in assessing criminal history points

for such offenses. However, there is no need to double count offenses committed prior to age 18 to enhance the offense level under this guideline.

D. Simple Possession of Controlled Substances

Defenders support the Commission's decision to exclude simple possession offenses from the guideline definition of "aggravated felony." Among other reasons, the immigration code includes only drug trafficking but not simple possession offenses in the list of aggravated felonies. See 8 U.S.C. § 1101(a)(43)(B).

E. Amendment to Provide Three Gradations for Drug Trafficking

The Federal Defenders support the proposed amendment, which would provide three gradations for drug trafficking offenses but recommend that for offenses where the sentence imposed was probation or a fine, the enhancement be 4 levels rather than 8 levels. For offenses, where the sentence imposed was less than 13 months or where the defendant received a mitigating role cap, the enhancement should be 8 levels rather than 12.

The following table describes our proposal.

Drug Trafficking Offenses				
Sentence Imposed	Current	Option 1	Option 2	Defenders' Proposal
> 13 mos	16 levels	16 levels	16 levels	16 levels
> 13 mos and defendant received a mitigating role adjustment	16 levels	16 levels	16 levels	8 levels
< 13 mos	16 levels	12 levels	12 levels	8 levels
probation/fine	16 levels	12 levels	8 levels	4 levels

1. A Four-Level Increase if Sentence For Prior Conviction Was Probation or Fine Is Sufficient and A Substantial Increase Under the Guidelines

A sentence of probation or fine usually reflects that the court sentencing a defendant considers that the offense was minor and that the offender is not violent or dangerous. Requiring a 4-level increase for a prior, minor drug trafficking conviction where the sentence imposed was probation is a substantial enhancement, particularly where the prior already is counted under the criminal history score. Under the guidelines, 4-level increases are more severe than the commonly used 2-level increase and reflect offense characteristic involving serious risk of injury or harm to others. For example, the guidelines provide a 4-level increase where a person is abducted to facilitate commission the commission or escape of a bank robbery. See U.S.S.G. § 2B3.1(b)(4). In the kidnapping guideline, a 4-level increase is imposed where the victim sustained permanent or life-threatening bodily injury. See U.S.S.G. § 2A4.1(b)(2). In air piracy cases where the offense involved intentionally or recklessly endangering the safety of a mass transportation vehicle or facility and a dangerous weapon was otherwise used a 4-level increase is imposed but if the weapon was brandished or its use threatened, only 3-levels are imposed. See U.S.S.G. § 2A5.2(b)(1)(ii). A four-level increase applies where the victim of abusive sexual contact had not attained the age of twelve years. See U.S.S.G. § 2A3.4(b)(1). In the white collar context, a 4-level increase is warranted where there are 50 or more victims. See U.S.S.G. § 2B1.1(b)(2)(B).

2. An 8-Level Increase Sufficiently Reflects the Severity of the Conduct

An 8-level enhancement is used even more infrequently under the guidelines because it reflects a substantial enhancement. In the bribery guidelines, for example, it applies where the offense involved a payment to influence a high-level elected official. See U.S.S.G. § 2C1.1(b)(2)(B); 2C1.2(b)(2)(B). It applies to obstruction of justice offenses where the offense involved causing or threatening to cause physical injury or property damage to obstruct the administration of justice. See U.S.S.G. § 2J1.2(b)(2). In the gun guideline it applies where the offense involved more than 100 firearms. See U.S.S.G. § 2K2.1(b)(1)(D).

Hence, Defenders recommend that the Commission impose no more than an 8-level enhancement where the prior drug trafficking offense involved a sentence of less than 13 months or regardless of the sentence of imprisonment, where the defendant received a mitigating role adjustment for his less culpable role in the prior offense.

The 8-level enhancement is more than sufficient to reflect the severity of the past conduct, particularly when the past conduct is already counted under the criminal history guideline.

3. **With Respect to Offense Level Enhancements, the Sentence Imposed Should be Limited to the Sentence Originally Imposed.**

The Federal Defenders oppose the proposed amendment to the commentary, which would provide that the sentence imposed includes a sentence imposed upon revocation of probation or a suspended sentence. U.S.S.G. § 2L1.2, comment. (n. 1(A)(iv)(III)(Proposed). The proposed amendment will only create additional confusion and is inconsistent with the approach taken in other provisions of the sentencing guidelines.

An alien convicted of returning unlawfully to the United States after removal, in violation of 8 U.S.C. § 1326(a), is subject to an enhanced sentence if his removal was "*subsequent* to a conviction for an aggravated felony." 8 U.S.C. § 1326(b)(2) (emphasis added). In many instances, the determination of whether an offense is an aggravated felony depends on the sentence imposed. See e.g. 8 U.S.C. §§ 1101(a)(43)(F)(crime of violence), (G)(theft); United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999)(aggravated assault "probation" was not aggravated felony); accord United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000). Under the statute, the sentence imposed includes the term of imprisonment imposed "regardless of any suspension of such an imprisonment" 8 U.S.C. § 1101(a)(48)(B); United States v. Graham, 169 F.3d 787, 790 (3d Cir.), cert. denied, 120 S.Ct. 116 (1999).

In some instances, the 2001 guideline also bases enhancements on the sentence imposed. For example, a defendant who previously received a sentence of more than thirteen months for a drug trafficking offense is enhanced sixteen levels, U.S.S.G. § 2L1.2(b)(1)(A)(i), while a defendant who received a lesser sentence is enhanced twelve levels. U.S.S.G. § 2L1.2(b)(1)(B). In an effort to address the disproportionate penalties arising from the broad definition of aggravated felony, the Commission amended the commentary to exclude the suspended or probated portion of the sentence from the consideration of the sentence imposed. U.S.S.G. § 2L1.2, comment. (n.1(A)(iv)) (Nov. 1, 2001).

The Commission now proposes to amend the commentary to require the addition of any sentence imposed upon revocation of probation, parole, or supervised release, for purposes of determining the term of imprisonment imposed. U.S.S.G. § 2L1.2, comment. n.1(A)(iv)(III). First, to the extent that this commentary permits consideration of a term of imprisonment imposed *subsequent* to the alien's removal, it is inconsistent with both the statute and the guideline itself. The statute enhances the sentence for aliens who were *removed subsequent to* conviction for the aggravated felony. 8 U.S.C. § 1326(b)(2). Thus, the aggravated felony conviction must precede removal. Similarly, the guideline enhances the offense level for an alien who was previously deported "after" conviction for certain offenses. U.S.S.G. § 2L1.2(b). Thus, the court must look to the conviction and sentence imposed prior to deportation. United States v. Sanchez-Mota, 2002 WL 31883195 (1st Cir. Dec. 24, 2002); United States v. Guzman-Bera, 216 F.3d 1019, 1020-21 (11th Cir. 2000).

This approach is consistent with other guidelines that enhance a defendant's offense level based on his status at the time of the new offense. For example, the Commission amended the firearms guideline to specify that a felon's offense level should be enhanced only if he possessed the firearm "subsequent to" conviction(s) for crimes of violence or drug trafficking. U.S.S.G. §§ 2K2.1(a)(1)-(4) (Nov. 1, 2000).

The offense addressed in U.S.S.G. § 2L1.2 is the illegal return after deportation. It is the defendant's status at the time of deportation that is relevant to his offense level, not any criminal conduct that occurs subsequent to his return. Such conduct is already adequately addressed in the calculation of criminal history.

Some courts have permitted consideration of the term of imprisonment imposed upon revocation of supervision if revocation occurred prior to the alien's removal. See e.g. United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002); United States v. Jimenez, 258 F.3d 1120, 1125-26 (9th Cir. 2001). This approach is also flawed.

The 2001 amendments to § 2L1.2 were designed to address the dangerousness of individuals who had been convicted of a wide variety of offenses deemed aggravated felonies, offenses that had dramatically different ranges of severity. As the Commission has said elsewhere, a revocation does not reflect the seriousness of the offense for which probation was originally imposed. It is not a punishment for the original offense, but a new sanction for a defendant's "breach of trust" in failing "to follow the court-imposed conditions of probation." U.S.S.G. § Ch.7, Pt.A(3)(b), p.s. "[T]he sentence imposed upon revocation" is "intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision," not to punish the defendant for his past crime, or even "for any new criminal conduct." *Id.* Because the revocation conduct has nothing to do with the nature of the underlying offense, a revocation in no way reflects the seriousness of that offense. Because revocation can occur merely for failing to follow court orders, it does not reflect the dangerousness of the defendant.

This is especially true in the cases of undocumented aliens. Because of their illegal status, they often cannot comply with various conditions of probation such as employment. Indeed, they are often deported and when they return they are faced with a motion to revoke probation for the failure to report or for the reentry itself. The probated sentence originally imposed reflects the severity of the underlying offense. It is that sentence that should be considered in determining the defendant's offense level under U.S.S.G. § 2L1.2.

4. **The Commission Should Clarify that the Aggravated Felony Enhancement Applies only to Defendants Who Were Convicted of a Felony.**

As discussed supra, a defendant may be deemed an aggravated felon even if he was actually convicted of a state misdemeanor if the sentence imposed, regardless of suspension, was at least one year. See e.g. Urias-Escobar, 281 F.3d at 167-68; Graham, 169 F.3d at 788, 791-93. While the Commission has clarified that such convictions are not considered "felonies" under this guideline, U.S.S.G. § 2L1.2, comment. n.1(B)(v), the eight-level enhancement applies to any defendant deported after "conviction for an aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C). Just as the use of the term "aggravated felony," may result in treatment of drug possession as "drug trafficking," the commentary's definition notwithstanding, Caicedo-Cuero, supra, a court might still impose the eight-level enhancement on a defendant who received a one-year sentence for a misdemeanor because the offense is still considered to be an aggravated felony under the immigration code. The Commission should clarify that the eight-level enhancement applies only to defendants previously convicted of a "felony," as defined in U.S.S.G. § 2L1.2, comment. n.1(B)(v).

F. **Definition of "Crime of Violence" Should Exclude Offenses That Do Not Meet Definition under Immigration Code**

1. **Sixteen Level Enhancement Should Be Limited to Defendants Who Received a Sentence of More Than Thirteen Months for a Felony Conviction for a Crime of Violence.**

The current guideline provides a sixteen-level enhancement for any alien who was deported after a felony conviction for "a crime of violence." U.S.S.G. § 2L1.2(b)(1)(A)(ii). This guideline is at once broader and narrower than the aggravated felony definition contained in the statute.

Under the statute, a "crime of violence" is an aggravated felony only if the sentence imposed was at least one year. 8 U.S.C. § 1101(a)(43)(F). Thus, a defendant convicted of aggravated assault, who receives a sentence of straight probation or deferred adjudication, has not been convicted of an aggravated felony for immigration purposes. See United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999). The sixteen-level enhancement contained in the guideline, however, apparently applies regardless of the sentence imposed.

On the other hand, the guideline is in some respects is more narrow than the immigration statute has been interpreted by some courts. A defendant convicted of a misdemeanor crime of violence is considered to be an aggravated felon if he received a one-year sentence. United States v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002). The guideline requires conviction of a "felony," U.S.S.G. § 2L1.2(b)(1)(A), which is defined to include only offenses punishable by a prison term exceeding one year. U.S.S.G. § 2L1.2, comment. n.1(B)(v). The immigration statute adopts the definition of "crimes of violence" contained in 18 U.S.C. § 16, which includes offenses that involve

the use of force against property. The guideline is generally limited to offenses that involve the use or threatened use of physical force against a person. U.S.S.G. § 2L1.2, comment. n.1(B)(ii)(I).

The absence of any limitation based on the sentence imposed, however, continues to result in harsh sentences for defendants convicted of a wide range of behavior. For example, the offense of assault may involve a wide variety of behavior. Participants in a bar room brawl may choose to accept a sentence of probation rather than risk the results of a trial. In some jurisdictions, assault is considered a misdemeanor but punishable by up to two years in jail. Thus, the offense falls within the guideline definition of a felony. A limitation on the sixteen-level enhancement to individuals who were sentenced to a term of imprisonment exceeding thirteen months, similar to the limitation for individuals convicted of drug trafficking, would reduce the unwarranted disparity in the treatment of these individuals.

G. Alien Smuggling – U.S.S.G. § 2L1.2, comment (n. 1(b)(i))

1. The Sixteen-Level Enhancement for Alien Smuggling Should be Limited to Defendants who were indicted and Convicted of Smuggling for Profit

Defenders oppose the definition of “alien smuggling” proposed by the Commission that would include specified offenses “regardless of whether the indictment charged that the offense was committed for profit.” The proposed amendment would permit a sixteen-level enhancement for defendants previously convicted of an alien smuggling offense for profit regardless of whether the “profit” allegation was included in the indictment. U.S.S.G. § 2L1.2, comment. (n.1(B)(i)). This amendment would be a drastic deviation from the categorical approach normally applied to such terms under statutory enhancement provisions in the sentencing guidelines. See Taylor v. United States, 495 U.S. 575, 588-89, 601 (1990). If the government is allowed to prove the “profit” allegation by reliance of facts outside the indictment, due process would require that the defendant be permitted an equal opportunity to refute such evidence by reference to evidence and witnesses outside the indictment. In addition, where a conviction was obtained pursuant to a plea agreement to a lesser or different charge, it would be unfair to attempt to establish conduct that was the excluded from consideration pursuant to an agreement in return for which the defendant waived constitutional rights to a trial by jury, to confront witnesses and others.

Where the guidelines enhance sentences on the basis of prior convictions, courts are not to look beyond the elements of the offense of conviction, see e.g. United States v. Zavala-Sustaita, 214 F.3d 601, 603 (5th Cir.) (citing Taylor, *supra*), *cert. denied*, 531 U.S. 982 (2000), or at most, the conduct set forth in the indictment. For example, in determining whether an offense should be considered a crime of violence under §2L1.2, the court must determine whether the elements of the offense charged include the intentional use of force. United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002) (injury to child not a crime of violence or aggravated felony); United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001) (DWI not a crime of violence or aggravated felony);

United States v. Hernandez-Castellanos, 287 F.3d 876, 879 (9th Cir. 2002)(felony endangerment).

Similarly, in the firearms and "career offender" guidelines, the categorical approach is used to determine if the defendant was previously "convicted" of crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1. Offenses are included if the elements of the offense include the use or threatened use of force or "the conduct set forth (*i.e.*, *expressly charged*) in the count of which the defendant was convicted involved use of explosives ... or, by its nature, presented a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2, comment. (n.1) (emphasis added). Consequently, with respect to the "career offender" provision of the guidelines, it is error to look beyond the face of the indictment to the actual underlying conduct in order to determine whether a prior conviction qualifies for the enhancement. United States v. Hascall, 76 F.3d 902, 904 (8th Cir. 1996) (second-degree burglary of a commercial building); United States v. Telesco, 962 F.2d 165, 166-67 (2d Cir. 1992) (following Taylor); United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992). A defendant is subject to the Armed Career Criminal provision only if the elements of the offense charged in the indictment included the intentional use of force. United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc).

The same reasoning should be applied to § 2L1.2(b)(1)(A)(vii)(Nov. 1, 2001). That provision explicitly requires "a conviction for a felony that is . . . an alien smuggling offense committed for profit." (Emphasis added). Therefore, to qualify for enhancement under § 2L1.2(b)(1)(A)(vii), the defendant's prior alien smuggling conviction must be under a statute whose elements establish "an alien smuggling offense committed for profit," see e.g. Zavala-Sustaita, 214 F.3d at 603, or, at a minimum, the conduct alleged in the indictment must unequivocally establish such an offense.

Further, a requirement that the previous conviction actually include as an element an allegation that the offense was committed for profit is more reliable and efficient. The court can readily determine whether the defendant was charged and convicted of such an offense by the traditional references to the charging instrument, judgment, and, if necessary, the jury charge. As the Supreme Court recognized:

The practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the ...definition... the trial court would have to determine what that conduct was.... Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own...? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts.

Taylor, 495 U.S. at 601. The proposed amendment would result in unfairness and inconsistency among similar guidelines provisions.

H. Remote Convictions Should Not Serve to Enhance the Offense Level

The illegal re-entry guideline contains no temporal limitation on consideration of prior convictions under U.S.S.G. § 2L1.2(b). This is in contrast to other guideline provisions, which count only convictions considered within the time limitations set forth in the criminal history provisions. See e.g. U.S.S.G. § 2K2.1 (a)(1)-(4) & comment. (n.15) (felon in possession of firearm). The guideline already provides that a defendant is subject to enhancement regardless of whether the conviction was considered to be an aggravated felony at the time of conviction or deportation. U.S.S.G. § 2L1.2, comment. (n. 2). Thus, a defendant may have a conviction that is so remote, that it is not included in criminal history, but it will still result in a dramatic enhancement in the offense level. The guideline should be amended to limit consideration of prior convictions to convictions counted under U.S.S.G. § 4A1.1.

Of note, this amendment still will not assist numerous defendants convicted of illegal re-entry. This is because illegal re-entry is considered to be a continuing offense that runs from the date of the illegal re-entry, until the defendant is discovered by the INS. United States v. Reyes-Nava, 169 F.3d 278, 280 (5th Cir. 1998); United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996). A defendant could have been convicted decades ago, but returned shortly thereafter to work and live quietly with his family in the United States. At the time of his removal, his offense was in all likelihood not considered an aggravated felony. Yet, if he is discovered in the United States after 1996, he will be subject to the enhancements for defendants convicted of an aggravated felony.

To address defendants whose prior felony convictions are remote, regardless of when they returned to the United States, the Commission should encourage a downward departure. As a less desirable alternative, the Commission could limit the departure to defendants who have been otherwise crime free (until the date of arrest, not re-entry).

I. If the Court Cannot Impose a Prison Sentence, the Offense Should Not Be a Felony under U.S.S.G. § 2L1.2.

In United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002), the defendant had been previously convicted in Arizona, where a sentence of probation was mandatory for first and second-time drug possession offenses. The Ninth Circuit held that where the maximum penalty authorized by state law is probation, the offense cannot be considered an "aggravated felony." Id. at 903-05.

The court noted that under the immigration statute, the term of imprisonment, rather than the terminology, is controlling. 281 F.3d at 903, 904 & n.3. Under 8 U.S.C. § 1101(43), a drug trafficking offense, defined as a "felony" punishable under the Controlled Substances Act, is an aggravated felony. United States v. Garcia-Olmedo, 112 F.3d 399, 4004 (9th Cir. 1997). A "felony drug offense," however, is "an offense punishable by imprisonment for more than one year... 21 U.S.C. § 802(44). Further, as the Ninth Circuit recognized, an offense punishable only by probation, is not a "felony" under Guideline 2L1.2. The Commission has limited the term "felony" to "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." U.S.S.G.

§ 2L1.2, comment. (n. 1(B)(iv)). Robles-Rodriguez, 281 F.3d at 905.

Both the Fifth and the Ninth Circuits have limited Robles-Rodriguez to the idiosyncracies of Arizona law. Both courts have held that a prior conviction must be considered a felony if the defendant can be sent to prison for more than one year upon revocation of probation. Caicedo-Cuero, 312 F.3d at 702-705; United States v. Arellano-Torres, 303 F.3d 1173, 1180 (9th Cir. 2002).

Although this logic is superficially appealing, on closer analysis it is untenable. *Potential* imprisonment beyond 365 days is irrelevant to whether an offense is "punishable" by more than a year in the first instance. If potential punishment upon revocation of mandatory probation defines an offense as a "felony," then countless misdemeanors would be considered to be "felonies." For instance, Class A federal misdemeanors are punishable by up to 365 days in jail. 18 U.S.C. §§ 3559(a)(6) & 3581(b)(6). Class A misdemeanors are additionally punishable by up to one year of supervised release. 18 U.S.C. § 3583(b)(3). Upon revocation of such supervised release, a defendant can be sentenced to an additional year of prison. 18 U.S.C. § 3583(e)(3).

Therefore, *potentially* a Class A federal misdemeanor could be punished in excess of one year, yet clearly courts treat Class A misdemeanors as non-felonies under federal law. *See, e.g., United States v. Smith*, 20 Fed. Appx. 258, 269 (6th Cir. 2001) (finding evidence to be insufficient to support the defendant's conviction under 18 U.S.C. § 924(c)(1) & (2) where the defendant's predicate drug offense was merely a Class A misdemeanor of simple possession of a controlled substance); United States v. Fountain, 993 F.2d 1136, 1137 n.1, 1139 (4th Cir. 1993) (same); *see also United States v. White*, 969 F.2d 681 (8th Cir. 1992) (holding that, if the evidence of a defendant's intent to distribute is insufficient, then the defendant "would be resentenced for the lesser included possession offense [which is a Class A misdemeanor] . . . and his § 924(c)(1) conviction would be reversed because a simple possession offense is not a predicate 'drug trafficking crime'").

SECTION 5G1.3 – Imposition of Sentences in Cases Involving Other Terms of Imprisonment

A. The Commission Should Retain the Limited Discretion Now Available Under Application Note 6 to the Commentary

The Commission proposes to make several changes to this guideline to address circuit conflicts. The simplest proposal to resolve is the one that proposes retaining the current Application Note 6 of the Commentary. This proposal offers a choice between requiring consecutive sentences where the defendant was on probation, parole or supervised release when he committed the instant offense versus retaining language that provides that such sentences "should" be consecutive but allowing district courts some discretion to do otherwise. Defenders believe that this is an area where district judges should be granted the limited discretion authorized because of the broad range of behavior that may constitute a violation and because requiring the sentence for the instant offense in all instances to run consecutively to the violation may not always be workable and may interfere with the sentence the district court is trying to fashion in light of the prison resources, facilities and

the characteristics of the offense and the offender.

B. Sentences Involving §5G1.3(b) Where a Term of Imprisonment Resulted from Another Offense

Defenders recommend adoption of Option Two A that clarifies the application of §5G1.3(b) by explaining that the sentencing court is authorized to adjust the sentence for any period of imprisonment already served in any case where a term of imprisonment "resulted from another offense that is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction." The courts have split as to whether the other offense had to be "fully" taken into account in the sense that the instant offense and the separate offense resulted in a sentence as if both had been prosecuted in a single proceeding.

The rule proposed in Option Two is more workable and less complicated in an area where application of the guideline has caused some confusion. Option Two clarifies that §5G1.3(b) applies in cases where the conduct of the prior offense is (1) incorporated in the base offense level for the instant offense; (2) covered by a specific offense characteristic in the guideline for the instant offense; or (3) covered by a Chapter Three adjustment in the instant offense. In addition to being easier to understand and apply, this option also is a more fair way of dealing with conduct that has already been the subject of another prosecution and sentence. It much more closely comports with the fundamental notion that persons should not be punished doubly for the same conduct.

Defenders also support the new §5G1.3(b)(2) that authorizes district courts to adjust the instant sentence for any period of imprisonment already served on a sentence that meets the criteria for §5G1.3(b) proposed in Option Two.

The adjustment should be mandatory because it is fundamentally more fair to adjust the current sentence in mitigation of imposing two separate sentences based on the same conduct. We believe that at a minimum the Commission ought to require that the sentencing court "should" adjust the current sentence for any period of imprisonment already served.

MISCELLANEOUS AMENDMENTS

C. Application Instructions – Section 1B1.1, comment. (n. 4):

The Commission proposes to include new language in U.S.S.G. §1B1.1, comment. (n.4) to cover instances where multiple adjustments are triggered by the same conduct. In such cases, the proposal would establish a default rule that makes multiple adjustments ordinarily apply cumulatively. Defenders recommend that the Commission make the default rule that such adjustments ordinarily should apply in the alternative, applying only the adjustment that best describes the conduct. In the ordinary case, the same conduct should only trigger a single enhancement. Where appropriate, the Commission may specify that multiple enhancements apply

even where they arise out of the same conduct.

Our proposal would allow courts to determine, on a case by case basis, that the particular injury or harm captured by the several adjustments should trigger multiple enhancements for example, where certain injuries or harms resulting from the single act are so different as to require multiple enhancements.

B. SEXUAL CONDUCT AMENDMENTS

The proposed changes deal with the definitional sections of the guidelines relating to Criminal Sexual Abuse, Repeat and Dangerous Sex Offenders and Child Pornography. None of the changes are substantive. They clean up or tweak definitional sections. These changes appear in part to be an effort to rid the guidelines of statutory references to language found unconstitutional in Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) regarding "virtual" child pornography. Defenders support the changes to bring the guidelines definitions into compliance with statutory and constitutional limits.

C. DRUG GUIDELINES

The Commission proposes three changes to the drug guidelines.

1. **Amendments to U.S.S.G. § 2D1.11 (Unlawful Trafficking of Listed Chemicals).**
 - a. **Offense-Level Cap for Less Culpable Defendants**

Defenders support extending to offenses involving precursor chemicals the provision that caps the base offense level at 30 for defendants who receive a mitigating role adjustment. Offenses involving listed precursor chemicals are sentenced under U.S.S.G. § 2D1.11, a different guideline than offenses involving the actual controlled substance, which are sentenced under U.S.S.G. § 2D1.1. Last year, when the mitigating role cap was promulgated the Commission made it applicable only to § 2D1.1 offenses. Under the guideline for listed chemicals, the maximum base offense level for most listed chemicals is offense level 30. U.S.S.G. § 2D1.11(e). Certain precursor chemicals, however, are subject to base offense levels as high as offense level 38, which is the same as for controlled substances calculated under U.S.S.G. § 2D1.1. See U.S.S.G. § 2D1.1(d). It would be irrational to cap controlled substance offenses at 30 for the less culpable defendants while sentencing similarly less culpable defendants who were involved with listed chemicals at a higher offense level. Indeed, those prosecuted for trafficking in listed chemicals, whose offenses are more inchoate, may generally be less deserving of punishment than defendants involved with controlled substances.

2. Reduction for Safety Valve Defendants

For the same reason, Defenders support the proposal to extend the two-level reduction currently available for offenses sentenced under U.S.S.G. § 2D1.1 to defendants who meet the criteria for the Safety Valve to defendants prosecuted for offenses involving precursor chemicals under U.S.S.G. § 2D1.11. Defendants involved with precursor chemicals who meet the Safety Valve criteria are as deserving of the reduction as those involved with the controlled substance.

3. Red Phosphorus

In response to recent action by the Attorney General scheduling Red Phosphorus as a prohibited "List 1" chemical in Schedule 1, the Commission proposes to add Red Phosphorus to the listed chemicals in U.S.S.G. § 2D1.11. The proposed quantity table for Red Phosphorus ranges from a base offense level 12 for a quantity of less than 3 grams up to an offense level 30 for quantities of 714 grams or more of Red Phosphorus. The Commission has not published any data to explain how these quantities were determined.

The problem with establishing a quantity of Red Phosphorus for sentencing purposes is that there is no accepted measure in the scientific literature that we are aware of for extrapolating the amount of a controlled substance that will be manufactured from a quantity of red phosphorus. It is not a precursor chemical but rather a catalyst for making methamphetamine by one particular method. "[C]landestine methamphetamine laboratories . . . utilize phosphorus chemicals as catalysts to drive the chemical conversion of ephedrine or pseudoephedrine to methamphetamine." 65 Fed. Reg. 57577, 57578 (Notice of Proposed Rule Making proposing the addition of red phosphorus as a List I chemical). Hence, the amount of Red Phosphorus possessed by a person has only a very rough or crude correlation to the amount of methamphetamine that will or may be manufactured.

It is somewhat like yeast to the manufacture of wine or eggs to the baking of a cake. To make a cake that calls for two eggs, a person may purchase a dozen eggs. The dozen eggs reflects nothing more than the fact that eggs are sold by the dozen. It does not reflect that the person intends to bake six cakes.

We are concerned that the Commission runs the risk of establishing a quantity ratio for Red Phosphorus that has little relation to the culpability of those who may possess the chemical, many of whom are likely to be less culpable couriers or other low-level participants. There is some indication that the quantities of Red Phosphorus purchased or possessed are more reflective of the unit of sale of Red Phosphorus than the scope of the clandestine methamphetamine labs. Red Phosphorus has legitimate industrial uses in the manufacture of "pyrotechnics, safety matches, . . . fertilizers, incendiary shells, smoke bombs, tracer bullets and pesticides." 65 Fed. Reg. 57577, 578 (Notice of Proposed Rule Making proposing the addition of Red Phosphorus as a List I chemical). It is sold at least for industrial use, in large volume quantities. For example, various distributors of Red

Phosphorus on the Internet advertise the product for sale in large quantities including a Belgium company, Brenntag N.V. that offers to sell 60-kilogram drums of Red Phosphorus. See <http://www.brenntag.be/prd/product/phosphorusphosphoriquefosforischen.shtml>.

Defenders recommend that the Commission not establish the proposed quantity ranges for Red Phosphorus unless empirical evidence that reflects culpability supports them at those levels.

INVOLUNTARY MANSLAUGHTER

B. Proportionate Sentencing

Defenders recommend that in raising the base offense level for involuntary manslaughter to correspond to the increased statutory maximum penalty for the offense, now six years' imprisonment, the Commission retain the penalty at a level proportionally lower than the guideline penalties for aggravated assault. The maximum penalty for aggravated assault offenses is generally ten years' imprisonment or more. See, e.g. § 18 U.S.C. § 113(a)(2) (assault with intent to commit a felony); 18 U.S.C. § 113(a)(3) (assault with a dangerous weapon or with intent to do bodily harm). For example, assault with intent to torture or main, one of the offenses sentenced under the aggravated assault guideline, carries a statutory maximum twenty years' imprisonment. See 18 U.S.C. § 114.

The *mens rea* for involuntary manslaughter is an absence of malice coupled with either negligent or reckless conduct. See 18 U.S.C. § 1112. This contrasts with the aggravated assault offenses which are based on a general or specific intent to cause harm or injury, sometimes of a serious nature to another person.

The current proportionality between the involuntary manslaughter guideline and the aggravated assault guideline is entirely consistent with the different maximum penalties and offense elements established by Congress.

Because involuntary manslaughter offenses result from negligent or reckless conduct rather than malicious intent, Defenders recommend that the Commission increase the base offense levels only slightly, to offense level 12 for criminally negligent conduct and offense level 16 for reckless conduct. Rather than set a higher offense level that will overstate culpability in a number of cases, the Commission could include specific offense characteristics where the negligent or reckless conduct warrants it. For example, a 2-level increase could be applied where the defendant used a firearm, where the defendant risked injury to multiple victims, or where the vehicular homicide involved driving while intoxicated.

In considering this amendment, the Commission should also consider the disproportionate application of this guideline to cases prosecuted in Native American reservations.