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of the NATIONAL LAWYERS GUILD

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United States Sentencing Commission
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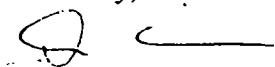
Attention: Public Affairs

Dear United States Sentencing Commission:

The National Immigration Project of the National Lawyers Guild (National Immigration Project) submits the attached comments to the proposed amendment to U.S.S.G § 2L1.2. The National Immigration Project works closely with the bench, the criminal defense bar and prosecutors on issues related to immigrants and the criminal justice system. I am the co-author of *Immigration Law and Crimes*, a treatise published by West Group. I have spoken to Judicial Conferences in Utah, Hawaii, and Massachusetts on the relationship between immigration law and the criminal justice system. I have also served on the faculty of many training sessions sponsored by the Federal Defender Training Service for CJA panel attorneys. Our office has also trained prosecutors and police officials on implementing aspects of the Violence Against Women Act.

Thank you for considering our views expressed in the attached document.

Sincerely,



Dan Kesselbrenner

**. Comment of the National Immigration Project of the National Lawyers Guild to
Proposed Amendment to U.S.S.G. § 2L1.2**

**I. The Sentencing Commission Should Amend Proposed Application Note
1(B)(iii) to Conform to the Statutory Definition of Aggravated Felony**

Section 1326(b)(2) of title 8 provides for additional potential punishment for violating 8 U.S.C. § 1326 after having been convicted of an aggravated felony. In 1999, the Supreme Court held that 8 U.S.C. § 1326(b)(2) does not define an element of a separate offense, but rather creates a sentencing enhancement. *Almendarez-Torres v. United States*, 523 U.S. 224 (1999). The term aggravated felony is defined in 8 U.S.C. § 1101(a)(43)(F). The Commentary to U.S.S.G. § 2L1.2 recognizes that the title 8 definition of aggravated felony governs enhancements for 8 U.S.C. § 1326(b)(2).

Section 1101 (a)(43)(F) of title 8 defines aggravated felony to include: "A crime of violence (as defined in section 16 of title 18 United States Code, but not including a purely political offense) for which the term of imprisonment [sic] at least one year." The Circuit Courts have uniformly determined that the word "is" should be in the definition. *See, e.g., United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); *United States v. Marin-Navarette*, 244 F.3d 1284 (2d Cir. 2000); *United States v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir. 2002); *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999). Congress has acquiesced to the Circuit Courts' interpretation regarding the missing verb. Had Congress meant a verb other than "is" to come between "imprisonment" and "at least one year," it would have amended the statute to make clear that the Circuit Courts of appeal were all in error.

The Application Note to the proposed amendment includes within the definition of crime of violence a burglary of a dwelling offense without regard to the punishment. This means that under the proposed commentary, a defendant who has a conviction for burglary of a dwelling for which she or he receives a sentence of six months could face a sentencing enhancement under 8 U.S.C. § 1326(b)(2). Congress provided that a defendant receives an enhancement under 8 U.S.C. § 1326(b)(2) only if she or he has been convicted of an aggravated felony. Congress defined an aggravated felony crime of violence to require a sentence of "at least one year." If the Commission does not modify Application Note 1(B)(iii), then a defendant could receive an enhancement under 8 U.S.C. § 1326(b)(2) for a conviction that does not satisfy the definition of aggravated felony.

The Sentencing Commission has broad powers to develop sentences. Nevertheless, that power does not include the authority to contravene a statute. *See Stinson v. United States*, 508 U.S. 36 (1993) (recognizing narrow exception to authority of Guideline Commentary).

The Proposed Guideline § 2L1.2(b)(1)(C) provides an 8-level enhancement for a basic aggravated felony, as defined in 8 U.S.C. § 1101(a)(43). For a crime of violence to be an aggravated felony under 8 U.S.C. § 1101(a)(43), the defendant must receive a sentence of

at least one year. Manifestly, the Sentencing Commission has the authority to treat certain aggravated felony offenses as being worse than other aggravated felony offenses. As provided now, a defendant can receive a 16-level enhancement for certain offenses that are not even aggravated felony offenses because the defendant received a sentence of less than one year.

II. An Offense Under Federal, State, or Local Law that Prohibits the Possession of a Firearm is Not an Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the title 8 definition of aggravated felony. Sections 1101(a)(43)(C) and 1101(a)(43)(E) of title 8 define aggravated felony to include:

“(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title); ...

(E) an offense described in—

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses).”

Neither 8 U.S.C. § 1101(a)(43)(C) nor 8 U.S.C. § 1101(a)(43)(E) includes 26 U.S.C. § 5845(a) or 18 U.S.C. § 841(e). The National Immigration Project respectfully suggests that the Sentencing Commission delete the reference in Application Note 1(B)(vi)(II) to firearm possession offenses.

III. A Conviction Under 18 U.S.C. § 2260 is not a “Child Pornography” Offense for Purposes of the Definition of Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the title 8 definition of aggravated felony. Congress defined child pornography offenses to include an “offense described in 2251, 2251A, or 2252 of title 18 United States Code.” 8 U.S.C. § 1101(a)(43)(I). The Sentencing Commission should amend the proposed change to delete the reference to a 16-level enhancement for a conviction under 18 U.S.C. § 2260.

IV. A Conviction Under 18 U.S.C. § 1589, 18 U.S.C. § 1590, or 18 U.S.C. § 1591 is Not a "Human Trafficking Offense" for Purposes of the Definition of Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the Title 8 definition of aggravated felony. Section 1101(a)(43)(K) covers:

" an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18, United States Code (relating to peonage, slavery, and involuntary servitude)"

The National Immigration Project urges the Sentencing Commission to strike the reference to a conviction under 18 U.S.C. §§1589-91 from the amended guideline because those offenses are not included in the statutory definition of aggravated felony

V. The Sentencing Commission Should Delete the Reference to State Smuggling Offenses in the Proposed Guideline

The Supreme Court has repeatedly recognized the federal government's preeminent role in regulating the status of noncitizens. See, e.g., *Matthews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365, 377-380 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-420 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941). This authority derives from the United States Constitution, which gives Congress the power "to establish a uniform Rule of Naturalization," U.S. Const., Art. I, § 8, cl. 4, and "to regulate Commerce with foreign Nations," *id.*, cl. 3. The authority to punish smuggling offenses flows from this exclusively federal power. The National Immigration Project respectfully suggests that the Sentencing Commission delete the reference in Application Note 1(B)(i)(II), which includes within its definition, "an offense under state law."

VI. The Sentencing Commission Cannot Add a Category of Crime that Does Not Appear in the Aggravated Felony Definition

The statutory definition of aggravated felony does not mention "terrorism offenses" as a distinct category of crime. In all likelihood, any "terrorism offense" listed in the proposed Guideline would be included already in the "crime of violence" definition. Although it is easy to understand the impetus behind including "terrorism offenses" in the wake of the tragedy on September 11, 2001, the manifest justification behind its inclusion does not authorize the Sentencing Commission to create an enhancement for an

aggravated felony offense, which Congress has not chosen to include in 8 U.S.C. § 1101(a)(43). The practical significance of respecting clear Congressional intent in this regard is nonexistent, since it is difficult to conceive of a "terrorism offense" that is not now within the scope of the crime of violence definition.