

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

2167 UNITED STATES COURTHOUSE

75 SPRING STREET, S.W.

ATLANTA, GEORGIA 30303-3309

CHAMBERS OF

JULIE E. CARNES

JUDGE

March 30, 2006

Via Federal Express

The Honorable Ricardo H. Hinojosa
Chair, Sentencing Commission
U.S. District Court
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Dear Judge Hinojosa and Members of the
United States Sentencing Commission:

I am writing to indicate my respectful disagreement with parts of the proposed amendments to the Immigration guidelines. I apologize for missing the March 28th deadline. I had mistakenly thought that March 31st was the deadline, and learned of my error when I reviewed the web site last night. I hope you will be willing to consider my concerns and

observations, notwithstanding that this letter missed your deadline by a few days. Further, I wish to emphasize that I make these remarks in my individual capacity as an interested federal district judge, and not as a representative of any group.

I. § 2L1.2(b)(1) Enhancements Based on Prior Convictions

My strongest concerns relate to the proposed amendments to § 2L1.2, which addresses the offense of illegal reentry by an alien who had previously been deported. Section 2L1.2 provides for a base offense level of 8, and then enhances that level based on the seriousness of the criminal conviction that preceded or led to the alien's deportation. The proposed amendment would, as a practical matter, substantially reduce the sentences of those deported illegal aliens who have committed the most serious offenses and, who, by their reentry into this country in violation of a clear command not to do so, evidence their continuing disdain for our law and pose the greatest continuing threat to the American communities in which they reside. Respectfully, I cannot understand why such a result would be considered to be a good development.

Specifically, the present Guideline awards a 16-level enhancement for a deported alien who had incurred a felony conviction for one of seven serious, enumerated offenses.¹ Thus, for example, an alien who has

¹ These offenses are a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, an alien smuggling offense, and a drug trafficking offense for which the defendant received at least a 13-month sentence. § 2L1.2(b)(1)(A).

stolen back into this country after being deported, and after having sustained a conviction for rape, or child molestation, or robbery, or attempted murder, or aggravated assault, or a terrorism offense, in his previous sojourn here, will receive a total offense level of 24 (8+16) and, postulating a 3-level reduction for acceptance of responsibility (for a final offense level of 21), and a Criminal History Category II, the sentencing range would now be 41-51 months.

The proposed amendments, however, would not necessarily confer on such a defendant the above 16-level enhancement. Rather, unless the alien defendant had actually received at least a 13-month sentence [Option 1] or a 2-year sentence [Option 2] for one of his prior convictions, the 16-level enhancement would not apply. Instead, the defendant would receive only an 8 or a 12-level enhancement, depending on the iteration adopted. The theory, apparently, is that by insisting that at least a 13-month [2-year] sentence had been previously imposed for one of the defendant's prior crimes, the Guidelines insure that the prior crime was actually a serious offense.

Unfortunately, as anyone who has dealt with overburdened state criminal justice systems knows, the latter rarely impose sentences on illegal aliens that reflect the seriousness of the crimes committed. In my experience, those systems are revolving doors, and the defendant often receives a short, time-served sentence, no matter how serious and repeated are his crimes. In fairness, many local governments have been beleaguered by many forces, including the huge numbers of illegal aliens

in their communities and the corresponding strain on the budgets of public health services, schools, and law enforcement that this influx has caused. Perhaps, these local entities have concluded that it is the job of the federal government to remove people who are here illegally and that the locals should not have to expend their scarce resources housing criminal aliens in state-supported jails. Whatever the reason, and with no intention to cast blame, the fact is that the sentence imposed on such an alien is rarely going to be a reliable proxy for the seriousness of the crime or the danger that the alien's continued presence in the country poses.²

In addition, the premise reflected in the proposed amendment is rather counterintuitive: an alien who was fortunate enough to receive a light sentence for his assault, robbery, or child molestation conviction continues to be able to utilize that generosity in perpetuity to receive more lenient treatment for future crimes.³

Although it appears that a desire to lower sentences for illegally reentering aliens is the primary impetus behind the proposed amendment,

² In the many prosecutions before me of defendants for illegal reentry, the defendant has typically been discovered in a local jail, having been arrested for committing another crime since his illegal reentry. Indeed, while I may have had some cases that do not meet this general rule, I cannot specifically recall them.

³ I recognize that the criminal history sections operate on this premise as well, but, for a variety of reasons, the criminal history provisions are not truly analogous to the enhancement provision in 2L1.2. For example, an underrepresentation of criminal history in the criminal history calculation will have much less impact on the resulting sentence than will an undercalculation of prior convictions in 2L1.2, because the enhancement for prior convictions is what powers that guideline.

the synopsis accompanying the proposal suggest another reason to abandon the "categorical approach." Specifically, the synopsis indicates that the "categorical analysis" "is often complicated by lack of documentation, competing case law decisions, and the volume of cases." I don't really understand what this sentence means, as I do not believe our district has experienced any problems applying the guideline. While we are not a border state, we have had a goodly number of these cases.

If there are competing case law decisions, the Commission should settle those conflicts. If there is a lack of documentation, that lack will exist no matter what methodology is used. Moreover, an absence of documentation supporting the enhancement will mean that the defendant will not receive the enhancement anyway. If there is a high volume of cases, there will still be a high volume of cases after the amendment is passed. In short, the explanation does not seem sufficient to me to warrant making the change.

Likewise, the Interim Staff Report indicates that there is some support for lowering the immigration guidelines because some border districts have "fast-track" programs that allow the imposition of substantially lower sentences to pleading defendants, and other districts do not have these sanctioned programs. I do not see this phenomenon as warranting a reduction of what should otherwise be an appropriate guidelines sentence, however. Admittedly, I am not totally clear on the thinking behind "fast-track" programs. If one has a lot of a particular kind of crime in a geographic area, lowering the sentence for that

offense will not likely reduce its incidence. To the contrary, criminals can rationally be expected to flock to places where the sentences are lower. Presumably, the basis for these programs is not principled, however, but pragmatic: there are so many immigration cases, and the border districts have been so inadequately supported and staffed, that they need some carrot to encourage the hundreds of illegal reentrants who appear before them to quickly dispose of their cases.

Yet, to work, that principle means that the border districts have to have some differential between the sentences that they impose under a fast-track plan and the sentences that would otherwise be imposed if the defendant went to trial. If the Guidelines sentencing ranges are lowered across the board, then necessarily the fast-track districts will have to further lower the sentences that they impose on their alien defendants, to make a guilty plea worthwhile for the defendant, until one reaches a point where the crime of reentry, itself, has been effectively decriminalized. In short, if, on a national level, everyone tries to emulate the border districts, it will be a race for the bottom, in terms of sentencing ranges.⁴

II. Making a Distinction Between a Probationary Sentence and Other Sentences, for Purposes of an Enhancement

Whatever the Commission decides to do regarding the "categorical approach" versus this new proposed approach, I implore you not to make

⁴ In the Northern District of Georgia, we do not need such an incentive. In thirteen years on the bench, I have only had one defendant go to trial on an illegal reentry charge. Everyone else pled guilty.

a distinction between a probationary sentence and other sentences, for purposes of pegging the level of an enhancement, because such a distinction is nonsensical. That is, under the proposed iterations, a reentering alien who had previously gotten a 10-day time served sentence for an assault would get a 12-level bump as a result of this conviction. Yet, if this same defendant had happened to see a judge immediately upon his arrest, and had instead gotten a probationary sentence (which, going forward, is effectively what a time-served sentence is), that defendant would receive only an 8-level bump. That a sentence is a probationary sentence versus a sentence for a relatively short term tells one nothing about the severity of the underlying offense. As Peter Hoffman, the principal drafter on the Commission in its early days, used to say, you might as well base the enhancement on the defendant's weight or his zodiac sign.

Moreover, to the extent one is concerned about the administrative burdens on sentencing judges, this suggestion would be very burdensome. Defendants would forever litigate this matter and, if document scarcity is a true problem, it would create a real problem in resolving this factor.

III. Suggestion

My suggestion is that the Commission defer doing anything radical this year in terms of changing the enhancements for illegal reentry. Before proceeding on the new approach for enhancements set out in the proposed amendments, I think that it would be useful to run the data to

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see how much sentences would be shortened under the Guidelines. Moreover, Congress may well be enacting new immigration laws this year, and waiting until the dust settles might be prudent. However much reasonable minds might differ about the wisdom of this change, from a policy point of view, there can be little disagreement that it would not be helpful for there to be a perception that the Commission is lowering sentences for the most dangerous reentering illegal aliens.

It may well be that the guideline, as written, sometimes sweeps too broadly. Likely, there are cases where there is an isolated 20-year old conviction or other substantially mitigating circumstances as to the facts underlying the conviction. If that is so, I believe that the Commission should collect those anecdotes and see if it can determine a way to carve out those situations, either through departure language or language in the guideline, itself. Yet, throwing out the enhancement, itself, seems to me to be too broad-brushed a way to handle a factor that could suggest great dangerousness on the part of many defendants. Further, it seems to me that the Commission should consider creating an enhancement based on repeated reentries. Many of my defendants have had two or more reentry convictions. Such conduct suggests a dogged determination to violate the law and should be accounted for by the Guidelines.

Thank you for considering my comments. I offer them in a constructive spirit. You have an enormous responsibility in these post-Booker days and are an institution that all look to in the upcoming

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debates. I greatly respect the work, time, and thought that you all bring to the task. Please let me know if I can ever be of service.

Sincerely,



Julie E. Carnes
U.S. District Court Judge

JEC/ghh