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March 29, 2007

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

Re: Comments on Proposed Amendments Relating to Immigration

Dear Judge Hinojosa:

With this letter, the National Immigration Project of the National Lawyers Guild (National Immigration Project) and the National Council of La Raza (NCLR) provides comments to the proposed amendments relating to immigration that were published on January 30, 2007.

I. General Concerns

1. Proposed options are inconsistent with pending legislation

Without any apparent justification, the proposed amendments would substantially increase the potential prison sentences for noncitizens convicted of illegally reentering the United States. There is no new legislation, or authoritative research to justify these harsher amendments. Moreover, all of the published options are out of sync with current legislative proposals. The Sentencing Commission should refrain from publishing a new Guideline, which may well be out of date very soon.

Legislation pending in the House (H.R. 1645) and the Senate (S. 2611) provides maximum statutory sentences of 20, 15, 10 and 2 years for illegal re-entry. Under section 236 of H.R. 1645 and section 207 of S. 2611, a defendant cannot receive a 20-year sentence unless she or he has:

- a felony conviction for which a court sentenced the defendant to at least sixty months,
- 3 felony convictions, or
- a conviction murder, rape, kidnapping, a felony relating to slavery or peonage, or a felony relating to terrorism.

2. Sentencing Commission should republish notice to allow meaningful opportunity for public comment

Section 994(x) of Title 28 U.S.C.A. subjects the United States Sentencing Commission to the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C.A. § 553. Under 5 U.S.C.A. § 553, subject to exceptions that do not apply in this instance, an agency must publish proposed rules in the Federal Register and give the public a meaningful opportunity to comment. The Sentencing Commission is considering an additional Option 7 for U.S.S.G. § 2L1.2 that the Commission did not publish in the Federal Register. The Commission did provide the National Immigration Project and NCLR with a copy of Option 7, for which we are grateful. However, the good graces and the helpfulness of the Commission staff cannot compensate for a failure to publish Option 7 in the Federal Register. Principles of good government and the obligations under 5 U.S.C.A. § 553 made binding on the Sentencing Commission by 28 U.S.C.A. § 994(x) require that the Commission not amend 2L1.2 until it gives the entire public notice and the opportunity to comment on Option 7 and any other amendments that the Commission is considering. The National Immigration Project and NCLR are not offering comment on Option 7 because to do so would be inconsistent with the letter and spirit of 28 U.S.C.A. § 994(x) and with principles of good government.

3. Existing and proposed penalties are inappropriate for seriousness of the offense

The proposed and existing penalties for unlawfully entering and remaining in the United States are disproportionate to the seriousness of the offense. Other federal offenses that enhance a sentence based on a defendant's criminal record are much less severe than the proposed options under U.S.S.G. § 2L1.2. For example, a felon in possession of a firearm receives an enhancement of six levels for having a prior conviction for a crime of violence, U.S.S.G. § 2K2.1(a)(4)(A), as opposed to an eight or sixteen level increase under Options 1-4 of U.S.S.G. § 2L1.2.

The disproportionately harsh consequences are especially problematic because the definition of aggravated felony under 8 U.S.C. § 1101(a)(43) is so broad and overarching that it includes offenses that are neither aggravated nor felonies. The definition of aggravated felony includes federal and state nonviolent offenses and individuals who serve no prison time whatsoever. *See, e.g., United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (treating as an aggravated felony a conviction for misdemeanor petty theft with a one-year suspended sentence). Therefore, defendants will be included under these harsh Guidelines who are not guilty of serious criminal offenses.

4. Sentence served is a more reliable indicator of seriousness of predicate offense than sentence imposed

If the Sentencing Commission were to use the sentence a defendant served rather than the sentence a court imposed, it would be better able to sentence harshly those defendants who warrant more serious sentences. Using the time a defendant served is more consistent with the overall sentencing purposes of 18 U.S.C.A. § 3553(a)(2) than using sentence imposed. A common thread among the great variety of state sentencing schemes is that the time a defendant actually serves is the best measure of the seriousness of her or his offense. As a result, using the sentence served would reduce the uneven impact that flows from the variety of state sentencing schemes and promote a more uniform federal treatment of defendants charged with illegal reentry. This approach also would be consistent with the Supreme Court's view in *Lopez v. Gonzales*, 127 S.Ct. 626 (2006) that Congress did not want a state's label to decide a federal concern.

II. General Concerns Regarding Commentary and Application Notes

The Commentary under the United States Sentencing Guidelines has the force of law unless contrary to the Constitution, a statute, or inconsistent with the Guideline that it interprets. *Stinson v. United States*, 508 U.S. 36 (1993). As a result, the National Immigration Project and NCLR note its concern regarding the proposed Commentary to U.S.S.G. § 2L1.2, because it includes material, which does not deserve the force of law, and thus should not be included in the Commentary.

1. Provisions of Federal Juvenile Delinquency Act should govern treatment of persons under 18

The proposed Commentary to all six options to U.S.S.G. includes offenses committed by a person under 18 if the law of the jurisdiction treated the defendant as an adult. The Sentencing Commission should heed the reasoning behind the Supreme Court's recent decision in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), and not make an enhancement dependent on the vagaries of local law. The National Immigration Project and NCLR suggest that the test be whether the defendant would have faced mandatory treatment as an adult under the Federal Juvenile Delinquency Act. Using a federal test would avoid disparities based on state law and promote uniformity.

2. Application notes should include downward departure considerations

The proposed options lack provisions that take into account the motivation for a substantial number of reentering noncitizens in returning to the United States, including such factors as: (1) extended length of residence in the United States, (2) the presence of family members in the United States who need them, and (3) the fear of persecution in their home country. Many reentering noncitizens are not being motivated by a desire to commit new crimes in the United States. Courts have recognized that a reduction in sentence is appropriate for defendants who are culturally assimilated or who return because of family medical needs. *See, e.g., United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001) (recognizing availability of downward departure for cultural assimilation); *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998) (same); *United States v. Singh*, 224 F. Supp.2d 962 (E.D. Pa. 2002) (granting downward departure for defendant who reentered to visit his dying mother).

III. Specific Comments to Proposed Options

1. Continued use of categorical approach

Options 1-4 would still require the categorical approach. The Supreme Court created the categorical approach in connection with the Armed Career Criminal Act. In 2007, the Supreme Court endorsed this approach to establish whether an offense is an aggravated felony. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007). The term "aggravated felony" means the same thing whether used in the civil or criminal contexts. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004); *Lopez v. Gonzales*, 127 S.Ct. 626 (2006). According to the Fifth Circuit, "*Lopez* ineluctably applies with equal force to immigration and criminal cases." *U.S. v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir. 2007).

The synopsis to the immigration proposal raises the concern that the "lack of documentation" makes difficult implementation of the existing 2L1.2. 72 FR 4372, 4393 (Jan. 30, 2007). While it may make sense to switch from a Guideline that is based on proving the existence of an aggravated felony to a Guideline based on the time a defendant served for her or his predicate offense, the lack of documentation is not a good reason on which to base a switch.

In the United States' criminal justice system, one price of having the rule of law paramount is that the lack of evidence sometimes means the truly guilty go unpunished. The Supreme Court has historically emphasized that justice is best served by promoting respect for the rule of law even if it is more difficult for prosecutors or law enforcement officials to obtain a confession, conviction, or an appropriate sentence. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (preventing interrogation of arrested person until right to counsel waived); *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding race-based preemptory challenges) *Blakely v. Washington*, 542 U.S. 296 (2004) (requiring proof beyond a reasonable doubt of any fact, other than recidivism, that increases a defendant's punishment). That the categorical approach is the Court's preferred method should be a sufficient response to the government's concerns that the proof requirement to establish an enhancement is too exacting.

2. Option five is fundamentally unfair

Section 1326(b) of Title 8 U.S.C.A adds punishment for having an aggravated felony or three misdemeanor convictions involving crimes against the person or drugs or both or a felony other than an aggravated felony. The Supreme Court has repeatedly put the burden on the government to prove an enhancement. *See Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). In *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815 (2007), the Supreme Court applied the *Shepard* and *Taylor* categorical approach to whether a noncitizen was deportable for an aggravated felony. In *Leocal v. Ashcroft*, 543 U.S. 1, 11 fn. 8 (2004), the Court made clear that the test for whether an offense is an aggravated felony is the same, regardless of whether the term is interpreted in the context of a civil removal proceeding or a criminal sentence enhancement:

Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

In *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), the Supreme Court abrogated both illegal reentry cases and civil immigration cases. Taken together, *Leocal*, *Duenas-Alvarez*, and *Lopez* mean that the Supreme Court intends for principles in *Shepard* and *Taylor* to apply to sentencing enhancements under 2L1.2. Since Option 5 puts the burden on the defendant to get a lower sentence, it is inconsistent with Supreme Court

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law. In addition, it is inconsistent with notions of fundamental fairness to put the burden on the defendant, who is the least able to meet the burden.

IV. Issue for Comment

The United States Sentencing Commission specifically seeks input regarding what changes, if any, the Commission should make to U.S.S.G. § 2L1.2 in light of *Lopez v. Gonzales*, 126 S.Ct. 625 (2006). The National Immigration Project and NCLR urges the Sentencing Commission to treat differently a defendant who has an aggravated felony based a state misdemeanor. For purposes of the existing 2L1.2 or proposed Options 1-4, which maintain an eight level enhancement for any aggravated felony, the Commission should include in the Commentary an exception for a defendant whose aggravated felony conviction is a state misdemeanor.

In *Lopez*, the Court acknowledged that defendants convicted of a misdemeanor under state law might have an aggravated felony for purposes of 8 U.S.C.A. § 1101(a)(43)(B). *Lopez v. Gonzales*, 126 S.Ct. 625, 633 (2006). In a post-*Lopez* decision, the Southern District Court for the District of Texas has held that a state misdemeanor can constitute an aggravated felony. *U.S. v. Castro-Coello et al*, 2007 WL 397496 (S.D. Tex. Feb. 6, 2007) (treating second possession conviction as a recidivist offense despite lack of equivalent notice to that provided under 21 U.S.C.A. § 851). An eight level increase for someone with a misdemeanor prior as the predicate offense is disproportionate to the seriousness of the offense.

Under principles of "fair notice," this exception should apply to all misdemeanor aggravated felony convictions, not just those under *Lopez*. Should the Commission decide not to exclude misdemeanor offenses completely from 2L1.2(b), then the National Immigration Project and NCLR suggests that the Commission provide a reduction of six levels for any misdemeanor that is treated as an aggravated felony.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,

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Executive Director
National Immigration Project

Janet Murguia
President and CEO
National Council of La Raza

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